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Explanatory Report to the European Convention on the International Validity of Criminal Judgments

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I. The European Convention on the International Validity of Criminal judgments, drawn up within the Council of Europe by a committee of governmental experts, was opened for signature on 28 May 1970 on the occasion of the VIth Conference of European Ministers of Justice.

II. The report adopted by the Committee of experts responsible for drawing up the draft Convention and addressed to the Committee of Ministers of the Council of Europe has been taken, as the basis for the present publication and does not constitute an instrument providing an authoritative interpretation of the text of the Convention although it may facilitate the application of the Convention's provisions.

History

(a) Setting up of sub-committee and mandate

During its VIIth plenary session which was held on 15-16 November 1961, the European Committee on Crime Problems recommended the setting up of a sub-committee which should examine "the international validity of criminal judgments in relation to recidivism Later this mandate was extended in order to allow the sub-committee to examine other aspects of the validity of foreign judgments. Dr. H. Grützner (Federal Republic of Germany) was appointed Chairman of the subcommittee and Secretariat duties were carried out by the Division of Crime Problems in the Directorate of Legal Affairs of the Council of Europe.

(b) Identification of key problems

During the early meetings the members of the sub-committee undertook a preliminary general examination of a variety of problems concerning the recognition of foreign judgments [(1)] [(1)]. The purpose of this was to crystallise the opinion of the members of the sub-committee on the various questions raised and provided an introduction to a more thorough examination and to the drafting of the Convention. This survey led to a detailed exchange of views and made it possible for the subcommittee to arrive at the conclusions on which its draft Convention was based. The problems thus identified and the conclusions of the sub-committee, which served as a basis for the further examination of the draft carried out by a committee of experts to the meetings of which all member States of the Council cif Europe were invited to send a representative, are set out briefly below.

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(1) See article by Dr. Grützner in " Aspects of the International Validity of Criminal judgments ", Council of Europe, 1968.

1. The sub-committee first discussed the recognition of foreign judgments. The sub-committee agreed that considerations of national sovereignty upon which the territoriality of legislative and judicial authority in penal matters is traditionally based should no longer be an obstacle to the recognition of the legal effects of foreign judgments; it thus took account of the mutual confidence between member States of the Council of Europe, the development of criminality in modern society and the necessity of combating it by collaboration across frontiers. It was of the opinion that each State is free to concede, by an international convention, to another Contracting Party the exercise of the rights derived from its sovereignty.

After an exchange of views on whether it would suffice that the facts on which a conviction was based should be punishable by the legislation of both States concerned (dual liability *in abstracto*) or whether it was also necessary that the convicted person could in a particular case be prosecuted and sanctions imposed in the State of enforcement if he had committed the act in the country (dual liability *in concerto),* the sub-committee decided in favour of the latter solution.

In the matter of time limitation for sanction, the subcommittee considered. that in order to he recognised a sanction should not be precluded by reason of lapse of time either under the law of the requesting State (State of conviction) or under that of the requested State (enforcing State). The solution thus adopted corresponds to that adopted in other European Conventions on crime problems of the Council of Europe. The majority of the sub-committee was of the opinion that the question of time limitation for prosecution at the time of conviction should not be taken into consideration by the requested State.

After a long discussion on the subject of amnesty the experts concluded that an amnesty granted in the enforcing State should preclude recognition of the judgment insofar as the offence would be annulled if it had been committed in the territory of that State. An amnesty in the State of conviction would preclude recognition of the judgment in the enforcing State.

The sub-committee also discussed whether recognition could be granted to a judgment which had been given in violation of the conditions laid down in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The sub-committee decided that recognition could not be granted on the ground that the non-observance of that article by the requesting State would render the enforcement of the judgment contrary to the *ordre public* of the requested State.

2. Discussion of the question of recognition of judgments rendered in *absentia* raised the related question as to the validity of *ordonnances pénales* In order to obtain more detailed information on the provisions on judgments rendered *in absentia* in national legislations, the sub-committee sent out a questionnaire, the replies to which greatly facilitated discussion. From these replies the sub-committee arrived at the opinion that all judgments rendered *in absentia* should be assimilated to judgments pronounced in the presence of the parties, provided that the accused had had the opportunity to defend himself, to ask for a hearing in his presence, and to appeal against the judgment rendered *in absentia.* It was also decided that *ordonnances pénales* might be enforced in the same way as decisions pronounced in the presence of the parties.

3. The sub-committee discussed the enforcement of subsidiary sanctions and made a distinction between subsidiary sanctions of a pecuniary nature and subsidiary sanctions of a different kind. It decided that all subsidiary sanctions of a pecuniary nature should be enforced by the requested State on condition that they were of a penal character.

During the discussion the sub-committee examined in detail the problems raised by forfeiture of civil rights, prohibition to exercise a profession and withdrawal of driving licence. It was of the opinion that these subsidiary sanctions, whose extra-territorial validity has never been recognised, could no longer be limited to one single territory even if the judge could only impose these sanctions by giving them a purely internal validity. It seemed particularly

inequitable that a person to whom a certain profession had been prohibited could exercise it freely in a neighbouring country. A regulation extending abroad such effects of criminal judgment appeared thus to be necessary, but the members hesitated nevertheless to make it an obligation for the Contracting States.

4. The sub-committee examined the problems raised by the taking into consideration of foreign criminal judgments. In particular, it studied these from the point of view of ascertaining recidivism, the imposition of security measures, the revocation of conditionally suspended national sanctions and the fixing of sanctions during subsequent proceedings. The sub-committee was of the opinion that it would be preferable to include a provision in the Convention whereby States would be free to take into consideration a sentence pronounced abroad without making it an obligatory rule.

5. An important question was raised before the sub-committee concerning the negative effects of *res judicata (ne bis in idem).* The members held the basic principle to be that any foreign judgment should have res *judicata* force regardless of the nationality of the person involved or of the place of the commission of the act. That principle should apply to acquittals as well as convictions followed by a sanction. Its application should, however, be excluded when the convicted person had not served his sanction or only a part of it except under specifically defined conditions.

6. During the general examination of problems relating to the international validity of criminal judgments, the members of the sub-committee became aware of the wide diversity of sanctions provided for in the legislations of the member States and of the necessity to establish comparative tables of penal sanctions which would facilitate the task of national judges when the sanction pronounced by the State of conviction was adapted to the penal system of the State of enforcement. A questionnaire was sent to member governments and from the replies received the Chairman of the sub-committee drew up the tables intended to facilitate the comparison of sanctions.

(c) Exclusion of certain problems from the scope of the Convention

During their discussion the members of the sub-committee examined certain problems which, though closely linked to the recognition of foreign criminal judgments, in their view should not be solved by a Convention on the International Validity of Criminal judgments. The sub-committee decided to exclude the following questions:

- the enforcement of that part of a criminal judgment which decided on requests for damages, as this fell within the jurisdiction of authorities competent in civil matters and it was for them to decide as to the desirability of enforcing that part of the judgment;

- the enforcement of that part of a criminal judgment which decided on the question of costs, as the imposition of costs might be an obstacle to the rehabilitation of the convicted person and this problem could be better regulated by bilateral agreements;

- the restitution of stolen objects to the victim;

- the harmonisation of national provisions on time limitation because of divergent theories as to their nature, in particular as to whether they were part of material law or procedural law;

- the enforcement of subsidiary sanctions imposed by an administrative authority, such a decision not being "a criminal judgment";

- the right for a private person to launch *exequatur* proceedings in order to render enforceable a decision containing a disqualification of the rights of another person, as this right, though known in Italian law, was not recognised by most of the legal systems in member States and as the person interested in the enforcement of the disqualification could make a request to the competent authorities to the effect that they launch the *exequatur* proceedings;

- the enforcement of moral sanctions, as their diversity rendered uniform rules difficult.

(d) Working methods of the sub-committee

Having thus during their first meetings examined the key problems raised, the members of the sub-committee agreed, on a proposal made by the Chairman, to submit reports on the most important aspects of the subject under study. During the meetings which took place in 1964 and 1965 the sub-committee studied in detail the following documents [(1)].

- Report on the question of *ne bis in idem* (by Mr. Brydensholt);

- Report on *exequatur* proceedings (by Mr. Altavista);

- Report dealing with sentences passed in the absence of the accused in arranging for the enforcement of foreign criminal sentences (by Mr. Hulsman);

- Report on the problem of limitation of time viewed from the standpoint of the international validity of criminal judgments (by Mr. Markees);

- Reports on disqualifications and other consequences of foreign criminal judgments excluding indirect contingent consequences, and on the European validity of criminal judgments in respect of contingent effects (by Mr. Kunter).

Subsequently, the members submitted draft articles of the Convention, together with a commentary relating to them, taking account of the ideas contained in their reports and the discussion to which these gave rise in the sub-committee.

From these individual proposals, the Chairman made the first draft of the Convention which was discussed during two meetings in 1965, and approved with certain amendments during a meeting in June 1966.

(e) Examination by the Conferences of European Ministers of Justice

During their second Conference held in Rome in 1962, the European Ministers of justice heard a report submitted by Dr Grützner on the work already completed and on the plans of the sub-committee for the recognition of foreign criminal judgments. As the result of the debate on the questions raised in this report, the Ministers adopted the following resolution:

"The Ministers taking part in the second Conference of European Ministers of justice,

Having regard to Resolution No. V of the first Conference of European Ministers of justice, held in Paris from 5 to 7 June 1961;

Observing that the effects of crime are becoming more and more apparent beyond the frontiers of a given country;

(1) Certain of these documents were published in 1968 under the title "Aspects of the International Validity of Criminal judgments".

Considering that this trend calls for the recognition of greater validity of penal sentences outside the territory of the State in which they have been pronounced;

Welcoming the study undertaken on this subject by the European Committee on Crime Problems of the Council of Europe,

Hold that it is necessary to resolve the problem of recognition of the validity of foreign penal sentences;

Express the wish that this study may be pursued until a European Convention on this subject has been drawn up."

During the fourth Conference held in May 1966, Mr. Grützner submitted a detailed report on the work accomplished by the sub-committee to the European Ministers of justice; the Ministers took note of this report by adopting the following resolution:

"The Ministers taking part in the fourth Conference of European Ministers of justice,

Having regard to Resolution No. V of the second Conference of European Ministers of Justice held in Rome from 5 to 7 October 1962;

Having been informed of the action being taken by ECCP to deal on a multilateral basis with the problems pertaining to the international validity of criminal judgments and to delimitation of the national jurisdiction of member States on criminal matters;

Considering that early resolution of these important issues is highly desirable,

Recommend the Committee of Ministers of the Council of Europe to give the European Committee on Crime Problems all necessary facilities to enable it to complete its work in this sphere at the earliest possible date."

(f) Examination by the European Committee on Crime Problems

During its plenary session in May 1967, the European Committee on Crime Problems briefly examined the draft Convention adopted by the sub-committee. It endorsed its previous decision that the draft should be submitted to a Committee of experts representative of all member States *of* the Council *of* Europe interested in this matter. It recommended the appointment of Dr. H. Grützner as Chairman also of this committee of experts.

(g) Examination of basic principles by the Committee of Experts on the International Validity of Criminal Judgments

Meeting in December 1967, experts from fourteen member States of the Council of Europe undertook a preliminary examination of the conclusions arrived at. by the sub-committee.

Basing itself on the solutions proposed under *(b)* above, the Committee agreed that:

- foreign criminal judgments should, generally speaking, be recognised;

- dual liability should be considered *in concreto*

- the sanction should not be precluded by lapse of time under the laws of the two States concerned;

- time limitation for prosecution in the requesting State should not be taken into consideration by the requested State;

- amnesty should under certain conditions preclude recognition of a foreign judgment;

- the proceedings in the requesting State should comply with the provisions of the Convention on Human Rights.

The experts also agreed to the general principles adopted in respect of judgments rendered *in absentia,* subsidiary sanctions, taking into consideration of foreign criminal judgments and *ne bis in idem*.

The experts also agreed to exclude from the scope of the draft Convention, the problems listed under letter (c) above.

(h) Working methods of the committee of experts

The experts then proceeded to a detailed examination of each article contained in the sub-committee's preliminary draft Convention. When a unanimous decision or one by a majority vote had been reached on the content, the text was referred to a drafting committee composed of experts having a special familiarity with the official languages of the Council of Europe in which the Convention was drafted.

The sub-committee's preliminary draft was substantially amended. The final text of the draft Convention was adopted during the meeting in December 1968.

The meetings in 1969 were devoted to the examination of the appendices to the Convention, of the comparatives tables of sanctions and of the explanatory report.

(i) Examination by the European Committee on Crime Problems

The text of the draft Convention was submitted to the XVIIIth plenary session of the ECCP. The text was adopted in principle, but the committee of experts was requested to re-examine Appendix 1 dealing with reservations. Any amendment brought to that appendix should be approved by the Bureau of the ECCP.

(j) Transmission to the Committee of Ministers

During its meeting on 18 September 1969, the Bureau of the ECCP formally approved the texts of the draft Convention and the draft explanatory report and decided to transmit them to the Committee of Ministers.

(k) Approval by the Committee of Ministers

The Committee of Ministers of the Council of Europe approved the text of the draft Convention at its meeting in March 1970 (187th meeting of the Ministers' Deputies).

(l) Opening for signature

The European Convention on the International Validity of Criminal judgments was opened for signature on 28 May 1970 during the VIth Conference of the European Ministers of justice at The Hague.

General observations

I. Background

The criminal law of the member States of the Council of Europe is governed, with some few exceptions, by the classical concept of national sovereignty. Each State takes indeed as its basis the principle of territoriality and the effect of its judicial decisions does not in general extend beyond its frontiers.

This situation does not fully meet present-day requirements. If society is to be effectively protected, account must be taken of trends in crime. The problems are, like many others, becoming international, largely owing to the considerable development of economic resources, improved means of transport and communication and to the ensuing mobility of populations.

Moreover, penal policy has come to lay greater emphasis upon treatment of the offender. It would seem that resocialisation is often considerably facilitated when the sanctions imposed upon the offender are carried out in his State of residence rather than in the State of the offence and judgment. This policy is also rooted in humane considerations, in particular the understanding of the detrimental influences upon a prisoner of difficulties in communication by reason of language barriers, alienation from local culture and habits and the absence of contact with relatives and friends.

For these reasons determined efforts have been made to regulate the question of extending the validity of foreign judgments. In recent years regional arrangements between sovereign States have broken down barriers created by long and established traditions and by legal concepts now considered inadequate. Thus, the five Nordic countries have enacted parallel legislation providing for the enforcement in one country of criminal judgments emanating from any of the other four countries, and the three Benelux countries have drawn up a draft treaty with the same aim. Both of these arrangements have been a source of inspiration to the members of the committee when drafting the present Convention.

International collaboration in criminal matters can take several forms:

(i) extradition, the traditional example of international co-operation by which a person is transferred from one State

to another in order to stand trial or for enforcement of sanctions in the latter;

(ii) mutual legal assistance, by which is understood the communication of relevant information and evidence from one State to another;

(iii) enforcement in one State of a criminal judgment rendered in another;

(iv) transfer of proceedings and delimitation of competences by which it is attempted to organise proceedings actually begun or planned in a more efficient way so that the State which is best placed prosecutes and enforces the sanction to be imposed.

In 1957 and in 1959 the Council of Europe regulated the first two methods of legal co-operation by opening for signature the European Convention on Extradition and the European Convention on Mutual Assistance in Criminal Matters respectively. The present Convention is a further step towards the ultimate goal of ensuring full international co-operation in criminal matters between member States of the Council of Europe. It extends the principles of the European Convention for the Punishment of Road Traffic Offences and of the European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders (principles which, *inter alia*, enable the State of residence under certain conditions to enforce judgments pronounced in the State of the offence and to take the measures

necessary for the social rehabilitation of persons convicted in another State) so as to make them more widely applicable.

