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Explanatory Report to the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime

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1. The Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, drawn up within the Council of Europe by a committee of governmental experts under the authority of the European Committee on Crime Problems (CDPC), was opened for signature on 8 November 1990.

2. The text of the explanatory report prepared on the basis of that committee's discussions and submitted to the Committee of Ministers of the Council of Europe does not constitute an instrument providing an authoritative interpretation of the text of the Convention although it may facilitate the understanding of the Convention's provisions.

Introduction

1. At their 15th Conference (Oslo, 17-19 June 1986), the European Ministers of Justice discussed the penal aspects of drug abuse and drug trafficking, including the need to combat drug abuse by smashing the drugs market, which was often linked with organised crime and even terrorism, for example by freezing and confiscating the proceeds from drug trafficking. The discussion resulted in the adoption of Resolution No. 1, in which the Ministers recommend that the European Committee on Crime Problems (CDPC) should examine "the formulation, in the light *inter alia* of the work of the United Nations, of international norms and standards to guarantee effective international co-operation between judicial (and where necessary police) authorities as regards the detection, freezing and forfeiture of the proceeds of illicit drug trafficking".

2. Following this initiative and the substantial work which had already been carried out by the Pompidou Group, *inter alia*, at two ad hoc technical conferences in Strasbourg in November 1983 and March 1985, the creation of a Select Committee of Experts on international cooperation as regards search, seizure and confiscation of the proceeds from crime (PC-R-SC) was proposed by the CDPC at its 36th Plenary Session in June 1987 and authorised by the Committee of Ministers in September 1987.

3. The PC-R-SC's terms of reference were to examine the applicability of the European penal law conventions to the search, seizure and confiscation of the proceeds from crime – and consider this question, in the light of the ongoing work of the Pompidou Group and the United Nations, in particular as regards the financial assets of drug traffickers. The PC-R-SC should prepare, if need be, an appropriate European legal instrument in this field.

It should already be noted here that it follows from the terms of reference that the work of the PC-R-SC did not only concern proceeds from drug-trafficking.

4. The PC-R-SC was initially composed of experts from sixteen Council of Europe member States (Belgium, Denmark, Finland, France, the Federal Republic of Germany, Greece, Italy, Liechtenstein, Luxembourg, the Netherlands, Portugal, Spain, Sweden, Switzerland, Turkey and the United Kingdom). Austria, Ireland and the European Community joined the committee at a later stage in its work. Australia, Canada and the United States of America as well as Interpol, the United Nations, the International Association of Penal Law, the International Penal and Penitentiary Foundation and the International Society of Social Defence were represented by observers. Mr G. Polimeni (Italy) was elected Chairman of the Select Committee. The secretariat was provided by the Directorate of Legal Affairs of the Council of Europe.

5. At the extraordinary Conference of the Pompidou Group in London in May 1989, the ministers urged the Council of Europe to expedite the work of the committee. Following that meeting, steps were taken to considerably speed up the work on the convention.

The draft convention was prepared at nine meetings of the Select Committee between October 1987 and April 1990. (The last meeting was enlarged to enable experts from all member States to participate.)

6. The draft convention was finalised by the CDPC at its 39th Plenary Session in June 1990 and forwarded to the Committee of Ministers.

7. At the 443rd meeting of their Deputies in September 1990, the Committee of Ministers approved the text of the convention and decided to open it for signature on 8 November 1990.

General considerations

8. One of the purposes of the Convention is to facilitate international co-operation as regards investigative assistance, search, seizure and confiscation of the proceeds from all types of criminality, especially serious crimes, and in particular drug offences, arms dealing, terrorist offences, trafficking in children and young women (see Resolution No. 3 of the 16th Conference of the European Ministers of Justice, 1988) and other offences which generate large profits.

The committee noted, when studying answers to a questionnaire which was distributed to the experts at the beginning of its deliberations, that not all States possessed domestic laws which would enable them to combat serious criminality efficiently. Investigations, searches, seizures and other measures were often carried out on the basis of codes of criminal procedure which were drafted a number of years ago. In respect of confiscation, the member States' legislation differed widely, in respect of both substantive and procedural rules.

As a result of these differences, it was felt that international cooperation which traditionally depends on shared concepts and principles of law might be seriously impaired. The Convention should therefore devise ways and means to overcome such differences, which may necessitate a need for substantial amendments to the domestic legislation of States that wish to become bound by it.

9. Another main purpose of the new Convention is to complement already existing instruments, drawn up within the framework of the Council of Europe. The committee noted in respect of the European Convention on Mutual Assistance in Criminal Matters that Article 3, paragraph 1, of that convention, which concerns the execution of letters rogatory "relating to a criminal matter. for the purpose of procuring evidence or transmitting articles to be produced in evidence", does not apply to search and seizure of property with a view to its subsequent confiscation. The wording of Article 1, paragraph 1, of that convention would however not exclude for example investigative assistance which could be considered "judicial" between judicial authorities in the field of simply tracing the whereabouts of criminally acquired assets. Co-operation between police authorities for the same purpose would normally not be covered by the terms of that convention.

The European Convention on the International Validity of Criminal Judgments provides for the possibility of enforcing a "sanction", including measures to confiscate objects. The sanctions must be applied to individuals in respect of an offence and expressly ordered in the criminal judgment. Provisional seizure is provided for, but only following a request for the enforcement of a confiscation order which has already been made in the requesting State, and not prior to that moment. The Validity Convention has so far been ratified by a limited number of States.

The European Convention on the Transfer of Proceedings in Criminal Matters provides that a State which has received a request for proceedings has jurisdiction to apply such provisional measures as could be applied under its own law if the offence in respect of which proceedings are requested had been committed in the territory of the requested State (Article 28). This convention has also so far been ratified by only a limited number of States.

10. In order to overcome these and other difficulties related to the European penal law conventions, the Convention seeks to provide a complete set of rules, covering all the stages of the procedure from the first investigations to the imposition and enforcement of confiscation sentences and to allow for flexible but effective mechanisms of international co-operation to the widest extent possible in order to deprive criminals of the instruments and fruits of their illegal activities. Section 1 of Chapter III provides for this general principle of international co-operation.

This goal is attained in the Convention through the adoption of several types of measures. It is important that States give each other assistance in order to secure evidence about instrumentalities and proceeds. States are also called upon to co-operate, even without a request, when they learn about events in relation to criminal activity which might be of interest to another State. This and other kinds of investigative assistance are provided for in Section 2 of Chapter III of the Convention.

Where the law enforcement agencies and judicial authorities have gathered information through investigations, there should also be efficient means available to ensure that the offender does not remove the instruments and proceeds of his criminal activities. "Freezing" of bank accounts, seizure of property or other measures of conservancy need to be taken to ensure this. Section 3 of Chapter III provides for international co-operation in respect of provisional measures.

In order to secure the confiscation of the instruments and proceeds from crime, the Convention provides in Section 4 of Chapter III principally two forms of international co-operation, namely the execution by the requested State of a confiscation order made abroad and, secondly, the institution, under its own law, of national proceedings leading to a confiscation by the requested State at the request of another State. In respect of the first alternative, the Convention follows the pattern of the European Convention on the International Validity of Criminal Judgments. The second method of international co-operation could be compared to the one which is provided for in the European Convention on the Transfer of Proceedings in Criminal Matters.

11. International co-operation need not only be effective, it must also be flexible. The Convention provides therefore, in Section 5 of Chapter III, for the possibility of refusal and postponement of co-operation. Flexibility is also shown in the distinction between the grounds for refusal, only some of which are valid for all kinds of international co-operation. Moreover, the grounds for refusal are all optional at the international level. Only a limited number of the grounds will be mandatory at national level. The Convention provides also that the Parties shall, before refusing or postponing co-operation, consult each other and consider whether the request may be granted partially or subject to conditions.

12. In order to protect the legitimate interests of third parties, the Convention provides in Section 6 of Chapter III for certain notification requirements and for situations where it may not be possible to recognise decisions concerning third parties. Moreover, the Convention imposes an obligation on each Party to provide in its domestic legislation for effective legal

remedies available to third parties to have their rights (which may be affected by provisional or confiscation measures) preserved.

13. Another of the main purposes of the Convention is to provide an instrument obliging States to adopt efficient measures in their national laws to combat serious crime and to deprive criminals of the fruits of their illicit activities. The committee noted, when studying answers to the previously mentioned questionnaire, that the national law of the member States differs widely and sometimes does not contain the necessary powers for law enforcement agencies to achieve these goals at domestic level. This situation is sometimes exploited by criminals to avoid detection and punishment.

The need for efficient national legal remedies was basically considered by the committee from the point of view of international cooperation. Differences in legislation may in fact impede the successful fight against serious criminality which is tending to become better organised, more international and increasingly dangerous to society. The Select Committee considered that it was necessary for member States to make their respective legislations come nearer to each other and to adopt efficient measures to investigate offences, to take provisional measures and to confiscate the instruments and fruits of illegal activity. This is imperative because, in order to be able to co-operate at international level, States should possess at least a comparable level of efficiency. This does not mean that the States' legislation need necessarily be harmonised but that they should at least find ways and means to enable them to co-operate more effectively.

