COUNCIL OF EUROPE

CONSEIL DE L'EUROPE

Council of Europe Treaty Series - No. 196

Explanatory Report to the Council of Europe Convention on the Prevention of Terrorism [*]

Warsaw, 16.V.2005

I. The Council of Europe Convention on the Prevention of Terrorism (hereafter referred to as "the Convention") and its Explanatory Report were adopted by the Committee of Ministers of the Council of Europe at its 925th meeting. The Convention was then opened for signature by the member States of the Council of Europe, the European Community and non-member States which participated in its elaboration on 16 May 2005 on the occasion of the Third Summit of Heads of State and Government of the Council of Europe.

II. The text of this Explanatory Report does not constitute an instrument providing an authoritative interpretation of the Convention, although it may serve to facilitate the application of the provisions contained therein.

Introduction

1 The Council of Europe's response to the terrorist attacks of unprecedented violence committed in the United States of America on 11 September 2001 was both firm and immediate.

2 At its 109th Session on 8 November 2001, the Committee of Ministers "agreed to take steps rapidly to increase the effectiveness of the existing international instruments within the Council of Europe on the fight against terrorism by, *inter alia*, setting up a Multidisciplinary Group on International Action against Terrorism (GMT)".

3 Among the tasks given to the GMT was reviewing the implementation of and examining the possibility of updating existing Council of Europe international instruments relating to the fight against terrorism, in particular the European Convention on the Suppression of Terrorism, in view also of a possible opening of that Convention to non-member States, and the other relevant instruments.

4 As a result of this work, on 13 February 2003, the Committee of Ministers approved a Protocol amending the European Convention on the Suppression of Terrorism (ETS No. 190) which was opened for signature on 15 May 2003.

5 In the course of the discussions of the GMT concerning the preparation of the Protocol, the question of the drafting of a comprehensive convention on terrorism in the Council of Europe was raised several times. However, the GMT did not formally take a stand on this question because it considered this issue to be beyond its remit.

(*) The Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community entered into force on 1 December 2009. As a consequence, as from that date, any reference to the European Community shall be read as the European Union.

6 The issue was re-launched by the Parliamentary Assembly in its Recommendation 1550 (2002) on combating terrorism and respect for human rights and, later on, in its Opinion No. 242 (2003) concerning the above-mentioned protocol, where the Assembly expressed its belief "that it would be appropriate, in due course, to consider the possibility of drawing up a comprehensive Council of Europe convention on terrorism, taking into account the work carried out by the United Nations". Furthermore, in January 2004, the Parliamentary Assembly adopted Recommendation 1644 (2004) on terrorism: a threat to democracies, where it invited the Committee of Ministers to begin work without delay on the elaboration of a comprehensive Council of Europe convention on terrorism, based on the normative *acquis* of the legal instruments and other texts of the United Nations, the Council of Europe and the European Union.

7 In May 2003, the Committee of Ministers stressed the necessity of reinforcing international co-operation in the fight against terrorism and supporting the efforts of the United Nations in this field. In this context, the Ministers noted with interest the proposal of the Parliamentary Assembly to draft a comprehensive convention on terrorism under the aegis of the Council of Europe.

8 In June 2003, the Committee of Ministers agreed to return to the discussion of the initial proposal to prepare a comprehensive convention on terrorism under the auspices of the Council of Europe on the basis of the conclusions of the 25th Conference of European Ministers of Justice (Sofia, 9 and 10 October 2003) on the theme of the fight against terrorism and of the proposals of the Committee of Experts on Terrorism (CODEXTER), a new governmental committee of experts set up following the expiry of the terms of reference of the GMT.

9 At the 25th Conference of the European Ministers of Justice, the Ministers invited the CODEXTER to provide the Committee of Ministers with an opinion on the added value of a possible comprehensive Council of Europe convention on terrorism, or of some elements of such a convention, which would contribute significantly to the United Nations' efforts in this field.

10 In pursuance of this request, at its first meeting (Strasbourg, 27-30 October 2003), the CODEXTER commissioned the preparation of an independent expert report on possible gaps in international instruments against terrorism and on the "possible added value" of a comprehensive Council of Europe convention in relation to existing universal and European instruments of relevance to the fight against terrorism. The general conclusion of the report was that a comprehensive Council of Europe convention on terrorism would provide considerable added value with respect to existing European and universal counter-terrorism instruments.

11 The CODEXTER considered this report at its second meeting (Strasbourg, 29 March-1 April 2004), but could not reach a consensus on the question of whether or not the Council of Europe should elaborate a comprehensive convention on terrorism. However, it agreed that an instrument, or instruments, with limited scope, dealing with the prevention of terrorism and covering existing lacunae in international law or action, would bring added value, and agreed to propose to the Committee of Ministers to instruct the CODEXTER to undertake work in this direction.

12 At its 114th Session (12 and 13 May 2004), the Committee of Ministers took note of the CODEXTER's work and agreed to give instructions for the elaboration of one or more instruments (which could be legally binding or not) with specific scope dealing with lacunae in existing international law or action on the fight against terrorism, such as those identified by the CODEXTER in its report. On this basis, in May 2004, the Committee of Ministers instructed the Secretariat to prepare proposals for follow-up to the 114th Session concerning the Council of Europe's contribution to international action against terrorism.

13 On 11 June 2004, the Committee of Ministers adopted revised specific terms of reference for the CODEXTER, pursuant to which the CODEXTER was instructed, *inter alia*, to "elaborate proposals for one or more instruments (which could be legally binding or not) with specific scope dealing with existing lacunae in international law or action on the fight against terrorism, such as those identified by the CODEXTER in its second meeting report."

14 The CODEXTER held a further six meetings, from July 2004 to February 2005 (its third to eighth meetings), concerning the preparation of a draft Convention on the prevention of terrorism. It was chaired by Ms Gertraude Kabelka (Austria), with Mr Zdzislaw Galicki (Poland) and Mr Martin Sørby (Norway) as vice-chairs.

15 From the outset, the CODEXTER agreed on the need to strengthen legal action against terrorism while ensuring respect for human rights and fundamental values, and on the necessity of including provisions on appropriate safeguards and conditions securing these aims.

16 Two of the Council of Europe texts adopted after the setting up of the GMT were particularly significant for the work of the CODEXTER, namely: the above-mentioned Recommendation 1550 (2002) and the Guidelines on Human Rights and the Fight against Terrorism, adopted by the Committee of Ministers on 11 July 2002.

17 It should be recalled that at its first meeting in October 2003, the CODEXTER had decided to set up the working group CODEXTER-Apologie to analyse the conclusions of an independent expert report on "*apologie du terrorisme*" and "incitement to terrorism" as criminal offences in the national legislation of member and observer States of the Council of Europe, which was prepared on the basis of relevant legislation and case-law in member and observer States, and the case-law of the European Court of Human Rights. From the survey on the situation in member States it appeared that a majority of them did not have a specific offence regarding "*apologie du terrorisme*". The working group was instructed to present proposals for follow-up, particularly in the context of the ongoing discussions relating to the preparation of new international instruments on terrorism.

18 The CODEXTER-Apologie, which was chaired by Mr David Touvet (France), reached a series of conclusions which the CODEXTER endorsed at its second meeting in March/April 2004, recognising the existence, at this stage, of lacunae in international law as far as the handling of "*apologie du terrorisme*" and/or "incitement to terrorism" was concerned. It further agreed to include this issue in the framework of its reflection on the possible elaboration of international instruments.

19 At the third meeting of the CODEXTER, the working group CODEXTER-Apologie produced preliminary draft provisions for a possible instrument on public provocation to commit acts of terrorism. These draft provisions, along with further substantial input from a number of delegations, were subsequently used by the Bureau of the CODEXTER in the elaboration of the draft instrument on the prevention of terrorism presented at the fourth meeting of the CODEXTER.

20 The CODEXTER adopted the draft Convention on first reading at its sixth meeting in December 2004 and then submitted it to the Committee of Ministers which authorised consultation of the Parliamentary Assembly and of the Commissioner for Human Rights of the Council of Europe.

21 At its seventh meeting, early in February 2005, the CODEXTER revised the draft in the light of the above-mentioned opinions and adopted the text on second reading, notwithstanding some issues which required further consideration. At this meeting, the CODEXTER also decided to make the drafts public and to invite interested organisations to submit comments.

22 At its eighth meeting at the end of February 2005, the CODEXTER finalised the draft Convention and approved the present explanatory report. The CODEXTER submitted both texts to the Committee of Ministers, asking it to adopt the Convention and open it for signature, and to authorise the publication of the explanatory report.

23 At the 925th meeting of the Ministers' Deputies on 3 May 2005, the Committee of Ministers adopted the Convention and decided to open it for signature by the member States of the Council of Europe, the European Community and non-member States that had participated in its elaboration on the occasion of the 3rd Summit of Heads of State and Government of the Council of Europe.

General considerations

24 The purpose of the Convention is to enhance the efforts of Parties in preventing terrorism and its negative effects on the full enjoyment of human rights and in particular the right to life, both by measures to be taken at national level and through international co-operation, with due regard to the existing applicable multilateral or bilateral treaties or arrangements between the Parties, as explicitly stated in Article 2.

25 The title of the Convention does not presuppose that the Convention is exhaustive in providing for all the means that may contribute to the prevention of terrorism. Clearly, it only provides some means and concentrates on policy and legal measures. In this respect, the present Convention joins other international standards in the overall objective of preventing and fighting terrorism.

26 The Convention purports to achieve this objective, on the one hand, by establishing as criminal offences certain acts that may lead to the commission of terrorist offences, namely: public provocation, recruitment and training and, on the other hand, by reinforcing co-operation on prevention both internally, in the context of the definition of national prevention policies, and internationally through a number of measures, *inter alia*, by means of supplementing and, where necessary, modifying existing extradition and mutual assistance arrangements concluded between Parties and providing for additional means, such as spontaneous information, together with obligations relating to law enforcement, such as the duty to investigate, obligations relating to sanctions and measures, the liability of legal entities in addition to that of individuals, and the obligation to prosecute where extradition is refused.

27 It was felt that the climate of mutual confidence among likeminded States, namely the member and observer States of the Council of Europe, based on their democratic nature and their respect for human rights, safeguarded by the institutions set up under the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (hereafter "ECHR") and other applicable international instruments, justified moving forward with the criminalisation of certain kinds of behaviour which until now had not been dealt with at international level, supplemented by provisions to strengthen international judicial co-operation.

28 The Committee carefully considered the possibility of including an explicit article on declarations and reservations regarding specific provisions in the Convention. Some countries made proposals related to problems where they saw a need for declarations and reservations concerning the application of the International Convention for the Suppression of the Financing of Terrorism to the criminalisation provisions of the Convention; the criminalisation requirements set out in Articles 5 and 9 and problems connected with Article 14, paragraph 1.c. The Committee concluded that it was better to leave those issues to be resolved in accordance with international law, in particular the regime set out in the Vienna Convention on the Law of Treaties.

29 The Convention, starting with the Preamble, contains several provisions concerning the protection of human rights and fundamental freedoms, both in respect of internal and international co-operation on the one hand and as an integral part of the new criminalisation provisions (in the form of conditions and safeguards) on the other hand, not overlooking, in the given context, the situation of victims (see paragraph 31 *infra*).

30 This is a crucial aspect of the Convention, given that it deals with issues which are on the border between the legitimate exercise of freedoms, such as freedom of expression, association or religion, and criminal behaviour.

