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**AD HOC COMMITTEE ON COUNTERFEITING OF MEDICAL PRODUCTS AND SIMILAR CRIMES  
INVOLVING THREATS TO PUBLIC HEALTH  
(PC-ISP)**

Study of the operational provisions  
with regard to jurisdiction and extradition  
of the draft Council of Europe Convention  
against Counterfeiting of Medical Products  
and Similar Crimes involving Threats to Public Health

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## CHAPTER I

### Scale and characteristics of crime relating to counterfeit medical products and similar crimes involving threats to public health

The scale and characteristics of crime relating to counterfeit medical products and similar crimes involving threats to public health have been referred to in several papers written in preparation for the draft Council of Europe convention on this subject.

I refer in this connection to the work of the international conference held in Moscow in October 2006 on "Europe against counterfeit medicines", to the deliberations of the Council of Europe Parliamentary Assembly which led to Recommendation 1793 (2007) on the need for a Council of Europe convention on the suppression of counterfeiting and trafficking in counterfeit goods, and to the feasibility study by Professor Tom VANDERBEKEN (Ghent University) in January 2007 on a Council of Europe convention on the counterfeiting of medicines and pharmaceutical crime.

Although it is hard to quantify the exact scale of this criminal activity, precisely because it is hidden, the proliferation of counterfeit medical products is obviously a scourge that is approaching epidemic proportions, in terms both of the variety and of the volume of medicines and medical devices concerned.

And the epidemic has become a global one: no continent, no region and no country is now immune.

According to some reports, trade in counterfeit medical products represents 5 to 7% of the global pharmaceutical market and amounts to at least 27 billion euros a year.

The developing countries are thought to be the ones most seriously affected by this form of crime. According to the World Health Organization (WHO), in Africa and south-east Asia up to 60-70% of certain categories of medicines are counterfeit. The WHO also reports that some 200,000 deaths from malaria each year result from taking counterfeit medicines. In China, 192,000 people are said to have died as a result of counterfeit medicines in 2001.

All the Council of Europe's member states are also concerned, whether as countries of origin, transit or destination of these counterfeit medical products.

At the Moscow conference, examples given for the year 2006 included 93 cases of counterfeiting of medicines in Russia, 39 in the United Kingdom, 28 in Ukraine and 25 in Germany.

The European Union believes that counterfeit products represent at least 3% of Europe's pharmaceuticals market. In 2005, 560,598 counterfeit medicines were seized in the European Union alone.

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Today, this vulnerability of states is increasing as people resort to counterfeit medical products sold over the Internet, making it possible to circumvent the regulations and controls put in place by national authorities.

The fact is that the Internet enables these products to be sold anonymously, in huge quantities, through techniques involving disguise or even rapid switching of supply websites when they are located by the authorities.

A European Union study of its member states has discovered 170 counterfeit medicines being sold through various distribution channels, mainly over the Internet, in the past 5 years. The international drugs control agencies and the World Health Organization are worried by the large-scale development of on-line pharmacies illegally supplying medicines that are normally supplied on prescription, including substances subject to international controls, as well as counterfeit medicines.

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This manufacturing of medical products is a lucrative, low-risk business, because criminal sanctions vary considerably from one state to another and are often derisory or even non-existent. This means that places of impunity (“drug havens”!) are all the more numerous. According to an OECD study, 80% of all counterfeit products seized come from just ten or so countries, mainly in Asia and especially south-east Asia.

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For all these reasons, counterfeiting of medicines and similar crimes involving threats to health are a particularly serious form of crime.

It is serious because of its scale, and also because of the major universal value - public health - which it tends to undermine.

The effects can take the form of poisoning, malformations, handicaps, physical and/or psychological consequences, and sometimes even death for hundreds or even thousands of individuals.

In order to ensure that this type of crime does not go unpunished, several conditions have to be met simultaneously.

On the one hand, the medical products concerned must no doubt be defined, the offences to be prosecuted and punished must be exhaustively listed, and machinery for national and international cooperation must be set in place.

But there must also be a bold policy on jurisdiction and extradition to match the characteristics of this type of crime - its scale, the seriousness of the threat to health, its transnational character, the existence of “drug havens”, and the multiplier effect of the Internet.