It should be added that a sub-committee of the European Committee on Crime Problems has recently [(1)] adopted a draft Convention concerning the fourth method of legal co-operation, namely the transfer of proceedings and plurality of proceedings in criminal matters.

Having examined the desirability of joining this draft Convention and the present Convention, the committee of experts decided to deal with the two methods of legal co-operation in two different instruments. It was indeed of the opinion that a single Convention would be an impractical solution rendering the presentation of these two methods less clear and ratification by the member States of the Council of Europe more difficult.

II. Basic principles

The fundamental concept behind the Convention is the assimilation of a foreign judgment to a judgment emanating from the courts of another Contracting State. This concept is applied in three different respects, namely to

- the enforcement of the sentence
- the *ne bis in idem* effect
- the taking into consideration of foreign judgments.

The Convention is divided into two main parts:

1. Enforcement of European criminal judgments (Part II, Articles 2-52);

2. International effects of European criminal judgments (Part III, Articles 53-57), this part being divided into two sections, one dealing with *ne bis in idem* and the other with taking into consideration.

1. Enforcement of European criminal judgments

A detailed examination in the Plenary Committee of the European Committee on Crime Problems, in the sub-committee and in the committee of experts as to which foreign decisions might be enforced has led to the adoption of the following conditions for enforcement:

- the decision must have been rendered in full observation of the fundamental principles of the Convention on Human Rights, notably Article 6, which lays down certain minimum requirements for court proceedings. Though it is not expressly stated in the text there was complete agreement that it was unthinkable to acknowledge the outcome of a trial as a valid judgment if it fell short of basic democratic requirements;

- the act for which a person is convicted in the State of judgment must also be punishable under the law of the requested State (see Article 4, (1));

- the decision must, with the exception of the judgment *in absentia* and the *ordonnance pénale* be final and enforceable in the State of judgment (see definition in Article 1 of the term "European criminal judgment" and Article 3);

(1) March 1969.

- a request must be validly made by the State of judgment (see Articles 3 and *5);*

- the requested State may refuse enforcement only on one of the grounds limitatively listed in the Convention (Article 6); and

- the effect *ne bis in idem,* as defined in the present Convention, is an obstacle to enforcement (see Article 7).

These principles are contained in sub-section *(a)* of Section I of the Convention, entitled . General conditions of enforcement.

Sub-section (b) deals with the various rights and competences of the requesting and requested States as a result of the former making a request for enforcement and the latter accepting this request.

Judgments rendered *in absentia* present a special problem which is dealt with in Section 3. A survey made by the subcommittee showed wide differences in national legislations. It is incontestable that these decisions do not offer the same guarantees to the accused person as decisions pronounced after hearing the accused in court. The objections are twofold. First, the gathering, verification and interpretation of evidence is rendered difficult by the absence of the accused person during the investigation and the court proceedings. Secondly, the absence of the offender prevents the sentencing judge from taking account of his special needs and from individualising the penalty.

Consequently, the sub-committee concluded - and the Committee of experts subsequently concurred in this opinion - that when laying down general rules for the enforcement of foreign judgments it was not possible to deal with those rendered *in absentia* in the same way as other judgments. On the other hand it thought it necessary to take into account the fact that judgments rendered *in absentia* represented a large proportion of judgments whose enforcement was not possible in the sentencing State and which therefore desirably should be enforced in another State. The practical value of rules on the enforcement of foreign judgments would be greatly diminished if they did not apply to judgments rendered in *absentia.* The only solution was to make the general rules applicable to judgments rendered *in absentia* and at the same time to establish a special system common to all Contracting States granting to the person sentenced *in absentia* the right to be heard before the enforcement of the sanction. This solution, which was used in the Benelux Treaty on the enforcement of criminal judgments, has also been adopted in the present Convention.

Except as provided for in Section 3, judgments rendered *in absentia* are therefore subject to the same rules as judgments rendered after a hearing of the parties. There are, however, important differences. With judgments rendered after a hearing enforcement may be requested only insofar as the judgment is final and enforceable. Enforcement of judgments rendered *in absentia* may, however, be requested as soon as they have been pronounced.

The Convention provides in respect of judgments rendered *in absentia,* a special common remedy; opposition (that is, an application to re-open the judgment) lodged in the requested State and decided upon either in the requested State or in the requesting State in lieu of all ordinary domestic remedies. Thus, it is not necessary to wait until domestic remedies have been exhausted and the judgment has become enforceable.

If the requested State accepts a request for enforcement, notice of the judgment is personally served on the person sentenced in that State. Thereafter, the person sentenced has 30 days in which to lodge an opposition. This remedy is based directly on the provisions of the Convention. It is the only remedy available to the person sentenced at this stage of the proceedings.

It follows that there are three possibilities which must be considered separately: (a) the person sentenced makes no opposition; (b) he submits his opposition to the court of the requesting State; (c) he submits his opposition to the court of the requested State.

(a) The person sentenced makes no opposition.

In these circumstances, the judgment may be enforced as if it had been passed after a hearing.

(b) The person sentenced submits his opposition to the court of the requesting State.

In these circumstances, he is summoned to the hearing. If he appears, or is represented, and the opposition is declared admissible, the case is re-opened. Following the new trial, the decision is rendered after a hearing of the parties.

If the person sentenced does not appear or the opposition is declared inadmissible, the judgment *in absentia is* regarded as a judgment pronounced after a hearing.

(c) The person sentenced submits his opposition to the court of the requested State.

In these circumstances he is summoned to the hearing. If he does not appear, or is not represented, the opposition is declared null and void and the judgment in *absentia* treated as a sentence passed after a hearing. The same applies if the opposition is declared inadmissible.

If he does appear, or is represented, and the opposition is declared admissible, the case is reconsidered as if the act had been committed in the requested State.

In all these cases the judgment is enforced in accordance with the provisions of Section 5.

The introduction of this system of opposition guarantees to the person sentenced that a judgment *in absentia* will not be enforced without his being afforded an opportunity to obtain a retrial.

Difficulties arose in respect of certain decisions imposing minor penalties after a simplified, often administrative, procedure *(ordonnance pénale).* It was, however, decided to apply a similar system of opposition to them.

The committee of experts agreed that a foreign judgment should be examined in the State of enforcement with a view to giving it effect in that State. These proceedings are divided into two phases: action at international level between the requesting and the requested States. and action at national level *(exequatur* proceedings) before the competent authorities of the requested State. The rules applicable to the administrative arrangements between the States concerned are contained in Section 2 of Part II; the rules applicable to the proceedings before the national authorities are contained in Section 5 of Part II.

Exequatur proceedings are instituted in order to give the convicted person the assurance that enforcement of the sanction imposed upon him and adaptation of the foreign sanction will be carried out in accordance with the provisions of the Convention. For this reason the examination of the request for enforcement and the final decision on the matter has been entrusted to the courts of the requested State. Examination and decision by a court would seem the most appropriate way to inspire confidence in the observance of basic judicial principles and better than proceedings before an administrative authority for securing a satisfactory legal interpretation of the conditions for enforcement laid down in the Convention. In the interest of speedy and efficient enforcement an exception has been allowed for fines and confiscation, on condition that appeal to a judicial authority is possible.

Adapting the foreign sanction to the legislation of the State of enforcement raises difficult problems. The legal systems of the member States of the Council of Europe differ widely. The committee of experts therefore found it necessary to oblige the Contracting States to supply information on their system of sanctions (Article 63).

Section 5 lays down the general rules for enforcement of all sanctions; it also sets out special rules dealing with sanctions involving deprivation of liberty, fines and confiscations and forfeiture of rights.

2. The international effects of European criminal judgments

It is widely recognised in national law that a person cannot be brought to trial twice for the same offence. It is no less desirable that the same principle should prevail in applying criminal law at the international level, though it has not yet, there, found similar recognition. justice requires that a foreign judgment should, if possible, be given the same negative effect as a national judgment. A necessary prerequisite for the recognition of such effect is the mutual confidence in legal systems prevailing in the member States of the Council of Europe. The committee found that the close co-operation manifest within the European Committee on Crime Problems was tangible evidence of such confidence. It was therefore the unanimous opinion of the committee that this matter should be regulated in the Convention.

In establishing these rules the committee took account of the views of the European Commission of Human Rights which, in 1964, drew the attention of the Committee of Ministers to the fact that the principle of *ne bis in idem* was not adequately internationally safeguarded in Europe.

The international application of the principle of *ne bis in idem* requires detailed regulation; this has been done in Section 1 of Part III of the Convention.

The taking into consideration of a foreign judgment in order to attach to it certain effects is dealt with in Section *2* of Part III of the Convention. Indirect effects are to be understood as the effects which result from a decision taken subsequently by a competent authority, judicial or other.

An important principle - which the committee preferred not to make mandatory - is that judgments rendered by foreign courts may be taken into consideration in cases where, under national law, an identical decision would have such effects.

3. Final clauses

Part IV of the Convention comprises the final provisions covering the conditions of ratification, or acceptance of, or accession to, the Convention, the form to be given to any declaration or reservation formulated by the Contracting Parties at the time of signature or ratification and the conditions in which special rules be applied rather than those laid down in the Convention.

III. Conclusion

The common desire of European States to make a joint effort to fight crime at an international legal level has found tangible expression in this Convention. It is hoped that its entry into force will mark an important stage in the development of international criminal law in general and European criminal law in particular, put at the disposal of governments new and more efficacious means for the protection of society and enable national authorities to develop a criminal policy laying emphasis on the resocialisation of the offender with greater success.

Commentary on the Convention

Title of the Convention

The title of the Convention was discussed, in particular whether the adjective "international" should have been replaced by "European" because the Convention would not be applicable to extra-European decisions and the idea of European integration did not admit of emphasis being laid on a distinction between national and international. In order not to repeat the word "European", however, the use of the adjective "extra-territorial" was also discussed. It was, however, decided to retain the present title for practical reasons because the term "international validity" was more widely used and better known. Moreover, the term "international" does not imply any world-wide application, but only application between two or more nations.

PART I – Definitions

Article 1

This article defines for the purposes of the Convention, the terms which recur frequently, and thus simplifies the drafting of all subsequent articles.

Sub-paragraph *(a)* defines "European criminal judgments", making it clear that the Convention attributes international validity only to decisions rendered by a court of another Contracting State. *Ordonnances pénales* (see subparagraph (g)) are not covered by this definition. They are, however, for the purpose of this Convention, assimilated to European criminal judgments in accordance with Article 21. The committee deliberately departed from the system adopted by the European Convention on the Punishment of Road Traffic Offences, which puts judgments and administrative decisions on the same footing (Article 1), because the fields of application of these two Conventions cannot be compared, that on the International Validity of Criminal judgments being almost unlimited in scope. The rules of the European Convention on the Punishment of Road Traffic Offences are not affected by a different regulation in the present Convention.

Article 1 lays down three conditions:

1. It must first of all originate from a criminal court this excludes the decisions of civil courts which are therefore not within the scope of the present Convention.

2. The decision must be rendered as a result of criminal proceedings. This condition excludes any decisions rendered by a criminal court as the result of a civil action for damages.

The Convention deals primarily with what might be called "principal" criminal proceedings liable to result in punishment of the accused or in the imposition of a preventive measure. But the decision need not necessarily be a conviction: a judgment of acquittal may also have international validity under the Convention.

3. The decision must be final. A decision is final if, according to the traditional expression, it has acquired the force of *res judicata.* This is the case when it is irrevocable, that is to say when no further ordinary remedies are available or when the parties have exhausted such remedies or have permitted the time-limit to expire without availing themselves of them. An exception to this rule is provided for in Section 3 of Part II dealing with judgments rendered *in absentia.*

The definition included judgments emanating from courts which in some member States of the Council of Europe have been specially set up to deal with juveniles.

Sub-paragraph *(b)* defines the term "offence". This means, of course, any act which is punishable under criminal law, but the term is extended to cover, for instance, illicit behaviour, known in Germany as an *Ordnungswidrigkeit* (violation of 11 rules of order"), i.e. a behaviour which is dealt with during a simplified procedure by an administrative authority, whose decision is subject to appeal to a judicial authority. Similar systems are known in other member States and the relevant provisions in national law are listed in Appendix II to this Convention.

Article 62 provides for a Contracting State to have further provisions included in Appendix II but it follows from Article 1, sub-paragraph *(b)* as a necessary condition that where the provision gives competence to an administrative authority there must be opportunity for the person concerned to have the case tried by a court. This means the right to a full and ordinary procedure before a court.

It may be useful in this context to explain briefly the notion of violation of "rules of order" and the system employed to deal with them as it has been explained to the committee of experts by the German delegation.

Since 1952, legislation in the Federal Republic of Germany distinguishes between offences *(Straftaten)* and violations of "rules of order", the former being punishable by sanctions (including prison sentences) and the latter attracting only pecuniary sanctions *(Celdbussen)* which put no moral stigma on the person concerned and do not label him as an offender.

However, offences and violations of "rules of order" have in common that a particular kind of unlawful behaviour is punished by the State in the interests of protection of the law.

Both kinds of violation form part of criminal law in the traditional sense: the only acts considered as violations of "rules of order" since 1952 are those that formerly were or would have been punishable as petty or correctional offences.

Offences and violations of "rules of order" are treated as separate categories because it seems unreasonable to make a particular conduct which is not morally reprehensible but must, in the public interest, be combated (e.g. a parking offence) punishable in the same way as an offence, such as murder, theft and false pretences. In distinguishing between offences and violations of "rules of order", offences are applied only to morally blameworthy conduct, thus strengthening the effect of criminal judgments. This distinction also has the advantage that because of the lesser sanctions applicable, violations of 11 rules of order" can be punished by an administrative authority in the course of simplified and accelerated proceedings. The judicial authorities are thereby relieved of a great number of insignificant cases.

The person found guilty of a violation of "rules of order" may not accept the decision given by the administrative authority, and the case may be brought before the judicial authorities (the ordinary courts).

Sub-paragraph (c) stipulates that the term "sentence" shall mean any pronouncement of a sanction. In the light of subparagraph *(d)* it is clear that the usual meaning of the term 10 sentence has been enlarged to comprise not only sentences as such, viz. those imposing the traditional sanctions, but also the judgments providing for the application to a person of preventive measures on account of an offence committed by that person as well as *ordonnances pénales*.

Sub-paragraph *(d)* makes it clear that the term "sanction" comprises punishments as well as measures such as preventive measures, and measures confiscating objects.

The committee was aware that some sanctions which in one country are officially known as "punishments" *(peines)* may in another be called "measures". For this reason it wished to avoid the use of these ambiguous terms.

The sanctions in question must be applied to an individual in respect of an offence. Thus purely precautionary measures sometimes also known as "preventive measures", are excluded.

The sanctions must moreover be expressly ordered in the criminal judgment.

Sub-paragraph *(e)* stipulates that the term "disqualification" shall mean any loss or suspension of a right or any prohibition or any loss of legal capacity, e.g. that of driving a motor vehicle, of exercising a profession, of voting, of administering property, of exercising parental authority. It was felt that these should for the sake of convenience be grouped under a single designation of "disqualification". The provisions relating specifically to enforcement of sanctions involving disqualifications are laid down in Section 5 (d) of Part II.

Sub-paragraph *(f)* which concerns the term "judgment rendered *in absentia"* refers to Article 21 (2) which defines for the purposes of this Convention a judgment *in absentia,* as being any judgment rendered by a court in a Contracting State after criminal proceedings at the hearing of which the sentenced person was not personally present.

The committee of experts considered such a definition to be necessary as judgments rendered *in absentia* were not covered by the definition of "European criminal judgments".

Sub-paragraph (g) defines the term *ordonnance pénale.* According to this sub-paragraph the term *ordonnance pénale* shall mean any of the decisions listed in Appendix III to the Convention. Such a definition was necessary, as in fact, the European Convention on the Punishment of Road Traffic Offences specifies that the term "judgment" refers also to *ordonnances pénales* and *amendes de composition.* The absence of any specific provision in this Convention might be interpreted to mean their being excluded from its field of application.

