



## **Explanatory Report to the Agreement on Illicit Traffic by Sea, implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances**

Strasbourg, 31.I.1995

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1. The Agreement on Illicit Traffic by Sea, 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 31 January 1995.

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 agreement although it may facilitate the understanding of the Convention's provisions.

### **Introduction**

1. At the 6th meeting, in October 1982, of the permanent correspondents of the Co-operation Group to Combat Drug Abuse and Illicit Trafficking in Drugs (Pompidou Group), the Italian permanent correspondent mentioned that his authorities considered that combating drug trafficking on the high seas was a priority objective.

2. Following this initiative, an *ad hoc* group of experts held six meetings between April 1983 and November 1986 to prepare a regional agreement to combat illicit drugs traffic by sea. In view of the work of the United Nations on the drafting of a comprehensive convention to combat illicit drugs trafficking, the work of the Pompidou Group was suspended, awaiting the outcome of the discussions on the convention in Vienna. When the Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances ("the Vienna Convention") was adopted on 20 December 1988, the *ad hoc* group of the Pompidou Group was reconvened in order to bring its draft into line with the Vienna Convention and harmonise it with the relevant Council of Europe conventions on criminal law co-operation. The Vienna Convention contains in its Article 17 rules relating to illicit traffic by sea. The Permanent Correspondents of the Pompidou Group asked the *ad hoc* group of experts to reconsider its work particularly in the light of Article 17, paragraph 9, of the Vienna Convention which reads as follows:

"9. The Parties shall consider entering into bilateral or regional agreements or arrangements to carry out, or to enhance the effectiveness of, the provisions of this article." [Note: Article 17 is reproduced as an appendix to this explanatory report.]

3. The *ad hoc* group of experts of the Pompidou Group, chaired by Mr Leonard Hay (United Kingdom) met five times from March 1989 to October 1992. At its first meeting, it concluded that any regional agreement should be an adjunct to Article 17 of the Vienna Convention and should contain all the necessary administrative and legislative provisions to give effect to the relevant provisions of that convention. The experts considered further that they might envisage provisions which were of a more binding and precise nature and/or which permitted earlier entry into force than within the framework of the Vienna Convention. It decided to ask the United Kingdom delegation to prepare an entirely new draft regional agreement which

would meet those criteria. The *ad hoc* group of experts further held an exchange of views on the main features of such a regional agreement.

4. In the course of the discussions among the experts of the Pompidou Group, the question of whether the draft agreement should be elaborated within a wider framework of experts was discussed. At a meeting in April 1991, the permanent correspondents decided, after having heard the opinion of the bureau of the European Committee on Crime Problems (CDPC), to ask the CDPC to continue the elaboration of the draft regional agreement, on the understanding that the CDPC would fully take into account the work carried out by the Pompidou Group. The CDPC adopted, at its plenary session in June 1992, the terms of reference of the Committee of Experts on the Implementation of Article 17 of the Vienna Convention (PC-NU). The terms of reference of the PC-NU Committee required it to elaborate a draft regional agreement, taking into account work already carried out by the Pompidou Group. The committee met for the first time in November 1992 when it elected Mr Gioacchino Polimeni (Italy) as chairman. The following States participated in the work of the committee: France, Germany, Greece, Italy, the Netherlands, Norway, Spain and the United Kingdom. The United Nations, the Customs Co-operation Council, the International Maritime Organisation and Interpol were invited to be represented as observers. Mr T. de Lafond (France), Mr E. Marotta (Italy), Mr P.W.A. Schellekens (the Netherlands), Mr P. Tresselt (Norway), Mr K. Bowen and Mr W.C. Gilmore (both United Kingdom) participated as scientific experts in the work of the committee, which met further in February, March, May, September and November 1993. All member States of the Council of Europe were invited to attend the last meeting. The CDPC held a preliminary exchange of views on the draft at its plenary session in June 1993 and the final draft agreement and a draft explanatory report were submitted to the CDPC which approved the text of the agreement on 24 June 1994 for transmission of the Committee of Ministers. At the 516th meeting of their Deputies in September 1994, the Committee of Ministers approved the text of the agreement and decided to open it for signature on 31 January 1995.

### **General considerations**

5. Neither the Single Convention on Narcotic Drugs of 1961, as amended in 1972, nor the Convention on Psychotropic Substances of 1971 contain specific provisions to regulate the suppression of illicit traffic by sea. Article 36, paragraph 1 of the 1961 Conventions contains, however, a definition of what constitutes "illicit traffic". A wide description of illicit traffic is found in Article 1 of the Vienna Convention, which refers to all offences under Article 3, paragraphs 1 and 2, of that convention. The 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone contains in its Article 19, paragraph 1.d, a provision which allows for the exercise by a coastal State of criminal jurisdiction in respect of crimes committed on board ships whilst passing through the territorial sea where action is necessary for the suppression of illicit traffic in narcotic drugs. The 1982 United Nations Convention on the Law of the Sea (hereinafter referred to as the Montego Bay Convention) contains in its Article 27, paragraph 1.d, a similar provision. The 1958 Geneva Convention on the High Seas (hereinafter referred to as "the Geneva Convention") does not contain any specific rules in relation to illicit drugs trafficking.

6. The Montego Bay Convention may be seen as expressing much of the current perception of what constitutes the international law of the sea, in particular as regards issues of relevance to the subject matter dealt with in the present agreement. In addition, it contains specific provisions dealing with illicit traffic on the high seas. Article 108 reads:

"1. All States shall co-operate in the suppression of illicit traffic in narcotic drugs and psychotropic substances engaged in by ships on the high seas contrary to international conventions.

2. Any State which has reasonable grounds for believing that a ship flying its flag is engaged in illicit traffic in narcotic drugs or psychotropic substances may request the co-operation of other States to suppress such traffic."

7. Article 17 of the Vienna Convention seeks to expand on such general provisions in order to provide a firm basis for practical co-operation to suppress illicit traffic by sea. Nonetheless, on some matters, the Vienna Convention either remains silent or fails to provide sufficient guidance for its optimal practical application. It is therefore useful, as foreseen by Article 17, paragraph 9, of the Vienna Convention, to enhance its effectiveness by the conclusion of bilateral or multilateral agreements. Several such agreements exist, and some were in fact negotiated before the Vienna Convention, for instance the exchange of notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America of 13 November 1981. A further bilateral agreement was concluded between the Kingdom of Spain and the Republic of Italy on 23 March 1990. The Portuguese-speaking countries (*inter alia* Portugal, Mozambique and Brazil) also adopted, in 1986, a mutual assistance convention under which action could be authorised against vessels suspected of involvement in drug trafficking. Such agreements contain detailed provisions on the legal relationship between the intervening State and the flag State, the authorisation procedures and the scope of application of the agreement.

8. The PC-NU Committee had to make a number of choices as to the scope and nature of the agreement and several questions raised difficult issues such as rights of sovereignty, the interpretation of the international law of the sea, use of force on board the vessel of another State, surrender of persons to another State, etc. A basic consideration for the experts of the committee was that the agreement would have to be applied and implemented by like-minded States which had either become parties to the Convention for the Protection of Human Rights and Fundamental Freedoms, or would sign the Convention within the near future, or would apply similar principles of the rule of law and human rights as embodied in the Convention.

9. The agreement would in principle work on the basis of a scheme similar to other schemes of international criminal law co-operation elaborated within the framework of the Council of Europe. A party (the intervening State) would be in possession of information leading it to believe that a vessel belonging to another party (the flag State) was engaged in or being used for the commission of a drug trafficking offence. The intervening State would request authorisation from the flag State to intervene on board the vessel in order to verify the offence and stop its commission. The flag State would have to consider the request within a very short time. The flag State would then authorise the action and the intervening State would make an intervention on the high seas. The flag State would possibly sometimes refuse its authorisation and it would always be under an obligation to communicate its decision. If authorisation was granted, it would often be necessary for the intervening State to bring the vessel to safe harbour or anchorage, in view of the difficult operational conditions on the high seas. The flag State would always retain its jurisdiction over any offences committed and would always be in a position to prosecute them in accordance with the terms of the agreement. In such cases, the agreement would need to provide for a scheme to solve the legally complicated matters of return of the vessel, arrested persons and evidence to the flag State.

10. Although such a scheme would cover the majority of cases relating to the operation of the agreement, the experts also had to consider more atypical situations. One such situation is described in Article 4 of the agreement where a flag State requests the assistance of another party which is in a better position than itself to intervene on board the ship. The experts felt it necessary to regulate such a situation which is the contrary of the situation in the main scheme just described. A similar provision in respect of stateless vessels is found in Article 5.