Chapters II and III of this paper deal with these aspects.

## CHAPTER II

Jurisdiction rules laid down in conventions
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This paper aims to provide the intergovernmental negotiating group on the draft convention with the means of evaluating a policy to match the problem, in particular with regard to jurisdiction.

For that purpose, this chapter offers a comparison of the relevant provisions of some fifteen international law instruments drawn up in different fields and seeking to tackle types of criminal behaviour comparable in scale and nature to those that concern us here - money counterfeiting, drugs, organised crime, trafficking in human beings, corruption, sexual exploitation of children, terrorism or cybercrime.

The comparative analysis of the principal instruments of international law, whether they emanate from the European Union, the Council of Europe or the United Nations, shows that five principles of jurisdiction are applied to varying degrees.

### **The first principle is the territorial jurisdiction of the criminal law.**

This principle is one manifestation of the national sovereignty of states over their own territories. However, as crime becomes increasingly internationalised, it is more and more common for offences to contain foreign elements. The question then arises of the extent to which the national courts may deal with them. In this connection, an international law instrument may provide for exceptions to the principle of territoriality of the criminal law. Such exceptions may be classed sequentially in accordance with the following four criteria:

- the principle of jurisdiction based on the subject-matter of the offence
- the principle of capacity to bring proceedings

- the principle of capacity to defend proceedings
- the principle of universal jurisdiction.

A. The principle of territoriality of the criminal law

The jurisdiction of the domestic criminal courts applies to all offences committed, in whole or in part, on the national territory, whatever the seriousness of the offence or the nationality of the offender or the victim.

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This territorial jurisdiction also extends, by reason of the nature of the criminal behaviour combated, to offences committed on board a vessel flying the national flag or committed on board an aircraft registered in accordance with its domestic law.

The value of this extension of jurisdiction is illustrated by the explanatory report to the Council of Europe Convention of 25 October 2007 on the Protection of Children against Sexual Exploitation and Sexual Abuse, which states:

*“This type of jurisdiction is extremely useful when the ship or aircraft is not located in the country’s territory at the time of commission of the crime, as a result of which paragraph 1 a would not be available as a basis for asserting jurisdiction. In the case of a crime committed on a ship or aircraft outside the territory of the flag or registry Party, it might be that without this rule there would not be any country able to exercise jurisdiction. In addition, if a crime is committed on board a ship or aircraft which is merely passing through the waters or airspace of another State, there may be significant practical impediments to the latter State’s exercising its jurisdiction and it is therefore useful for the Registry State to also have jurisdiction.”*

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The European Union’s framework decision of 22 December 2003 on combating the sexual exploitation of children and child pornography contains a provision on territorial jurisdiction which may well be of special interest in the context of the present study, in so far as it refers to a computer system enabling the offence to be committed.

Article 8 (5) reads as follows:

*“Each Member State shall ensure that its jurisdiction includes situations where an offence under Article 3 (child pornography) and, insofar as it is relevant, under Article 4 (abetting and attempt), is committed by means of a computer system accessed from its territory, whether or not the computer system is on its territory.”*

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This territoriality principle of the criminal law is practically the general rule in all international instruments, whether drawn up in the framework of the Council of Europe or of the United Nations (cf. the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse or the Council of Europe Convention on Cybercrime (Budapest, 23 November 2007, Article 22 § 1b and c), the International Convention for the Suppression of Terrorist Bombing (New York, 15 December 1997), the International Convention for the Suppression of the Financing of Terrorism (9 December 1999), or the optional protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (25 May 2000) or, lastly, the United Nations Convention against Corruption (31 October 2003, Article 42 § 1b).

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However, this territoriality rule applies in a quite special way where the criminal activity of a criminal organisation is concerned.

Thus the Joint Action of 21 December 1998 of the Council of the European Union to make participation in a criminal organisation an offence requires (Article 4) each member state to ensure that the types of conduct referred to in Article 2(1)(a) or (b) which take place in its territory are subject to prosecution wherever in the territory of the Member States the organisation is based or pursues its criminal activities.