PART II – Enforcement of European criminal judgments

SECTION 1 – General provisions

(a) General conditions of enforcement

Part II of the Convention deals with the enforcement of European criminal judgments. In the main, it lays down rules governing the making of a request, the effects of the request for both States involved (Section 1) the special system applicable to judgments rendered *in absentia* (Section 3), provisional measures of arrest (Section 4) and the enforcement of sanctions (Section 5). It deals exclusively with such judgments as are susceptible of enforcement abroad.

Sub-section *(a) of* Section 1 sets out the general conditions for enforcement. Articles 3 - 5 lay down the conditions under which a State may request another State Party to the Convention to enforce a decision emanating from one of its courts,

Articles 6 and 7 list the grounds on which the requested State may or shall refuse such enforcement.

Article 2

This article sets out the scope of the Convention. the system of enforcement established by the Convention is limited by the nature of the sanction. The system only operates in respect of:

(a) sanctions involving deprivation of liberty
(b) fines or confiscation
(c) disqualification.

It differs therefore from the system adopted in the European Convention on Extradition, the scope of which is limited both by the nature and the duration of the sanction provided for in respect of the act giving rise to extradition (Article 2). The seriousness of the offence is not relevant for the application of the present Convention and it is possible to enforce the judgment in a State other than that in which it was pronounced, even for a minor offence, providing the sanction is one of those laid down in the Convention.

The various categories of sanctions are explicitly stated, and this should rule out any difficulty of interpretation. The enumeration in Article 2 comprises only sanctions laid down in the criminal law of all European member States. It was necessary, in order to avoid difficulties, to include only those aspects which were common to all the legal systems in question.

One effect of distinguishing between the various categories of sanction is to clarify the structure of the Convention for the purposes of Section 5, which contains special clauses on *exequatur* procedure for each category of sanction.

Article 3

This article gives competence to the State of judgment to request the enforcement of a sanction which has been imposed upon an offender. It also gives competence to the requested State to undertake this enforcement.

The word " enforce" is not to be understood in a limited sense. For the purposes of this Convention it must be given a wider meaning so as to comprise the possibilities of adapting the sanction, its duration and nature.

The article contains two basic conditions.

One condition is that the sanction must be enforceable (paragraph 1). According to Article 1, sub-paragraph (a), the judgment must be final. Although in most cases a decision is enforceable if it is final, yet recourse to an extraordinary remedy may preclude enforcement. On the other hand, an enforceable decision is not necessarily final since appeal may not always result in a stay of execution. Thus enforceability cannot be completely identified with finality and for this reason it was held essential to stipulate the enforceable character of the criminal judgment as a separate condition. This condition cannot present any problem in practice for there is express provision in Article 16 for the competent authority of the requesting State to certify that the sanction is enforceable. Such an attestation means that the sanction has been found to be enforceable according to the rules laid down in the legislation of the requesting State, and also that the court in the requested State need not make any enquiry into this question.

The requirement that the sanction shall be enforceable applies only to Part 11. For the purpose of Part III *(ne bis in idem* and " taking into consideration) this condition is not relevant.

Another basic condition implied is that the request for enforcement must be made by the competent authorities of the sentencing State. It follows from the provision that the competence of the requested State may be exercised only if it is seized by a request under the Convention from the State which imposed the sanction (paragraph 2).

It is indeed the request and its acceptance which create the special legal relation between the requesting and the requested States on which the Convention relies for its system for enforcement. This relation deliberately departs from the traditional notion that criminal judgments are not, and cannot

become enforceable outside the State in which they are pronounced. In the absence of a request this special relation does not come into existence, for enforcement of any sanction imposed is transferred from one State to another only if the State on whose territory the judgment was pronounced waives enforcement.

Article 4

Paragraph 1

Article 4 specifies another condition for the enforcement of a foreign criminal judgment, namely compliance with the principle of dual criminal liability.

The present article deals only with one aspect of dual liability. The punishability of the act in question in the requesting State is not to be examined, for the existence of a valid criminal judgment confirms liability in that State. Only punishability in the requested State is open to examination. In accordance with Article 10 (2) it is the requesting State alone which has the right to decide on any review of the sentence.

Dual liability may be defined either *in abstracto* or *in concreto.* For the present Convention, after careful deliberation, the principle of dual liability *in concreto* was adopted.

The condition is fulfilled if the act which gave rise to the judgment in a particular State would have been punishable if committed in the State requested to enforce the judgment and if the person who performed the act could have had a sanction imposed on him under the law of the requested State. Paragraph 1 covers this notion, since it refers expressly to the punishability of the particular act, viewed as a complex of objective and subjective elements, as well as to the punishability of the perpetrator.

The rule does not imply that the *nomen juris* must necessarily be the same, for one cannot expect the legal systems of two or more States to agree to such an extent that they invariably consider a particular factual situation to constitute the same offence.

Moreover, the general nature of the wording of the clause on the punishability of acts shows clearly that identical categorisation is not in fact required and that differences in the legal classification of an act are therefore of no importance.

In order to clarify the notion of dual liability *in concreto,* account must be taken of relations between the offender and the injured party (when such relations make an act unpunishable), grounds justifying an act or serving as an excuse for it (self-defence, *force majeure* etc.) and objective considerations making an act punishable. Such circumstances are in fact among the factors which constitute an offence; relations between the offender and the injured party and grounds justifying an act or serving as an excuse for it, may take away from the act its criminal character and may exempt the perpetrator from his liability to punishment. Thus, if the justification and extenuating circumstances mentioned above are recognised by the law of the requested State, but not by the law of the requesting State, there is no dual liability *in concreto,* since in the requested State the offender would not have been punishable for the same act.

The conditions for instituting criminal proceedings are not to be considered for these purposes, for they are in no way concerned with liability for the act or with the punishability of the offender. At the time of the request for enforcement, institution of criminal proceedings has already taken place within the jurisdiction of the requesting State and in accordance with its law. The conditions for criminal action play therefore no part in determining dual liability *in concreto*.

When the draft text was in preparation, inclusion was urged of a clause providing expressly for rejection of a request for enforcement in the absence of a complaint in those cases where the law of the requested State required a complaint to have been made.

It was decided that such a clause would be superfluous, the requirement of dual liability being sufficient. Indeed, where the legislation of the requested State provides that an act shall only be punishable if a complaint has been lodged, there can be no dual liability *in concreto* if there is no complaint. However, this is not so when the law makes the instituting of a criminal action dependent on a complaint. The act is already punishable as such but actual punishment depends on a complaint launching the proceedings.

Another question arising in connection with dual liability is the possible effect of grounds for extinction of the criminal proceedings and the sanction. But the Convention contains explicit clauses on such grounds (time-limitation, pardon, age etc.) since it was thought desirable to distinguish them, for the purposes of dual liability, from the other factors which have to be considered.

It is for the authorities of the requested State to establish whether there is dual liability *in concreto.* Where there is doubt, about the facts stated in the judgment, those authorities may ask the authorities of the requesting State for clarification and information (Article 17).

Paragraph 2

The request for enforcement and the rejection of a request, may be total or partial if the conviction covers several offences at once, or if it imposes several sanctions.

It may in fact happen that some of the offences do not meet the requirement of dual liability, that the various sanctions imposed are not all listed in Article 2 or that the judgment complies only in part with the conditions laid down in Article 6.

A partial request for enforcement presents no difficulty since it is the requesting State which has to specify the sanction to be enforced and thus the offences for which it was imposed; on the other hand, partial rejection which restores to the requesting State the power to enforce the rejected part of the judgment, presupposes that the authorities of the requested State are in possession of all the information necessary to avoid the danger of either double enforcement or aggravation of the penalty.

The information required is clearly apparent where the court in the requesting State has imposed a separate sanction for each offence, but this is not so where several offences have been considered together and have given rise to a single sanction. It has not been possible to make a rule to govern each case and, since partial refusal has been accepted in order not to restrict the scope of enforcement of judgments given abroad, particular solutions will have to be found for each case as it arises, within the context of, and in conformity with, the principles underlying the Convention.

If the sanction cannot be divided, the requested State is entitled entirely to refuse the request for enforcement. This follows from the words of Article 6 which require that the enforcement is "requested in accordance with the foregoing provisions".

The term "sanction" comprises also a plurality of sanctions.

Article 5

This article lists five further conditions for the making of a request for enforcement which have been regarded as essential. They preclude, for instance, a request for enforcement founded solely on a requesting State's desire to avoid enforcing a judgment passed by its own authorities.

The limitations on the right to make a request are counterpart to the limitations on the right of the requested State to reject the request.

The rules adopted are not intended to delimit jurisdiction between the authorities of the States in question; their sole purpose is to ensure a preliminary examination which, in the case of the requesting State, is concerned only with the conditions which have been judged essential to presentation of a request.

That the presentation of a request is subject to a number of conditions does not in itself confer any fight on the convicted person. Nor is he thereby deprived of protection, as any objection which he may have may be made during the *exequatur* procedure. In addition, laws and regulations in the requesting State may require that the convicted person is heard before the request for enforcement is made. The first examination of the request which is preliminary to that procedure is only concerned with establishing the special enforcement relations between States.

The limits laid down for presentation of a request for enforcement, however varied they may be, have a common denominator in the inability of the State in which conviction took place itself to enforce the judgment; such inability is not to be understood in a purely objective sense, for it also implies an assessment of what is desirable.

The nationality of the convicted person has not the same paramount importance as in extradition matters, as, for the purposes of the present Convention, the basic consideration is that, whatever his nationality, the judgment shall not only be enforced in that State in which this can in fact be done, but also where it can most advantageously be done.

Indirectly, nationality may, however, decide in practice the question of the place of the enforcement. If, for example, the convicted person cannot be extradited because he is a national of the requested State, enforcement in that State of the judgment passed abroad is at times the only way by which justice can be done.

If a judgment given in the requesting State imposes two or more different sanctions for the same offence, or several offences, that State is entitled to request enforcement of only one of these sanctions. The right to enforce the remaining sanction or sanctions rests with the requesting State (see also the commentary of Article 11).

The conditions mentioned in sub-paragraphs (a) – (e) are not cumulative.

Article 5 acknowledges that the State in which judgment has been pronounced may decide after appraisal that the judgment is more usefully enforceable in another State for various reasons. Thus, this State may be the State of the Ordinary residence of the person sentenced (sub-paragraph (a)), the State in which enforcement will make his social rehabilitation easier (sub-paragraph (b)), the State in which he is already serving, or is due to serve, another sanction involving deprivation of liberty (sub-paragraph (e)) and his State of origin, provided that State is prepared to accept responsibility for enforcement (sub-paragraph (d)). Finally, as a general clause, the State of judgment, unable itself to ensure enforcement even by recourse to extradition, may ask the State which is able to do so, to undertake enforcement (sub-paragraph (e)).

The order in which the cases mentioned in sub-paragraph (a) and the succeeding three sub-paragraphs are listed does not indicate any gradation: all the cases are of the same importance in relation to the objectives, i.e. to prevent the convicted person from evading enforcement of the judgment and to facilitate his rehabilitation. It would seem that, on the whole, enforcement of a judgment in a milieu and in surroundings which are familiar to the offender is more likely to facilitate his social rehabilitation. All contemporary European systems of law stress the re-integration into society as an important aim of corrections, and a Council of Europe Convention naturally seeks to give expression to modern thinking in this matter.

The various conditions have been considered in relation to the rehabilitative aim. For instance, that aim may well be more successful where the convicted person is resident since this enables him to live in his own environment and maintain his necessary social contacts more easily (sub-paragraphs (a) and (b)).

The other conditions also, to some extent, relate to this point. If the convicted person is already serving a sentence in one State, his transfer to another State for another enforcement may be harmful to the continuity of the treatment given him with a view to rehabilitation (sub-paragraph (c)); similarly, enforcement in his State of origin may accord better with his needs and produce better results (sub-paragraph (d)).

In this context "State of origin" does not necessarily mean the State of which the convicted person is a national; it can denote, for example, that State in which the convicted person has passed the greater part of his life and in consequence with whose way of life and general conditions he is most familiar.

No request for enforcement can be made to the State of origin unless it has declared its readiness to accept responsibility for enforcement, except where such request is made in pursuance of another sub-paragraph of this article. This provision has two objectives: firstly it reflects the secondary position of the State of origin in the system of the Convention, secondly it makes it clear that other States, unlike the State of origin, must proceed to enforcement once the conditions laid down are fulfilled.

The rule in sub-paragraph *(e)* gives the State in which judgment was passed full discretion to declare whether or not it is able to enforce the sanction. The reason for this is that at the time of the request for enforcement normally only the State which passed judgment has all the information necessary to take this decision. It must be noted that, in accordance with Article 6 (i) the requested State is entitled to refuse the request.

Article 6

Articles 6 and 7 lay down when the requested State may or must, wholly or in part, reject a request for enforcement. Article 6 deals with optional refusal, Article 7 with obligatory refusal. The grounds for optional refusal are several and varied, for it has to be borne in mind that the requested State has to solve all the problems raised by the enforcement of the foreign judgment, having regard to its own constitutional and penal system.

It is, of course, essential in matters of international cooperation to allow for the protection of the fundamental principles of the domestic legal systems of States; it is impossible to conceive of an obligation to enforce a foreign judgment which in one way or another contravenes the constitutional and other fundamental laws of the State which has to proceed to enforcement (sub-paragraph (a)).

Application and observance of the underlying principles of national legislation are, for every State, absolute requirements which it cannot avoid. It is for the authorities of the State in question to assess for themselves whether this condition is fulfilled in practice. The general expression "the fundamental principles of the legal system" was carefully chosen to make it possible to establish this broad ground of incompatibility and still respect the particular distinctive characteristics of each system of law.

In any case the legal principles enunciated in Article 6, which lists conditions of refusal, have to be interpreted in the light of the law of the State to which the request for enforcement is made.

However, there is provision for the rejection of a request for enforcement for the following reasons: the protection of the State's domestic legal system, the character of the offences, the nature of the sanction, the safeguard of the State's prerogatives in the matter of criminal proceedings, the observance of international undertakings, ascertainment of a defect in the evaluation of the grounds and conditions underlying the request for enforcement and application of the provisions of national law with regard to lapse of time and the convicted person's age. This list does not exclude a refusal based on a failure to observe the conditions laid down elsewhere in the Convention, notably in Articles 3 - 5.

The nature of the offence (see sub-paragraph (b)) only comes into play in the case of political and military offences. As there is a clear trend against giving international effect to the punishment of these offences the requested State has the right to refuse enforcement. Such offences are often committed under the influence of strong emotion and in circumstances difficult for other States to judge; their objective existence as offences may depend on situations and aims which may even be in opposition to the policies of other States. This is the reason for the systematic refusal of extradition for such offences, and the same considerations are valid in respect of enforcement under the present Convention.

This article does not exclude offences of a fiscal or religious nature; it was thought preferable, in view of the different aims and values which apply in this sphere, to allow each State to make reservations (Appendix I).

Sub-paragraph (c) corresponds to Article 3, paragraph (2) of the European Convention on Extradition. It arises from the general human rights philosophy that considerations of race, religion, nationality or political opinion should not be the sole or major factor influencing the treatment of private persons by the State. If suspicion arises that such influence brought about or aggravated the judgment to be enforced, the requested State shall be under no obligation to participate in conduct which might contravene the European Convention on Human Rights or any other international or national legal instrument safeguarding human rights and fundamental freedoms.

Observance of international undertakings is an absolute requirement in relations between States, and the purpose of the explicit reference to such observance in the Convention is to underline its conformity with these general principles of international co-operation (sub-paragraph (d)).

