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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 40th meeting Strasbourg, 6–8 March 2000

Secretariat Memorandum
prepared by the
Directorate General of Legal Affairs

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1. The PC-OC held its 40th meeting from 6 to 8 March 2000 at the Council of Europe headquarters in Strasbourg. The Committee met under the chairmanship of Mr O. Landelius (Sweden) on 6 March and Mr M. Knaapen (the Netherlands) on 7 and 8 March.

Elections

2. Mr M. Knaapen (the Netherlands) was elected Chairman and Mr E. Selvaggi (Italy) Vice-Chairman.

3. The Bureau of the Committee is consequently formed as follows:

- Mr M. Knaapen (the Netherlands), Chairman, elected in March 2000;
- Mr M. Hatapka (Slovak Republic), 1st Vice-Chairman, elected in September 1998;
- Mr E. Selvaggi (Italy), 2nd Vice-Chairman, elected in March 2000.

4. The list of participants forms Appendix I to this report.

5. The Agenda of the meeting, as adopted by the Committee, forms Appendix II to this report.

6. 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 112	Convention on the Transfer of Sentenced Persons

(b) Working papers

PC-OC (2000) OJ 1 Rev.	Draft annotated agenda
PC-OC (99) 10	Report of the 39 th meeting
PC-OC (99) 11	Draft 2 nd Additional Protocol
PC-OC (2000)1 REV	Convention on Mutual Assistance in Criminal Matters – Article 11
PC-OC / Inf 22	Arrest in the context of the European Convention on Extradition
PC-OC (2000) 2	Convention on the Transfer of Sentenced Persons ETS 112
PC-OC (2000) 3	Information on the transfer of mentally disturbed offenders under the Convention on the Transfer of Sentenced Persons
PC-OC (2000) 3 add.	Transfer of mentally disturbed offenders (English only)
PC-OC (2000) 4	Forms for requests for co-operation
PC-OC (2000) 5	Tasks assigned to the PC-OC by the CDPC
PC-OC (2000) 6	Proposal to include an Article in the Second Additional Protocol Concerning Voluntary Statements by Witnesses (Israel)
PC-OC (2000) 7	Council of Europe's convention on the transfer of sentenced persons – the requirement of double criminality – questions to the committee of experts(Norway)
PC-OC (2000) 8	Practical difficulties arising out of the application of the Conventions (Turkey)
PC-OC (2000) 9	Practical difficulties arising out of the application of the Conventions (ETS 167)
PC-OC (2000) 10	Practical difficulties arising out of the application of the Conventions (ETS73)

T-RV(99) 4 Rev.1	Recommendation n°3/99 on the identification and treatment of offenders and the exchange of intelligence at the European Football Championships (EURO 2000)
T-RV(2000)1rév.	European Convention on Spectator Violence and Misbehaviour at Sport events and in particular at Football Matches (T-RV)
PC-CY 18 REV2	Draft Convention on Cyber-Crime (Draft n° 18REV2)
CDPC-BU(2000)1	Progress Report on preparation on a consultation Meeting on the implications of ratification of the Rome Statue of the International Criminal Court
no reference	Letter from Professor H.W.Kaspersen, Chairman of the PC-CY
PC-OC (2000) 11	Document submitted by INTERPOL

(c) Documents for information

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

Adoption of the Agenda

7. The Committee adopted the Agenda, as it appears in Appendix II to this report.

Adoption of the report of the 39th meeting

8. The Committee adopted the report of its 39th meeting, as it appears in document PC-OC (99) 10.

Draft 2nd Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters

9. The discussions held at the Committee's 39th meeting were reflected both in the report of that meeting [doc. PC-OC (99) 10], and in doc PC-OC (99) 11 where the (then) latest version of the draft 2nd Additional Protocol was reproduced.

10. For lack of time, the Committee did not then finalise examination of the draft 2nd Additional Protocol. It decided to continue, if possible finalise, examining the text as a matter of priority at its present meeting.

11. Members were invited to submit comments in writing, if any.

12. Israel suggested that a sentence should be added to Article 11 to the effect that "the restrictions set out in Article 12 of the Convention shall not apply to the act or omission for which the person has been sentenced in the sentencing State and which is the subject of the review". The Committee decided to include such a sentence in the Explanatory Report.

13. Israel also submitted (cf. doc PC-OC (2000) 6) reasons for including in the draft Protocol provisions concerning voluntary statements by witnesses. The Committee did not follow the Israeli views.
14. The Netherlands submitted a proposal for new wording to Article 21 (reservations). The Committee will re-visit this matter at its next meeting.
15. The Committee did not discuss the matter of data protection. It decided to adjourn that discussion pending developments in the European Union.
16. The text of the draft 2nd Additional Protocol, as amended after the Committee's 40th meeting, is reproduced in document PC-OC (2000) 14.
17. The Committee intends to finalise the examination of the draft 2nd Additional Protocol at its next meeting (September 2000).
18. The members of the Committee were therefore invited to forward to the Secretariat comments on that text, if any, by 31 May 2000.
19. The Secretariat was invited to prepare a preliminary draft explanatory report for consideration at the Committee's next meeting.