11. Bearing these general considerations in mind, the committee had first to consider whether the agreement should formally implement Article 17 of the Vienna Convention or whether it should become a freestanding convention. This choice would affect matters such as the content of the instrument, the eligibility to become a party to it, the settlement of disputes mechanism and the reporting system to the Secretary General of the United Nations on the practical application of the convention. It was clear from the outset that all experts were in agreement that, no matter what the final choice would be, the agreement should be seen as fully compatible with the Vienna Convention and merely supplementing and strengthening it, in accordance with Article 17, paragraph 9. There would always exist a functional relationship

between the two instruments and solutions which were contrary to the letter or spirit of the Vienna Convention would not be acceptable. In that sense, the new instrument would always be seen as implementing Article 17 of the Vienna Convention. In the final event, the committee elected to draft an implementation agreement. It also decided to include the substance of several articles of the Vienna Convention in the implementation agreement in order to ensure the compatibility of both instruments. As a consequence of this choice, it was decided to limit the possibility of joining the instrument to those member States of the Council of Europe which have ratified the Vienna Convention. Since it could be expected that most members of the Council which are not yet parties to that convention would become bound by it in the near future, this was not considered to be a major inconvenience. A primary reason for this choice was that maritime interdiction should be based on the Vienna Convention, which provided the overall legal framework and would most likely become almost universal in its implementation. A number of member States of the Council of Europe had already ratified the Vienna Convention or would do so in the near future. Nevertheless, the agreement would have to take into account that it had been negotiated within the framework of the Council of Europe, under the authority of the CDPC, and of the relationship between the agreement and other conventions on criminal law co-operation of the Council of Europe.

Although the agreement could also be seen as implementing other articles of the Vienna Convention, such as Article 4, the committee agreed that the draft agreement should be seen in the light of Article 17, paragraph 9, of that convention. The final paragraph of the preamble accordingly uses the same language as Article 17, paragraph 9, of the Vienna Convention.

12. Another basic consideration concerned whether the agreement should be limited to illicit drugs trafficking by sea or whether it could or should be made applicable also to other kinds of offences committed on the high seas. The committee considered whether the agreement should be extended, on an optional basis and subject to reciprocity, to cover such offences as illicit arms trafficking. It concluded however that the present situation did not make it imperative to include further offences.

The committee was of the view that it would be relatively easy for States that so wished to conclude appropriate bilateral agreements covering other offences on the basis of the procedures provided for in the present agreement.

13. The committee also gave consideration to a number of issues relating to the territorial reach of the agreement. It was agreed that the text should only contemplate action being taken beyond the territorial sea of any State. This would include the high seas, the contiguous zone and the exclusive economic zone within the meaning of the Montego Bay Convention and customary international law. A non-derogation provision was inserted in Article 2, paragraph 3, in order to fully protect the relevant rights of coastal States. It was further decided that it would not be appropriate to seek to restrict the territorial ambit of the agreement by reference to some concept of "European waters" or otherwise.

For reasons of convenience, sometimes in this explanatory report the expression "the high seas" is used to designate the waters beyond the territorial sea of any State.

14. The committee discussed in considerable detail the legal nature of an intervention on board a vessel flying the flag of another State, when such intervention is founded on a request from or on some form of consent or authorisation by the flag State. It could be questioned whether, as in the bilateral treaty between Spain and Italy, the intervening State could be considered as an agent of the flag State or whether, when the flag State has exercised its preferential jurisdiction, the actions taken by the intervening State should be seen as having been carried out on behalf of the flag State. In view of the uncertainty of the legal consequences of such an approach in a multilateral convention, the committee opted for clearly defining the legal consequences in the agreement. A legal fiction was, however, created in Article 14, paragraph 5, to the effect that, when the flag State has exercised its preferential jurisdiction, measures taken against the vessels and persons on board may be deemed to have been taken as part of the proceedings of the flag State. It was thought that the creation of such a legal fiction could solve some of the intricate legal problems which the

committee was faced with when it created the *sui generis* scheme for international co-operation under the agreement.

15. Furthermore, the committee gave detailed consideration to the central provisions of the authorisation procedures. In principle, three alternatives were envisaged:

- a. prior authorisation to stop and board the vessel follows from the treaty itself;
- b. express authorisation is needed in each instance but failure to respond to a request in a timely fashion is considered as a tacit consent to the action;
- c. express authorisation is needed; failure to respond to a request may either: i. expressly be considered a refusal, or ii. the treaty should not contain any express rules as to the legal consequences flowing from a failure to respond since the intervening State may not, by virtue of the agreement, intervene in any case without specific authorisation.

The committee opted for alternative c.ii. This also reflects the approach of the Vienna Convention and the committee felt that it was not desirable to deviate from this fundamental rule, although it would have been possible for some States to agree to other solutions. Article 30, paragraph 2, would, however, make it possible to adopt a different approach, in particular in bilateral treaties.

16. The committee was always conscious of the fact that the practical operation of the provisions of the agreement would be situated in a difficult environment, often during extreme conditions on the high seas where human judgment has to be confronted with the caprices of nature. It was therefore important, on the one hand, that the provisions of the agreement should give serious consideration to the risks involved in such operations and, on the other hand, that the operational personnel should not be hampered by rigid provisions which would not give sufficient leeway to take decisions which were adapted to the factual situation. Several provisions of the agreement seek to reflect such a balanced approach.

17. Finally, the committee considered it important to point out that the provisions of the agreement are closely interlinked and reflect, as a whole, a choice which is based on a number of considerations. For instance, the rules of compensation and liability for damage are closely connected with the powers of visit; the choice of authorisation procedures depends on the rules for jurisdiction, etc. The treaty should therefore be seen as a whole, and its interpretation should be made in such a way as to further the co-operative spirit within which it was elaborated. Furthermore, it was the opinion of the experts that the terminology used in the agreement does not, as a rule, refer to a specific legal system or a particular law. Rather they intend 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 agreement. In addition, the committee thought it wise that the terminology used should, as far as possible, be in harmony with that of the Vienna Convention.

## **Commentary on the articles of the agreement**

### **Chapter I – Definitions**

#### **Article 1 – Definitions**

18. The committee felt that it was necessary to define the term "intervening State" since it is a term not generally used in the international law of the sea.

Some of the provisions of the agreement may be applicable to States which are in a position to become intervening States, if the flag State authorises an intervention. This situation is covered by the expression "proposes to request" action under the agreement. Such States may be considered "potential" intervening States.

19. The term "preferential jurisdiction" similarly needs to be defined as it is not commonly used in the international law of the sea.

It was felt desirable to restate that the flag State, in accordance with the international law of the sea (see Article 6, paragraph 1, of the Geneva Convention), has the exclusive jurisdiction on the high seas, save as provided for in international conventions and customary international law. However, in order to be able to pursue the aims of the agreement, the committee felt that it had to create a system of concurrent jurisdiction in relation to relevant offences for the intervening State, which could be used as a legal basis for its intervention (see Article 3, paragraph 2) and for the eventual prosecution in the intervening State of the suspect offenders. The exercise of the concurrent jurisdiction of the intervening State would be suspended when the flag State has exercised its preferential jurisdiction and could be revived when the flag State has expressly renounced the exercise of its preferential jurisdiction.

The meaning of the terms "relevant offence" in the context of jurisdiction is commented upon under Article 3.

20. The committee discussed whether the terms "vessel" or "ship" should be used. The Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (Rome, 10 March 1988) uses the term "ship" for vessels of any type whatsoever not permanently attached to the sea-bed, including dynamically supported craft, submersibles, or any other floating craft. The committee considered, however, that the term "vessel" is broader and describes other crafts which under national law might not be entitled to fly a flag but which might still be used for illicit traffic by sea. In addition, the Vienna Convention uses the term "vessel" and it was desirable to conform with the terminology of that convention so as to minimise the possibility of confusion. The purpose of defining the term "vessel" is, in particular, to make it clear that the term includes hovercraft and submersible craft.

The committee discussed whether it would be useful to insert a definition of "flag State" in the agreement but decided against it. It noted that the Vienna Convention does not define "flag State" and that Article 5 of the Geneva Convention refers to the concept of nationality of a ship rather than to the flag. The agreement refers, for reasons of convenience, in some provisions, only to vessels "flying the flag", "its vessel" or similar instead of the longer formula of "vessels flying the flag, displaying marks of registry or bearing any other indications of nationality". No substantive change is intended, and in any case the international law of the sea is not affected by the terms of the agreement.

## **Chapter II – Internal co-operation**

### **Section 1 – General provisions**

#### **Article 2 – General principles**

21. Paragraph 1 describes the object and purpose of the agreement, namely to co-operate to the fullest extent possible to suppress illicit traffic by sea. The wording is also found in Article 17, paragraph 1, of the Vienna Convention. In the present context, it is intended to reflect the co-operative spirit in which the agreement was negotiated and to serve as a guiding principle both in its practical application and in its formal interpretation. The article creates furthermore the legal basis for taking action which is not expressly mentioned in other provisions of the agreement. Similar provisions may be found in other instruments of co-operation elaborated within the Council of Europe - see Article 1, paragraph 1, of the

European Convention on Mutual Assistance in Criminal Matters (European Treaty Series, No. 30).

22. Article 2, paragraph 3, is to be found in the Vienna Convention, Article 17, paragraph 11. It is a form of a "non-derogation" provision designed to safeguard rights and obligations and the exercise of jurisdiction of coastal States. It has been designed to ensure that no relevant rights or obligations of coastal States as set out in the Geneva Convention on the Territorial Sea and the Contiguous Zone or the Montego Bay Convention will be affected by the provisions of the agreement.

