COUNCIL OF EUROPE

CONSEIL DE L'EUROPE

Strasbourg, 21 November 2014 CDPC (2014) 24
cdpc /docs 2014/cdpc (2014) 24

EUROPEAN COMMITTEE ON CRIME PROBLEMS

(CDPC)

ADDENDUM TO DOCUMENT ON THE MODEL PROVISIONS PROJECT
DRAFT ELEMENTS FOR AN EXPLANATORY REPORT

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CHAPTER I – PURPOSE, PRINCIPLE OF NON-DISCRIMINATION, SCOPE, DEFINITIONS

Article 1 - Purpose of the Convention

1. Paragraph 1 sets out the purposes of the Convention, which are to prevent and combat ….

2. Paragraph 2 provides for the establishment of a follow-up mechanism (Articles 19–21) in order to ensure an effective implementation of the Convention.

Article 2 - Principle of non-discrimination

3. This article prohibits discrimination in Parties' implementation of the Convention and in particular in enjoyment of measures to protect and promote victims' rights. The meaning of discrimination in Article 2 is identical to that given to it under Article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

4. The concept of discrimination has been interpreted consistently by the European Court of Human Rights in its case law concerning Article 14 ECHR. In particular, this case law has made clear that not every distinction or difference of treatment amounts to discrimination. As the Court has stated, for example in the *Abdulaziz, Cabales and Balkandali v. the United Kingdom* of 28 May 1985 judgment, "a difference of treatment is discriminatory if it 'has no objective and reasonable justification', that is, if it does not pursue a 'legitimate aim' or if there is not a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised".

5. The list of non-discrimination grounds in Article 2 is based on that in Article 14 ECHR and the list contained in Article 1 of Protocol No. 12 to the ECHR. However, the negotiators wished to include also the non-discrimination grounds of age, sexual orientation, state of health and disability. "State of health" includes in particular HIV status. The list of non-discrimination grounds is not exhaustive, but indicative, and should not give rise to unwarranted a contrario interpretations as regards discrimination based on grounds not so included. It is worth pointing out that the European Court of Human Rights has applied Article 14 to discrimination grounds not explicitly mentioned in that provision (see, for example, as concerns the ground of sexual orientation, the judgment of 21 December 1999 in *Salgueiro da Silva Mouta v. Portugal*). The reference to "or other status" could refer, for example, to members of refugee or immigrant populations.

Article 3 - Scope and use of terms

(….)

CHAPTER II – SUBSTANTIVE CRIMINAL LAW

Article 4 - … (brief description of the criminal offence)

Paragraph 1

(…)

6. It is clear from the wording of the provisions, that Parties are only obliged to criminalize the acts set out in the mandatory provisions, if they are committed intentionally. The interpretation of the word "intentionally" is left to domestic law, but the requirement for intentional conduct relates to all the elements of the offence. As always in criminal law conventions of the Council of Europe, this does not mean that Parties would not be allowed to go beyond this minimum requirement by also criminalising non-intentional acts.

7. The obligation to ensure that the act constitutes a 'criminal offence" requires States that their respective domestic law provisions can be applied in the course of criminal procedures imposing criminal sanctions. The term 'ensure' means that Parties may have to take legislative and/or other measures in order to fulfill this obligation. However, Parties may not need to take any such action provided that their domestic legislation is already in full compliance with the obligations under this article. The article sets a minimum standard according to which the domestic legislation has to ensure that at least the conduct described in this article constitutes a criminal offence. However, Parties may go beyond the definition of the offence provided for in this article and may criminalize also other forms of conduct which would only partially fulfill this definition.

Alternative versions of paragraph 1 - Option A

8. This article sets out the principle that … (refer to conduct described in this article) constitutes a criminal offence or be subject to administrative sanctions, which means that the drafters decided to allow for flexibility to choose the appropriate measures. Depending also on the different legal concepts applicable in different States they thus may decide to apply e.g. administrative (regulatory) sanctions, which may be imposed in a different type of procedure than a criminal court case. As Articles 5 to 16 refer only to 'criminal offences in accordance with this Convention', the obligations provided for in those articles apply only if a State chooses to apply criminal sanctions and no such obligation exists where a State decides to apply other types of sanctions.

Alternative versions of paragraph 1 - Option B

9. The negotiators were not in agreement over the question of whether or not the conduct described in paragraph 1 should constitute a criminal offence. They thus decided to leave a certain margin of appreciation to Parties with regard to whether or not to criminalize such conduct.

10. The last sentence of paragraph 1 clarifies that while it is left to each Party to decide whether or not and if so in which respect it will establish criminal offences covering the conduct described in this paragraph, and while a Party which decides to establish any such criminal offences is not legally obliged to apply also Articles 5 to 16 to such criminal offences, the Party is called upon to endeavor to do so.