Mutual Assistance (Article 11 of the Convention)

20. At its previous meeting (cf. paras.116 – 121 of doc. PC-OC (99) 10), the Committee discussed questions relating to the scope of that Article. A questionnaire was circulated. On the basis of the replies to that questionnaire, the Secretariat prepared document PC-OC (2000) 1 REV.
21. The Committee was invited to resume examination of this question.
22. Doc. PC-OC (2000) 1 REV shows that almost all respondents consider that the temporary transfer of a suspect for the purposes of being heard (as a suspect) is not included in the scope of Article 11 of the European Convention on Mutual Assistance in Criminal Matters. Most of them think that provisions to that effect should be included in the 2nd Additional Protocol.
23. Difficulties however remain, as follows:
- what does "suspect" mean in a context where any witness may become a suspect and vice-versa from one point in time to the following;
 - should the temporary transfer of a person be considered where that person's extradition had previously been refused ?
 - should that be the case, then it is proper to make a distinction between nationals and not nationals;
 - would it however be proper to make such a distinction in the context of mutual assistance ?
 - where suspects are transferred, does the rule of speciality apply ?
 - where suspects are transferred, should there not be rules safeguarding the fundamental rights of the defence ?;

- does the requirement of the consent of the person not answer many of the above questions, especially where the person concerned has an interest in his transfer;
- should the person concerned be recognised the legal faculty of requesting his transfer?

24. A proposal was made to leave Article 11 as it stands (not applicable to suspects) and to introduce new provisions in the Protocol regulating the temporary transfer of suspects.

25. The Committee decided to change slightly Article 11 by replacing ambiguous language by clearer language taken from the Comprehensive Convention. The expert from France reserved her position in that respect.

Mutual Assistance (Article 7 of the Convention)

26. At its 28th meeting (February 1994), the Committee discussed the following question. For unknown reasons, the Secretariat failed to pursue the matter. At the request of the expert from Germany, the matter was now again submitted to the Committee.

27. The question concerns the application of Articles 7 et seq. of Convention ETS 30. Experience shows that documents the service of which is requested are often produced in the original language only. Regardless of the question whether the requested Party has an interest in the submission of a translation, and also a right thereto (Article 16 of ETS 30), this may still be problematic from the point of view of the person concerned.

28. The Committee had then agreed on rules in this respect expressed in the form of recommendations.

29. Re-examining the question, the Committee decided to include such rules in the draft Protocol.

Extradition (Provisional arrest)

30. This issue had been discussed at the Committee's previous meeting on the basis of a document that the Secretariat revised in order to take care of the views then expressed.

31. The Committee was invited to examine the new paper (document PC-OC / INF 22). It did not raise difficulties.

32. Certain aspects of the document were clarified by the observer from Interpol and will be taken into consideration (cf. doc. PC-OC (2000) 11).

Transfer of Sentenced Persons (general)

33. In anticipation of the 48th plenary session of the CDPC (1999) and on the basis of replies to a questionnaire which it circulated to Delegations, the Secretariat prepared a document (CDPC (99)9) reviewing obstacles relating to the ratification and the application of the Convention on the Transfer of Sentenced Persons.

34. The CDPC examined that document and instructed the Secretariat to update it in the light of new information received and submit it to the PC-OC.

35. The PC-OC was invited to examine the revised document prepared by the Secretariat (PC-OC (2000) 2) and consider what action, if any, it might take in order to remove obstacles to the ratification and application of the Convention.

36. Many supported the UK proposal (cf. page 5 of doc. PC-OC (2000) 2) for the Secretariat to prepare a document highlighting the release /remission arrangements for each of the Parties to the Convention. However, it was underlined that such general information could not replace direct communication between the States concerned on a case by case basis.

37. The proposal was made to update the guide to procedures. in this respect, it was suggested that the guide (or part of it) could be prepared with reference to hypothetical cases indicating what happens in each country when a person wishes to leave and upon the return of a sentenced person.

38. The following information, amongst other, should be included in the updated guide:

- information on relevant case-law;
- information on whether transfer is possible in the absence of a treaty;
- whether there are bilateral treaties in force that do not require the consent of the person concerned;
- what is the maximum duration of provisional arrest pending the arrival of documents supporting a request under Article 2 of the Protocol.

39. The USA indicated that they did not consider transfers, neither in nor out, without a treaty basis. Their policy in this respect is to encourage third States to accede to Convention ETS 112.

40. The Secretariat was invited to prepare a revised version of the guide to procedures, having into consideration the above elements (see also para. 54 and 114 ahead).

41. 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.