No State may be coerced or limited in the exercise of its jurisdiction, which is one of the attributes of its sovereignty, except by its own express decision. For this reason the Convention provides that enforcement may be refused in cases in which the requested State itself has already opened proceedings in respect of the act which is the subject of the foreign judgment or where it proposes to take such proceedings after it has received the request for enforcement (sub-paragraph (e)).

Sub-paragraph (f) extends this principle to the requested State's decision not to take proceedings or to discontinue proceedings. It corresponds to Article 9 of the European Convention on Extradition and to Article 9 (2) (a) of the European Convention on the Punishment of Road Traffic Offences.

The authorities which are competent to institute proceedings against a perpetrator of the offence in question are competent for the purposes of this provision.

Sub-paragraph (g) states that if the judgment, enforcement of which has been requested, is based on a jurisdictional principle other than that of territoriality, the requested State has the right to refuse enforcement. This means that it is not obliged to enforce decisions based on the active or the passive personality principle or on the universality principle.

Sub-paragraphs (h) and (i) supplement each other in the following way:

The requested State can decline to accept the assessment of the requesting State as to its inability to enforce the sanction. A clause of this kind is necessary in order to place the two States on an equal footing and encourage them to co-operate effectively in ascertaining directly where it would be easier to enforce the sanction (sub-paragraph (j)).

This clause, which confirms that the requested State may judge for itself what action to take on the request, avoids resort to explicit rules which would necessarily have been too restrictive. It seeks to ensure that solutions appropriate to each individual case are found and applied.

The requested State is indeed entitled to review on its own behalf the original assessment of the situation made by the requesting State. The situation leading originally to the request may prove to have changed or the circumstances may appear in a different light due to the information obtained subsequently. This is particularly important when it affects the prospects of rehabilitation. The requested State may therefore re-examine all relevant aspects of the case and relate its own judgment to that of the requesting State.

In addition to sub-paragraph (i) which presupposes a subjective assessment by the requested State, there is the objective rule with regard to that State's inability to enforce the sanction, which arises principally when the convicted person is not on its territory (sub-paragraph (h)).

Sub-paragraph (i) also deals with inability to enforce the sanction. It gives the requested State the right to refuse enforcement if the request is based solely on the appreciation of the requesting State that it is not able to enforce the sanction. Obviously, this right lapses, however, if the request also invokes one of the grounds laid down in sub-paragraphs (a) (d) of Article 5.

The convicted person's age may be a ground for refusal if, because of his age at the time of the offence, he cannot be prosecuted in the requested State (sub-paragraph (k)). The age at which a sanction can be imposed on a minor varies greatly from State to State. In certain member States of the Council of Europe minors can be brought to trial if charged with the commission of a criminal offence. In other States the same minor would be considered too young to have incurred responsibility under criminal law. The latter States will in certain cases consider the imposition of a sanction on such a minor to he against the fundamental principles of their legal systems. To avoid any ambiguity, it seems preferable to provide a specific and explicit ground for refusal when the person convicted would be considered a minor under the criminal law of the requested State.

The clause on lapse of time (sub-paragraph (1)) as ground for rejecting a request for enforcement relates to a complex matter: it is therefore explained in detail.

Lapse of time may affect either the prosecution or the sanction.

Time limitation for prosecution implies that no definitive judgment has been rendered within the period laid down to this effect by law, but the operation of time limitation on sanction only begins to run after final judgment has been pronounced. This distinction occurs in the legal systems of the various States, but the periods of limitation, as well as their causes of interruption or suspension of its operation, differ widely. In view, therefore, of the effect of time limitation on the enforcement of sanctions imposed abroad, it was necessary to find a solution that would overcome the difficulties inherent in the differences without unduly restricting the scope of the Convention.

For the case of time limitation for sanction only, the formula which appeared best to achieve this was to render applicable the law of the State to which the request for enforcement is made. This solution differs from that adopted in the European Convention on Extradition, Article 10 of which provides that extradition shall not be granted when the person claimed has, according to the law of either of the States in question, become immune by reason of lapse of time for prosecution or sanction.

This difference is justified especially by the different position of a State which is asked to enforce a sanction from that of a State which is asked to extradite.

It is because of this that the European Convention on the Punishment of Road Traffic Offences provided, in connection with the enforcement of foreign judgments in the State where the convicted person is resident, that the law of that State only should apply in respect of time limitation for sanction.

This provision is clearly parallel with that referred to in the present Convention, for both relate to the enforcement phase, with necessary assumption that criminal proceedings have already been validly undertaken.

A request for enforcement implies that the procedural stage, consisting of pronouncement of judgment, has been completed. Since prosecution is not precluded as long as that stage has not been arrived at, the question of time limitation for prosecution concerns only the jurisdiction of the State which has to pass the judgment. This is also in line with the principle that procedural acts are governed by the law of the State in which they are performed.

At the time of the request the only stage of procedure to be considered is that of enforcement. Moreover, the requested State is a party to the enforcement stage only and therefore

its law can only apply to that stage. If it were accepted that that State could, notwithstanding the fact that the stage of cognisance had been closed in the requesting State, invoke lapse of time for prosecution as a ground for extinguishing the offence under its own law, this would be equivalent to saying that the request for enforcement re-opened that stage. The entire system of the Convention is based on the opposite concept.

However, as the solution adopted may conflict with other considerations in the legal systems of certain States, for example, time limitation for prosecution may be considered as a ground for exempting the perpetrator from his liability to punishment, therefore as a ground to be considered when the dual liability *in concreto* is being examined. It is why it was agreed that reservations might be made in respect of this clause (see Appendix 1, sub-paragraph (c)).

When a Contracting State avails itself of the reservation provided on the subject of lapse of time, it is obliged, when considering whether action may have become precluded under its own law, to take account of acts with interruptive or suspensive effect validly performed by the authorities of the State in which the foreign judgment was given (see Article 8).

In consequence of the forgoing, only time limitation for sanction is relevant from the point of view of enforcement of a judgment rendered abroad. It is clear that the requested State will not take action on a request for enforcement if under its own law the sanction is already precluded.

The period of limitation begins to run from the day on which the judgment became final; a request for enforcement and the *exequatur* procedure will be considered as grounds for suspension or interruption, according to the rules in force in the requested State.

No mention is made of the law of the requesting State on time limitation for sanction. This is because presentation of the request for enforcement presupposes that under that State's law the sanction was not precluded at the time the request was made, for otherwise it could not have made the request according to its own law. It therefore was unnecessary to provide for the requested State to make any subsequent inquiry into the question.

The sanctions mentioned in Article 2 include disqualifications (sub-paragraph (c)); thus in principle these may be the subject of a request for enforcement. However, it was accepted that their enforcement could be refused since, in most cases, such sanctions are restrictions on activities within the territory of the State where judgment was passed. Moreover, they differ from one country to another either in their conception, or on the conditions (compulsory or otherwise) of their application as corollaries to other sentences passed, or as to the authority competent to apply them. It must be noted that it is only to the extent that the sentence imposes a disqualification that the request can be refused in accordance with this provision. If the sentence also contains Other sanctions, refusal of their enforcement cannot be grounded on sub-paragraph *(m)*.

Article 7

This article stipulates another condition for admissibility of the request for enforcement, one which is a general condition of a binding nature. It concerns observance of the principles laid down in Section 1 of Part III which is devoted specifically to the effect *ne bis in idem* (see Articles 53-55).

The word "principle" should be understood in the widest sense. Although Article 53 does not expressly state that enforcement shall not be accepted when a sanction has been imposed in the requesting State but its enforcement not yet begun, it is clear that the provisions of that article shall be applicable.

(b) Effects of the transfer of enforcement

Sub-section *(b)* of Section 1 deals with the effects of the transfer of enforcement of the sanction in both States concerned. It gives, *inter alia*, rules on speciality, on pardon and amnesty and on the right to enforcement, its lapse and restoration.

Article 8

This article provides that any act which interrupts or suspends time limitation for sanction which is validly performed by the authorities in the requesting State must be given the same effect in the requested State.

This clause refers to time limitation of both the criminal proceedings and the sanction, for this article refers not only to Article 6 (1) on time limitation of the sanction, but also to the reserve mentioned in sub-paragraph (c) of Appendix I regarding time limitation of the criminal proceedings.

The Convention is based on the principle of the equivalence of the acts of procedure validly carried out in the States concerned. It adopts at the same time the equivalence of the effects of those acts, since an interrupting or suspending act in one State shall be considered to have the same effect in another State, even if the latter's legislation does not attribute that effect to the act. Paragraph *(e)* of Appendix 1 provides a reservation for those States preferring to adopt only the equivalence of acts and, consequently, to apply only its own provisions as regards the suspending or interrupting effect of the time limitation when such States have an original competence.

Article 9

The Convention is based on the principle that enforcement in the requested State does not presuppose the offender's prior consent. It is therefore necessary to give a rule of speciality. Such a rule is laid down in Article 9, which draws on Article 17 of the European Convention on Extradition.

Paragraph 1 of this article establishes the principle that a person surrendered with a view to enforcement of a sanction may not be proceeded against or sentenced or detained for an offence other than that relating to the requested enforcement. Nor shall he for any other reason be restricted in his personal freedom. Sub-paragraphs (a) and (b) of this paragraph set out the following exceptions to this principle:

Sub-paragraph (a): if the sentencing State consents, enforcement may be allowed for other sanctions. To obtain such consent, the enforcing State must submit a request accompanied by the relevant documents and by an official record of the statements of the convicted person, drawn up by a judicial authority.

In some countries statements concerning a new offence are part of legal proceedings and might as such be considered to violate the principle of speciality. It is essential, however, that the convicted person should be given the opportunity of making a statement concerning a new charge before any decision is taken on the extension of the enforcement of the sanction imposed upon him to cover proceedings taken in respect of any new offence. Since sub-paragraph (a) expressly requires that an official record should be made of the statements of the convicted person, there can be no objection to such statements being taken.

The third sentence of this sub-paragraph lays down that the sentencing State is obliged to agree to the extension if it follows from the request made and documents produced by the enforcing State that the offence, for which extension is requested, would allow for extradition. The same applies in cases where extradition is not possible on the sole ground that it is too insignificant under Article 2 of the European Convention on Extradition to warrant such action.

Sub-paragraph (b) lays down that the rule of speciality shall not apply if the convicted person has not left, having had the opportunity to do so, the territory of the Party to which he was delivered, within 45 days after his final discharge or if he has returned to that territory after leaving it.

The provision contains two conditions: that the person has been finally discharged and that he has had the opportunity to leave the territory.

The words "had the opportunity" make it clear that the person must not only have been free to leave the territory, but must also have had the opportunity to do so. He must not have been impeded from availing himself of that liberty by causes beyond his control (e.g. illness). Nor could it be said that he had had an opportunity to leave if he lacked means or money to do so.

Paragraph 2 authorises the enforcing State to take the measures necessary, in particular, to interrupt any legal effects of the lapse of time.

Article 10

Once the authorities of a State have accepted a request for enforcement, everything relating to the enforcement must be done in accordance with that State's law and through its authorities.

This fundamental rule is stated in paragraph 1 of Article 10.

It follows that by its acceptance the requested State deprives the requesting State of its competence to take the various decisions normally connected with enforcement. The Convention explicitly mentions conditional release as one example of this rule which is extended also to other decisions relevant to enforcement.

Paragraph 2 provides that the requesting State alone has the right to take decisions on applications for review of a final sentence. The acknowledgement of this right should not in fact be considered as an exception to paragraph 1 since review proceedings are not logically speaking part of enforcement. The object of such application is to obtain the re-examination of the final sentence in the light of new elements of fact. As the requesting State alone is competent to re-examine the materiality of facts, it follows necessarily that only that State has jurisdiction to examine such an application, especially since it is better placed to obtain new evidence on the point at issue. It should be noted that the term "review" used in Article 10 also covers the extraordinary proceedings which in some States may result in a new examination of the legal aspects of the case.

Paragraph 3 of the article lays down two exceptions to the rule stated in paragraph 1 in that it recognises the legal validity of a pardon or amnesty granted by the requesting State. The justification for these exceptions is that enforcement is of primary concern to the State which imposed the sanction. Thus, if that State thinks a pardon or amnesty may be granted in respect of the sanction, the enforcing State has no reason to reject this assessment of the situation, especially since enforcement does not preclude the requested State's power itself to grant a pardon. The paragraph does indeed safeguard the rights of *both* States concerned in the matter.

By using the words "may exercise" the Convention has implied the recognition of a competence.

Article 11

This article further limits the competence of the requesting State. From the moment it has made the decision to request enforcement in another State and given effect to this decision, as a general rule it forfeits its right to begin enforcement of the sanction. The rule is made in application of the general principle that a sanction can be enforced only once; it corresponds to the rule laid down in Article 5 of the European Convention on the Punishment of Road Traffic Offences.

As mentioned in the observations on Article 5, the requesting State is entitled, where a sentence imposes two or more different sanctions, to request enforcement of only one of them. In accordance with Article 11 (1) the requesting State may no longer begin the enforcement of a sanction which is the subject of a request but it is still entitled to enforce the remaining sanctions.

The second sentence of the paragraph provides an exception to the rule mentioned in the first sentence. The requesting State is authorised to begin the enforcement if the sentenced person is already detained in the territory of that State at the moment of the presentation of the request. It would indeed not be reasonable to require the release of a person who - irrespective of the decision of the requested State on the request for enforcement - would have to be incarcerated again in either of the two States concerned and who might therefore attempt to escape while at liberty.

Another exception is contained in Article 31 which permits arrest of the sentenced person by the requesting State if such action is necessary for the purpose of ensuring enforcement.

Paragraph 2 specifies the situations in which the requesting State regains its right to enforce the sanction. It might be due either to that State's early reconsideration of its decision by a withdrawal of the request made (sub-paragraph (a)), or to a deliberate decision on the part of the requested State not to pursue the matter (sub-paragraphs (b) and (c)).

The requesting State has the right to withdraw its request until the requested State has informed it of its intention to take positive action on the request. The consent of the requested State to such a withdrawal is not required. The notification of the withdrawal annuls the request and the special legal relation between the two States concerned becomes non-existent.

Having received the request for enforcement the requested State submits it to an examination under Articles 6 and 7 with a view to deciding whether the request shall be referred to a court, or an administrative authority as the case may be, for the purpose of *exequatur* proceedings. This may be decided negatively or positively. If it decides to take no action on the request it shall so inform the requesting State, which then regains the right it lost in accordance with paragraph 1.

Although the requested State has provisionally accepted in principle the request for enforcement, it is not obliged to carry out such enforcement in practice. It is free at any stage of the *exequatur* proceedings to decide not to enforce by invoking one or more of the grounds laid down in Articles 6 and 7 if the existence of these grounds is ascertained or confirmed during the course of proceedings in the requested State. In these circumstances, it shall also notify the requesting State of its decision and the requesting State again becomes entitled to enforce the sanction.

This right shall likewise be restored to the requesting State if the requested State expressly relinquishes its right of enforcement. Relinquishment is not completely discretionary; it is possible only:

1. if both the requesting and the requested State agree; or
2. if the requested State can no longer enforce the sanction.

It becomes compulsory if in the second case the requesting State demands the restoration of its right to enforce. These rules have been adopted with a view to ensuring enforcement; a refusal to relinquish on the part of the requested State incapable itself of enforcing the sanction would result in impunity for the offender even if he re appeared in the sentencing State.

A temporary suspension of the possibility to enforce the sanction should not be construed as being an impossibility to do so.

Article 12

This article restricts the competence of the requested State to enforce a foreign sanction. It is based on the idea that that State acts as a representative of the State which imposed the sanction. It follows that if, for one of the reasons indicated in paragraph 1, the sanction ceases to be enforceable in the requesting State, the requested State shall discontinue enforcement. A continuation could indeed result in an aggravation of the penal situation of the convicted person who, had the sanction been enforced in the State of judgment, would have benefited from measures of pardon, amnesty etc. The basic principle is that any development in the requesting State favourable to the convicted person should have effect also in the requested State. However, it will be noted that the time limitation for sanction in accordance with the law of the requesting State is not mentioned in Article 12; references to this question are made in the observations on Article 6, subparagraph (1).