14. The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (hereinafter referred to as the United Nations Convention), concluded in Vienna in December 1988, played an important role in the deliberations of the experts. The relevant provisions of the United Nations Convention were constantly taken into consideration: on the one hand, the experts tried as far as possible to use the terminology and the systematic approach of that convention unless changes were felt necessary for improving different solutions; on the other hand, the experts also explored the possibilities of introducing in the Council of Europe instrument stricter obligations than those of the United Nations Convention on the understanding that the new Convention – in spite of the fact that it is open to other States than the member States of the Council of Europe – will operate in the context of a smaller community of like-minded States. For instance, in the field of international co-operation for the purposes of confiscation, the combination of the obligation to confiscate provided for in Article 13 and the grounds for refusal in Article 18 represents a more binding system than that created by Article 5 of the United Nations Convention. Moreover, the Convention addresses many questions and issues about which the United Nations Convention is either completely silent or which it has left to be resolved or worked out in further bilateral or multilateral arrangements between Parties.

15. The experts were able to identify considerable differences with regard to the basic systems of confiscation at national level in the member States of the Council of Europe. All States have a system of so-called property confiscation, that is, the confiscation of specific property, with respect to the instrumentalities used in the commission of offences, including items or substances whose uncontrolled possession is in itself illegal. Some States also know property confiscation for the proceeds, directly or indirectly derived from offences, or their substitutes. As a result of property confiscation, the ownership rights in the specific property concerned are transferred to the State.

With regard to the proceeds from offences, another system of confiscation is widely used in some of the member States of the Council of Europe: so-called value confiscation, which consists of the requirement to pay a sum of money based on an assessment of the value of the proceeds directly derived from offences, or their substitutes. As a result of a value confiscation, the State can exert a financial claim against the person against whom the order is made, which, if not paid, may be realised in any property (no matter whether legally or illegally acquired) belonging to that person. The order is thus executed in a similar way to fines or court orders in civil cases.

Some States have, as far as the confiscation of proceeds is concerned, the two systems (both property and value confiscation) available under their domestic law.

The experts were also able to identify considerable differences in respect of the procedural organisation of the taking of decisions to confiscate (decisions taken by criminal courts, administrative courts, separate judicial authorities, in civil or criminal proceedings totally separate from those in which the guilt of the offender is determined (these proceedings are referred to in the text of the Convention as "proceedings for the purpose of confiscation" and in the explanatory report sometimes as "*in rem* proceedings"), etc.). It was also possible to distinguish differences in respect of the procedural framework of such decisions (presumptions of licitly/illicitly acquired property, time-limits, etc.).

The experts agreed that it would be impossible to devise an efficient instrument of international co-operation without taking into account these basic differences in national legislation. On the other hand, effective co-operation must recognise that the systems may not be alike but that they aim to achieve the same goals. This is why the committee agreed to put the two systems (value and property confiscation) of confiscation on an equal footing and to make the text unambiguous on this point.

16. The Select Committee also stressed that the successful fight against serious criminality required the introduction of a laundering offence in States which had not already introduced such an offence. The United Nations Convention requires the Parties to that convention to adopt such measures as may be necessary to establish laundering in respect of drug offences as criminal offences under domestic law. The Select Committee considered it possible to go further in the framework of mainly European co-operation, but recognised that full harmonisation of national laws would not be feasible. It therefore, on the one hand, subjected the implementation of some of the provisions to the constitutional and other basic principles of the legal system of the Parties and, on the other hand, allowed Parties to limit the range of predicate offences by making a reservation to this effect.

17. International co-operation as regards the proceeds of crime requires that efficient instruments be put at the disposal of law enforcement agencies. Since property (aircraft, vessels, money, etc.) might be moved from one country to another in a matter of days, hours and sometimes minutes, it is necessary that rapid measures may be taken in order to "freeze" a current situation to enable the authorities to take the necessary steps.

18. Unlike most other conventions on international co-operation in criminal matters prepared within the framework of the Council of Europe, the present Convention does not carry the word "European" in its title. This reflects the drafters' opinion that the instrument should from the outset be open also to like-minded States outside the framework of the Council of Europe. Three such States – Australia, Canada and the United States of America – were, in fact, represented on the Select Committee by observers and actively associated with the drafting of the text.

Commentary on the articles of the Convention

CHAPTER I – Use of terms

Article 1 – Use of terms

19. Article 1 defines certain terms which form the basis of the mechanism of international co-operation provided for in the Convention and the scope of application of Chapter II. Following practice from other conventions elaborated within the framework of the Council of Europe, the number of terms requiring a definition has been limited to what is absolutely necessary for the correct application of the Convention. Several of the definitions are drafted in a broad manner in order to ensure that particular features of national legislation are not excluded from the application of the Convention.

20. It was the opinion of the experts that the terminology used in the Convention did not, as a rule, refer to a specific legal system or a particular law. Rather they intended to create an autonomous terminology which, in the light of the national laws involved, should be so interpreted as to ensure the most efficient and faithful application of the Convention. If, as an example, a foreign confiscation order referred to a "forfeiture" instead of a "confiscation", this should not prevent the authorities of the requested State from applying the Convention. Likewise, if the "freezing" of a bank account has been requested, the requested State should not refuse to co-operate merely on the ground that the national law only provided for "seizure" in the case under question. The Select Committee recognised that national procedural laws could sometimes differ widely but the end result would often be the same despite formal differences. In addition, the Select Committee thought it wise that all definitions should, as far as possible, be in harmony with the aforementioned United Nations Convention. This was justified since a number of cases that were to be dealt with under the Convention would concern drug offences.

21. The definition of "proceeds" was intended to be as broad as possible since the experts agreed that it was important to deprive the offender of any economic advantage from his criminal activity. By adopting a broad definition, this ultimate goal would be made possible. Also, the experts felt that by adopting this approach they could avoid a discussion as to whether, for example, substitutes or indirectly derived proceeds would in principle be subject to international co-operation. If a Party could not, in a particular case, accept international co-operation because of the remote relationship between the confiscated property and the offence, that Party could instead invoke Article 18, paragraph 4.*b*, which provides for the possibility of refusing co-operation in such a case.

The committee discussed whether the words "economic advantage" implied that the cost of making the profit (for instance the purchase price of narcotic drugs) should be deducted from the gross profit. It discovered that national legislation varied considerably on this point; there were even differences within the same legal system depending on the categories of offences. The experts also considered that differences in national legislation or legal practice in this respect between Parties should not be invoked as an obstacle to international co-operation. As regards drug offences, the experts agreed that the value of drugs initially purchased would always be subsumed within the definition of proceeds.

The committee deliberately chose to speak of "criminal offences" to make it clear that the scope of application of the Convention is limited to criminal activity. It was therefore not necessary to define the term "offences".

The wording of the definition of "proceeds" does not rule out the inclusion of property and assets that may have been transferred to third parties.

In the broad definition of property, the experts deleted the initially proposed terms "tangible or intangible" since it was found that those terms could be subsumed under the definition. The experts also considered adding the term "assets" but decided against it for the same reasons.

In respect of "instrumentalities", the experts discussed whether instrumentalities that were used to facilitate the commission of an offence or intended to be used to commit an offence were covered by the definition. In respect of instrumentalities that were used in the preparatory acts leading to the commission of an offence or to hinder the detection of an offence, the experts agreed that such questions should be resolved according to the national law of the requested Party while taking account of the differences in national law and the need for efficient international co-operation. The term "instrumentalities" should, for the purposes of international co-operation, be interpreted as broadly as possible. Property which facilitates the commission of the offence, for instance, could in some cases be included in the definition.

22. The experts discussed whether it was necessary to include "objects of offences" under the scope of application of the Convention but decided against it. The terms "proceeds" and "instrumentalities" are sufficiently broadly defined to include objects of offences whenever necessary. The broad definition of "proceeds" could include in the scope of application, for instance, stolen property such as works of art or trading in endangered species.

23. The committee discussed whether it was necessary to define "confiscation" or "confiscation order" under the Convention. Such a definition exists in the United Nations Convention where "confiscation", which includes forfeiture where applicable, means the permanent deprivation of property by order of a court or other competent authority. The European Convention on the International Validity of Criminal Judgments defines a "European criminal judgment" as any final decision delivered by a criminal court of a contracting State as a result of criminal proceedings and a "sanction" as any punishment or other measure expressly imposed on a person, in respect of an offence, in a European criminal judgment or in an *ordonnance pénale*.

The definition of "confiscation" was drafted in order to make it clear that, on the one hand, the Convention only deals with criminal activities or acts connected therewith, such as acts related to civil *in rem* actions and, on the other hand, that differences in the organisation of the judicial systems and the rules of procedure do not exclude the application of the Convention. For instance, the fact that confiscation in some States is not considered as a penal sanction but as a security or other measure is irrelevant to the extent that the confiscation is related to criminal activity. It is also irrelevant that confiscation might sometimes be ordered by a judge who is, strictly speaking, not a criminal judge, as long as the decision was taken by a judge. The term "court" has the same meaning as in Article 6 of the European Convention on Human Rights. The experts agreed that purely administrative confiscation was not included in the scope of application of the Convention.

The use of the word "confiscation" includes also, where applicable, "forfeiture".

" Predicate offence" refers to the offence which is at the origin of a laundering offence, that is, the offence which generated the proceeds. The expression is found in Article 6, paragraphs 1, 2 and 4.

CHAPTER II – Measures at national level

24. The reasons for and the aim of this chapter are described above under "General considerations". The wording of the articles in the chapter makes it clear that if States already possess the necessary measures, it is not necessary to take further legislative steps.