Article 5 - Aiding or abetting and attempt

11. Paragraph 1 requires Parties to ensure that an intentional act of aiding or abetting an offence, as referred to in [Articles x and y of]this Convention, that has been committed by another person, also constitutes a criminal offence. Thus Parties are only required to ensure criminal liability for

aiding or abetting where the person who commits a crime is aided by another person who also intends the crime to be committed.

12. Paragraph 2 provides for the criminalisation of an attempt to commit the offences referred to in [Articles x and y of]this Convention. The interpretation of the word “attempt” is left to domestic law. The principle of proportionality, as referred to in the Preamble of the Convention, should be taken into account by Parties when distinguishing between the concept of attempt and mere preparatory acts which do not warrant criminalization.

13. Paragraph 3 allows for the Parties to make reservations with regard to the application of paragraph 2 (attempt) to offences referred to in [Articles x and y of]this Convention due to differences in the criminal law systems of member States of the Council of Europe.

14. As with all the offences referred to in this Convention, Article 5 requires the criminalisation of aiding or abetting and attempt only if committed intentionally.

Article 6 - Jurisdiction

15. This article lays down various requirements whereby Parties must establish jurisdiction over the offences referred to in this Convention. The obligation in this respect is only to make the necessary provisions in their domestic law which allow exercising of jurisdiction in such cases. The provision is not intended to require law enforcement authorities and/or courts to actually exercise (make use of that) statutory jurisdiction in a specific case. This Article is considered to set “minimum rules”. Thus it only contain an obligation to “at least” criminalize offences and/or foresee a competence for their courts when the offence is committed under the circumstances described in that article on jurisdiction (c.f. paragraph 6).

16. Paragraph, 1.a is based on the territoriality principle. Each Party is required to punish the offences established under the Convention when they are committed on its territory.

17. Paragraph 1.b and .c are based on a variant of the territoriality principle. These subparagraphs require each Party to establish jurisdiction over offences committed on ships flying its flag or aircraft registered under its laws. This obligation is already in force in the law of many countries, ships and aircraft being frequently under the jurisdiction of the State in which they are registered. This type of jurisdiction is 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, letter 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.

18. Paragraph 1.d is based on the nationality principle. The nationality theory is most frequently applied by countries with a civil-law tradition. Under that principle, nationals of a country are obliged to comply with its law even when they are outside its territory. Under sub-paragraph d, if one of its nationals commits an offence abroad, a Party is obliged to be able to prosecute him/her.

19. Paragraph 2 is linked to the nationality of the victim. It is based on the premise that the particular interests of victims overlap with the general interest of the state to prosecute crimes committed against its nationals. Hence, if a national is a victim of an offence committed abroad, the Party shall endeavour to establish jurisdiction in order to start proceedings. However, there is no obligation imposed on Parties, as demonstrated by the use of the expression “endeavour”.

20. [Except as specified in paragraph 3*bis*] the obligations to exercise jurisdiction in respect of extra-territorial offences does not prevent that State to subordinate its jurisdiction to the condition that the acts are criminalized (also) at the place where they were performed ("dual criminality principle"). Any Party may, however, go further in its domestic law and wave such a condition in case of specific crime types in order to be able to investigate and prosecute an offence committed – e.g. by an own national – abroad, even if the conduct is not considered to be a crime in the State where it was performed.

21. Paragraph 3 concerns the principle of *aut dedere aut judicare* (extradite or prosecute). Jurisdiction established on the basis of paragraph 3 is necessary to ensure that Parties that refuse to extradite a person have the legal ability to undertake investigations and proceedings domestically instead.

22. Paragraph 3*bis* eliminates, in relation to the most serious offences of the Convention, the usual rule of dual criminality where acts committed by an own national abroad (paragraph 1.d) must be criminal offences also in the place where they are committed. Its aim is to combat…. Paragraph 4 allows Parties, while applying paragraph 1.d in principle, not to implement the obligation under paragraph 3*bis* and thus to continue applying the dual criminality rule to offences committed by own nationals abroad.

23. Paragraph 3*ter* prohibits the subordination of the initiation of proceedings, which is based on the jurisdiction provided for in paragraph 1.d to the conditions of a complaint of the victim or the laying of information from the authorities of the State in which the offence took place. Indeed, certain States in which such offences take place do not always have the necessary will or resources to carry out investigations. In these conditions, the requirement of the laying of information by the State or of a complaint of the victim often could constitute an impediment to the prosecution by the authorities of the Parties to this Convention. Here again, paragraph 4 allows Parties to wave the obligations under paragraph 3*ter* by entering a reservation in respect of the conditions under which they would apply paragraph 1.d. Parties making use of this possibility may thus subordinate the initiation of prosecution of alleged offenders to cases where a report has been filed by a victim, or the State Party has received a denunciation from the State of the place where the offence was committed.

24. Paragraph 4 provides for a possibility for Parties to enter reservations on the application of the jurisdiction rules laid down in paragraph 1.d. A Party may determines that it reserves the right not to apply, or to apply only in specific cases or conditions paragraph 1.d. This may include a reservation also in respect of the obligations under paragraphs 3*bis* and 3*ter*.