31 It also contains a provision regarding the protection and compensation of victims of terrorism and a provision emphasising that the human rights that must be respected are not only the rights of those accused or convicted of terrorist offences, but also the rights of the victims, or potential victims, of those offences (see Article 17 of the ECHR).

32 The Convention does not define new terrorist offences in addition to those included in the existing conventions against terrorism. In this respect, it refers to the treaties listed in the Appendix. However, it creates three new offences which may lead to the terrorist offences as defined in those treaties.

33 These new offences are: public provocation to commit a terrorist offence (Article 5), recruitment for terrorism (Article 6) and training for terrorism (Article 7). They are coupled with a provision on accessory (ancillary) offences (Article 9) providing for the criminalisation of complicity (such as aiding and abetting) in the commission of all of the three aforementioned offences and, in addition, of attempts to commit an offence under Articles 6 and 7 (recruitment and training).

34 One of the characteristics of the new crimes introduced by the Convention is that they do not require that a terrorist offence, within the meaning of Article 1, that is: any of the offences within the scope of and as defined in one of the international treaties against terrorism listed in the Appendix, actually be committed. This is explicitly stated by the Convention in Article 8 based on an equivalent provision in the International Convention for the Suppression of the Financing of Terrorism. Consequently, the place where such an offence would be committed is also irrelevant for the purposes of establishing the commission of any of the offences set forth in Articles 5 to 7 and 9.

35 In addition, these offences must be committed unlawfully and intentionally, as is explicitly stated for each and every one of them.

36 Concerning international co-operation, the Convention builds on the latest trends reflected by treaties such as the Protocol amending the European Convention on the Suppression of Terrorism, the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (ETS No. 182) and the United Nations Convention against Transnational Organized Crime.

37 Where extradition and mutual assistance are concerned, it modifies the agreements concluded between member States of the Council of Europe, including the European Convention on Extradition of 13 December 1957 (ETS No. 24) and its additional protocols of 15 October 1975 and 17 March 1978 (ETS Nos. 86 and 98), the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959 (ETS No. 30) and its additional protocols of 17 March 1978 and 8 November 2001 (ETS Nos. 99 and 182) and the European Convention on the Suppression of Terrorism (ETS No. 90) and its amending Protocol, in particular by making the offences set forth in the Convention extraditable, and imposing an obligation to provide mutual legal assistance with respect to them.

38 At the same time, in Article 21 safeguards are provided with respect to extradition and mutual legal assistance that make clear that this Convention does not derogate from important traditional grounds for refusal of co-operation under applicable treaties and laws; for example, refusal of extradition where the person will be subjected to torture or to inhuman or degrading treatment or punishment, or to the death penalty, or refusal of either extradition or mutual legal assistance where the person will be prosecuted for political or other impermissible purposes. Where the person is not extradited for these or other reasons, the Party in which he or she is found has the obligation to submit the case for domestic prosecution pursuant to Article 18.

39 The obligations which Parties undertake by adhering to the Convention are closely linked with the special climate of mutual confidence among likeminded States, which is based on their collective recognition of the rule of law and the protection of human rights. For that reason, in spite of the fact that terrorism is a global problem, it was thought necessary to restrict the circle of Parties to the member and observer States of the Council of Europe and to the European Community, although the Committee of Ministers may invite other States to become Parties to the Convention.

40 It goes without saying that the Convention does not affect the other rights, obligations and responsibilities of Parties and individuals in accordance with other international undertakings to which the Parties to the Convention are Parties.

Specific commentaries on the Articles of the Convention

Preamble

41 At the outset, it should be recalled that the preambular paragraphs are not part of the operative provisions of the Convention and therefore by their nature, do not bestow rights or impose obligations on Parties. However, the preambular paragraphs are intended to set a general framework and facilitate the understanding of the operative provisions of the Convention.

42 Against the background of the *grave concern caused by the increase in terrorist offences and the growing terrorist threat and aware of the precarious situation faced by those who suffer from terrorism*, the preamble states the objective pursued by the Parties which is to *take effective measures to prevent terrorism and to counter, in particular, public provocation to commit terrorist offences and recruitment and training for terrorism*.

43 The preamble further excludes any justification of terrorist offences and the offences set forth in the Convention, while also recalling that all measures taken in the fight against terrorism must respect the rule of law and democratic values, human rights and fundamental freedoms as well as other provisions of international law, including, where applicable, international humanitarian law.

44 The preamble recognises that the Convention is not intended to affect established principles relating to freedom of expression and freedom of association.

45 The eighth preambular paragraph is rather intended to cover established legal principles relating to freedom of expression and freedom of association as expressed in international and/or national law.

46 Finally, this provision recalls that terrorist offences are characterised by so-called terrorist motivation, stating that acts of terrorism "have the purpose by their nature or context to seriously intimidate a population or unduly compel a government or an international organisation to perform or abstain from performing any act or seriously destabilise or destroy the fundamental political, constitutional, economic or social structures of a country or an international organisation." Terrorist motivation is not a substantial element in addition to the requirements laid down in the operative part for the offences set forth in this Convention.

Article 1 – Terminology

47 This article provides that for the purposes of the Convention, the term "terrorist offence" is taken to mean any of the offences within the scope of and as defined in one of the treaties listed in the Appendix.

48 When the CODEXTER considered this article, it bore in mind Parliamentary Assembly Recommendation 1550 (2002) which requested that the Council of Europe consider using the definition of terrorism adopted by the European Union in the European Council Common Position of 27 December 2001 on the application of specific measures to combat terrorism (2001/931/CFSP) [(1)]. The CODEXTER decided not to do so, given that the European Union definition had been agreed upon "for the purpose of the Common Position" and because it had not received the mandate to draft a comprehensive convention on terrorism but rather a limited scope specific instrument for the prevention of terrorism.

49 In paragraph 1, the offences are defined by reference to the treaties in the Appendix. The reference to the offences "within the scope and as defined" in the conventions listed in the Appendix indicates that, in addition to the definitions of crimes, there may be other provisions in these conventions that affect their scope of application. This reference covers both principal and ancillary offences. Nevertheless, when establishing the offences in their national law, Parties should bear in mind the purpose of the Convention and the principle of proportionality as set forth in Article 2 and Article 12, paragraph 2 respectively. The purpose of the Convention is to prevent terrorism and its negative effects on the full enjoyment of human rights and in particular the right to life. To this end, it obliges Parties to criminalise conduct that has the potential to lead to terrorist offences, but it does not aim at, and create a legal basis for, the criminalisation of conduct which has only a theoretical connection to such offences. Thus, the Convention does not address hypothetical chains of events, such as "provoking an attempt to finance a threat".

50 It should be recalled that the Appendix contains the same list of treaties as in Article 1, paragraph 1 of the European Convention on the Suppression of Terrorism as revised by its amending Protocol.

51 Paragraph 2 is based on similar provisions in other international treaties against terrorism, including the International Convention for the Suppression of the Financing of Terrorism (Article 2, paragraph 2).

52 Its purpose is to deal with the situation where a Party to the present Convention is not a party to a treaty listed in the Appendix, taking into account the consequences that this could cause for the Party concerned in terms of the treaty obligations incumbent upon it.

53 Parties are therefore given the possibility to exclude from the Appendix any of the treaties to which they are not a party. This would be done by means of a declaration at the time of expressing the consent to be bound by the Convention. Such a declaration would cease to have effect once the treaty in question entered into force for the declaring Party. The latter is required to inform the Secretary General of the Council of Europe, as depository of the Convention, of this fact.

(1) In the European Union context, this definition was subsequently agreed upon for the purpose of the approximation of the legislation of the European Union member states in the Framework Decision of the Council of 13 June 2002 (2002/475/JAI, JO L 164 of 13.6.2002, p. 3)..

Article 2 – Purpose

54 This article states explicitly the purpose of the Convention which is to enhance the efforts of Parties in preventing terrorism and dealing with its effects, both by measures to be taken at national level and through international co-operation, with due regard to the existing applicable multilateral or bilateral treaties or arrangements between the Parties.

55 Reference is made to the negative effects of terrorism on human rights, the right to life being expressly stressed for the reason that terrorist acts mostly result in the loss of human life.

Article 3 – National prevention policies

56 This article is closely connected with Article 12 in so far as they both draw on the same reference texts. However, there are clear differences between the two Articles. While the former deals with prevention policies, the latter comprises safeguards pertaining to the criminalisation obligations established in Articles 5 to 7 and 9.

57 The article is also connected with Article 4. While Article 3 aims at improving co-operation at domestic level, Article 4 is designed to foster co-operation at international level.

58 Article 3 refers to national prevention policies and particularly includes four aspects connected with the prevention of terrorism: a. training, education, culture, information, media and public awareness (paragraph 1); b. co-operation between public authorities (paragraph 2); c. promotion of tolerance (paragraph 3); and d. co-operation of the citizens with the public authorities (paragraph 4). The entire Article is worded in such a way as to make sure that it must not be understood as providing an exhaustive list of possible and appropriate measures.

59 Paragraph 1 requires Parties to take appropriate measures (in particular in the fields of law enforcement training, information and media, public education and awareness raising) for the purposes of preventing the commission of terrorist offences.

60 Reference to training is made in this paragraph because it covers a wider field than the domestic co-operation provided for in paragraph 2.

61 The term "other bodies" is taken to mean bodies other than law-enforcement or judicial authorities at various levels (central, regional, local), civil protection, etc.

62 Each Party is to determine the extent and manner of implementation, in a manner consistent with its system of government, and its laws and procedures applicable to these fields.

63 In carrying out prevention measures, Parties are to ensure respect for human rights, and a number of international human rights instruments that provide relevant human rights standards are listed.

64 The term "where applicable" is intended to exclude the application of those treaties to which a Party to this Convention is not a Party. This is due to the fact that the Convention is open to non-member States of the Council of Europe which therefore would not be Parties to the ECHR.

65 Thus, such non-member States of the Council of Europe which become Parties to this Convention would be required to implement this paragraph pursuant to obligations they have undertaken with respect to the 1966 International Covenant on Civil and Political Rights (ICCPR), other applicable human rights instruments to which they are party, customary law, and their respective domestic laws.

66 Paragraph 2 focuses on specific measures that Parties are called upon to take for the purposes of enhancing co-operation between public authorities as a means of better preventing terrorist offences and their effects. A number of concrete examples of such measures are given to illustrate the point, some concern prevention as such, for instance through better protection of persons and/or facilities, others the readiness to deal with the effects of terrorist attacks by focusing on the civil emergencies they generate and the challenges they pose.

67 Paragraph 3 calls upon Parties to encourage inter-religious and cross-cultural dialogue with a view to reducing tensions and, in this manner, helping to prevent terrorist offences.

68 Here again, considerable flexibility is left to Parties to determine the precise extent and manner in which they implement this paragraph, in order to ensure consistency with their systems of government, including their laws and procedures applicable in the given context.

69 The term "tensions" is used broadly and covers any factor contributing to the rise of terrorism. Thus, these tensions may be of an ethnic, religious or other nature. They may also include situations of injustice for a variety of reasons.

70 As has been stated above, paragraph 4 deals with co-operation between citizens and public authorities for the purposes of the prevention of terrorism.

71 It starts by calling upon Parties to promote public awareness about the terrorist threat. The notion of public awareness is also included in paragraph 1 of this article, but contrary to that paragraph, where it is used in general terms, in this paragraph it is used specifically in relation to citizens.