Paragraph 2 lays down an obligation for the requesting State to inform the requested State of any decision or measure taken which affects the enforceability of the sanction. Even if such information has not - or not yet - 'been given, the requested State is obliged to make enquiries into the possible cessation of enforcement when it obtains knowledge of such decision or measure by other means, for instance, by information received directly from the person concerned.

The information under paragraph 2 must be addressed to the authorities of the requested State and not only to the individual concerned. This does not exclude informing both the authorities of the requested State and the individual concerned.

The requested State is not obliged to keep itself informed of any development. Ignorance cannot in any way be construed as a neglect of duties on the part of its authorities.

The word "decision" in paragraph 2 refers to acts of pardon and amnesty, the words "procedural measures" to any step taken with a view to, or during, retrial proceedings and having a suspensive effect on enforcement.

(c) Miscellaneous provisions

Article 13

This article lays down the rules governing the transit of persons passing from the requesting State to the requested State through the territory of another Contracting State.

Article 13 corresponds to Article 21 of the European Convention on Extradition.

Under the terms of paragraph 1 the Contracting State which has been asked to grant transit must do so. If this were not so, that State could render the application of the Convention, if not impossible, at least considerably more difficult by withholding its consent.

The State of transit is entitled to have its own authorities examine whether the conditions provided for under this Convention are fulfilled. It is thus not obliged to consent without question to a request for transit. This results from the right of that State to be supplied on its request with any document throwing light on the facts and the legal basis of the case. Such documents may, for instance, be a copy of the judgment and the written consent to enforcement by the requested State.

On granting transit, the authorities are under obligation to maintain the person under transfer in custody, the purpose, of course, of the transit being to facilitate enforcement; this presupposes control of his whereabouts on his passage from the authorities of the State imposing the sanction to the authorities of the State called upon to enforce that sanction.

Article 13 applies only to Contracting States. Transit through a State which has not become a party to the Convention, though a Member of the Council of Europe, cannot be claimed as a right by the States concerned by the enforcement procedure. It is, however, hoped that those member States of the Council of Europe which are unable to accept the Convention, will nevertheless give all possible assistance to the States which are able to do so. It is indeed in the interest of the European community as a whole that crime be counteracted as efficiently as possible by the unimpeded function, *inter alia*, of the several European Conventions to that effect.

Paragraph 1 does not exclude the transit of a national of the State of transit. Paragraph 2, however, entitles a State to refuse the transit of its nationals. It may also refuse if the offence for which the sanction was imposed was of a political or purely military character or if it was brought about by considerations, alien to a proper respect for human rights. An exception to this rule is provided for under Article 34 where the convicted person has himself taken the initiative to have his opposition against a judgment rendered *in absentia* heard in the State in which he is not present. His presence at the hearing of the opposition is vital to the functioning of the special system established in respect of such judgments and if the State of transit had the right to oppose transit it could render this system inoperative to the detriment of the convicted person in particular and to the administration of justice in general.

Paragraph 3 deals with transit by air. A prior request for transit is required only if the aircraft intends to land in the State of transit. Otherwise a simple notification suffices. If for some unexpected reason the aircraft lands in the State of transit, a formal request for transit shall immediately be made; meanwhile that State may proceed to the arrest Of the person transferred, the notification already received being considered to imply a request for such arrest. In such cases the State of transit is also entitled to refuse transit on the grounds laid down in paragraph 2.

When a similar text was examined in the committee of experts drafting the Convention on Extradition, a full discussion took place on whether the transport of a person on board a ship or aircraft of the nationality of a State other than the requesting or requested State was to be considered as transit through the territory of that State. Several experts thought that it should be so considered. Others observed that the strict application of such a rule would raise difficulties, in particular when the ship called in at the ports of third States or merely went through their territorial waters. Would it in such cases be necessary to request such third States to allow transit ? The reply to this question would vary according to whether the ship in question belonged to a private person, a private company or a State. In view of these difficulties, the committee decided not to deal with this question in the Convention on Extradition, but to leave it to be settled in practice. The question was not further elucidated in the committee drafting the present Convention which decided to limit itself to a reference to the European Convention on Extradition.

In this Convention, unlike the European Convention on Extradition, the requesting State will often be the State in which the person concerned is present. It is for that State alone to make the necessary arrangements for transit and to settle all questions connected with it in agreement with the authorities of the State of transit. It shall inform the requested State as soon as the transit can be effected. It has fulfilled its obligations by the delivery of the person transferred either at the frontier or at the port of disembarkation of the ship or at the place of landing or the aircraft used to transport the person if, however, charge of the person is taken over by one requested State on the territory of the requesting State, with the intention of transporting him by air through a third country, the requested State alone is responsible for securing transit. The requesting State cannot therefore demand guarantees concerning the arrangements for the transit even if an aircraft of the requesting State is used.

The rule of speciality laid down in Article 9 applies to persons in transit, whether this transit takes place with their consent or not.

Article 14

This article, which governs the question of costs, provides that States shall not claim the refund of any expenses which may result from application of the Convention. The purpose is to eliminate a possible obstacle to the smooth functioning of the Convention by avoiding the procedural difficulties involved.

SECTION 2 – Requests for enforcement

Section 2 lays down the formal rules applicable to the proceedings at inter-State level. Most of these rules are common to all the Conventions drawn up by the Council of Europe in the field of crime problems.

Article 15

The requirement that requests shall be made in writing is generally recognised in other Conventions [(1)].

Article 15 lays down that communications shall be exchanged as a general rule between the Ministries of Justice of the States concerned, but allows for communications to be exchanged, by agreement, direct between the competent authorities.

" Communications" means both the decisions to take further action on the request and the decisions to enforce the judgment.

Article 16

This article lays down what documents shall accompany the request [(2)].

Whereas other Conventions contain a detailed enumeration of the documents required, it has been preferred to draft the present article in wider terms by using the words "all other necessary documents". Indeed, it was not considered possible to state in precise terms what documents might be needed for the determination of the sanction to he imposed by the requested State. On the other hand, it will normally not be difficult for the requesting State to foresee what documents should be sent in each particular case.

If the requested State wishes further information in the form of the whole or part of the criminal file, such a request shall be complied with. Article 16 must be read in connection with Article 17, according to which a request may be made for such additional information as is considered necessary. In the last resort it is for the requested State to judge what information must be considered necessary in each particular case.

(1) See Article 14 (1) of the European Convention on the Punishment of Road Traffic Offences and Article 1 (1) of the European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders; in respect of paragraph 2 see Article 15 (3) of the European Convention on the Punishment of Road Traffic Offences and to Article 27 (3) of the European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders.

(2) See Article 14 (2) and (3) of the European Convention on the Punishment of Road Traffic Offences and Article 26 (2) and (3) of the European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders.

It may be taken for granted that a judgment will always contain a description of the fact which is regarded as established. It should be recognised, however, that such description of fact is made on the basis of the legal criteria decisive in the sentencing State, and that it is quite possible that the requested State may apply other legal criteria. It may therefore be of decisive importance to the requested State, partly for the decision as to whether the offence is punishable at all under the law of that State (see Article 4), partly for the determination of the sanction (see Article 42), that in addition to those facts appearing from the description in the judgment, other elements of facts be brought to its attention.

The competent authority of the requesting State shall certify the sanction enforceable so as to ensure that this condition laid down in Article 3 (1) is fulfilled. No special form is necessary for this purpose.

Article 17

Some comments on this article [(1)] have been included under those for the preceding article.

Reference should also be made to the observations on Article 42.

Article 18

This article [(2)] requires the authorities of the requested State to keep the requesting State informed of the action it takes on the request for enforcement and of the termination of the enforcement.

No particular form has been prescribed for the notification to be made under this article.

Article 19

This article [(3)] contains the rules concerning the use of languages for the purposes of applying this Convention.

It should be stressed that the choice of one of the official languages of the Council of Europe under paragraph 2 will rest with the requested State.

Article 20

This article [(4)] lays down that documents require no formal legalisation (authentication); it is sufficient for the competent authority of the sending State to ensure that the document has been certified in accordance with the general rules in force in that State.

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(1) See Article 16 of the European Convention on the Punishment of Road Traffic Offences and of Article 28 of the European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders.

(2) See Article 18 of the European Convention on the Punishment of Road Traffic Offences.

(3) See Article 19 of the European Convention on the Punishment of Road Traffic Offences and Article 29 of the European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders.

(4) See Article 20 of the European Convention on the Punishment of Road Traffic Offences, Article 30 of the European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders and Article 17 of the European Convention on Mutual Assistance in Criminal Matters.

SECTION 3 –Judgments rendered *in absentia* and "*ordonnances pénales*"

The term "judgments rendered *in absentia" is* used in the Convention, in a non-technical sense, covering all judgments passed in the absence of the accused, that is to say without his having been heard. Such judgments form a special category of criminal judgments. There is no doubt that they do not afford the same safeguards as judgments pronounced after hearing the accused.

For this reason national systems of law have certain procedures designed to avoid the rendering of judgments *in absentia,* or at least to limit as far as possible the hardships they cause.

In examining the possibility of including judgments rendered *in absentia* in the general rules on the enforcement of foreign judgments, it must be borne in mind that it must be a general condition of any system for the enforcement of such judgments that enforcement brings about neither a diminution of the accused rights of defence nor a lowering of the quality of prosecution. justice must not be sacrificed to considerations of expediency or efficiency; furthermore it can be maintained - with good reason - that prosecution is only effective if in accordance with exacting standards of justice.

From the foregoing it is apparent that a system for the enforcement of foreign judgments must not lead to the rendering of judgments *in absentia* and the enforcement of such judgments in cases where they are not generally considered adequate by national standards; in particular, the accused must not be deprived of the practical possibility of avoiding a judgment *in absentia* or of having such a judgment converted at a later stage into a judgment passed following a hearing of his case.

In order to ascertain whether these. conditions are fulfilled it is necessary to examine:

- whether national procedures for the avoidance of judgments *in absentia* or for the limitation, as far as possible, of the hardships caused by them are equally effective in the case of accused persons resident abroad

- whether such procedures will still be effective once the possibility of enforcing foreign judgments in general is accepted.

From consideration of these questions it appears that some national procedures – although they apply formally to persons resident abroad -do not give them the same practical safeguards as are enjoyed by persons living in the territory of the State in question. This situation would be further aggravated if it became generally possible to enforce foreign judgments. A large number of safeguards provided in the extradition system would thereby lose their value. A national of a State would be obliged to go to the State of judgment in order to avoid the effect of a judgment rendered *in absentia* which was enforceable there; this would be tantamount to an obligation to extradite himself. Moreover, a person without ample financial means would be deprived of any practical possibility of defending himself in criminal proceedings conducted at a great distance from his own State of residence.

An additional difficulty lies in the fact that there are profound differences between the legal systems of the member States of the Council of Europe with regard to judgments *in absentia.* There are wide variations both in the extent to which such judgments are permitted and in the remedies available against them.

The conclusion must therefore be that it is not possible to place judgments passed *in absentia* on the same footing as other judgments in any general rules on the enforcement of foreign judgments. On the other hand, it must be remembered that many of the judgments which cannot be enforced in the countries where they were passed – in which case enforcement elsewhere is indicated – are judgments rendered *in absentia.* Any rules for the enforcement of foreign judgments which did not cover judgments rendered *in absentia* would lose most of their practical value. The only way out of this dilemma is to include such judgments in the general rules and at the same time to set up a special system among the Contracting Parties granting persons sentenced *in absentia* the right to be heard before the judgment is enforced.

Article 21

Where the Convention makes no special provision for judgments *in absentia* within the meaning of this article, their enforcement is subject to the same rules as those governing the enforcement of judgments rendered after a hearing of the accused. These rules differ according to the nature of the sanction imposed in the judgment (imprisonment, fine and confiscation, disqualification).

It appears from paragraph 1 that a distinction is made between judgments rendered in *absentia* and *ordonnances pénales.* Generally speaking, the *ordonnance pénale is* a decision rendered by application of a simplified procedure without a hearing and solely on the basis of the file, the accused person having had the possibility to defend himself by making a statement to the police. They are often issued by a judicial authority but not necessarily so. For example, in Denmark, the Federal Republic of Germany (in respect of *Bussgeldbescheid),* Italy (in respect of decisions rendered in accordance with Act No. 317 of 3 March 1967), Norway, Sweden, Turkey and certain Swiss cantons, the competence is vested in authorities which would not normally be described as "judicial", although appeal or referral to a judicial authority is possible. Appendix III to the Convention gives the list of *ordonnances pénales* in the various member States of the Council of Europe.

The judgments rendered *in absentia* are judgments rendered after a hearing in the absence of the accused person. The definition thus made in paragraph 2 is wider than the sense given to this term in many national legal systems. Many codes of criminal procedure permit indeed the accused, under certain conditions, to be represented by counsel. Moreover, it is sometimes open to courts to exempt an accused person from his duty to appear at the hearing if he so requests invoking illness or the distance between his residence and the seat of the court; the court will then refer to the statement given by him prior to the trial before a judge at the place of his residence. But even in the cases where the accused person was able to defend himself through counsel at the hearing or made a statement before a judge prior to the trial and when he was in the latter case at his request exempted from his duty to appear, the judgment pronounced as a result of the trial cannot be considered as having been rendered after a hearing of the accused. The definition emphasises the need for a personal appearance by the accused person at the hearing of his case.

Paragraph 3 of this article states two exceptions to the general rule. It should be made clear that letter *(a)* deals with the application to re-open a judgment on the national level. If it is established that the accused has at national level made an opposition or lodged an appeal against the decision of the court of first instance and he has therefore had the possibility to bring about a hearing in his presence but that he did not appear, there is no need to provide any special remedy. In such cases, therefore, a judgment rendered *in absentia* may be treated as one given after a hearing of the accused. Under Article 29 this also applies to judgments in *absentia* or an *ordonnance pénale* against which the convicted person has not lodged an opposition as provided for in the Convention. Hence the reference to that article. The transformation of a judgment rendered *in absentia* to a decision rendered after a hearing is admitted only once.

The expression "sentencing State" in letter *(a)* of paragraph 3 will normally refer to the requesting State, but in respect of Article 26 it refers to the requested State which has replaced the judgment rendered *in absentia* by its own decision.

Article 22

Under Article 3, a criminal judgment can as a rule only be enforced in another State if it is enforceable in the State in which it was pronounced. In the case of judgments rendered *in absentia,* proceedings with a view to enforcement in another State open with personal notification of the judgment in the requested State. Thus it is not necessary to require the judgment to have become enforceable in the requesting State, for that would go so far as to make enforcement impossible in numerous cases. This article therefore provides that a request for notification and possible enforcement of a judgment rendered *in absentia* may be made and accepted as soon as judgment is rendered.

Ordonnances pénales shall be dealt with in the same way.

If the accused has already made an opposition or appeal the request for enforcement is no longer possible. The expression used in this article "appeal or opposition" refers to action taken in the requesting State in accordance with the legislation of that State.

Article 23

When a State receives a request under the provisions of the preceding article it considers first whether in principle it should accept the request. The real proceedings for enforcement of a judgment rendered *in absentia* will not begin in that State until it has answered the question in the affirmative. The acceptance, which it is recalled implies examination of the conditions laid down in Articles 4-6, may be decided by an administrative authority. The requested State then opens the proceedings by notifying the convicted person himself of the judgment. This notification must be given by personal service even if he has already in another way received notice of the judgment.

The notification required under this article is also necessary in order to determine the moment in time from which the person sentenced has recourse to the remedy against judgment *in absentia* allowed to him under the Convention.