23. Article 2, paragraph 4, is designed to ensure that the principle of *non bis in idem* as applied in national law, will not be infringed. Since the application of this principle in a particular case may differ, the committee felt it necessary to make a reference to the national law. The paragraph was drafted to counter some of the inconveniences which the creation of a system of concurrent jurisdiction may have.

The reference to the national law at the end of the paragraph indicates that it is the international *non bis in idem*, as it is applied by each State, which is covered by the paragraph. In this context, it was considered that not all countries recognise the international *non bis in idem*. The paragraph does not create any new principle but is simply a reminder that the principle exists and that, for instance, the provisions in the agreement concerning concurrent and preferential jurisdiction would leave the principle unaffected.

24. Paragraph 5 describes one way of implementation of the principle of co-operation stated in paragraph 1 of the article, namely through the spontaneous exchange of information about vessels, cargo and facts when such exchange of information would assist in carrying out the general aim of the agreement. The draft of the paragraph has been inspired by Article 10 of the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime ("the Laundering Convention", European Treaty Series, No. 141), and may be taken as the legal basis, where such is needed, for exchange of information between the competent authorities which will carry out action under the agreement. Communication may be made orally. It may be noted that, in operational terms, such exchange of information already takes place between several member States of the Council of Europe and that those States would not need explicit provisions to allow for the exchange of information. In other States, an explicit legal basis may be needed for such exchanges. The information must of course not be transmitted if it might harm or endanger investigations or proceedings in the sending party.

The committee discussed whether disclosure of information would create some kind of obligation for the receiving party to intervene. It was recalled in this context that Article 17, paragraph 2, of the Vienna Convention (see Articles 4 and 5, paragraph 1, of the present agreement) requires that parties from which assistance has been requested by another party, shall render such assistance "within the means available to them". It was agreed that the mere exchange of information would not create any obligation for a party to intervene, or to request authorisation under Article 6, but was simply a means of placing a party in a better position to take a decision on whether or not to request an authorisation under Article 6, if the vessel bears any indications of nationality. Article 5, paragraph 1, deals with a specific form of information relating to vessels without nationality or vessels that are assimilated to vessels without nationality.

25. Paragraph 6 was drafted to make it clear that warships and government vessels operating for non-commercial purposes are immune in respect of action taken against them (see Articles 8 and 9 of the Geneva Convention and Articles 95 and 96 of the Montego Bay Convention).

### Article 3 – Jurisdiction

26. This article concerns prescriptive jurisdiction as opposed to enforcement jurisdiction. As with the Vienna Convention, paragraph 1 requires each party to establish its criminal jurisdiction over relevant offences taking place on board its flag vessels. In addition, and in contrast to the permissive approach reflected in Article 4, paragraph 1.b.ii of the Vienna Convention, paragraphs 2 and 3 oblige each party to establish its jurisdiction over the same range of offences when committed on board the vessels of all other parties or on board stateless vessels. The committee found in this respect that it was useful to go further than the Vienna Convention. The article does not create an obligation on any State to intervene. In paragraphs 2 and 3, it is only "for the purposes of applying" the agreement that such jurisdiction is created and the onus is on the intervening State to take the appropriate measures to institute the procedures under the agreement. In addition, the jurisdiction is only to be exercised in conformity with the agreement and may not be exercised outside its scope of application.

27. The committee also discussed the meaning of the term "relevant offence" in this context. Although it was recognised that a number of the offences enumerated in Article 3, paragraph 1, of the Vienna Convention, such as cultivation for the purpose of production of narcotics, were most unlikely to be committed upon a vessel on the high seas, it was felt that it was neither desirable nor necessary to seek to redraft that fundamental provision. The definition of "relevant offences" by reference to Article 3, paragraph 1, of the Vienna Convention had the merit of simplicity and also served to reinforce the close link between the two instruments.

28. Paragraph 3 should be read in conjunction with Article 5. The committee considered that it was important, for the purposes of applying the agreement, to establish jurisdiction over vessels which are without nationality, or are assimilated to such vessels under international law. Paragraph 3 was therefore inserted to ensure jurisdiction existed in the domestic law of each Party in respect of relevant offences taking place on such vessels.

29. With respect to vessels flying the flag of a State other than the intervening State, paragraph 2 provides that "such jurisdiction shall be exercised only in conformity with this agreement", that is, for instance respecting the principle stated in paragraph 4 which gives the flag State preferential jurisdiction concerning any relevant offence committed on board its vessel or in relation to the rules on the necessity of having prior authorisation before any action is taken.

Since the application of the agreement would mean that officials of the intervening State would act on other States vessels, and that they could therefore become victims of offences or even, more unlikely, offenders themselves, the committee discussed whether it was necessary for the States to create jurisdiction for such offences. The committee agreed that the agreement does not prevent any State from creating jurisdiction for such offences, if it considers it necessary for the implementation of the agreement.

Paragraph 5 provides for a declaration concerning the jurisdiction established pursuant to paragraph 2. The declaration would permit a party that so wishes to inform other parties of the intentions it has concerning one aspect of the practical application of the agreement, namely the criteria for exercising the wide jurisdiction provided for by the article. Such criteria would be relevant for the party in its decisions on whether to request authorisation to intervene under Article 6. This possibility of making a declaration may, however, not be interpreted so as to limit the obligation to establish jurisdiction provided for by paragraph 2 of the article. It is expected that this declaration will be used by a limited number of parties which for practical reasons in connection with national implementation of the agreement would otherwise experience some difficulties.



Paragraph 6 provides a reservation possibility for land-locked States which do not have vessels in service enabling them to become intervening States under the agreement. A requirement for such States to establish jurisdiction under paragraphs 2 and 3, which only concerns intervening States, would place an unreasonable legislative burden upon those States.

#### **Article 4 – Assistance to flag States**

30. Articles 4 and 5 of the agreement seek to implement Article 17, paragraph 2, of the Vienna Convention. Notwithstanding that the two kinds of vessel (flag vessels and stateless ones) are linked in one paragraph in the Vienna Convention, the committee saw merit in separating them for the purposes of the present agreement. This is because the flag State will have a continuing responsibility for authorising actions and will continue to have a right to exercise its preferential jurisdiction on board its flag vessels. A requesting State has no similar rights in respect of stateless vessels. Article 4 was included in the general provisions under Section 1 of the agreement in order to separate it from the situations for which the agreement is mainly considered, namely where the intervention is carried out on the initiative of the intervening State which acts on the basis of its own suspicions (see paragraph 9 of the explanatory report).

31. Unlike most other articles of the agreement, Article 4 deals with the situation where a flag State requests assistance from another party ("potential intervening State") to suppress illicit traffic by sea.

Paragraph 1 is virtually the same text as Article 17, paragraph 2, of the Vienna Convention. The fact that the agreement uses the expression "engaged in or being used for" is not considered to deviate from the Vienna Convention. The reasons for this drafting change are explained in the commentary to Article 6. For the purposes of applying this article, it may be necessary for the requested party, besides action taken in accordance with Articles 9 and 10, within the means available to it, at the request of the flag State, or of any party in respect of stateless vessels, for instance:

- i. to search for a suspected vessel and notify the flag State of its position;
- ii. to engage in pursuit of the vessel and transfer the surveillance thereof to a government vessel of the flag State;
- iii. to continue a pursuit, lawfully initiated in the territorial sea of a coastal State in the territorial sea of the flag State, until the intervention of a government ship of the same State takes place;
- iv. to prevent any attempt by the suspected vessel to unload suspected cargo.
- v. to permit the presence of enforcement personnel of the flag State on board government vessels or aircraft belonging to the requested party.

These alternatives are only indicated as possibilities of action. The obligation of the requested party is in any case limited to rendering assistance within the means available to it, which would cover not only material resources and personnel but also whether the action may carry extraordinary or substantial costs (see Article 25). It is for the intervening State alone to assess whether it has the means available to it.

32. Paragraph 2 permits the requested State to take some or all of the actions specified in the agreement but the flag State is not limited to requesting such actions. The requested party must also respect conditions imposed by the flag State (Article 8, paragraph 1). Under these circumstances the intervening State is not obliged to exercise its jurisdiction in respect of relevant offences discovered during its intervention. In fact, it is in principle for the flag State

to decide on the appropriate legal action which should follow any intervention it has originated.

33. Paragraph 3 assimilates in principle the requesting State to the flag State and the requested State to an intervening State. For instance, the requested party shall have the right to take any action an intervening State may take under Articles 9 and 10 and it is also bound by any conditions laid down by the flag State (Article 8, paragraph 1). The flag State would still have the right to exercise its preferential jurisdiction under Article 14. However, a special provision relating to costs is provided for in Article 25.

#### **Article 5 – Vessels without nationality**

34. Paragraph 1 is derived from and has the same purpose as Article 17, paragraph 2, of the Vienna Convention. The committee, however, considered it more useful to utilise the orthodox terminology of the international law of the sea in describing the vessels to which this article applies. The paragraph contains the additional requirement of an information obligation to another party that appears more closely affected, and which, for instance, is in a position to become an intervening State or is a known destination of the vessel.