72 This provision then goes on to invite the Parties to consider encouraging the public to provide specific, factual help to public authorities with a view to preventing the commission of the offences set forth in the Convention.

73 The wording of this paragraph is based on the United Nations Convention against Transnational Organized Crime, adopted in Palermo on 15 December 2000 (Article 31, paragraph 5) and on Resolution A/RES/55/25 adopted by the United Nations General Assembly on 15 November 2000 which, in its operative paragraph 6, calls upon all States to recognise the links between transnational organised criminal activities and terrorist offences, taking into account the relevant General Assembly resolutions, and to apply the United Nations Convention against Transnational Organized Crime in combating all forms of criminal activity, as provided therein.

Article 4 – International co-operation on prevention

74 This article deals with international co-operation and aims at enhancing the capacity of Parties to prevent terrorism. It calls upon Parties to assist and support each other in this respect and provides a series of possible means to this end, including exchanges of information and best practice, training and joint efforts, such as joint teams for analysis and investigation.

75 This provision is to be implemented subject to the capabilities of Parties and where deemed by them to be appropriate.

Articles 5 to 7 – criminalisation provisions – common aspects

76 Articles 5 to 7 provide the core provisions of the Convention, which require Parties to establish criminal offences concerning "*public provocation to commit terrorist offences*" (Article 5), "*recruitment for terrorism*" (Article 6) and "*training for terrorism*" (Article 7), coupled with a series of accessory crimes (Article 9).

77 These offences should not be considered as terrorist offences in the sense of Article 1, that is the offences established by the international conventions included in the Appendix.

78 They are criminal offences of a serious nature related to terrorist offences as they have the potential to lead to the commission of the offences established by the above-mentioned international conventions. However, they do not require that a terrorist offence be committed. The absence of such a requirement is affirmed by Article 8.

79 By the same token, the place where the terrorist offence might be committed is irrelevant for the purposes of the application of this Convention.

80 The offences set forth in Articles 5 to 7 have several elements in common: they must be committed unlawfully and intentionally.

81 The requirement of unlawfulness reflects the insight that the conduct described may be legal or justified not only in cases where classical legal defences are applicable but also where other principles or interests lead to the exclusion of criminal liability, for example for law enforcement purposes.

82 The expression "unlawfully" derives its meaning from the context in which it is used. Thus, without restricting how Parties may implement the concept in their domestic law, it may refer to conduct undertaken without authority (whether legislative, executive, administrative, judicial, contractual or consensual) or conduct that is otherwise not covered by established legal defences or relevant principles under domestic law.

83 The Convention, therefore, leaves unaffected conduct undertaken pursuant to lawful government authority.

84 Furthermore, the offences must be committed "intentionally" for criminal liability to apply. In certain cases an additional specific intentional element forms part of the offence.

85 The drafters of the Convention agreed that the exact meaning of "intentionally" should be left to interpretation under national law.

Article 5 – Public provocation to commit a terrorist offence

86 This article resulted from thorough discussions and deep considerations, first by a working party of the CODEXTER, the CODEXTER-Apologie, which was called upon to carry out a survey of the situation in member and observer States and to consider an independent expert report prepared on this basis.

87 The CODEXTER-Apologie concluded in favour of focusing on public expressions of support for terrorist offences and/or groups; causality links – direct or indirect – with the perpetration of a terrorist offence; and temporal connections – *ex ante* or *ex post* – with the perpetration of a terrorist offence.

88 The Committee therefore focused on the recruitment of terrorists and the creation of new terrorist groups; the instigation of ethnic and religious tensions which can provide a basis for terrorism; the dissemination of "hate speech" and the promotion of ideologies favourable to terrorism, while paying particular attention to the case-law of the European Court of Human Rights concerning the application of Article 10, paragraph 2 of the ECHR, and to the experience of States in the implementation of their national provisions on "*apologie du terrorisme*" and/or "incitement to terrorism" in order to carefully analyse the potential risk of a restriction of fundamental freedoms.

89 Freedom of expression is one of the essential foundations of a democratic society and applies, according to the case-law of the European Court of Human Rights (see, for example, the *Lingens v. Austria* judgment of 8 July 1986, HUDOC REF 000000108), not only to ideas and information that are favourably received or regarded as inoffensive but also to those that "offend, shock or disturb".

90 However, in contrast to certain fundamental rights which are absolute rights and therefore admit no restrictions, such as the prohibition of torture and inhuman and degrading treatment or punishment (Article 3 of the ECHR), interference with, or restrictions on freedom of expression may be allowed in highly specific circumstances. Article 10, paragraph 2 of the ECHR lays down the conditions under which restrictions on, or interference with, the exercise of freedom of expression are admissible under the ECHR, while Article 15 of the ECHR provides for possible derogations in time of emergency.

91 Thus, for instance, incitement to racial hatred cannot be considered admissible on the grounds of the right to freedom of expression (see Article 9, paragraph 2 of the Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965). The same goes for incitement to violent terrorist offences, and the Court has already held that certain restrictions on messages that might constitute an indirect incitement to violent terrorist offences are in keeping with the ECHR (see *Hogefeld v. Germany*, 20 January 2000, HUDOC REF 00005340).

92 The question is where the boundary lies between indirect incitement to commit terrorist offences and the legitimate voicing of criticism, and this is the question that the CODEXTER addressed.

93 The current provision is construed on the basis of the Additional Protocol to the Cybercrime Convention concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems (ETS No. 189, Article 3).

94 In the present Convention, Article 5, paragraph 1 defines public provocation to commit a terrorist offence as "the distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of a terrorist offence, where such conduct, whether or not directly advocating terrorist offences, causes a danger that one or more such offences may be committed."

95 When drafting this provision, the CODEXTER bore in mind the opinions of the Parliamentary Assembly (Opinion No. 255 (2005), paragraph 3.vii and following), and of the Commissioner for Human Rights of the Council of Europe (document BcommDH (2005) 1, paragraph 30 *in fine*) which suggested that such a provision could cover "the dissemination of messages praising the perpetrator of an attack, the denigration of victims, calls for funding for terrorist organisations or other similar behaviour" which could constitute indirect provocation to terrorist violence.

96 This provision uses a generic formula as opposed to a more *casuistic*one and requires Parties to criminalise the distributing or otherwise making available of a message to the public advocating terrorist offences. Whether this is done directly or indirectly is irrelevant for the application of this provision.

97 Direct provocation does not raise any particular problems in so far as it is already a criminal offence, in one form or another, in most legal systems. The aim of making indirect provocation a criminal offence is to remedy the existing lacunae in international law or action by adding provisions in this area.

98 The provision allows Parties a certain amount of discretion with respect to the definition of the offence and its implementation. For instance, presenting a terrorist offence as necessary and justified may constitute the offence of indirect incitement.

99 However, its application requires that two conditions be met: first, there has to be a specific intent to incite the commission of a terrorist offence, which is supplemented with the requirements in paragraph 2 (see below) that provocation be committed unlawfully and intentionally.

100 Second, the result of such an act must be to cause a danger that such an offence might be committed. When considering whether such danger is caused, the nature of the author and of the addressee of the message, as well as the context in which the offence is committed shall be taken into account in the sense established by the case-law of the European Court of Human Rights. The significance and the credible nature of the danger should be considered when applying this provision in accordance with the requirements of domestic law.

101 As far as provocation of the offences set forth in the International Convention for the Suppression of the Financing of Terrorism is concerned, it should be stressed that such offences may play an important role in the chain of events that leads to the commission of violent terrorist offences. While the prospect of violent crime in such cases is fairly remote from the act of provocation, it is what ultimately justifies the criminalisation of public provocation to commit the offence of terrorist financing.

102 The term "distribution" refers to the active dissemination of a message advocating terrorism, while the expression "making available" refers to providing that message in a way that is easily accessible to the public, for instance, by placing it on the Internet or by creating or compiling hyperlinks in order to facilitate access to it.

103 The term "to the public" makes it clear that private communications fall outside the scope of this provision.

104 In order to make a message available to the public, a variety of means and techniques may be used. For instance, printed publications or speeches delivered at places accessible to others, the use of mass media or electronic facilities, in particular the Internet, which provides for the dissemination of messages by e-mail or for possibilities such as the exchange of materials in chat rooms, newsgroups or discussion fora.

105 Further guidance is provided by the case-law of the European Court of Human Rights. In this connection, reference should be made to the Collection of relevant case law of the European Court of Human Rights prepared for the CODEXTER (document CODEXTER (2004)19).

Article 6 – Recruitment for terrorism

106 This article requires Parties to criminalise the recruitment of possible future terrorists, understood as solicitation to carry out terrorist offences whether individually or collectively, whether directly committing, participating in or contributing to the commission of such offences.

107 For the purposes of paragraph 1, a Party may choose to interpret the terms "association or group" to mean "proscribed" organisations or groups in accordance with its national law and Parties can so declare in accordance with the general principles of international law.

108 Solicitation can take place by various means, for instance, via the Internet or directly by addressing a person.

109 For the completion of the act, it is not necessary that the addressee actually participate in the commission of a terrorist offence or that he or she join a group for that purpose. Nevertheless, for the crime to be completed, it is necessary that the recruiter successfully approach the addressee.

110 If the execution of the crime is commenced but not completed (for example, the person is not persuaded to be recruited, or the recruiter is apprehended by law enforcement authorities before successfully recruiting the person), the conduct is still punishable as an attempt to recruit under Article 9, paragraph 2.

111 A Party is free to use the term "solicit" in its domestic implementing laws or different terminology for purposes of clarity under its national legal system.

112 What is important is that implementation of Article 6 and Article 9, paragraph 2 together results in the criminalisation of the completed, as well as commenced but not completed, recruitment conduct described above, and as has already been said, the solicitation effectively takes place regardless of whether the addressees of the solicitation actually participate in the commission of a terrorist offence or join an association or group for that purpose.

113 Paragraph 1 requires that the recruiter intends that the person or persons he or she recruits commit or contribute to the commission of a terrorist offence or join an association or group for that purpose.

Article 7 – Training for terrorism

114 The CODEXTER considered that this provision was closely connected with the provision of the International Convention for the Suppression of the Financing of Terrorism, listed in the Appendix to the Convention. While the latter criminalises the provision of financial resources to terrorists or for terrorist purposes, this provision criminalises the provision of know-how.

115 Thus, this article requires Parties to criminalise the supplying of know-how for the purpose of carrying out or contributing to the commission of a terrorist offence. This is defined as providing instruction in methods or techniques that are suitable for use for terrorist purposes, including in the making or use of explosives, firearms and noxious or hazardous substances.

116 This provision does not criminalise the fact of receiving such know-how or the trainee.

117 The Convention does not contain a definition of weapons, firearms and explosives, or noxious or hazardous substances, which are generic terms. They are characterised by existing international treaties and national legislation.

118 Thus, the term "explosive" could be defined according to the International Convention for the Suppression of Terrorist Bombings, Article 1, paragraph 3.a as "*an explosive or incendiary weapon or device that is designed, or has the capability, to cause death, serious bodily injury or substantial material damage*."

119 The term "firearm" could be understood within the meaning of Appendix I to the European Convention on the Control of the Acquisition and Possession of Firearms by Individuals (ETS No. 101).