In this context the second paragraph provides that at the time of notification the person sentenced shall be informed of the request for enforcement and of the remedy open to him. The requested State must explain to the sentenced person the consequences of his lodging an opposition or of his failure to do so, and inform him that he will in any event be heard by the court on the question of the transformation of the sanction. It shall in general give him all useful information on his legal position during the *exequatur* proceedings. It is also appropriate to give the sentenced person the essential elements of the judgment which is to be enforced in his own language.

Paragraph (3) provides that the authorities of the requesting State shall be informed of the notification.

Article 24

The notification dealt with in Article 23 has the effect of substituting the system laid down in the Convention for the remedies available against the judgment according to national rules. The convicted person may avail himself of the opposition, as provided in the Convention, only at the sacrifice of the remedies that might be open to him under national law. An opposition is admissible if the conditions laid down in the Convention are complied with.

The fact that national remedies are ruled out when enforcement of a judgment rendered in *absentia* is requested does not prevent exercise of national remedies against the judgment rendered following an opposition. It is evident that the article does not apply to the judgments covered by Article 21 (3) which shall be treated as judgments rendered after a hearing of the accused. Any national remedies available against them remain open, and enforcement of such judgments cannot be requested before they have in fact become enforceable.

The opposition need not necessarily contain reasons but should mention the decision against which it was directed.

A convicted person may, at his own discretion, have his opposition dealt with by the courts of either the requesting or the requested State. In each case, the opposition must be lodged with the competent authority in the requested State. If the matter is settled in that State, the competent authority must notify the fact without delay to the authority of the State which requested enforcement.

The competent authority of the requested State which has received the opposition transmits it after a preliminary examination to the court which, by the choice - or lack of choice - of the convicted person, is competent to deal with the case. This court decides on the admissibility of the opposition.

The object of stipulating 30 days as the time limit for making the opposition was to give the person concerned the opportunity to obtain legal opinion both in his State of residence and in the requesting State. The period is calculated in accordance with the law of the requested State. If the person sentenced fails to observe this time limit, the national legislation of re-instatement of the requested State shall be applicable (see Article 30).

Article 25

A convicted person who wishes his opposition to be dealt with in the requesting State must be summoned at least 21 days beforehand to appear at the hearing arranged for reconsideration of the case. The summons must be served personally.

As a reduction of the period of 21 days may be to the convicted person's benefit, for instance if he has been remanded in custody. the article makes provision for such reduction subject to his consent.

Judgment on the opposition in the requesting State must be given according to its own rules of procedure: its legislation on reinstatement shall apply in case of failure to appear at the hearing (Article 30).

It is recalled that the opposition procedure is a new procedure instituted by this Convention. National law might not therefore provide any special rules on this matter and competence will in that case be given to the authority which would normally be competent to deal with the case.

If the convicted person does not appear after making the opposition (or is not represented, in cases where the law of the requesting State so allows), or if the court in the requesting State declares the opposition inadmissible (as not introduced in complete observation of rules and regulations), the competent authority in the requested State must be informed, and the judgment rendered *in absentia* may be enforced as though it had been passed after a hearing of the accused. One of the procedures mentioned in Section 5 will then be followed, according to the nature of the sanction. The requesting State may merely inform the requested State that it maintains its original request.

If the opposition is admitted, a new judgment must be given, and the one covered by the original request for enforcement is thereupon annulled. It follows that the request is also annulled. In that case, the requesting State must consider whether it is desirable to request that the new judgment is enforced. Enforcement is of course, if requested, subject to the procedure for judgments passed after a hearing of the accused.

Article 26

If a decision is to be given in the requested State on an opposition, the convicted person is summoned to appear at a hearing. The form for the summons shall be as laid down in that State's law. The time limit corresponds to that provided for under Article 25.

If the convicted person does not appear (or is not represented, in cases in which the law of the requested State so allows), or if the opposition is declared inadmissible, enforcement is subject to the procedure for judgments rendered after a hearing of the accused.

If the person sentenced appears or is represented, and the opposition is declared admissible, the case is reheard in the requested State. It is not necessary to take an express decision on admissibility: the rendering of a decision on the opposition is implicit acceptance of admissibility. It is expressly stated that the court of the requested State shall not be entitled to examine the question of a possible preclusion of the proceedings by reason of lapse of time according to the law of the requested State. This question has been definitively settled during the proceedings in the requesting State prior to the making of the request for enforcement.

The act on which the judgment *in absentia is* based is heard *in toto* in the requested State, according to the rules applicable to a similar act committed in that State and on the basis of all the circumstances that give rise to the initial trial. The court may apply only its own law.

The preceding provisions may not be interpreted as prohibiting *reformatio in pejus* provided that this possibility is allowed under the law of the requested State.

It should be, however, noted that the principle of double incrimination (Article 4) is valid also in the cases dealt with under Article 26 (3) where the opposition procedure takes place in the requested State. If it appears, for instance, that the act committed is not punishable under the law of the requesting State, the person concerned must be acquitted, even if the act would have been an offence under the law of the requested State.

Paragraph 4 provides that any step with a view to prosecution or a preliminary enquiry taken in the course of the proceedings in the requesting State shall have the same validity in the requested State as if it had been taken by the authorities of that State. However the text of the article adds that this assimilation cannot have the effect of giving such steps a greater evidential weight in the requested State than they had in the requesting State.

Article 27

The national provisions on legal assistance are also to be applied in the cases referred to in this article. The assistance is granted by the competent authorities of the requested State when opposition proceedings are being brought in this State. It must also be granted if national law so permits for the purpose of judging the desirability of lodging an opposition, even if the person sentenced envisages having the opposition examined in the requesting State.

If the convicted person chooses in pursuance of Article 24, paragraph 1, second sentence, to have the opposition heard in that State, the legal assistance during the opposition proceedings must be granted by its competent authorities in accordance with its law.

This article does not exclude partial payment of fees.

Article 28

The proceedings carried out in the requested State on the basis of an opposition by the convicted person are in every respect national proceedings and solely subject to the national law. The judgment *in absentia or* the *ordonnance pénale* pronounced in the requesting State is rendered null and void as a result of the enforceable decision pronounced by the judge in the requested State. The enforcement of the judgment rendered in the requested State belongs exclusively to that State. The requesting State has no possibility of influencing the enforcement procedure. In particular, it is precluded from exercising any right of pardon or from examining any request for a reconsideration of the trial which originally took place before its courts.

Article 29

Where there has been no appeal against a judgment passed *in absentia* or an *ordonnance pénale,* they must be enforced, once the time limit for submitting an opposition has expired, as if they had been passed after a hearing of the accused. This article refers to the opposition at national level and to that instituted by this Convention.

Article 30

This article renders national legislation on reinstatement applicable in cases where a person, for reasons beyond his control, has failed to observe the time limits laid down in Section 3 or to appear at the hearing of his opposition.

SECTION 4 – Provisional measures

All codes of criminal procedure include provisional measures designed to prevent the accused or convicted person from evading the consequences of the judgment. Similar provisions also exist in extradition law. A request for provisional arrest may precede the request for extradition. An accused person whose extradition has been requested may be detained until a decision has been taken on the request. It was essential to include a similar provision in this Convention.

In addition to measures to detain convicted persons it is necessary to provide for the detention of goods liable to confiscation. Seizure of goods is a counterpart to provisional detention with a view to enforcement of a prison sentence.

Article 31

This article allows for the arrest of the sentenced person if that step is necessary to ensure enforcement in the requested State. In other words the arrest is permitted as it is considered in this situation as a preliminary to a transfer only and not as part of the enforcement.

This article does not therefore derogate from the general principle contained in Article 11 which provides that after requesting enforcement, the sentencing State may not itself begin the enforcement of the sanction.

It is understood that the requesting State can under the present article arrest the person concerned only if objective reasons so require.

After examination of the content of Article 3 of the fourth Protocol to the Convention on Human Rights, it was concluded that the transfer of a person from his State of nationality to another State for the purpose of enforcement did not constitute expulsion as understood in that Article.

Article 32

This article deals with the situations in which a foreign judgment may entail remand in custody. There are two such situations:

The first occurs when a request for enforcement, accompanied by the related documents, is already in the possession of the requested State. Paragraph 1 deals with this.

The second arises when the State in which judgment was delivered has decided to request enforcement but has not yet completed all the necessary formalities. This is dealt with in paragraph 2.

Article 32 must be seen in connection with Article 3. Whereas Article 3 provides a competence in the requested State to enforce a foreign judgment, Article 32 creates a competence in the requested State to arrest the person concerned.

If the request for enforcement has already reached its destination, the requested State may on its own initiative arrest the person sentenced. The situation is somewhat different where all the formalities necessary to the request for enforcement have not yet been fulfilled. The requested State can then arrest only at the express request of the requesting State, without, however, being obliged to act on such a request; it has entire discretion to judge whether such action is desirable.

Paragraph 2 is inspired by Article 16 (2) of the European Convention on Extradition. It states in detail the information which should be contained in the request for provisional arrest.

Article 33

Provisional detention under Article 32 is governed solely by the law of the requested State, which may terminate it at any time. This freedom is restricted in the two cases mentioned in paragraph 2. The requested State is obliged to terminate detention:

- where the sentenced person has spent a period under remand in custody equal to the length of sanction imposed in the requesting State and to be enforced in the requested State, and

- when the requesting State has not sent the request for enforcement within 18 days from the date of the arrest.

The first rule is based on the consideration that any prolongation of the provisional arrest is unnecessary and even unjustified as the sanction has in fact already been enforced. The second rule underlines the provisional nature of the arrest where the requesting State has made only its request for arrest and not yet its request for enforcement. It obliges that State to clarify its intentions with regard to enforcement as soon as possible. If the request for enforcement arrives before the eighteenth day of the arrest, the legal basis for the detention changes and is no longer the second paragraph of Article 32, but the first paragraph of that article. The requested State is therefore entitled to prolong detention if authorised under its own law.

Moreover, release shall not prejudice re-arrest, so soon as the necessary conditions are fulfilled.

Article 34

If the person sentenced *in absentia* wishes to reopen the proceedings before the courts of the requesting State (see Article 25) and he is deprived of his liberty in the requested State, he shall be transferred to the territory of the requesting State for the purpose of the hearing in these proceedings. The sole aim of this transfer is to ensure the presence of that person at the hearing.

If the proceedings no longer necessitate his presence the sentenced person must be released or returned to the requested State. The transfer does not confer any right to enforce a sentence of imprisonment, not even of the sanction which may have been imposed as a result of the rehearing of the case. Enforcement in the requesting State can only take place if the requested State agrees (Article 11 (2) (c)).

The rules concerning transit through a third State are laid down in Article 13.

Article 35

This article corresponds to Article 12 (2) and (3) of the European Convention on Mutual Assistance in Criminal

Matters. It renders applicable a rule of speciality to persons summoned to appear before a court in the requesting State (see Article 9).

Article 36

When enforcement of a confiscation is requested, the possibility must be provided of taking immediate steps to detain the goods, so that the sanction can in fact be enforced. The most suitable measure is seizure. This article enables the requested State to effect such seizure if it considers this desirable and if its legislation provides for seizure in case of similar offences. Such seizure is governed solely by the law of the requested State.

SECTION 5 – Enforcement of sanctions

The Convention is based on the notion that it is for each Contracting State to establish an *exequatur* procedure for European criminal judgments similar to that applicable to civil judgments. It therefore confines itself to laying down three principles considered necessary to secure the degree of uniformity which is essential for its application and to determining the material conditions to be fulfilled for the grant of *exequatur.* The procedural principles in question are: intervention by a court of the requested State, or an administrative authority if the sanction to be enforced is only a fine or a confiscation; application of the convicted person's right to be heard in *exequatur* proceedings; and the provision of a remedy against decisions taken in the course of such proceedings. The other provisions in this Section confer on the court the right to adapt the sanction laid down in the foreign judgment to its own legal system and stipulate limits and conditions for such adaptation.

(a) General clauses

Article 37

Article 37 requires, as a main rule, a decision by a court in the requested State for any enforcement of a sanction pronounced in another Contracting State. This principle is justified by the nature of the material conditions for the grant of *exequatur* and by the important fact that it is a matter of applying measures which affect individual liberty.

The second sentence contains an exception to this rule by allowing the Contracting State to use a more expedient administrative system in respect of fines and confiscations only. It is a condition that any decision by such administrative authority may be reviewed by a court. If a judgment provides for a fine or confiscation *and* deprivation of liberty, it must consequently be examined by a court and not by an administrative authority.

Article 38

This article lays down that the requested State is required to bring a case before a court or before an administrative authority, as the case may be, without specifying the authority responsible for deciding in this matter. This question has been left for national law to decide. The competent authorities, which under national law have been granted the necessary competence, have the right to examine if the conditions required for the enforcement of a foreign decision are complied with. If they find that these conditions have not been fulfilled, for instance, because the act on which the decision is based is considered to be of a political nature (see Article 6 sub-paragraph (b)), they can reject it without having recourse to a judge. These authorities may also avail themselves of Article 17 and ask for additional information, if the information given is considered inadequate. If, having examined the file, the authorities of the requested State are of the opinion that the request should be complied with, they are obliged to transmit the request to a judge or, in the case of a fine or a confiscation, to the appropriate authority, for decision. This transmission of the request to a judge or administrative authority does not imply a recognition of the decision, nor an obligation on the part of the competent authorities to enforce the decision. Their decision that the request should be complied with relates solely to the opening of *exequatur* proceedings by the transmission of the decision and the file to the judge or administrative authority. The further examination of the case is exclusively a matter for the judge or administrative authority.

Article 39

Paragraph 1 of this article gives the sentenced person the right to be heard during the *exequatur* proceedings if these take place before a court. No reference is made to the authorities empowered under Article 37 to take decisions on the enforcement of fines or confiscations in the article.

The sentenced person may be heard in person or by letters rogatory. He may decide himself that he wishes to be personally present at the hearing and the court is bound to accede to such a wish. If no such wish is expressed the court may choose the method to be adopted.

This absolute rule applies only to decisions on the actual enforcement of the sanction. It does not apply to decisions concerning the acceptance of the request where such decisions are taken on a request made directly to the court by the competent authority in the requesting State in application of an agreement under Article 15 (1) of this Convention. These latter decisions may be taken in the absence of the sentenced person if he is detained in the requesting State.

The question of the substitution of the sanction may, however. not be decided in his absence but shall be adjourned until he has been transferred to the requested State.

Article 40

This article lays down the legal conditions on which the court or authority must satisfy itself before it can order enforcement of the judgment.

Sub-paragraph (a) must be interpreted in the light of the definition given in Article 1 (a). Only sanctions imposed in a judgment passed in the course of criminal proceedings by a court in another Contracting State, and enforceable under the law of that State, can be enforced. An *ordonnance pénale* must be considered equivalent in certain circumstances to a judgment passed after a hearing of the accused. Insofar as such *ordonnances pénales* and assimilated decisions (see Appendix III) are deemed to have been given after a hearing of the accused in accordance with Section 3, the sanctions imposed under them therefore comply with the conditions stated in subparagraph (a).

Sub-paragraph (b) covers the conditions of dual criminal liability *in concreto* and the punishability of the offender, (see commentary on Article 4).

Sub-paragraph (c) is concerned with the compatibility of enforcement of the judgment in question with the fundamental principles of the legal system of the requested State including statutory limitation. (See commentary on Article 6 (a)). The use of the word "should" refers to the objective evaluation by the court in the requested State of the conditions for enforcement.

As a result of the reference in Article 7 to Section 1 of Part III of the Convention, the condition in sub-paragraph *(d)* means that there should be no other European criminal judgment with the effect of *res judicata* as recognised in Articles 53-55 of the Convention.

Sub-paragraph *(e)* applies only if the judgment, the enforcement of which is requested, was originally rendered *in absentia* or by *ordonnance pénale.* The judgment must then be deemed to have been passed after a hearing of the accused, in accordance with Articles 21 (2), 25 (2), 26 (2) or 29 of the Convention.

Finally, other conditions may be verified by the court if the law of the requested State so provides.

