



## **Explanatory Report to the European Convention on the Transfer of Proceedings in Criminal Matters**

Strasbourg, 15.V.1972

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I. The European Convention on the Transfer of Proceedings in Criminal Matters, drawn up within the Council of Europe by a committee of governmental experts under the authority of the European Committee on Crime Problems (ECCP), was opened to signature by the member States on 15 May 1972, at Strasbourg, on the occasion of the 50th Session of the Committee of Ministers of the Council.

II. The text of the explanatory report prepared by the committee of experts and submitted to the Committee of Ministers of the Council of Europe, as amended and completed by the CCJ, does not constitute an instrument providing an authoritative interpretation of the Convention, although it might be of such a nature as to facilitate the application of the provisions contained therein.

### **Introduction**

1. On 29 January 1965 the Consultative Assembly of the Council of Europe adopted Recommendation 420 on the settlement of conflicts of jurisdiction in criminal matters.

This problem had been extensively discussed in the Legal Committee of the Consultative Assembly which, with the help of three consultant experts, drew up the text of the recommendation and of the draft Convention appended.

The recommendation reads as follows

"The Assembly,

1. Noting that under international law each State possesses various kinds of criminal jurisdiction: territorial, *ratione personae*, or universal, or jurisdiction to punish offences that jeopardise its safety or its credit; that, whenever an offence involves some foreign element, there may be overlapping of two or more of these jurisdictional powers, giving rise to positive conflicts of jurisdiction;

2. Noting that, when territorial jurisdiction is involved, that jurisdiction itself may give rise to conflict regarding determination of the place of the offence;

3. Whereas such conflict of jurisdiction is undesirable and may, in particular, have the consequence, unacceptable in law, that a single person may be tried successively by courts in several States for the same offence;

4. Whereas it is of unquestionable value to find a solution for these problems;

5. Whereas this solution can only be found in an agreement between States by means of an international convention;

6. Having considered the report of its Legal Committee and the draft European Convention on conflicts of jurisdiction in criminal matters prepared by that committee (Doc. 1873),

Recommends the Committee of Ministers:

7. To instruct the European Committee on Crime Problems to prepare a draft European Convention on conflicts of jurisdiction in criminal matters, taking the attached draft as a basis;

8. To submit to the Assembly for an opinion the draft Convention prepared by the European Committee on Crime Problems before it is signed by the member governments."

2. The European Committee on Crime Problems (ECCP) had already, as part of its examination of the problems connected with the international validity of criminal Judgments, touched upon several of the issues raised by the recommendation and in particular by the draft Convention attached to it.

During its XIIIth Plenary Session (December 1964) the ECCP recommended that a new sub-committee be created to undertake a study of "the division of legislative and judicial power" with essentially the same membership as the sub-committee, examining the international validity of criminal Judgments, ie. experts appointed by only eight governments. This proposal was subsequently agreed to by the Committee of Ministers.

3. During their 139th meeting (March 1965) the Committee of Ministers, sitting at Deputy level, re-examined the proposals put forward by the Assembly in Recommendation 420 and decided to communicate them to the ECCP. The ECCP then forwarded them to the sub-committee set up to undertake this study.

4. The sub-committee of the ECCP met under the chairmanship of Dr. H. Grützner (Federal Republic of Germany) and held eight meetings from 1965 to 1969. At the end of its work, it adopted the final text of the preliminary draft Convention on transfer of proceedings in criminal matters and of the explanatory report.

5. In accordance with the customary procedure of the ECCP for the elaboration of conventions, the preliminary draft Convention was submitted to an enlarged committee of experts on which all interested member States were represented. This committee also met under the chairmanship of Dr. H. Grützner and terminated its work in February 1971 after having held four meetings.

6. During its XXth Plenary Session (May 1971) the ECCP approved the texts of the draft Convention and of the draft explanatory report; it also decided to transmit them to the Committee of Ministers.

7. The Committee of Ministers of the Council of Europe adopted the text of the Convention in September 1971 at the 201st meeting held at Deputy level.

8. The European Convention on the Transfer of Proceedings in Criminal Matters was opened to signature by the member States of the Council of Europe on 15 May 1972, at Strasbourg, on the occasion of the 50th Session of the Committee of Ministers of the Council.

## General observations

9. When examining the complex problems connected with the recognition of foreign judgments and their enforcement, the ECCP became fully aware that a satisfactory solution to these problems could not ignore the stages in criminal proceedings which preceded the rendering of a judgment and its enforcement. It was highly desirable to extend European cooperation to the equally complex problems of determining competence between several States to prosecute, and of arranging for the transfer of proceedings from one State to another before judgment was rendered.

The complexity of these problems is explained by the very nature of traditional criminal law, strongly impregnated with the principle of the territorial sovereignty of the State. Criminal courts almost invariably apply their own criminal law. The problems of criminal law are therefore more difficult to solve than those of other fields of law where conflicts of legislation and of jurisdiction may be solved by the application of foreign law by the national court or by harmonising the legal provisions involved.

In recent years, however, crime has assumed an international character, especially as a result of the extensive development of means of communication. The result is the necessity of closer co-operation among States prompting them to lower their legal barriers and review the traditional consequences of their national sovereignty.

## Analysis of systems of jurisdiction

10. It is recalled that in most States provisions relating to the applicability of criminal law have a twofold function. They determine on the one hand which penal law shall be applied by the courts in the case of an offence which falls under national jurisdiction; they lay down, on the other hand, the criteria for limiting national jurisdiction.

11. Doctrine – as it has been established by many individual scholars and at international meetings in scientific associations or organisations – distinguishes a number of categories of jurisdiction in criminal matters:

- (a) the territorial jurisdiction of the State where the offence was committed;
- (b) (i) jurisdiction founded on the active personality principle, that is jurisdiction exercised by the State over its own nationals or persons domiciled in its territory, without regard to the place of the offence;
- (ii) jurisdiction founded on the passive personality principle, that is jurisdiction exercised by the State for the protection of its nationals abroad in respect of offences of which they may have been the victims;
- (e) jurisdiction exercised by the State for the punishment of offences against its sovereignty or its security;
- (d) jurisdiction founded on the principle of universality, which reflects the concern to ensure the punishment of certain offences creating a common danger in a plurality of States.

12. Although it was decided after a detailed examination of all aspects of the problem not to follow the Consultative Assembly in its attempt to create a hierarchy of these jurisdictions, it would seem appropriate briefly to explain these notions.

## **A. Territorial jurisdiction**

For obvious reasons of social defence and ordre public, every State declares itself competent to punish offences committed in its territory. These are offences against the law of the State concerned which must be respected by all persons who find themselves in the territory of that State. Thus the right to punish depends basically on the place of the offence. Jurisdiction established on this ground is both legislative and judicial. When an offence is deemed to have been committed on the territory of a State, the criminal courts of that State are competent and, according to the generally accepted rule, national criminal law is applicable absolutely and without restriction.

A survey made of the law of the various member States of the Council of Europe showed a general tendency towards an extension of the rule of *locus delicti commissi*. Such a tendency has one serious drawback—there is a danger that the cases of concurrent jurisdiction between States will be multiplied and, consequently, the cases of positive conflicts of jurisdiction and legislation.

This is so because the settlement of these conflicts creates difficult problems by reason of the equal right of the sovereignties concerned to inflict punishment. While the one may be bound to punish any prejudice to the interests it safeguards the other may be obliged to impose punishment for the disturbance caused on its territory by the criminal activity. The second sovereignty will generally have more reliable means of information at its disposal, whereas the first will often be able to claim more direct interest. Punishment by a foreign court cannot impair a sovereign State's right to punish.

The solution can be provided only by international agreements in which the Contracting States undertake to harmonise the exercise of the rights to impose sanctions.

Territorial jurisdiction may be established on different rules. It may be founded on the criminal act ("act theory") or on the consequence, or sometimes on both combined.

The "act theory" regards the State within whose territory the criminal activity took place as the only one with an interest in its punishment. The State in whose territory the offence produced its effect may, however, under certain circumstances, claim a more immediate interest in its punishment.

International criminal law has evolved towards concurrence of the two jurisdictions. Today most legal systems - at least in the member States of the Council of Europe recognise - the jurisdiction of both the State of the act and the State of the consequence.

## **B. Jurisdiction based on the personality principles**

### *(a) Active personality principle*

This principle is based on the idea that the nationals of a State are subject to its law even when they are abroad, that the reputation of a State is damaged by offences committed by its nationals in foreign countries, that a person is most familiar with the law of the State of which he is a national and that his prosecution is the necessary corollary to his not being extradited.

Most member States of the Council of Europe are empowered under their criminal law to exercise jurisdiction over their nationals, and at least, in respect of certain offences, certain States are also empowered to exercise jurisdiction over persons having habitual residence in their territory.

*(b) Passive personality principle*

This system extends a State's judicial and legislative authority to acts committed abroad against its nationals. It identifies the victim's interests with those of the State of his nationality.

The substantive law of several States is influenced by this system, but to a lesser extent than by the active personality system. Furthermore, the prosecution of offences committed abroad by foreigners against nationals is made contingent upon strictly defined conditions, such as the requirement that the acts concerned shall be punishable under the criminal law of the place where they were committed (unless that place is not subject to any criminal jurisdiction), the presence of the offender in the territory of the prosecuting State of which the victim is a national, the lodging of a complaint by the victim or by the foreign authorities, or intervention by the Public Prosecutor.

**C. Jurisdiction in respect of offences against the sovereignty or the security of the State**

The substantive law of the member States of the Council of Europe contains provisions empowering their courts to try offences against the State's security, independence, political organisation and sometimes administrative machinery. These self-protective measures are based on tradition and arise from the impossibility of successfully requesting extradition of perpetrators of this type of offence from their countries of Origin, and Of being certain that proceedings are brought against them in this State.

**D. Principle of universality**

The universality principle is the principle whereby the court of the place in which the offender is located is competent to hear the case, irrespective of the place of commission or the nationality of the offender or his victim. The principle arose from a need to ensure the safety of certain values in which every State has an equal concern. These are fundamental values which are protected either by penal codes or by international conventions and general rules of international law.