120 The term "other weapons" could be understood in the sense of "lethal weapon" as defined by the International Convention for the Suppression of Terrorist Bombings, Article 1, paragraph 3.b which characterises it as "*a weapon or device that is designed, or has the capability, to cause death, serious bodily injury or substantial material damage through the release, dissemination or impact of toxic chemicals, biological agents or toxins or similar substances or radiation or radioactive material*."

121 As concerns the term "noxious or hazardous substances", more specific references can be found, for instance, in the International Maritime Organisation (IMO) Protocol on Preparedness, Response and Co-operation to Pollution Incidents by Hazardous and Noxious Substances, 2000 (HNS Protocol, Article 1, paragraph 5) which defines them by reference to lists of substances included in various IMO conventions and codes. These include oils; other liquid substances defined as noxious or dangerous; liquefied gases; liquid substances with a flashpoint not exceeding 60°C; dangerous, hazardous and harmful materials and substances carried in packaged form; and solid bulk materials defined as possessing chemical hazards.

122 For such conduct to be criminally liable, it is necessary that the trainer know that the skills provided are intended to be used for the commission of or the contribution to commit a terrorist offence. This requirement of knowledge is complemented with the two additional requirements of unlawfulness and intention stated in paragraph 2, as explained above in the paragraphs relating to the common aspects of Articles 5 to 7 (see paragraphs 76 to 85).

Article 8 – Irrelevance of the commission of a terrorist offence

123 When deciding on the title of this article, the Committee based itself on the French version of the text, namely: "*Indifférence du résultat*". Both language versions convey the same message, that is: for an act to constitute an offence as set forth in Articles 5 to 7 of this Convention, it shall not be necessary that a terrorist offence be actually committed. The same holds true for the accessory crimes set forth in Article 9.

124 This article is based on an equivalent provision in Article 2, paragraph 3 of the International Convention for the Suppression of the Financing of Terrorism.

125 It should be recalled that the negotiators had a number of common understandings flowing from the obligation set forth in Articles 5 to 7 to punish public provocation, recruitment and training, even where no terrorist offence is ultimately committed.

126 For instance, it was understood that since no terrorist offence need be carried out at all for the conduct in Articles 5 to 7 to be punishable, it is consequently not necessary that the provocation, recruitment or training be aimed at the commission of a terrorist offence in the territory of the Party concerned.

127 Rather, each Party has the obligation to punish the crimes set forth in Articles 5 to 7 and 9, irrespective of whether it may have been envisaged that the ultimate terrorist offence would be committed in that Party or elsewhere.

Article 9 – Ancillary offences

128 This article is based on similar provisions in existing international conventions against terrorism, including, most recently, the International Convention for the Suppression of Terrorist Bombings (Article 2, paragraphs 2 and 3) and the International Convention for the Suppression of the Financing of Terrorism (Article 2, paragraphs 4 and 5).

129 Its purpose is to establish additional offences related to attempts at or complicity in the commission of the offences defined in this Convention.

130 As with all the offences established in the Convention, attempt and participation as an accomplice must be committed intentionally. The term "participation as accomplice" comprises the concept of "aiding and abetting".

131 While paragraph 1 refers to the accessory crimes in relation to the offences established in Articles 5 to 7, paragraph 2 limits the criminalisation of attempt to the offences established in Articles 6 to 7, and excludes it in relation to public provocation to commit terrorist offences.

132 Paragraph 1 requires Parties to establish as a criminal offence the participation as an accomplice in the commission of any of the offences under Articles 5 to 7. Liability for such complicity arises where the person who commits a crime established in the Convention is aided by another person who also intends that the crime be committed. For example, although public provocation to commit a terrorist offence through the Internet requires the assistance of service providers as a conduit, a service provider that does not have criminal intent cannot incur liability under this provision.

133 With respect to paragraph 2 on attempt, the offence covered by Article 5 or elements thereof were considered to be conceptually difficult to attempt. Moreover, unlike in paragraph 1, the offence must be established not only under but also in accordance with national law. In so far as the mental elements required for attempt are furnished by domestic law, the notion of attempt may differ from country to country.

Article 10 – Liability of legal entities

134 This article deals with the liability of legal entities or persons and is based on a similar provision of the United Nations Transnational Organized Crime Convention (Article 10), although it uses the term "entity" instead of "persons" as it was considered to have a wider scope.

135 It is consistent with the current legal trend to recognise the liability of legal entities. It is intended to impose liability on corporations, associations and similar legal persons for the criminal actions undertaken for the benefit of that legal person.

136 Under paragraph 1, Parties are required to establish the liability of legal entities in accordance with their legal principles.

137 Liability under this article may be criminal, civil or administrative. Each Party has the flexibility to choose to provide for any or all of these forms of liability, in accordance with the legal principles of each Party, as long as it meets the criteria of Article 11, paragraph 3, that the sanction, whether criminal or not, should be "effective, proportionate and dissuasive" and should include monetary sanctions.

138 Paragraph 3 clarifies that corporate liability does not exclude individual liability.

Article 11 – Sanctions and measures

139 This article deals with the punishment of the offences set forth in the Convention and is consistent with the general trend in international criminal law. Thus, similar provisions are to be found, for instance, in the United Nations Convention against Corruption (Article 26), the United Nations Convention against Transnational Organized Crime, (Article 10) and the International Convention for the Suppression of the Financing of Terrorism (Articles 4, paragraph 2 and 5, paragraph 3).

140 Paragraph 1 requires that the penalties be effective, proportionate and dissuasive. While paragraph 2 invites Parties to consider previous convictions in other States for the purposes of determining the sentence and, where this is possible according to domestic law, of determining recidivism.

141 Paragraph 3 relates to Article 10 more specifically as it deals with the sanctions to be imposed upon legal entities whose liability is established in accordance with Article 10 and shall also be subject to sanctions that are effective, proportionate and dissuasive. Such sanctions can be of a criminal or non criminal nature, that is: administrative or civil. Parties are compelled, under this paragraph, to provide for the possibility of imposing monetary sanctions on legal persons.

142 This article leaves open the possibility of other sanctions or measures reflecting the seriousness of the offence, for example, measures could include an injunction or forfeiture. It leaves Parties the discretionary power to create a system of criminal offences and sanctions that is compatible with their existing national legal systems.

Article 12 – Conditions and safeguards

143 This is one of the key provisions of the Convention by which the negotiators purport to enhance the efficiency of the fight against terrorism while ensuring the protection of human rights and fundamental freedoms.

144 The formulation of this article is similar to that of Article 3 in relation to the human rights obligations and standards that are referred to therein.

145 This article requires Parties to ensure respect for human rights in establishing and applying the offences set forth in Articles 5 to 7 and 9.

146 A number of international human rights instruments are listed that provide relevant human rights standards to which Parties to the Convention must adhere as they represent obligations arising from international law. The list is not exhaustive.

147 These instruments include the ECHR and its additional Protocols Nos. 1, 4, 6, 7, 12 and 13 (ETS Nos. 005, 009, 046, 114, 117, 177 and 187), in respect of European States that are Parties to them.

148 They also include other applicable human rights instruments in respect of States in other regions of the world (for example, the 1969 American Convention on Human Rights and the 1981 African Charter on Human Rights and Peoples' Rights) which are Parties to these instruments, as well as the ICCPR and other universal human rights instruments. In addition, similar protection is provided under the laws of most States.

149 As in Article 3, the term "where applicable" is used here to indicate that, because the Convention is open to non-member States of the Council of Europe, the human rights framework in the ECHR would not be applicable to non-member States which are Parties to the present Convention. Rather, non-member States of the Council of Europe will implement this paragraph pursuant to obligations they have undertaken with respect to the ICCPR, other applicable human rights instruments to which they are party, customary law, and their respective domestic laws.

150 An additional safeguard is provided by paragraph 2 which requires that the establishment, implementation and application of the criminalisation under Articles 5 to 7 and 9 "be subject to the principle of proportionality, with respect to the legitimate aims pursued and to their necessity in a democratic society" while excluding "any form of arbitrariness or discriminatory or racist treatment".

151 The principle of proportionality shall be implemented by each Party in accordance with the relevant principles of its domestic law. For European countries, this will be derived from the principles of the ECHR, its applicable case-law, and national legislation and case-law. This principle requires that the power or procedure shall be proportional to the nature and circumstances of the offence.

152 For non-member States, the principle of proportionality is applied through constitutional or other domestic legal norms applied for the purposes of fixing an appropriate range of potential punishments in light of the conduct aimed at, and of imposing an appropriate sentence in an individual criminal prosecution. The exclusion of arbitrary, discriminatory or racist treatment is similarly to be carried out through the application of relevant constitutional or other domestic legal norms.

Article 13 – Protection, compensation and support of victims of terrorism

153 This article is consistent with recent developments in international law and the growing concern for the victims of terrorism as reflected, for instance, in the European Convention on Compensation of Victims of Violent Crimes (ETS No. 116, Article 2), the Council of Europe Guidelines on Human Rights and the Fight against Terrorism (Guideline No. XVII) and the additional Guidelines on the protection of victims of terrorism (principle No. 1) at regional level, or at universal level in United Nations Security Council resolutions, including Resolution 1566 (2004) of 8 October 2004; and in the International Convention for the Suppression of the Financing of Terrorism (Article 8, paragraph 4).

154 Furthermore, this issue forms part of the Council of Europe's priority activities against terrorism, as requested by the 25th Conference of European Ministers of Justice in October 2003 (see Resolution No. 1 on combating terrorism). The CODEXTER therefore pursues work in this area with a view to promoting exchanges of information and best practice among member States.

155 More specifically, this provision requires Parties to adopt measures to protect and support the victims of terrorism that has been committed within their own territory. These measures which are subject to domestic legislation may include, for instance, financial assistance and compensation for victims of terrorism and their close family members, in the framework of national schemes.

156 The CODEXTER was also provided with the opinion of the Commissioner for Human Rights, who considered that the protection afforded to victims might also include many other aspects, such as emergency and long-term assistance, psychological support, effective access to the law and the courts (in particular access to criminal procedures), access to information and the protection of victims' private and family lives, dignity and security, particularly when they co-operate with the courts.

Article 14 – Jurisdiction

157 This article establishes a series of criteria under which Parties are obliged to establish jurisdiction over the offences set forth in the Convention and is based on similar provisions to be found in most international conventions against terrorism, as well as in the Cybercrime Convention (ETS No. 185).

158 Paragraph 1.a is based upon the principle of territoriality. Each Party is required to establish jurisdiction for the offences set forth in the Convention that are committed in its territory. This is notwithstanding what has been said in relation to Articles 5 to 7 regarding the irrelevance of the place where a terrorist offence, as defined in Article 1, may be committed as a result of the commission of any of the offences set forth in Articles 5 to 7 and 9.

159 Paragraph 1.b is based upon a variant of the principle of territoriality. It requires each Party to establish criminal jurisdiction over offences committed upon ships flying its flag or aircraft registered under its laws.

160 This obligation is already implemented as a general matter in the laws of many States, since such ships and aircraft are frequently considered to be an extension of the territory of the State. This type of jurisdiction is most useful where the ship or aircraft is not located in its territory at the time of the commission of the crime, as a result of which paragraph 1.a would not be available as a basis to assert jurisdiction. If the crime is committed on a ship or aircraft that is beyond the territory of the flag Party, there may be no other State that would be able to exercise jurisdiction. In addition, if a crime is committed aboard a ship or aircraft which is merely passing through the waters or airspace of another State, the latter State may face significant practical impediments to the exercise of its jurisdiction, and it is therefore useful for the State of registry to also have jurisdiction.