Transfer of Sentenced Persons (Article 23 of the Convention)

42. The Committee took note with appreciation of the fact that France withdrew its reservation to Article 23 of the Convention.

Transfer of Sentenced Persons (ad hoc arrangements)

43. At its previous meeting, the Committee was invited to consider the advantages of introducing a mechanism for ad hoc arrangements that took care of the particularities of each case.

44. The relevant part of the meeting report reads as follows:

“55. The expert from Italy went on to say that in his view the Convention was too rigid and in that way inadequate to cope with present-day needs. The Convention was not flexible in the sense that requests were either to be totally granted or totally rejected. The Convention did not provide a mechanism for ad hoc arrangements that took care of the particularities of each case.

“56. He invited the Committee to consider the advantages of introducing such a mechanism.

“57. The expert from the USA supported the views expressed by the expert from Italy. He stressed that the Convention did not preclude *ad hoc* arrangements.

“58. It was said by others that the Convention should not be used as an instrument under which *ad hoc* arrangements were agreed upon, according to which the States involved would follow a course of action opposite to that which is foreseen under the Convention. Indeed the case under the USA/Italy agreement seems to be that it nullifies the provision of Article 9.3 of the Convention.

“59. It was also questioned whether *ad hoc* arrangements were consistent with the spirit of the Convention. Was it not one of the purposes of any Convention to close negotiations as to how to deal with a given category of situations? Should it now become routine practice to discuss from scratch the terms under which sentenced persons are transferred, then the Convention would become purposeless.”

45. Invited to pursue its reflection on this issue, the Committee decided to adjourn the point and come back to it as soon as possible.

Transfer of Sentenced Persons (relations with Parties to the Convention, non-members of the Council of Europe and non-observers)

46. At its 39th meeting, the Committee considered that it would be most useful to have a contact person in each of the countries (Parties to the Convention, non-members of the Council of Europe and non-observers), easily reached, to whom practical questions could be asked at any moment, to whom all the PC-OC information material relating to the Convention would be forwarded and from whom the PC-OC would expect to receive relevant information.

NB: The Bahamas, Chile, Costa Rica, Panama, Trinidad and Tobago already are a Party to ETS 112; Venezuela and the Kingdom of Tonga have asked to be invited to accede

47. In this respect, the Secretariat informed the Committee that its efforts to achieve that goal had not been very successful and therefore were to be pursued.

Transfer of Sentenced Persons : accession of non-members of the Council of Europe

48. The Secretariat informed the Committee that Japan and Australia had informally showed interest in acceding to the Convention.

Transfer of Sentenced Persons (transfer of mentally disturbed offenders)

49. At its 36th meeting, the Committee had provisionally reached the conclusion (cf. paras 93 and 94 of doc. PC-OC (98) 5) that “*all the Parties to the Convention [on the Transfer of*

Sentenced Persons] appear to be in a position both to transfer out and transfer in mentally disturbed offenders. This conclusion however should be confirmed by the Secretariat by way of a written question circulated to the members of the Committee.”

50. Thus the Secretariat consulted in writing the members of the Committee. A synthesis of the replies appears in document PC-OC (99) 4. Moreover, the expert from the Netherlands contributed with document PC-OC (99) 1.

51. The Committee examined these documents at its 38th meeting. It appears that the problem area is not so much the transfer (in or out) of those mentally disturbed offenders who have been convicted. The difficulties arise where offenders, because they are mentally disturbed, are deemed not liable and therefore not convicted. In such cases, however, because they are dangerous, administrative decisions are taken in their respect that amount to their freedom of movement being severely curtailed. The Convention on the Transfer of Sentenced Persons probably should not apply to such unsentenced persons. If that is the case, ways and means must be found to transfer such persons to their countries of origin. Indeed, it makes no sense to keep them in a country where little can be made to take proper care of them. Their transfer, however, should take place under formal arrangements that take due care of:

- the interests of the person concerned, who probably cannot give his or her consent;
- the need to ensure that the society into which the person is being transferred is properly protected against him or her;
- the need to ensure that the person does not move on, uncontrolled, to another country, including the country from which he or she was transferred out.

52. On a careful approach to this matter, pending indication that serious difficulties actually arise in practice, the Committee decided to gather information on national practices in these matters. Once gathered, such information should be made available to practitioners.

53. To that effect, a questionnaire was circulated. The Secretariat prepared a document (PC-OC (2000)3) on the basis of the replies.

54. Invited to examine that document, the Committee decided that the information contained therein should be appended to the new guide to procedures.

55. The Committee was informed that the Working Party on Psychiatry and Human Rights (CDBI-PH) was preparing recommendations to ensure the protection of human rights and dignity of people suffering from mental disorder, especially those placed as involuntary patients in a psychiatric establishment. The Committee welcomes any initiative by the CDBI-PH that might contribute to the wanted aim of facilitating the treatment of mentally disturbed offenders by bringing them closer to their homes, families, etc., if necessary across borders.