Article 2 – Confiscation measures

25. Paragraph 1 was drafted because several States do not yet possess sufficiently broad and effective legal provisions in respect of confiscation. It seeks to create an effective scheme for confiscation. It should be seen as a positive obligation for States to enact legislation which would enable them to confiscate instrumentalities and proceeds. This would also enable States to co-operate in accordance with the terms of the Convention, see Article 7, paragraph 2.

26. The expression "property the value of which corresponds to such proceeds" refers to the obligation to introduce measures which enable Parties to execute value confiscation orders by satisfying the claims on any property, including such property which is legally acquired. Value confiscation is, of course, still based on an assessment of the value of illegally acquired proceeds. The expression is also found in the United Nations Convention.

27. The committee discussed whether it was possible to define certain offences to which the Convention should always be applicable. The experts agreed that Parties should not limit themselves to offences as defined by the United Nations Convention. The offences would include drug trafficking, terrorist offences, organised crime, violent crimes, offences involving the sexual exploitation of children and young persons, extortion, kidnapping, environmental offences, economic fraud, insider trading and other serious offences. Offences which generate huge profits could also be included in such a list. The experts thought however that the scope of application of the Convention should in principle be made as wide as possible. For that purpose, the committee created an obligation to introduce measures of confiscation in relation to all kinds of offences. At the same time, they felt that this approach required a possibility for States to restrict co-operation under the Convention to certain offences or categories of offences. The possibility of entering a reservation was therefore introduced. The mere fact that a Party may enter a reservation as regards a specific offence does not necessarily mean that it must refuse a request made by a Party which has not made a similar reservation. Article 18 of the Convention states only optional grounds for refusal.

Without the possibility of entering a reservation, States would be obliged to adopt measures which would enable them to confiscate the proceeds of all kinds of offences. Even if this were regarded as desirable, for the criminal should never gain from his criminal activities, the experts considered it premature to require this. It could in fact be counterproductive to the aim of the Convention to require such a condition, since this would prevent several States from ratifying the Convention as quickly as possible in order to enact the necessary domestic legislation. The experts agreed, however, that such States should review their legislation periodically and expand the applicability of confiscation measures, in order to be able to restrict the reservations subsequently as much as possible. They also agreed that such measures should at least be made applicable to serious criminality and to offences which generate huge profits.

Article 3 – Investigative and provisional measures

28. This article was drafted with the same object in mind as the previous one. It concerns the categories of measures indicated in Articles 8 and 11, in so far as they do not relate to the special investigative techniques referred to in Article 4, paragraph 2. As in the case of Article 2, the present paragraph should be seen as an obligation for ratifying States to take legislative action. This would also enable them to co-operate in accordance with the terms of the Convention (see Article 7, paragraph 2).

This article does not allow for declarations. Thus, while a Party may declare what offences or categories of offences it wishes to include within the obligation in Article 2, it must none the less enact possibilities of taking investigative and provisional measures concerning all offences or categories of offences. In so far as the relation between this article and Chapter III is concerned, a Party should not have the possibility of refusing measures under Section 2 or 3 simply because it has made a declaration under Article 2, paragraph 2, in respect of a certain offence. The faculty of using Article 18, paragraph 1.*f*, will of course still remain open. Article 7 requires Parties to adopt measures to enable them to comply with requests for investigative assistance and the taking of provisional measures, under the conditions provided for in Chapter III.

Article 4– Special investigative powers and techniques

29. Article 4, paragraph 1, was drafted with the same object in mind as Articles 2 and 3. In general, bank secrecy does not constitute an obstacle to domestic criminal investigations or the taking of provisional measures in the member States of the Council of Europe, in particular when the lifting of bank secrecy is ordered by a judge, a grand jury, an investigating judge or a prosecutor. The second sentence of the paragraph is also found in the United Nations Convention. The sentence should, for the purposes of international co-operation, be read in conjunction with Article 18, paragraph 7.

30. Paragraph 2 of the article was drafted to make States aware of new investigative techniques which are common practice in some States but which are not yet implemented in other States. The paragraph imposes an obligation on States at least to consider the introduction of new techniques which in some States, while safeguarding fundamental human rights, have proved successful in combating serious crime. Such techniques could then also be used for the purposes of international cooperation. In such cases, Chapter III, Section 2, would apply. The enumeration of the techniques is not exhaustive.

Monitoring orders means, in the sense used by the committee, judicial orders to a financial institution to give information about transactions conducted through an account held by a particular person with the institution. Such an order is usually valid for a specific period.

Observation is an investigative technique, employed by the law enforcement agencies, consisting in covertly watching the movements of persons, without hearing them.

Interception of telecommunications includes interception of telephone conversations, telex and telefax communications. Recommendation No. R (85) 10 concerning the practical application of the European Convention on Mutual Assistance in Criminal Matters in respect of letters rogatory for the interception of telecommunications deals with this question.

Access to computer systems is discussed in the report on computer related crime, elaborated by a committee of experts under the CDPC (see Recommendation No. R (89) 9 on computer-related crime). Such access creates special difficulties both at national and international level because of the possibilities of transfrontier transmission of data.

Production orders instruct individuals to produce specific records, documents or other items of property in their possession. Failure to comply with such an order may result in an order for search and seizure. The order might require that records or documents be produced in a specific form, as when the order concerns computer-generated material (see also the report on computer-related crime).

Article 5 – Legal remedies

31. Interested parties are basically all persons who claim that their rights with respect to property subject to provisional measures and confiscation are unjustifiably affected. These claims should in principle be honoured in cases where the innocence or *bona fides* of the party concerned is likely or beyond reasonable doubt. As long as no final confiscation order has been made against him, the accused may also qualify as an interested party. The legal provisions required by this article should guarantee "effective" legal remedies for interested third parties. This implies that there should be a system where such parties, if known, are duly informed by the authorities of the possibilities to challenge decisions or measures taken, that such challenges may be made even if a confiscation order has already become enforceable, if the party had no earlier opportunity to do so, that such remedies should allow for a hearing in court, that the interested party has the right to be assisted or represented by a lawyer and to present witnesses and other evidence, and that the party has a right to have the court decision reviewed.

This article does not bestow upon private citizens any right beyond those normally permitted by the domestic law of the Party. In any case, minimum rights of the defence are safeguarded by the Convention for the Protection of Human Rights and Fundamental Freedoms.

Article 6 – Laundering offences

32. The first paragraph of the article is based on the United Nations Convention. However, the wording differs slightly from that convention in respect of the element of "participation" which is found in the United Nations Convention, and also as regards the predicate offences to which the proceeds relate. Participation has not been included in paragraph 1, sub-paragraphs *a, b* and *c*, of the article since, because of the different approach taken by the

committee, it appeared to be redundant. The present Convention is not limited to proceeds from drug offences. The experts considered that it was not necessary to provide that States could not limit the scope of application *vis-à-vis* the United Nations Convention, which had become a universally recognised instrument in the fight against drugs.

The first part of paragraph 1 establishes an obligation to criminalize laundering. The second part makes this obligation in respect of certain categories of laundering offences dependent on the constitutional principles and the basic concepts of the legal system of the ratifying State. To the extent that criminalisation of the act is not contrary to such principles or concepts, the State is under an obligation to criminalize the acts which are described in the paragraph. A further explanation of what is meant by basic concepts of the legal system is found in the explanatory report in respect of Article 18, paragraph 1.*a.*

Paragraphs 2 and 3, with the exception of paragraph 2.*c,* are not found in the United Nations Convention. The experts thought it useful to make it clear that the present Convention is intended to cover extra-territorial predicate offences. Paragraph 2.*b* takes into account that in some States the person who committed the predicate offence will not, according to basic principles of domestic penal law, commit a further offence when laundering the proceeds. On the other hand, in other States laws to such effect have already been enacted.

Paragraph 3 criminalizes acts other than those designated in the United Nations Convention. It is, however, not mandatory for Parties to enact any or all of the offences described in the paragraph. Paragraph 3.*a* suggests the criminalisation of negligent behaviour whereas the following sub-paragraph concerns a person who lawfully trades with a criminal, knowing that the payment is proceeds from crime but who does not see this fact as an obstacle to a business relationship. The case mentioned in paragraph 3.*c* concerns a person who promotes criminal activity.

33. The question has been raised, in relation to the United Nations Convention, whether it would be illegal for a lawyer's fees to be paid out of funds related to a laundering offence. Some lawyers have even suggested that the United Nations Convention would, by its working, make it criminal to hire a lawyer or to accept a fee. In the view of the experts, the wording of the present Convention cannot be misinterpreted to that effect.

34. In respect of paragraph 4 of the present article, reference is made to the commentary on Article 2, paragraph 2. The offences or categories of offences referred o therein are however not necessarily the same as the ones referred to in the present article.

CHAPTER III – INTERNATIONAL CO-OPERATION

Section 1 – Principles of international co-operation

Article 7 – General principles and measures for international co-operation

35. Paragraph 1 of this introductory article was drafted to indicate the scope and the aims of the international co-operation which is detailed in the following sections. Those sections should, in principle, exclusively define the scope of international co-operation, but Section 1 will affect the interpretation of the other sections. Where co-operation concerns investigations or proceedings which aim at confiscation, Parties should co-operate with each other to the widest extent possible.