The framework decision of 13 June 2002 on combating terrorism contains the same principle, while broadening it to read "*wherever the terrorist group is based or pursues its criminal activities*"; so the identity of the state concerned is unimportant.

The same holds true of the United Nations Convention against Transnational Organized Crime (Palermo Convention, 15 November - 15 December 2000). Article 15 of that convention states that each State Party must adopt such measures as may be necessary to establish its jurisdiction over the offences committed by a criminal organisation where certain of those offences are committed outside its territory with a view to the commission of other crimes within its territory.

To the extent that the parties to the draft convention have also ratified that United Nations Convention, it does not appear helpful to include this in the text under discussion.

#### B. The principle of jurisdiction based on the subject-matter of the offence

An international law instrument in the criminal field may also provide for the jurisdiction of the domestic courts where certain overriding interests of a state or an international institution are threatened.

This is true, for example, of the European Union's framework decision of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro. That framework decision states, in Article 7 § 2, that at least the Member States in which the euro has been adopted must take the appropriate measures to ensure that prosecution of counterfeiting, at least in respect of the euro, is possible independently of the nationality of the offender and the place where the offence has been committed.

Similarly, Article 42 §2d of the United Nations Convention against Corruption accords jurisdiction to a state party where the corruption offence is committed against it. The corruption may be deemed detrimental to the general interests of the state, and this justifies the right to jurisdiction. The question may arise in the same terms where the damage to public health affects the financial structure of the state, in this case the social security budget.

#### C. The principle of capacity to bring proceedings

The principle of capacity to bring proceedings takes the nationality of the perpetrator of the offence as the criterion for jurisdiction of the domestic courts.

This criterion is based on the principle that a state's nationals are required to comply with the domestic law of their state even when they are outside the territory of that state.

This criterion of jurisdiction is adopted in many international law instruments drawn up by the European Union, the Council of Europe and the United Nations. Examples are the United Nations international conventions for the Suppression of Terrorist Bombing (New York, 15 December 1997) or for the Suppression of the Financing of Terrorism (9 December 1999).

The European Union's framework decision on combating the sexual exploitation of children and child pornography states, in Article 8 § 1c, that this jurisdiction also holds where the offence was committed for the benefit of a legal person established in the territory of the Member State.

The United Nations Convention against Corruption of 31 October 2003, like the above-mentioned conventions to combat terrorism, goes one step further by giving each state party jurisdiction where the offence has been committed not only by one of its nationals but also by a stateless person habitually residing on its territory.

Better still, the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna, 20 December 1988, Article 4 § 1b i), as well as the optional protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (25 May 2000, Article 4 § 2a), give states the possibility of establishing their jurisdiction where the alleged perpetrator of the offence has his habitual residence on their territory.

The Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote, 25 October 2007, Article 25 § 1e) attributes that jurisdiction *ipso jure* to the state party where the offence has been committed by a person having his habitual residence on its territory.

However, Article 25 § 3 of that Convention gives the state party the option of declaring that it reserves the right not to apply, or to apply only in specific cases or conditions, this jurisdiction rule.

On the other hand, for prosecution of the most serious offences, Article 25 § 6 requires each state party to take the necessary legislative or other measures to ensure that its jurisdiction as regards paragraphs 1.d and e is not subordinated to the condition that the prosecution can only be initiated following a complaint by the victim or a denunciation of the State of the place where the offence was committed.

And the explanatory report on this paragraph justifies this rule in the following terms:

*“Certain States in which children are sexually abused or exploited do not always have the necessary will or resources to carry out investigations. In these conditions, the requirement of an official denunciation or of a complaint of the victim often constitutes an impediment to the prosecution.”*

#### D. The principle of capacity to defend proceedings

The principle of capacity to defend proceedings relates to the nationality of the victim and equates the particular interests of nationals who are victims with the general interests of their state of origin.

The above-mentioned United Nations conventions against transnational crime and to combat terrorism provide for this principle as an option available to the states parties.

As for the optional protocol to the Convention on the Rights of the Child, on the sale of children, child prostitution and child pornography, it establishes this jurisdiction *ipso jure* where the victim is a national of the state party.