As in Article 4, the requested State is under an obligation to intervene "within the means available" to it, an expression which also includes economic and similar resources. It is for the requested State to assess whether it has such resources.

35. Paragraph 2 deals only with the situation where a party has received information in accordance with paragraph 1. Paragraph 3 deals with both situations and was drafted in order to foster international cooperation in this area.

#### **Section 2 – Authorisation procedures**

##### **Article 6 – Basic rules on authorisation**

36. This article concerns the necessary authorisation of the flag State before the intervening State can take any action regarding the vessel. The central philosophy of the agreement is that as long as no authorisation exists, the intervening State would have no right to stop and board the vessel by virtue of the agreement. The intervening State might have an independent possibility to intervene in conformity with the international law of the sea (see, for instance, Article 23 of the Geneva Convention and Article 111 of the Montego Bay Convention in respect of the right of pursuit where the coastal State has good reason to believe that the ship has violated the laws and regulations of the State). As may be seen from the preamble and from Article 2, paragraph 1, the agreement is not intended to derogate from the international law of the sea.

The committee agreed to use the concept of "authorisation" instead of "consent". This would make it clear that there is no obligation for the intervening State to intervene and that Article 6 does not give any powers of action to the potential intervening State. Such powers of action stem exclusively, by virtue of the agreement, from the authorisation given by the flag State.

If a party refrains from requesting authorisation to take action on the high seas because it considers it more appropriate to inform the authorities at the vessel's next port of call of the grounds it has to believe that the vessel is engaged in illicit traffic, a possible intervention by the authorities of that State would not be covered by the terms of the present agreement.

37. The provision on request for authorisation in the article is central in the operation of the entire agreement. It enumerates several conditions which must be satisfied before a State may request authorisation from another State to intervene on the high seas. If those conditions are not fulfilled, such as when the intervening State has no reasonable grounds, no

request may be made under the agreement. It was considered that the object of the entire agreement, namely to combat illicit traffic by sea, is expressed in the terms "engaged in or being used for" the commission of a relevant offence. In phrasing the provision in that manner, the committee considered that it was not necessary to refer to criteria such as the place or time of the commission of the offence. The fact that the agreement uses the expression "engaged in or being used for" is not considered to deviate from the Vienna Convention. The committee wished only to detail the principle found therein in order to cover more clearly the situation where a "mother ship" had unloaded drugs to a smaller vessel to be transported to the coast. It was clear that the Vienna Convention was intended to cover such situations of recently committed offences. Furthermore, the committee agreed that it was not necessary for the application of the agreement that the suspicion arose while the vessel was beyond the territorial sea of any State. In this context, it was reminded that the obligations under Article 3 to create jurisdiction is confined to offences committed "on board" vessels.

It is not necessary for the application of the agreement for the vessel to be directly involved or exclusively engaged in illicit traffic. It would be sufficient if one member of the crew used the vessel for committing any of the relevant offences.

It is also clear in the understanding of the committee that the intervening State would only request authorisation when there are reasonable grounds to assume that evidence of the offence could be gathered by undertaking an intervention.

38. The committee has amended the provision in comparison with the Vienna Convention in respect of the identification of the vessel. Such identification would be necessary in order to request authorisation to take action under the agreement. The vessel could fly the flag of another party, display its marks of registry or bear any other indications of nationality of another party. Whenever a vessel flies the flag, bears the marks of registry or any other marks of identification of nationality, it is purporting to enjoy the protection of that State. If the vessel were flying the flag of a State, but was in fact of another nationality, it would in any case have lost the protection of the "true" flag State (see Article 6 of the Geneva Convention and Articles 91 and 92 of the Montego Bay Convention). Each flag State has the power to exercise its jurisdiction and control over any ships flying its flag (see Articles 5 and 6 of the Geneva Convention and Article 94 of the Montego Bay Convention).

It was noted in this context that an independent right of visit exists when a warship has reasonable grounds for suspecting that a ship is without nationality or has the nationality of the warship although it is flying the flag of another State (see Article 22 of the Geneva Convention and Article 110 of the Montego Bay Convention).

The committee considered that it was self-evident that no State would use the agreement to seek authorisation to intervene on the high seas where the suspected relevant offence was a minor one. In any case, the flag State would always have the right to refuse authorisation if it considered the case minor. According to Article 21, a request for authorisation shall specify the details of the suspected offences.

39. Article 86 of the Montego Bay Convention deals with the application of the provisions of Part VII of that convention (see the provisions relating to the high seas). In view of the omission of the exclusive economic zone from the application of Part VII, the experts of the committee considered it necessary to clarify that the present agreement would include the exclusive economic zone (see Article 58, paragraph 2, of the Montego Bay Convention). Moreover, the contiguous zone, as defined in Article 33 of the Montego Bay Convention, would be included in the scope of application, without prejudice to the rights and obligations which the States parties have, or are subjected to, in their contiguous zone.

It is obvious from the context of other articles, for instance Article 10, sub-paragraph i.d, that some of the authorised actions taken under the agreement will be carried out in the territory of another State.

## **Article 7 – Decision on the request for authorisation**

40. The provisions regarding the decision on the request for authorisation were equally considered by the committee to be of major importance for the operation of the agreement. It is clear that this article does not create any obligation to respond favourably to a request for authorisation. The article creates, however, obligations in relation to the communication of any decision a flag State will take following a request for authorisation.

It was emphasised that communication between the parties should be established immediately so that a channel of communication existed thus permitting the close involvement of both States. For these reasons, the intervening State needs to know that the flag State has received the request for authorisation and the receipt thereof should be confirmed immediately. On the other hand, it was appreciated that some governments might have considerable difficulties, both of a legal and practical nature, to communicate a decision within an extremely short time, although it was recognised by all experts that, so far as practicable, the parties should make arrangements whereby the authority referred to in Article 17 of the agreement may receive and respond to requests on a twenty-four hour basis. Since it can be foreseen that a number of requests made under the agreement may be of a priority nature, all parties should, as far as practicable, communicate a decision as soon as possible. The four-hour time limit mentioned in the agreement should be regarded as the latest time for communication of the decision in most cases. Parties were encouraged to communicate, if possible, decisions before that time limit, in view of the often difficult operational requirements on the high seas. In particular, it should be possible to shorten the times for communication of decisions in respect of smaller, noncommercial vessels.

41. The committee discussed whether it was appropriate to attach a legal consequence to a non-response and to expressly State that a failure to respond would be deemed to constitute a refusal of the request for authorisation. The committee considered that the agreement was founded on the principle that as long as no authorisation exists, the intervening State would have no authorisation to stop and board the vessel by virtue of the agreement. This principle is clearly expressed by the last part of Article 6, where it is provided that no action may be taken without the authorisation of the flag State.

42. If the flag State elects to refuse the request for authorisation, indication of the reason for refusal is not required.

43. The flag State may take this early opportunity to notify the intervening State that it exercises its preferential jurisdiction.

## **Article 8 – Conditions**

44. Article 8 provides rules for attaching conditions to the authorisation of the flag State and a possibility of making a declaration regarding a specific condition posed by the intervening State in relation to its intervention. Article 17, paragraph 6, of the Vienna Convention contains a possibility for the flag State to attach its authorisation with certain conditions.

The committee considered the possibility for the flag State to attach conditions to its authorisation in the light of the Vienna Convention. Such conditions may, in conformity with Article 17, paragraph 6, of that convention concern authorised actions in relation to Articles 9 and 10 or limitations to actions also in respect of the law of the intervening State (see Article 11, paragraph 1), although such conditions should be exceptional. Conditions could also be related to damages (see Article 26) or could be made in relation to nationals of the flag State found on board the vessel. The committee considered that it would be compatible with the provisions of the agreement to subject the authorisation to the condition that, if the flag State does not exercise its preferential jurisdiction, its own nationals convicted in the intervening State shall have a possibility to be transferred to the flag State to serve a sentence imposed. Conditions could also be made in relation to the possibility of arresting

vessels for purposes of civil proceedings. A special condition relating to restriction of use of information is mentioned in Article 23. In practice, conditions have, for instance, concerned:

- a. an obligation for the intervening State to consult the flag State before the vessel is taken into the jurisdiction of a third State; and
- b. an obligation for the intervening State to give information to the authorities of the flag State of all the stages of the intervention and its follow-up.

Although a State may make its authorisation dependent on conditions, the committee agreed that these could not be of a kind which were incompatible with the object and purpose of the agreement. It was also accepted that it would be a source of considerable difficulty if one State sought through, for example, the imposition of conditions relating to liability, to "rearrange" the entire scheme provided for by the agreement, if such conditions were not founded in the national law. Similarly, any conditions which were not based on principles embodied within the legal system of the flag State would be difficult, in practice, to accept.

If the flag State imposed conditions which were not acceptable to the intervening State, it would refrain from the intervention. The committee agreed therefore that States should be cautious in using conditions and only make use of them when it was strictly necessary. When conditions were used and the intervening State took action following the authorisation, it would be deemed to have accepted the conditions.