161 Paragraph 1.c is based upon the principle of nationality. The nationality theory is most frequently applied by States applying the civil law tradition. It provides that nationals of a State are obliged to comply with its domestic law even when they are outside its territory. Under this provision, if a national commits an offence abroad, the Party is obliged to have the ability to prosecute him or her if the act is also an offence under the law of the Party in which it was committed or the act has been committed outside the territorial jurisdiction of any Party.

162 Paragraph 2 provides a second set of criteria on the basis of which Parties have the possibility, at their discretion, of establishing their jurisdiction over the offences set forth in the Convention.

163 This provision incorporates the latest trends in international criminal law and is based on similar provisions in the International Convention for the Suppression of the Financing of Terrorism (Article 7, paragraph 2) and the International Convention for the Suppression of Terrorist Bombings (Article 6, paragraph 2).

164 Thus, paragraph 2.a covers cases where the offence is directed towards the commission of an offence *in the territory of or against a national of that Party*.

165 Paragraph 2.b covers the case of offences against the governmental premises of a Party abroad, including its embassies and consulates.

166 Paragraph 2.c covers cases where an offence is committed *to compel that Party to do or abstain from doing any act*.

167 Paragraph 2d. contains a traditional criterion for jurisdiction and covers cases where the offence is committed by a *stateless person who has his or her habitual residence in the territory of that Party*.

168 The criterion in paragraph 2.e is closely related to the one in paragraph 1.b with the specific feature that the aircraft on which the offence is committed must be operated by the Government of that Party.

169 Paragraph 3 establishes an additional criterion for jurisdiction which is of a mandatory nature and is related to cases falling under the principle of *aut dedere aut judicare* established in Article 18 by requiring a Party to establish its jurisdiction where the alleged offender is present in its territory and it does not extradite that person to any of the Parties whose jurisdiction is based on a rule of jurisdiction existing equally in the law of the requested Party.

170 Finally, it should be noted that the bases of jurisdiction set forth in paragraph 1 are not exclusive. Paragraph 4 permits Parties to establish, in conformity with their domestic law, other types of criminal jurisdiction as well.

171 Paragraph 5 covers conflicts of jurisdiction, where more than one Party claims jurisdiction over an alleged offence set forth in this Convention and invites the Parties involved to consult with a view to determining the most appropriate jurisdiction for prosecution.

172 It is based on an identical provision in the Cybercrime Convention (Article 22, paragraph 5) which is most relevant in this case. In the case of crimes committed by use of computer systems or through the Internet, for instance public provocation to commit a terrorist offence, there will be occasions in which more than one Party has jurisdiction over some or all of the participants in the crime.

173 Thus, in order to avoid duplication of effort, unnecessary inconvenience for witnesses, or competition among law enforcement officials of the Parties concerned, or to otherwise facilitate the efficiency and fairness of the proceedings, the affected Parties are to consult in order to determine the proper venue for prosecution. In some cases, it will be most effective

for the Parties concerned to choose a single venue for prosecution; in others, it may be best for one Party to prosecute some participants, while one or more other Parties pursue others. Either result is permitted under this paragraph. Finally, the obligation to consult is not absolute, but is to take place "where appropriate." Thus, for example, if one of the Parties knows that consultation is not necessary (for example, it has received confirmation that the other Party is not planning to take action), or if a Party is of the view that consultation may impair its investigation or proceedings, it may delay or decline consultation.

Article 15 – Duty to investigate

174 This article is based on similar provisions in most international treaties against terrorism, including the International Convention for the Suppression of the Financing of Terrorism (Article 9) and the International Convention for the Suppression of Terrorist Bombings (Article 7).

175 Paragraph 1 calls upon a Party to investigate the information provided to it that a person who has committed or who is alleged to have committed an offence set forth in this Convention may be present in its territory.

176 The term "information" in this paragraph is not to be understood necessarily as having the same meaning as the same term used in Article 22, paragraph 1, since the information may come from various sources.

177 It is up to national legislation to define the conditions that the information will have to satisfy in terms of reliability in the context of legal proceedings or for the purposes of law enforcement.

178 Once such conditions are met, by virtue of paragraph 2, the Party in whose territory the offender or alleged offender is present is called upon to take the appropriate measures under its domestic law so as to ensure that person's presence for the purposes of prosecution or extradition. In relation to such measures, paragraph 3 provides for a set of rights relating to the Vienna Convention on Consular Relations (see Article 36, paragraph 1) which are self-explanatory and shall be exercised in conformity with the laws of the Party unless they do not enable full effect to be given to the purposes for which the rights are intended (paragraph 4) and without prejudice to the right of any Party having a claim of jurisdiction in accordance with Article 14, paragraphs 1.c and 2.d to invite the International Committee of the Red Cross to communicate with and visit the alleged offender.

Article 16 – Non application of the Convention

179. This article provides for the non-application of the Convention in cases of a purely national nature, that is: where the offence is committed within a single State, the alleged offender is a national of that State and is present in the territory of that State, and no other State has jurisdiction.

180. It is based on a similar provision in the International Convention for the Suppression of the Financing of Terrorism (Article 3) and the International Convention for the Suppression of Terrorist Bombings (Article 3).

181. This provision does not modify the regime established by the Convention, particularly in so far as the establishment of criminal offences in pursuance of Articles 5 to 7 and 9 should comply with the conditions and safeguards provided for in Article 12.

182. Neither does it exclude or limit the possibility for Parties to criminalise the acts provided for in the Convention, even when the conditions of this article are met, that is when only "national" elements are present.

183 This provision has the primary effect of excluding the application of the provisions on extradition or mutual assistance and is closely connected with the provision on jurisdiction, Article 14. The application of this provision is complicated by the fact that some of the offences may be committed through the Internet.

Article 17 – International co-operation in criminal matters

184. This article deals with mutual assistance, within the meaning of the European Convention on Mutual Assistance in Criminal Matters and bilateral mutual assistance treaties in force between Parties, in criminal investigations and related proceedings concerning the offences set forth in the Convention.

185 Paragraph 1 is based on the International Convention for the Suppression of the Financing of Terrorism (Article 12, paragraph 1) and requires Parties to provide each other mutual assistance in the investigation of and in the legal proceedings relating to the offences set forth in the Convention.

186 Parties are called upon to implement the obligations arising from paragraph 1 in conformity with applicable treaties or arrangements on mutual legal assistance and, where such treaties or arrangements do not exist, in accordance with their domestic law (paragraph 2).

187 Paragraph 3 is based on the United Nations Convention against Transnational Organized Crime (Article 18, paragraph 2) and specifies the requirements in paragraphs 1 in relation to legal entities, consistently with the provisions of Article 10.

188 Finally, paragraph 4, which is based on the International Convention for the Suppression of the Financing of Terrorism (Article 12, paragraph 4) and the United Nations Transnational Organized Crime Convention (Article 18, paragraph 30) invites Parties to establish additional co-operation mechanisms for the purposes of sharing information and evidence in the prosecution of the offences set forth in the Convention.

Article 18 – Extradite or prosecute

189 This article is based on a similar provision in the International Convention for the Suppression of Terrorist Bombings (Article 8) and the International Convention for the Suppression of the Financing of Terrorism (Article 10). It establishes an obligation on the requested Party to submit the case to its competent authorities for the purpose of prosecution if it refuses extradition (*aut dedere aut judicare*).

190 This obligation is subject to conditions similar to those laid down in paragraph 1 of Article 14: the suspected offender must have been found in the territory of the requested Party, which must have received a request for extradition from a Party whose jurisdiction is based on a rule of jurisdiction existing equally in its own law.

191 The case must be submitted to the prosecuting authority without exception and without undue delay. Investigation and prosecution follow the rules of law and procedure in force in the requested Party for offences of a comparably serious nature. The same goes for the judicial decision concerning the case.

192 The Convention does not provide an indication of what is meant by "offence of a serious nature". It will be up to national authorities to characterise such an offence. However, recent international treaties provide standards in this respect. For instance, the United Nations Convention against Transnational Organized Crime defines – for the purpose of that Convention – "serious crimes" as "conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty."

193 Paragraph 2 covers cases where a "Party extradites or otherwise surrenders one of its nationals only upon the condition that the person will be returned to that Party to serve the sentence imposed as a result of the trial or proceeding for which the extradition or surrender of the person was sought."

194 It provides that the requirements of paragraph 1 are met where the requesting and the requested Party agree with such conditional extradition or surrender.

Article 19 – Extradition

195 This article is based on similar provisions in the International Convention for the Suppression of Terrorist Bombings (Article 9) and in the International Convention for the Suppression of the Financing of Terrorism (Article 11).

196 Paragraph 1 provides for the automatic inclusion, as an extraditable offence, of any of the offences set forth in the Convention into any existing extradition treaty concluded between Parties. Moreover, Parties undertake to include such offences in every extradition treaty they may conclude.

197 Furthermore, paragraph 2 introduces the possibility for a Party which makes extradition conditional on the existence of a treaty, and receives a request for extradition from another Party with which it has no extradition treaty, to consider the Convention as a legal basis for extradition in relation to any of the offences set forth in the Convention. Such a decision is at the discretion of the requested Party, which may subject its decision to extradite to conditions provided by national law, for example that the person subject to extradition will not be exposed to the death penalty (see Article 21).

198 As for Parties which do not make extradition conditional on the existence of a treaty, paragraph 3 requires them to recognise the offences set forth in the Convention as extraditable offences between themselves, subject to the conditions provided by the law of the requested Party.

199 Paragraph 4 is related to the Convention's provisions on jurisdiction (Article 14) and aims at facilitating international co-operation by providing that, for the purposes of extradition between the Parties, the offences set forth in the Convention be treated as if they had been committed in the territory of the Parties that have established jurisdiction in accordance with Article 14.

200 Paragraph 5 is related to Article 26, paragraph 2 as it provides that the provisions of all extradition treaties and arrangements between Parties with regard to offences set forth in the Convention shall be deemed to be modified between Parties to the extent that they are incompatible with this Convention.

201 In this connection, the term "arrangements" is intended to cover extradition procedures which are not enshrined in a formal treaty, such as those existing between Ireland and the United Kingdom. For that reason, the term "*accords*" in the French text is not to be understood as designating a formal international instrument.

202 One of the consequences of this paragraph is the modification of Article 3, paragraph 1 of the European Convention on Extradition. For States which are Parties to both the present Convention and the European Convention on Extradition, Article 3, paragraph 1 of the latter is modified, in so far as it is incompatible with the new obligations arising from the former. The same applies to similar provisions contained in bilateral treaties and arrangements which are applicable between Parties to this Convention.

Article 20 – Exclusion of the political exception clause

203 This article is based on similar provisions in the International Convention for the Suppression of Terrorist Bombings (Article 11) and the International Convention for the Suppression of the Financing of Terrorism (Article 14) and was later incorporated in the Protocol amending the European Convention on the Suppression of Terrorism.

204 It aims at facilitating international co-operation by excluding the political character of the offences set forth in the Convention for the purposes of extradition or mutual legal assistance.

205 Accordingly, a request for extradition or for mutual legal assistance based on such an offence may not be refused on the sole ground that it concerns a political offence or an offence connected with a political offence or an offence inspired by political motives.