13. It is generally recognised in the doctrine that the above-mentioned jurisdictions are not always able to guarantee that successful proceedings are taken in respect of all offences.

Consequently, in order to avoid that a person having committed an offence abroad remains unpunished on the territory of a State, it is necessary to create a subsidiary jurisdiction for that State.

The following limitations are generally put on the exercise of such jurisdiction:

1. The subsidiary jurisdiction shall be given to a State only in respect of offences committed abroad which cannot be prosecuted under the law of that State and where extradition of the offender is either impossible or inopportune.
2. It should not apply to political or related offences.
3. The offence must also constitute a punishable act at the place where it was committed.
4. Generally speaking, a State should not exercise subsidiary jurisdiction unless prosecution is requested by a State having original jurisdiction.

14. During the course of the sub-committee's examination of the problems relating to the plurality and the transfer of proceedings, various studies and reports were submitted by Dr. Grützner and by experts consulted by the Legal Committee of the Consultative Assembly.

These studies and reports dealt *inter alia* with the provisions concerning jurisdiction in the various legislations in the member States of the Council of Europe.

The following conclusions emerged from these studies and reports:

- (a) The rules governing jurisdiction in the various member States are based on broadly analogous concepts.
- (b) Almost every one of their legislations recognises the following grounds on which jurisdiction may be determined: the place of the offence, the nationality of the offender, the need to protect the State from offences against its sovereignty or security and universal jurisdiction. Some legislations recognise also the nationality of the victim, and the habitual residence of the offender.
- (c) Territorial jurisdiction remains the fundamental form of jurisdiction; the concept of territory appears to be gradually widened.
- (d) The nationality of the offender is recognised as a ground of jurisdiction by almost all legislations; but in many cases it is of a secondary character being subject to procedural conditions, and proceedings may be barred if the case has already been heard elsewhere.
- (e) The need to protect the State from offences against its sovereignty or its safety is always recognised as a principal ground of jurisdiction.
- (f) Universal jurisdiction is recognised for certain offences only.
- (g) The nationality of the victim is not recognised as a ground of jurisdiction by all countries; the procedural conditions to which it is usually subject tend to make it a secondary ground.
- (h) jurisdiction based on the offender's habitual residence is recognised by some States.

### **Solutions adopted**

15. The task involved in studying these problems was twofold. It involved a search for solutions to positive conflicts of jurisdiction (where several States claim jurisdiction) as well as to negative conflicts of jurisdiction (where no State can claim jurisdiction). It was necessary to examine the possibility of putting restrictions on the exercise of jurisdiction to deal with the former situation and Of providing extensions of competence to fill gaps arising in the latter situation.

16. After examination of national legislations it was concluded that situations where no State is competent to act do not arise in member States of the Council of Europe; a regulation of negative conflicts was therefore unnecessary.

A comparative study of the criminal law of member States, shows that conflicts of jurisdiction can arise:

- (i) when several States claim jurisdiction in respect of an offence by reason of the place of commission (conflicts of territorial jurisdiction);

(ii) when States claim the right to prosecute and try offences committed in foreign territory invoking grounds such as the active or passive personality principle, or universal jurisdiction or jurisdiction based on the protection of the sovereignty or the security of the State (conflicts between claims to jurisdiction based on different grounds).

17. The solution to positive conflicts of jurisdiction entails arriving at some form of agreement between the States concerned as to which of them should take action against the perpetrator of a given offence. It was considered that an adequate solution to these conflicts must necessarily comprise the possibility of transferring to one State proceedings already begun in another State. These situations are dealt with in Parts IV and III respectively of the Convention.

18. In its recommendation to the Committee of Ministers the Consultative Assembly attempted to establish a list of priorities. The starting point in that recommendation was that the State in which the act was committed should have priority to prosecute the offender. Other criteria should be subordinate to this principle. Hence prosecution in the State in which the offender is ordinarily resident would depend on the State where the offence has been committed renouncing prosecution.

The assumption that it is normally most appropriate to prosecute an offence where it has been committed is not justified. Rehabilitation of the offender which is increasingly given weight in modern penal law requires that the sanction be imposed and enforced where the reformative aim can be most successfully pursued, that is normally in the State in which the offender has family or social ties or will take up residence after the enforcement of the sanction.

On the other hand it is clear that difficulties in securing evidence will often be a consideration militating against the transmission of proceedings from the State where the offence has been committed to another State. The weight to be given in each case to conflicting considerations cannot be decided by completely general rules. The decision must be taken in the light of the particular facts of each case. By attempting in this way to arrive at an agreement between the various States concerned it will be possible to avoid the difficulties which they would encounter by a prior acceptance of a system restricting their power to impose sanctions.

19. It was also observed that a State competent to deal with an offence may consider that prosecution of the offender would be more effectively carried out by another State which, under its own law, is not competent to deal with the offence. International co-operation of that sort in the field of penal law requires an international instrument conferring competence on the second State to take over the proceedings as requested by the first State. The first State shall decide to transfer proceedings where, for instance, an offender has fled to the territory of the second State which is ordinarily his State of residence, so that proceedings by default become pointless and extradition most frequently impossible; there are other reasons why transfer of proceedings would be justified, such as the rehabilitation of an offender.

Part II of the Convention covers, *inter alia*, these points.

## Plan of the Convention

20. The Convention which contains 47 articles is divided into six parts:

- Part I – Definitions – Article 1
- Part II – Competence – Articles 2-5
- Part III – Transfer of Proceedings – Articles 6-29
- Part IV – Plurality of Criminal Proceedings – Articles 30-34
- Part V – *Ne bis in idem* – Articles 35-37
- Part IV – Final clauses – Articles 38-47

Appendix I and Appendix II to the Convention list respectively the reservations and the declarations which a Contracting State is entitled to make under Article 41 (1) and Appendix III sets out the list of offences other than offences dealt with under criminal law.

## Particular observations

21. The Preamble establishes the link- between the Convention on the Transfer of Proceedings in Criminal Matters and the other conventions previously drawn up by the ECCP, with a view to fulfilling the following objectives: to prevent crime and to arrive at a better treatment of offenders.

## PART 1 – Definitions

### Article 1

22. The experts decided to include in a separate article definitions of two terms which occur frequently in the Convention and have the same meaning throughout the Convention.

The terms are "offence" and "sanction".

Sub-paragraph (a) defines the term "offence". This means any act which is punishable under criminal law. The term is, however, extended to cover also behaviour which is not primarily within the competence of the judicial authorities, but dealt with by simplified procedure by an administrative authority whose decision is subject to appeal to a judicial authority. Such a system is used in some member States and the relevant provisions in national law are listed in Appendix III to the Convention.

The words "tried by a court" include appeals involving a full re-hearing of the case by a court as to the facts and as to the law. The word "court" refers to administrative tribunals at all levels on condition that these institutions are independent and that they give the offender the possibility to defend himself.

Sub-paragraph (b) defines "sanction". It makes clear that the term comprises punishments, the repressive measures which in certain legislations are not considered to be of a penal nature, and detention orders.

These definitions are drawn from the definitions contained in the European Convention on the International Validity of Criminal Judgments; the minor textual differences reflect only improved drafting.

## **PARTS II AND III – Competence and transfer of proceedings**

### **A. General remarks**

#### **Framework and history**

23. In the general observations in the Explanatory Report on the European Convention of the International Validity of Criminal Judgments, the present state of development of international criminal law was described in broad outline. The Council of Europe has undertaken a wide-ranging programme to modernise this field of law which for almost a century had remained relatively unchanged. The principle underlying this work is that the resources in penal and penitentiary matters existing in the member States of the Council of Europe must be employed in such a way as to ensure their maximum efficacy with a view not only to reducing crime but also to protecting the rights of the individual and furthering the subsequent rehabilitation of the offender.

24. Such an undertaking demands active international co-operation, which can take several forms:

- extradition;
- "minor" mutual legal assistance (e.g. communication of information and evidence);
- enforcement and the taking into consideration in the State of a criminal judgment rendered in another State
- transfer of proceedings;
- regulation of plurality of jurisdictions.

Obviously, there is no general abstract rule for deciding which of these forms of co-operation is the best. It depends on the particular features of the case actually under consideration. There are, however, good reasons for ensuring that the competent authorities are aware of the various forms of international co-operation in criminal matters as soon as they are called upon to decide on the prosecution of an offence or the enforcement of a sentence or measure having international connotations.

The choice of one or other of these forms will largely depend on the nature of the offence, on the requirements of the penal process, particularly where the presentation of evidence is concerned, and on the personality of the offender; the main effect of the choice will be on the nature of the sentence or measure and its enforcement.

By opening for signature the European Convention on Extradition (1957), the European Convention on Mutual Assistance in Criminal Matters (1959) and the European Convention on the International Validity of Criminal Judgments (1970) the Council has established a common juridical system for the first three methods of co-operation.

25. The purpose of the present Convention is to establish a similar system for the fourth and fifth methods of co-operation: the transfer of criminal proceedings and regulation of plurality of proceedings. Other European conventions embody provisions which relate to this subject but do not regulate it completely. For example, Article 21 of the European Convention on Mutual Assistance in Criminal Matters defines the procedure for presenting a request for proceedings and provides that the requested State shall notify the requesting State of any action taken on the request. Fairly complete rules in the matter, but applicable only to road offences, are contained in the European Convention on the Punishment of Road Traffic Offences. The system advocated in the present Convention resembles that introduced by the last-mentioned Convention in several respects.

### Notion and scope

26. The transfer of proceedings within the meaning of the present Convention is a form of international co-operation in criminal matters, that is to say a form of mutual assistance. The use of the term is possible only where one State institutes proceedings at the request of another State which is competent to prosecute the offence. Mutual legal assistance is always "co-operation" – in the proper meaning of the term – in the field of criminal law, and presupposes that the requesting State is itself competent to take proceedings.