45. Paragraph 2 is intended to facilitate the practical application of the agreement in relation to special circumstances. It might occur that suspected persons found on the vessel are nationals of the intervening State. In such a case, if the flag State exercises its preferential jurisdiction the intervening State may experience difficulties in surrendering such persons. The possibility of allowing an opportunity for the transfer to the intervening State of its nationals to serve the sentence imposed would contribute to the smooth application of the agreement in this respect. It was considered appropriate to provide for the possibility of making a declaration contained in the paragraph.

If the intervening State subjected its intervention to the condition that their nationals were transferred to serve their sentences, the flag State would have to take into account such conditions when making its decision under Article 7; the flag State should authorise the intervention only if it is in a position to comply with the conditions.

It is to be assumed that most cases of transfer of sentenced persons would operate under the Convention on the Transfer of Sentenced Persons (European Treaty Series, No. 112) or in accordance with ad hoc arrangements between the parties.

### **Section 3 – Rules governing action**

#### **Article 9 – Authorised actions**

46. In considering this important matter the committee felt that it would be sufficient to enumerate in paragraph 1 the types of action which may be taken by the intervening State after the authorisation of the flag State had been obtained and to refrain from any attempt to provide full details thereof.

A similar approach had been utilised in Article 17, paragraph 4, of the Vienna Convention. Furthermore, the action taken is governed by the law of the intervening State (see Article 11, paragraph 1) and the rules of public international law. For instance, although sub-paragraphs ii.c and d provide for the right to require persons to give information or to produce documents, this right is of course subject to relevant provisions of the European Convention on Human Rights and of the constitutions of the parties. If the person is a suspect, he would not be obliged to provide any information or document which could incriminate him. The committee

found it useful to insert a specific provision as a reminder of this rule in paragraph 2 of the article. The interpretation of the rule would be subject to the provisions of the national law, for instance that the suspected person would not be under an obligation to answer questions.

The committee elsewhere in the agreement emphasised that the use of force was a last resort and that instances in which firearms were used must be reported as soon as possible to the flag State (see Article 12, paragraph 1.d and 2).

47. The intervening State must ensure that its actions comply with any conditions or limitations imposed by the flag State, in accordance with Article 8, paragraph 1. The experts underlined that any such conditions or limitations must take into account operating requirements on the high seas and any exceptional condition which might arise during the intervention.

48. Article 9, sub-paragraph i.d mentions the "territory" of the intervening State. Although the committee did not find it necessary to define the territory for the purposes of the agreement, it considered that it was clear that this sub-paragraph of Article 9 and Article 10, paragraph 4, would become applicable from the moment the vessel crossed the territorial sea boundary.

#### **Article 10 – Enforcement measures**

49. This article concerns the enforcement measures which may be taken when the intervening State has gained evidence confirming the suspicions which motivated the intervention. Such measures are governed by the law of the intervening State (see Article 11, paragraph 1).

Paragraph 2 requires the intervening State to notify the flag State of any arrest of persons or detention of the vessel without delay.

Paragraph 3 lays down basic criteria for the intervening State to satisfy while completing its investigations. Non-compliance with those rules may subject the intervening State to liability in accordance with the provisions of the agreement (see Article 26). Article 13, paragraph 3, contains an exception to the rule laid down in the last sentence of the paragraph.

Paragraph 4 provides for the possibility of an agreement between the concerned States to escort the vessel to the territory of a third State which is a party to the agreement. This State then becomes an intervening State when the vessel has reached its territory. However, the fact that a third State takes over the role of the intervening State does not change the position of the original intervening State in relation to the actions that have been carried out before that event. In particular, the original intervening State will for purposes of certain provisions of the agreement continue to be considered as such, for example with respect to its jurisdiction or in relation to the provisions on damages.

#### **Article 11 – Execution of action**

50. Paragraph 1 lays down the main principle that actions taken under the agreement shall be governed by the law of the intervening State. Exceptionally, the flag State may have made its authorisation dependent on conditions which may limit the possibility of action of the intervening State.

The committee agreed that the paragraph applies except where specific rules have been established by the agreement itself, for instance Article 10, paragraph 3. In any case, a State ratifying the agreement has an obligation to ensure that its national law is in conformity with the provisions of the agreement.

51. Paragraph 3 of this article has been drafted to protect the officials of the intervening State in relation to any criminal proceedings in the flag State, both when the official is an alleged perpetrator of an offence and when he is a victim of such an offence.

The committee found it important to provide that it should not be possible for the flag State to prosecute officials who have allegedly committed an offence when, acting under their own law (see Article 11, paragraph 1), they were carrying out one or more of the authorised actions indicated under Articles 9 and 10. In such cases, the most natural procedure would be to prosecute the offence in the intervening State.

In any proceedings in the intervening State, the official will have the right to invoke as a defence that his actions were permissible and justifiable under his own law, which is the law that governs the actions taken under the agreement although such actions are based on the authorisation of the flag State (see paragraph 1 of the article). In addition, the official might be entitled to invoke any specific conditions posed by the flag State in the decision to authorise the intervention.

Where the official has been a victim of an offence, he should enjoy the same protection as officials of the flag State, in proceedings in that State.

Paragraph 4 was drafted to protect the flag State and the owners or operators of the vessel. Any possibilities to prevent or delay communication with the owners or operators will be governed by the law of the intervening State, in accordance with paragraph 1.

#### **Article 12 – Operational safeguards**

52. Paragraph 1 of this article concerns the practical application of the agreement, in particular as regards the action taken under Articles 9 and 10, but is not limited to those articles. For instance, when the intervening State decides, in accordance with Article 6 to request authorisation to take action and when the flag State decides under Article 7 to grant its authorisation, consideration should be given to the general provisions of paragraph 1 of this article so as to cover the circumstances of the case after a general evaluation.

Similar language to that of paragraph 1 is found in Article 17, paragraph 5, of the Vienna Convention which however refers only to the commercial and legal interests of a State. The committee found that, since commercial and legal interests would normally affect private entities, it would not be necessary to limit the scope of application of the present article to States' interests.

The rule of proportionality should always be kept in mind in assessing the action taken with respect to a vessel suspected of engaging in illicit trafficking and the need to avoid interfering with the interests of the owner or operator of the vessel. The ultimate decision to board, when the flag State has granted its authorisation, must be taken by the operational authorities actually carrying out the action, in view of the circumstances on the high seas. Bad weather conditions, for instance, might lead to a decision not to board or to an interruption of any action. An overriding concern at all times must be safety at sea for all involved parties.

53. Any general evaluation of the circumstances of the case under this article must in particular take into account the reasons for avoiding taking action against vessels providing a scheduled passenger service or larger vessels involved in commercial trade. Such vessels could often usefully be searched at the next port of call, particularly if the next port of call is located in the territory of a party to the agreement or to the Vienna Convention. Also, such vessels should normally be searched in a safe harbour or anchorage.

54. Larger commercial vessels would normally mean vessels of a gross registered tonnage (GRT) of more than 1 600, which is a figure which is used within Nato to distinguish between small and large vessels.

55. Paragraph 1.c was drafted more generally to apply to the entire agreement whereas Article 10, paragraph 3, specifically refers to investigations.

56. Paragraph 1.d of this article concerns the permitted use of force. Normally international instruments are silent on this subject, though international law in general provides that any are 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 315th meeting of their Deputies in February 1980. Most of these articles do not therefore call for specific comment, but the following points require some explanation.

With regard to Article 27, it is clear that the agreement should always be conceived as implementing and supplementing, at the regional level, Article 17 of the Vienna Convention in accordance with paragraph 9 of that article. Only those member States of the Council of Europe, and States invited to accede to the agreement under article 28, which have ratified the Vienna Convention may therefore join the present agreement.

The words "the instructions of the intervening State" refer to any instructions given by the operational personnel stopping and boarding the vessel in accordance with the agreement.

The expression "the use of force" includes also the use of firearms, for which a special rule is given in the following paragraph.

57. Paragraph 2 concerns a reporting obligation for cases where firearms have actually been used and shots discharged. The French texts use the word "*usage*" instead of "*emplo*" (see the previous paragraph) which makes this distinction clear. Threatening the use of firearms would therefore not be included in the reporting obligation.

Warning shots in the air or across the bow would normally not be included in the reporting obligation since the text uses the expression "use of firearms against". However, if the flag State has an interest in knowing the circumstances of the intervention, report should be made at the request of that State.

58. In paragraph 3 it was felt unnecessary to draft an exception to the reporting obligation for trivial and very minor injuries. The committee agreed, for purposes of the present agreement, that the term "injury" excludes light or superficial injury. In accordance with the obligation to co-operate mentioned in this paragraph, the authorities of the intervening State should allow the officials who took part in the operation to appear and testify as witnesses in any enquiry or proceedings in the flag State.

#### **Section 4 – Rules governing the exercise of jurisdiction**

##### **Article 13 – Evidence of offences**

59. Paragraph 1 of this article, which deals with evidence of offences, requires the intervening State to transmit "without delay" a summary of the evidence obtained to the flag State. This summary must be transmitted as soon as the evidence has been gathered and summarised. The use of the word "summary" indicates that the totality of the evidence is not required; a summary sufficient to enable the flag State to make a decision on whether or not to exercise its preferential jurisdiction is all that is needed in this context. On the other hand, nothing would prevent a State from submitting more than the summary of evidence if it finds it appropriate.