Article 25 § 2 of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse requires each party to endeavour to take the necessary legislative or other measures to establish jurisdiction over any offence established in accordance with this convention, where the offence is committed against one of its nationals or a person who has his or her habitual residence in its territory.

The explanatory report explains that there is no obligation here, as is demonstrated by the use of the expression “endeavour”.

#### E. The principle of universal jurisdiction

Universal jurisdiction means the legal competence of a court to try an offence regardless of the place where it was committed and whatever the nationality of the perpetrator and the victim.<sup>1</sup>

This principle is an application of the adage “aut dedere, aut judicare”, invoked in order to prevent impunity in prosecuting the most serious offences: according to this adage, a state which is not able to extradite persons whose extradition has been requested is required to try them itself, whatever - I repeat - the place of the offence or the nationality of the perpetrator and the victim.

Universal jurisdiction also seeks to protect values and interests which are deemed essential at the national and international levels, and accordingly to make punishment of extreme forms of international crime more effective.

For example, piracy at sea has from time immemorial been regarded as the prime subject of universal jurisdiction.

Other types of crime have been added to it - drug trafficking, trafficking in human beings, child pornography, terrorism etc., as have crimes of the most serious nature which are repellent to the universal conscience - genocide, crimes against humanity and war crimes.

Article 36 § 2 a. iv of the Single Convention on Narcotic Drugs of 1961, as amended by the protocol of 1972 amending the Single Convention on Drugs, provides that production, exportation and trafficking in drugs, *“committed either by nationals or by foreigners shall be prosecuted by the Party in whose territory the offence was committed, or by the Party in whose territory the offender is found if extradition is not acceptable in conformity with the law of the Party to which application is made, and if such offender has not already been prosecuted and judgement given”*.

Article 22 § 2 a) iv of the Vienna Convention on Psychotropic Substances of 21 February 1971 lays down the same rule.

Other United Nations conventions establish this principle using different forms of words.

Thus the United Nations counter-terrorism conventions give each state party jurisdiction over offences, for example the financing of terrorism or bombings, provided that the alleged perpetrator is on the territory of the state and it does not extradite him to any of the states parties which have themselves established their own jurisdiction in accordance with the provisions of those conventions.

Article 4 § 3 of the optional protocol to the Convention on the Rights of the Child requires each state party to take such measures as may be necessary to establish its jurisdiction over the aforementioned offences when the alleged offender is present in its territory and it does not extradite him or her to another State Party on the ground that the offence has been committed by one of its nationals.

The United Nations Convention against Corruption distinguishes between two options.

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<sup>1</sup> Henry D. Bosly, Damien VANDERMEERSCH, Droit de procédure pénale. La Charte 2003, pp. 76-79.

One is mandatory: the state party has jurisdiction where the alleged perpetrator is on its territory and it does not extradite him because he is one of its nationals. The other is optional: each party may establish its jurisdiction where the alleged perpetrator is on its territory and it does not extradite him. One may imagine two situations: the alleged perpetrator has the status of political refugee or the extradition application is refused on humanitarian grounds (application of the death penalty, torture, special court, etc.).

Article 7 § 1 of the Convention of 27 September 1996 on extradition between the member states of the European Union stipulates that extradition may not be refused on the ground that the person whose extradition is requested is a national of the member state requested. Nevertheless, Article 7 § 2 of the Convention permits any member state to declare that it will not grant extradition of its nationals or will authorise such extradition only on certain conditions.

However, such a reservation is valid for only five years and lapses unless the member state entering it has notified its extension.

The European Union Framework Decision on combating trafficking in human beings (19 July 2002) provides that any member state which, under its laws, does not extradite its own nationals must establish its jurisdiction to prosecute the perpetrators of offences covered by the framework decision when they are committed by its own nationals outside its territory.

The Council of Europe conventions also contain provisions of this kind.