Crime in Cyberspace

56. At its meeting on 25 November 1999, the Bureau of the CDPC discussed plans of the Committee of experts on Crime in Cyberspace (PC-CY) to include provisions on mutual legal assistance in the draft Convention (under preparation) on crime in cyberspace.

57. The Bureau of the CDPC recalled that, at its 46th plenary session (June 1997), the CDPC (following a request made by the PC-OC at its 33rd meeting), decided to instruct its subordinate committees not to include in newly drafted legal instruments any provisions on mutual assistance, extradition, transfer of proceedings or recognition of foreign judgments without previously having consulted the PC-OC.

58. The Bureau thus instructed the PC-OC to examine the PC-CY's plans in that respect.

59. Members of the PC-OC were kindly invited, where appropriate, to consult with their national colleagues involved in the work of the PC-CY.

60. In a letter dated 23 February 2000, addressed to the Chairman of the PC-OC and distributed to the Committee, the Chairman of the PC-CY, Professor H.W.Kaspersen (the Netherlands), explains his Committee's views on the issue.

61. Mr Rudi Troosters (Belgium), member of the PC-CY, designated to that effect by that Committee, participated in the part of the PC-OC meeting where this matter was discussed.

62. Mr H.-J. Bartsch, Head of the Department of Crime Problems within the Secretariat of the Council of Europe, also participated in the part of the PC-OC meeting where this matter was discussed. The Department of Crime Problems covers both units of the Secretariat that serve respectively the PC-CY and the PC-OC. He briefed the PC-OC in particular on the background and the purpose of this exercise.

63. Mr Troosters briefed the Committee on the PC-CY's plans and reasons for such plans. In particular, he stressed the need to include in the new convention provisions on international legal co-operation in criminal matters. That was necessary on the basis *inter alia* of:

- the accrued speed required in co-operation, where the issue is one of cyber-crime, it being obvious that cyber-crime has the ability to move at cyber-speed, a co-operation network must be available around-the-clock;
- the circumstance that cyber-crime has no borders makes it indispensable to open the new convention as much as possible in order to avoid the establishment of cyber-havens; a widely open convention entails the need to include rules that have an aptitude to apply to countries all around the world;
- the very nature of cyber-crime requires the establishment of cyber-crime-specific coercive measures.

64. In respect of the articulation between different conventions, Mr Troosters pointed out to the differences of approach between the cyber-crime convention and the money-laundering and corruption conventions respectively. In particular, he pointed out to the draw-backs of attempting to compare which convention "facilitates international co-operation" (cf. Article 39.3 of the Money-laundering convention) or which convention is "more favourable than" the other (cf. Article 25.3 of the Corruption Convention).

65. In particular, he underlined the fact that the provisions on mutual assistance under Article 23 of the draft cyber-crime convention (23CY) in principle do not apply where the countries concerned are a Party to the European Convention on Mutual Assistance in Criminal Matters.

66. A number of different points were made, such as:

- the CY convention should be as comprehensive, self-contained and broad based as possible in view of the fact that it will be universally applied;
- Article 23.1 CY carries with it the risk that in cases of multiple-country co-operation, different treaties will simultaneously apply;
- Article 23.1 CY carries with it the risk that in cases of multiple-offence co-operation, different treaties will simultaneously apply;
- Article 23.1 CY carries with it the risk that in cases of multiple country and multi-offence co-operation, many different treaties will simultaneously apply;
- once the corruption convention has chosen to follow the “more favourable” approach, there may be advantages, if and where necessary, in keeping the same approach in future sectoral conventions, including the CY text;
- should the exception included in Article 23.1 CY [worded “unless the Parties concerned agree” otherwise] be applied systematically, the consequence is that Article 23 CY will no longer apply on the basis of subsidiarity;
- should the same exception be applied on a case by case basis, the question may be raised of the speed under which the necessary agreement must be reached;
- all provisions on international legal co-operation that the drafters included in the CY text should be considered for inclusion in the 2nd Additional Protocol;
- all non-CY-specific provisions on international legal co-operation that the drafters find necessary to include in the CY convention should be worded along the lines of existing provisions (in ETS 30, draft 2nd Protocol, ETS 24, ...);
- indeed the exercise of uniformisation of language that the PC-OC has so far accepted, between its current draft and the EU draft, must be extended to include in particular the CY draft.