Paragraph 2 of this provision should also be considered in connection with the obligation provided for under Article 13. If a State has only the system of value confiscation of proceeds, it would be necessary for it to take legislative measures which would enable it to grant a request from a State which applies property confiscation. The converse would be true, since the two systems are equal under the Convention.

So-called "fishing expeditions" (general and not determined investigations which are carried out sometimes even without the existence of a suspicion that an offence has been committed) lie outside the scope of application of the Convention. If the requesting Party has no indication of where the property might be found, the requested Party is not obliged to search, for instance, all banks in a country (see Article 27, paragraph 1, sub-paragraph *e*.ii).

Section 2 – Investigative assistance

Article 8 – Obligation to assist

36. This article should be interpreted in a broad manner since the committee refers to the "widest possible measure of assistance". Such assistance could relate to criminal proceedings, but it could also be proceedings for the purpose of confiscation which are related to a criminal activity.

The latter part of the paragraph should only be seen as giving examples of assistance and does not limit its application. For example, if monitoring or telephone tapping orders may be made under the law of the requested Party, they should also be granted in international co-operation.

The paragraph relates to "identification and tracing" of property. In that respect, the wording should also be interpreted broadly so that, for instance, notifications relating to investigations as well as evaluation of property are included in the scope of application. To the extent that the scope of application of the present Convention and the European Convention on Mutual Assistance in Criminal Matters converge, Parties should, if no reasons to the contrary exist, endeavour to use the latter convention.

The words "other property liable to confiscation" have been added to make it clear that investigative assistance should also be rendered when the requesting Party applies value confiscation and the assistance relates to property which might be of licit origin.

The assistance also includes seizure for evidentiary purposes.

The wording of the Convention does not exclude the possibility of the investigative assistance referred to in this paragraph also being rendered to authorities other than judicial ones, such as police or customs authorities, in so far as such assistance does not involve coercive action (see Article 24, paragraph 5).

Article 9 – Execution of assistance

37. Paragraph 1 of this article describes the general principle that the carrying out of investigative measures is governed by the law of the requested Party. However, the requesting Party may in its request ask that special procedures be used in relation to the measure. Such procedures could for example consist of special notifications to third parties, preserving the chain of custody of seized items of evidence or the allowing of a policeman, prosecutor or judge of the requesting Party to be present during an investigation. The question of compatibility will necessarily be determined in the requested Party in accordance with its own legal system.

The words "as permitted by" indicate that the decision concerning the assistance should also be taken according to the law of the requested Party. That law must, under Article 7, provide for the possibility of taking the investigative measures so that the requested Party can comply with its obligations under the Convention. The aforementioned words also make reference to the use of discretionary powers that some authorities might have.

The words "in accordance with" also define the procedural rules governing requests for assistance.

In carrying out requests under this article, the requested Party should endeavour not to prejudice investigations or proceedings in the requesting Party.

Article 10 – Spontaneous information

38. This article introduces a novelty in the field of legal assistance in criminal matters: a possibility for States to forward without prior request information about investigations or proceedings or which might become relevant in relation to co-operation under the Convention. Such information must of course not be transmitted if it might harm or endanger investigations or proceedings in the sending Party. As regards confidentiality, see Article 33, paragraph 3.

Section 3 – Provisional measures

Article 11 – Obligation to take provisional measures

39. Paragraph 1 of the article concerns cases where a confiscation order has not yet been rendered by the requesting Party but where proceedings have been instituted. The experts agreed that, in respect of this paragraph, an obligation to take the provisional measures exists, subject of course to the provisions on grounds for refusal and postponement. Freezing and seizing are only examples of provisional measures. They do not refer to any specific legal instrument as defined by national law. The words "to prevent any dealing in, transfer or disposal..." are the same as those used in the United Nations draft model treaty on mutual assistance in criminal matters. They indicate the aim of the provisional measures. The wording "which, at a later stage, may be the subject of a request... or which might be such as to satisfy the request" makes it clear that both systems of confiscation are subject to the provision. Any property, including legally acquired property, in cases of value confiscation is envisaged. Of course, such property should be made subject to provisional measures only in cases where this is explicitly requested by the requesting Party.

40. Paragraph 2 deals with the case where a Party has already received a request for confiscation pursuant to Article 1 3. The requested Party shall then, when requested, take the necessary provisional measures so that the request for confiscation can be executed. The requesting Party should indicate necessary provisional measures in accordance with Article 27, paragraph 3, sub-paragraph a.iv. Since the words "pursuant to Article 13" are used, it follows that both systems of international cooperation apply.

The "measures" under paragraph 2 of the article are the same as those mentioned in the previous paragraph. As to the term "property", the same considerations apply as to paragraph 1 of the article.

Article 12 – Execution of provisional measures

41. Paragraph 1 of this article describes the general principle which is found in most instruments of international legal co-operation, that the carrying out of provisional measures is governed by the law of the requested Party.

The words "as permitted by... the domestic law" indicates that decisions should also be taken according to the law of the requested Party. That law must, under Article 7, provide for the possibilities of taking provisional measures so that the requested State can comply with its obligations under the Convention. The Convention does not, however, oblige Parties, in all cases where confiscation is possible, to provide at the same time for the right to apply provisional measures. Parties may, if they deem this appropriate, restrict the applicability of provisional measures to certain conditions, such as the seriousness of the offence or the value of the property to be seized (see Article 18, paragraph 1.*c*). Therefore, a Party may be in a position where it can comply with a request for confiscation, but not with a request for provisional measures prior to the requested confiscation. This situation is also reflected in Article 18, paragraph 2.

The requesting Party might in its request ask that special procedures be taken in relation to the measure. Such requests should be granted to the extent that they are not incompatible with the law of the requested Party. The question of compatibility will necessarily be determined in the requested Party in accordance with its own legal system.

42. The national law of the requested Party governs when the provisional measures may or must be lifted. Paragraph 2 of the article institutes an obligation for the requested Party to give the requesting Party an opportunity to present its reasons in favour of continuing the provisional measure. This could be done either directly to the court, for example, as an intervention *amicus curiae*, if permitted by national law, or as a notification through official channels. Unless the requesting Party has had the opportunity of presenting its views, the provisional measure may not be lifted if special reasons do not exist. Such reasons may be that the property concerned has been the subject of a bankruptcy, in which case the property comes into the custody of the receiver, or that the measure must automatically be lifted because an event has or has not occurred. In the latter case, the requesting State will know in advance that the measure might be lifted since the requested State is obliged to inform it of the provisions of the national law. Reference is made to Article 31, paragraph 1.*e*, which obliges the requested Party to inform the requesting Party about such provisions of its domestic law as would automatically lead to the lifting of the provisional measure. Such laws could for instance require that a provisional measure be lifted if a prosecutor has not applied for a renewal of the measure within a specified time-limit.

Section 4 – Confiscation

Article 13 – Obligation to confiscate

43. Article 13, paragraph 1, describes the two forms of international cooperation regarding confiscation. Paragraph 1.*a* concerns the enforcement of an order made by a judicial authority in the requesting State; paragraph 1.*b* creates an obligation for a State to institute confiscation proceedings in accordance with the domestic law of the requested Party, if requested to do so, and to execute an order pursuant to such proceedings. This dual scheme of international co-operation follows the United Nations Convention, Article 5, paragraph 4.

From the wording of the article, it follows that the request must concern instrumentalities or proceeds from offences. In respect of value confiscation, see the commentary on Article 13, paragraph 3.

It also follows from the article that the request concerns a confiscation which by its very nature is criminal and thus excludes a request which is not connected with an offence, for example administrative confiscation. However, the decision of a court to confiscate need not be taken by a court of criminal jurisdiction following criminal proceedings.

Any type of proceedings, independently of their relationship with criminal proceedings and of applicable procedural rules, might qualify in so far as they may result in a confiscation order, provided that they are carried out by judicial authorities and that they are criminal in nature, that is, that they concern instrumentalities or proceeds. Such types of proceedings (which include, for instance, the so called" *in rem* proceedings") are, as indicated under "General considerations" above, referred to in the text of the Convention as "proceedings for the purpose of confiscation".

44. Paragraph 1.*a* speaks of "courts" whereas paragraph 1.*b* refers to "competent authorities". This means that a limit is set to the scope of application of the Convention. The term "competent authorities" in paragraph 1.*b* may include authorities responsible for prosecution, who in their turn are to bring the case before their judicial authorities (courts). It has not been considered necessary to restrict the Convention with respect to the procedure under Article 13, paragraph 1.*b*, since such confiscation entirely follows national law.

The obligation to co-operate for the purpose of confiscation under Article 13, paragraph 1, is fulfilled when the requested Party acts in accordance with at least one of the two methods of co-operation specified in the paragraph. The requested Party has the possibility, in general or in relation to a specific case, of excluding the use of one of the two methods. However, the simultaneous use of both methods is admissible. Nothing in the Convention prevents Parties from providing for the possibility of applying both systems under their law. Exceptional cases may occur when a State requests co-operation under paragraph 1.a in respect of a certain type of property and under paragraph 1.*b* for some other property, irrespective of the fact that the underlying offence might be the same. This may be the case where property has been substituted, where third party interests are involved or where the request concerns indirectly derived proceeds or intermingled property (licitly acquired property intermingled with illicitly acquired property). Moreover, the competent authorities of the requested Party should in such a case ensure that the scope of a confiscation order to be obtained does not go beyond the objectives specified in the request of the requesting Party.

