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and Enhancing of Combating Main Criminal Activities
and Police Co-operation

**Focus: Strengthening police capacities
against serious crime in South-eastern Europe**

**SEMINAR ON STRATEGIES FOR THE RATIFICATION AND
IMPLEMENTATION OF THE 2ND ADDITIONAL PROTOCOL TO THE
EUROPEAN CONVENTION ON MUTUAL ASSISTANCE IN CRIMINAL
MATTERS (ETS 182)**

**Compilation of Council of Europe
reference texts**

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EUROPEAN CONVENTION ON MUTUAL ASSISTANCE IN CRIMINAL MATTERS

Strasbourg, 20.IV.1959

Preamble

The governments signatory hereto, being members of the Council of Europe,

Considering that the aim of the Council of Europe is to achieve greater unity among its members;

Believing that the adoption of common rules in the field of mutual assistance in criminal matters will contribute to the attainment of this aim;

Considering that such mutual assistance is related to the question of extradition, which has already formed the subject of a Convention signed on 13th December 1957,

Have agreed as follows:

Chapter I – General provisions

Article 1

- 1 The Contracting Parties undertake to afford each other, in accordance with the provisions of this Convention, the widest measure of mutual assistance in proceedings in respect of offences the punishment of which, at the time of the request for assistance, falls within the jurisdiction of the judicial authorities of the requesting Party.
- 2 This Convention does not apply to arrests, the enforcement of verdicts or offences under military law which are not offences under ordinary criminal law.

Article 2

Assistance may be refused:

- a if the request concerns an offence which the requested Party considers a political offence, an offence connected with a political offence, or a fiscal offence;
- b if the requested Party considers that execution of the request is likely to prejudice the sovereignty, security, *ordre public* or other essential interests of its country.

Chapter II – Letters rogatory

Article 3

- 1 The requested Party shall execute in the manner provided for by its law any letters rogatory relating to a criminal matter and addressed to it by the judicial authorities of the requesting Party for the purpose of procuring evidence or transmitting articles to be produced in evidence, records or documents.
- 2 If the requesting Party desires witnesses or experts to give evidence on oath, it shall expressly so request, and the requested Party shall comply with the request if the law of its country does not prohibit it.
- 3 The requested Party may transmit certified copies or certified photostat copies of records or documents requested, unless the requesting Party expressly requests the transmission of originals, in which case the requested Party shall make every effort to comply with the request.

Article 4

On the express request of the requesting Party the requested Party shall state the date and place of execution of the letters rogatory. Officials and interested persons may be present if the requested Party consents.

Article 5

- 1 Any Contracting Party may, by a declaration addressed to the Secretary General of the Council of Europe, when signing this Convention or depositing its instrument of ratification or accession, reserve the right to make the execution of letters rogatory for search or seizure of property dependent on one or more of the following conditions:
 - a that the offence motivating the letters rogatory is punishable under both the law of the requesting Party and the law of the requested Party;
 - b that the offence motivating the letters rogatory is an extraditable offence in the requested country;
 - c that execution of the letters rogatory is consistent with the law of the requested Party.
- 2 Where a Contracting Party makes a declaration in accordance with paragraph 1 of this article, any other Party may apply reciprocity.

Article 6

- 1 The requested Party may delay the handing over of any property, records or documents requested, if it requires the said property, records or documents in connection with pending criminal proceedings.
- 2 Any property, as well as original records or documents, handed over in execution of letters rogatory shall be returned by the requesting Party to the requested Party as soon as possible unless the latter Party waives the return thereof.

Chapter III – Service of writs and records of judicial verdicts - Appearance of witnesses, experts and prosecuted persons

Article 7

- 1 The requested Party shall effect service of writs and records of judicial verdicts which are transmitted to it for this purpose by the requesting Party.

Service may be effected by simple transmission of the writ or record to the person to be served. If the requesting Party expressly so requests, service shall be effected by the requested Party in the manner provided for the service of analogous documents under its own law or in a special manner consistent with such law.

- 2 Proof of service shall be given by means of a receipt dated and signed by the person served or by means of a declaration made by the requested Party that service has been effected and stating the form and date of such service. One or other of these documents shall be sent immediately to the requesting Party. The requested Party shall, if the requesting Party so requests, state whether service has been effected in accordance with the law of the requested Party. If service cannot be effected, the reasons shall be communicated immediately by the

requested Party to the requesting Party.

- 3 Any Contracting Party may, by a declaration addressed to the Secretary General of the Council of Europe, when signing this Convention or depositing its instrument of ratification or accession, request that service of a summons on an accused person who is in its territory be transmitted to its authorities by a certain time before the date set for appearance. This time shall be specified in the aforesaid declaration and shall not exceed 50 days.

This time shall be taken into account when the date of appearance is being fixed and when the summons is being transmitted.

Article 8

A witness or expert who has failed to answer a summons to appear, service of which has been requested, shall not, even if the summons contains a notice of penalty, be subjected to any punishment or measure of restraint, unless subsequently he voluntarily enters the territory of the requesting Party and is there again duly summoned.

Article 9

The allowances, including subsistence, to be paid and the travelling expenses to be refunded to a witness or expert by the requesting Party shall be calculated as from his place of residence and shall be at rates at least equal to those provided for in the scales and rules in force in the country where the hearing is intended to take place.

Article 10

- 1 If the requesting Party considers the personal appearance of a witness or expert before its judicial authorities especially necessary, it shall so mention in its request for service of the summons and the requested Party shall invite the witness or expert to appear.

The requested Party shall inform the requesting Party of the reply of the witness or expert.

- 2 In the case provided for under paragraph 1 of this article the request or the summons shall indicate the approximate allowances payable and the travelling and subsistence expenses refundable.
- 3 If a specific request is made, the requested Party may grant the witness or expert an advance. The amount of the advance shall be endorsed on the summons and shall be refunded by the requesting Party.

Article 11

- 1 A person in custody whose personal appearance as a witness or for purposes of confrontation is applied for by the requesting Party shall be temporarily transferred to the territory where the hearing is intended to take place, provided that he shall be sent back within the period stipulated by the requested Party and subject to the provisions of Article 12 in so far as these are applicable.

Transfer may be refused:

- a if the person in custody does not consent,
- b if his presence is necessary at criminal proceedings pending in the territory of the

requested Party,

- c if transfer is liable to prolong his detention, or
 - d if there are other overriding grounds for not transferring him to the territory of the requesting Party.
- 2 Subject to the provisions of Article 2, in a case coming within the immediately preceding paragraph, transit of the person in custody through the territory of a third State, Party to this Convention, shall be granted on application, accompanied by all necessary documents, addressed by the Ministry of Justice of the requesting Party to the Ministry of Justice of the Party through whose territory transit is requested.

A Contracting Party may refuse to grant transit to its own nationals.

- 3 The transferred person shall remain in custody in the territory of the requesting Party and, where applicable, in the territory of the Party through which transit is requested, unless the Party from whom transfer is requested applies for his release.

Article 12

- 1 A witness or expert, whatever his nationality, appearing on a summons before the judicial authorities of the requesting Party shall not be prosecuted or detained or subjected to any other restriction of his personal liberty in the territory of that Party in respect of acts or convictions anterior to his departure from the territory of the requested Party.
- 2 A person, whatever his nationality, summoned before the judicial authorities of the requesting Party to answer for acts forming the subject of proceedings against him, shall not be prosecuted or detained or subjected to any other restriction of his personal liberty for acts or convictions anterior to his departure from the territory of the requested Party and not specified in the summons.
- 3 The immunity provided for in this article shall cease when the witness or expert or prosecuted person, having had for a period of fifteen consecutive days from the date when his presence is no longer required by the judicial authorities an opportunity of leaving, has nevertheless remained in the territory, or having left it, has returned.

Chapter IV – Judicial records

Article 13

- 1 A requested Party shall communicate extracts from and information relating to judicial records, requested from it by the judicial authorities of a Contracting Party and needed in a criminal matter, to the same extent that these may be made available to its own judicial authorities in like case.
- 2 In any case other than that provided for in paragraph 1 of this article the request shall be complied with in accordance with the conditions provided for by the law, regulations or practice of the requested Party.

Chapter V – Procedure

Article 14

- 1 Requests for mutual assistance shall indicate as follows:
 - a the authority making the request,
 - b the object of and the reason for the request,
 - c where possible, the identity and the nationality of the person concerned, and
 - d where necessary, the name and address of the person to be served.
- 2 Letters rogatory referred to in Articles 3, 4 and 5 shall, in addition, state the offence and contain a summary of the facts.