67. The Chairman summed up the discussion as follows:

- the PC-OC took note of the draft text prepared by the PC-CY, it appreciated the letter forwarded to its Chairman by the Chairman of the PC-CY and it was grateful to Mr Troosters for his kind assistance in explaining the reasons and the consequences of the PC-CY’s choices;
- the PC-OC recognised the need for the CY draft to include provisions on mutual legal assistance that are specifically designed to cope with the particular nature of CY-crime (example: Article 25 CY);
- bearing in mind the circumstance that the CY draft is designed to serve a group of States larger than that of the member States of the Council of Europe, the PC-OC also recognised the need for that draft to contain provisions on general international legal co-operation; however, such provisions must not apply in principle to relations between member States that are already covered by the provisions of the Council of Europe’s “general” conventions, in particular the European Convention on Mutual Assistance in Criminal Matters, its two Protocols¹, the European Convention on Extradition, its two Protocols, the European Convention on the Suppression of Terrorism ...;

¹ For the present purposes, the draft 2nd Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters should be taken into consideration on the same footing as the mother Convention.

- the PC-OC considered that all provisions on international legal co-operation that are included in the draft CY text should be re-visited in order to consider (a) whether they cannot be included in the draft 2nd Additional Protocol, or (b) whether they cannot be re-worded along the pattern of the corresponding provisions in the aforementioned “general” conventions;
- the members of the Committee were once again invited, where appropriate, to consult with their national colleagues involved in the work of the PC-CY in order to ensure coordination of the general objectives pursued by the PC-OC with the specific requirements of the PC-CY;
- the Secretariat was invited to make proposals for amendments in the PC-CY text, designed to take care of this summing-up, and submit them to the Bureau of the PC-OC;
- the Bureau of the PC-OC should meet in order to examine such proposals and report to the CDPC in time for the latter’s 49th meeting (26-30 June 2000);
- the PC-OC will come back to this matter at its meeting in September 2000.

Forms for requests for co-operation

68. At its previous 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.

69. Short of time, the Committee adjourned this point after having invited its members to forward comments, if any, to the Secretariat (comments are welcome by 31 May 2000).

Tasks assigned to the PC-OC by the Bureau of the CDPC

70. At its 38th meeting, under an Agenda item worded as above, the Committee had discussed some matters of significance to it. At its 39th meeting, the Committee asked the Secretariat to submit such matters for examination at the present meeting. For that purpose, the Secretariat prepared document PC-OC (2000) 5.

71. Short of time, the Committee did not examine this point. It invited its Bureau to examine it and report back.

Exchange of views on practical problems relating to the setting up of the International Criminal Court (ICC)

72. The Secretariat recalled the content of paras. 75 to 80 of the report of the Committee’s previous meeting and confirmed that a Consultation meeting on the implications of ratification of the Rome Statute will be held at the Council of Europe on 16 and 17 May next. The Secretariat directed the Committee to further information that can be found in document CDPC-BU (2000) 1.

Information on co-operation in criminal matters

73. Bearing in mind its role in co-ordinating developments in co-operation in criminal matters involving member States of the Council of Europe, the Committee welcomed information on the latest such developments.

(a) between the Members of the European Union

74. The PC-OC was informed by Ms Francisca Van Dunem (Portugal) and Mr. Jürgen Frieberger (European Commission) of the latest developments in co-operation in criminal matters between the Members of the European Union.

75. Reference was made by the Secretariat to a meeting held on 9 November 1999 (the sixth of a series started on 25 March 1997), between a Council of Europe delegation (including the chairmen of the CDPC, the CDCJ and the PC-OC) and the troika of the Article 36 Committee. A seventh meeting in the same series is scheduled to be held on 15 May 2000.

(b) between other

76. The Committee was informed of the latest developments in the work being carried out within the framework of the United Nations in relation to the preparation of a convention on organised crime.

77. In this respect it was observed that it would be appropriate to bear in mind that inconsistencies were likely to show up between provisions being prepared in Vienna and provisions being prepared in Strasbourg.

Information documents available

78. The Secretariat prepared and made available to all members of the Committee a certain number of information documents, as listed in doc. PC-OC / INF. The Committee was invited to put forward comments and suggestions, if any, concerning the contents and presentation of such documents.

79. Members of the Committee were requested to forward to the Secretariat any information that might be of assistance in updating the above documents.

80. A live presentation of the new Council of Europe web site [HTTP//CONVENTIONS.COE.INT](http://conventions.coe.int) was organised. The site contains inter alia the texts in English and French of all the Council of Europe Conventions, information on signatures and ratifications, the text (again in both languages) of the declarations and reservations made, as well as the explanatory reports of most conventions.

Practical difficulties arising from the application of the Conventions

Extradition / rule of speciality / Article 14

81. Article 14 – Rule of speciality

- 1 A person who has been extradited shall not be proceeded against, sentenced or detained with a view to the carrying out of a sentence or detention order for any offence committed prior to his surrender other than that for which he was extradited, nor shall he be for any other reason restricted in his personal freedom, except in the following cases:
 - a when the Party which surrendered him consents. A request for consent shall be submitted, accompanied by the documents mentioned in Article 12 and a legal record of any statement made by the extradited person in respect of the offence concerned. Consent shall be given when the offence for which it is requested is itself subject to extradition in accordance with the provisions of

this Convention;

- b when that person, having had an opportunity to leave the territory of the Party to which he has been surrendered, has not done so within 45 days of his final discharge, or has returned to that territory after leaving it.
- 2 The requesting Party may, however, take any measures necessary to remove the person from its territory, or any measures necessary under its law, including proceedings by default, to prevent any legal effects of lapse of time.
 - 3 When the description of the offence charged is altered in the course of proceedings, the extradited person shall only be proceeded against or sentenced in so far as the offence under its new description is shown by its constituent elements to be an offence which would allow extradition.