If a State requests co-operation under paragraph 1*a*, nothing prevents the requested State from granting co-operation under paragraph 1.*b* instead, since the choice of the form of co-operation rests with the requested Party. In such cases, the foreign order of confiscation might serve as proof or presumption, depending on the legal practices under the domestic law of the requested Party. Article 14, paragraph 2, is however still valid in such cases.

45. The way paragraph 1.*b* is drafted implies an obligation for the requested State always to submit the request to its competent authorities for the purpose of obtaining an order of confiscation. The question arises as to whether the government of the requested State has to submit the request in a case where it intends to invoke one of the grounds for refusal under Article 18. This is not, however, the intention of the experts. An obligation to submit the request to the competent authorities should only exist if the competent authority of the requested Party, after a summary test, considers that there are no immediate obstacles to granting the request. This does not prevent the competent authority, if it subsequently finds obstacles, from deciding not to pursue the matter, provided of course that the conditions of the Convention are met.

46. Paragraph 2 is modelled on Article 2 of the European Convention on the Transfer of Proceedings in Criminal Matters. If the requested State already has competence under its own law to institute confiscation proceedings, the provisions of the paragraph are superfluous. If, however, no such jurisdiction exists, the necessary competence follows, on the basis of this paragraph, directly from the request of the requesting Party made under paragraph 1. Such jurisdiction need not have been expressly established by the domestic law of the requested Party. It goes without saying that this paragraph can only be applicable to the procedure envisaged in paragraph 1.*b*.

It follows necessarily that the requested Party has competence to render investigative assistance and to take provisional measures also in cases where it may be foreseen that assistance under Article 13 will be rendered in accordance with paragraph 1.*b*. Articles 8 and 11 contain an obligation to take measures without making a distinction between the two systems of international co-operation.

47. The application of the procedure under paragraph 1.*b* presupposes that the requested State, at least for international cases, is equipped to undertake proceedings for the purposes of confiscation (independently of the trial of the offender).

48. The committee drafted paragraph 3 of the article in order to make it clear that value confiscation, consisting of a requirement to pay a sum of money to the State corresponding to the value of the proceeds, is covered by the Convention. The requested Party, acting under paragraph 1, sub-paragraph *a* or *b*, will ask for payment of the sum due and, if payment is not obtained, then realise the claim on any property available. The wording "any property available" shows that the claim might be realised on either legally or illegally acquired property. It also indicates that property which is in the possession of third parties, such as ostensible persons or in cases where a so-called *Actio Pauliana* might be invoked under

national law, is affected. The expression "if payment is not obtained" also includes part-payments.

According to this paragraph, Parties must, for purposes of international co-operation in the confiscation of proceeds, be able to apply both the system of property confiscation and the system of value confiscation. This is made clear by Article 7, paragraph 2.*a*. It may imply that Parties which have only a system of property confiscation in domestic cases have to introduce legislation providing for a system of value confiscation of proceeds, including the taking of provisional measures on any realisable property, in order to be able to comply with requests to that effect from value confiscation countries. On the other hand, Parties which have only a system of value confiscation of proceeds in domestic cases must introduce legislation providing for a system of property confiscation of proceeds in order to be able to comply with requests to that effect from property confiscation countries.

49. Paragraph 4 plays only a subsidiary role in that, failing agreement, paragraph 1 of the article applies. If a request for confiscation of a specific property has been made, a country which applies value confiscation must also enforce the decision on that particular property.

Article 14 – Execution of confiscation

50. Article 14, paragraph 1, states the fundamental rule that, once the authorities of a State have accepted a request for enforcement or a request under Article 13, paragraph 1.*b*, everything relating to the request must be done in accordance with that State's law and through its authorities. This rule of *lex fori* is normally interpreted to the effect that the law of the forum governs matters of procedure, mode of confiscation proceedings, matters relating to evidence and also limitation of actions based on time bars (see, however, Article 18, paragraph 4.*e*). In the case of remedies in respect of cases relating to Article 13, paragraph 1.*a*, a special rule is provided for in Article 14, paragraph 5, which preserves the right to deal with applications for review of confiscation orders, originally issued by the requesting Party, for that Party alone.

As one of the consequences of the interpretation of paragraph 1, the experts agreed that, if the law of the requested Party requires notification of a confiscation order and such notification was not given, the requested Party would not be in a position to execute the order since the execution is governed by the law of the requested Party. In addition, the paragraph covers possible interventions by the requested Party which might lead to the mitigation of confiscation orders which have already been issued.

51. The question of limitation of actions is particularly complicated in respect of confiscation. Some countries may not provide for any rules in this respect, whereas others may have provided for a set of rules relating to the original offence, the service of summons, the enforcement of the confiscation order, etc. In the view of the experts, such limitations, where they exist, should always be interpreted under the law of the requested State in conformity with what is provided under Article 14. If a confiscation order is statute-barred under the law of the requesting State, this would normally mean that it is not enforceable in the requesting Party. Confiscation may then be refused under Article 18. There should therefore be no room for doubt. Under Article 27, paragraph 3.*a*.ii, the competent authority of the requesting Party should certify that the confiscation order is enforceable and not subject to ordinary means of appeal. In addition, the requesting Party is obliged to inform the requested Party of any development by reason of which the confiscation order ceases to be wholly or partially enforceable (see Article 31, paragraph 2.*a*).

52. Paragraph 2 was inspired by Article 42 of the European Convention on the International Validity of Criminal Judgments. Similar wording is found also in Article 11, paragraph 1.*a*, of the Convention on the Transfer of Sentenced Persons. The experts considered this provision to be of crucial importance in the field of co-operation in penal matters, but provided a possibility of making a reservation in paragraph 3 to assure a sufficient degree of flexibility to the Convention. Such possibility is however limited only to those few States which, for

constitutional or similar reasons, would otherwise have had difficulties in ratifying the Convention.

Without prejudice to the principle of review of a confiscation order provided for in Article 14, paragraph 5, the following could be stated in order to clarify the meaning of paragraph 2.

Paragraph 2 is in principle only applicable to a request for enforcement of a confiscation order under Article 13, paragraph 1*a*. If, for instance, the requested State chooses to initiate its own proceedings under Article 13, paragraph 1.*b*, despite the fact that an enforceable confiscation order by the requesting State exists, the present paragraph applies equally to those proceedings. The purpose of the paragraph is that, if a factual situation has already been tried by the competent authorities of one State, then the competent authorities should not once again try those facts. It should place confidence in the foreign authorities' decision. Regarding the additional protection provided for innocent third parties, see also Article 22.

It is another matter if a party invokes new facts which, since they occurred later, were not tried by the authorities of the requesting Party (*factum superveniens*) or facts that existed but, for a valid reason (for example they were not known), were not brought before the authorities of the requesting Party. In such cases, the authorities of the requested Party are, of course, free to decide on such facts.

The requested State is bound by the "findings as to the facts". It is not immediately apparent what may constitute facts and what may constitute legal consequences of such facts. An example would be the case where the courts of the requesting State have found a person guilty of illegal trafficking of 100 kg of cocaine. In consequence, property equal to the proceeds of trafficking 100 kg was confiscated. The offender cannot, in such a case, in proceedings before the authorities of the requested State argue that he had only trafficked 10 kg since the authorities of the requested State are bound by the findings of the authorities of the requesting State.

Legal consequence, on the other hand, is not binding upon the requested State. If, for instance, mental deficiency does not constitute a ground for non-confiscation in the requesting State, the requested State might still examine the confiscation order and take into account the mental deficiency. The requested State may even examine whether the facts relating to the mental deficiency, as stated in the decision by the court in the requesting State, amount to mental deficiency under the law of the requested State.

If there is a difference between the legal systems to the effect that a certain fact constitutes a legitimate defence in the requested but not in the requesting State, the requested State would in some circumstances be in a position to refuse enforcement if it finds such a fact to be present. Such refusal would then be based on Article 18, paragraph 1.f. Thus, it may be necessary for the court or authority in the requested State to conduct a supplementary investigation into facts not determined by the decision in the requesting State. However, the court of the requested State is not allowed to proceed to the hearing of new evidence in respect of facts contained in the decision of the requesting State, unless such evidence was not produced for valid reasons, for instance because the evidence was not known.

It follows from the above that the court of the requested State cannot make any independent assessment of evidence bearing upon the guilt of the person convicted and contained in the decision of the requesting State.

53. The rate of exchange in paragraph 4 refers to the official middle rate of exchange. Paragraph 5 is inspired by Article 10, paragraph 2, of the Validity Convention. Since the requesting State took the decision to confiscate, it seems logical that it should also have the right to review its decision. This implies of course a review of the conviction as well as the judicial decision on the basis of which the confiscation was made. The term "review" also covers extraordinary proceedings which in some States may result in a new examination of the legal aspects of a case and not only of the facts.

54. When elaborating Article 14, the committee discussed whether it was necessary to draft a ground for refusal in respect of the case where the confiscation order had been the subject of amnesty or pardon. This question, which is of little significance, might be covered by other grounds for refusal and need not be treated expressly in the Convention. Under Article 31, paragraph 2.*a*, the requesting Party is obliged to inform the requested Party of any decision by reason of which the confiscation ceases to be enforceable.