Article 15

- 1 Letters rogatory referred to in Articles 3, 4 and 5 as well as the applications referred to in Article 11 shall be addressed by the Ministry of Justice of the requesting Party to the Ministry of Justice of the requested Party and shall be returned through the same channels.
- 2 In case of urgency, letters rogatory may be addressed directly by the judicial authorities of the requesting Party to the judicial authorities of the requested Party. They shall be returned together with the relevant documents through the channels stipulated in paragraph 1 of this article.
- 3 Requests provided for in paragraph 1 of Article 13 may be addressed directly by the judicial authorities concerned to the appropriate authorities of the requested Party, and the replies may be returned directly by those authorities. Requests provided for in paragraph 2 of Article 13 shall be addressed by the Ministry of Justice of the requesting Party to the Ministry of Justice of the requested Party.
- 4 Requests for mutual assistance, other than those provided for in paragraphs 1 and 3 of this article and, in particular, requests for investigation preliminary to prosecution, may be communicated directly between the judicial authorities.
- 5 In cases where direct transmission is permitted under this Convention, it may take place through the International Criminal Police Organisation (Interpol).
- 6 A Contracting Party may, when signing this Convention or depositing its instrument of ratification or accession, by a declaration addressed to the Secretary General of the Council of Europe, give notice that some or all requests for assistance shall be sent to it through channels other than those provided for in this article, or require that, in a case provided for in paragraph 2 of this article, a copy of the letters rogatory shall be transmitted at the same time to its Ministry of Justice.
- 7 The provisions of this article are without prejudice to those of bilateral agreements or arrangements in force between Contracting Parties which provide for the direct transmission of requests for assistance between their respective authorities.

Article 16

- 1 Subject to paragraph 2 of this article, translations of requests and annexed documents shall not be required.
- 2 Each Contracting Party may, when signing or depositing its instrument of ratification or

accession, by means of a declaration addressed to the Secretary General of the Council of Europe, reserve the right to stipulate that requests and annexed documents shall be addressed to it accompanied by a translation into its own language or into either of the official languages of the Council of Europe or into one of the latter languages, specified by it. The other Contracting Parties may apply reciprocity.

- 3 This article is without prejudice to the provisions concerning the translation of requests or annexed documents contained in the agreements or arrangements in force or to be made between two or more Contracting Parties.

Article 17

Evidence or documents transmitted pursuant to this Convention shall not require any form of authentication.

Article 18

Where the authority which receives a request for mutual assistance has no jurisdiction to comply therewith, it shall, *ex officio*, transmit the request to the competent authority of its country and shall so inform the requesting Party through the direct channels, if the request has been addressed through such channels.

Article 19

Reasons shall be given for any refusal of mutual assistance.

Article 20

Subject to the provisions of Article 10, paragraph 3, execution of requests for mutual assistance shall not entail refunding of expenses except those incurred by the attendance of experts in the territory of the requested Party or the transfer of a person in custody carried out under Article 11.

Chapter VI – Laying of information in connection with proceedings

Article 21

- 1 Information laid by one Contracting Party with a view to proceedings in the courts of another Party shall be transmitted between the Ministries of Justice concerned unless a Contracting Party avails itself of the option provided for in paragraph 6 of Article 15.
- 2 The requested Party shall notify the requesting Party of any action taken on such information and shall forward a copy of the record of any verdict pronounced.
- 3 The provisions of Article 16 shall apply to information laid under paragraph 1 of this article.

Chapter VII – Exchange of information from judicial records

Article 22

Each Contracting Party shall inform any other Party of all criminal convictions and subsequent measures in respect of nationals of the latter Party, entered in the judicial records. Ministries of Justice shall communicate such information to one another at least once a year. Where the person concerned is considered a national of two or more other Contracting Parties,

the information shall be given to each of these Parties, unless the person is a national of the Party in the territory of which he was convicted.

Chapter VIII – Final provisions

Article 23

- 1 Any Contracting Party may, when signing this Convention or when depositing its instrument of ratification or accession, make a reservation in respect of any provision or provisions of the Convention.
- 2 Any Contracting Party which has made a reservation shall withdraw it as soon as circumstances permit. Such withdrawal shall be made by notification to the Secretary General of the Council of Europe.
- 3 A Contracting Party which has made a reservation in respect of a provision of the Convention may not claim application of the said provision by another Party save in so far as it has itself accepted the provision.

Article 24

A Contracting Party may, when signing the Convention or depositing its instrument of ratification or accession, by a declaration addressed to the Secretary General of the Council of Europe, define what authorities it will, for the purpose of the Convention, deem judicial authorities.

Article 25

- 1 This Convention shall apply to the metropolitan territories of the Contracting Parties.
- 2 In respect of France, it shall also apply to Algeria and to the overseas Departments, and, in respect of Italy, it shall also apply to the territory of Somaliland under Italian administration.
- 3 The Federal Republic of Germany may extend the application of this Convention to the *Land* of Berlin by notice addressed to the Secretary General of the Council of Europe.
- 4 In respect of the Kingdom of the Netherlands, the Convention shall apply to its European territory. The Netherlands may extend the application of this Convention to the Netherlands Antilles, Surinam and Netherlands New Guinea by notice addressed to the Secretary General of the Council of Europe.
- 5 By direct arrangement between two or more Contracting Parties and subject to the conditions laid down in the arrangement, the application of this Convention may be extended to any territory, other than the territories mentioned in paragraphs 1, 2, 3 and 4 of this article, of one of these Parties, for the international relations of which any such Party is responsible.

Article 26

- 1 Subject to the provisions of Article 15, paragraph 7, and Article 16, paragraph 3, this Convention shall, in respect of those countries to which it applies, supersede the provisions of any treaties, conventions or bilateral agreements governing mutual assistance in criminal matters between any two Contracting Parties.
- 2 This Convention shall not affect obligations incurred under the terms of any other bilateral or

multilateral international convention which contains or may contain clauses governing specific aspects of mutual assistance in a given field.

- 3 The Contracting Parties may conclude between themselves bilateral or multilateral agreements on mutual assistance in criminal matters only in order to supplement the provisions of this Convention or to facilitate the application of the principles contained therein.
- 4 Where, as between two or more Contracting Parties, mutual assistance in criminal matters is practised on the basis of uniform legislation or of a special system providing for the reciprocal application in their respective territories of measures of mutual assistance, these Parties shall, notwithstanding the provisions of this Convention, be free to regulate their mutual relations in this field exclusively in accordance with such legislation or system. Contracting Parties which, in accordance with this paragraph, exclude as between themselves the application of this Convention shall notify the Secretary General of the Council of Europe accordingly.

Article 27

- 1 This Convention shall be open to signature by the members of the Council of Europe. It shall be ratified. The instruments of ratification shall be deposited with the Secretary General of the Council.
- 2 The Convention shall come into force 90 days after the date of deposit of the third instrument of ratification.
- 3 As regards any signatory ratifying subsequently the Convention shall come into force 90 days after the date of the deposit of its instrument of ratification.

Article 28

- 1 The Committee of Ministers of the Council of Europe may invite any State not a member of the Council to accede to this Convention, provided that the resolution containing such invitation obtains the unanimous agreement of the members of the Council who have ratified the Convention.
- 2 Accession shall be by deposit with the Secretary General of the Council of an instrument of accession which shall take effect 90 days after the date of its deposit.

Article 29

Any Contracting Party may denounce this Convention in so far as it is concerned by giving notice to the Secretary General of the Council of Europe. Denunciation shall take effect six months after the date when the Secretary General of the Council received such notification.

Article 30

The Secretary General of the Council of Europe shall notify the members of the Council and the government of any State which has acceded to this Convention of:

- a the names of the signatories and the deposit of any instrument of ratification or accession;
- b the date of entry into force of this Convention;
- c any notification received in accordance with the provisions of Article 5 – paragraph 1, Article 7 – paragraph 3, Article 15 – paragraph 6, Article 16 – paragraph 2, Article 24,

Article 25 – paragraphs 3 and 4, Article 26 – paragraph 4;

- d any reservation made in accordance with Article 23, paragraph 1;
- e the withdrawal of any reservation in accordance with Article 23, paragraph 2;
- f any notification of denunciation received in accordance with the provisions of Article 29 and the date on which such denunciation will take effect.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at Strasbourg, this 20th day of April 1959, in English and French, both texts being equally authoritative, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to the signatory and acceding governments.

Explanatory Report

The present text is a revised edition of a confidential explanatory report on the European Convention on Mutual Assistance in Criminal Matters, which was opened for signature by member States of the Council of Europe in April 1959.

Events and developments occurring after that date and having a bearing on the contents of the report have been indicated in footnotes. Furthermore, the original report has been slightly amended with a view to preserving the anonymity of governmental or individual opinions expressed during the preparation of the Convention.

It is hoped that this text may facilitate an understanding of the background considerations which led to the final text of the Convention which entered into force on 12 June 1962.

Introduction

In 1953 the Committee of Ministers of the Council of Europe instructed the Secretary General to convene a Committee of Governmental Experts to examine the possibility of establishing certain principles of extradition to be embodied in a European Convention on Extradition.

The Committee of Experts mentioned in its report accompanying the draft Convention that it had discussed the question of mutual assistance in criminal proceedings. The relevant part of the report reads as follows:

"This question which is connected with the problem of extradition was referred to during the committee's discussions. The committee was generally in favor of concluding a special convention on mutual assistance in criminal proceedings. So far, no multilateral convention on this subject has been drawn up. Several delegations stated that their countries had concluded bilateral treaties on the question and that model conventions had also been prepared.

The experts thought that this was a matter of great practical importance and should be dealt with in a multilateral convention between the member countries of the Council of Europe. They considered that such a convention would be acceptable to more of the Council's Members than the Convention on Extradition. The Committee of Experts therefore recommends to the Committee of Ministers that it should instruct a Committee of Experts to prepare a convention on mutual assistance in criminal proceedings."