82. The question was raised (by the expert from Turkey - cf. doc PC-OC (2000)8) of what meaning should be given to the expression “be proceeded” in Article 14 above. In particular, does it mean :

- not to institute proceedings ?
- not to continue proceedings ?
- that the extradited person cannot in any way be involved in the investigation of any offence committed prior to his surrender other than that for which he was extradited ?
- that the requesting State is not allowed to summon the person to be heard for any such offence ?
- even if it is clear that proceedings – if proceedings exist – cannot entail the person’s detention nor lead to the person being tried, may the person be involved in such proceedings, as a suspect or as an accused ?
- that the requesting State is prevented from summoning the person in connection with the above-mentioned offences, where the purpose of the procedure for which the person is being summoned is not to institute proceedings against that person ?
- that the requesting State is prevented from summoning the person for the purpose of gathering evidence in order to institute proceedings against other, unprotected, persons?

83. The query is limited to offences that were committed before the surrender of the person, other than the offence or offences for which the person was extradited.

84. Some experts thought that in respect of such offences it is clear that under Article 14.1 the requesting State is under an obligation not to proceed against the extradited person. The question of course is that of defining the scope of such an obligation.

85. The wording of Article 14.1 leads to believe that the obligation not to proceed includes the obligation not to institute proceedings. However, that obligation not to institute proceedings is not absolute, since - under Article 14.2 - proceedings by default may be instituted.

86. It is questionable whether the obligation not to proceed also includes the obligation to discontinue proceedings already instituted. Indeed, in acknowledging the requesting State’s right to prevent any legal effects of lapse of time, the above-mentioned provision of Article 14.2 indicates that the purpose of Article 14 is not entirely to prevent that State from ever proceeding against the person.

87. Many thought that the requesting State should not be barred from doing whatever is necessary in order to organise the file for a request to be addressed, where appropriate, to the Party which surrendered the person, seeking (under Article 14.1.a) the consent of that Party for fresh proceedings. It must be noted that such a request for consent should be accompanied by “the documents mentioned in Article 12 and a legal record of any statement made by the extradited person in respect of the offence concerned”. In other words, the requesting Party may initiate, or continue proceedings, up to the point where it obtains whatever is needed (e.g. a warrant of arrest) to request the other Party’s consent.

88. Some thought that the scope of the obligation not to proceed must be defined in connection with the interests protected by the rule of speciality, in particular the interest of the requested State in that the effects of extradition be limited to designated offences.

89. The European Convention on Extradition makes no reference neither to human rights nor to the European Convention on Human Rights. Its purpose is to regulate inter-State relations in the field of extradition; not to take in any way care of individual rights and freedoms. Thus - quite unfortunately in the views of many - the interests of the person concerned, including his fundamental rights and freedoms, are not legally protected by the rule of speciality. Such interests and rights are protected by the law of one and, separately, the law of the other State involved, as well as – again separately – by their respective international obligations under treaties other than the European Convention on Extradition, for example the European Convention of Human Rights.

90. While this situation does not change, it cannot be said that the scope of the obligation not to proceed under Article 14 of the European Convention on Extradition must also be defined in connection with the fundamental rights and freedoms of the person concerned.

91. The scope of the obligation not to proceed is clearly also limited in terms of time, namely the period that starts with surrender and runs up to such a point in time as described in Article 14.1.b.

92. One can argue that where a State is barred from instituting proceedings within a given period of time, that State is also barred from taking steps the only purpose of which is to put itself in a position where proceedings may be instituted within that period of time. Some therefore think that the extradited person should not be summoned where the purpose of the procedure for which the person is being summoned cannot be any other but to institute proceedings against that person within that period of time.

93. However, many cannot see any valid arguments according to which Article 14 should prevent the State from summoning the person in connection with the above-mentioned offences, where the purpose of the procedure for which the person is being summoned is not to institute proceedings against that person or is not to institute proceedings against that person within the protected period of time. In particular, Article 14 cannot prevent the State from summoning the extradited person for the purpose of gathering evidence in order to institute proceedings against other, unprotected, persons.

94. All agreed that the person may neither be indicted (formerly accused) nor deprived of his liberty while protected by the rule of speciality.

Transfer of sentenced persons / Dual criminality / Article 3

95. **Article 3 – Conditions for transfer**

1 **A sentenced person may be transferred under this Convention only on the following conditions:**

[.....]