For example, Article 7 of the European Convention on the Suppression of Terrorism of 1977, as amended by the protocol of 15 May 2003, states that:

“Article 7

*A Contracting State in whose territory a person suspected to have committed an offence mentioned in Article 1 is found and which has received a request for extradition ... shall, if it does not extradite that person, submit the case, without exception whatsoever and without undue delay, to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any offence of a serious nature under the law of that State.”*

The Council of Europe Conventions on Cybercrime (23 October 2001), on the Prevention of Terrorism (2005) and on the Protection of Children against Sexual Exploitation and Sexual Abuse (25 October 2007) all contain the same clause, viz:

*“Each Party shall take the necessary legislative or other measures to establish jurisdiction over the offences established in accordance with this Convention, in cases where an alleged offender is present on its territory and it does not extradite him or her to another Party, solely on the basis of his or her nationality.”*

F. Competition in respect of jurisdiction

In some cases, the rules on jurisdiction may create competition and result in several states parties claiming jurisdiction with regard to one and the same offence. In order to obviate these inconvenient overlaps and the pointless disadvantages to both victims and witnesses, some of the conventions mentioned contain clauses designed to coordinate the action of the states in question through a process of consultation.

For example, Article 25 § 8 of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse provides that when more than one



party claims jurisdiction over an alleged offence (...) the parties involved shall, where appropriate, consult with a view to determining the most appropriate jurisdiction for prosecution.

The explanatory report on this convention states:

*“175. In certain cases of sexual exploitation or abuse of children, it may happen that more than one Party has jurisdiction over some or all of the participants in an offence. For example, a child may be recruited into prostitution in one country, then transported and exploited in another. In order to avoid duplication of procedures and unnecessary inconvenience for witnesses or to otherwise facilitate the efficiency or fairness of proceedings, the affected Parties are required to consult in order to determine the proper venue for prosecution. In some cases it will be most effective for them to choose a single venue for prosecution; in others it may be best for one country to prosecute some alleged perpetrators, while one or more other countries prosecute others. Either method is permitted under this paragraph. Finally, the obligation to consult is not absolute; consultation is to take place “where appropriate”. Thus, for example, if one of the Parties knows that consultation is not necessary (e.g. it has received confirmation that the other Party is not planning to take action), or if a Party is of the view that consultation may impair its investigation or proceeding, it may delay or decline consultation.”*

In the European Union framework decision on combating terrorism, Article 9 § 2 goes further by setting out the different factors in order of importance.

The clause in question reads as follows:

*“2. When an offence falls within the jurisdiction of more than one Member State and when any of the States concerned can validly prosecute on the basis of the same facts, the Member States concerned shall cooperate in order to decide which of them will prosecute the offenders with the aim, if possible, of centralising proceedings in a single Member State. To this end, the Member States may have recourse to any body or mechanism established within the European Union in order to facilitate cooperation between their judicial authorities and the coordination of their action. Sequential account shall be taken of the following factors:*

- *the Member State shall be that in the territory of which the acts were committed,*
- *the Member State shall be that of which the perpetrator is a national or resident,*
- *the Member State shall be the Member State of origin of the victims,*
- *the Member State shall be that in the territory of which the perpetrator was found.”*

### CHAPTER III

Extradition rules in conventions
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The question of extradition among the member states of the Council of Europe is dealt with under the European Convention on Extradition of 13 December 1957.

Article 2 sets out the two basic conditions: extraditable offences are those punishable under the laws of the requesting party and of the requested party by deprivation of liberty or under a detention order for a maximum period of at least one year or by a more severe penalty. Thus they must be punishable in both states and a minimum penalty is set.

These two conditions were restated in a recent Council of Europe convention, that of 23 October 2001 on cybercrime (cf. Article 24 § 1a). It was doubtless thought best to restate

them by virtue of the fact that this convention is open to non-member states of the Council of Europe.

Regarding the minimum penalty, it is to be noted that Article 2 of the Convention of 27 September 1996 on extradition between the member states of the European Union stipulates that extraditable offences are those punishable under the law of the requesting member state by deprivation of liberty or a detention order for a maximum period of at least 12 months and under the law of the requested Member State by deprivation of liberty or a detention order for a maximum period of at least six months.

For the Benelux states (Belgium, Netherlands, Luxembourg), Article 2 of the Treaty of 27 June 1962 provides for a minimum sentence of six months.

As regards the requirement that the offence should be an offence in both countries, this is the general rule in most international law instruments. However, there are exceptions.

As regards genocide, war crimes and crimes against humanity, many international instruments (conventions, resolutions of the United Nations Security Council and General Assembly) require states to prosecute these crimes under international humanitarian law (IHL).