25. In certain cases, it may happen that more than one Party has jurisdiction over some or all of the participants in an offence. For example, in order to avoid duplication of procedures and unnecessary inconvenience for suspects and witnesses or to 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 some cases 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 paragraph 5. 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.

26. The bases of jurisdiction set out in paragraph 1 are not exclusive. Paragraph 6 of this article confirms that this Convention does not prevent Parties from establishing in its domestic law further reaching provisions on exercising extra-territorial jurisdiction such as, for example, in respect of offences committed by persons who are not nationals but habitual residence of that State.

Article 7 - Liability of legal persons

27. Article 7 is consistent with the current legal trend towards recognising a liability of legal persons for criminal offences committed by certain natural persons. The intention is to make commercial companies, associations and similar legal entities ("legal persons") liable for criminal actions performed for their benefit by anyone in a leading position in them. Article 7 also contemplates liability where someone in a leading position fails to supervise or check on an employee or agent of the entity, thus enabling them to commit any of the offences established in the Convention for the benefit of the entity.

28. Under paragraph 1, four conditions need to be met for liability to attach. First, one of the offences described in the Convention (including aiding and abetting of such offences) must have been committed. Second, the offence must have been committed for the entity's benefit. Third, a person in a leading position must have committed the offence. The term "person who has a leading position" refers to someone who is organisationally senior, such as a director. Fourth, the person in a leading position must have acted on the basis of one of his or her powers (whether to represent the entity or take decisions or perform supervision), demonstrating that that person acted under his or her authority to incur liability of the entity. In short, paragraph 1 requires Parties to be able to impose liability on legal entities solely for offences committed by such persons in leading positions.

29. In addition, paragraph 2 requires Parties to be able to impose liability on a legal entity ("legal person") where the crime is committed not by the leading person described in paragraph 1 but by another person acting on the entity's authority, i.e. one of its employees or agents acting within their powers. The conditions that must be fulfilled before liability can attach are: 1) the offence was committed by an employee or agent of the legal entity; 2) the offence was committed for the entity's benefit; and 3) commission of the offence was made possible by the leading person's failure to supervise the employee or agent. In this context failure to supervise should be interpreted to include not taking appropriate and reasonable steps to prevent employees or agents from engaging in criminal activities on the entity's behalf. Such appropriate and reasonable steps could be determined by various factors, such as the type of business, its size, and the rules and good practices in force.

30. Liability under this article may be criminal, civil or administrative. It is open to each Party to provide, according to its legal principles, for any one or all of these forms of liability as long as the requirements of Article 8, paragraph 2 are met, namely that the sanction or measure be "effective, proportionate and dissuasive" and includes monetary sanctions.

31. Paragraph 4 makes it clear that corporate liability does not exclude individual liability. In particular, foreseeing a liability of the legal person should not be considered as an alternative to imposing a criminal sanction on the offender and vice versa.

Article 8 - Sanctions and measures

32. This article is closely linked to Articles 4 to x of this Convention, which define the various criminal offences that shall be punishable under domestic law. Paragraph 1 applies to natural persons and requires Parties to match their criminal law response to the seriousness of the offences and lay down sanctions which are "effective, proportionate and dissuasive". In the case of an offence in accordance with Article X and Y, Parties must provide for prison sentences that can give rise to extradition. It should be noted that, under Article 2 of the European Convention on Extradition (ETS No. 24), extradition is to be granted in respect of offences punishable under the laws of the requesting and requested Parties by deprivation of liberty or under a detention order for a maximum period of at least one year or by a more severe penalty.

33. Paragraph 2 concerns the liability of legal persons in accordance with Article 7. In this case, the sanctions shall also be “effective, proportionate and dissuasive”, but may be criminal or non-criminal monetary sanctions such as administrative sanctions or civil liability.

34. In addition, paragraph 2 provides for other measures which may be taken in respect of legal persons, with particular examples given: temporary or permanent disqualification from the practice of commercial activities; exclusion from entitlement to public benefits or aid; placing under judicial supervision; or a judicial winding-up order. The list of measures is not mandatory or exhaustive and Parties are free to apply none of these measures or envisage other measures.

35. Paragraph 3 requires Parties to ensure that measures concerning seizure and confiscation of the proceeds derived from criminal offences can be taken. This paragraph should be read in the light of the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS No. 141) as well as the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No. 198), which are based on the idea that confiscating the proceeds of crime is an effective anti-crime weapon.

36. Paragraph 3 (i) provides for the seizure and confiscation of any instrumentalities which have been used in the commission of any of the offences in accordance with this Convention. Paragraph 3 (ii), provides for the seizure and confiscation of proceeds of the offences, or property whose value corresponds to such proceeds.