- e **if the acts or omissions on account of which the sentence has been imposed constitute a criminal offence according to the law of the administering State or would constitute a criminal offence if committed on its territory; and**

[.....]

96. A question was raised (by the expert from Norway - cf. docs PC-OC (2000) 7), as follows. In one case, a Norwegian citizen applied to be transferred to Norway to serve a sentence imposed on him in another Party. He claimed that he had been provoked by the police into performing the illegal act for which he was sentenced. Such provocative methods by the police are accepted and legal in the sentencing Party; however, they may not substantiate a conviction in Norway. Thus, the Director of Public Prosecution concluded that, had the act been committed in Norway, no punishment could have been imposed. The Norwegian authorities thus rejected the application for transfer. On appeal, according to the Norwegian Public Administration Act, it was found that the conditions in Article 3(1)(e) had been met and, therefore, transfer was finally granted.

97. In reaching conclusions in the appeal, emphasis was put on the aims of the Convention, as stated in the Preamble and in Article 2, as well as the opinion of Mr. Michal Plachta stated in the book «Transfer of Prisoners under International Instruments and Domestic Legislation» (1993) page 315.

98. Once transferred, the person now claims that he is illegally detained in Norway because the act for which the sentence was imposed, does not constitute a criminal offence in Norway.

99. The Ministry of Justice asked for the Committee's opinion on the following questions:

- i. Should the expression «the law» be interpreted only as the written law, i.e. the Penal Code, or can it also include the interpretation of «the law» as in «the whole body of such customs or practices», i.e. also case law etc.?
- ii. Is the expression «double criminality» to be interpreted as double criminality *in concreto* or double criminality *in abstracto*? There seems to be a difference in opinion between the «Explanatory Report» and Mr. Plachta as the latter finds it sufficient with double criminality *in abstracto* while the report indicates the opposite.

100. The Committee thought that the word “law” in Article 3 of the Convention should be interpreted to include all sources of law (statute, common law, customary law, ...), in the meaning usually given to the word that figures in the French version of the Convention, namely the word “*droit*” (as opposed to “*loi*”).

101. Many experts talked in favour of dual criminality being assessed in concreto, as is proposed in the explanatory report. In abbreviated terms, dual criminality means (a) looking at the “law” of both countries, as it applies, or as it would apply, to the concrete circumstances of the case, and (b) assessing whether there is sufficient overlap in view of the effect sought.

102. Recalling the provisions of the Convention that require that the person’s consent must be informed, many said that such a consent carried with it the acceptance of the effects of transfer in the administering Party. In other words, the possibility should not be considered of giving transferred persons the right to challenge the effects of transfer in the administering State.

103. Moreover, it would be circumventing the provisions of Article 13 to give transferred persons the right to apply to the administering State for a direct or indirect review of the judgment

104. It was also said that the legitimate interest of the sentencing State in that the sentence be fully served cannot be frustrated by allowing for the sentence to be challenged in the administering State.

105. It can always happen that it is not before the actual transfer of the person that it becomes apparent or that it is found that the dual criminality requirement was not met. In such circumstances, the remedy could not be to free the person, but rather to annul the transfer and return the person.

Transfer of sentenced persons (Protocol) / provisional arrest / Article 2

106. **Article 2 – Persons having fled from the sentencing State**

- 1 **Where a national of a Party who is the subject of a sentence imposed in the territory of another Party as a part of a final judgment, seeks to avoid the execution or further execution of the sentence in the sentencing State by fleeing to the territory of the former Party before having served the sentence, the sentencing State may request the other Party to take over the execution of the sentence.**
- 2 **At the request of the sentencing State, the administering State may, prior to the arrival of the documents supporting the request, or prior to the decision on that request, arrest the sentenced person, or take any other measure to ensure that the sentenced person remains in its territory, pending a decision on the request. Requests for provisional measures shall include the information mentioned in paragraph 3 of Article 4 of the Convention. The penal position of the sentenced person shall not be aggravated as a result of any period spent in custody by reason of this paragraph.**
- 3 [.....]

107. Article 2 of the Additional Protocol to the Convention on the Transfer of Sentenced Persons (ETS 167) concerns persons having fled from the sentencing State. Under that Article, upon a request from the sentencing State, the administering State may, pending the arrival of documents supporting the request, arrest the person concerned on a provisional basis.

108. A question was raised (by the expert from Italy - cf. doc PC-OC (2000)9) concerning the maximum length of time for the provisional arrest of the person concerned. There is no provision in the Protocol, nor is there any indication in the explanatory memorandum.

109. It was pointed out that in normal circumstances, there should be no great danger that the person might abscond, because in any other third State the person is no longer protected against extradition.

110. The explanatory report indicates that the documents supporting the request should be transmitted as soon as practicable. That may be seen as an indication of the sense of urgency that the situation carries. Such a sense of urgency is of course inherent to any situation where a person is arrested on a provisional basis.