During their 41st meeting (September 1956) the Ministers' Deputies decided at the request of the experts to widen their terms of reference, instructing them to prepare a draft Convention on Mutual Assistance in Criminal Matters.

The Committee of Experts on Mutual Assistance in Criminal Matters met at the Council of Europe, Strasbourg on 13-20 February, 4-13 November 1957, and 16-23 April 1958, with Mr. de la Fontaine (Luxembourg) in the Chair.

The present explanatory report contains:

- (a) general considerations on the work of the committee;
- (b) commentaries on the Articles of the Convention;
- (c) the text of the European Convention on Mutual Assistance in Criminal Matters opened for signature by the Member States of the Council of Europe on 20 April 1959.

General considerations

The work of the Council of Europe on mutual assistance in criminal matters follows on that relating to the preparation of the European Convention on Extradition signed in Paris on 13 December 1957.

The Convention drafted by the experts deals with such matters as letters rogatory for the examination of witnesses or experts, service of official documents and judicial verdicts, summoning of witnesses, experts, or persons in custody and transmission of information from judicial records.>

A number of guiding principles were laid down for mutual assistance in criminal matters. It was decided that such assistance should be independent of extradition in that it should be granted even in cases where extradition was refused. For example, it was agreed that assistance should be granted in the case of minor offences and that as a general rule the offence need not be an offence under the law of both countries. In the case of letters rogatory for search and seizure, however, the Contracting Parties could derogate from these rules under Article 5 of the Convention.

It was considered advisable to exclude mutual assistance in cases of a military nature from the application of the Convention and to make it optional to refuse assistance in cases of a political or fiscal nature.

Mutual assistance in the prosecution of nationals of the requested country was not excluded. A clause was inserted, however, in order to protect their interest (see commentary on Article 7, paragraph 3). An expert considered that, in this respect, aliens or stateless persons domiciled in the requested country should receive the same treatment as nationals.

Assistance must be given even if the offence is one which may be prosecuted by the authorities of *both* the requesting *and* the requested Parties.

It should be pointed out that some States, including Austria, the Federal Republic of Germany and Norway, make no distinction between "letters rogatory" and "other requests for mutual assistance" such as the "service of writs" or "communication of information from judicial records." For those States, all these forms come under the single concept of "mutual assistance" and should be dealt with as a whole. The special situation of those countries was accordingly taken into account, particularly in designing the arrangements of the Convention. Thus, for example, the experts were led to group the provisions concerning "channels" for the transmission of requests for mutual assistance in a single Article.

The experts examined certain other points which were not regulated in the draft Convention.

In the first place, the committee debated whether a provision should be drawn up to enable single items of information concerning a criminal matter to be exchanged directly between "police authorities acting in an auxiliary capacity to the judicial authorities." The majority of the experts were in favor of making no such provision. They thought it best not to force the existing practice of the police into a rigid mould, besides which, the Statute of the International Criminal Police Organisation (Interpol) already regulated mutual assistance between police authorities. However, it was stipulated in paragraph 5 of Article 15 relating to channels of communication that, in all cases where direct transmission is permitted, it may take place through Interpol.>

Second: the question was raised whether provision should be made for an "arbitral body" to settle any disputes over the interpretation or application of the Convention.

The committee thought that arbitration would be out of place, as Article 2 enabled Contracting Parties to refuse assistance on the grounds specified therein, which are to be assessed according to the practice of the requested country.

Some experts then asked whether it would not be advisable to consider setting up a "Committee" which would be responsible for establishing a "common interpretation" of the provisions of the Convention. The experts were unable to come to an agreement on this question.

Third: The question was brought up whether *officials and magistrates* of one Party should not be authorised to engage in *certain activities in the territory of another Party* with a view to the continued pursuit and arrest of a fugitive offender. It was explained that such activities would be subject to the condition that the offender, after arrest, should be immediately handed over to the local authorities.

The experts thought that this matter should be the subject of bilateral arrangements, as it affected only countries with a common frontier.

The European Convention on Mutual Assistance was, by a decision taken by the Committee of Ministers sitting at Deputy level, at its 71st meeting (April 1959), opened for signature by the Member States of the Council of Europe on 20 April 1959.

Commentaries on the articles of the Convention

Article 1

Paragraph 1 applies to the whole Convention, the Contracting Parties giving an undertaking in principle to afford each other the widest measure of mutual assistance in proceedings in respect of offences the punishment of which falls within the competence of the judicial authorities of the requesting Party. Provision is thus made for minor offences as well as for other, serious, offences; furthermore, mutual assistance is not subject to the rules governing extradition (but see commentary on Article 5). Mutual assistance must also be accorded in cases where the offence comes under the jurisdiction of the requested Party.

The Convention applies only to judicial proceedings as opposed to administrative proceedings. As regards the concept of "judicial authorities" mentioned in that paragraph, some experts pointed out that in their countries "public prosecutors" were regarded as administrative authorities, whereas in certain others they were judicial authorities. A provision (Article 24) was accordingly adopted in order to enable the Parties to state which authorities they consider as judicial authorities within the meaning of this Convention (see commentary on Article 24).

This paragraph, which is of a general character, is to be interpreted in a broad sense. It covers not only those forms of mutual assistance specifically mentioned in the Convention, but also every other kind of mutual legal assistance, including requests for assistance made in connection with:

(i) proceedings in respect of an *Ordnungswidrigkeit* under German law; an *Ordnungswidrigkeit* is an offence which, while not classified as a criminal offence, is punishable by a fine imposed by an administrative authority; the accused person has, however, a right of appeal to the ordinary courts. To make it quite clear that mutual assistance can only be invoked in the judicial stage of such proceedings, the Committee of Experts inserted the phrase "at the time of the request for assistance" in this paragraph;

(ii) injured party claims for damages in criminal proceedings;

- (iii) application for pardon or review of sentence;
- (iv) proceedings for the compensation of persons found innocent.

In Austria the amount of compensation payable to persons found innocent was a matter not for criminal jurisdiction but for the civil courts. Under Turkish legislation compensation could be obtained only by application to the administrative authorities.

It was specified in *paragraph 2* that this Convention does not apply to "arrests and the enforcement of verdicts". These words were substituted for the words "enforcement of judgments" employed in the preceding text of the experts since this expression was not sufficiently precise; for instance, it did not cover arrest warrants and imprisonment for debt which are generally to be excluded from the application of mutual assistance. Furthermore, this paragraph excluded military offences which are not offences under ordinary law from the field of application of the Convention. Other treaties or agreements may provide for assistance in cases of military offences. A similar clause appears in Article 4 of the European Convention on Extradition.

Article 2

This article sets forth a number of exceptions.

Sub-paragraph (a) concerns political and fiscal offences. Assistance will not, however, always be refused in these cases since the text of this Article leaves the matter to the discretion of the requested State.

Several experts pointed out that in such cases it might still be in the interest of an accused person that assistance should be granted since he would then be informed of the charge and could prepare his defence. Hearing witnesses might also operate in favour of the accused.

With regard to fiscal offences, it was agreed that the requested Party might in certain circumstances consider it desirable to grant assistance even if such a course was unfavourable to the accused.

Sub-paragraph (b) mentions other cases in which the requested State may refuse assistance.

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

During the drafting it was suggested to add to Article 2 a clause worded as follows:

"The execution of letters rogatory may be refused if such execution does not lie within the competence of the judicial authorities of the requested State."

This proposal was taken from Article 11 (3) of the Convention on Civil Procedure signed at The Hague on 11 March 1954. It was not adopted by the experts, however, on account of its restrictive character.

Another proposal would have resulted in a provision being inserted to the effect that assistance may be refused if the requested Party has substantial grounds for believing that the proceedings against the person concerned have been instituted for the purpose of prosecuting or punishing him on account of his race, religion, nationality or political opinions. A similar provision appears in Article 3 (2) of the European Convention on Extradition.

This suggestion was not accepted by the committee, which considered such a clause unnecessary in the case of mutual assistance under Council of Europe arrangements.

With reference to Articles 8 and 9 of the European Convention on Extradition, it was proposed to provide an optional clause whereby the requested Party would retain the right to refuse assistance:

(a) if the person charged is being proceeded against by the authorities of the requested Party or by the judicial authorities of a third State for the offence or offences which have given rise to the proceedings in the requesting country, or

(b) if the person charged has been finally convicted or acquitted by the judicial authorities of the requested Party or those of a third State in respect of the offence or offences which have given rise to the proceedings in the requesting country or if the aforesaid authorities have decided either not to institute or to terminate proceedings in respect of the same offence or offences.

This proposal was not adopted. It was considered that the insertion of this clause would have reduced the scope of the Convention. Moreover, in certain cases, such a clause might harm not only the interests of the requesting Party – which would still have to take a decision in the criminal matter in question even though it has not received the assistance requested, but also the interests of the requested Party which might require certain information concerning the accused person from the requesting Party, which Party would then apply to it reciprocity. Hence this proposal was not adopted; however, it was accepted that governments may enter a reservation to that effect.

Article 3

This article concerns the execution of letters rogatory.