37. The Convention does not contain definitions of the terms “confiscation”, “instrumentalities”, “proceeds” and “property”. However, Article 1 of the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No. 198) provides definitions for these terms which may be used for the purposes of this Convention. The term “seizure” means temporarily prohibiting the transfer, destruction, conversion, disposition or movement of property or temporarily assuming custody or control of property on the basis of an order issued by a court or other competent authority. “Confiscation” refers to a penalty or measure, ordered by a court following proceedings in relation to a criminal offence or criminal offences, resulting in final deprivation of property. “Instrumentalities” means any property used or intended to be used, in any manner, wholly or in part, to commit a criminal offence or criminal offences. “Proceeds” means any economic advantage, derived from or obtained, directly or indirectly, from criminal offences. It may consist of any “property” as defined below. The wording of paragraph 3 takes into account that there may be differences of domestic law as regards the type of property which can be confiscated after an offence. It can be possible to confiscate items which are (direct) proceeds of the offence or other property of the offender which, though not directly acquired through the offence, is equivalent in value to its direct proceeds (“substitute assets”). “Property” includes property of any description, whether corporeal or incorporeal, movable or immovable, and legal documents or instruments evidencing title to or interest in such property.

Article 9 – Aggravating circumstances

38. Article 9 requires Parties to ensure that certain circumstances (mentioned in letters a. to d.) may be taken into consideration as aggravating circumstances in the determination of the sanction for offences established in this Convention. This obligation does not apply to cases where the aggravating circumstance already forms part of the constituent elements of the offence in the domestic law of the State Party.

39. By the use of the phrase “may be taken into consideration”, the negotiators highlighted that the Convention places an obligation on Parties to ensure that these aggravating circumstances are available for judges to consider when sentencing offenders, although there is no obligation on judges to apply them. The reference to “in conformity with the relevant provisions of domestic

law" is intended to reflect the fact that the various legal systems in Europe have different approaches to address those aggravating circumstances and permits Parties to retain their fundamental legal concepts.

40. The first aggravating circumstance (a), is where the offence caused the death of, or [serious] damage to the [physical or mental] health of, the victim…..

41. The second aggravating circumstance (b) is where the offence was committed by persons abusing the confidence placed in them in their professional capacity….

42. The third aggravating circumstance (c) is where the offence was committed in the framework of a criminal organisation. The Convention does not define "criminal organisation". In applying this provision however, Parties may take their line from other international instruments which define the concept. For example, Article 2(a) of the United Nations Convention against Transnational Organised Crime (UNTOC, Palermo Convention) defines "organised criminal group" as "a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit". Recommendation Rec(2001)11 of the Committee of Ministers to member States concerning guiding principles on the fight against organised crime and the EU Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime give very similar definitions of "organised crime group" and "criminal organisation".

43. The fourth aggravating circumstance (d) is where the perpetrator has previously been convicted of offences established under the Convention. By including this, the negotiators wanted to signal the need to make a concerted effort to combat recidivism in respect of the crimes referred to in this Convention.

Article 10 - Previous Convictions

44. At domestic level, many legal systems provide for harsher penalties where someone has been previous convicted for a similar offence. Traditionally, previous convictions by foreign courts were not taken into account on the grounds that criminal law is a national matter and that there can be differences of domestic law, and because of a degree of suspicion of decisions by foreign courts.

45. Such arguments have less force today in that internationalisation of criminal law standards is tending to harmonise different countries' law. In addition, in the space of a few decades, countries have adopted instruments such as the ECHR whose implementation has helped build a solid foundation of common guarantees that inspire greater confidence in the justice systems of all the participating States. The principle of international recidivism is established in a number of international legal instruments. Under Article 36, paragraph 2 (iii) of the New York Convention of 30 March 1961 on Narcotic Drugs, for example, foreign convictions shall be taken into account for the purpose of establishing recidivism, subject to each Party's constitutional limitations, legal system and domestic law.

46. The fact remains that at international level there is no standard concept of recidivism and the law of some countries does not have the concept at all. The fact that foreign convictions are not always brought to the courts' notice for sentencing purposes is an additional practical difficulty. However, in the framework of the European Union, Article 3 of the Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the member States of the European Union in the course of new criminal proceedings has established in a general way – without limitation to specific offences – the obligation of taking into account a previous conviction handed down in another (EU member) State.

47. Therefore, Article 10 provides for the possibility to take into account final sentences passed by another Party in assessing a sentence. To comply with the provision Parties may provide in their domestic law that previous convictions by foreign courts may, to the same extent as previous convictions by domestic courts would do so, result in a harsher penalty. They may also provide that, under their general powers to assess the individual's circumstances in setting the sentence, courts should take those convictions into account. This possibility should also include the principle that the offender should not be treated less favourably than he would have been treated if the previous conviction had been a national conviction.

48. Under Article 13 of the European Convention on Mutual Assistance in Criminal Matters (ETS No. 30), a Party's judicial authorities may request from another Party extracts from and information relating to judicial records, if needed in a criminal matter. In the framework of the European Union, the issues related to the exchange of information contained in criminal records between member States are regulated by the Council Framework Decision 2009/315/JHA of 26 February 2009 on the organisation and content of the exchange of information extracted from the criminal record between member States. However, Article 10 does not place any positive obligation on courts or prosecution services to take steps to find out whether persons being prosecuted have received final sentences from another Party's courts.