111. However, under the circumstances described above, one might rightly suggest that the person cannot benefit from a presumption of innocence, but rather, on the contrary, that there is a presumption – based upon the declaration of a competent authority of the sentencing State – that the person concerned is a sentenced person whose sentence has not yet been entirely served.

112. It follows that the sense of urgency inherent to any situation where a person is arrested on a provisional basis is less pressing in the instant case than in other cases. In particular, it is less pressing than in a situation where extradition is requested.

113. One might therefore conclude that where a limit is established for provisional arrest under Article 2 of ETS 167, that limit may go beyond the limit of 40 days provided in Article 16 of the European Convention on Extradition.

114. The Committee decided that the updated version of the Guide to Procedures on the transfer of sentenced persons should contain information in respect of national provisions concerning maximum length of provisional arrest as mentioned above.

Transfer of proceedings / scope

115. In the perspective of the preparation of national legislation making possible the ratification of the European Convention on the Transfer of Proceedings in Criminal Matters (ETS 73), the question was raised (by the expert from Italy – cf. doc PC-OC (2000)10) whether State A may request State B to take proceedings against a person who is present in State A. Should that be possible, the question also arises of knowing how to ensure the presence of the person in State B, for purposes of investigation and trial: by way of extradition or by other means ?

116. The judgment of the European Court of Human Rights of 18 December 1996 in the case of *Scott v. Spain*² illustrates circumstances where – at least in theory – it would have been conceivable to follow such an avenue.

117. The Czech Republic and the Slovak Republic are bound by a bilateral treaty that provides both for the requesting State to hand over the person (while at the same time transferring the proceedings) and for the requesting State to receive the person handed over by the requested State (along with the proceedings).

118. Other States (Sweden, Switzerland, ...) may proceed as suggested by way of applying their national law.

² Document PC-OC (2000) 10 wrongly makes reference to the case of *Amann v. Switzerland*, where it should have mentioned the case of *Scott v. Spain*.

119. Some said that they interpreted the Convention as not precluding the possibility envisaged in this question. Should the person not move from State A to State B on his own volition, the application of coercive measures in order to obtain that result would not necessarily amount to “extradition” in the classical approach to the concept, but rather to a *sui generis* “handing over”. It is up to the national legislator to decide whether it wishes or not to make provision going that way.

120. Others said that the suggested action would not be possible under the Convention, because it would amount to disguised extradition.

EURO 2000

121. A short meeting was held between experts from countries that participate in the European Football Championships (June 2000) to discuss practical arrangements on judicial co-operation applicable to such event. The countries concerned are: Belgium; Czech Republic; Denmark; France; Germany; Italy; Netherlands; Norway; Portugal; Romania; Slovakia; Spain; Sweden; Turkey and United Kingdom.

Future work

122. The Committee will go on affording priority to the examination of the 2nd Additional Protocol to the European Convention on Mutual Assistance.

Miscellaneous

123. Guidelines on how to obtain mutual legal assistance from the United Kingdom can be found on the internet site www.homeoffice.gov.uk/oicd/jcu/guidelns.htm (Note the spelling of "guidelns").

Dates of next meetings

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

25 - 28 September 2000

and

5-7 March 2001

125. Because of the pressing urgency of finalising the 2nd Additional Protocol, the next meeting was scheduled to have a duration of **FOUR DAYS**.

126. The Bureau of the PC-OC should meet in advance of the next meeting of the Committee.

* * *

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APPENDIX II / ANNEXE II**AGENDA**

1. **Opening of the meeting**
2. **Elections**
3. **Adoption of the Agenda**
4. **Adoption of the report of the previous meeting**
5. **Draft 2nd Additional Protocol to the Mutual Assistance Convention**
6. **Mutual Assistance (Article 11 of the Convention)**
7. **Mutual Assistance (Article 7 of the Convention)**
8. **Extradition (provisional arrest)**
9. **Transfer of Sentenced Persons (general)**
10. **Transfer of Sentenced Persons (Article 23 of the Convention)**
11. **Transfer of Sentenced Persons (ad hoc arrangements)**
12. **Transfer of Sentenced Persons (relations with Parties to the Convention, non-members of the Council of Europe and non-observers)**
13. **Transfer of Sentenced Persons (accession of non-member States)**
14. **Transfer of Sentenced Persons (mentally disturbed offenders)**
15. **Crime in Cyber-Space**
16. **Forms for requests for co-operation**
17. **Tasks assigned to the PC-OC by the Bureau of the CDPC.**
18. **Exchange of views on the setting up of the International Criminal Court (ICC)**
19. **Information on co-operation in criminal matters between (a) member States of the European Union, and (b) other**
20. **Information documents available**
21. **Practical difficulties arising from the application of the Conventions**
22. **Future work**
23. **EURO 2000**
24. **Miscellaneous**

25. Dates of next meetings