Article 15 – Confiscated property

55. The agreements referred to in the article may be included in multilateral or bilateral agreements already concluded or in *ad hoc* agreements for the purpose of the disposal of the property. When elaborating the Convention, several experts considered that such *ad hoc* agreements should take into account the work of international funds or organisations engaged in the fight against serious criminality as well as individuals who might be the victims of offences on which the confiscation is based. Parties were also encouraged to enter into agreements whereby the confiscated property is shared among the co-operating Parties in such a manner as to generally reflect their participation in the case. Such international sharing should be designed to further the co-operative spirit embodied in this Convention.

Article 16 – Right of enforcement and maximum amount of confiscation

56. Paragraph 1 of this article states the general principle that the requesting State maintains its right to enforce the confiscation, whereas paragraph 2 seeks to avoid adverse effects of a value confiscation which is enforced simultaneously in two or more States, including the requesting State. This solution departs from the one adopted in Article 11 of the Validity Convention.

Article 17– Imprisonment in default

57. In some States it is possible to imprison persons who have not complied with an order of confiscation of a sum of money or where the confiscated property is out of reach of the law enforcement agencies of the State. Also, other measures restricting the liberty of the affected person exist in some States. Imprisonment or such measures may in other States have been declared unconstitutional.

Section 5 – Refusal and postponement of co-operation

Article 18 – Grounds for refusal

58. In order to set up an efficient but at the same time flexible system, the committee chose not to elaborate a system of conditions coupled with mandatory grounds for refusal. It considered instead that the Convention should provide for a system which would, to the fullest extent possible, place States wishing to co-operate in a position to do so. No grounds for refusal are therefore mandatory in the relationship between States. However, this does not exclude States from providing that some of the grounds for refusal will be mandatory at the domestic level. This is especially true for the two first grounds listed in paragraph 1, subparagraphs *a* and *b*.

There are two sides to Article 18. On the one hand, the requested State may always claim that a ground for refusal exists and the requesting State will usually not be in a position to contest that assessment. On the other hand, the requested State may not claim any other grounds for refusal than those enumerated in the article. If no grounds for refusal exist or if it is not possible to postpone action in accordance with Article 19, the requested State is bound to comply with the request for cooperation. Moreover, the requested Party is obliged to consider, before refusing co-operation, whether the request may be granted partially or subject to conditions.

It goes without saying that the requested State is not obliged to invoke a ground for refusal even if it has the power to do so. On the contrary, several of the grounds for refusal are drafted in such a way that it will be a matter of discretion for the competent authorities of the requested State to decide whether to refuse co-operation.

59. Paragraph 1 is valid for all kinds of international co-operation under Chapter III of the Convention. Paragraphs 2 and 3 concern only measures involving coercive action, whereas paragraph 4 only concerns confiscation. Paragraphs 5 and 6 concern proceedings *in absentia*, paragraph 7 contains a special rule for bank secrecy and paragraph 8 limits the possibility of invoking the ground for refusal in paragraph 1.*a* in two particular situations.

60. The ground for refusal contained in paragraph 1, sub-paragraph *a*, is also found in Article 11, paragraph j, of the European Convention on the Transfer of Proceedings in Criminal Matters and Article 6, paragraph *a*, of the European Convention on the International Validity of Criminal Judgments. As stated in the explanatory reports to those conventions, it is impossible to conceive of an obligation to enforce a foreign judgment (the Validity Convention) or to make prosecution compulsory (the Transfer Convention) if it contravenes the constitutional or other fundamental laws of the requested State. Observance of these fundamental principles underlying domestic legislation constitutes for each State an overriding obligation which it may not evade it is therefore the duty of the organs of the requested State to see that this condition is fulfilled in practice. This ground for refusal takes account of particular cases of incompatibility by means of a reference to the distinctive characteristics of each State's legislation, for it is impossible, in general regulations, to enumerate individual cases.

The committee of experts on several occasions discussed possible cases when this ground might come into play. During these discussions, the following examples were mentioned:

– where the proceedings on which the request are based do not meet basic procedural requirements for the protection of human rights such as the ones contained in Articles 5 and 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

– where there are serious reasons for believing that the life of a person would be endangered;

– where in particular cases it is forbidden under the domestic law of the requested Party to confiscate certain types of property;

– cases of exorbitant jurisdictional claims asserted by the requesting Party;

– where the confiscation order is determined on the basis of an assumption that certain property represents proceeds, whereas the burden of proof as to its legitimate origin was incumbent upon the convicted person, and such a determination would, under the law of the requested Party, be contrary to the fundamental principles of its legal system. It follows from this that, if a State recognises this principle in respect of one category of offence, it cannot apply this ground for refusal for another category of offences;

– where interests of the requested State's own nationals could be jeopardised. One example is when a request for enforcement concerns property which is already subject to a restraint order for the benefit of a privileged creditor in a bankruptcy or concerns property which is subject to litigation in a fiscal matter. Such priority problems should be solved according to the requested State's own legislation.

The scope of application of sub-paragraph *a* is limited by Article 18, paragraphs 5 and 6.

61. The ground for refusal in sub-paragraph *b* is also found in Article 2, paragraph *b*, of the European Convention on Mutual Assistance in Criminal Matters. It is however slightly reworded in the present Convention to indicate that the criterion is judged objectively.

The phrase "essential interests" refers to the interests of the State, not of individuals. Economic interests may, however, be covered by this concept.

62. Sub-paragraph *c* is intended to cover three different cases of grounds for refusal. This is why the committee deliberately chose the general term "importance". The first concerns cases when there an apparent disproportion between the action sought and the offence to which it relates. If, for example, a State is requested to confiscate a large sum of money when the offence to which it relates is of a minor nature, international co-operation could in most cases be refused on the basis of the principle of proportionality. In addition, if the costs of confiscation outweigh the law enforcement benefit at which the confiscation action is directed, the requested Party may refuse co-operation, unless an agreement to share costs is reached.

The second case relates to requests where the sum in itself is minor. It is clear that the often expensive system of international co-operation should not be burdened with such requests.

The third case concerns offences which are inherently minor (see Recommendation No. R (87) 18 on the simplification of criminal justice). The system of international co-operation provided under this Convention should not be used for such cases.

Where the request gives rise to extraordinary costs, Article 34 will apply. It is clear that the present paragraph can be applied if no such agreement as is envisaged under Article 34 can be reached.

63. In respect of sub-paragraph *d*, the committee agreed that the terms "political" and "fiscal" should be interpreted in conformity with other European penal law conventions elaborated under the auspices of the Council of Europe. The experts agreed that no offence defined as a drug offence or a laundering offence under the United Nations Convention should be considered a political or fiscal offence.

64. The principle of *ne bis in idem* is generally recognised in domestic cases. It also plays an important role in cases with a foreign element, but its application may vary from country to country. Sub-paragraph e refers only to the principle as such without defining its content. The principle and its limits must be interpreted in the light of the domestic law of the requested Party.

Ne bis in idem will usually be interpreted in relation to the facts in a specific case. If, in a given case, other facts were involved than the ones relied upon in the request, it would be possible to postpone co-operation on the basis of Article 19.

65. The ground for refusal contained in sub-paragraph *f* indicates the requirement of double criminality. It is not, however, a requirement which is valid for all kinds of assistance under the Convention. In respect of assistance under Section 2, the requirement is only valid when coercive action is implied.

In the field of international co-operation in criminal matters, the principle of double criminality may be *in abstracto* or *in concreto*. It was agreed, for the purpose of requests under Section 4 of Chapter III of the present Convention, to consider the principle *in concreto*, as in the case of the Validity Convention and the European Convention on the Transfer of Proceedings in Criminal Matters. In cases where double criminality is required for assistance to be afforded under Section 2, it is sufficient to consider the principle *in abstracto*. For requests under Section 3, it may depend on whether the request is one covered by paragraph 1 of Article 11, or by paragraph 2 of that article. For requests under Article 11, paragraph 2, double criminality *in concreto* would be necessary.

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

This rule means that the *nomen juris* need not necessarily be identical, since the laws of two or more States cannot be expected to coincide to the extent that certain facts should invariably be considered as constituting the same offence. Besides, the general character of the wording of the clause indicates that such identity is not, in fact, necessary, which implies that differences in the legal classification of an offence are unimportant where the condition considered here is concerned. The requirement of double criminality should thus be applied flexibly to ensure that co-operation under the Convention stresses substance over form. The technical title of the offence or the penalty carried by that offence should not be a basis for refusal if the actions criminalized in both States are approximately the same or seek to redress the same injury.

It is for the authorities of the requested State to establish whether or not there is double criminality *in concreto*. Article 28 gives the requested State the possibility of asking for additional information if the information supplied is not sufficient to deal with the request.

66. When coercive action is sought, the requesting State might not be in a position to give a full account of the facts on which the request is based simply because that State does not yet possess information in respect of all relevant elements. This implies that the requested State must consider such a request liberally in respect of the requirement of double criminality.

"Coercive action" must be defined by the requested Party. It is in the interest of that Party that the requirement of double criminality is upheld.

67. Paragraph 2 concerns only provisional measures and investigative assistance involving coercive action. The paragraph should be read in conjunction with Articles 9 and 12, paragraph 1. It affords to the requested Party the possibility of refusing co-operation if the measure could not be taken under its law if the case had been a purely domestic one. By mentioning a "similar" domestic case, it becomes clear that not all objective elements need to be the same. The requested Party must also take account of the urgency of the measures requested. It will be obliged sometimes to consider a request liberally in respect of the requirement in this paragraph.