CHAPTER III – INVESTIGATION, PROSECUTION AND PROCEDURAL LAW

Article 11 - Initiation and continuation of proceedings

49. Article 11 is designed to enable the public authorities to prosecute offences established in accordance with the Convention ex officio, without a victim having to file a complaint. The purpose of this provision is to facilitate prosecution, in particular by ensuring that criminal proceedings may continue regardless of pressure or threats by the perpetrators of offences towards victims.

Article 12 - Criminal Investigations

50. Article 12 provides for Parties to ensure the effective investigation and prosecution of offences established under the Convention in accordance with the fundamental principles of their domestic law. The notion of “principles of domestic law” should be understood as also encompassing basic human rights, including those provided under Article 6 of the ECHR. The negotiators noted that conducting effective criminal investigations may imply the use of special investigation techniques in accordance with the domestic law of the Party in question, such as financial investigations, covert operations, and controlled delivery, taking into account the principle of proportionality

Article 13 - International cooperation

51. The article sets out the general principles that should govern international co-operation in criminal matters.

52. Paragraph 1 obliges Parties to co-operate, on the basis of relevant international and national law, to the widest extent possible for the purpose of investigations or proceedings of crimes established under the Convention, including for the purpose of carrying out seizure and confiscation measures. In this context, particular reference is made to the European Convention on Extradition (ETS No. 24), the European Convention on Mutual Assistance in Criminal Matters (ETS No. 30), the Convention on the Transfer of Sentenced Persons (ETS No. 112), the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS No. 141) and the Council of Europe Convention Laundering, Search, Seizure and Confiscation of the proceeds from Crime and on the Financing of Terrorism (CETS No.198) but also to the United Nations Convention of 15 November 2000 against Transnational Organized Crime (UNTOC, Palermo Convention).

53. Paragraph 2 invites a Party that makes mutual assistance in criminal matters or extradition conditional on the existence of a treaty to consider the Convention as the legal basis for judicial co-operation with a Party with which it has not concluded such a treaty. This provision is of interest because of the possibility provided to third States to sign the Convention (cf. Article 24). The requested Party will act on such a request in accordance with the relevant provisions of its domestic law which may provide for conditions or grounds for refusal. Any action taken shall be in full compliance with its obligations under international law, including obligations under international human rights instruments.

CHAPTER IV – MEASURES FOR PROTECTION

54. The protection of, and assistance to, victims of crime has long been a priority in the work of the Council of Europe.

55. The horizontal legal instrument in this field is the European Convention on the Compensation of Victims of Violent Crime (ETS No. 116) from 1983, which has since been supplemented by a series of recommendations, notably Recommendation No. R (85) 11 on the position of the victim in the framework of criminal law and procedure, Recommendation No. R (87) 21 on the assistance to victims and the prevention of victimisation and Recommendation Rec(2006)8 on assistance to crime victims.

56. Furthermore, the situation of victims has also been addressed in a number of specialised conventions, including the Council of Europe Convention on the Prevention of Terrorism (CETS No. 196), the Council of Europe Convention on Action against Trafficking in Human Beings (CETS No. 197), both from 2005, and the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS No. 201) from 2007, the Council of Europe Convention on preventing and combating violence against women and domestic violence (CETS No. 210) and the Council of Europe Convention on the counterfeiting of medical products and similar crimes involving threats to public health (CETS No. 211).

57. Taking into account the potential grave consequences for victims of ….., the negotiators found that it was justified to provide specifically for the protection of such victims, and also to ensure that victims of the crimes established under this Convention have access to information relevant to their case and the protection of their health and other rights from the competent national authorities and that – subject to the domestic law of the Parties – they are being given the possibility to be heard and to supply evidence.

58. It is recalled that, the term “victim” is not defined in the Convention, as the negotiators felt that the determination of who could qualify as victims of …. was better left to the Parties to decide in accordance with their domestic law.

Article 14 - Protection of Victims

59. Article 14 provides for the protection of the rights and interests of victims, in particular by requiring Parties to ensure that victims are given access to information relevant for their case and necessary to protect their [health and other]rights involved; that victims are assisted in their physical, psychological and social recovery, and that victims are provided with the right to compensation from the perpetrators under the domestic law of the Parties.

60. Article 14, letter c, establishes a right of victims to compensation. The compensation is pecuniary and covers both material injury (such as the cost of medical treatment) and non-material damage (the suffering experienced). If, in the criminal proceedings, the criminal courts are not empowered to determine civil liability towards the victims, it must be possible for the victims to submit their claims to civil courts with jurisdiction in the matter and powers to award damages with interest. As regards the right to compensation, the negotiators also noted that in a number of member States of the Council of Europe, national victim funds are already in existence. However, this provision does not oblige Parties to establish such funds.