Paragraph 1 sets forth the purposes for which letters rogatory may be sent. By "letters rogatory", in this Article, is meant a mandate given by a judicial authority of one country to a foreign judicial authority to perform in its place one or more specified actions.

The expression "procuring evidence" refers, *inter alia*, to the hearing of witnesses, experts or accused persons, the transport involved as well as search and seizure. The words "criminal matter" mean any proceedings within the meaning of Article 1 (1).

It follows from this text that letters rogatory must be executed in the manner provided for by the laws of the requested Party. No condition of substance is stipulated and the rule of culpability in both countries, which is one of the guiding principles of the European Convention on Extradition, has not been retained in the present Convention, because mutual assistance does not have exactly the same effects as extradition. Nevertheless, provision is made in Article 5 (1) for an exception in the case of search and seizure.

In respect of the Federal Republic of Germany, the term "judicial authorities of the requesting Party" denoted also the judicial authorities of the *Länder*.

According to *paragraph 2*, experts and witnesses may give evidence on oath only if the law of the requested Party does not prohibit it. Under this provision, the requested Party may hear evidence given on oath even if, as a general rule, there is no provision in its judicial practice for the taking of an oath, provided that this is not contrary to its law. It was also agreed that the oath would be administered in accordance with the rules of the requested Party.

Paragraph 3 does not call for special comment.

Article 4

This concerns notice of execution of letters rogatory.

The object of this clause is to enable the authorities of the requesting Party or the interested persons, if they expressly so request, to be present at the execution of letters rogatory if the requested Party agrees to this course. It is understood that consent may be given only if the law of the requested Party does not prohibit it.

It was also agreed that where this "express request" is not contained in the letters rogatory it should be transmitted by the channels laid down for such letters.

The Italian expert said during the elaboration of the Convention that under Italian law the interested persons could not be present at the execution of letters rogatory because judicial enquiries were secret. Only the foreign authorities could be allowed to attend.

Article 5

This article lays down the conditions governing execution of letters rogatory for search or seizure.

Under Articles 1 and 3, mutual assistance is not subject to the rules of extradition or to those of culpability in both countries; but *paragraph 1* of Article 5 enables the Parties concerned to require the application of one or both of those rules to cases of search or seizure. According to sub-paragraph (c), moreover, a Party may declare that it will only authorise the execution of a letter rogatory for search or seizure if such execution is consistent with its law.

Paragraph 2 makes it possible for reciprocity to be invoked in regard to any Party which has made use of the optional provisions of the preceding paragraph.

Article 6

This concerns the handing over of property to the requesting Party in execution of letters rogatory.

Paragraph 1 is based on paragraph 3 of Article 20 of the European Convention on Extradition.

The property referred to in *paragraph 2* means (a) property seized in pursuance of letters rogatory, (b) property seized on a previous occasion in connection with other proceedings and handed over to the requesting Party, (c) property handed over without previous seizure. The word "property" refers to the "evidence" mentioned in Article 3, paragraph 1.

It was agreed that in accordance with this text the requesting Party may not dispose of such property even in a case where under its own legislation it is obliged to decide the question of its ownership.

Article 7

This refers to service of writs and records of judicial verdicts. The word "service" is to be understood in a broad sense as referring to both simple transmission and official notification. It is not, however, necessary that the document in question be handed personally to the person to be served unless this is stipulated in the law of the requested Party or is consistent with this law and desired by the requesting Party.

According to *paragraph 1*, the requested Party is obliged to serve writs and records of judicial verdicts sent to it by the requesting Party on the persons concerned. This text refers in

particular to the summoning of accused persons, witnesses and experts to hearings in the requesting country. Provision is made for various methods of service on the persons concerned according as to whether the requesting Party does or does not specify the form of service to be employed.

(a) If the requesting Party does not specify the method of service, "service may be effected by simple transmission ". This clause was given an optional form in order to enable the requested Party either to transmit the papers to the person to be served without further formality or to serve them in a manner provided for under domestic law. The requested Party can thus choose the method of service to be employed.

(b) If the requesting Party expressly so requires, the requested Party must serve the documents in a manner provided for under its law or in a special manner compatible with such law.

With regard to *paragraph 2*, it was explained that receipts could be made out in any form desired. The requested Party was not therefore bound to use whatever form was attached to the documents to be served.

Paragraph 3: Before commenting on this text, it should be recalled that the criminal courts of the Scandinavian countries proceed on the basic principle that no accused person may be convicted without having been informed in good time of the charge preferred against him. Moreover, under the legislation of the Scandinavian countries, judgment by default is allowed only in exceptional cases.

It follows that in criminal cases, judgment by default, which is the practice of many Council of Europe States, is unknown to the Scandinavian courts. This divergency between the Scandinavian system and that of these other countries arises not only from a difference in the conduct of criminal proceedings but also from a difference of tradition in the administration of justice. With regard to procedure, for example, it is to be noted that Scandinavian courts may, at their discretion – and here they probably have much wider powers than those of the courts in other countries – compel the accused to appear in court in person.

The final text of paragraph 3 is the result of a compromise between the various legal systems.

According to the *first sentence of this paragraph*, Contracting Parties having exercised the right provided therein might request that the writ should reach them a given time before the date set for appearance. This time, which must not exceed 50 days, is to be specified by the Parties themselves in their "declaration". Its purpose is to enable the requested Party to transmit the writ in good time to the accused so that he may prepare his defence and travel to the place where he is due to appear.

According to the *second sub-paragraph of this paragraph*, this time-limit "shall be taken into account". Under this provision the requesting Party is obliged to fix the date of the appearance of the accused and to serve the writ in time to allow the accused to observe this date. This clause does not make it compulsory for the law to provide that the courts of the requesting Party may not give a judgment by default if, due to special circumstances, the writ could not be transmitted to the requested Party within the stipulated time-limit.

Article 8

This article refers to all witnesses and experts, whether their personal appearance (see Article 10) has or has not been expressly requested.

The rule laid down is derived from an international custom by which witnesses and experts are completely free not to go to the requesting country.

The word "penalty" refers to all forms of restraint, including fines.

Article 9

This article refers to all witnesses or experts whether their personal appearance has or has not been expressly requested (See Article 10).

The phrase "rates at least equal" implies that experts and witnesses will always receive at the very least the amount payable under the scales and rules in force in the requesting country. Thus the requesting Party, which is alone empowered to decide in the matter, may grant them a larger sum.

Article 10

Implicit provision is made in Article 7 (1) for the summoning of witnesses or experts for the purpose of giving evidence.

Paragraph 1 of Article 10 supplements paragraph 1 of Article 7 in that it obliges a requesting Party which attaches particular importance to the personal appearance of a witness or expert to say so in its request for service. In this case, the obligation of the requested Party will be to "invite" the witness or expert to comply with the summons. It was agreed that such invitation would be merely a "recommendation". It follows, quite apart from the provisions of Article 8, that witnesses or experts cannot be compelled by force or otherwise to appear before a court in the requesting country.

Paragraphs 2 and 3 apply only in the case provided for in the preceding paragraph, i.e. when the requesting Party has mentioned in its request that it considers the personal appearance of a witness or expert to be especially necessary.

Article 11

This article is concerned with the transfer of persons in custody.

According to *paragraph 1*, persons in custody whose personal appearance is requested must in principle be transferred. Such transfer may be refused only in the cases provided for in the second sub-paragraph of paragraph 1 which contains four derogations. Of these the fourth is to be regarded as a general clause.

Paragraphs 2 and 3 call for no special comment.

Article 12

This article concerns immunity.

Paragraph 1 applies to both witnesses and experts summoned to appear in the territory of the requesting Party.

Paragraph 2 is in essence identical with paragraph 1 and applies to a person summoned on a charge. This person may not be prosecuted or detained in respect of an offence or a former conviction not mentioned in the summons.

Persons summoned as witnesses, experts, or accused enjoy immunity only in respect of offences or convictions preceding their departure and may be prosecuted for offences committed subsequently.

Paragraph 3 is similar to paragraph 1 (b) of Article 14 of the European Convention on Extradition.

Article 13

This article refers to information in judicial records. It should not be confused with "exchange of information from judicial records" referred to in Article 22.

Paragraph 1 applies to requests from a judicial authority in connection with a "criminal matter".

Paragraph 2 deals with cases where the requests are made by judicial authorities without jurisdiction in criminal matters, for example civil courts, or by administrative authorities. The word "practice" has been inserted in view of the fact that in some countries such matters are not governed by law or regulation.

Article 14

Paragraph 1 specifies what must be contained in requests for assistance.

Paragraph 2 deals with the content of letters rogatory. It was emphasised that it would be useful to add to such letters a list of questions that might be put to the witnesses or experts. This list would be indicative and not restrictive.

Article 15

This article specifies the channels of transmission to be used in mutual assistance. However, it was recognised that whatever the channel adopted, the requesting Party could always use the diplomatic channel if it deemed this to be necessary for special reasons.

Paragraph 1 specifies the channels of transmission for letters rogatory and applications for the personal appearance of a person in custody; these must, in principle, pass through the Ministries of Justice of the two Parties, but there is provision for some exceptions with regard to letters rogatory (see paragraphs 2 and 6 below).