60. Paragraph 2 deals with the situation which may arise when evidence of non-drug related offences may be discovered on board the vessel, or where persons who may be the subject of so-called "red notices", issued by Interpol, are discovered on board the vessel. For instance, if while searching the vessel, a shipment of arms were discovered, it is evident that such a discovery, which is outside the scope of the agreement, would seriously hamper the



enforcement mechanism provided by the agreement, for example if the intervening State claimed priority jurisdiction in respect of the arms offence, since it may have been directed against the intervening State. Equally, the flag State has an obvious interest in immediately gaining knowledge of the suspected offence or persons.

The intervening State must in such cases notify the flag State of the circumstances and, where those circumstances so warrant, the parties are under an obligation to consult with each other. Such consultations may, for instance, lead to requests for extradition or mutual assistance under the applicable conventions of the Council of Europe or in accordance with other treaties in force between the parties.

61. Paragraph 3 of the article deals with some aspects of the rule of speciality, which is found in other Council of Europe instruments on co-operation in criminal law. The committee's main concern was that the provisions of the agreement should be so construed as permitting the intervening State to take other measures than those aimed at prosecuting the alleged perpetrators of relevant offences only in two specific circumstances (see Article 10, paragraph 3, which lays down the general rule that persons not suspected of relevant offences shall be released). The first situation is when the flag State gives its express consent. The intervening State may in such cases deal with offences other than the relevant offences thus specified. The agreement does not provide any specific rules after consent has been given. The second situation concerns offences committed after the person has been taken into the territory of the intervening State. In these cases the intervening State is not required to seek the consent of the flag State. If offences other than those for which a request for authorisation under Article 6 had been made are discovered, such discovery should not prevent the functioning of the agreement.

#### **Article 14 – Exercise of preferential jurisdiction**

62. The committee considered that the normal case would be that the relevant offence or offences were prosecuted by the authorities of the intervening State. However, the possibility cannot be excluded that the flag State, for reasons of policy or on an *ad hoc* basis, would wish to prosecute the suspect. It was therefore necessary to detail the rules on the exercise of preferential jurisdiction in the agreement.

63. This article provides for the flag State to notify the intervening State that it exercises its preferential jurisdiction as soon as possible and at the latest within a period of fourteen days after the receipt of the summary of evidence pursuant to Article 13. The time of notification would have to be short so that any delay would be minimal, particularly in cases where suspected persons are held in custody and would wish to know which State would prosecute them. The prosecutor and investigating judge equally have a legitimate interest in knowing in which State the offence would be prosecuted. On the other hand, it would not be in the interests of criminal justice if the time were so short that the flag State would almost automatically claim preferential jurisdiction. It must therefore be sufficiently long to enable the flag State to evaluate the summary of evidence and generally assess the situation together with involved authorities and, possibly, shipowners or operators.

64. In all cases, Article 5, paragraph 3, of the European Convention on Human Rights prevails, which entitles the suspect to be brought promptly before a judge. During the time period in which the flag State has to make its choice the laws of the intervening State govern the procedure (see Article 11, paragraph 1). Those procedural laws would usually contain rules in respect to the detention of persons, for instance concerning the right to be heard by a judge if the detention exceeds a certain time limit.

65. If the flag State fails to notify the intervening State that it exercises its preferential jurisdiction within the prescribed time limit of fourteen days after the receipt of the summary, it shall be deemed to have waived its preferential jurisdiction. This is to be considered as an absolute timelimit for the communication of the decision. Usually, it should be possible for the flag State to take its decision within a much shorter time frame.

66. The effect of a notification of exercise of preferential jurisdiction is that the jurisdiction of the intervening State shall be suspended. In exceptional cases, for instance if the flag State, possibly because of new evidence (*factum superveniens*), changes its decision to exercise preferential jurisdiction, the intervening State may invoke its jurisdiction again. Article 2, paragraph 4, was drafted in order to cover any problems in respect of *non bis in idem*.

67. Paragraph 4 requires the flag State to submit the case to its competent authorities for the purposes of prosecution. It is not necessary for the case to be actually prosecuted, but the authorities are required to deal with the case as if it were a domestic case and proceed accordingly.

68. The committee created in paragraph 5 a legal fiction which would come into effect only in the case where the flag State has notified the intervening State of its intention to exercise its preferential jurisdiction. In that case, measures taken against the vessel and persons on board may be deemed to have been taken as part of the proceedings of the flag State. A consequence of this provision would also be that it would become clear that any time spent in detention would have to be counted towards a sentence in the flag State. The legal fiction would in no manner change the principle embodied in Article 11, paragraph 1, that action taken by the intervening State would be governed by the law of that State.

#### **Article 15 – Surrender of vessels, cargoes, persons and evidence**

69. The committee paid considerable attention to the issue of surrender of persons, the vessel, cargoes and seized evidence and whether a person's surrender would amount to extradition, requiring full extradition procedures or, possibly, some simplified procedures, or if a system of surrender could be designed in view of the particular circumstances of the scheme provided for by the agreement. In practice the crew are nearly always removed from the vessel and taken into the port on board the intervening vessel. A *sui generis* system, based on surrender of persons and seized property, was widely favoured to specifically cover the unique situation dealt with in the agreement. The main reason for this approach was that it is only with the authorisation of the flag State that the intervening State is allowed to take action under Articles 9 and 10. In addition, it was felt that resorting to some kind of extradition system would jeopardise the concept of preferential jurisdiction.

70. In the light of these factors, the committee considered that, when the intervening State requests authorisation from the flag State, it applies to have enforcement jurisdiction in the form of a "loan". The jurisdiction which the intervening State exercises is thus fragile and totally dependent on whether the flag State exercises its preferential jurisdiction. If it does so, a *restitutio in integrum* should take place and the surrender of persons and property should be expedited. The fact that a person, for constitutional or similar reasons, in some countries could not be denied access to the courts of the intervening State would not necessarily have to be contrary to the general principle of expeditious surrender (see paragraph 4 of the article).

71. Paragraph 1 lays down the main obligation for the intervening State to surrender any person arrested, vessel, cargo or seized evidence upon simple demand of the flag State. This principle is a necessary complement to the principle of the preferential jurisdiction of the flag State. The fact that surrender may be delayed for reasons which are beyond the control of the intervening State is dealt with in paragraph 4.

72. Paragraph 2 deals with supporting documents in respect of detained persons. The certified copy may be sent by telefax (see the provisions of Article 19). The "certification" mentioned in the paragraph would only require that the central authority certifies that the copy is a true copy of the original and that it certifies that the authority which has signed the warrant of arrest is a judicial authority under the law of the flag State. The committee considered that the warrant of arrest would normally contain detailed information in relation to the charges against the detained persons and the right of the accused to know such charges

would in any case be covered by the law of the flag state when it had exercised its preferential jurisdiction.

73. As previously stated, the main obligation to surrender follows from paragraph 1 of the article. However, an arrested person may wish to seize the courts of the intervening State for some reason. The agreement does not preclude such judicial intervention. The purport of paragraph 3 is to emphasise that, once the flag state has notified the intervening State that it exercises its preferential jurisdiction, that State is under an obligation to expedite the surrender of persons, vessels, etc. The committee recognised that there may be circumstances in which the ability to surrender may be constrained by circumstances beyond the control of the competent authorities, for example where a suspect person has recourse to the courts of the intervening State to challenge the lawfulness of his detention. In considering this principle, which follows from Article 5 of the European Convention on Human Rights, the committee recognised that the procedures for the surrender of persons will be in accordance with the national procedures of the intervening state (see paragraph 4 of the article). The courts of the intervening State should in certain cases be able to take into consideration that the courts of the flag State may be able to deal with the matter in all of its aspects.

74. Paragraph 4 was drafted as a reminder of Article 5 of the European Convention on Human Rights. Any detained person would always have the right to have the lawfulness of his detention determined either by the courts of the intervening State or, when preferential jurisdiction had been exercised, by the courts of the flag State. No provision of the agreement deprives any detained person of that right. It is another matter that the intervening State, when preferential jurisdiction has been exercised, is under an obligation, binding between the states, to surrender the person in accordance with paragraph 1 and to endeavour to expedite the surrender in accordance with paragraph 3. In any case, any procedures necessary for the surrender of persons, vessels, cargo or evidence, including judicial supervision, may be established by the national law of the intervening State and the agreement does not intend to interfere with that right of the intervening State. The domestic provisions may, however, not derogate from the system laid down in the article and the intervening State is obliged to implement its obligation to surrender persons, which is a consequence of the exercise of preferential jurisdiction by the flag State.

75. The committee recognised, on the one hand, that it would be difficult to foresee all the kinds of situations which could arise in the practical operation of the agreement, on the other that it would be cumbersome to draft provisions for all the kinds of situations that could arise. It was therefore agreed to draft in paragraph 5 an exceptional safety valve in case something goes entirely wrong in the procedure. The paragraph would only be used in exceptional circumstances, for instance in relation to own nationals or to protect the interests of the owners or operators of the vessel.