Article 15 - The Standing of victims in criminal proceedings

61. This article contains a non-exhaustive list of procedures designed to victims of crimes established under this Convention during investigations and proceedings. These general measures of

protection apply at all stages of the criminal proceedings, both during the investigations (whether they are carried out by a police service or a judicial authority) and during criminal trial proceedings.

62. First of all, Article 15 sets out the right of victims to be informed of their rights and of the services at their disposal and, upon request, the follow-up given to their complaint, the charges retained, the state of the criminal proceedings (unless in exceptional cases the proper handling of the case may be adversely affected), their role therein as well as the outcome of their cases.

63. Article 15 goes on to list a number of procedural rules designed to implement the general principles set out in the provision: the possibility, for victims, (in a manner consistent with the procedural rules of the domestic law of a Party), of being heard, of supplying evidence, of having their views, needs and concerns presented and considered, directly or through an intermediary, and anyway the right of being protected against any risk of intimidation and retaliation.

64. Paragraph 2 also covers administrative proceedings, since procedures for compensating victims are of this type in some States. More generally, there are also situations in which protective measures, even in the context of criminal proceedings, may be delegated to the administrative authorities.

65. Paragraph 3 provides for access, in accordance with domestic law and free of charge, where warranted, to legal aid for victims. Judicial and administrative procedures are often highly complex and victims therefore need the assistance of legal counsel to be able to assert their rights satisfactorily. This provision does not afford victims an automatic right to legal aid. The conditions under which such aid is granted must be determined by each Party to the Convention when the victim is entitled to be a party to the criminal proceedings.

66. In addition to Article 15, dealing with the status of victims as parties to criminal proceedings, the States Parties must take account of Article 6 of the ECHR. Even though Article 6, paragraph 3.c. of the ECHR provides for the free assistance of an officially assigned defence counsel only in the case of persons charged with criminal offences, the case law of the European Court of Human Rights (Airey v. Ireland judgement, 9 October 1979) also, in certain circumstances, recognises the right to free assistance from an officially assigned defence counsel in civil proceedings, under Article 6, paragraph 1 ECHR, which is interpreted as enshrining the right of access to a court for the purposes of obtaining a decision concerning civil rights and obligations (Golder v. United Kingdom judgment, 21 February 1975). The Court took the view that effective access to a court might necessitate the free assistance of a lawyer. For instance, the Court considered that it was necessary to ascertain whether it would be effective for the person in question to appear in court without the assistance of counsel, i.e. whether he could argue his case adequately and satisfactorily. To this end, the Court took account of the complexity of the proceedings and the passions involved – which might be incompatible with the degree of objectivity needed in order to plead in court – so as to determine whether the person in question was in a position to argue his own case effectively and held that, if not, he should be able to obtain free assistance from an officially assigned defence counsel. Thus, even in the absence of legislation affording access to an officially assigned defence counsel in civil cases, it is up to the court to assess whether, in the interests of justice, a destitute party unable to afford a lawyer's fees must be provided with legal assistance.

67. Paragraph 4 is based on Article 17, paragraph 2, of the Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime. It is designed to make it easier for victims to file a complaint by enabling them to lodge it with the competent authorities of the State of residence. A similar provision is also found in Article 38, paragraph 2 of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS No. 201) of 25 October 2007 and in Article 20, paragraph 4, of the Council of Europe Convention on the

Counterfeiting of Medical Products and Similar Crimes involving Threats to Public Health (CETS No. 211) of 28 October 2011.

68. Paragraph 5 provides for the possibility for various organisations to support victims. The reference to conditions provided for by internal law highlights the fact that it is up to the Parties to make provision for assistance or support, but that they are free to do so in accordance with the rules laid down in their domestic systems, for example by requiring certification or approval of the organisations, foundations, associations and other bodies concerned.

Article 16 - Protection of Witnesses

69. Article 16 is inspired by Article 24, paragraph 1, of the United Nations Convention against Transnational Organized Crime (Palermo Convention) from 2000. Paragraph 1 obliges Parties to provide effective protection from potential retaliation or intimidation for witnesses giving testimony in criminal proceedings. As appropriate the protection should be extended to relatives and other persons close to the witnesses. Paragraph 2 of Article 16 provides for the protection of victims in so far as they are witnesses, in the same manner as set out in paragraph 1.

70. It should be noted that the extent of this obligation for Parties to protect witnesses is limited by the wording “within its means and in accordance with the conditions provided for by its domestic law”.

CHAPTER V – MEASURES FOR PREVENTION AND OTHER ADMINISTRATIVE MEASURES

Article 17 - Measures at domestic level

….

Article 18 - Measures at international level

….

CHAPTER VI – FOLLOW-UP MECHANISM

Article 19 - Committee of the Parties

71. Article 19 provides for the setting-up of a committee under the Convention, the Committee of the Parties, which is a body with the composition described above, responsible for a number of Convention based follow-up tasks.