27. Transfer implies that the requesting State has instituted proceedings, that the first stage of the criminal proceedings has been begun and is perhaps completed, and that the presumed perpetrator is known. It is possible that the investigations against the accused have been carried out in the requesting State and that the trial stage has already been reached, or that a judgment has been rendered but not yet enforced. It may be that the prosecuting authority in the requesting State has arrived at the conclusion that the criminal proceedings cannot be properly conducted there. There may be numerous reasons for this. They may relate to the trial proceedings: difficulties in proving a charge or in reaching a decision after the parties have been heard or the connection with other offences tried elsewhere. But they may also be associated with the enforcement of the sentence to be expected: enforcement in the requesting State may be impossible or inadequate. Moreover, there may not be rules permitting enforcement in another State; or, even if so, the adaptation of the sanction may, create difficulties.

28. Where the prosecuting authority of one State has reached the conclusion-whatever the reason-that it is not desirable to continue the proceedings, it may ask another State, in which adequate criminal proceedings are possible, to take over the proceedings. If the requested State agrees to this request a "transfer of criminal proceedings" is taking place. Usually – but not always – the requesting State will be that in which the offence was committed and the requested State the State of residence of the accused. Acceptance of the request does not necessarily imply that the case will be examined by the judge of the requested State. That State remains free to decide whether or not to institute proceedings or to discontinue them (but see Article 21 (2)(d)).

29. Proceedings may be transferred even if no international convention has been concluded in the matter. The sole condition is that the criminal law of the requested State should be applicable to the perpetrator of the offence; it is of little consequence whether provision to this effect was made with a view to mutual assistance or not.

Although the existence of an international convention is not an indispensable condition for the transfer of criminal proceedings, it is nevertheless highly desirable. It is only after appropriate procedure has been established for the communication of information etc., that mutual assistance can be developed and intensified.

It is not only the need to communicate information which militates in favour of international rules. Owing to its international aspect, the prosecution of offences demands that States co-ordinate their policies to ensure the effective application of the various instruments governing mutual legal assistance and in particular the determination of uniform provisions on *ne bis in idem*. Thus, the important thing is to harmonise these instruments, for mutual assistance can be best organised by means of an international agreement.

### **Basic problems**

30. The drawing up of an international instrument regulating the transfer of criminal proceedings calls for an examination of the following points:

- the conditions under which proceedings may be transferred;
- the competence of the judge of the requested State to try the offence to which the request for proceedings relates and the law which he must apply;
- the effect of a request for transfer on the competence of the requesting State;
- communication between the authorities of the requesting and requested State;
- legal validity in the requested State of the preliminary investigations already carried out in the requesting State;
- statutory limitation;
- the complaint;
- the relations between original competence and competence granted by the Convention.

### **Basic solutions**

31. The solutions which the Convention offers to the foregoing questions are the following:

#### *1. Conditions under which proceedings may be transferred*

The transfer of proceedings may take place in respect of any offence which may be prosecuted in the requesting State and in respect of which the condition of dual criminal liability is fulfilled, if such transfer is in the interests of a proper administration of justice.

Thus the principle of dual criminal liability already adopted in the field of extradition and in that of the enforcement of criminal judgments rendered abroad, also governs the present form of mutual assistance (Articles 6 and 7).

The principle that proceedings should be transferred only in the interests of a proper administration of justice is fundamental. Because it is self-evident, this principle is not expressed explicitly in the Convention. It may, however, be deduced from the conditions listed in Article 8 that a transfer of proceedings is designed to serve the interests of a proper administration of justice. The fulfilment of these conditions and of those mentioned in Article 11 is a prerequisite for any transfer of proceedings. Thus, Articles 8 and 11, and to a certain extent Articles 10 and 12 also, confirm this fundamental principle (see also Article 31).

#### *2. Judicial competence and applicable law*

The requested State may accept a request for proceedings only if its criminal courts have competence to try the offence and if it can apply either its own criminal law or that of the requesting State.

Under criminal law, in contrast to private law, the applicable law is almost invariably that of the State which has competence and there are many good reasons to maintain this principle. Therefore, in order that proceedings may be transferred wherever the interests of a proper administration of justice so require, it is essential, in such cases, to confer competence on the requested State and make its criminal law applicable. There are two ways of achieving this:

- to make a request for proceedings have the automatic effect of making the criminal law of the requested State applicable;
- to make the criminal law of each Contracting State applicable to any offence to which the criminal law of another Contracting State is applicable, on condition that the exercise of the resulting competence is limited to cases in which a request for proceedings has been presented by another Contracting State.

In both instances, the extension of the field of application of the criminal law and of the resulting competence remains limited to what is necessary for the purposes of the transfer of the proceedings.

In order to avoid conflict with the principle of *nulla poena sine lege* the second method was chosen; this implies that the State in question was already competent at the time the act was committed. Under Article 2 (1), any Contracting State shall have competence to prosecute according to its own criminal law any offence to which the law of another Contracting State is applicable. Exercise of the competence is limited by paragraph 2 to cases in which a request for proceedings has been presented.

### *3. Effect of the request for proceedings on the competence of the requesting State*

According to Article 2, a request for proceedings entitles the requested State to prosecute the offence according to its own criminal law. In order to obviate the possibility of dual proceedings, the extension of the requested State's prosecuting powers must be offset by a corresponding restriction of those of the requesting State. This is the purpose of Article 21.

### *4. Communication between the authorities of the requesting and the requested States*

It is essential for satisfactory international co-operation in criminal matters that communication procedure should be clear and rapid. The Convention provides for the establishment of such procedure:

- Article 6 (2) stipulates that the competent authorities of a Contracting State shall take into consideration the possibility of a transfer of proceedings wherever such a possibility is offered by the present Convention;
- if the authorities reach the conclusion that transfer is desirable, communications shall be sent either by the Ministries of Justice or -where special agreements exist- direct by the authorities named in these agreements.

The procedure laid down in Articles 13 to 20 is much the same as that provided for in the other European conventions on mutual assistance in criminal matters.

### *5. Legal validity in the requested State of preliminary investigations already carried out in the requesting State*

In all cases in which a request for the transfer of proceedings is presented, an enquiry has already been carried out in the requesting State and evidence gathered. This information will almost always be necessary in order to render a decision in the requested State; that State may even require additional information. A good system of mutual legal assistance is therefore indispensable for the transfer of proceedings. Moreover, it is important to attribute

to official proceedings conducted in the requesting State the same value as if they had been conducted in the requested State. Mention must be made here, in particular, of the evidential value of records and reports drawn up by the competent authorities. Article 26 (1) lays down the same rules in the matter as Article 27 (4) of the European Convention on the International Validity of Criminal Judgments.

#### 6. *Statutory limitation*

The three problems under this heading are

##### (a) *Time-limit for prosecution in the requesting State*

Under Article 21, a request for proceedings limits the requesting State's right to prosecute. Nevertheless, such request does not guarantee that proceedings can take place in the requested State, for that State must first examine whether or not it can take action on it. It may find that it is impossible for it to comply with the request, in which case or in case of revocation of the acceptance the full right of prosecution reverts to the requesting State. Except where otherwise expressly provided, the time-limits for prosecution continue to run, in the requesting State, between the presentation of the request and the negative reply by the requested State. In order to prevent the continuation of the proceedings in the requesting State from being adversely affected as a result of this, Article 22 provides that any request to take proceedings shall have the effect, in that State, of extending the time-limit for prosecution by six months.

Article 10 provides that the requested State cannot take action on the request if at the date of the request the time-limit for criminal proceedings had already expired in the requesting State in accordance with the legislation of that State. It is self-evident that a transfer of proceedings is impossible if the time-limit for prosecution has expired in the requesting State. It is indeed a general condition for the application of this Part that the offence may be prosecuted in the requesting State.

##### (b) *Time-limit for prosecution in the requested State*

Time-limitation for prosecution occurs in two ways in the requested State. Either this State is already competent under its own law or its competence is exclusively grounded on the present Convention. In the former situation its ordinary time-limits are applicable; in the latter situation Article 23 provides that these time-limits are prolonged by six months. The reasons are identical to those set out under (a):above. Article 11 (f) entitles the requested State in the former situation to refuse a request if proceedings were already time-barred when the request was received; Article 11 (g) gives it the right to refuse in the latter situation if, in spite of the prolongation of six months, lapse of time has occurred.

##### (c) *Acts interrupting time-limitation*

Article 26 (2) provides that any step which interrupts time-limitation and which has been validly performed by the authorities, whether of the requesting or of the requested State, shall have the same effect in both States.

#### 7. *Complaint*

By virtue of the principle that it is a general condition that the offence may, be prosecuted in the requesting State, proceedings for which a complaint is necessary in that State may be transferred only if such complaint is lodged in accordance with the rules. A problem arises where the complaint is necessary also or solely in the requested State.

If a complaint is required in both States, the complaint brought in the requesting State has equal validity with that brought in the requested State (Article 24 (1)).

If a complaint is necessary only in the requested State, there are two possibilities for allowing proceedings in that State. The first consists of lodging a complaint in that State in accordance with rules normally in force. The second is provided by the procedure laid down in Article 24 (2). According to this provision, the proceedings requested may be taken even in the absence of a complaint if the person entitled to bring the complaint has made no objection thereto within one month from the date of receipt from the Public Prosecutor's Department of information on his right to object.

*8. Original competence of the requested State and the present Convention*

In order to extend application of the transfer of proceedings, Article 2 confers a common competence on all Contracting States by virtue of their role as requested State. Independent of domestic legislation, this competence does not influence or in any way limit the competence conferred on these States under their own law (Article 5).

**B. Notes on the articles**

32. In addition to the comments made in paragraphs 23-31 above, the following observations are made in respect of each separate article in Parts II and III.

**Part II**

**Article 2**

Where the States in question each have the necessary jurisdiction under their own law, the provisions of this article itself are superfluous. The difficulty arises where a State's criminal law does not provide it with such jurisdiction. It is obvious that a system for the transfer of proceedings cannot operate unless the courts of the requested State receive jurisdiction to try the offence. In the absence of such jurisdiction a transfer would have no meaning.