This universal jurisdiction provided for in international law with regard to the perpetrators of serious IHL crimes may apply in domestic law where the jurisdiction is of a customary kind and the domestic legal system of the state of the forum does not present an obstacle.<sup>2</sup>

Furthermore, Article 44 of the United Nations Convention against Corruption stipulates that a state party whose legislation so permits may grant extradition of a person on any of the charges covered by the said convention which are not punishable under its own domestic law.

The Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote, 25 October 2007) goes one step further in this direction.

Article 25 § 4 of that convention provides that, for the most serious “sex tourism” offences of which children are victims, each party shall take the necessary legislative or other measures to ensure that its jurisdiction is not subordinated to the condition that the acts are also criminalised at the place where they were performed.

However, Article 25 § 5 offers the possibility of reservation to this exception to the rule that the offence must be punishable in both states. But that reservation is limited to offences not typically committed by “sex tourists”.

The explanatory report has the following to say about these two paragraphs of Article 25 of the said convention:

*“171. Paragraph 4 represents an important element of added value in this Convention, and a major step forward in the protection of children from certain acts of sexual exploitation and abuse. The provision eliminates, in relation to the most serious offences in the Convention, the usual rule of dual criminality where acts must be criminal offences in the place where they are performed. Its aim is to combat the phenomenon of sex tourism, whereby persons*

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<sup>2</sup> Combating impunity – Proceedings of the Brussels Colloquy, 11 to 13 March 2002, BRUY-LANT. Report of workshop 1: Universal jurisdiction, chaired by Eric DAVID (U.L.B.).

*are able to go abroad to commit acts which are classified as criminal offences in their country of nationality. Paragraph 4 enables these cases to be tried even where they are not criminalised in the State in which the offence was committed. This paragraph applies exclusively to the offences defined in Articles 18 (sexual abuse), Article 19 (offences concerning child prostitution), Article 20 paragraph 1 a (production of child pornography) and Article 21 paragraph 1 a and b (offences concerning the participation of a child in pornographic performances) and committed by nationals of the State Party concerned.*

*172. In paragraph 5, the negotiators wished to introduce the possibility for Parties to reserve the right to limit the application of paragraph 4 with regard to offences established in accordance with Article 18 paragraph 1 b second and third indents. Therefore the reservation may be applied only in relation to situations where abuse is made of a recognised position of trust, authority or influence over the child including within his or her family, or when abuse is made of a particularly vulnerable situation of the child. It was considered that these types of offences are not typically committed by "sex tourists". Thus, Parties should have the possibility to limit the application of paragraph 4 to cases where a person actually has his or her habitual residence in the State of nationality and has travelled to the country where the offence has been committed. Such reservations should not cover cases of persons working abroad for limited periods of time, such as those involved in humanitarian or military postings or other similar missions."*

There is one final point concerning extradition to which I should like to draw attention with a view to the conclusion of a convention open to accession by non-member states of the Council of Europe.

It concerns provisions relating to the conditions to which extradition is subject in the absence of an extradition treaty covering the type of criminal activity covered by the convention or the draft.

I refer in this connection to Article 24 §§ 2 to 5 of the Council of Europe Convention on Cybercrime, which read as follows:

1. "The criminal offences described in paragraph 1 of this article shall be deemed to be included as extraditable offences in any extradition treaty existing between or among the Parties. The Parties undertake to include such offences as extraditable offences in any extradition treaty to be concluded between or among them.
2. If a Party that makes extradition conditional on the existence of a treaty receives a request for extradition from another Party with which it does not have an extradition treaty, it may consider this Convention as the legal basis for extradition with respect to any criminal offence referred to in paragraph 1 of this article.
3. Parties that do not make extradition conditional on the existence of a treaty shall recognise the criminal offences referred to in paragraph 1 of this article as extraditable offences between themselves.
4. Extradition shall be subject to the conditions provided for by the law of the requested Party or by applicable extradition treaties, including the grounds on which the requested Party may refuse extradition."