The Irish and Swedish experts said that in their countries the Foreign Ministry took the place of the Ministry of Justice for the transmission of letters rogatory. The Ministry of Justice of the requesting Party should therefore apply to the Department of External Affairs in Ireland or the Foreign Ministry in Sweden.

Paragraph 2 makes an exception in respect of the letters rogatory referred to in Articles 3, 4 and 5 by introducing the rule of direct communication in urgent cases; its application, however, is optional. Nevertheless, after the execution of letters rogatory, documents must be returned by the Ministry of Justice of the requested Party to the Ministry of Justice of the requesting Party.

The Irish expert stated that communications could not be made directly between judicial authorities abroad and judicial authorities in Ireland, even in urgent cases.

Paragraph 3 specifies the channels for the transmission of requests for information, including extracts, from the judicial records. Two channels are laid down according to whether the request is made in pursuance of paragraph 1 or paragraph 2 of Article 13.

If the request is made in accordance with paragraph 1 of Article 13, it "may be addressed directly" to the appropriate department of the requested Party, that is the competent local authority. This channel is thus not obligatory, and the requesting Party is therefore also free to apply to the Ministry of Justice (for example, if it does not know the competent local authority).

On the other hand, if the request is made in accordance with paragraph 2 of Article 13, it must needs be transmitted through the Ministries of Justice.

Paragraph 4 specifies the channels for the transmission of requests for assistance other than those mentioned in paragraphs 1 and 3 discussed above. These include requests for service of writs and records of judicial verdicts as well as requests for investigation preliminary to prosecution made by the Public Prosecutor. Direct channels are provided for, but their use is optional.

It was specified that the word "proceedings" under German law referred to *die gerichtliche Strafverfolgung*.

Paragraph 5 allows direct transmission to take place through the International Criminal Police Organisation (Interpol). A similar provision appears in Article 16 of the European Convention on Extradition.

Paragraph 6 was drawn up because some delegations could not accept all the channels provided for in the preceding paragraphs, in particular direct transmission. This provision will allow the Parties concerned freely to choose in all cases the channel of transmission they consider the most appropriate.

According to *paragraph 7*, this Article is without prejudice to the provisions of bilateral agreements or arrangements which provide for the direct transmission of requests for assistance. This clause had to be inserted because, under Article 26 (1), such agreements will be superseded upon the entry into force of this Convention. Without this paragraph, the countries concerned would have to draw up new agreements on this particular point.

Article 16

This article concerns the translation of requests for mutual assistance and annexed documents.

Paragraph 1 lays down the principle that translations shall not be required and, at least for some countries, confirms existing practice.

Paragraph 2 gives Parties the right to derogate from the principle laid down in the preceding paragraph by enabling them to request a translation either into their own language or into either of the official languages of the Council, namely French or English, or into one of the latter languages specified by it. It was thought advisable to allow such derogation, since it is the local authorities (and not, as in extradition matters, the central authorities) who are required to act on requests for assistance and they are, as a rule, familiar only with their own tongue; but reciprocity may be applied. It was agreed that the "declaration" provided for in this paragraph could name countries from which translations would be required.

In the event of the requesting Party having difficulty in securing a translation of the documents to be transmitted into the language of the requested Party, it could always ask the latter to arrange for such translation but would undertake to bear the cost thereof itself. The requested Party shall comply with this request in so far as it is able.

Paragraph 3 is essentially the same as paragraph 7 of Article 15. It stipulates that its provisions shall be without prejudice to those of agreements or arrangements in force or to be made in the matter of the translation of requests or annexed documents. It follows from this text that, where such agreements already exist, a Contracting Party may not exercise the right set forth in paragraph 2 with regard to a Party to the said agreement or arrangement.

Article 16 will not apply to the exchange of information from judicial records referred to in Article 22.

Article 17

It was agreed that the phrase "any form of authentication" also covers every additional formality such as "certification of competence" in German law.

Article 18

Only those local authorities that have received a request for assistance through direct channels are required to inform the requesting authority that the request has been transmitted to the competent local authority.

This is not, however, the case where transmission has taken place through the Ministries of Justice, since in the latter event the requesting Party is not directly interested in knowing which local authority in the requested country is competent.

Article 19

The expression "any refusal" includes refusal in part.

Article 20

This article calls for no special comment.

Article 21

This provision enables any Contracting Party to request another Party to institute proceedings against an individual. It refers in particular to cases where a person, having committed an offence in the requesting country, takes refuge in the territory of the requested country and cannot be extradited.

In this situation it is clear that the requesting Party shall itself afford the widest measure of mutual assistance which could be requested of it by the requested Party in such a case.

The Irish expert explained that in his country, except in a limited number of cases, a person could not be charged with or punished for an offence committed abroad.

Article 22

This article, which is not to be confused with Article 13, introduces the rule of automatic communication of information from judicial records and relates to nationals of other Contracting Parties. According to this text, "criminal convictions" and "subsequent measures" need only be notified if they are entered in the judicial records of the country where sentence was passed.

The words "criminal convictions" must be construed in a broad sense. The "subsequent measures" refer, more particularly, to rehabilitation.

Information – such as is available – must be communicated once a year: it is not necessary for it to be communicated within a year of being entered.

Article 23

This article which concerns reservations is identical with Article 26 of the European Convention on Extradition.

Article 24

As mentioned in the commentary on Article 1, paragraph 1, the term "judicial authorities" has a different connotation in different countries. In some countries "Public Prosecutors" come within the term, whereas in others they do not. Accordingly, it was agreed that any country could at the time of signature or of deposit of its instruments of ratification define how it would construe "judicial authorities" for the purposes of the Convention, so as to allow, if considered desirable, for the inclusion of "Public Prosecutors".

Article 25

This article which concerns the territorial application of the Convention follows the text of Article 27 of the European Convention on Extradition, except for the second sentence of paragraph 2 and paragraph 4.

It should be noted that when depositing its instruments of ratification, the French Government made a declaration excluding from the field of application of the Convention Algeria which has become independent.

Article 26

This article concerns the relationship between this Convention and existing or future bilateral and multilateral agreements.

Paragraph 1 is based on paragraph 1 of Article 28 of the European Convention on Extradition. Under Article 15 (7) and Article 16 (3), the provisions of former treaties relating to the direct transmission of requests for assistance and the translation of requests and annexed documents will remain in force.

Paragraph 2 lays down that clauses relating to specific aspects of mutual assistance in bilateral or multilateral conventions shall not be affected by the present Convention. The Contracting Parties will therefore be bound to respect these clauses. However, if these international conventions are incomplete in this respect, the corresponding provisions of this Convention will have to be applied accordingly. As a general rule, however, the provisions of these conventions shall to the extent they deal with particular aspects of mutual assistance always take precedence with regard to these particular aspects over those of the Council of Europe.

Paragraph 3 is based on paragraph 2 of Article 28 of the European Convention on Extradition. It was accepted that the "agreements" referred to in this paragraph could provide for keeping in force certain provisions of international instruments superseded by virtue of paragraph 1.

Paragraph 4 is based, mutatis mutandis, on paragraph 3 of Article 28 of the European Convention on Extradition. Thus Parties having a system of mutual assistance "on the basis of uniform legislation" (Scandinavian countries) may regulate their mutual relations exclusively in accordance with that system. The reference to a "special system providing for the reciprocal application in their respective territories of measures of mutual assistance" was inserted in order to protect any reciprocal arrangements that might exist between Ireland and the United Kingdom.

Article 27

This article which concerns the signature, ratification and entry into force of the Convention, reproduces the text of Article 29 of the European Convention on Extradition.

Article 28

This article which concerns accession reproduces the text of Article 30 of the European Convention on Extradition.

Article 29

This article which concerns denunciation of the Convention reproduces the text of Article 31 of the European Convention on Extradition.

Article 30

This article which concerns notifications corresponds to Article 32 of the European Convention on Extradition.

**ADDITIONAL PROTOCOL TO THE EUROPEAN
CONVENTION ON MUTUAL ASSISTANCE IN CRIMINAL
MATTERS**

Strasbourg, 17.III.1978

The member States of the Council of Europe, signatory to this Protocol,

Desirous of facilitating the application of the European Convention on Mutual Assistance in Criminal Matters opened for signature in Strasbourg on 20th April 1959 (hereinafter referred to as “the Convention”) in the field of fiscal offences;

Considering it also desirable to supplement the Convention in certain other respects,

Have agreed as follows:

Chapter I

Article 1

The Contracting Parties shall not exercise the right provided for in Article 2.a of the Convention to refuse assistance solely on the ground that the request concerns an offence which the requested Party considers a fiscal offence.

Article 2

- 1 In the case where a Contracting Party has made the execution of letters rogatory for search or seizure of property dependent on the condition that the offence motivating the letters rogatory is punishable under both the law of the requesting Party and the law of the requested Party, this condition shall be fulfilled, as regards fiscal offences, if the offence is punishable under the law of the requesting Party and corresponds to an offence of the same nature under the law of the requested Party.
- 2 The request may not be refused on the ground that the law of the requested Party does not impose the same kind of tax or duty or does not contain a tax, duty, customs and exchange regulation of the same kind as the law of the requesting Party.