Paragraph 1 therefore provides jurisdiction to prosecute any offence to which the law of another Contracting State is applicable. It should be observed that paragraph 1 provides that the requested State when exercising this jurisdiction applies its own criminal law (see paragraph 31, 3). The enforcement of any sentence imposed is a natural consequence of the application of national law to the exercise of this jurisdiction.

Paragraph 2 specifies that the exercise of any jurisdiction grounded exclusively on this Convention (subsidiary jurisdiction) and consequently not contained in a provision of a national law, such as the Penal Code or the Code of Penal Procedure (this means that the State has no original jurisdiction) depends on the presentation of a request for proceedings.

If the jurisdiction conferred, under paragraph 1, in order to avoid absence of jurisdiction, were not subject to restrictions, it would, indeed, result in an excess of jurisdiction.

The solution adopted in paragraph 2 is based on the principles governing the application of subsidiary jurisdiction. One State exercises its jurisdiction only, if another State, having original jurisdiction, is unable to exercise it or waives its right to do so.

See also "General remarks" (paragraph 31, 2).

### **Article 3**

The purpose of this article is to give a legal basis for the waiver or discontinuance of proceedings by one State, having original jurisdiction to institute them, in favour of a State in a better position to prosecute. The provision is particularly essential for States which have the system of "legality" of proceedings, ie. the obligation to prosecute an offender. They would otherwise be bound by their traditional system and have no possibility of availing themselves of the provisions of the Convention.

It should be noted that a State is not obliged to request a transfer of proceedings. With a view to the transmission of proceedings, waiving occurs when a State has not yet instituted proceedings but is only preparing to do so, and desisting when the proceedings are already under way. A State may desist from proceedings at any stage up to the enforcement of the judgment.

It is desirable that the transfer under Part III or agreement under Part IV should take place at an early stage in the proceedings. However, there is no reason why they should not occur at a later stage, on the condition that the final judgment has not yet been enforced.

Furthermore, it is expressly provided that the offender "is being or will be prosecuted for the same offence by another Contracting State". Where the offender is already being prosecuted in another State, there exists plurality of criminal proceedings (see Part IV). Where he will be prosecuted in another State, a request for proceedings will have the effect of seizing the requested State, which may or may not already have original jurisdiction for dealing with the offence (see Part III).

### **Article 4**

Where the requested State derives its competence from Article 2 of this Convention, it exercises only a subsidiary jurisdiction. This is the reason why the rights of prosecution of the requesting and the requested State are closely linked. This link finds expression in Article 4 which provides that the extinction of the right of the requesting State precludes the exercise of the subsidiary jurisdiction.

This article refers in particular to amnesty, pardon and subsequent modification of legislation under which an act ceases to be liable to sanction.

The basic principle is that dual criminal liability required at the moment when the request for proceedings was made shall continue to be an absolute requirement at later stages of the proceedings in the requested State. If the right to punish ceases in the requesting State, action shall cease in the requested State.

An exception to this article is statutory limitation, expressly dealt with elsewhere in the Convention.

### **Article 5**

This article provides that the Convention does not affect the application of domestic law in any case where this law gives competence to national jurisdictions to deal with a case; see "General remarks" (paragraph 31, 8).

### **Part III: Section 1**

Section 1 states the basic rules applicable to the transfer of proceedings and defines the conditions in which a request for transfer may be presented by the requesting State (Articles 6-8) and accepted or refused by the requested State (Articles 9-12). The articles of this section, which follow each other in systematic order, deal with the examination as to the possibility and expediency, first, of requesting a transfer of proceedings and,, secondly, of accepting such a request.

#### **Article 6**

Paragraph 1 gives a State which is competent to prosecute an offence the right to ask another State to institute proceedings against the presumed perpetrator of the offence, whether the latter State has jurisdiction under its own law or by virtue of Article 2 of this Convention. In other words, it concerns the action which triggers off the effects of the Convention as between the two States.

As has been stated, there is no obligation for a Contracting State to request a transfer of proceedings to another State. States are consequently required, under paragraph 2, to examine the possibility – and nothing more – of asking the other State to take proceedings. During this examination, account should also be taken of the provisions of national law.

It is hardly possible to enumerate all the factors which the competent authorities must take into consideration in making their decision. To quote an example, it depends entirely on the particular circumstances of each case whether the fact of possessing evidence is to be regarded as outweighing the fact that better possibilities of rehabilitation exist in another State. It is, however, important that the States should undertake to examine the question.

It is equally impossible to specify at what point a decision should be made as to the advisability of asking another State to take proceedings. Normally it is possible to make such a decision before proceedings are begun; there may, however, be cases in which the advisability of transferring proceedings to another State does not become apparent till later. It could perhaps be stipulated that the competent authorities shall examine the question "as soon as possible". This expression might, however, be interpreted as implying that once the question is settled, it will not arise again at any later stage. But, in fact, there may be cases where the competent authorities decide that there is no need to address a request to another State, but where it becomes apparent later on that a transfer of proceedings would be advisable after all.

It is left to each State to determine which authorities shall be empowered to take the decision.

#### **Article 7**

One of the main conditions for the transfer of proceedings is that deriving from the principle of dual criminal liability.

The application of this principle is, in fact, prevalent in the field of co-operation between States in criminal matters, for a common defence against crime presupposes that there is agreement, at least as regards their aims, between the laws of the various States governing the punishment of criminal offences.

In the field of international co-operation in criminal matters, this principle may be *in abstracto* or *in concreto*. It was agreed, for the purpose of this Convention, to consider the principle *in concreto*, as in the case of the Convention on the International Validity of Criminal Judgments.

This condition is fulfilled if an offence which is punishable in a given State would have been punishable if committed in the State requested to prosecute the accused and if the perpetrator of that offence would have been liable to a sanction under the legislation 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.

This rule means that the *nomen juris* need not necessarily be identical, since the laws of two or more States cannot be expected to coincide to the extent that certain facts should invariably be considered as constituting the same offence. Besides, the general character of the wording of the clause in question indicates that such identity is not, in fact, necessary, which implies that differences in the legal classification of an offence are unimportant where the condition considered here is concerned.

Certain factors such as the relations between the offender and the victim (where these make the offence non-punishable), the grounds of justification or absolute extenuation (legitimate defence, *force majeure* etc.) and the subjective and objective conditions which make an offence punishable will also have to be taken into account in defining the scope of the condition of dual criminal liability.

These latter conditions are among the elements constituting the offence; the relations between the offender and the victim and the grounds of justification or absolute extenuation rid the offence of its criminal character or the perpetrator of his liability to punishment. Consequently, if the law of the requested State provides for these grounds and conditions whilst the law of the requesting State does not, there is no dual criminal liability in the concrete sense, since the accused would not have been liable to punishment in the requested State if he had committed the same offence there.

The words in paragraph 1 "be an offence" include the violation of the rule of order (*Ordnungswidrigkeit*).

It is for the authorities of the requested State to establish whether or not there is dual criminal liability *in concreto*.

It is provided, in the event of doubt as to the facts given in the request or as to the legal provisions applied, that the said authorities may ask the authorities of the requesting State for explanations or information (Article 14).

Where a request for proceedings concerns several offences and one of those offences does not fulfil the conditions of dual criminal liability referred to above, the requested State may refuse the request insofar as it relates to that particular offence.

The purpose of paragraph 2 of this article is closely to associate acts committed abroad with acts committed in the territory of a Contracting State, e.g. corruption of a civil servant of a requesting State must be considered as an act of corruption against the integrity of a civil servant of the requested State. If not, the State against whose interest the offence was committed would never be disposed to make use of the possibility of transferring proceedings; furthermore it is possible that it would not be in the interest of the offender if the State of the offence were bound to prosecute.

## **Article 8**

This article indicates the cases in which one Contracting State may request the taking of proceedings in another Contracting State.

Paragraph 1 is based on Article 6 of the Convention on the International Validity of Criminal Judgments, and is linked with Article 11 which indicates the cases in which the requested State may refuse the request.

The conditions listed in sub-paragraphs (a) to (h) are in the nature of alternatives and are not cumulative. The list is exhaustive. The conditions are not listed in order of importance, and none has overriding importance for the aims of the Convention. They are all intended to achieve a better administration of justice. See also "General remarks" (paragraph 31, 1).

The first four conditions are objective in character. The last four conditions, however, presuppose a subjective appreciation by the requesting State.

These conditions call for the following comments

*Sub-paragraph (a):* The expression "ordinarily resident" has already been accepted and used in other European conventions, for example in Article 5 of the Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders. It does not include persons who are visitors in the requested State. The inclusion of this sub-paragraph in the article is in line with the aims of modern criminal law: to enforce the sanction – in the event of conviction – with an eye to the social rehabilitation of the person concerned. Rehabilitation is greatly facilitated if the convicted person is permitted, while undergoing his sentence, to live in national and cultural surroundings which are familiar to him and to remain in contact with his family.

*Sub-paragraph (b):* The concern to facilitate rehabilitation also underlies this provision. Although a person's links with the State of which he is a national are not always very close, they are frequently more numerous than with the State in which he has committed an offence, perhaps as a migrant worker. A person's State of nationality is not always the same as his State of origin. The State of origin may be for instance the State in which the convicted person has passed the greater part of his life and consequently he would be more familiar with the general way of life and conditions there. Persons who have recently changed nationality may have more established links with their State of origin than with the State of their new nationality. Nationals will not be extradited by the majority of member States, so transfer of proceedings must be a possibility. For these reasons it is important to refer in this sub-paragraph to both the State of nationality and the State of origin.

*Sub-paragraph (c):* Still with a view to facilitating rehabilitation, this sub-paragraph provides for the enforcement of successive sanctions. If the accused is already imprisoned or is to be imprisoned in the requested State, it may be considered advisable in the interests of a proper administration of justice and of the effectiveness of the treatment to transfer the proceedings, for a carefully planned course of treatment followed through in a single State is likely to produce more promising results than two separate non-co-ordinated courses of treatment carried out in two different States.