## CHAPTER IV

Proposed convention clauses relating to jurisdiction and extradition
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Having regard to the scale and characteristics of crime relating to counterfeit medical products and similar crimes involving threats to public health (see Chapter I above) and to the comparative law analysis with regard to jurisdiction and extradition in the international law instruments covering forms of criminal behaviour comparable to those that concern us here (see Chapters II and III above), I would offer the following proposed texts for consideration by the negotiating group. Article 8 - Jurisdiction; Article 8bis - Extradition.

These texts are also based on the assumption that the convention is to be open to accession by non-member states of the Council of Europe.

### “Article 8 - Jurisdiction

1. *Each Party shall take the necessary legislative or other measures to establish jurisdiction over any criminal offence established in accordance with this Convention, when the offence is committed:*

- a. on its territory; or*
- b. on board a vessel flying the flag of that Party; or*
- c. on board an aircraft registered under the law of that Party; or*
- d. by one of its nationals; or*
- e. by a person habitually residing on its territory; or*
- f. for the benefit of a legal person established on its territory; or*
- [ g. against itself.]*

2. *Each Party shall take the necessary legislative or other measures to ensure that its jurisdiction covers cases in which an offence covered by Articles 5 and 6 and, where relevant, by Article 7, was committed by means of a computer system accessed from its territory, whether or not the said computer system is on its territory.*

3. *Each Party shall take the necessary legislative or other measures to establish jurisdiction over any criminal offence established in accordance with this Convention, when the offence is committed against one of its nationals or a person habitually residing on its territory.*

4. *Each Party may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, declare in a declaration sent to the Secretary General of the Council of Europe that it reserves the right not to apply, or to apply only in specific cases or conditions, the rules on jurisdiction set out in § 1e of the present article.*

5. *For the prosecution of the offences established in accordance with Article 5 § 1 a, b and c in conjunction with Article 11 points a, e or f, each Party shall take the necessary legislative or other measures to ensure that the establishment of its jurisdiction in accordance with point d of § 1 is not made subject to the condition that the offences also be punishable in the place where they were committed.*

6. *For the prosecution of the offences established in accordance with Article 5 § 1 a, b and c in conjunction with Article 11 points a, e or f of the present convention, each Party shall take the necessary legislative or other measures to ensure that the establishment of its jurisdiction in accordance with points d and e of § 1 is not made subject to the condition that prosecution be preceded by a complaint by the victim or against the state of the place where the offences were committed.*

## 7. Alternative 1

§7. Each Party on whose territory the alleged perpetrator of an offence covered by Articles 5 and 6 is discovered and which has received a request for extradition in accordance with the conditions set out in Article 8bis § 1 shall, if it does not extradite the alleged perpetrator of the offence, submit the matter without exception and without undue delay to its competent authorities for criminal prosecution. Those authorities shall take their decision in the same manner as for any serious offence in accordance with the law of that state.

## Alternative 2

§ 7. Each Party shall take the necessary legislative or other measures to establish jurisdiction over any criminal offence established in accordance with this convention, when the alleged perpetrator is present on its territory and cannot be extradited to another party by reason of his nationality.

In such cases, the requested Party shall submit the case, at the request of the requesting Party, to its competent authorities for prosecution, and shall report the outcome of the case to the requesting Party in due course. The authorities in question shall take their decision and shall conduct the investigation and proceedings in the same manner as for any other offence of a comparable nature, in accordance with the legislation of that Party.

§ 7bis. Each Party may also take the necessary measures to establish its jurisdiction over offences established in accordance with the present convention where the alleged perpetrator is on its territory and it does not extradite him.

8. Where more than one Party claims jurisdiction over an alleged offence established in accordance with the present convention, the Parties concerned shall consult each other where expedient in order to determine which of them is best able to bring the prosecution. [To this end, the Parties may have recourse to any body or mechanism established within the Council of Europe in order to facilitate cooperation between their judicial authorities and the coordination of their action. Sequential account shall be taken of the following factors:

- the Party shall be that in whose territory the acts were committed,
- the Party shall be that of which the perpetrator is a national or resident,
- the Party shall be the state of origin of the victims,
- the Party shall be that in whose territory the perpetrator was found.”]