Chapter II

Article 3

The Convention shall also apply to:

- a the service of documents concerning the enforcement of a sentence, the recovery of a fine or the payment of costs of proceedings;
- b measures relating to the suspension of pronouncement of a sentence or of its enforcement, to conditional release, to deferment of the commencement of the enforcement of a sentence or to the interruption of such enforcement.

Chapter III

Article 4

Article 22 of the Convention shall be supplemented by the following text, the original Article 22 of the Convention becoming paragraph 1 and the below-mentioned provisions becoming paragraph 2:

- “2 Furthermore, any Contracting Party which has supplied the above-mentioned information shall communicate to the Party concerned, on the latter's request in individual cases, a copy of the convictions and measures in question as well as any other information relevant thereto in order to enable it to consider whether they necessitate any measures at national level. This communication shall take place between the Ministries of

Justice concerned.”

Chapter IV

Article 5

- 1 This Protocol shall be open to signature by the member States of the Council of Europe which have signed the Convention. It shall be subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.
- 2 The Protocol shall enter into force 90 days after the date of the deposit of the third instrument of ratification, acceptance or approval.
- 3 In respect of a signatory State ratifying, accepting or approving subsequently, the Protocol shall enter into force 90 days after the date of the deposit of its instrument of ratification, acceptance or approval.
- 4 A member State of the Council of Europe may not ratify, accept or approve this Protocol without having, simultaneously or previously, ratified the Convention.

Article 6

- 1 Any State which has acceded to the Convention may accede to this Protocol after the Protocol has entered into force.
- 2 Such accession shall be effected by depositing with the Secretary General of the Council of Europe an instrument of accession which shall take effect 90 days after the date of its deposit.

Article 7

- 1 Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, specify the territory or territories to which this Protocol shall apply.
- 2 Any State may, when depositing its instrument of ratification, acceptance, approval or accession or at any later date, by declaration addressed to the Secretary General of the Council of Europe, extend this Protocol to any other territory or territories specified in the declaration and for whose international relations it is responsible or on whose behalf it is authorised to give undertakings.
- 3 Any declaration made in pursuance of the preceding paragraph may, in respect of any territory mentioned in such declaration, be withdrawn by means of a notification addressed to the Secretary General of the Council of Europe. Such withdrawal shall take effect six months after the date of receipt by the Secretary General of the Council of Europe of the notification.

Article 8

- 1 Reservations made by a Contracting Party to a provision of the Convention shall be applicable also to this Protocol, unless that Party otherwise declares at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession. The same shall apply to the declarations made by virtue of Article 24 of the Convention.
- 2 Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, declare that it reserves the right:
 - a not to accept Chapter I, or to accept it only in respect of certain offences or certain catego-

ries of the offences referred to in Article I, or not to comply with letters rogatory for search or seizure of property in respect of fiscal offences;

- b not to accept Chapter II;
 - c not to accept Chapter III.
- 3 Any Contracting Party may withdraw a declaration it has made in accordance with the foregoing paragraph by means of a declaration addressed to the Secretary General of the Council of Europe which shall become effective as from the date of its receipt.
 - 4 A Contracting Party which has applied to this Protocol a reservation made in respect of a provision of the Convention or which has made a reservation in respect of a provision of this Protocol may not claim the application of that provision by another Contracting Party; it may, however, if its reservation is partial or conditional claim the application of that provision in so far as it has itself accepted it.
 - 5 No other reservation may be made to the provisions of this Protocol.

Article 9

The provisions of this Protocol are without prejudice to more extensive regulations in bilateral or multilateral agreements concluded between Contracting Parties in application of Article 26, paragraph 3, of the Convention.

Article 10

The European Committee on Crime Problems of the Council of Europe shall be kept informed regarding the application of this Protocol and shall do whatever is needful to facilitate a friendly settlement of any difficulty which may arise out of its execution.

Article 11

- 1 Any Contracting Party may, in so far as it is concerned, denounce this Protocol by means of a notification addressed to the Secretary General of the Council of Europe.
- 2 Such denunciation shall take effect six months after the date of receipt by the Secretary General of such notification.
- 3 Denunciation of the Convention entails automatically denunciation of this Protocol.

Article 12

The Secretary General of the Council of Europe shall notify the member States of the Council and any State which has acceded to the Convention of:

- a any signature of this Protocol;
- b any deposit of an instrument of ratification, acceptance, approval or accession;
- c any date of entry into force of this Protocol in accordance with Articles 5 and 6;
- d any declaration received in pursuance of the provisions of paragraphs 2 and 3 of Article 7;
- e any declaration received in pursuance of the provisions of paragraph 1 of Article 8;
- f any reservation made in pursuance of the provisions of paragraph 2 of Article 8;

- g the withdrawal of any reservation carried out in pursuance of the provisions of paragraph 3 of Article 8;
- h any notification received in pursuance of the provisions of Article 11 and the date on which denunciation takes effect.

In witness whereof the undersigned, being duly authorised thereto, have signed this Protocol.

Done at Strasbourg, this 17th day of March 1978, in English and in French, both texts being equally authoritative, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each of the signatory and acceding States.

Explanatory Report

I. The Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, drawn up within the Council of Europe by a committee of governmental experts under the authority of the European Committee on Crime Problems (ECCP) was opened to signature by the member states of the Council of Europe on 17 March 1978.

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

Introduction

1. The preparation of this Additional Protocol has its origin in a meeting which the Council of Europe organised in June 1970 for the persons responsible at national level for the implementation of the European Convention on Mutual Assistance in Criminal Matters. The participants in this meeting examined the problems arising in connection with the implementation of the Convention and adopted a number of conclusions including, *inter alia*, certain proposals aimed at facilitating the application of the Convention in the future.

2. These conclusions were examined by the European Committee on Crime Problems (ECCP) at its 23rd Plenary Session, and Sub-committee No. XXXI which the ECCP had set up in 1971 to examine the practical application of the European Convention on Extradition was also given the supplementary terms of reference to examine, on the basis of the conclusions of the 1970 meeting, the general application of the European Convention on Mutual Assistance in Criminal Matters, with the exception of the problems already covered by Resolution (71) 43 of the Committee of Ministers. The sub-committee was instructed to propose the appropriate means for implementing the conclusions reached at the 1970 meeting.

3. The sub-committee met under the chairmanship of Mr R. Linke (Austria). The secretariat was provided by the Division of Crime Problems of the Directorate of Legal Affairs of the Council of Europe.

4. During the meetings held from 22 to 25 April 1975 and from 15 to 19 March 1976, the sub-committee prepared, *inter alia*, the Protocol which is the subject of this report.

5. For the purpose of examining the draft texts, the ECCP decided, at its 25th Plenary Session in 1976, to enlarge the composition of the subcommittee so as to comprise experts from all member States as well as from the Contracting Parties which are not members of the Council of Europe.

The enlarged sub-committee met from 6 to 10 September 1976 and from 7 to 11 March 1977.

6. The draft Additional Protocol as amended by the enlarged subcommittee was submitted to the 26th Plenary Session of the ECCP in May 1977 which decided to transmit it to the Committee of Ministers.

7. The Committee of Ministers of the Council of Europe adopted the text of the Additional Protocol at the 279th meeting of the Ministers' Deputies in November 1977 and decided to open it for signature.

General observations

8. When preparing the Protocol, the sub-committee was faced with a basic choice: either to elaborate separate instruments for each of the subjects to be dealt with, or to elaborate one

Protocol. Following the method already adopted for the Additional Protocol to the Extradition Convention of 15 October 1975, the sub-committee decided in favour of the latter approach. Consequently the Protocol contains provisions on a number of different topics; they relate to:

- the extension of the Convention to fiscal offences (Chapter I);
- mutual assistance in matters concerning the enforcement of sentences and similar measures (Chapter II); and
- the communication of information from judicial records (Chapter III).

9. It should be noted that whereas Chapter I modifies the existing text of the Convention, Chapters II and III complement the system of mutual assistance established under the Convention.

Commentary on the articles of the Protocol

Chapter I – Fiscal offences

10. According to Article 2.a of the Convention, assistance may be refused if the request concerns an offence which the requested Party considers a fiscal offence.

11. The effect of Article 1 of the Protocol is to remove the possibility under Article 2.a of the Convention for States to refuse assistance simply because the request concerns a fiscal offence. The Protocol thus puts fiscal and "ordinary" offences on the same footing. It would, of course, remain possible for States not Party to the Protocol to grant such assistance under the Convention itself.

12. The text, rather than defining the expression "fiscal offence", the meaning of which varies from one country to another, repeats the words appearing in the Convention itself. In this connection it should be noted that in Article 5 of the European Convention on Extradition "fiscal offences" are described as "offences in connection with taxes, duties, customs and exchange".

13. Article 2.b of the Convention is left untouched, so that States Party to the Protocol could refuse assistance in the case of a fiscal offence on one of the grounds stated therein. The sub-committee considered it unnecessary to add, for fiscal offences, further grounds of refusal, those listed in Article 2.b being sufficiently wide to cover for example, secrecy and certain individual, or general, economic interests.

With regard to secrecy, the situation might arise that the requested Party considers that the information to be furnished shall not be disclosed to persons who are not connected with the proceedings for which it has been requested. The sub-committee was of the opinion that in such a case the requested Party should inform the requesting Party of its views as soon as possible after having received the request. This would enable the requesting Party to decide at an early stage whether such a condition is compatible with its domestic legislation.