*Sub-paragraph (d):* This sub-paragraph relates to the same situation as sub-paragraph (e) but at an earlier stage in the proceedings. This provision aims at avoiding two proceedings for the same offence and at combining proceedings for several offences.

*Sub-paragraphs (e) and (f):* These provisions relate to situations where an appreciation of the facts by the requesting State leads it to the conclusion that the ends of justice would be more effectively and more easily achieved by proceedings conducted in another State. This conclusion may be influenced by the existence of evidence in the latter State, the presence there of essential witnesses or of experts called on to give an opinion on the accused's personality and previous record, the greater accessibility of the relevant documents or the need to visit the scene, or again, better possibilities for the accused's rehabilitation if he is convicted.

*Sub-paragraph (g)*: This provision reflects the general principle that judgments rendered *in absentia* should be avoided and recalls the need to guarantee to everyone charged with a criminal offence a fair hearing with protection of the rights of defence. In these circumstances, a State which is competent to prosecute, but cannot guarantee the presence of the accused at the hearing before the competent court, is entitled to ask the State in which the accused is residing to prosecute.

The purpose of *sub-paragraph (h)* is to ensure that a sentence will not remain a dead letter owing to the impossibility of enforcing it because the suspected person is in the territory of another State. Thus, it is imperative in the interests of justice, to enable a State to transfer the proceedings at an early stage to another State where a sentence, which may be passed eventually, could be enforced. As the transfer of proceedings at an early stage ensures the unity of proceedings and enforcement, it is preferable to a request for the enforcement of a criminal judgment. Consequently, *sub-paragraph (h)* will still be important even after the Convention on the International Validity of Criminal Judgments has entered into force,

Paragraph 2 is intended to cover cases where the suspected person has already been finally sentenced in a Contracting State.

In such a case, a Contracting State may request another Contracting State to undertake proceedings if the following three conditions are met:

1. if the requesting State is not itself able to enforce the sentence even by having recourse to extradition;
2. if the requested State does not admit the principle of the enforcement of criminal judgments passed in other States or refuses to enforce the sentence already passed;
3. if one or more of the conditions listed in paragraph 1 can be invoked.

The purpose of this paragraph is to prevent the suspected person from evading punishment for an act committed by him, because the requesting State is unable to enforce a sentence passed in its territory, or to have it enforced by another State.

## **Article 9**

Article 9 (1) provides that the competent authorities of the requested State shall examine the request for proceedings. It will be noted that those authorities are only obliged to examine the request and to decide what action to take on it. The reference to the law of the requested State leaves it open to the States to prescribe in domestic law whether the examination shall be carried out by an administrative or a judicial authority,

This examination will enable the requested State to decide by applying the criteria laid down in Article 10 whether action shall not be taken on the request and then to rule on the possibility of a total or partial refusal of the request in the limited circumstances laid down in Article 11. Even when the authorities have decided to take action on the request, they remain at liberty to decide whether or not proceedings should actually be taken in respect of the offence committed abroad. The reference to the law of the requested State is explained above all by the wish not to interfere with the principle of opportunity as applicable to criminal proceedings when this principle is recognised in law.

Paragraph 2 relates to penal proceedings conducted in the requested State before an administrative authority. Mention must be made here of the German system, for the Federal Republic of Germany pioneered a highly developed system of administrative penal procedure in Europe.

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

However, criminal offences and violations of regulations 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 regulations since 1952 are those that formerly were or would have been punishable as petty or correctional offences.

Criminal offences and violations of regulations 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. parking offence) punishable in the same way as a criminal offence, such as murder, theft and false pretences. In distinguishing between criminal offences and violations of regulations, criminal 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 regulations 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 regulations may not accept the decision given by the administrative authority, and the case may be brought before the judicial authorities (the ordinary courts).

The existence of such a system in one or more of the Contracting States raises the following questions:

- (a) Can transfer be requested where an offence is the subject of administrative proceedings in the requesting State but of judicial proceedings in the requested State ?
- (b) Can transfer be requested where an offence is the subject of judicial proceedings in the requesting State but of administrative proceedings in the requested State ?
- (c) In the latter case, is the requesting State obliged to recognise the effects resulting from the decision of the administrative authority in the requested State ?

The Convention gives affirmative replies to these questions. A Contracting State may, however, make a reservation by which it declares that it will refuse a request for proceedings for an act the sanction for which, in accordance with its own law, can be imposed only by an administrative authority. Such a reservation will, of course, be applicable to any offence as defined in Article 1 (a) of the Convention, including the offences mentioned in Appendix III.

Paragraph 2 of Article 9 lays an obligation on the requested State to inform the requesting State of the fact that, under the legal system of the requested State, the offence will be punishable by an administrative authority. This obligation might complicate and delay the proceedings unnecessarily, where such a system was applicable to a large number of offences. Paragraph 3 consequently affords States the possibility of making a general and prior declaration concerning the details of their administrative penal system. The Secretary General of the Council of Europe is required, under Article 46, to notify all the Contracting Parties thereof.

The consequence of this information given in accordance with paragraph 2 to the requesting State is to give it the right to withdraw its request if it does not wish to see the case dealt with by an administrative authority. It follows that the requested State must wait a reasonable time before it takes a decision on the request, so that the requesting State has a real opportunity to withdraw its request.

#### **Article 10**

This article states the grounds for not taking action on a request for proceedings. Such a request must be refused absolutely where there is no dual criminal liability (Article 7 (1)), where prosecution of the accused would conflict with the generally recognised principle of *ne bis in idem* (Article 35) and where the time-limit for taking proceedings has at the date of the request expired in the requesting State. Another ground, which is absolutely fundamental, is referred to, namely, that the request must be made in accordance with the provisions of the Convention which govern the right of the requesting State to present the request. A major error of form or of substance has the effect of rendering superfluous any examination of the substance of the request. These all form significant obstacles to the transfer which can be ascertained without any detailed examination of the request.

#### **Article 11**

This article lists the grounds of optional refusal.

*Sub-paragraph (a)* entitles the requested State to dispute the factual or legal reasons given by the requesting State to justify its request for proceedings. This provision relates to Article 8 in its entirety and not only to the subjective elements of that article.

*Sub-paragraph (b)* concerns the case where the accused is not ordinarily resident in the requested State. In these circumstances one of the considerations on which the system established by the Convention is based often cannot be satisfied, namely the concern to facilitate the social rehabilitation of the person sentenced. If the necessary links between him and the requested State are not present, it is justifiable to refuse to institute proceedings in that State.

*Sub-paragraph (c)* relates to persons who are not nationals of the requested State and who at the time of the offence were not ordinarily resident in that State. These two conditions are cumulative. It was agreed that the requested State should be entitled to refuse to prosecute such persons even though they were ordinarily resident in that State at the time of the request.

*Sub-paragraph (d)*: The nature of the offence only comes into play in the case of political, purely military and purely fiscal 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 the request. Such offences are at times 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 political and purely military offences and the frequent refusal of extradition for purely fiscal offences.

This article does not exclude offences of a 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 (e)* is similar to Article 3 (2) of the European Convention on Extradition, and is concerned with ensuring that there will be no conflict between obligations under this Convention and under conventions in the field of human rights.

*Sub-paragraphs (f) and (g):* See "General remarks" (paragraph 31, 6).

Under sub-paragraph (h) the requested State may refuse to undertake proceedings which are transmitted by the requesting State if the latter's competence in the case is not founded on the territoriality principle. This is so if the offence in question was committed on territory other than that of the requesting State.

*Sub-paragraph (i):* Respect for international commitments is an absolute obligation in inter-State relations. It is mentioned explicitly in the Convention in order to emphasise that it is entirely in keeping with the current system of international collaboration, that it fits into it. The European Convention on Human Rights is of particular importance in this respect. Article 6 of that Convention lays down certain minimum rules applicable to criminal proceedings and implies that a transfer of proceedings should not result in a worsening of the accused person's legal position. "International undertakings" also relate to the impossibility of bringing charges against a person having diplomatic immunity (parliamentary immunity falls under the following sub-paragraph).

*Sub-paragraph (j):* It is obviously essential to take account of the fundamental principles of the domestic legal systems of member States, for it would be absurd to make prosecution compulsory if it were to contravene, in any way whatsoever, the constitutional or other fundamental laws of the State required to prosecute.

Observance of these fundamental principles underlying domestic legislation constitutes for each State an overriding obligation which it may not evade; it is therefore the duty of the organs of the requested State to see that this condition is fulfilled in practice. This clause, in which the general expression "fundamental principles of the legal system" is used on purpose, takes account of particular cases of incompatibility by means of a reference to the distinctive characteristics of each State's legislation, for it is impossible, in general regulations, to enumerate individual cases.

*Sub-paragraph (k):* It is evident that the violations of the rules of procedure which may justify a refusal of acceptance do not relate to the errors of form which prevent the requested State from taking action on the request (see comments on Article 10 above), but, rather, to violations of the rules laid down in Section 2 of Part III of this Convention. Furthermore, it is obvious that they must be substantial violations for which the Convention has not itself provided a remedy (such as in the case referred to in Article 14).

## **Article 12**

The acceptance by the requested State of the request for proceedings is not irrevocable. It may happen that new facts which call in question the soundness of the initial decision come to light during the proceedings in that State. Article 12 (1) requires the requested State, in such cases, to withdraw its acceptance where it notes the existence of one or another of the situations outlined in Article 10, and Article 12 (2) entitles it to do so where the proceedings would result in a judgment *in absentia* or in a judgment which the said State would be unable to enforce or where a ground for refusal mentioned in Article 11 becomes apparent. The term "court" in paragraph 2 (b) of Article 12 also includes competent administrative authorities. The third sub-paragraph makes it clear that the two States can always agree upon a re-transfer to the requesting State.