Article 41

This article provides that the *exequatur* decision taken by the court or by the administrative authority must allow for appeal. The details relating to this legal remedy are a matter for national law. If the enforcement of a fine or a confiscation has been decided first by an administrative authority, there is in accordance with Article 37, second sentence, a right of appeal to a court; the decision by the court is, in its turn, also appealable under the provisions of Article 41.

Article 42

This article lays down that the court or the administrative authority of the requested State is bound by the facts.

The court has therefore no freedom to evaluate differently the "factual" aspect on which the judgment of the requesting State is based. The findings in this judgment may be explicit or implicit. They may relate to "objective" or "subjective" facts. "Objective" facts relate to the commission of the act and its results. "Subjective" facts relate to design, premeditation, the "voluntary" nature of an act and the convicted person's mental state etc.

There is no problem with regard to the facts explicitly found in the judgment. The court or authority in the requested State knows where it stands. More difficult is the case of facts found by implication in the judgment, for instance the absence of justifying or exonerating facts. Such findings bind the court or authority in the requested State insofar as it can deduce them from the judgment.

If there is a difference between the legal systems to the effect that a certain fact constitutes a legitimate defence in the requested but not in the requesting State, the requested State must refuse enforcement if it finds that such a fact was present.

Thus it may be necessary for the court or authority in the requested State to conduct a supplementary investigation into he facts, not determined by the judgment of the requesting State. However, the court of the requested State is not allowed to proceed to the hearing of new evidence in respect of facts contained in the judgment of the requesting State. This need will arrive if under the law of the requested State certain facts must be examined which it was not necessary to take into account under the law of the requested State. It follows from the above that the court of the requested State cannot make any independent assessment of evidence bearing upon the guilt of the person convicted and contained in the judgment of the requesting State. However, in accordance with generally recognised principles of law, the request may be dismissed if the offence cannot with certainty be regarded as punishable under the law of the requested State.

When a court or administrative authority in the requested State examines a request for enforcement of a criminal judgment it must take account of its various aspects: one of these is the condition of dual criminal liability *in concreto* (Article 4 *(M).*

The criminal liability of the act according to the law of the requesting State must be considered beyond dispute as the examination relates to an enforce-able decision by a court of that State. The examination of the question of dual criminal liability by the requested State concerns only the verification that the convicted person could have been convicted also by the courts of the requested State on the facts underlying the decision of the requesting State if a similar act had been committed in the territory of that requested State.

Dual liability implies therefore a dual legal qualification of the act; first, by the court of the requesting State, then, by the court of the requested State. Each court qualifies the act legally according to its own law. Although bound by the findings of the facts, the court or administrative authority of the requested State is free to qualify these legally. There are differences between the qualifications used in the various States. What is theft in one country may be breach of trust in a second, while in a third it may not be punishable.

As already stated in respect of Article 4, the penal codes of member States differ on the grounds justifying the act (such as legitimate defence and consent by the victim) grounds for exemption from responsibility (such as mental deficiency) and grounds for non-infliction of punishment (i.e. relationship to the injured party in certain offences). The judge or authority in the requested State must therefore examine in each case whether the law of the requesting State recognises the same grounds justifying the act and the same grounds for exemption from responsibility and for non-infliction of punishment as the law of the requested State. It is consequently according to its own legal system that the court judges all the facts underlying the foreign judgment in respect of the unlawfulness of the act and the punishability of the offender as well as of the determination of the penalty. It is bound on only two points: firstly, it must accept that the act is contrary to criminal law of the requesting State, and the offender punishable under that law and, secondly, it cannot, when fixing the sanction, make the penal situation of the sentenced person harsher than that laid down in the judgment whose enforcement is requested (Article 44 (2)).

(b) Clauses relating specifically to enforcement on sanctions involving deprivation of liberty

Article 43

This article provides for the transfer of the person whose sentence is to be enforced from the requesting State to the requested State. If transit through a third State is necessary, Article 13 applies. The phrase "unless the law of that State otherwise provides" refers, for instance, to the situation where the sentenced person is discovered, after the request for enforcement has

been made, to be a national of the requesting State and where the Constitution of that State does not permit the extradition of nationals. It also refers to the situation where the person in question has, according to the law of the requesting State, the right to request an examination in that State of the conditions for the enforcement.

Article 44

Paragraphs 1 and 2

This article which is of capital importance for the smooth and efficient functioning of the Convention gives the requested State the right to adapt the sanction imposed in the requesting State to its own legal system. It should be read in conjunction with Article 42. Whereas the requested State is bound as to the facts on which the European criminal judgment is based, it is as a main rule free to replace the sanction imposed in the foreign judgment by a sanction known in its own law.

It is an attempt to solve the extremely difficult and delicate problems raised by the considerable diversity of penal systems between the States of the Council of Europe. The law in some of those States is based on a threefold division of penalties entailing deprivation of freedom (penal servitude, imprisonment and detention). Other States have only a twofold division; still other States have only one. While enforcement of a particular judgment in a State which has the same division of sanctions as the sentencing State usually raises no difficulties of adaptation, this is not so where the two States concerned have different systems.

Moreover, the legal framework in which a sanction may be imposed for a particular offence varies appreciably from one State to another; this is also true of the legal minimum and maximum length for a particular kind of sanction. It follows that a sanction imposed in the requesting State may, for example:

(a) exceed the maximum laid down for the same offence or even for the same kind of sanction in the law of the requested State;

(b) be below the minimum laid down in that law;

(c) not apply to the offence in question under that law or by reason of the nature of the sanction;

(d) even be non-existent (as a type of sanction) in the system of the requested State.

Lastly, some laws attach to certain judgments automatic effects which are unknown or merely optional in the legal systems of other States.

When one of these cases occurs, the question of adaptation arises first as a matter of admissibility in principle and subsequently, if this is accepted, in connection with the extent of such adaptation and the criterion applicable to it.

Adaptation was considered admissible. This applies to the nature of the sanction as well as to its duration. Adaptations may take many forms; the Convention only refers to the principle embodied in an express stipulation (paragraph 2) that the penal situation of the person sentenced should not be aggravated. This prohibition does not refer solely to prolongation of the restrictions placed on his freedom or to application of a harsher kind of sanction than that ordered in the judgment to be enforced. Such aggravation would also occur if enforcement of part of a composite sanction were to be deferred because there was no dual liability in respect of part of the facts underlying the judgment whose enforcement was requested, thus making enforcement by the requested State impossible. On the other hand, it would not be

contrary to this principle for an administrative authority to attach a disqualification or forfeiture to the sanction, whether or not they were inflicted in the judgment to be enforced.

Another rule is that the court in the requested State must abide within the limits of its own law as far as enforcement is concerned, This means that the court cannot enforce a sanction which exceeds the maximum laid down in its own law for the offence in question (see (a) above). On the other hand it is allowed to reduce the sanction in the light of any circumstances which authorise it to do so under its own law. It is also expressly allowed not to respect a minimum laid down in its own law if the sanction imposed abroad is less than that minimum (see *(b)* above). The court is also allowed to suspend the sanction. In lieu of a sanction imposed in the foreign judgment, some other measure provided by the law of the requested State may be enforced (see (c) and *(d)* above).

The legal situation in respect of changes of the nature and of the duration of the sanction was examined in detail and in the light of these principles.

1. As to the nature of the sanction the following questions were discussed:

(a) Would it be possible to substitute a sanction of reclusion" (a severe form of imprisonment) for a sanction of prison?

(b) Would it be possible to substitute a sanction of prison for a sanction of "reclusion"?

(c) Would it be possible to substitute a sanction involving deprivation of liberty for a fine?

(d) Would it be possible to substitute a fine for a sentence involving deprivation of liberty?

On the first and the third questions ((a) and (c) above) it was agreed that normally paragraph 2 would prevent such substitution, but account should be taken of the particular circumstances of each case. The court of the requested State should appreciate whether the rule in paragraph 2 would be complied with. It should not be bound by any objective criteria but should be given the liberty necessary to appreciate the practical and legal consequences of the adaptation of the sanction.

On the second question ((b) above) an affirmative answer was given. The requested State's right to impose a milder sanction than that imposed in the requesting State corresponds to developments in modem criminal law. It is undoubtedly important to support in the present Convention trends to individualise sanctions and take account not only of the convicted person's personality and situation, but also of the practice prevailing and the criminal policy followed in the requested State. The use of probation for example, in that State should thus not be excluded on the sole ground that the requesting State does not use probation.

The same or similar considerations led to a positive reply to the fourth question ((d) above).

2. On the duration of the sanction, the following questions were discussed:

(a) Would it be possible to impose a sanction of a shorter duration than the minimum duration for sanction laid down in the legislation of the requested State?

(b) Could a more severe penalty be imposed than the maximum provided for in that legislation?

An affirmative answer was given to the first question ((a) above) and the third sentence of the first paragraph reflects this opinion.

On the second question it was agreed that the court in the requested State should be bound by the maximum laid down in the law of that State (see, however, paragraph 4).

It was agreed that the court was allowed to take into consideration extenuating circumstances admitted under its own system, though unknown in the requesting State. Thus, the duration of the sanction could be accordingly diminished. In addition, the court had the right to diminish the duration in accordance with court practice in the requested State.

It should be made clear that an adaptation of sanction does not affect the validity of the original judgment. The requesting State does not have the right to enforce the original sanction (for example a "reclusion") even respecting the sanction substituted (an imprisonment) and enforced in the requested State. The substitution by a sanction of a different nature or duration does not imply any modification of the judgment but should be considered as part of the ordinary and normal enforcement of the sanction. It does not differ from the frequent changes made during the national enforcement with a view to improved rehabilitation of the convicted person.

Paragraph 3

Paragraph 3 creates an obligation for any part of the sanction served subsequent to the judgment in the same case to be deducted from the sanction imposed in the requested State, whether it is the part of the sanction served in the requesting State or provisional detention in accordance with Section 4. Moreover, deduction must be made of the period of remand in custody served by the convicted person prior to conviction in the requesting State if this period has been deducted by the judgment or any other decision by a court in the requesting State or should have been deducted according to the law of that State. It is clear that the deduction must also be made if the law of the requested State so requires.

Paragraph 4

This paragraph opens the possibility for Contracting States, by means of a declaration deposited with the Secretary General of the Council of Europe, to enforce a sanction of the duration longer than the maximum laid down in their national legislation. This possibility is, however, conditional on the existence of provisions permitting the imposition of sanctions of a more severe nature. To give an example, a State, which provides a sanction of "reclusion" of up to ten years for a certain offence, is permitted to enforce a foreign sanction of four years' imprisonment, even if according to its law the maximum imprisonment is two years.

The sanction imposed may be served in a penal establishment intended for the enforcement of sanctions of another nature.

(c) Clauses relating specifically to enforcement of fines and confiscations

Article 45

This article is the counterpart to Article 44 but adapted to cover the enforcement of fines and confiscations. Many of the questions arising in respect of Article 45 have already been dealt with under Article 44.

Article 45 authorises the requested State to adapt pecuniary sanctions. Normally this will be done by a conversion of the amount from the currency of the requesting State to that of the requested State at the exchange rate prevailing at the moment the decision is taken. When adapting it the requested

State shall be bound by the maximum laid down in its own law for the same offence. As it was realised that several member States do not provide a maximum sum for pecuniary sanctions in their legislations, it was recognised that, in this situation, the maximum limit should be that fixed by practice.

In accordance with paragraph 2, such a maximum need not be respected if the law of the requested State for the same offence provides other sanctions of a more severe nature. In that case the requested State may even enforce a fine, though it is not provided for at all in its own law.

The present article applies to fines and confiscations of sums of money (for other confiscations, see Article 46) whether imposed by a European criminal judgment or an *ordonnance pénale*.

A "more severe" sanction under paragraph 2 would normally mean a sanction involving deprivation of liberty. It might also mean, for instance, the withdrawal of a driving licence for a professional driver or the loss of a right to exercise a profession.

In accordance with paragraph 3, the sentenced person shall be entitled to benefit in the requested State from any payment facilities granted in the requesting State. This is a natural consequence of the principle laid down in Article 44 (2) that his penal situation shall not be aggravated.

Article 46

This article renders the main principles of Article 45 applicable to confiscations of specific objects.

Article 47

The first paragraph of this article governs the requested State's right, subject to the rights of third parties, to the proceeds of enforcement of the sanction mentioned in Subsection (c). This is the counterpart of Article 14 and follows logically from the desire to avoid, in the interests of economy in relations between the Contracting States, all book-keeping transactions.

Paragraph 2 provides that certain property confiscated may be remitted to the requesting State if it so requires. This relates to property which may be of historical, criminological or other special interest.

Article 48

This article deals with the conversion of fines which cannot be exacted. The words "may impose" make it clear that this conversion is optional. It is in any event conditional upon the legislation of both States concerned providing such possibility and on the requesting State not excluding the conversion in its request for enforcement.

The detailed rules are given in sub-paragraphs *(a) and (b)*. They are derived from the provisions of Article 44 concerning the adaptation of sanction. The court of the requested State shall be bound by its own law in converting the fine. Nevertheless it may disregard the minimum limit for the sanctions in question if the sanction imposed in the requesting State is lower than that limit. The penal situation of the person sentenced shall not be aggravated by the conversion.

(d) Clauses relating specifically to enforcement of disqualification

Article 49

This article states the principle that a disqualification, if it is to be enforced in another Contracting State, must be known to the law of that State, a principle which might be described as "double recognition".

It is recalled that the disqualifications dealt with in this sub-section are imposed by the judgment itself. Disqualifications derived from the judgment by other means are the subject of Articles 56-57. Sub-section (d) is applicable only when a request for enforcement has been made.

Paragraph 1 requires the double recognition to be in *concreto,* that is to say the disqualification must be prescribed for the same offence by the law of the State of enforcement.

The second paragraph makes clear that a disqualification shall not be enforced in another Contracting State unless the court in that State, having regard to all the circumstances of the case, in particular the interest of the community and of the sentenced person, considers it expedient.

If the foreign judgment provides for a sanction involving deprivation of liberty and for a disqualification, the requested State may accept enforcement of the sanction but refuse enforcement of the disqualification. It follows from Article 7, sub-paragraph (m).

If the judge is not willing to execute the foreign disqualifications, Part III of the present Convention may be applied.

This article is not intended to interfere with national systems providing for the automatic and obligatory enforcement of foreign disqualifications.

Article 50

This article deals with any adaptation, which may be necessary, of disqualifications to the legislation of the State of enforcement. It requires that the adaptation shall always be made by a judge.

The adaptation may be seen from two points of view: duration and rights forfeited. As to duration, the Convention adopted a system according to which the disqualification shall be enforced for a period falling within the limits prescribed by the law of the State of enforcement. The judge who, in accordance with Article 44 (2) may not aggravate the sanction, cannot extend the duration beyond the limits laid down in the European criminal judgment. As to rights forfeited, adaptation may consist in restricting forfeiture to a part of the rights in respect of which it was imposed.

Article 51

This article makes disqualification an exception to the rule that acceptance of a request for enforcement by the requested State shall debar the requesting State from exercising its right of enforcement (Article 11).

Enforcement of a disqualification differs from enforcement of a prison sentence or a fine. Whereas these latter sanctions are enforced once and for all by a positive act, disqualifications call for no positive act and are enforced separately for the whole of their duration. Hence enforcement of a disqualification in another Contracting State should not prevent its enforcement in the State where the sentence was passed.

Article 52

This article relates to reinstatement. Obviously the State in which sentence was passed retains the competence to grant reinstatement. Since disqualifications must be enforced, according to the law of the State of enforcement, it is however logical also for that State to be able to grant reinstatement in application of its own law.

It results from the words "in accordance with a decision taken in application of this Section" that the reinstatement granted by the State of enforcement shall not be effective in the State where the sentence was passed.

