Parliamentary Assembly
Assemblée parlementaire
https://pace.coe.int

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

Opinion 306 (2025)[1]

Draft third additional protocol to the European Convention on Mutual Assistance in Criminal Matters

Parliamentary Assembly

1. The Parliamentary Assembly welcomes the finalisation of the draft third additional protocol to the European Convention on Mutual Assistance in Criminal Matters (ETS No. 30) by the Committee of Experts on the Operation of European Conventions on Co-operation in Criminal Matters and the European Committee on Crime Problems.

2. Since the convention was first established in 1959, criminal activities have become increasingly transnational. International, and especially cross-border, co-operation is essential to combat transnational crime – and this co-operation should be as rapid, effective and efficient as possible. At the same time, co-operation and mutual assistance in criminal matters should respect human rights and the rule of law: for Council of Europe member States this includes the standards of protection under the European Convention on Human Rights (ETS No. 5), in particular the right to a fair trial and the right to respect for private life.

3. The European Convention on Mutual Assistance in Criminal Matters has been updated with protocols approximately every twenty years, with the first additional protocol (ETS No. 99) opened for signature in 1978 and the second additional protocol (ETS No. 182) in 2001, to meet the relevant needs of co-operation in criminal matters. The draft third additional protocol ("the draft third protocol") follows this pattern: it provides for a welcome modernisation of the convention by reflecting the use of modern technologies as well as by broadening the range of means via which mutual assistance can be requested and facilitating the execution of mutual assistance requests.

4. The Assembly welcomes that the draft third protocol takes account of modern technological developments to facilitate mutual assistance requests and make them more cost-effective, notably by prioritising secure electronic communication in request procedures, by enabling hearings by video conference (with relevant safeguards) and by establishing procedures to facilitate the use of recording devices when the subject of an investigation enters the territory of another party, as well as a procedure through which parties can make requests for the interception of telecommunications.

5. As regards hearings by video conference (Article 2), the Assembly notes that parties may, at their discretion, apply this possibility to hearings involving the accused person or the suspect. In this case, the manner in which the video conference is carried out shall be subject to agreement between the parties concerned, in accordance with national law and relevant international instruments (Article 2, paragraph 8). The Assembly understands that this should be done in accordance with the right to a fair trial enshrined in Article 6 of the European Convention on Human Rights and/or other similar provisions under international human rights law. This implies that the accused person or suspect should be guaranteed the right to follow the proceedings without technical impediments and the right to legal assistance, including effective and confidential communication with a lawyer. For the sake of clarity, the Assembly proposes that these safeguards be explicitly referred to in the draft explanatory report to the protocol in relation to Article 2, paragraph 8.

1. *Text adopted by the Standing Committee*, acting on behalf of the Assembly, on 23 May 2025 (see Doc. 16173, report of the Committee on Legal Affairs and Human Rights, rapporteur: Mr Vladimir Vardanyan).

6. A significant part of the draft third protocol (Articles 3 and 4) is designed to facilitate international co-operation concerning State surveillance. The draft text sets out an improved legal basis for such co-operation, with safeguards such as the obligation for the requesting State to indicate the reason why the purpose sought with the surveillance measure cannot be adequately achieved by other means of investigation, thereby facilitating a proportionality test, and the possibility of refusing a request on the ground that such a measure would not have been authorised under the law of the requested party. The Assembly welcomes these safeguards and notes that they are also meant to cover the refusal of a request on the rule of law or human rights grounds, including on the basis of the European Convention on Human Rights.

7. While supporting the introduction of a legal basis for international co-operation, equipped with sound safeguards, the Assembly recalls that the European Court of Human Rights has identified significant shortcomings in the regulation, oversight and functioning of State surveillance in several member States, in violation of the right to respect for private life guaranteed by Article 8 of the European Convention on Human Rights. Many of these judgments are still pending implementation, which indicates that the problems identified by the European Court of Human Rights remain.

8. Along the same lines, in its Resolution 2513 (2023) "Pegasus and similar spyware and secret State surveillance", the Assembly highlighted the highly intrusive nature of modern spyware used for targeted surveillance, expressing deep concern that spyware had been used illegally or for illegitimate purposes by several member States. The Assembly concluded that recourse to such spyware should be limited to exceptional situations, as a measure of last resort, and always under court supervision.

9. Likewise, in its Recommendation 2258 (2023), the Assembly called on the Committee of Ministers to adopt a recommendation to member States of the Council of Europe on secret surveillance and human rights, particularly in the light of the threats posed by new surveillance technologies and spyware; and to examine the feasibility of a Council of Europe convention on the acquisition, use, sale and export of spyware. The Committee of Ministers agreed that a non-binding instrument on secret surveillance and human rights would have a genuine added value and invited the Steering Committee for Human Rights to bear this in mind in its work. In December 2024, the European Commission for Democracy through Law ("Venice Commission") adopted a report entitled "A rule of law and human rights compliant regulation of spyware" at the request of the Assembly. The report concluded that spyware is "an unprecedently intrusive surveillance tool", which should only be developed and used under relevant legal frameworks meeting strict requirements. It transpires from this study that relatively few States have developed legislation that specifically regulates the use of spyware. It is also doubtful whether member States have all the necessary minimum safeguards in place.

10. With these considerations in mind, the Assembly recommends that the draft third protocol be adopted by the Committee of Ministers and opened for signature and ratification. At the same time, however, the Assembly makes a strong call for urgent steps to be taken to ensure that State surveillance is carried out following procedures which are compliant with international standards, failing which greater international co-operation is bound to be flawed. In particular:

10.1. Council of Europe member States should take the necessary steps to implement judgments of the European Court of Human Rights concerning State surveillance by adopting the relevant general measures required;

10.2. Council of Europe member States should ensure that their legal framework for the development and use of spyware includes the minimum safeguards as set out by the Venice Commission;

10.3. the Committee of Ministers should take further steps towards the adoption of a recommendation on secret surveillance and human rights and a legally binding instrument on the acquisition, use, sale and export of spyware, in light of Assembly Recommendation 2258 (2023);

10.4. non-member States of the Council of Europe which are parties to the convention and wish to become parties to the third protocol should also ensure that their legislative framework on State surveillance and its implementation are compliant with international human rights standards.