Such withdrawal has the effect of restoring to the requesting State its right of prosecution and enforcement (Article 21, 2 (c)).

National law regulates the details of the revocation procedure referred to in this article.

## **Part III: Section 2**

### **Article 13**

The rule requiring requests to be presented in writing (paragraph 1) is generally recognised by conventions in similar fields (cf. Article 14 (1) of the European Convention on the Punishment of Road Traffic Offences and Article 26 (1) of the European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders).

It is not stated that the request shall be dated, although this date is important under for instance Article 10 (c). It is presumed that an official request for a transfer of proceedings will always bear a date. If this is not so, the requested State is entitled under Article 14 to ask for this information.

Paragraph 1 also provides that, as a general rule, communications shall be exchanged between the Ministries of justice of the States concerned. The direct exchange of communications between the competent authorities is also possible however under an agreement, between the States concerned.

Paragraph 2 corresponds to Article 15 (3) of the European Convention on the Punishment of Road Traffic Offences, to Article 27 (3) of the European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders, and Article 15 (2) of the European Convention on the International Validity of Criminal Judgments. The transmission of communications through INTERPOL is without prejudice to the principles stated in paragraph 1.

When Article 15 of the European Convention on the Punishment of Road Traffic Offences and Article 27 of the European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders were being drafted, it was deemed preferable, as in the case of the European Convention on the International Validity of Criminal Judgments, rather than to provide for agreements between the Contracting States on direct communication between the competent authorities, to entitle each State, by means of a declaration addressed to the Secretary General of the Council of Europe, to apply different rules where it is concerned. This concerns particularly States which for constitutional or other reasons are bound to insist on the use of diplomatic channels.

Paragraph 3 of Article 13 adopts the same system without, however, excluding agreements on direct communication. The term "rules... other" does not apply to the requirement that requests shall be made in writing.

### **Article 14**

This article corresponds to Article 16 of the European Convention on the Punishment of Road Traffic Offences and Article 28 of the European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders. For more detailed comments, see Article 15.

### **Article 15**

This article concerns the documents which must accompany the request.

Paragraph 1 corresponds, as regards its substance, to Article 14 (2) and (3) of the European Convention on the Punishment of Road Traffic Offences and to Article 26 (2) and (3) of the European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders.

Whereas the last-mentioned articles contain a detailed list of the necessary documents, it was deemed preferable to draft Article 15 of the present Convention in vaguer terms using the words "and all other necessary documents". The reason for this was the impossibility of finding general terms to define the documents which might be necessary for the proceedings. It will not normally be difficult for the requesting State to foresee, in each particular case, which documents should be sent.

Where the requested State wishes to obtain fuller particulars its request must be complied with. This provision must be considered in conjunction with that of Article 14 whereby a request may be presented for such additional information as may be judged necessary. In the last resort, it is for the requested State to judge what information is necessary in each particular case.

The first part of the paragraph provides that the necessary documents shall accompany the request. The second part of the paragraph provides for an exception to this rule. It relates to the provisional measures which may be taken in the requested State: in particular, remand in custody. Such measures may be necessary if the presumed author of the offence is suspected of wishing to abscond or to conceal documents essential to the disclosure of the truth. There are often compelling reasons to act quickly in these situations and the requesting State may find it impossible to observe the general rule in Article 15.

Consequently, the request for proceeding may be sent to the requested State without the necessary supporting documents.

The documents must be sent to the authority mentioned in Article 13 or in the agreement concluded between the States concerned.

Paragraph 2 must be read in conjunction with Article 21 (1) which provides that, until notification of the requested State's decision on the request for proceedings, the requesting State shall retain its right to take all necessary steps in respect of prosecution. It goes without saying that, as the request for proceedings contains no mention of any steps taken meanwhile, the requesting State must inform the requested State thereof in accordance with the procedure laid down in Article 13.

#### **Article 16**

This article corresponds to the (provisions of Article 18 of the European Convention on the Punishment of Road Traffic Offences.

The decision taken as a result of the proceedings must be communicated to the requesting State. One clause, in Article 18 regarding this decision expressly constitutes an exception to the customary rules on the translation of documents. The experts considered that the work, often considerable, entailed in translating judgments was not justified in the present case.

The requesting State shall be informed of any discontinuance of proceedings and shall receive the documents, if any, which relate to the final outcome of such proceedings, be it a waiver or a court decision. It is often important for that State to get information on practice in the requested State, to be able to advise the victim of the offence and to take account of a foreign decision for the purpose of establishing recidivism.

#### **Article 17**

The intention behind the requirement that the authorities of the requested State shall inform the suspected person of the request for proceedings against him is that the suspected person shall be entitled to be heard or, in any event, to present such views as he deems to be relevant, before a decision is taken. On the one hand, this provision is prompted by the need to respect the individual's right to defend himself, since the decision – even when within the

province of an administrative authority – is liable to affect the outcome of the criminal proceedings to a very considerable degree; on the other, it is prompted by the need for the information provided by the requesting State to be supplemented and, where appropriate, disputed by the person actually concerned, so as to preclude so far as possible the danger of decisions based on erroneous evidence, which might possibly give rise at a later stage to a withdrawal of acceptance (see Article 12, (2) (b)).

It was considered unnecessary to provide the same requirement where the requested State has original competence.

#### **Article 18**

The provisions of this article correspond to those of Article 19 of the European Convention on the Punishment of Road Traffic Offences and to those of Article 29 of the European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders. This article states the principle that documents relating to the application of this Convention need not be translated. A State may, however, by express declaration, require translations of these documents. It can never insist upon the exclusive use of its own language, unless it happens to be an official language of the Council of Europe. If the requested State has not specified which of these official languages should be used, the requesting State is free to choose whichever of these languages it prefers. It shall not be prevented, however, from using a non-official language which is the language of the requested State if this solution is easier for its authorities. It is open to other States to apply the rules of reciprocity. Provisions concerning translation of documents contained in agreements between Contracting States are not affected. Translations do not render superfluous the dispatch of original documents.

Although the text of this article differs from that of Article 19 of the Convention on the International Validity of Criminal Judgments, there is no change of substance. The difference is accounted for by improved and more explicit drafting.

#### **Article 19**

The article corresponds, in substance, to Article 20 of the European Convention on the Punishment of Road Traffic Offences and to Article 17 of the European Convention on Mutual Assistance in Criminal Matters.

It is specified that the documents transmitted need not be authenticated. It is sufficient that the competent authority of the State sending them should ensure that they have been issued in conformity with the rules in force in that State.

#### **Article 20**

This article corresponds to Article 14 of the European Convention on the International Validity of Criminal Judgments.

It is specified that Contracting States may not claim the refund of expenses which may result from the application of this Convention.

### **Part III: Section 3**

#### **Article 21**

The effects in the requesting State of a request for proceedings are specified in Section 3.

From the moment it presents its request for proceedings, that is, under this Convention, from the date on which it dispatches the request, the requesting State is required, under Article 21 (1), to refrain from instituting proceedings or to terminate any proceedings already instituted. Since the examination of the request by the requested State under Articles 9 to 11 necessarily takes a certain time and since it is hardly reasonable from the point of view either of the requesting State or of the person concerned to stop the progress of the proceedings entirely, it is provided that the requesting State may take any steps in respect of prosecution, short of bringing the matter before the trial court. This means that the requesting State cannot render a decision in the case, nor arrange for the hearing in court of witnesses or experts. On the other hand it is not prohibited from having the accused questioned by the investigating authorities, from seizing stolen objects and from taking the necessary steps to preserve evidence. The steps taken during this period constitute a form of mutual legal assistance in the common interests of the two States concerned.

Paragraph 2 restores to the requesting State all the rights of which it was deprived by the request which it made to the requested State, if, for one of the reasons listed, the latter does not prosecute the accused or if the requesting State withdraws its request before the requested State has informed it of a decision to take action on the request. For instance, a decision not to prosecute or to discontinue proceedings whatever the reasons for this decision based on for example lack of evidence or the principle of opportunity, does not prevent the right to prosecute from reverting to the requesting State.

It results from sub-paragraph (e) that the right of prosecution will revert to the requesting State if it withdraws the request at any time before the requested State has informed it of a decision to take action on the request. When that decision has been communicated to the requesting State, that State's right of prosecution can revert to it only if there is an agreement between the two States to that effect, under paragraph 2 (c) of Article 12.

#### **Article 22**

As already stated (see Article 21) the examination of the request in the requested State may take some time. Suppose that the request for proceedings is made just before the time-limit for prosecution has expired and that the requested State decides not to take action on the request or to refuse to accept it, then by the time the requested State's decision becomes known the requesting State will be prevented by statutory limitation from taking proceedings itself. In order to remedy this situation, Article 22 provides for the exceptional extension of the time-limit for prosecution by six months. It entails of course at least a moral obligation for the requested State to decide within that period. See "General remarks" (paragraph 31, 6). A possibility of making reservations to this article has been provided.

#### **Part IV: Section 4**

#### **Article 23**

This article relates to time-limitation for proceedings in the requested State. In this State also the request for proceedings will for the same reasons result in a prolongation of the time-limit by six months but only if that State has not got original competence. See also "General remarks" (paragraph 31, 6). A possibility of making reservations to this article has been provided.

#### **Article 24**

This article deals with proceedings which are dependent on the filing of a complaint by the injured party. See "General remarks" (paragraph 31, 7).

It should be made clear that a complaint legally filed in the requesting State has the same validity as a lawful complaint in the requested State, even if the rules are different; for example, if the time-limit is 6 months in the requesting State and 3 months in the requested State, a complaint filed in the former State after 4 months is considered as validly filed for the purpose of proceedings in the latter State.

Private prosecutions are excluded from the scope of the Convention. Complaints within the meaning of this article also refer to authorisation to bring proceedings.

Paragraph 2 of this article refers to the case where a complaint is necessary only in the requested State. The Public Prosecutor's intervention in the proceedings is justified by the public interest demonstrated by the request for transfer.