PART III – International effects of European criminal judgments

SECTION 1 – *Ne bis in idem*

General remarks

The term *ne bis in idem,* which is generally used in legal literature and is used also in other European Conventions, means that a person who has once been the subject of a final judgment in a criminal case cannot be prosecuted again on the basis of the same fact.

Insofar as this principle is concerned, a distinction has to he made between its application at the national level and its application at the international level.

At the national level the principle is generally recognised in the laws of member States, for a final judgment delivered in a particular State has the effect of debarring the authorities of that State from taking once more proceedings against the same person on the basis of the same body of facts.

At the international level, on the other hand, the principle of *ne bis in idem is* not generally recognised. By way of example, no State in which a punishable act has been committed is debarred from prosecuting the offence only because the same offence has already been prosecuted in another State.

It is not difficult to understand the considerations underlying this legal position. Traditionally, the right to prosecute offences has been considered part of sovereignty. To this must be added, however, that the State of the offence more often than not will be the State in which the commission of the act by the accused can best be proved; it would therefore seem unjustified for that State normally to be bound by decisions delivered in other States, where the absence of certain elements of evidence may have led to acquittal or the imposition of less severe penalties.

Against this view may be that which considers that the offender will be subjected to a manifestly inequitable treatment if he is again prosecuted and may even be subjected to the enforcement of several judgments for the same offence.

It might be argued that the need for a reasonable protection of the offender might be dealt with through a protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms. It was deemed preferable, however, to include the provisions in a convention regulating the co-operation between the States in penal matters.

Two reasons justify this solution.

The recognition of a foreign judgment presupposes a certain degree of confidence in foreign justice. Such confidence exists among the member States of the Council of Europe but is, at the present time, hardly equally apparent in wider international relations between States. For this reason it is urged that it is possible to give more substance to the principle of *ne bis in idem* at the European level than at the wider international level. But the insertion of this principle in the European Convention for the Protection of Human Rights and Fundamental Freedoms would have an effect *erga omnes,* and would thereby be liable to be deprived of most of its content and hence its usefulness.

It is also claimed that such an insertion in the Human Rights Convention would result in a more advanced degree of unification than an insertion in the Convention on the International Validity of Criminal judgments. But at the present moment such a degree of unification appears to be difficult to obtain in view of the pronounced differences between the technical rules of criminal procedure.

Accordingly, it was decided to insert a number of provisions regulating the question in Articles 53 to 55 of the Convention dealt with here.

It will be necessary to view these provisions as a whole.

First, it should be pointed out that the provisions are in the nature of minimum rules, each State being free to maintain or adopt rules which to a wider extent give the effect of *ne bis in idem* to foreign judgments. This is apparent from the provisions of Article 55.

Article 53 indicates the extent to which foreign criminal judgments shall be given an actual effect of *ne bis in idem*.

The system adopted in the Convention is that, where a State has itself requested another State to take proceedings, the requesting State shall always recognise the judgment delivered as a result of these proceedings. A part from this, European criminal judgments never have the effect of *ne bis in idem* in relation to the State in which the offence was committed (paragraph (3)), or – in the case of specified offences directed against the particular interests of a State – in relation to that State (paragraph (2)).

Where none of these special situations exists - that is, notably, in cases where judgment was delivered in the State where the offence was committed - the judgment has the effect of *ne bis in idem* in relation to other States in the event of an acquittal or a conviction where the sanction imposed is enforced in the normal manner or of the court having convicted the offender without imposing a sanction (paragraph (1)).

For those cases where the principle of *ne bis in idem does* not apply in accordance with this Convention a supplementary rule has been laid down. According to this rule any period of deprivation of liberty already served in one Contracting State as part of the enforcement of a sanction shall be deducted from the sanction which may be imposed in another Contracting State (Article 54).

Mention should be made that there is according to Appendix I, sub-paragraph (f) a possibility to make a reservation of this Section.

Article 53

Paragraph 1

"European criminal judgment" is defined in Article 1 (a) as "any final decision delivered by a criminal court of a Contracting State as a result of criminal proceedings ".

The requirement that the decision shall be final has been made with a particular view to Part II of the Convention (Enforcement of European criminal judgments). It is evident that it will normally be contrary to the factual considerations underlying the provision of paragraph (1) if another State should commence prosecution in the period of time between the pronouncement of the first judgment and the expiration of the time allowed for appeal. Under certain legal systems, however, there may be cases where a decision will never be final. In such cases it is inconceivable that a non-final sentence should prevent any subsequent prosecution being instituted by another State.

Sub-paragraph *(a)* relates to acquittals.

The question has arisen whether an acquittal, which is not due to the absence of evidence showing that the prosecuted act was committed by the accused, but to the fact that the particular act is not punishable under the penal legislation of the State of judgment, should also debar other States in which the act would be punishable, from prosecuting. In view of the fact that the rule of *ne bis in idem* will normally be relevant only if the judgment is delivered in the State in which the offence was committed, it will accord best with the general principle of dual criminal liability (see the comment to Article 4, paragraph (1)) that an acquittal based on the fact that the act is not punishable in that State should also be covered by the provision of paragraph (1).

Sub-paragraph *(b)* relates to judgments imposing a sanction.

For the meaning of the term "sanction", reference is made to Article 1 (d).

The general application of the principle of *ne bis in idem* would in respect of these judgments lead to the unacceptable result that the mere fact that a State happened to take criminal proceedings first would debar other States from prosecuting the offence. The interest of the States in the effective reduction of crime has to be weighed against the general consideration requiring that a person should not be prosecuted several times for the same act.

In the member States whose legislation contains special provisions on the subject, such weighing of conflicting considerations has normally led to the result that a foreign conviction is given the effect of *res judicata* only if the sanction has been served or has been remitted or is time-barred under the law of the State of judgment.

That solution reasonably meets the legitimate interest of the convicted person not to be prosecuted several times for the same act, since -normally, in any case - new proceedings will be taken only where he has rendered himself liable thereto by evading the enforcement of the sanction in the State of the first judgment. On the other hand, as long as the enforcement of a judgment follows a normal course, new proceedings ought not to be instituted.

Sub-paragraph *(b)* has been drafted accordingly. *Res judicata* effect is given to a sanction which (i) has been completely enforced or is being enforced, (ii) has been wholly, or with respect to the part not enforced, the subject of a pardon or an amnesty, or (iii) can no longer be enforced because of lapse of time.

The term "sanction" also covers special conditions which may be imposed in a suspended sentence. Thus the principle *ne bis in idem* applies as long as the sentenced person *complies* with the conditions imposed in the suspended sentence.

Having regard to the drafting of the provision, the fact that only a minor part of a sanction, or possibly a measure imposed under the judgment, has not been served in the normal way will imply that another State will be free to open new proceedings. It has not been considered possible to distinguish whether the convicted person has evaded a larger or smaller part of the sanction; it must be stressed, however, that in accordance with the view underlying this provision, States should hesitate to open new proceedings where only a small part of the sanction has not been served. This applies irrespective of the question whether the other State would, in its determination of sanction, have to take account of the sanction already served; the mere fact that the person already sentenced might be subject to a new prosecution may imply an inequitable aggravation of his situation.

Sub-paragraph (c) relates to judgments where the court convicted the offender without imposing a sanction. By that provision and the provision of sub-paragraph (b) (i), any form of suspension or exclusion of sanctions is covered.

Paragraph 2

This provision relates to certain special cases where a particular State has a quite special interest in being able to prosecute the offence, since it cannot be supposed that other States will adopt the same strict view of the offence.

The cases concerned are those where the offence is directed against either a person or an institution or any thing having public status in that State, or where the offender had himself a public status in that State.

Consideration was given to whether a more general term could be applied in that provision, such as "acts directed against the interests of a State", but the term was thought too comprehensive and vague. Such a term would, for example, include offences against a large number of the trade regulations provided for in special national legislation.

As examples of offences that will be covered by the provision of paragraph (2), mention may be made of assaults on public servants ("a person... having public status"), espionage ("an institution.. having public status"), counterfeiting ("any thing having public status") and the taking of bribes ("had himself a public status").

Paragraph 3

This provision arises out of the notion that in most cases the State of offence has a special interest in judging the offender by its own courts, which can more easily collect all the evidence. Such criminal procedure may also be of value in respect of civil proceedings for the purpose of compensating an injured party.

In view of the differences between the laws of member States on the criteria determining the place of the offence, it has been considered advisable to provide that the question whether an offence was committed on this territory of a particular State shall be decided in accordance with the domestic law of that State.

Article 54

Reference is made to the general remarks at the beginning of this Part.

Consideration has been given to whether it would be possible to provide a wider protection of offenders so that not only enforced sanctions involving deprivation of liberty but all enforced sanctions, e.g. also fines, should have the effect of reducing the new sanction. It is evident, however, that the need for a rule of protection is particularly urgent in regard to sanctions involving deprivation of liberty. Besides, providing for a possible reduction where the sanctions to be compared are of different types presents special difficulties. Since the cases

where a State wishes to prosecute an offence for the second time which has already been decided and enforced in another State are likely to be the more serious ones where the new judgment will generally imply a sanction involving deprivation of liberty, a provision to the effect that foreign sanctions of fine should also cause a reduction would typically lead to difficult comparisons in practice between sanctions of different types. Furthermore, taking into consideration that the provisions concerned are minimum rules so that each State is free to provide a wider protection, it was considered that, at the present time, no steps should be taken to insert a wider rule in the Convention. For the same reason also deduction of any period during which the sentenced person was detained pending trial was left to national legislation.

Article 55

Reference is made to the general remarks at the beginning of this Part.

SECTION 2 – Taking into consideration of European criminal judgments

General remarks

Section 2 of Part III deals with the taking into consideration of a European criminal judgment. This is to be distinguished from its enforcement. It does not mean enforcing the sanctions ordered in the European criminal judgment (for instance, disqualification as a sanction falls under Articles 49) but attaching to it, through a subsequent decision by the authorities in another State, certain indirect effects which are provided for in the law of this State in respect of its national judgments.

Individualisation of the sanction requires knowledge of the offender's personality and this in its turn requires knowledge of his previous convictions no matter in which State they were passed. The criminal record is relevant to the offender's history and should not be influenced by the national or foreign origin of his convictions.

On these grounds it was decided to insert in the Convention provisions dealing with the taking into consideration of European criminal judgments for the purpose of attaching to them the indirect effects as is done in respect of national judgments.

The Convention obliges the Contracting Parties to provide the legislative basis for this taking into consideration but leaves them free to decide on the nature of the indirect effects which could or should be attached to European criminal judgments.

Taking into consideration does not require that there should be a new offence (Article 57) although this may often be the case (Article 56).

Mention should be made that there is according to Appendix I, sub-paragraph (f) a possibility to make a reservation in respect of this section.

Article 56

The previous judgment is considered by the judge examining the new offence for the purpose of determining the sanction to be imposed in respect of that new offence. In this context it is indeed important to have all information necessary to enable the court to decide whether it should establish *re*cidivism, qualify a person as a habitual offender, or an offender by profession or inclination, grant a suspended sentence or probation etc.

Although the importance of considering the elements necessary for attaching effects to a European criminal judgment was never in dispute, it was however decided not to render such attachment obligatory. This arose through the insufficient harmonisation of criminal policy of member States of the Council of Europe and because an obligation would run counter to the national evolution of criminal law and deprive the judge of his discretionary powers to decide whether to attach such effects. In view of the general desirability of creating links between the various national systems it was nevertheless decided that the words "all or some of the effects" should be interpreted to mean that a complete refusal by a State to agree to the principle of taking into consideration was excluded; on the other hand, to provide a possibility in internal legislation for the courts to attach only one effect, for instance, recidivism to a previous European criminal judgment would suffice.

The conditions in which such effect is given to a European criminal judgment are determined by the national legislation.

The text specified that the first judgment must have been rendered after a hearing of the accused. The taking into consideration of judgments rendered *in absentia* is therefore outside the scope of this Convention.

Article 57

Other indirect effects of a European criminal judgment imposed without the occurrence of a new offence are dealt with in this article. They are called additional effects because they are attached as a supplement to the original judgment. The obligation in this article to take legislative measures does not concern all the supplementary effects but only those which are termed disqualification, loss and suspension of rights (see Article *1 (e)* and comments thereto).

For the same reasons as those given above (Article 56), a judge or an administrative authority is not obliged under Article 57 to attach effects to a European criminal judgment in a particular case unless national legislation itself confers on them a compulsory character with respect to a European criminal judgment.

PART IV – Final provisions

Articles 58 – 68 are, for the most part, based on the model final clauses of Agreements and Conventions which were approved by the Committee of Ministers of the Council of Europe, sitting at Deputy level during its 113th meeting. Most of these articles do not call for specific comments; Articles 62, 63 and 65 have been inserted by express decision.

Article 62 relates to Appendices II and III which set out, respectively, the list of offences other than offences under criminal law (for instance in the Federal Republic of Germany *Ordnungswidrigkeiten)* and the list of *ordonnances pénales.* It was considered necessary that these Appendices should, at any given time, reflect the actual legislative situation in those member States which have become Contracting Parties to the Convention. This article gives the States a right to insert in the Appendices any provision of their legal systems relating to the imposition of sanctions for "depenalised" offences or to *ordonnances pénales* (for comments see above Article 1, sub-paragraphs (b) and (g) respectively; see also Article 21).

If they have availed themselves of this possibility they are obliged to keep the Secretary General of the Council of Europe informed of any amendments or additions made to these provisions whenever modifications of the latter render the information contained in the Appendices inexact. It follows that changes which affect aspects of these systems but which have not been communicated originally to the Secretary General, need not be notified. It is stipulated that the changes shall have effect one month after communication to the other Contracting States by the Secretary General in accordance with Article 67, sub-paragraph (h).

In accordance with *Article* 63 (1), each Contracting State shall supply information to the Secretary General on the system of sanctions applicable in that State and their enforcement. This information should be given in respect of each sanction applicable in the requesting State. It was decided to recommend that this information be obtained following a definite scheme [(1)]. This scheme may be reviewed by the ECCP in collaboration with the Secretariat in the light of experience in accordance with Article 65. The Secretary General shall, under Article 67 sub-paragraph (i), notify other member States of the information thus received. The purpose of this information is to assist the courts in the requested State in adapting the foreign judgment to their own legal system and to avoid an aggravation of the penal situation of the accused person (see Article 44 (2)).

Any subsequent change of this information shall be notified to the Secretary General. It is clear that this provision is applicable to Contracting States only.

Article 65 provides that the European Committee on Crime Problems shall assist the Contracting States, if necessary, in the application of this Convention.

Comments on Appendix I

This Appendix contains the six reservations of which Contracting States may avail themselves when depositing their instruments of ratification, acceptance or accession, in accordance with Article 61 (1).

The reason for these reservations is stated above; see

as to reservation (a): comments relating to Article 6 sub-paragraph (b)
as to reservation (b): comments relating to Articles 1 (b) and 4
as to reservation (c): comments relating to Articles 6, sub-paragraph (1) and 8
as to reservation (d): comments relating to Articles 21-30
as to reservation (d) . comments relating to Articles 21-30
as to reservation *(e):* comments relating to Article 8
as to reservation (f): comments relating to Part III, Sections 1 and 2.

Comments on Appendix II

This Appendix sets out the list of offences other than offences dealt with under criminal law. See comments under Articles 1 (b) and 62.

Comments on Appendix III

This Appendix sets out the lists of *ordonnances pénales* in the member States of the Council of Europe. For comments see Articles 1, sub-paragraph (g), 21 - 30 and 62.

(1) (a) Name in official language(s) of the State; (b) Legal basis (reference to codes and acts); (c) Maximum and minimum sanction; (d) Supplementary effects of the sanction, nature (disqualification etc.) and duration; (e) Method of enforcement (for pecuniary sanctions: possibility of transformation into sanctions involving deprivation of liberty; for sanctions involving deprivation of liberty: nature and regime of the establishment in which enforcement may take place, conditional release).