#### **Article 16 – Capital punishment**

76. This article is based on Article 11 of the European Convention on Extradition (European Treaty Series, No. 24). Although it might be interpreted as an interference with the principle of the preferential jurisdiction of the flag State, the committee believed that its inclusion was justified on the grounds that a growing number of countries now provide the death penalty for drug trafficking offences and it would remove an obstacle which might otherwise affect the willingness of parties to co-operate with those countries since it cannot be excluded that the agreement will be opened to a wider circle of States than European ones (see Article 28).

#### **Section 5 – Procedural and other general rules**

##### **Article 17 – Competent authorities**

77. Article 17 gives the parties a right to designate two competent authorities where necessary. The authority designated by virtue of paragraph 1 shall have operational responsibility, that is receiving and responding to requests under Articles 6 and 7 on a twenty-

four hour basis. The authority designated in accordance with paragraph 2 is more centrally responsible for all other communications and notifications under the agreement, for instance notifications under Article 14 of the exercise of preferential jurisdiction and such communications made by virtue of Article 2, paragraphs 1 and 5. The powers of the authorities so designated are determined by national law. Nothing in the agreement would prevent any State from designating the same authority to perform the various functions under paragraphs 1 and 2.

The "other information facilitating communication" referred to in paragraph 3 could, for instance, include a fax number.

#### **Article 18 – Communication between designated authorities**

78. This article describes the channels of communication. The use of diplomatic channels in the application of the agreement is not necessary.

79. Within the committee there was a consensus that the most effective means of sending and answering requests under Articles 4 to 7 is by direct communication between the authorities designated under Article 17, and that the parties should, therefore, establish such arrangements wherever practicable. Since use of the ICPO-Interpol communications channel is mentioned in a number of other Council of Europe instruments and in the Vienna Convention, the committee agreed that, where for any reason it was impracticable for designated authorities to communicate with each other directly, it would be reasonable for them to agree to make use of the communications channels of ICPO-Interpol and the Customs Co-operation Council. However, the committee felt that it was undesirable for parties to make use of these channels on a permanent basis.

#### **Article 19 – Form of request and languages**

80. According to paragraph 1, all communications relating to most of the operative provisions of the agreement, and in particular requests for authorisation, shall be made in writing, but modern means of telecommunications may be used. The paragraph permits an evolution if techniques change. The term "telecommunications" should therefore be interpreted broadly.

81. The wording of paragraph 1 clarifies that oral requests or answers to such requests are not permitted. Since a request in principle should be answered within four hours and since an answer may contain conditions, it is in the interest of both parties to leave a written record of the content of the communications under Section 2. This would, of course, not exclude the possibility that oral contacts may have taken place before the request. On the contrary, it is to be assumed that oral communications will often be established between the designated authorities under Article 17, paragraph 1, before a formal request is made. In the event of urgency, States would often prefer to make the first contact by telephone.

It follows from the wording of the paragraph that communications other than those referred to in Articles 4 to 16 may be made orally, unless the context shows that the communication must be made in writing. Communications relating to Article 2, paragraphs 1 and 5, for instance, may be made orally.

82. Paragraph 3 is similar to those found in several of the modern conventions, drafted under the auspices of the Council of Europe, for instance in Article 25 of the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime. The summary of evidence referred to in Article 13, paragraph 1, would be included in the communications mentioned in the present paragraph. Since such a summary of evidence need not be particularly long, the committee considered that it should not cause any problem, in particular since the States were expected to deal with these matters in a practical manner to further the co-operative spirit in which the agreement was drafted. Receiving a translated summary of evidence would usually reduce the time taken by the flag state to assess the evidence and take a decision on the exercise of the preferential jurisdiction.

83. The States should pay attention to the security aspects of using public networks, for instance by protecting the communication through encryption.

#### **Article 20 – Authentication and legalisation**

84. The committee decided to include a provision which would exclude both authentication and legalisation from the agreement since not all Council of Europe members have ratified the European Convention on the Abolition of Legalisation of Documents executed by Diplomatic Agents or Consular Officers (Council of Europe Treaty Series, No. 63).

#### **Article 21 – Content of request**

85. Article 21 States the important rules pertaining to the content of the request for authorisation. If the rules are not strictly followed it is clear that international co-operation will be adversely affected.

Article 21.c mentions that the details of the suspected offences together with the grounds for suspicion must be specified. This means that it would not be sufficient to merely provide the legal qualification of an offence but that more details of the offence must be given.

Article 21.d refers to a requirement of what may be called "double enforceability *in concreto*". The intervening State should be able to assure the flag State that action would have been taken under similar conditions, both as a matter of policy, using for instance discretionary powers, and that it would have been lawful to take that action if the offence had concerned one of its own flag vessels. It is, however, not the intention to create an obligation to exact equivalence of treatment for both flag vessels and foreign ones. An intervening State may, of course, adopt a more expansive policy in relation to its own flag vessels.

#### **Article 22 – Information for owners and masters**

86. The paragraph deals with an obligation to inform owners and masters of vessels of the contents of the agreement. Such information may be given through organisations for owners or masters of vessels, or through public newspapers and other media, or in any other way which appears appropriate to effectively achieve the purpose of this provision.

#### **Article 23 – Restriction of use**

87. Article 23 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 cases to which the agreement applies. It provided, therefore, for the possibility that the flag State may make its authorisation dependent upon the rule of speciality. Certain parties would always utilise this possibility. Should investigations or proceedings be related to relevant offences, it would be possible to use the information without the prior consent of the flag State. This exception to the general rule of speciality should be seen in the wider context of the necessity of combating drugs offences, as expressed in the Vienna Convention.

The article prevents use and transmission of information. "Use" indicates that it is the authority which collected the information which is concerned whereas "transmission" would be to any other authority, including transmission abroad.

The restriction of use is limited to investigations or proceedings. Use of information for purposes of so-called pro-active investigations or intelligence purposes would therefore not be covered by this article.

The article should be read in conjunction with Article 13, paragraph 3.

## **Article 24 – Confidentiality**

88. Article 24 deals with confidentiality both in the intervening State and in the flag State.

## **Section 6 – Costs and damages**

### **Article 25 – Costs**

89. The costs of an intervention on the high seas will often be considerable. Nonetheless, the committee considered that the cost should normally be borne by the intervening State unless the parties agreed otherwise.

This general principle would also be valid for cases where the intervening State renders assistance to another party in accordance with Articles 4 and 5. However, in such cases the intervention is made at the request of the flag State or at the request of another State and the intervening State is under an obligation to intervene "within the means available" to it, an expression which also includes economic and similar resources. The committee could not exclude the possibility that there would be situations where the cost should be borne by the flag State or the other State requesting assistance where the intervention followed a request under Articles 4 and 5, and it was therefore inserted that such costs should "normally" be borne by the intervening State, which in such cases renders assistance to the flag State or the other state. The committee considered that the opinion of the intervening State as to whether it has the available means must in any case prevail.

In particular where substantial or extraordinary costs are involved, it can be assumed that the flag State or the State requesting assistance would be asked to share the burden of the intervention when requesting assistance under Articles 4 or 5. In such cases, it would be necessary for the concerned parties to seek an agreement on the apportionment of the costs. Failing such agreement, the intervention would probably not take place.

Paragraph 2 provides that in instances in which preferential jurisdiction is invoked, the costs of returning suspected persons, the vessel and the evidence should be borne by the flag State. This paragraph concerns only the relation between the parties to the agreement and does not prevent any State from seeking reimbursement from any convicted person.

### **Article 26 – Damages**

90. The committee spent a considerable amount of time discussing the important issue of damages. It decided not to limit any provisions on damage to inter-state relations but sought to go further than it had previously been possible to do in other Council of Europe instruments. It considered whether it would be advisable to draft provisions which would specifically designate the intervening State as the State where any litigation should take place, or the law of the intervening State as the law which should govern the issue of damages, but decided against it. The provisions on damages should leave any such consideration unaffected.

91. Article 8, paragraph 1, of the agreement and Article 17, paragraph 6, of the Vienna Convention make it possible to subject an authorisation to intervene to conditions relating to responsibility. The present article does not interfere with this basic right, although the committee considered that for most states, it would not become necessary to use such special conditions in this context. It recognised however that some States would, in view of their national legal system, always have to impose conditions on the intervening State in relation to responsibility, in view of the particularities of their legal system.

92. Paragraph 1 of the article is limited to damages as a result of actions pursuant to Articles 9 and 10, whereas paragraph 2 concerns any action not justifiable by the terms of the agreement as a whole. Paragraph 1 is limited to any loss suffered by natural or juridical persons, whereas paragraph 2 also covers cases where States as such have suffered prejudice. Paragraph 1 was drafted in particular with a view to covering maritime casualties, although it extends to any damage or injury which occurs as a result of the negligence or other fault attributable to the intervening State, when the damage has been sustained in the process of taking action under Articles 9 and 10.