The system adopted in this article is different from that adopted in Article 6 of the European Convention on the Punishment of Road Traffic Offences. This difference is due to the desire to facilitate transfer by enabling proceedings to be taken unless the injured party objects. Positive action on his part is no longer necessary but he retains the right to impose a veto if he considers that, for one reason or another, proceedings in the requested State are undesirable. If he takes no action, proceedings are instituted normally. In other words, the injured party's silence is taken to mean consent.

#### **Article 25**

This article deals with the law applicable in the requested State for the purpose of determining the sanction. It takes account of the conclusions on the application of foreign law adopted in 1961 by the Lisbon Conference of the International Association of Penal Law.

Under Article 25 the sanction shall, without any restriction imposed by this Convention, be determined by the law of the requested State if the competence of that State is already grounded on its national law. The law of another State shall only be taken account of if the law of the requested State expressly so provides. This is so, for example, with the Swiss Penal Code, which makes a less severe foreign law applicable to certain offences committed abroad. If, however, the competence of the requested State is grounded exclusively on this Convention, the requested State cannot act in complete liberty.

The *lex mitior* of the requesting State shall be taken into consideration. In this case the requested State does not exercise an original jurisdiction but only a subsidiary jurisdiction. Under these conditions, it would not be justifiable to empower the requested State to impose a more severe sanction than that provided for in the law of the requesting State.

Appendix I provides for the possibility of making a reservation in respect of the second sentence of the article.

#### **Article 26**

This article corresponds to Article 26 (4) of the Convention on the International Validity of Criminal Judgments.

Paragraph 1 of the article lays down the rule of the equivalence of steps by specifying that procedural steps lawfully taken in the requesting State have the same validity (hence equivalence) in the requested State as if they had been taken in the latter State.

The assimilation of steps taken for the same purposes does not of course mean the assimilation of the effects which result from them. Under the rule laid down in the Convention, the effects prescribed by the foreign law are not equated with the effects of the national law. However, when it is a question of probative effect, i.e. of the evidential weight of procedural acts, the Convention places a restriction on the application of the rule of non-assimilation of

effects. There will be a limit to the evidential weight in the national law: that weight cannot be greater than that in the foreign law.

In respect of the effects of procedural acts on the time limitation for proceedings, an exception was adopted. Under paragraph 2 of this article a procedural act which interrupts time limitation in the requesting State must be given the same effect in the requested State. States which are unwilling to accept this exception and which are competent by virtue of their law may make a reservation.

### **Part III: Section 5**

#### **Article 27 and 28**

Section 5 lays down the rules relating to provisional measures in the requested State. These rules are relevant only to the extent that the competence of the requested State is a subsidiary one, otherwise domestic law is applicable.

Two situations may arise:

The first occurs where the request for proceedings is already in the possession of the requested State. Article 28 deals with this situation and creates the legal basis for provisional measures between the time of the receipt of the request and its acceptance. After acceptance the competence to take provisional measures is derived from the domestic law of the requested State.

The second occurs where the requesting State although it has decided to request proceedings, has not yet completed all the formalities to this end. Therefore the measures provided for in Article 27 are taken between the date on which the requesting State makes known its intention to transmit a request for proceedings and the date on which that request is actually transmitted.

If the request for proceedings has already been received, the requested State may arrest the accused provisionally on its own initiative. The situation is somewhat different in cases where all the formalities necessary for the request have not yet been completed: the requested State is entitled by the Convention itself to take the necessary steps to ensure the presence of the accused, but it cannot make the arrest except on an express application by the requesting State, and unless the two specific conditions mentioned in sub-paragraphs (a) and (b) are both fulfilled. Suppression of evidence refers also to interference with witnesses. The requested State is not, however, bound to comply with a request for arrest, but remains completely free to decide as to the advisability of such a measure. It shall without delay inform the requesting State of the result of the application.

The detention provided for in Article 27 differs from ordinary remand in custody as regards both its legal basis and the reasons which may justify the provisional arrest.

It is pointed out that the rules contained in Article 13 are applicable to Article 27. This results from paragraph 3 of the latter article.

#### **Article 29**

Provisional arrest and remand in custody, applied in pursuance of Articles 27 and 28, are governed by this Convention and the law of the requested State, and that State may terminate them at any time. This discretion allowed to the requested State is limited in the cases mentioned in paragraphs 2 to 5; in these cases, the requested State is obliged to terminate the detention. This happens when, for one reason or another, proceedings are not taken at all in that State.

Rules other than those which may be contained in national law are designed to safeguard the accused person against abusive detention. If he is arrested at the request of the requesting State in pursuance of Article 27 he must be released 18 days after his arrest if the requested State has then not yet received the request for proceedings. If a request has been received but without the necessary documents he must be released 1,5 days after the receipt of the request for proceedings if the requested State has then not yet received these documents. On the assumption that the request for proceedings is received on the eighteenth day after his arrest, it follows that he may still be detained for a further 15 days, i.e. 33 days in toto, in accordance with his Convention. In order to allow an adequate examination of the case in the light of information submitted, a total period of custody of 40 days is allowed. Even if such examination is not completed by that time, the accused person must be released.

## **PART IV – Plurality of criminal proceedings**

### **A. General remarks**

33. Part IV of the Convention contains provisions which are to be applied in the case of plurality of criminal proceedings. The main purpose of these provisions is to prevent anyone from being accused and brought to trial more than once for the same offences.

A conflict of competence *in concreto* arises or exists, when the authorities of two or more States, competent under domestic law, simultaneously claim jurisdiction in the same case and actually start proceedings or, at least, indicate their intention to do so. It is not necessary that the competence of one of the States concerned should actually be contested; it is sufficient that two or more States are acting simultaneously and that there is a consequent overlapping of proceedings.

The plurality of competence raises therefore only international problems where the competent States decide to exercise their competence. Consequently, the Convention only speaks of "plurality of criminal proceedings" and not of "plurality of competence".

Efforts should not be directed solely to the introduction of a system under which proceedings are taken in only one State in respect of the same offence. The purpose of the Convention makes it necessary that provision should be made for the conduct in one State alone of proceedings in respect of different punishable acts which are subject to the criminal law of several States and which have been committed by the same person or by several persons acting in unison or of one punishable act committed by several persons acting in union.

Though there is in these cases no question of "plurality of criminal proceedings" in the sense indicated in the second paragraph above, the regulation of such cases has been included in Part IV. This is because, in practice, the method employed for regulating the case is the same in these different categories of cases.

### **B. Notes on the articles**

34. In addition to the comments made in the "General remarks" above, the following observations are made in respect of each article in Part IV.

#### **Article 30**

According to Article 30 (1), each Contracting State which intends to institute or already has instituted criminal proceedings is, first of all, responsible for considering the possibility of avoiding conflicting criminal proceedings, if that State has come to know that criminal proceedings are also pending in another Contracting State against the same accused person and for the same facts. The measures appropriate to avoid conflicting proceedings are listed in the first paragraph of the article. Having evaluated all the relevant circumstances, the State may, as the case may be:

- (a) waive its own prosecution in the given case, or
- (b) provisionally stop or interrupt the proceedings in order to wait for the outcome of the proceedings pending in the other State, or
- (c) transfer the proceedings to the other State, i.e. request the other State to take proceedings in accordance with Article 8.

The right of each State, under its domestic law, to take the measures mentioned above under sub-paragraphs (a) and (b) is already covered by Article 3. These measures may be combined with the possibility of offering extradition of the accused to the other State.

There is no obligation for the State considering the measures envisaged in Article 30 (1), to take one of these measures. If that State intends to institute or to continue its own proceedings, notwithstanding the proceedings pending in the other State, the provisions of paragraph 2 will be applicable.

How a Contracting State has obtained information about criminal proceedings pending in another Contracting State is of no importance. The information may be acquired through an official communication from the other State, through a request for extradition, transit or legal assistance from the competent authorities of the other State or through a communication from the accused himself. It may also be obtained through the International Criminal Police Organisation (INTERPOL).

The examination provided for in Article 30 (1) does not apply if the State considers that the offence is of a political or purely military character. Such cases are of so specific an interest for the States involved that it would not be realistic to oblige a State to negotiate with other States about the prosecution. Contrary to the provision of Article 11 (d), offences of fiscal character are not mentioned here. It was considered that fiscal offences would only rarely give rise to plurality of proceedings. It was therefore felt reasonable to apply Part IV of the Convention to those rare cases also.

The meaning of the term "the same offence" (*les mêmes faits*) has given rise to some difficulty. The opinion has been expressed that the meaning of that term would be doubtful, especially in the case of the so-called continuing offences (*infractions continues*). As example was mentioned the falsification of cheques continued in several countries. It was, however, felt that any definition of the term "the same offence" in the Convention would not be advisable, and that the problem should be solved in each particular case by the jurisprudence of each State concerned. Anyhow, it will be necessary to consider the facts of the case in the widest sense, the conformity of the legal denotations of the offence being of no importance.

The commission of several offences of the same kind by the same person cannot be regarded as covered by the phrase "the same offence", with the result that Article 30 cannot be applied and Article 32 (a) will apply instead.

Plurality of proceedings may be avoided in accordance with paragraph 1, if the examination, prescribed in that paragraph, leads to one of the measures mentioned. In that case, the possible conflict is settled and there is no more obligation for the State which has examined the circumstances. If the State decides, however, not to waive its own criminal jurisdiction or not to stop its proceedings provisionally, a further obligation arises for that State. It has to inform the other State of the decision taken with respect to the exercise of criminal jurisdiction. This decision may also lead to a request to the other State for extradition of the accused, In this case, the dispatch of the request for extradition could be regarded as notification within the meaning of paragraph 2.

The notification must be effected within reasonable time. The text uses the words "in good time and in any event before judgment is given on the merits". The Convention does not deal with the situation where the judgment has already been passed in another State before a consultation can take place. These situations are dealt with in Part V of the Convention.