68. During the elaboration of the Convention, the experts discussed whether it was necessary to draft similar grounds for refusal for these measures to the ones contained in Article 18, paragraph 4, sub-paragraphs *a* to *c*. It was agreed however that the wording of Article 18, paragraph 2, would also cover such situations.

69. Paragraph 3 provides for the possibility of refusing co-operation where a Party requests another Party to take measures which would not have been permitted under the law of the requesting Party. Not all the experts considered that it was necessary to draft a ground for refusal for this situation. The latter part of the paragraph refers to the competence of the authorities in the requesting Party. The experts thought that a request for measures involving coercive action should always be authorised by a judicial authority, including public prosecutors, competent in criminal matters. This would exclude administrative courts or judges or courts competent in civil cases only.

70. With regard to Article 18, paragraph 4, sub-paragraph a, the expression "type of offence" is meant to cover cases where confiscation is not at all provided for in respect of a certain offence in the requested Party. The sub-paragraph applies to those offences or categories of offences which are excluded from the scope of application of Article 2, paragraph 1, pursuant to a declaration under Article 2, paragraph 2.

71. Sub-paragraph *b* refers to laws other than those relating to fundamental principles of the legal system (paragraph 1.a of Article 18). Such laws may restrict the possibility of confiscation on the basis of the relationship between the offence and the economic advantage of it, for example by excluding or permitting confiscation through a reference to concepts such as "direct/indirect proceeds", "substitute property" for instrumentalities or proceeds, "fruits of licit activities financed by illicit proceeds", etc. When a request for confiscation relates to a case that, had it been a domestic case, would not result in a confiscation because of those laws, the requested Party should have the possibility of refusing cooperation.

The committee discussed the interaction between this paragraph and the obligation under Article 13, paragraph 3. In this connection, the experts agreed: on the one hand, that the paragraph will apply only when a request emanates from States which apply property confiscation or when it concerns a request from a value confiscation country to a value confiscation country; on the other hand, if, at the stage of realising the claim, there is no relationship between an offence and the property, which can be the case in the system of value confiscation, that that alone is no ground for refusal since the expression "advantage that might be qualified as proceeds" refers to the assessment stage. Another way of expressing this would be to state that co-operation may be refused when the assessment of the proceeds made by the requesting Party would run counter to the principles of the domestic law of the requested Party, because of the remote relationship between the offence and the proceeds.

Experts from States which mainly use the system of value confiscation expressed misgivings, during the elaboration of this provision, that it might be misinterpreted in a way which would exclude the application of value confiscation orders. In order to remedy this, the beginning of the sub-paragraph was added to make it clear that the application of the provision should be without prejudice to the value confiscation system. Experts were also reminded of the general principle embodied in the Convention that the two systems were equal under the Convention.

The committee also concluded that, where the confiscation is not at all based on an assessment of proceeds but only of the capital of the convicted person, such cases were outside the scope of application of the Convention. It was noted that, besides confiscation of instrumentalities, Articles 2 and 3 refer to confiscation procedures essentially based on an assessment of the existence and quantity of illicit proceeds. This is valid both for property confiscation (when the property assessed as proceeds is usually also the object of the enforcement of the confiscation) and for value confiscation (where the confiscation order may ultimately be satisfied by realising the claim on property which does not constitute proceeds, but where in any case the "value" to be confiscated is determined by assessing the proceeds from offences).

72. Sub-paragraph *c* need not be commented on in great detail. In respect of the enforcement of a foreign confiscation order (Article 13, paragraph 1.*a*), it is obvious that the requested Party must make an assessment as if the confiscation had been a similar national case. In cases where confiscation procedures are initiated in accordance with Article 13, paragraph 1.*b*, the requested Party may wish to recognise any acts performed by the requesting Party which may have had the effect of interrupting running periods of time-limitations under its law.

73. Sub-paragraph *d* was discussed at great length by the experts. It is probable that most requests for co-operation under Chapter III, Section 4, will concern cases where a previous conviction exists already. However, it is also possible in some States to confiscate proceeds without a formal conviction of the offender, sometimes because the offender is a fugitive or because he is deceased. In certain other States, the legislation makes it possible to take into account, when confiscating, offences other than the one which is adjudicated without a formal charge being made. The latter possibility concerns in particular certain States' drug legislation. The experts agreed that international co-operation should not be excluded in such cases, provided however that a decision of a judicial nature exists or that a statement to the effect that an offence has or several offences have been committed is included in such a decision. The expression "decision of a judicial nature" is meant to exclude purely

administrative decisions. Decisions by administrative courts are however included. The statements referred to in this article do not concern decisions of a provisional nature.

74. Sub-paragraph *e* describes the case where confiscation is not possible because of the rules relating to the enforceability of a decision or because the decision might not be final. Although in most cases a decision is enforceable if it is final, recourse to an extraordinary remedy may preclude enforcement. On the other hand, an enforceable decision may not be final, for instance in cases where the decision has been rendered *in absentia*. The lodging of an opposition or appeal against such a decision may have an interruptive effect as to its enforceability, but need not affect the part of the decision which may already have been enforced, nor necessarily imply the lifting of any seizure of realisable property. Thus, enforceability cannot be completely identified with finality and for this reason it was held essential to differentiate between the two possibilities. Under Article 27, paragraph 3.a.ii, the competent authority of the requesting Party should certify that the confiscation order is enforceable and not subject to ordinary means of appeal.

75. Sub-paragraph *f* concerns in absentia proceedings. The paragraph is inspired by the Second Additional Protocol to the European Convention on Extradition. The committee had in mind, when drafting the provision, Resolution (75) 11 of the Committee of Ministers on the criteria governing proceedings held in the absence of the accused as well as Article 6 of the European Convention on Human Rights.

76. Paragraphs 5 and 6 were drafted to limit the possibility of criminals escaping justice by simply refusing to answer the summons to appear in court. Paragraph 6 is, however, not compulsory. It is a matter for the authorities of the requested State to assess the fact that the decision was taken *in absentia* and the weight of the circumstances mentioned in the paragraph in the light of the domestic law of the requested Party.

77. Paragraph 7 deals with bank secrecy in the framework of international co-operation. As regards the national level, see Article 4, paragraph 1, and the explanatory report on that article.

In most States, the lifting of bank secrecy requires the decision of a judge, an investigating judge, a prosecutor or a grand jury. The experts considered it natural that a Party may require that international cooperation should be limited to instances where the decision to lift bank secrecy had been ordered or authorised by such authority.

Under the United Nations Convention, bank secrecy may never be invoked to refuse co-operation in respect of proceeds from drug or laundering offences. The present Convention is not intended to restrict international co-operation for such offences.

Article 19 – Postponement

78. A decision to postpone will usually indicate a time-limit. The requested Party may therefore postpone action on a request several times. According to Article 20, the requested Party must also consider whether the request may be granted partially or subject to conditions before taking a decision to postpone. It is normal that any such decision be taken in consultation with the requesting Party. If the requested Party decides to postpone action, Articles 30 and 31, paragraph 1.*c*, will apply.

Article 20 – Partial or conditional granting of a request

79. Reference is made to the commentary under Article 19 above. The words "where appropriate" indicate that consultation should be the rule; immediate decisions should be the exception unless they are purely based on questions of law, because it is usually appropriate to seek consultations with the Party that requests international co-operation. The Convention does not prescribe any form for such consultations. They may also be informal, via a simple telephone call for instance between the competent authorities.

Conditions can be laid down either by the central authorities of the requested Party or, where applicable, by any other authority which decides upon the request. Such conditions may for instance concern the rights of third parties or they may require that a question of ownership of a certain property be resolved before a final decision as to the disposal of the property is taken.

The paragraph also covers partial refusal which could take the form of admitting only confiscation of certain property or enforcing only part of the sum of a value confiscation order.

Section 6 – Notification and protection of third parties' rights

Article 21 – Notification of documents

80. This article has been drafted on the basis of the Hague Convention on the serving of legal documents in civil or commercial matters but differs slightly from that convention. Notification requirements are in particular relevant to rights of third parties. The article has therefore been placed in this section to stress this fact.

As to the relationship between this article and other conventions, see Article 39.

The Convention provides the legal basis, if such does not exist on the basis of other instruments, for international co-operation in the fulfilment of notification requirements. Among the notifications that might be required, depending on domestic law, can be mentioned a court order to seize property, the execution of such an order, seizure of property in which third party rights are vested, seizure of registered property, etc. The type of judicial documents that might be served must always be determined under the national law.

In cases where it is important to act quickly or in respect of notifications of judicial documents which are of a less important nature, the law of the notifying State might permit the sending of such documents directly or the use of direct, official channels. Provided that a Party to the Convention does not object to this procedure, by entering a reservation under Article 21, paragraph 2, states should have the possibility of using such direct means of communication.

In respect of the indication of legal remedies, the experts agreed that it is sufficient to indicate the court of the sending State to which the person served has direct access and the time-limits, if any, within which such court has to be accessed. It should also be indicated whether this has to be done by the person himself or whether he may be represented by a lawyer for this purpose. No indication of further possibilities of appeal is necessary.

Article 22 – Recognition of foreign decisions

81. Article 22 describes how third party rights should be considered under the Convention. Practice has shown that criminals often use ostensible "buyers" to acquire property. Relatives, wives, children or friends might be used as decoys. Nevertheless, the third parties might be persons who have a legitimate claim on property which has been subject to a confiscation order or a seizure. Article 5 obliges the Parties to the Convention to protect the rights of third parties.

