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IMPROVING EUROPEAN CO-OPERATION IN THE CRIMINAL JUSTICE FIELD

Report presented by the Rapporteur for the Second Session:

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on

"Improving European co-operation in the criminal justice field"

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Second Session (11h 45'- 12h 40'):

"Towards an improvement of the efficiency of the operation of the European Conventions on judicial co-operation in criminal matters: the settlement of disputes concerning the interpretation of the application of Conventions".

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Efficient co-operation between States, in all matters, requires a clear legal framework and trust among partners. The Council of Europe conventions have over the years led to the development of a legal framework which sets out clear rules as to ensure an efficient effort against crime, through co-operation.

In international relations, States are bound by the treaties they have ratified. They take decisions on requests for co-operation which can be submitted to them in application of a Council of Europe treaty. States might either agree to co-operate or, for different reasons set forth in the Convention or in their reservations or declarations, give a negative answer to the request. This situation can lead to disagreements between two States on how a convention should be construed and applied, and may ultimately represent a dispute which has to be settled.

In my report I will concentrate on the latter element, dispute settlement, which is crucial for the efficient application of legislation, as it determines how conventions are effectively enacted. Efficient mechanisms for the settlement of disputes not only enhance co-operation between States, but also ensure that legislation is interpreted and applied uniformly.

Certainly, most Council of Europe conventions propose solutions to deal with such situations and offer dispute settlement mechanisms. Traditionally, three possibilities are offered: negotiation, arbitration and the International Court of Justice.

These traditional mechanisms have been included in the Council of Europe Convention for the Peaceful Settlement of Disputes (1957)

First, the European Committee on Crime Problems (CDPC) is entrusted by many Conventions to "do whatever is needful to facilitate a friendly settlement of any difficulty which may arise out of the convention's execution". The CDPC has both in theory, and in practice, a role to play in the negotiation process. The Recommendation (1999) 20, concerning the friendly settlement of any difficulty that may arise out of the application of the Council of Europe conventions in the penal field, adopted by the Committee of Ministers, describes the procedure of settling disputes by the CDPC.

Second, several Conventions foresee the recourse to an arbitral tribunal. The setting up of such a tribunal and its functioning are also described in detail by Recommendation (1991) 12, concerning the setting up and functioning of arbitral tribunals under Article 42, paragraph 2, of the Convention of 8 November 1990 on "Laundering, Search, Seizure and Confiscation of the Proceeds from Crime". In practice, this possibility has not been used in the Council of Europe context.

Third, the case can be brought to the International Court of Justice. States having ratified the 1957 Convention on the peaceful settlement of disputes have also a priori accepted the International Court of Justice's jurisdiction in respect of the States parties. However, no cases have yet been brought to that jurisdiction with respect to the Council of Europe Conventions.

Perhaps, the limited number of ratifications (14) of the convention can be an obstacle to its full application.

In the context of criminal law, the Committee of Ministers has assigned a central role to the European Committee on Crime Problems (CDPC) in coordinating and monitoring the functioning and implementation of Council of Europe Conventions and Agreements.

As far as the *Convention on Mutual Assistance in Criminal Matters* and the *Convention on Extradition* are concerned, this task has been undertaken by the Committee of Experts on the Operation of European Conventions in the Penal Field (PC-OC).

For some Conventions, including the *Convention on Extradition and the Convention on Mutual Assistance in Criminal Matters*, the CDPC has also been entrusted with the responsibility of facilitating friendly settlement of disputes. Most Conventions since 1964 - the *Convention on the Transfer of Sentenced Persons* of 1983, for example - contain a special clause referring to that facilitating role of the CDPC.

In other conventions, such as the *Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime*, the CDPC's facilitating role is provided as one of three options of dispute settlement, the other two being an arbitral tribunal and the International Court of Justice (Article 42 para 2).