206 Thus, it modifies the consequences of existing extradition and mutual legal assistance agreements and arrangements with regard to the evaluation of the nature of these offences. It eliminates the possibility for the requested Party to invoke the political nature of the offence in order to oppose an extradition or mutual legal assistance request.

207 It does not, however, create an obligation to extradite, as the Convention is not an extradition treaty as such. The legal basis for extradition remains the extradition treaty, arrangement or law concerned. Nevertheless, under Article 19 of the Convention, a Party may use the Convention as a legal basis for extradition at its discretion.

208 The terms "political offence" and "offence connected with a political offence" were taken from Article 3, paragraph 1 of the European Convention on Extradition, which is modified to the effect that Parties to the present Convention may no longer consider as "political" any of the offences set forth in the Convention.

209 The term "offence inspired by political motives" is intended to supplement the list of cases in which the political nature of an offence cannot be invoked. Reference to the political motives of an act of terrorism is made in Resolution (74) 3 on international terrorism, adopted by the Committee of Ministers of the Council of Europe on 24 January 1974.

210 In paragraph 2, the term "Without prejudice to the application of (…) the Vienna Convention on the Law of Treaties (…) to the other articles in the Convention" indicates that reservations to other articles of the Convention would still be subject to the general regime of the Vienna Convention on the Law of Treaties.

211 This paragraph allows Parties to make reservations in respect of the application of paragraph 1 of this Article. The Convention thus recognises that a Party might be impeded, for instance for legal or constitutional reasons, from fully accepting the obligations arising from paragraph 1, whereby certain offences cannot be regarded as political for the purposes of extradition. However, this possibility has been made subject to a number of conditions.

212 If a Party avails itself of this possibility of making a reservation it can subsequently refuse extradition in respect of the offences set forth in the Convention. However, it is under the obligation to apply the reservation on a case-by-case basis and to give reasons for its decision. However, the requested Party remains free to grant or to refuse extradition, subject to the conditions referred to in the other paragraphs of this article.

213 The notion of "duly reasoned decision" should be taken to mean an adequate, clear and detailed written statement explaining the factual and legal reasons for refusing the extradition request.

214 Paragraph 3 provides for the withdrawal of reservations made in pursuance of paragraph 2 and of partial or conditional reservations.

215 Paragraph 4 in particular lays down the rule of reciprocity in respect of the application of paragraph 1 by a Party having availed itself of a reservation. This provision repeats the provisions contained in Article 26, paragraph 3 of the European Convention on Extradition. The rule of reciprocity applies equally to reservations not provided for in this Article.

216 Paragraphs 5 and 6 deal with the temporal validity of reservations. Paragraph 5 provides that reservations have a limited validity of three years from the date of entry into force of the Convention. After this deadline they will lapse, unless they are expressly renewed. Paragraph 6 provides a procedure for the automatic lapsing of non-renewed reservations. Where a Party upholds its reservation, it shall provide an explanation of the grounds justifying its continuance. Paragraphs 5 and 6 reflect provisions of the Criminal Law Convention on Corruption of 27 January 1999 (ETS No. 173, Article 38, paragraphs 1 and 2). They have been added with a view to ensuring that reservations are regularly reviewed by the Parties which have entered them.

217 If extradition is refused on the grounds of a reservation made in accordance with paragraph 2, Articles 14, 15 and, 18 apply. This is explicitly stated in paragraph 7, which reflects and reinforces the principle of *aut dedere aut judicare* by a duty to forward the decision promptly to the requesting Party, as provided in paragraph 8.

218 In paragraph 7, an obligation for the requested Party to submit the case to the competent authorities for the purpose of prosecution arises as a result of the refusal of the extradition request made by the requesting Party. Nevertheless, the requesting and the requested Party may agree that the case will not be submitted to the competent authorities of the requested Party for prosecution. For instance, where the requesting or the requested Party consider that there is not sufficient evidence to bring a case in the requested Party, it might be more appropriate to pursue their investigations until the case is ready for prosecution. Thus, the strict application of the maxima *aut dedere aut judicare* is balanced with a degree of flexibility which reflects the necessity for full co-operation between the requesting and the requested Parties for the successful prosecution of such cases.

219 Where the requested Party submits the case to its competent authorities for the purpose of prosecution, the latter are required to consider and decide on the case in the same manner as any offence of a serious nature under the law of that Party. The requested Party is required to communicate the final outcome of the proceedings to the requesting Party and to the Secretary General of the Council of Europe, who shall forward it to the Consultation of the Parties provided in Article 30 for information.

220 Where a requesting Party considers that a requested reserving Party has disregarded the conditions of paragraphs 2 and/or 7 because, for instance, no judicial decision on the merits has been taken within a reasonable time in the requested Party in accordance with paragraph 7, it has the possibility of bringing the matter before the Consultation of the Parties pursuant to paragraph 8. The Consultation of the Parties is competent to consider the matter and issue an opinion on the conformity of the refusal with the Convention. This opinion is submitted to the Committee of Ministers for the purpose of issuing a declaration thereon. When performing its functions under this paragraph, the Committee of Ministers shall meet in its composition restricted to the Parties to the Convention.

221 The notion of "without undue delay" used in paragraph 7 and "within a reasonable time" in paragraph 8 shall be understood as synonyms. They are flexible concepts which, in the words of the European Court of Human Rights must be assessed in the light of the particular circumstances of the case and having regard to the criteria laid down in the case-law of the Court, in particular the complexity of the case, the conduct of the subject of the extradition request and of the relevant authorities (see, among many other judgments: *Pélissier and Sassi v. France* of 25 March 1999, [GC], No. 25444/94, ECHR 1999-II, and *Philis v. Greece* (No. 2) of 27 June 1997, *Reports of Judgments and Decisions* 1997-IV, p. 1083, § 35) (see *Zannouti v. France* of 31 July 2001, in French only).

Article 21 – Discrimination clause

222 This article is based on a similar provision in the International Convention for the Suppression of the Financing of Terrorism (Article 15) and concerns the grounds for refusing extradition and mutual legal assistance.

223 It is intended to emphasise the aim of the Convention, which is to assist Parties in the prevention of terrorism which constitutes an attack on the fundamental rights to life and liberty of persons. While Articles 17 to 20 are international co-operation tools to strengthen the ability of law enforcement to act effectively, this article ensures that the Convention complies with the requirements of the protection of human rights and fundamental freedoms as they are enshrined in the ECHR or other applicable international instruments. This is all the more important because of the very nature of the offences set forth in the Convention.

224 In this connection, it should be recalled that the Convention does not seek to determine the grounds on which extradition or mutual assistance may be refused, other than by reference to the exception regarding political offences.

225 This article is intended to make this clear by reference to certain existing grounds on which extradition or mutual assistance may be refused. The Article is not, however, intended to be exhaustive as to the possible grounds for refusal.

226 One of the purposes of this Article is to safeguard the traditional right of asylum and the principle of non-refoulement. Although the prosecution, punishment or discrimination of a person on account of his or her race, religion, nationality or political opinion is unlikely to occur in the member States of the Council of Europe which, at the time of the adoption of this Convention, have all, with the exception of one State which has recently joined the Organisation, ratified the ECHR, it was considered appropriate to insert this traditional provision (paragraph 1) in this Convention also, particularly in view of the opening of the Convention to non-member States (see Article 23 below). It is already contained in Article 3, paragraph 2 of the European Convention on Extradition.

227 If a requested Party has substantial grounds for believing that the real purpose of an extradition or mutual assistance request, made for one of the offences set forth in the Convention, is to enable the requesting Party to prosecute or punish the person concerned for the political opinions he or she holds, the requested Party may refuse to grant extradition.

228 The same applies where the requested Party has substantial grounds for believing that the person's position may be prejudiced for political reasons, or for any of the other reasons mentioned in this article. This would be the case, for instance, if the person to be extradited would, in the requesting Party, be deprived of the rights of defence guaranteed by the ECHR.

229 Two additional paragraphs have been added to this Article, bearing in mind, in particular, Parliamentary Assembly Recommendation 1550 (2002) on Combating terrorism and respect for human rights (paragraph 7.i) and the Guidelines on Human Rights and the Fight against Terrorism (Guidelines IV, X, XIII and XV) adopted by the Committee of Ministers on 11 July 2002. These had also been added to the equivalent provision in the European Convention on the Suppression of Terrorism by means of its amending Protocol.

230 These paragraphs explicitly recognise that Parties have no obligation to extradite and can indeed refuse extradition on the ground that the subject of the extradition request risks being exposed to torture or to inhuman or degrading treatment or punishment (paragraph 2) or, in certain circumstances, where the person in question risks being exposed to the death penalty or to life imprisonment without the possibility of parole (paragraph 3).

231 In paragraph 2, the reference to inhuman or degrading treatment as a ground for refusal represents an addition to the formula used in the European Convention on the Suppression of Terrorism as revised by its amending Protocol and was requested by the Parliamentary Assembly and the Commissioner for Human Rights of the Council of Europe in their respective opinions on the draft of this Convention. Furthermore, it was consistent with the Council of Europe Guidelines on Human Rights and the Fight against Terrorism, Guideline IV of which provides for the absolute prohibition of torture and inhuman or degrading treatment or punishment in all circumstances, and in particular during the arrest, questioning and detention of a person suspected or convicted of terrorist activities, irrespective of the nature of the acts that the person is suspected of or for which he/she was convicted.

232 As stated above, these grounds for refusal already exist independently of the Convention. For instance, the possibility of refusing extradition where there is a risk of the death penalty being carried out is provided in Article 11 of the European Convention on Extradition, and Article 3 of the United Nations Convention against Torture governs the issue of non-extradition where there is a danger of torture. Nevertheless, like the GMT before it, the CODEXTER considered it necessary to state them explicitly, in order to stress the necessity to reconcile an efficient fight against terrorism with respect for fundamental rights, particularly in view of the opening of the Convention to non-member States.

233 It is obvious that a Party applying this Article should provide the requesting Party with reasons for its refusal to grant the extradition request. It is by virtue of the same principle that Article 18, paragraph 2 of the European Convention on Extradition provides that "reasons shall be given for any complete or partial rejection" and that Article 19 of the European Convention on Mutual Assistance in Criminal Matters states that "reasons shall be given for any refusal of mutual assistance".

234 If extradition is refused on human rights grounds, Article 18 of the Convention applies and the requested Party must submit the case to its competent authorities for the purpose of prosecution.

Article 22 – Spontaneous information

235 This article is based on a similar provision in the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (Article 11), which in turn is based on other international treaties, the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS No. 141, Article 10) concerning paragraph 1 and the Convention on Mutual Assistance in Criminal Matters between the member States of the European Union (Article 6) concerning paragraphs 2 and 3.

236 It extends to mutual assistance in general following the trend in other fields of criminality, for instance money laundering, organised crime, cybercrime and corruption. Thus, it recognises the possibility for Parties, without prior request, to forward to each other information about investigations or proceedings which might contribute to the common aim of responding to crime.

237 It should be noted that this provision introduces a possibility; it does not place obligations on Parties. Moreover, it expressly provides that the relevant exchanges are to be carried out within the limits of national law.

238 The competent authorities in the "sending" Party are those authorities who deal with the case in which the information came up; the competent authorities in the "receiving" Party are the authorities who are likely to use the information forwarded or who have the powers to do so.