By third party the committee understood any person affected by the enforcement of a confiscation order or involved in confiscation proceedings under Article 13, paragraph 1.b, but who is not the offender. This could also include, depending on national law, persons against whom the confiscation order could be directed. See also the commentary under Article 5.

The rights of third parties could either have been considered in the requesting State or not considered in that State. In the latter case, the affected third party will always have the right to put forward his claim in the requested State according to its law. In fact, this could often happen since, in some States such as the United Kingdom, third party rights are safeguarded

at the stage of the execution of the confiscation order and not at the stage of decision. A consequence of this is that States cannot in this case invoke any of the grounds for refusal, such as Article 18, paragraph 1*a*, on the grounds that third party rights had not been examined.

In the case where third party rights had already been dealt with in the requesting State, the Convention is based on the principle that the foreign decision should be recognised. However, when any of the situations enumerated in paragraph 2 exist, recognition may be refused. In particular, when the third parties did not have adequate opportunity to assert their rights, recognition may be refused. This does not however mean that the request for co-operation must be refused. It might be appropriate to remedy the situation in the requested Party, in which case refusal does not seem necessary. Article 20 could also be used in so far as the requested Party may make co-operation conditional on the protection of the rights of third parties.

It follows that Article 14, paragraph 2, does not concern the adjudication of rights in respect of third parties. The present article deals exclusively with the rights of third parties. Nothing in the Convention shall be construed as prejudicing the rights of bona fide third parties.

Section 7 – Procedural and other general rules

Most provisions of this section are evident and need no further comments. The following should however be explained.

82. Article 23 gives the Parties a right to designate several central authorities where necessary. This possibility should be used restrictively so as not to create unnecessary confusion and to promote close cooperation between States. Even if not expressly stated in the Convention, the Parties should, depending on internal organisational matters, have the right to change central authorities when appropriate. The powers of the central authorities are determined by national law.

83. Article 24 describes the communication channels. Normally, the central authority should be used. The application of paragraph 2 is optional. However, the judicial authority is obliged to send a copy of the request to its own central authority which must forward it to the central authority of the requested Party. For the purposes of this Convention, the term "judicial authority" also includes public prosecutors. Requests or communications referred to in paragraph 5 of the article are mostly intended for simple requests for information, for instance information from a land register.

84. Article 25 permits an evolution if techniques change. The term "telecommunications" should therefore be interpreted broadly.

In the event of urgency, States might prefer to make the first contact by telephone. Requests for co-operation must however in any case be confirmed in writing. States should pay attention to the security aspects of using public networks, for instance by protecting the communication through encryption. Article 27, paragraph 3.*a*, requires that a certified true copy be sent. It should be possible to send a copy of the certificate by telefax but confirm such certification by sending the original certificate at a later stage.

85. Article 27 states the important rules pertaining to the contents of the request for co-operation. If the rules are not strictly followed, it is clear that international co-operation will be difficult. In particular, it is absolutely necessary that the requesting Party follow conscientiously the provisions of paragraph 1, sub-paragraphs *c* and *e*. In particular, with regard to banks, it is necessary to indicate in detail the relevant branch office and its address. It is however not the intention of the committee that the article should be interpreted as implying a requirement on a requesting Party to furnish *prima facie* evidence.

Paragraph 1.*f* refers to Articles 9 and 12.

Paragraph 2 requires an indication of a maximum amount for which recovery is sought. It concerns, in particular, requests for provisional measures with a view to the eventual enforcement of value confiscation orders.

Paragraph 3, sub-paragraph *a*.iii, may in particular be relevant to the enforcement of a value confiscation order which has already been partly enforced. It may also be relevant when requests for enforcement are made in several States or when the requesting State seeks to execute part of the order.

Paragraph 3, sub-paragraph *a*.iv, might in some States amount to a request for the taking of provisional measures.

Paragraph 3.*b* is of a general nature. In order to fully understand its implications in a specific case, the Parties should read this paragraph in conjunction with the preceding paragraphs of the article.

86. Article 28 makes it possible for a Party to ask for additional information. It may do so but, at the same time, it may take necessary provisional measures if the request for co-operation would cease to have any purpose if the provisional measures were not taken.

87. Article 29 seeks to avoid any adverse effects of requests concerning the same property or person. It may happen, particularly when the system of value confiscation is used, that the same property is subject to confiscation. In cases concerning requests for confiscation, Article 29 obliges the requested Party to consider consulting the other Parties.

88. Article 31, paragraph 1.*a*, requires the requested Party to promptly inform the requesting Party of the action initiated. Such obligation to inform concerns in particular cases where a Party undertakes measures which might continue for some time and where the requesting Party has a legitimate interest in being kept informed that action is taken and of its continued results, for instance in respect of telephone tapping, monitoring orders, etc. Paragraph 1.*b* might include communications relating to events affecting the final result of the co-operation. Paragraph 2 deals with the obligation for the requesting Party to inform the requested Party of any development by reason of which any action under the Convention is not justified, for instance a decision by the requesting Party on amnesty or pardon. When such an event occurs, the requested Party is obliged to discontinue the procedures. This is usually the case under the law of the requested Party (see Article 14, paragraph 1). The requesting Party always has the possibility of withdrawing its request for co-operation.

89. Article 32 indicates the rule of speciality which is contained in several other European conventions. The committee did not wish, however, to make the rule compulsory in all the cases to which the Convention applies. It provided therefore, in paragraph 1, for the possibility that the requested Party may make the execution of a request dependent upon the rule of speciality. Certain Parties would always use this possibility. The experts provided therefore, in paragraph 2, for the possibility of declaring that the rule of speciality would always be applied in relation to other Parties to the Convention.

90. Article 33 deals with confidentiality both in the requesting Party and the requested Party. It is important that national law be adapted so that, for instance, financial institutions are not able to warn their clients that criminal investigations or proceedings are being carried out. Disclosure of such facts is a criminal offence in certain States. The degree of confidentiality in international co-operation coincides with the degree of confidentiality in national cases. The term "confidential" might have different legal connotations under the law of some States.

91. Article 34 refers only to "costs" of the action sought. The experts discussed whether Article 34 should also refer to "expenses", but decided against it.

92. Article 35, paragraph 1, requires Parties, in principle, to enter into consultations in the case of any liability for damages. Such consultations shall be without prejudice to any obligation of a Party to promptly pay the damages due to the injured person pursuant to a judicial decision to that effect. Consultations are however not always necessary when a question has arisen on how such damages should be paid. If a Party decides to pay damages to a victim because of an error made by that Party, no obligation to consult the other Party exists.

If another Party might have an interest in a case, it is normal that that Party should have an opportunity to be able to take care of its interests. The Party against whom legal action has been taken should therefore, whenever possible, endeavour to inform the other Party of the matter.

CHAPTER IV – FINAL PROVISIONS

93. With some exceptions, the provisions contained in this chapter are, for the most part, based on the "Model final clauses for conventions and agreements concluded within the Council of Europe" which were approved by the Committee of Ministers of the Council of Europe at the 31 5th meeting of their Deputies in February 1980. Most of these articles do not therefore call for specific comments, but the following points require some explanation.

94. Articles 36 and 37 have been drafted on 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, which allow for signature, before the convention's entry into force, not only by the member States of the Council of Europe, but also by non-member States which have participated in the elaboration of the convention. These provisions are intended to enable the maximum number of interested States, not necessarily members of the Council of Europe, to become Parties as soon as possible. The provision in Article 36 is intended to apply to three non-member States, Australia, Canada and the United States of America, which were represented on the Select Committee by observers and were actively associated with the elaboration of the Convention.

95. Article 39 is intended to ensure the coexistence of the Convention with other treaties – multilateral or bilateral – dealing with matters which are also dealt with in the present Convention.

Paragraph 1 concerns, *inter alia*, the United Nations Convention. It is possible that a request made under the present Convention might be dealt with under either of the two conventions. The same is valid for requests which might fall within the scope of application of both the present Convention and the Mutual Assistance Convention or the Validity Convention. Paragraph 2 expresses in a positive way that Parties may, for certain purposes, conclude bilateral or multilateral agreements relating to matters dealt with in the Convention. The drafting permits the *a contrario* deduction that Parties may not conclude agreements which derogate from the Convention. Paragraph 3 safeguards the continued application of agreements, treaties or relations relating to subjects which are dealt with in the present Convention, for instance in the Nordic co-operation.

96. Article 41 is an innovation in respect of the penal law conventions elaborated within the framework of the Council of Europe. The amendment procedure is mostly thought to be for minor changes of a procedural character. The experts considered that major changes to the Convention should be made in the form of additional protocols. It was noted that, in accordance with paragraph 5, any amendment adopted would come into force only when all Parties had informed the Secretary General of their acceptance.

97. The Committee of Ministers, which adopted the original text of this Convention, is also competent to adopt any amendments.

98. Article 42, paragraph 1, is slightly redrafted in comparison with other penal law conventions elaborated within the framework of the Council of Europe, without there being, however, any intention to change the substance of the paragraph. The experts thought it appropriate to clarify that the CDPC should also be kept informed about the interpretation of the provisions of the Convention.

Paragraph 2 imposes an obligation on the Parties to seek a peaceful settlement of any dispute concerning the interpretation or the application of the Convention. Any procedure for solving disputes should be agreed upon by the Parties concerned.