A similar approach is followed in the *Convention on the Suppression of Terrorism* of 1977, the *Criminal-Law Convention on Corruption* and the *Agreement on Illicit Traffic by Sea*, which primarily delegate the role of monitoring implementation to special bodies, such as COSTER (for the Suppression of Terrorism Convention) and GRECO (for the Corruption Convention). In both cases the facilitating role of the CDPC in dispute settlement is retained, either alone or as an alternative path to other settlement procedures like arbitration. With regard to the latter - the option of arbitration - the *Convention on the Suppression of Terrorism* and its amending Protocol set

out general rules that ought to be followed concerning the appointment of arbitrators and the arbitration procedure.

However, more recent Conventions, although they follow different approaches regarding implementation monitoring, seem to share common ground in respect of dispute settlement in that they give the CDPC a more marginal role than previous legal instruments. More specifically, the *Convention on the Prevention of Terrorism* assigns the function of implementation to the Consultation of the Parties, including the identification of problems, and expressing an opinion on any question concerning the application of the Convention (Article 30).

On the other hand, its dispute settlement clause (Article 29) is drafted on the model of the *Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime* and, though it does not exclude the CDPC's involvement in dispute settlement, it makes no explicit reference to it as such. Obviously, the other options of dispute settlement, i.e. the resort to the International Court of Justice or an arbitral tribunal, remain available and expressly mentioned.

Additionally, the *Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism*, follows a similar approach, i.e. by entrusting the implementation monitoring role to a different body, namely the Conference of the Parties. This convention does not expressly exclude the CDPC from dispute settlement, but makes specific reference to the possibility of submitting the dispute to the Conference of the Parties, thus marginalizing even further the CDPC in this respect (Article 48, paragraph 4).

The Council of Europe *Convention on Action against Trafficking in Human Beings* goes a step further in marginalizing the role of the CDPC, by not referring to it at all, at least as far as implementation monitoring and dispute settlement are concerned; the Convention contains no dispute settlement clause and assigns implementation monitoring to the Group of Experts on Action against Trafficking in Human Beings (GRETA).

From what I already mentioned, it is evident that several Conventions contain clauses which traditionally provide three optional dispute settlement mechanisms. These are the mechanisms provided for in the *European Convention for the Peaceful Settlement of Disputes* of 1957 which requires states to refer their disputes to three types of peaceful settlement: conciliation, arbitration and judicial settlement.

With regard to the first method - conciliation - the European Committee on Crime Problems (CDPC) is entrusted by many Conventions to "do whatever is needful to facilitate a friendly settlement of any difficulty which may arise out of its execution". The appendix of Recommendation (1999) 20 contains procedural guidelines, which ought to be followed for the friendly settlement of disputes in this forum. Nonetheless recent legal instruments seem to water down that role.

The second mechanism - arbitration - as one of the judicial methods for settling inter-state disputes, is defined as 'the settlement of differences between states by judges of their own choice, and on the basis for respect of law' (Article 15 of the 1899 *Hague Convention for the Pacific Settlement of International Disputes*).

It is worth noting here the establishment of two related bodies: the **International Court of Conciliation and Arbitration** set up by the OSCE in 1994 providing consultative opinions at states' request, and the **Permanent Court of Arbitration** set up under the 1899 Hague Convention for the Pacific Settlement of International Disputes (as revised in 1907), which provides permanent facilities to States in the Hague, so that in practice each state party may appoint up to four arbitrators from a list and the parties to a dispute choose their arbitrators from this list.

The third option is the referral of the dispute to the International Court of Justice (ICJ). States having ratified the 1957 Convention on the Peaceful Settlement of Disputes have also a priori accepted the ICJ's jurisdiction in respect of the States parties. However, there has been a certain amount of

disaffection with the ICJ in some countries, which may explain the stagnation in the number of ratifications of the Convention.

On the other hand, other instruments, like the *Convention on Action against Trafficking in Human Beings*, I mentioned earlier, remain silent on the issue of dispute settlement as they contain no relevant clause(s). The same applies to the *Convention on Mutual Assistance in Criminal Matters*, the *Convention on Extradition* and the *Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders*. This is a gap in the law with which I will deal later on.

The *Convention for the Peaceful Settlement of Disputes* and the *Convention for the Pacific Settlement of International Disputes* have had a satisfactory acceptance among Council of Europe Member States. Thirty four states have ratified at least one of them, while thirty three have signed the *International Court of Conciliation and Arbitration Convention* and have each appointed two conciliators and two arbitrators.