72. The Committee of the Parties will be convened the first time by the Secretary General of the Council of Europe, within a year of the entry into force of the Convention by virtue of the 10th ratification. It will then meet at the request of a third of the Parties or of the Secretary General of the Council of Europe.

73. It should be stressed that the negotiators intended to allow the Convention to come into force quickly while deferring the introduction of the follow-up mechanism until such time as the Convention was ratified by a sufficient number of States for it to operate under satisfactory conditions, with a sufficient number of representative Parties to ensure its credibility.

74. The setting-up of this body will ensure equal participation of all the Parties in the decision-making process and in the Convention follow-up procedure and will also strengthen co-operation between the Parties to ensure proper and effective implementation of the Convention.

75. The Committee of the Parties must adopt rules of procedure establishing the way in which the follow up system of the Convention operates, on the understanding that its rules of procedure must be drafted in such a way that the implementation of the Convention by the Parties, including the European Union, is effectively monitored.

76. The Committee of Ministers shall decide on the way in which those Parties which are not member States of the Council of Europe are to contribute to the financing of these activities. The Committee of Ministers shall seek the opinion of those Parties which are not member States of the Council of Europe before deciding on the budgetary appropriations to be allocated to the Committee of the Parties.

Article 20 - Other representatives

77. Article 20 contains an important message concerning the participation of bodies other than the Parties themselves in the Convention follow-up mechanism in order to ensure a genuinely multisectoral and multidisciplinary approach. It refers, firstly, to the Parliamentary Assembly and the European Committee on Crime Problems (CDPC), and, secondly, more unspecified, to other relevant intergovernmental or scientific committees of the Council of Europe which, by virtue of their responsibilities would definitely make a worthwhile contribution by taking part in the follow-up of the work on the Convention.

78. The importance afforded to involving representatives of relevant international bodies and of relevant official bodies of the Parties, as well as representatives of civil society, in the work of the Committee of the Parties is undoubtedly one of the main strengths of the follow-up system provided for by the negotiators. The wording “relevant international bodies” in paragraph 3, is to be understood as inter-governmental bodies active in the field covered by the Convention.

79. Paragraph 6 prescribes that when appointing representatives as observers under paragraphs 2 to 5 (Council of Europe bodies, international bodies, official bodies of the Parties and representatives of nongovernmental organisations), a balanced representation of the different sectors and disciplines involved (the law enforcement authorities, the judiciary, the health authorities, as well as civil society interest groups) shall be ensured.

Article 21 - Functions of the Committee of the Parties

80. When drafting this provision, the negotiators wanted to base itself on a similar provision in several recent Council of Europe Conventions, creating a simple and flexible mechanism as, centred on a Committee of the Parties with a broader role in the Council of Europe's legal work on combating …. The Committee of the Parties is destined to serve as a centre for the collection, analysis and sharing of information, experiences and good practice between Parties to improve their policies in this field using a multisectoral and multidisciplinary approach.

81. With respect to the Convention, the Committee of the Parties has the traditional follow-up competencies and:
    - plays a role in the effective implementation of the Convention, by making proposals to facilitate or improve the effective use and implementation of the Convention, including the identification of any problems and the effects of any declarations or reservations made under the Convention;
    - plays a general advisory role in respect of the Convention by expressing an opinion on any question concerning the application of the Convention, including by making specific recommendations to Parties in this respect. This activity does not entail mutual evaluation or similar intrusive follow-up;
    - serves as a clearing house and facilitates the exchange of information on significant legal, policy or technological developments in relation to the application of the provisions of the Convention. In this context, the Committee of the Parties may avail itself of the expertise of relevant committees and other bodies of the Council of Europe.

82. Paragraph 4 states that the European Committee on Crime Problems (CDPC) should be kept periodically informed of the activities mentioned in paragraphs 1, 2 and 3 of Article 21.

Article 22 - Relationship with other International Instruments

83. Article 22 deals with the relationship between the Convention and other international instruments.

84. In accordance with the 1969 Vienna Convention on the Law of Treaties, Article 22 seeks to ensure that the Convention harmoniously coexists with other treaties – whether multilateral or bilateral – or instruments dealing with matters which the Convention also covers. Article 22, paragraph 1 aims at ensuring that this Convention does not prejudice the rights and obligations derived from other international instruments to which the Parties to this Convention are also Parties or will become Parties, and which contain provisions on matters governed by this Convention.

85. Article 22, paragraph 2 states positively that Parties may conclude bilateral or multilateral agreements – or any other legal instrument – relating to the matters which the Convention governs. However, the wording makes clear that Parties are not allowed to conclude any agreement which derogates from this Convention.

86. Following the signature of a Memorandum of Understanding between the Council of Europe and the European Union on 23 May 2007, the CDPC took note that "legal co-operation should be further developed between the Council of Europe and the European Union with a view to ensuring coherence between Community and European Union law and the standards of Council of Europe conventions. This does not prevent Community and European Union law from adopting more far-reaching rules."