The normal rules of private international law apply to the question of the choice of the substantive law applicable to the litigation. The committee recognised that in certain cases, if an intervening State was sued in the courts of the flag state, the intervening State would have the right to invoke State immunity since the action taken could be considered to be an act *jure imperii*.

93. In paragraph 1, the liability is based on negligence or other fault committed in the course of action under Articles 9 and 10. The interpretation of "fault" would be decided in accordance with the applicable law but the courts would, of course, always have to take into account Article 11, paragraph 1, of the agreement. "Fault" would also cover a number of other situations, attributable to the intervening State.

94. The committee considered, in particular in relation to provisions on compensation for damages dealt with by the Geneva Convention (Article 22, paragraph 3) and the Montego Bay Convention (Article 110, paragraph 3), the issue of whether the intervening State should be liable to pay compensation when it had reasonable grounds for the suspicion that the vessel was engaged in illicit traffic, although no drugs were found. Such a situation might arise where the criminals had the time to unload the illicit cargo. The committee agreed that in such a situation it would not be justifiable to pay compensation, since it was then established that when the vessel had been boarded, the operator or the crew had committed an act justifying suspicion. The second part of paragraph 2 was thus added, in the light of the relevant provisions of the Geneva Convention and the Montego Bay Convention, to ensure that compensation would not be paid in such situations. In addition, since the provision was found in the relevant conventions expressing the current status of the international law of the sea on certain matters relating to liability, the committee found it appropriate to add the provision, on the understanding that it would be interpreted in the light of the provisions of these two conventions and the specific aims and obligations of the present agreement.

95. Paragraph 2 makes a reference to action taken "in a manner" which is not justified by the agreement. This expression covers the reasonable grounds specified in Article 6 as well as any procedure taken under the agreement.

Paragraph 2 will be applicable, for instance, where the intervening State has acted by negligence or in bad faith, when its powers have been abused or when unjustified delays have occurred (see Article 12, paragraph 1.c). It is also applicable when a state, which acted on the basis that it had reasonable grounds in accordance with Article 6, at a later stage will find that such grounds prove to be unfounded, provided that, when the vessel has been boarded, the operator or the crew have been found not to have committed any act justifying suspicion. Liability may also, in the light of the relevant national law, applicable to the litigation, be considered when, at a later stage, an accused person may be found not guilty for an offence.

The conditions which have been required in accordance with Article 8, paragraph 1, would also be covered by paragraph 2.

In referring to "compensation for any such loss, damage or injury" the second sentence of paragraph 2 makes it clear that liability covers the same type of compensation as under the first sentence. This does not imply the need that all substantial conditions for compensation, as contained in the first sentence, must also be met under this provision; at the same time

liability to pay compensation does not exist, where suspicions prove to be unfounded, for the mere interference with the freedom of navigation, regardless of whether or not any actual loss was sustained.

96. Any inquiry into reasonable grounds for suspicion should not jeopardise sources of sensitive information which the law enforcement authorities may have. Such information should always be kept secret (see Article 24).

97. The committee found it appropriate to draft a special rule for cases relating to assistance under Article 4. On the other hand, the committee saw no need to draft any particular rules on damage relating to stateless vessels. The rules of public and private international law would apply.

### **Chapter III – Final provisions**

98. With some exceptions, the provisions contained in this chapter are 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 315th meeting of their Deputies in February 1980. Most of these articles do not therefore call for specific comment, but the following points require some explanation.

With regard to Article 27, it is clear that the agreement should always be conceived as implementing and supplementing, at the regional level, Article 17 of the Vienna Convention in accordance with paragraph 9 of that article. Only those member States of the Council of Europe, and States invited to accede to the agreement under Article 28, which have ratified the Vienna Convention, may therefore join the present agreement.

99. Article 30 is intended to ensure the co-existence of the agreement with other treaties dealing with matters which are also dealt with in the present agreement. In particular, it is clear that the interpretation and operation of the Vienna Convention remains unaffected. The "special matters" referred to in paragraph 1 concern, for instance, mutual assistance in criminal matters or extradition. As provided for by Article 2, paragraph 1, the agreement should be interpreted in conformity with the international law of the sea. Action taken under the agreement shall not interfere with or affect the rights and obligations and the exercise of jurisdiction of coastal States in accordance with the international law of the sea (see Article 2, paragraphs 1 and 3).

100. Paragraph 2 provides for the possibility of concluding bilateral or multilateral agreements for purposes of supplementing or strengthening the provisions of the agreement or the Vienna Convention. The committee recognised that altering the provisions of Articles 6 and 7 on a bilateral basis to allow for other legal schemes would be possible at bilateral level, provided that such agreements could be considered to strengthen or supplement the agreement or the Vienna Convention. Such agreements could contain, for instance, provisions recognising that prior authorisation to stop and board the vessel would not be needed or that express authorisation is needed in each instance, but failure to respond to a request in a timely fashion could be considered as a tacit consent to the action. Those bilateral agreements could also deal with cases of extreme urgency and provide for a shorter time than the normal four hours to answer a request for intervention. The committee agreed that such agreements would not be considered contrary to the present agreement or to the Vienna Convention.

Paragraph 3 is relevant in relation to some bilateral agreements which have already been concluded, for instance the agreement between Italy and Spain of 23 March 1990.

101. The committee felt it was necessary to set up a mechanism, in Article 32, to monitor the practical operation of the agreement, as the smooth operation would require meetings at different technical or political levels. This would be difficult to achieve within the framework of the regular Council of Europe committee which monitors the operation of Council of Europe conventions in the criminal law area. One of the most urgent tasks of the monitoring



committee would be to ensure that the communications between parties run smoothly and safely.

The monitoring committee may make its own procedural rules. It is the representative of the parties to the agreement. As such, it may invite as observers other States, and in particular the member States of the Council of Europe, the Pompidou Group, international organisations such as the United Nations International Drug Control Programme, the International Maritime Organisation, Interpol and the Customs Cooperation Council to its meetings. It may also decide to send any information received from the parties or a copy of any report drawn up by the Secretary General, or parts thereof, to those states, organisations or bodies, as it deems appropriate.

102. The amendment procedure in Article 33 is thought to be for minor changes of a procedural character. It was noticed that, in accordance with paragraph 5, any amendment adopted would come into force only when all the parties had informed the Secretary General of their acceptance.

103. Under Article 34, the CDPC should always be kept informed about the interpretation and application of the agreement. Such information could be given to it by the monitoring committee.

Article 34 provides also for a mechanism to settle any disputes between parties regarding the interpretation and application of the agreement. Paragraphs 1 and 2 are also to be found in the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (European Treaty Series, No. 141), together with some amendments, inspired by the Vienna Convention. The committee thought, however, that it was important to construe a system of settlement of disputes in case where the parties could not agree on a particular method. For this reason, paragraphs 3 to 6 and the appendix were added to the article.

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## APPENDIX

### Article 17 – Illicit traffic by sea

1. The Parties shall co-operate to the fullest extent possible to suppress illicit traffic by sea, in conformity with the international law of the sea.

2. A Party which has reasonable grounds to suspect that a vessel flying its flag or not displaying a flag or marks of registry is engaged in illicit traffic may request the assistance of other Parties in suppressing its use for that purpose. The Parties so requested shall render such assistance within the means available to them.

3. A Party which has reasonable grounds to suspect that a vessel exercising freedom of navigation in accordance with international law and flying the flag or displaying marks of registry of another Party is engaged in illicit traffic may so notify the flag State, request confirmation of registry and, if confirmed, request authorisation from the flag State to take appropriate measures in regard to that vessel.

4. In accordance with paragraph 3 or in accordance with treaties in force between them or in accordance with any agreement or arrangement otherwise reached between those Parties, the flag State may authorise the requesting State to, *inter alia*:

a. board the vessel;

b. search the vessel;

c. if evidence of involvement in illicit traffic is found, take appropriate action with respect to the vessel, persons and cargo on board.

5. Where action is taken pursuant to this article, the Parties concerned shall take due account of the need not to endanger the safety of life at sea, the security of the vessel and the cargo or to prejudice the commercial and legal interests of the flag State or any other interested State.

6. The flag State may, consistent with its obligations in paragraph 1 of this article, subject its authorisation to conditions to be mutually agreed between it and the requesting Party, including conditions relating to responsibility.

7. For the purposes of paragraph 3 and 4 of this article, a Party shall respond expeditiously to a request from another Party to determine whether a vessel that is flying its flag is entitled to do so, and to requests for authorisation made pursuant to paragraph 3. At the time of becoming a Party to this convention, each Party shall designate an authority or, when necessary, authorities to receive and respond to such requests. Such designation shall be notified through the Secretary General to all other Parties within one month of the designation.

8. A Party which has taken any action in accordance with this article shall promptly inform the flag State concerned of the results of that action.

9. The Parties shall consider entering into bilateral or regional agreements or arrangements to carry out, or to enhance the effectiveness of, the provisions of this article.

10. Action pursuant to paragraph 4 of this article shall be carried out only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorised to that effect.

11. Any action taken in accordance with this article shall take due account of the need not to interfere with or affect the rights and obligations and the exercise of jurisdiction of coastal States in accordance with the international law of the sea.