However, a number of states have excluded the provisions of the 1957 Convention relating to arbitration, possibly because it provides for non-legal disputes to be submitted to arbitration, and states expressed their rejection of judicial settlement of non-legal disputes. As a result, subsequent Conventions referring to arbitration have concentrated exclusively on legal disputes, i.e. the interpretation and application of convention provisions.

Having described the current institutional framework in the area of dispute settlement and the solutions available as formulated by the European Conventions, I will now try to outline the practical experience in dispute resolution so far.

As a matter of fact, although the Council of Europe conventions are dealing with sensitive matters, such as extradition, terrorism, cybercrime, money laundering or corruption, and although some of them, such as the conventions on Extradition or on Mutual Legal Assistance, date back from the 1950s, the Council of Europe has experienced only one formal dispute brought to it by States. That was a case (the Silvia Baraldini case), which concerned a long-standing dispute between Italy and the

United States over the interpretation and application of the *Convention on the Transfer of Sentenced Persons*. The dispute was successfully resolved in 1998 through the CDPC, which issued an opinion, pursuant to Art. 23 of that Convention.

The fact that only one friendly settlement procedure has been initiated confirms the impression that the system in place is operating rather well. It also means that, hitherto, nearly all the difficulties arising in the application of the conventions in the criminal-law field have been settled without the involvement of a third party.

The role of other bodies could also be mentioned: the Permanent Court of Arbitration has been involved in nearly 150 arbitrations since 1902, while nine cases are currently pending before it, including three involving Council of Europe member states. On the other hand, no dispute has yet been referred to the International Court of Conciliation and Arbitration. This is also the case regarding the International Court of Justice, since no case has yet been brought to it, reflecting the limited number of ratifications (only 14) of the 1957 Convention on the Peaceful Settlement of Disputes.

As far as the Conventions on Extradition and on Mutual Assistance in Criminal Matters are concerned - which contain no settlement clause – the role of the Committee of Experts on the Operation of European Conventions in the Penal Field (PC-OC) is of considerable significance. As the competent working group for facilitating the operation of the two conventions, the PC-OC has produced guides, explanatory notes and other useful information which have been useful in preventing disputes between parties.

As I mentioned earlier, the Committee of Ministers in 1991, seeking to resolve the absence in the *Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime* of any provisions as to the specific procedural rules for the establishment of arbitral tribunals and their adjudication process, issued a set of relevant recommendations; these can be adopted by all states, whether members of the Council of Europe or not and are detailed in Recommendation (1991) 12.

Given that several other conventions in the criminal-law field provide for the submission of disputes to an arbitral tribunal in terms similar to those of

the Convention on Laundering, the procedure described in Recommendation (1991) 12 could be used for disputes arising under one of those conventions too.

However, according to the information available, the Council of Europe member states have never used an arbitration clause contained in a Council of Europe convention in the criminal-law field.

Further procedural work was issued on 15 September 1999 when the Committee of Ministers adopted Recommendation (1999) 20 concerning the friendly settlement of any difficulty that may arise out of the application of the Council of Europe conventions in the penal field. Appended to the recommendation are procedural guidelines for the friendly settlement of difficulties arising out of the application of conventions in the penal field.

The Recommendation specifies the role of the European Committee on Crime Problems (CDPC) and its Bureau and the procedure to be followed in settling a dispute. The request for a settlement is examined by an *ad hoc* working party whose membership and *modus operandi* are described in the Recommendation.

Two possibilities are provided for. In the first, settlement of the dispute is discussed during a plenary meeting of the CDPC and an open-ended working party is set up to deal with the matter. In the second case, the request for a settlement does not coincide in time with a plenary meeting of the CDPC, so an *ad hoc* working party is therefore set up and convened to that effect.

Having identified the main issues in the settlement of disputes concerning criminal matters, and after presenting the most significant methods, legal and practical, to deal with them, one has to stress that this is an on-going process and that further work is still required.