### Article 31

In the consultative procedure, envisaged in the first paragraph of this article and following the communication according to Article 30 (2), the States concerned have to make all possible efforts to reach an agreement as to which State should continue and terminate the criminal proceedings. This will be the right and the duty of the State which, under the given circumstances, is in the better position to do so. It is not possible already in the Convention to name this State. The decisions must be based, in each particular case, on certain general criteria which point towards the competence of one or the other State. The circumstances, listed in Article 8, are also in this respect relevant to the decision as to which State should have the exclusive duty to conduct proceedings.

Article 8 does not contain a priority list of the criteria enumerated. This does not prevent one or more of these circumstances from being of such importance in a particular case that they outweigh the other circumstances. The consultative procedure will therefore, above all, consist in determining which criteria militate, in a given case, for or against the preference being given to the jurisdiction of one or the other State. After that, these criteria will be evaluated in toto.

It has been considered whether it would be suitable to create in the Convention itself a certain order of precedence among the criteria listed in Article 8 in the sense, that in case a certain criterion is fulfilled, that criterion should prevail over the other criteria. Such a provision, however, would not make allowance for all the circumstances of a particular case.

It might be asked in the light of modern penal policy whether in the case of a juvenile offender a criterion, according to which priority should be given to the State of the habitual residence of the offender, should prevail. For various reasons of principle it is not advisable to create an obligation for the State of the offence to waive its own jurisdiction in favour of the State of the habitual residence of the offender, although it is true that such a renunciation would be in the interest of the juvenile offender in many cases.

One can imagine the case where it is impossible to obtain an agreement in the course of the consultative procedure. In that case none of the States concerned loses its right to exercise its own criminal jurisdiction. If, however, in one of the States concerned, a final judgment is rendered after the failure of the consultative procedure or after the expiration of the time-limit envisaged in Article 31 (2), the other State will have to observe the provisions laid down in Part V *ne bis in idem*.

The possibility was examined of creating a system of priorities of jurisdiction in the Convention, to be applied in the case where the States concerned are unable to reach an agreement in the course of the consultative procedure. According to such a system, the jurisdiction of a certain State the jurisdiction of the State of the offence-would have priority over the jurisdictions of the other States concerned, It was felt, however, that such a system of priority would be too rigid and could not take into account all the practical needs.

In order not to prejudice the outcome of the consultative procedure, each State concerned has to abstain, during a maximum period of 30 days, beginning with the dispatch of the notification, from entering a judgment on the merits.

It may be that the consultative procedure envisaged in paragraph 1 cannot start earlier than at a stage of proceedings, when, for procedural or practical reasons, it would be no longer advisable to relinquish jurisdiction in favour of the other State. The opening of the trial in the presence of the accused was chosen as the decisive moment. Consideration was given also

to an earlier moment, i.e. the filing of the indictment. It was felt, however, that the right of the accused to be judged should for the purposes of the Convention become effective not earlier than at the beginning of the trial. Until that moment, a transfer of the criminal proceedings should be possible.

The opening of the trial, at which the accused is not present, prevents neither the consultative procedure envisaged in paragraph 1 nor the transfer of criminal proceedings. Criminal proceedings conducted, in the absence of the accused do not offer the same guarantees as proceedings in the presence of the parties, and it is one of the aims of the draft to avoid, as much as possible, criminal proceedings in the absence of the accused (cf. Article 8 (g), Article 12 (a)).

Appendix I provides for the possibility of making a reservation excluding the application of Articles 30 and 31 in respect of an act for which the sanction in accordance with the law of either of the States concerned can be imposed only by an administrative authority.

### **Article 32**

As mentioned in the "General remarks" (paragraph 33), it has been found important also to provide a rule to the effect that the Contracting States shall co-operate to prosecute by common agreement:

- different punishable acts committed by the same person, or
- different punishable acts committed by several persons together, or
- one punishable act committed by several persons together.

Article 32 states two reasons for doing so:

First, regard for the establishment of truth. Obviously, the prosecution of the same person in several States will involve difficulties of evidence, as it will not always be possible to ensure that the offender appears in person in all States concerned. Moreover, where several persons have been involved in the offences, it will also be important for the statements made by these persons to be compared.

Secondly, mention is made of the regard for the application of a more appropriate sanction. In order to determine the sanction which it is most appropriate to apply to the offender, the competent court must be able to take account of all the offences committed by the offender. If some of the offences are tried in one State, and the others in another State, the total sanction to be imposed on the offender will often be more severe than if judgment had been made in one State. Where several persons are involved in the same complex of offences, adjudication in different States is likely, by reason of differing ranges of sanctions, to lead to results that will appear unjust to the offenders.

On the other hand, it is evident that it will by no means always be reasonable to take steps for such cases to be tried by a single prosecution in one State.

If among several different cases the case or cases which may be transferred to another State is or are of a less serious character so that only a minor sanction (a fine) is likely to be imposed in that State, it will normally not be reasonable to complicate criminal prosecution through negotiations with that State. Where a single act (or set of acts) gives rise to proceedings against several persons, action by a single prosecution is excluded if they have been apprehended in their respective home countries.

It is because it will obviously often be impossible to hold a single trial of these cases that the provision of this article imposes no duty on the States to give notification as provided for in Article 30 (2), or to await the outcome of any negotiations initiated as provided for in Article 31 (1). The individual States have wide discretionary powers to decide whether in a particular case it will be expedient to take steps to join the case to a case pending in another State.

The application of this article requires in all cases that the offence which may be transferred for prosecution in another State shall fall under the criminal law of each of those States. This means only that the offence would be punishable if committed in the other State; there is no requirement for that other State to have jurisdictional competence in the matter also under its own law. indeed, it follows from Article 33 that agreement about joining a case to one already pending in another State automatically gives that other country jurisdictional competence in pursuance of Article 2.

### **Article 33**

This article deals with the legal consequences Of the decisions reached under Article 31 (1) and Article 32. It follows from the reference to the provisions concerning the transfer of criminal proceedings that a State, having renounced to continue its own criminal proceedings, may continue these proceedings only to the extent laid down in Article 21.

The State which, according to the agreement reached, continues the single criminal proceedings, will, pursuant to Article 16 (2), be obliged to inform the other State of the result of criminal proceedings.

### **Article 34**

This article applies to Part IV the provisions contained in Articles 13-20 to the extent that these articles are appropriate for the application of this Part.

## **PART V – *Ne bis in idem***

### **A. General remarks**

35. The term *ne bis in idem*, which is generally used in legal literature and is used also in other European Conventions, notably Articles 53-55 of the European Convention on the International Validity of Criminal Judgments, means that a person who has been the subject of a final judgment in a criminal case cannot be prosecuted again on the basis of the same fact.

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

37. At the national level the principle is generally recognised in the law 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.

38. 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 be best 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.

39. It might be argued that the need for a reasonable protection of the offender might be dealt with through a protocol to the Europe-an Convention for the Protection of Human Rights and Fundamental Freedoms. It is 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 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 has also been claimed that such an insertion in the Human Rights Convention would result in a more advanced degree of unification. 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.

40. It will be necessary to view Articles 35-37 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 37.

41. Article 35 indicates the extent to which foreign criminal judgments shall be given an actual effect of *ne bis in idem*.

The system in the Convention which corresponds to the system adopted in the European Convention on the International Validity of Criminal Judgments 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. Apart 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 where the court has convicted the offender without imposing a sanction (paragraph 1).

42. 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 36).

43. Mention should be made that there is according to Appendix I, a possibility to make a reservation to this Section.

## **B. Notes on the articles**

44. Apart from the comments contained in the "General remarks" (paragraphs 37-45), the following observations are made on the specific articles.

### **Article 35**

For a decision to obtain the force of *ne bis in idem* it must be final. It is evident, however, 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 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 comments on Article 7 (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 (b). 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.

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.

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 entail 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 this provision and the provision of sub-paragraph (b) (i), any form of suspension or exclusion of sanctions is covered.

Paragraph 2 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.

Sub-paragraph (b) has been drafted accordingly. The *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.

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 this paragraph, 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 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 the territory of a particular State, shall be decided in accordance with the domestic law of that State.

## **Article 36**

Reference is made to the "General remarks" (paragraph 42).

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 a 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 37**

Reference is made to the "General remarks" (paragraph 40).

### **PART VI – Final provisions**

#### **A. General remarks**

45. Articles 38-47 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 43 and 44 have been inserted by express decision.

The provisions of Article 43 (1) raise in particular the problem of the respective fields of application of this Convention and the Convention on the Punishment of Road Traffic Offences. A comparison of these two international instruments reveals that the provisions relating to the transfer of criminal proceedings in the present Convention are notably different in some respects from those contained in the Convention on the Punishment of Road Traffic Offences.

In respect of Article 43 (3) it has been noted that the certain States (Denmark, Finland, Iceland, Norway and Sweden) have established a special system of transferring proceedings by an informal arrangement among the Attorneys General.

Article 44 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

46. This appendix contains the eight reservations of which Contracting States may avail themselves when depositing their instruments of ratification, acceptance or accession, in accordance with Article 41 (1).

The reason for these reservations are stated above; see

- as to reservation (a) - comments relating to Article 11, subparagraph (d);
- as to reservation (b) - comments relating to Article 9;
- as to reservation (c) - comments relating to Article 22;
- as to reservation (d) - comments relating to Article 23;
- as to reservation (e) - comments relating to Article 25;
- as to reservation (f) - comments relating to Article 26;
- as to reservation (g) - comments relating to Articles 30 and 31;
- as to reservation (h) - comments relating to Part V.

### Comments on Appendix II

47. This appendix contains the two declarations which Contracting States may make under Article 41 (1).

The first declaration will enable one of the member States of the Council of Europe to adhere to the Convention in spite of constitutional provisions running counter to certain provisions of the Convention, concerning the making or receipt of request for proceedings.

The second declaration allows each State to define the notion "national" – which may be different in the various national legislations. It is analogous to declarations permitted under other conventions and takes account of the special Nordic interpretation of the notion "national" in some international connections.

### Comments on Appendix III

48. This appendix sets out the list of offences other than offences dealt with under criminal law.