14. Article 2 of the Protocol introduces for mutual assistance principles similar to those adopted, in the context of extradition, for the interpretation of the principle of dual criminal liability, where a State has declared, under Article 5.1.a of the Convention, that this principle is to apply to the execution of letters rogatory for search or seizure of property, or where a State has made a reservation to this effect.

However, as the laws of member States differ in respect of the constituent elements of the various "fiscal offences", Article 2 provides that the condition of dual criminal liability laid down in Article 5.1.a of the Convention is fulfilled if the offence corresponds to "an offence of the same nature" under the law of the requested Party.

15. The fact that the law of the requested Party does not impose the same kind of tax or duty or does not contain the same fiscal regulation as the law of the requesting Party is no ground for refusing the request for assistance (Article 2, second sentence).

Chapter II – Mutual assistance concerning the enforcement of sentences and similar measures

16. Assistance concerning the enforcement of judgments is at present excluded from the scope of the Convention by virtue of Article 1.2, one of the reasons being that the Convention applies only to judicial proceedings and that in some member States the measures concerning the enforcement of sentences are taken by administrative authorities or by public prosecutors who, in some States, are regarded as administrative authorities. In the practical application of the Convention some doubts arose as to what kind of assistance was in fact excluded by this provision.

17. Article 3 extends the scope of application of the Convention in two respects. Assistance is to be granted:

a. with regard to the service of documents concerning the enforcement of a sentence or similar measures, as the recovery of a fine or the payment of costs, as well as

b. with regard to certain measures concerning the enforcement of the sentence (suspension, conditional release, deferment of the commencement, interruption of the enforcement, pardon).

18. Where the document to be served does not emanate from a judicial authority or where one of the measures mentioned in Article 3.b is not taken by a judicial authority, the provision is applicable only if the Contracting Party concerned has declared that it considers the authority in question a judicial authority for the purposes of the Convention (Article 24 of the Convention). To that end, Article 8.1 of the Protocol provides that declarations made under Article 24 of the Convention shall be applicable also to the Protocol, unless the Contracting Party declares otherwise.

19. Article 3.a is particularly designed to cover the case where, prior to taking a measure of enforcement, a formal notice concerning the enforcement must be served on a person abroad.

Chapter III – Communication of information from judicial records

20. Article 22 of the Convention, as it stands at present, provides for the automatic periodical mutual information of all criminal convictions and subsequent measures which are entered into the judicial records of the State where sentence was passed.

Article 4 of the Protocol complements this general exchange of information by providing for the case that the requesting Party, following the automatic communication under Article 22, requires a copy of the conviction, or of any subsequent measure (e.g. concerning the rehabilitation of the convicted person), or some other information relevant to the specific case. The communication of these copies or of any additional information is intended to enable the requesting Party to consider whether any measures consequent upon the sentence (e.g. the revocation of a driving licence) need be taken by it.

21. The phrase "any other information relevant thereto" is meant to limit the information which may be obtained to indications on the content, meaning and nature of the conviction or measure in question.

22. The information is communicated between the Ministries of Justice concerned. This is the same channel of communication as provided for by Article 22 of the Convention (Article 22, second sentence).

In this regard it should be noted that a reservation made to the Convention concerning a different channel of communication applies also to this Protocol, unless there is a declaration to the contrary under Article 8.1.

Chapter IV – Final clauses

23. The provisions contained in Chapter IV are, for the most part, based on the model clauses of agreements and conventions which were approved by the Committee of Ministers of the Council of Europe at the 113th meeting of their Deputies. Most of these articles do not call for specific comments, but the following points require some explanation.

24. As regards Article 5, it should be noted that member States of the Council of Europe which have signed but not ratified the Mutual Assistance Convention may sign the Protocol before ratifying the Convention. However, paragraph 4 of this article makes it clear that the Protocol may be ratified, accepted or approved only by a member State which has ratified the Convention. There is no obligation on a member State ratifying the Convention in the future to become a Contracting Party to the Protocol.

25. The Protocol may be acceded to by a non-member State only if it has acceded to the Convention (Article 6).

Accession to the Convention by non-member States of the Council of Europe has been and remains conditional on invitation from the Committee of Ministers, but no such invitation is required for accession to the Protocol. A non-member State which has at any time acceded to the Convention thus has an automatic right (but not an obligation) to accede to the Protocol; the only limitation is that no such accession may be effected until after the Protocol's entry into force which, under Article 5.2, is conditional on ratification, acceptance or approval by three member States.

26. With regard to reservations, Article 8.1 lays down the principle that, in the absence of a declaration to the contrary, existing reservations to the Mutual Assistance Convention apply also to the Protocol. The same applies to declarations made by virtue of Article 24 of the Convention, it being understood that the scope of application of such declarations may be limited to Article 3 of the Protocol.

27. Article 8.2 refers to the possibility for Contracting Parties not to accept one or more of the three chapters and to limit their nonacceptance of Chapter I to certain offences or certain categories of offences. Contracting States have wide discretion in defining the categories of offences in respect of which they wish to accept Chapter I, for instance, by reference to the acts constituting an offence, or by reference to the fiscal regulations which are affected. Furthermore, Article 8.2 allows Contracting States not to comply with letters rogatory for search or seizure of property if they concern a fiscal offence.

These provisions were inserted in order to enable States which, for the time being, find it impossible to accept all chapters, or to accept

Chapter I fully, to become nevertheless Parties to the Protocol as a whole. They may withdraw any reservation made under Article 8.2 (see Article 8, paragraph 3).

28. Article 9 is designed to ensure the smooth co-existence of the Protocol with any bilateral or multilateral agreements concluded in pursuance of Article 26.3 of the Convention which permits Contracting States to conclude agreements for the purpose of either supplementing the provisions of the Convention or of facilitating the application of its principles. According to the rule established by Article 9, such agreements shall supersede the provisions of the Protocol to the extent that they provide for more extensive mutual assistance.

**SECOND ADDITIONAL PROTOCOL TO THE EUROPEAN
CONVENTION ON MUTUAL ASSISTANCE IN CRIMINAL
MATTERS**

Strasbourg, 8.XI.2001

The member States of the Council of Europe, signatory to this Protocol,

Having regard to their undertakings under the Statute of the Council of Europe;

Desirous of further contributing to safeguard human rights, uphold the rule of law and support the democratic fabric of society;

Considering it desirable to that effect to strengthen their individual and collective ability to respond to crime;

Decided to improve on and supplement in certain aspects the European Convention on Mutual Assistance in Criminal Matters done at Strasbourg on 20 April 1959 (hereinafter referred to as “the Convention”), as well as the Additional Protocol thereto, done at Strasbourg on 17 March 1978;

Taking into consideration the Convention for the Protection of Human Rights and Fundamental Freedoms, done at Rome on 4 November 1950, as well as the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, done at Strasbourg on 28 January 1981,

Have agreed as follows:

Chapter I

Article 1 – Scope

Article 1 of the Convention shall be replaced by the following provisions:

- “1 The Parties undertake promptly to afford each other, in accordance with the provisions of this Convention, the widest measure of mutual assistance in proceedings in respect of offences the punishment of which, at the time of the request for assistance, falls within the jurisdiction of the judicial authorities of the requesting Party.
- 2 This Convention does not apply to arrests, the enforcement of verdicts or offences under military law which are not offences under ordinary criminal law.
- 3 Mutual assistance may also be afforded in proceedings brought by the administrative authorities in respect of acts which are punishable under the national law of the requesting or the requested Party by virtue of being infringements of the rules of law, where the decision may give rise to proceedings before a court having jurisdiction in particular in criminal matters.
- 4 Mutual assistance shall not be refused solely on the grounds that it relates to acts for which a legal person may be held liable in the requesting Party.”

Article 2 – Presence of officials of the requesting Party

Article 4 of the Convention shall be supplemented by the following text, the original Article 4 of the Convention becoming paragraph 1 and the provisions below becoming paragraph 2:

- “2 Requests for the presence of such officials or interested persons should not be refused where that presence is likely to render the execution of the request for assistance more responsive to the needs of the requesting Party and, therefore, likely to avoid the need for supplementary requests for assistance.”

Article 3 – Temporary transfer of detained persons to the territory of the requesting Party

Article 11 of the Convention shall be replaced by the following provisions:

- “1 A person in custody whose personal appearance for evidentiary purposes other than for standing trial is applied for by the requesting Party shall be temporarily transferred to its territory, provided that he or she shall be sent back within the period stipulated by the requested Party and subject to the provisions of Article 12 of this Convention, in so far as these are applicable.

Transfer may be refused if:

- a the person in custody does not consent;
 - b his or her presence is necessary at criminal proceedings pending in the territory of the requested Party;
 - c transfer is liable to prolong his or her detention, or
 - d there are other overriding grounds for not transferring him or her to the territory of the requesting Party.
- 2 Subject to the provisions of Article 2 of this Convention, in a case coming within paragraph 1, transit of the person in custody through the territory of a third Party, shall be granted on application, accompanied by all necessary documents, addressed by the Ministry of Justice of the requesting Party to the Ministry of Justice of the Party through whose territory transit is requested. A Party may refuse to grant transit to its own nationals.
- 3 The transferred person shall remain in custody in the territory of the requesting Party and, where applicable, in the territory of the Party through which transit is requested, unless the Party from whom transfer is requested applies for his or her release.”