With this in mind the Parliamentary Assembly recommended, in January 2005, that the Committee of Ministers "instruct its competent steering committee to analyse how far the *Convention for the peaceful settlement of disputes* reflects the current requirements of conflict settlement among member

states of the Council of Europe, and where it should be revised in order to provide an adequate instrument for the peaceful settlement of disputes between member states".

At its March 2005 meeting, the Committee of Legal Advisers on Public International Law (CAHDI) drew up a draft reply to this recommendation at the request of the Committee of Ministers. The delegations stressed that the European Convention for the Peaceful Settlement of Disputes is a satisfactory legal instrument and that it is unnecessary to revise it. They pointed out, however, that the effectiveness of the convention could be increased through further ratifications.

In any case, the work programme of the Committee of Legal Advisers on Public International Law could include the question of recourse to international arbitration. This would enable an exchange of views to be held on arbitration and states could be invited to provide information on their arbitration practices.

Returning now to the gap in the law left by the Conventions that contain no dispute settlement clause, such as the Extradition and the Mutual Assistance in Criminal Matters Conventions, a possible solution could be to utilise the peaceful settlement obligation under Article 33 of the United Nations Charter to fill the gap. The provision requires that:

> "The Parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice".

In any case, apart from these specific problem areas, future work could focus on two general areas:

Firstly, it could focus on examining the need for an alternative measure of dispute settlement, taking duly into account the possibilities offered by the Council of Europe conventions and the relevant recommendations, such as the referral to the European Committee on Crime Problems (CDPC), as well as the existing international judicial and arbitral bodies like the International Court of

Justice, the Permanent Court of Arbitration and the International Court of Conciliation and Arbitration.

Thus, in view of the interest expressed by one member state in consideration being given to the question of dispute settlement methods, and in view of the variety of such methods in the Council of Europe conventions in the criminal-law field, a committee of experts could be instructed to:

- sound out the member states as to the methods they regard as being most appropriate for settling a dispute,
- study the feasibility and desirability of envisaging dispute settlement procedures for those Council of Europe conventions which do not have them,
- study the feasibility and desirability of envisaging dispute settlement procedures such as, for example, the drawing up by the Council of Europe of a list of experts who could be asked to give a consultative opinion during the negotiation stage, or list of arbitrators on the model of that existing at the Permanent Court of Arbitration, and
- submit its findings to the European Committee on Crime Problems (CDPC).

The most appropriate committee would seem to be the Committee of Experts on the Operation of the European Conventions in Penal Field (PC-OC). However, the Legal Advisers on Public International Law (CAHDI) could also be consulted.

Secondly, future efforts could seek to develop and promote measures preventing the rise of disputes. To this end, the access to information on international instruments and to applicable national legislations and procedures, the development of personal relations and other practical measures of the same kind would contribute towards increasing trust among persons in charge of the international co-operation, therefore limiting the risk of emergence of formal disputes. Proposals initiated in the Council of Europe to launch a database on national procedures with regard to the application of several conventions, as

well as to promote networking among national points of contact, certainly go in the right direction.

The work of the Council of Europe, and in particular of its committees where representatives of States' central authorities can meet and find concrete solutions to practical problems related to the practical application of the Conventions, is essential in this preventive role. Such a work deserves to be promoted and supported to a large extent.

It is common knowledge that the penal Conventions of the Council of Europe constitute the 'operational legal instruments', par excellence, for the enhancement and promotion of interstate co-operation. The Conventions of Mutual Legal Assistance and Extradition have been successfully tested and have yielded positive results for half a century. These Conventions, however, adapted to satisfy the needs and the legal facts of any era, could now be enriched with new ideas in order to be up to date and more efficient.

I consider it very positive that in the history of the application of the Council of Europe's penal Conventions, we have had so few cases of disputes.

The Council of Europe, due to, on the one hand, the number of States parties to the Conventions and, on the other hand, due to its ground work, has left its mark on the issue of protection of human rights and of individual liberties. This is what distinguishes it and has been its international trademark for decades.

Allow me to express my wish that we continue our work in this direction and that we promote further co-operation by new ideas and mutual trust enhancement.

Thank you.