239 In accordance with paragraph 2, conditions may be attached to the use of information provided under this article, and paragraph 3 provides that, if that should be the case, the receiving Party is bound by those conditions.

240 In reality, the sending Party only binds the receiving Party to the extent that the receiving Party accepts the unsolicited information. By accepting the information, it also accepts to be bound by the conditions attached to the transmission of that information. In this sense, Article 9 creates a "take it or leave it" situation.

241 The conditions attached to the use of the information may, for example, be a condition that the information transmitted will not be used or re-transmitted by the authorities of the receiving Party for investigations or proceedings, as specified by the sending Party.

242 Some Parties might have difficulties in not accepting the information once it has been transmitted, for example where their national law puts a positive duty upon authorities who have access to such information. Paragraph 4 therefore opens the possibility for Parties to declare that information must not be transmitted without their prior consent. Should the sending Party attach conditions to the use of such information, if the receiving Party agrees to the conditions, it must honour them.

Articles 23 to 32 – the final clauses

243 With some exceptions, the provisions contained in Articles 23 to 32 are, for the most part, based on the "Model final clauses for conventions and agreements concluded within the Council of Europe" approved by the Committee of Ministers at the 315th meeting of the Deputies in February 1980.

244 As most of Articles 23 to 32 either use the standard language of the model clauses or are based on long-standing treaty-making practice at the Council of Europe, they do not call for specific comments.

245 However, certain modifications of the standard model clauses or some new provisions require some explanation. It is noted in this context that the model clauses have been adopted as a non-binding set of provisions. As the Introduction to the model clauses points out, "these model final clauses are only intended to facilitate the task of committees of experts and avoid textual divergences which would not have any real justification. The model is in no way binding and different clauses may be adapted to fit particular cases."

Article 23 – Signature and entry into force

246 This article provides the conditions for signature and entry into force of the Convention.

247 Paragraph 1 has been drafted following several precedents established in other conventions elaborated within the framework of the Council of Europe, for instance, the Convention on the Transfer of Sentenced Persons (ETS No. 112) and the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime or, more recently, the Cybercrime Convention, which allow for signature, before their entry into force, not only by the member States of the Council of Europe, but also by non-member States which have participated in their elaboration. Similarly, this paragraph foresees the possibility for the European Community to sign the Convention, thus following the trends in other draft conventions of the Council of Europe, including the draft conventions on laundering, search, seizure and confiscation of the proceeds from crime and on the financing of terrorism (see Article 49) and on action against trafficking in human beings (see Article 42).

248 In this connection, it should be noted that from the outset, the Council of Europe wished to provide for the signature of the Convention both by member States and by the non-member States that have participated in its elaboration, that is, those States which have Observer status with the Council of Europe, as these had been included in the specific terms of reference given to the CODEXTER, similar to those provided earlier on to the GMT in relation to the updating of the European Convention on the Suppression of Terrorism by its amending Protocol.

249 The provision is intended to enable the maximum number of interested States, not just members of the Council of Europe, to become Parties as soon as possible. Here, the provision is intended to apply to five non-member States: the Holy See, Canada, Japan, the United States of America and Mexico, which actively participated in the elaboration of the Convention.

250 Once the Convention has entered into force, in accordance with paragraph 3, other non-member States not covered by this provision may be invited to accede to the Convention in conformity with Article 24, paragraph 1.

251 Paragraph 3 sets the number of ratifications, acceptances or approvals required for the Convention's entry into force at six. This figure reflects the belief that a slightly larger group of Parties is needed to successfully begin addressing the challenge posed by the offences set forth in the Convention. The number is not so high, however, so as not to delay unnecessarily the Convention's entry into force. Among the six initial Signatories, at least four must be members of the Council of Europe, but the two others could belong to the non-member States that participated in the Convention's elaboration or the European Community. This provision would of course also allow for the Convention to enter into force based on expressions of consent to be bound by six Council of Europe member States.

Article 24 – Accession to the Convention

252 This article regulates the accession by non-member States other than those which have participated in the elaboration of the Convention and are therefore covered by the provisions of Article 23, paragraph 1.

253 It has been drafted on precedents established in other Council of Europe conventions, but with an additional express element. The procedure is established in paragraph 1.

254 In accordance with long-standing practice, the Committee of Ministers decides, on its own initiative or upon request, to invite a non-member State, which has not participated in the elaboration of a convention, to accede to that convention after having consulted all the Parties, whether they are member States or not.

255 This implies that if any Party objects to the non-member State's accession, the Committee of Ministers would normally not invite it to join the convention. However, under the usual formulation, the Committee of Ministers could, at least in theory, invite such a non-member State to accede to a convention even if a non-member Party objected to its accession. This means that no right of veto is usually granted to non-member Parties in the process of extending Council of Europe treaties to other non-member States.

256 However, an express requirement that the Committee of Ministers consult with and obtain the unanimous consent of all Parties – not just member States of the Council of Europe – before inviting a non-member State to accede to the Convention, has been inserted in paragraph 1. This new practice was established with the Cybercrime Convention which contains an identical provision (Article 37).

257 As indicated above, such a requirement is consistent with usual practice and recognises that all Parties to the Convention should be able to determine with which non-member States they are to enter into treaty relations.

258 Nevertheless, the formal decision to invite a non-member State to accede will be taken, in accordance with usual practice, by the representatives of the States Parties entitled to sit on the Committee of Ministers. This decision requires the two-thirds majority provided for in Article 20.d of the Statute of the Council of Europe and the unanimous vote of the representatives of the States Parties entitled to sit on the Committee.

259 Paragraph 2 states the date of entry into force of the Convention for the acceding State in a similar fashion to Article 23, paragraph 4.

Article 25 – Territorial application

260 It should be noted that during discussions within the GMT on a similar provision in the Protocol amending the European Convention on the Suppression of Terrorism, the proposal was put forward to modify this territorial clause by replacing the words "shall apply" by "shall or shall not apply". Ultimately, the GMT decided to retain the original formula of the final clause in order to conform with the long-standing practice of the Council of Europe aiming at ensuring the uniform application of European treaties upon the territory of each Party (the scope of the standard territorial clause being limited to overseas territories and territories with a special status).

261 It was stated that the wording of this provision would not, however, constitute an obstacle for Parties claiming not to have control over their entire national territory to make unilateral statements declaring that they would not be able to ensure the application of the treaty in a certain territory. Any such declarations would not be considered as territorial declarations, but statements of factual character, prompted by exceptional circumstances making full compliance with a treaty temporarily impossible.

Article 26 – Effects of the Convention

262 This article merits particular attention as it regulates the effects of the Convention on other treaties, and on rights, obligations and responsibilities assumed under international law. It is based on similar provisions in existing treaties, namely the Cybercrime Convention (Article 39) for paragraphs 1, 2 and, notwithstanding certain specifications, 3, and the International Convention for the Suppression of Terrorist Bombings (Article 19, paragraph 2) for paragraph 4.

263 Paragraphs 1 and 2 address the Convention's relationship with other international agreements or arrangements. The subject of how conventions of the Council of Europe should relate to one another or to other, bilateral or multilateral, treaties concluded outside the Council of Europe is not dealt with by the model clauses referred to above.

264 The usual approach taken in Council of Europe conventions in the criminal law area (for example, Agreement on Illicit Traffic by Sea (ETS No. 156)) is to provide that: 1. new conventions do not affect the rights and undertakings derived from existing international multilateral conventions concerning special matters; 2. Parties to a new convention may conclude bilateral or multilateral agreements with one another on the matters dealt with by the convention for the purposes of supplementing or strengthening its provisions or facilitating the application of the principles embodied in it; and 3. if two or more Parties to the new convention have already concluded an agreement or treaty in respect of a subject which is dealt with in the convention or otherwise have established their relations in respect of that subject, they shall be entitled to apply that agreement or treaty or regulate those relations accordingly, in lieu of the new convention, provided this facilitates international co-operation.

265 Inasmuch as the Convention is generally intended to supplement and not supplant multilateral and bilateral agreements and arrangements between Parties, the drafters did not believe that a possibly limiting reference to "special matters" was particularly instructive and were concerned that it could lead to unnecessary confusion. Instead, paragraph 1 simply indicates that the present Convention supplements other applicable treaties or arrangements between Parties and it mentions, in particular, a series of Council of Europe conventions dealing with international co-operation and terrorism.

266 Therefore, regarding general matters, such agreements or arrangements should in principle be applied by the Parties to this Convention. Regarding specific matters only dealt with by this Convention, the rule of interpretation *lex specialis derogat legi generali* provides that the Parties should give precedence to the rules contained in the Convention and, where such specificity exists, this Convention, as *lex specialis*, should provide a rule of first resort over provisions in more general mutual assistance agreements.

267 Similarly, the drafters considered language making the application of existing or future agreements contingent on whether they "strengthen" or "facilitate" co-operation as possibly problematic, because, under the approach established in the provisions on international co-operation, the presumption is that Parties will apply relevant international agreements and arrangements.

268 For example, where there is an existing mutual assistance treaty or arrangement as a basis for co-operation, the present Convention would only supplement, where necessary, the existing rules.

269 Consistent with the Convention's supplementary nature in this respect and, in particular, its approach to international co-operation, paragraph 2 provides that Parties are also free to apply agreements that are already in force or that may come into force in the future. The precedent for such an articulation is found in the Convention on the Transfer of Sentenced Persons.

270 Certainly it is expected that the application of other international agreements (many of which offer proven, longstanding formulas for international assistance) will in fact promote international co-operation. Consistent with the terms of the present Convention, Parties may also agree to apply such other agreements in lieu. As the present Convention generally provides for minimum obligations, paragraph 2 recognises that Parties are free to assume obligations that are more specific in addition to those already set out in the Convention, when establishing their relations concerning matters dealt with therein. However, this is not an absolute right: Parties must respect the objective and purpose of the Convention.

271 Furthermore, in determining the Convention's relationship with other international agreements, the relevant provisions in the Vienna Convention on the Law of Treaties apply.

272 Paragraph 3 relates to the mutual relations between the Parties to the Convention which are members of the European Union. In relation to this paragraph, upon the adoption of the Convention, the European Community and the member States of the European Union, made the following declaration:

> "The European Community/European Union and its Member States reaffirm that their objective in requesting the inclusion of a "disconnection clause" is to take account of the institutional structure of the Union when acceding to international conventions, in particular in case of transfer of sovereign powers from the Member States to the Community.
>
> This clause is not aimed at reducing the rights or increasing the obligations of a non-European Union Party vis-à-vis the European Community/European Union and its Member States, inasmuch as the latter are also parties to this Convention.
>
> The disconnection clause is necessary for those parts of the Convention which fall within the competence of the Community/Union, in order to indicate that European Union Member States cannot invoke and apply the rights and obligations deriving from the Convention directly among themselves (or between themselves and the European Community/Union). This does not detract from the fact that the Convention applies fully between the European Community/European Union and its Member States on the one hand, and the other Parties to the Convention, on the other; the Community and the European Union Members States will be bound by the

> Convention and will apply it like any Party to the Convention, if necessary, through Community/Union legislation. They will thus guarantee the full respect of the Convention's provisions vis-à-vis non-European Union Parties."

As an instrument made in connection with the conclusion of a treaty, within the meaning of Article 31, para. 2(b) of the Vienna Convention on the Law of Treaties, this declaration forms part of the "context" of the Convention.