9. Without prejudice to the general rules of international law, the present convention shall not exclude any criminal jurisdiction exercised by a Party in accordance with its domestic law.

## Article 8bis: Extradition

1. a. This article applies to extradition between Parties for the criminal offences established in accordance with Articles 5 and 6 of this convention, provided, without prejudice to the application of Article 8 § 5, that they are punishable under the laws of both parties concerned by deprivation of liberty for a maximum period of at least one year, or by a more severe penalty.

b. Where a different minimum penalty is to be applied under an extradition treaty, including the European Convention on Extradition (ETS No. 24), applicable between two or more Parties, or an arrangement agreed on the basis of uniform or reciprocal legislation, the minimum penalty provided for under such treaty or arrangement shall apply.

2. *The criminal offences described in paragraph 1 of this article shall be deemed to be included as extraditable offences in any extradition treaty existing between or among the Parties. The Parties undertake to include such offences as extraditable offences in any extradition treaty to be concluded between or among them.*

3. *If a Party that makes extradition conditional on the existence of a treaty receives a request for extradition from another Party with which it does not have an extradition treaty, it may consider this convention as the legal basis for extradition with respect to any criminal offence referred to in §1 of this article.*

4. *Parties that do not make extradition conditional on the existence of a treaty shall recognise the criminal offences referred to in §1 of this article as extraditable offences between themselves.*

5. *Extradition shall be subject to the conditions provided for by the law of the requested Party or by applicable extradition treaties, including the grounds on which the requested Party may refuse extradition*

6. a. *Each Party shall, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, communicate to the Secretary General of the Council of Europe the name and address of each authority responsible for making or receiving requests for extradition or provisional arrest in the absence of a treaty.*

b. *The Secretary General of the Council of Europe shall set up and keep updated a register of authorities so designated by the Parties. Each Party shall ensure that the details held on the register are correct at all times.*

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## APPENDIX

International law instruments analysed for the purpose of this study

### A. Mutual judicial assistance in connection with enforcement

1. In the framework of the Council of Europe  
European Convention on Extradition (Paris, 13 December 1957)
2. In the framework of the BENELUX  
Treaty on Extradition and Mutual Legal Assistance in Criminal Matters between the Kingdom of Belgium, the Grand Duchy of Luxembourg and the Kingdom of the Netherlands (Brussels, 27 June 1962)
3. In the framework of the European Union  
Convention on extradition between the member states of the European Union (Dublin, 27 September 1996)

### B. International criminal law instruments designed to protect the state or an international institution

1. Currency counterfeiting  
Framework decision of the European Union on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro (29 May 2000)
2. Terrorism
  - a. United Nations
    - International Convention for the Suppression of Terrorist Bombing (15 December 1997)
    - International Convention for the Suppression of the Financing of Terrorism (9 December 1999)
  - b. Council of Europe
    - Convention on the Suppression of Terrorism (Strasbourg, 27 January 1977)
    - Convention the Prevention of Terrorism (Warsaw, 16 May 2005)
  - c. European Union
    - Framework decision on combating terrorism (13 June 2002)
3. Corruption
  - a. United Nations  
Convention against Corruption (31 October 2003)
  - b. Council of Europe  
Criminal law Convention on Corruption (Strasbourg, 23 January 1999)

### C. International criminal law instruments designed to protect the individual

1. Trafficking in human beings, sexual exploitation of children
  - a. United Nations

Optional protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography

- b. Council of Europe
    - Convention on Action against Trafficking in Human Beings (Warsaw, 16 May 2005)
    - Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote, 25 October 2007)
  - c. European Union
    - Framework decision on combating the sexual exploitation of children and child pornography (22 December 2003)
2. Drugs
- - Single Convention on Narcotic Drugs of 1961, as amended by the protocol of 1972 amending the single convention on drugs of 1961 (New York, 30 March 1961)
  - - Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna, 20 December 1988)
3. Transnational organised crime
- a. United Nations
    - Convention against Transnational Organized Crime (Palermo, 15 November 2000)
  - b. Council of Europe
    - Convention on Cybercrime (Budapest, 23 November 2001)
  - c. European Union
    - Joint Action to make participation in a criminal organisation an offence in the member states of the European Union (21 December 1998)