Article 23 - Amendments

87. Amendments to the provisions of the Convention may be proposed by the Parties. They must be communicated to all Council of Europe member States, to the non-member States enjoying observer status with the Council of Europe, to the European Union and to any State invited to sign the Convention.

88. The CDPC and other relevant Council of Europe intergovernmental or scientific committees will prepare opinions on the proposed amendment, which will be submitted to the Committee of the Parties. After considering the proposed amendment and the opinion submitted by the Committee of the Parties, the Committee of Ministers may adopt the amendment by the majority provided for in Article 20.d of the Statute of the Council of Europe. Before deciding on the amendment, the Committee of Ministers shall consult and obtain the unanimous consent of all Parties. Such a requirement recognises that all Parties to the Convention should be able to participate in the decision-making process concerning amendments and are on an equal footing.

CHAPTER IX – FINAL CLAUSES

Article 24 - Signature and entry into force

Option A

89. The Convention is open for signature by Council of Europe member States, the European Union, and States enjoying observer status with the Council of Europe. In addition, with a view to encouraging the participation of non-member States to the Convention, this article provides them with the possibility, subject to an invitation by the Committee of Ministers, to sign and ratify the Convention even before its entry into force. By doing so, this Convention departs from previous Council of Europe treaty practice according to which non-member States which have not participated in the elaboration of a Council of Europe Convention usually accede to it after its entry into force. Precedent to such a provision may be found in the Council of Europe Convention on the counterfeiting of medical products and similar crimes involving threats to public health (CETS No. 211) as well as the Council of Europe Convention against Trafficking in Human Organs (CETS No. xy).

90. Article 24, paragraph 3 sets the number of ratifications, acceptances or approvals required for the Convention's entry into force at five. This number is not very high in order not to delay unnecessarily the entry into force of the Convention, but reflects nevertheless the belief that a minimum group of Parties is needed. Of the five Parties which will make the Convention enter into force, at least three must be Council of Europe members.

Option B

91. The Convention is open for signature by Council of Europe member States, the European Union and non-members States which took part in its elaboration (…. (insert names)…). Once the Convention enters into force, in accordance with paragraph 3, other non-member States may be invited to accede to the Convention in accordance with Article 24*bis*, paragraph 1.

92. Article 24 paragraph 3 sets the number of ratifications, acceptances or approvals required for the Convention's entry into force at ten. Of the ten states which will make the Convention enter into force, at least eight must be Council of Europe members.

[Article 24*bis* - Accession to the Convention

93. After consulting the Parties and obtaining their unanimous consent, the Committee of Ministers may invite any State not a Council of Europe member which did not participate in drawing up the Convention to accede to it. This decision requires the two-thirds majority provided for in Article 20.d of the Statute of the Council of Europe and the unanimous vote of the Parties to the Convention having the right to sit on the Committee of Ministers.]

Article 25 - Territorial Application

94. This provision is only concerned with territories having a special status, such as overseas territories, the Faroe Islands or Greenland in the case of Denmark, or Gibraltar, the Isle of Man, Jersey or Guernsey in the case of the United Kingdom.

95. It is well understood, however, that it would be contrary to the object and purpose of this Convention for any contracting Party to exclude parts of its main territory from the Convention's scope and that it was unnecessary to make this point explicit in the Convention.

Article 26 - Reservations

Option A

96. Article 26 specifies that the Parties may make use of the reservations expressly authorized by the Convention. No other reservations may be made. The provisions also provides for a procedure to withdraw any such reservations.

Option B

97. The reservations listed in paragraph 1 of this article have been introduced in the Convention with regard to Articles for which unanimous agreement was not reached among the negotiators, despite the efforts achieved in favor of compromise. These reservations aim at enabling the largest possible number of ratifications of the Convention, whilst permitting Parties to preserve some of their fundamental legal concepts.

98. In addition, Article 26, paragraph 2 allows States and European Union to enter a reservation limiting the scope of application of Articles …, as specified by them in their reservation.

99. Paragraph 3 specifies that no reservation may be made in relation to any provision of this Convention, with the exceptions provided for in paragraphs 1 and 2 of this article.

100. Paragraph 4, by making it possible to withdraw reservations at any time, aims at reducing in the future divergences between legislations which have incorporated the provisions of this Convention.

Article 27 - Dispute Settlement

101. Article 27 provides that the Committee of the Parties, in close co-operation with the European Committee on Crime Problems (CDPC) and other relevant Council of Europe intergovernmental or scientific committees shall follow the application of the Convention and facilitate the solution of all disputes related thereto between the Parties. Coordination with the CDPC will normally be ensured through the participation of a representative of the CDPC in the Committee of the Parties.

Article 28 - Denunciation

102. Article 28 allows any Party to denounce the Convention.

Article 29 - Notification

103. Article 29 lists the notifications that, as the depositary of the Convention, the Secretary General of the Council of Europe is required to make, and designates the recipients of these notifications (States and the European Union).