273 The European Community would be in a position to provide, for the sole purpose of transparency, necessary information about the division of competence between the Community and its Member States in the area covered by the present Convention, inasmuch as this does not lead to additional obligations placed on the Community.

274 While the Convention provides a level of harmonisation, it does not purport to address all outstanding issues relating to fight against terrorism, even from a preventive perspective. Therefore, paragraph 4 was inserted to make plain that the Convention only affects what it addresses. Other rights, restrictions, obligations and responsibilities that may exist but that are not dealt with by the Convention are left unaffected. Precedent for such a "savings clause" may be found in other international agreements, such as the International Convention for the Suppression of the Financing of Terrorism.

275 In this connection, this paragraph mentions in particular international humanitarian law given the specific nature of the subject of the Convention.

276 The wording of paragraph 4 is based on similar provisions in recent international texts, including the Inter-American Convention against Terrorism (Article 15, paragraph 2) and United Nations Security Council Resolution 1566 (2004) which contains similar language (preambular paragraph 6).

277 It should be noted that obligations under international refugee law include the responsibility to ensure that the institution of asylum is not abused by persons who are responsible for terrorist acts.

278 Refugee status may only be granted to those who fulfil the criteria as set out in Article 1.A.2. of the 1951 Convention relating to the Status of Refugees, that is "a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion". In many cases, persons responsible for terrorist acts may not fear persecution for a motive provided for in the 1951 Convention but rather may be fleeing legitimate prosecution for criminal acts they have committed.

279 According to Article 1.F. of the 1951 Convention, persons who would otherwise meet the refugee criteria of Article 1.A.2. shall be excluded from international refugee protection if there are serious reasons for considering that they have committed a crime against peace, a war crime, a crime against humanity, or a serious non-political crime outside the country of refuge prior to admission to that country as a refugee, or have been guilty of acts contrary to the purposes and principles of the United Nations.

280 While indications of an applicant's involvement in acts prohibited under the present Convention would make it necessary to examine the applicability of Article 1.F. of the 1951 Convention, international refugee law requires an assessment of the context and circumstances of the individual case in a fair and efficient procedure before a decision is taken.

281 Paragraph 5 of Article 26, which is based on Article 19, paragraph 2 of the International Convention for the Suppression of Terrorist Bombings, is an additional saving clause which provides for the application of international humanitarian law and not the present Convention in relation to activities of armed forces during an armed conflict. As for activities undertaken by military forces of a Party in the exercise of their official duties, reference is made to paragraph 82 above, which states that the Convention leaves unaffected conduct in pursuance of lawful instructions or government authority.

282 Paragraph 5 does not legitimise the behaviour covered by Articles 5 to 7 of this Convention when carried out by armed forces during an armed conflict or by military forces of a Party in the exercise of their official duties, and is thus consistent with other international treaties against terrorism such as the International Convention for the Suppression of Terrorist Bombings which states in its preamble that "Noting that the activities of military forces of States are governed by rules of international law outside the framework of this Convention and that the exclusion of certain actions from the coverage of this Convention does not condone or make lawful otherwise unlawful acts, or preclude prosecution under other laws."

Articles 27 and 28 – Amendment procedures

283 Amendments of the Convention are regulated by Articles 27 and 28 which are based on a similar provision in the Protocol amending the European Convention on the Suppression of Terrorism which the GMT provided in order to solve the problem of possible future amendments to the convention. Two procedures are provided for: a general procedure for amendments concerning the Convention other than those concerning the Appendix and a simplified procedure for the revision of the Appendix allowing for new conventions to be added to this list. In this connection, it should be recalled that the Appendix contains the same list of treaties as Article 1, paragraph 1 of the European Convention on the Suppression of Terrorism as revised by its amending Protocol.

Article 27 – Amendments to the Convention

284 This provision concerns amendments to the Convention other than those relating to the Appendix. It aims to simplify the amendment procedure by replacing the negotiation of a protocol with an accelerated procedure.

285 Paragraph 1 provides that amendments may be proposed by any Party, the Committee of Ministers or the Consultation of the Parties provided for in Article 30, in accordance with standard Council of Europe treaty-making procedures.

286 This procedure provides therefore for a form of consultation that the Committee of Ministers should carry out before proceeding to the formal adoption of any amendment. This is the mandatory consultation of the Parties to the Convention including non-member Parties. This consultation is justified in so far as non-member Parties are concerned because they do not sit in the Committee of Ministers and therefore it is necessary to provide them with some form of participation in the adoption procedure. This procedure takes place in the framework of the Consultation of the Parties which gives an opinion in pursuance of Article 30.

287 The Committee of Ministers may then adopt the proposed amendment. Although it is not explicitly mentioned, it is understood that the Committee of Ministers would adopt the amendment in accordance with the majority provided for in Article 20.d of the Statute of the Council of Europe, that is a two-thirds majority of the representatives casting a vote and of a majority of the representatives entitled to sit on the Committee (paragraph 4).

288 The amendment would then be submitted to the Parties for acceptance (paragraph 5).

289 Once accepted by all the Parties, the amendment enters into force on the thirtieth day following notification of acceptance by the last Party (paragraph 6).

290 In accordance with standard Council of Europe practice and in keeping with the role of the Secretary General as depositary of Council of Europe conventions, the Secretary General receives proposed amendments (paragraph 1), communicates them to the Parties for information (paragraph 2) and for acceptance once adopted by the Committee of Ministers (paragraph 5) and receives notification of acceptance by the Parties and notifies them of the entry into force of the amendments (paragraph 6).

Article 28 – Revision of the Appendix

291 Article 28 introduces a new simplified amendment procedure for updating the list of treaties in the Appendix to the Convention.

292 This procedure represents a development in Council of Europe conventions inaugurated by the Protocol amending the European Convention on the Suppression of Terrorism (Article 13) which was inspired by existing anti-terrorist conventions, such as the International Convention for the Suppression of the Financing of Terrorism of 9 December 1999 (Article 23). The novelty lies in the fact that this simplified procedure concerns an appendix which is not of a purely technical nature, as it was the case, for instance, with the appendices to the Bern Convention on the Conservation of European Wildlife and Natural Habitats (ETS No. 104) or to the Protocol of Amendment to the European Convention for the Protection of Vertebrate Animals used for Experimental and other Scientific Purposes (ETS No. 170).

293 Paragraph 1 provides for a number of substantive conditions that have to be met in order to have recourse to this procedure. Firstly, the amendment can only concern the list of treaties in Article 1, paragraph 1. Secondly, such amendments can only concern treaties concluded within the United Nations System – these terms cover the United Nations Organisation and its Specialised Agencies, dealing specifically with international terrorism and having entered into force.

294 In line with Article 27, amendments may be proposed by any Party or by the Committee of Ministers and are communicated by the Secretary General of the Council of Europe to the Parties (paragraph 1). However, contrary to Article 27, the Consultation of the Parties is not entitled to make such proposals for amendments.

295 The forms of consultation and adoption by the Committee of Ministers of a proposed amendment provided for in the general amendment procedure of Article 27 are provided in Article 28 also, for the simplified procedure in paragraph 2.

296 However, contrary to the general procedure under Article 27, in the simplified procedure an amendment, once adopted by the Committee of Ministers, enters into force after the expiry of a period of one year from the date on which it was communicated to the Parties by the Secretary General (paragraph 2), provided that one third or more of the Parties do not notify an objection to the entry into force of the amendment to the Secretary General (paragraph 3), in which case the amendment would not enter into force.

297 Any objection from a Party shall be without prejudice to the other Parties' tacit acceptance and where less than one-third of the Parties object to the entry into force of the amendment, the proposed amendment enters into force for those Parties which have not objected (paragraph 4).

298 Acceptance by all the Parties is therefore not required for the entry into force of the amendment.

299 For those Parties which have objected, the amendment comes into force on the first day of the month following the date on which they have notified the Secretary General of the Council of Europe of their subsequent acceptance (paragraph 5).

Article 29 – Settlement of disputes

300 Article 29 concerns the settlement, by means of negotiation, arbitration or other peaceful means, of those disputes over the interpretation or application of the Convention. The current provision is similar to the one found in the Cybercrime Convention (Article 45, paragraph 2).

301 It provides, *inter alia,* for the setting up of an arbitration tribunal along the lines of Article 47, paragraph 2 of the European Convention for the Protection of Animals during International Transport of 13 December 1968 where this system of arbitration was for the first time introduced. Alternatively, the Parties may also agree to submit their dispute to the International Court of Justice. Whatever procedure is chosen to settle the dispute, it should be agreed upon by the Parties.

302 Further guidance is provided by the European Convention on the Peaceful Settlement of Disputes (ETS No. 23, Article 1).

Article 30 – Consultation of the Parties

303 This article provides for the setting up of a conventional committee, the Consultation of the Parties responsible for a number of conventional follow-up tasks and providing for the participation of all Parties.

304 Such a procedure was believed necessary by the drafters of the Convention to ensure that all Parties to the Convention, including Parties non-member of the Council of Europe, could be involved – on an equal footing – in any follow-up mechanism.

305 When drafting this provision, the negotiators wanted to devise as simple and flexible a mechanism as possible, pending the entry into force of the Protocol amending the European Convention on the Suppression of Terrorism which itself provides for another specific follow-up committee, the COSTER (Conference of States Parties against Terrorism).

306 Beyond its purely conventional functions in relation to the revised European Convention on the Suppression of Terrorism, the COSTER has a broader role in the Council of Europe's anti-terrorist legal activities. It is called upon to act as a forum for exchanges of information on legal and policy developments and, at the request of the Committee of Ministers, to examine additional legal measures with regard to terrorism adopted within the Council of Europe and could well discharge the role of the Consultation of the Parties with its membership restricted to representatives of the Parties to the present Convention.

307 The flexibility of the follow-up mechanism established by the present Convention is reflected by the fact that there is no temporal requirement for its convocation. It will be convened by the Secretary General of the Council of Europe (paragraph 2) as appropriate and periodically (paragraph 1).

308 However, it can only be convened at the request of the majority of the Parties or at the request of the Committee of Ministers (paragraph 1).

309 With respect to this Convention, the Consultation of the Parties has the traditional follow-up competencies and plays a role in respect of :

> a the effective implementation of the Convention, by making proposals to facilitate or improve the effective use and implementation of this Convention, including the identification of any problems thereof, as well as the effects of any declaration made under this Convention;

b the amendment of the Convention, by making proposals for amendment in accordance with Article 27, paragraph 1 and formulating its opinion on any proposal for amendment of this Convention which is referred to it in accordance with Article 27, paragraph 3;

c a general advisory role in respect of the Convention by expressing an opinion on any question concerning the application of this Convention;

d serving as a *clearing house* and facilitating the exchange of information on significant legal, policy or technological developments in relation to the application of the provisions of the Convention.

Article 31 – Denunciation

310 This provision aims at allowing any Party to denounce this Convention. The sole requirement is that the denunciation be notified to the Secretary General of the Council in his or her role as depository of the Convention.

311 This denunciation takes effect three months after it has been received, that is, as from the reception of the notification by the Secretary General.

Article 32 – Notification

312 This provision, which is a standard final clause in Council of Europe treaties, concerns notifications to Parties. It goes without saying that the Secretary General must inform Parties also of any other acts, notifications and communications within the meaning of Article 77 of the Vienna Convention on the Law of Treaties relating to the Convention and not expressly provided for by this article.