Article 4 – Channels of communication

Article 15 of the Convention shall be replaced by the following provisions:

- “1 Requests for mutual assistance, as well as spontaneous information, shall be addressed in writing by the Ministry of Justice of the requesting Party to the Ministry of Justice of the requested Party and shall be returned through the same channels. However, they may be forwarded directly by the judicial authorities of the requesting Party to the judicial authorities of the requested Party and returned through the same channels.
- 2 Applications as referred to in Article 11 of this Convention and Article 13 of the Second Additional Protocol to this Convention shall in all cases be addressed by the Ministry of Justice of the requesting Party to the Ministry of Justice of the requested Party and shall be returned through the same channels.
- 3 Requests for mutual assistance concerning proceedings as mentioned in paragraph 3 of Article 1 of this Convention may also be forwarded directly by the administrative or judicial authorities of the requesting Party to the administrative or judicial authorities of the requested Party, as the case may be, and returned through the same channels.
- 4 Requests for mutual assistance made under Articles 18 and 19 of the Second

Additional Protocol to this Convention may also be forwarded directly by the competent authorities of the requesting Party to the competent authorities of the requested Party.

- 5 Requests provided for in paragraph 1 of Article 13 of this Convention may be addressed directly by the judicial authorities concerned to the appropriate authorities of the requested Party, and the replies may be returned directly by those authorities. Requests provided for in paragraph 2 of Article 13 of this Convention shall be addressed by the Ministry of Justice of the requesting Party to the Ministry of Justice of the requested Party.
- 6 Requests for copies of convictions and measures as referred to in Article 4 of the Additional Protocol to the Convention may be made directly to the competent authorities. Any Contracting State may, at any time, by a declaration addressed to the Secretary General of the Council of Europe, define what authorities it will, for the purpose of this paragraph, deem competent authorities.
- 7 In urgent cases, where direct transmission is permitted under this Convention, it may take place through the International Criminal Police Organisation (Interpol).
- 8 Any Party may, at any time, by a declaration addressed to the Secretary General of the Council of Europe, reserve the right to make the execution of requests, or specified requests, for mutual assistance dependent on one or more of the following conditions:
 - a that a copy of the request be forwarded to the central authority designated in that declaration;
 - b that requests, except urgent requests, be forwarded to the central authority designated in that declaration;
 - c that, in case of direct transmission for reasons of urgency, a copy shall be transmitted at the same time to its Ministry of Justice;
 - d that some or all requests for assistance shall be sent to it through channels other than those provided for in this article.
- 9 Requests for mutual assistance and any other communications under this Convention or its Protocols may be forwarded through any electronic or other means of telecommunication provided that the requesting Party is prepared, upon request, to produce at any time a written record of it and the original. However, any Contracting State, may by a declaration addressed at any time to the Secretary General of the Council of Europe, establish the conditions under which it shall be willing to accept and execute requests received by electronic or other means of telecommunication.
- 10 The provisions of this article are without prejudice to those of bilateral agreements or arrangements in force between Parties which provide for the direct transmission of requests for assistance between their respective authorities.”

Article 5 – Costs

Article 20 of the Convention shall be replaced by the following provisions:

- “1 Parties shall not claim from each other the refund of any costs resulting from the application of this Convention or its Protocols, except:
 - a costs incurred by the attendance of experts in the territory of the requested Party;

- b costs incurred by the transfer of a person in custody carried out under Articles 13 or 14 of the Second Additional Protocol to this Convention, or Article 11 of this Convention;
 - c costs of a substantial or extraordinary nature.
- 2 However, the cost of establishing a video or telephone link, costs related to the servicing of a video or telephone link in the requested Party, the remuneration of interpreters provided by it and allowances to witnesses and their travelling expenses in the requested Party shall be refunded by the requesting Party to the requested Party, unless the Parties agree otherwise.
- 3 Parties shall consult with each other with a view to making arrangements for the payment of costs claimable under paragraph 1.c above.
- 4 The provisions of this article shall apply without prejudice to the provisions of Article 10, paragraph 3, of this Convention."

Article 6 – Judicial authorities

Article 24 of the Convention shall be replaced by the following provisions:

"Any State shall at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, by means of a declaration addressed to the Secretary General of the Council of Europe, define what authorities it will, for the purpose of the Convention, deem judicial authorities. It subsequently may, at any time and in the same manner, change the terms of its declaration."

Chapter II

Article 7 – Postponed execution of requests

- 1 The requested Party may postpone action on a request if such action would prejudice investigations, prosecutions or related proceedings by its authorities.
- 2 Before refusing or postponing assistance, the requested Party shall, where appropriate after having consulted with the requesting Party, consider whether the request may be granted partially or subject to such conditions as it deems necessary.
- 3 If the request is postponed, reasons shall be given for the postponement. The requested Party shall also inform the requesting Party of any reasons that render impossible the execution of the request or are likely to delay it significantly.

Article 8 – Procedure

Notwithstanding the provisions of Article 3 of the Convention, where requests specify formalities or procedures which are necessary under the law of the requesting Party, even if unfamiliar to the requested Party, the latter shall comply with such requests to the extent that the action sought is not contrary to fundamental principles of its law, unless otherwise provided for in this Protocol.

Article 9 – Hearing by video conference

- 1 If a person is in one Party's territory and has to be heard as a witness or expert by the judicial authorities of another Party, the latter may, where it is not desirable or possible for the person to be heard to appear in its territory in person, request that the

hearing take place by video conference, as provided for in paragraphs 2 to 7.

- 2 The requested Party shall agree to the hearing by video conference provided that the use of the video conference is not contrary to fundamental principles of its law and on condition that it has the technical means to carry out the hearing. If the requested Party has no access to the technical means for video conferencing, such means may be made available to it by the requesting Party by mutual agreement.
- 3 Requests for a hearing by video conference shall contain, in addition to the information referred to in Article 14 of the Convention, the reason why it is not desirable or possible for the witness or expert to attend in person, the name of the judicial authority and of the persons who will be conducting the hearing.
- 4 The judicial authority of the requested Party shall summon the person concerned to appear in accordance with the forms laid down by its law.
- 5 With reference to hearing by video conference, the following rules shall apply:
 - a a judicial authority of the requested Party shall be present during the hearing, where necessary assisted by an interpreter, and shall also be responsible for ensuring both the identification of the person to be heard and respect for the fundamental principles of the law of the requested Party. If the judicial authority of the requested Party is of the view that during the hearing the fundamental principles of the law of the requested Party are being infringed, it shall immediately take the necessary measures to ensure that the hearing continues in accordance with the said principles;
 - b measures for the protection of the person to be heard shall be agreed, where necessary, between the competent authorities of the requesting and the requested Parties;
 - c the hearing shall be conducted directly by, or under the direction of, the judicial authority of the requesting Party in accordance with its own laws;
 - d at the request of the requesting Party or the person to be heard, the requested Party shall ensure that the person to be heard is assisted by an interpreter, if necessary;
 - e the person to be heard may claim the right not to testify which would accrue to him or her under the law of either the requested or the requesting Party.
- 6 Without prejudice to any measures agreed for the protection of persons, the judicial authority of the requested Party shall on the conclusion of the hearing draw up minutes indicating the date and place of the hearing, the identity of the person heard, the identities and functions of all other persons in the requested Party participating in the hearing, any oaths taken and the technical conditions under which the hearing took place. The document shall be forwarded by the competent authority of the requested Party to the competent authority of the requesting Party.
- 7 Each Party shall take the necessary measures to ensure that, where witnesses or experts are being heard within its territory, in accordance with this article, and refuse to testify when under an obligation to testify or do not testify according to the truth, its national law applies in the same way as if the hearing took place in a national procedure.
- 8 Parties may at their discretion also apply the provisions of this article, where appropriate and with the agreement of their competent judicial authorities, to hearings by video conference involving the accused person or the suspect. In this

case, the decision to hold the video conference, and the manner in which the video conference shall be carried out, shall be subject to agreement between the Parties concerned, in accordance with their national law and relevant international instruments. Hearings involving the accused person or the suspect shall only be carried out with his or her consent.

- 9 Any Contracting State may, at any time, by means of a declaration addressed to the Secretary General of the Council of Europe, declare that it will not avail itself of the possibility provided in paragraph 8 above of also applying the provisions of this article to hearings by video conference involving the accused person or the suspect.

Article 10 – Hearing by telephone conference

- 1 If a person is in one Party's territory and has to be heard as a witness or expert by judicial authorities of another Party, the latter may, where its national law so provides, request the assistance of the former Party to enable the hearing to take place by telephone conference, as provided for in paragraphs 2 to 6.
- 2 A hearing may be conducted by telephone conference only if the witness or expert agrees that the hearing take place by that method.
- 3 The requested Party shall agree to the hearing by telephone conference where this is not contrary to fundamental principles of its law.
- 4 A request for a hearing by telephone conference shall contain, in addition to the information referred to in Article 14 of the Convention, the name of the judicial authority and of the persons who will be conducting the hearing and an indication that the witness or expert is willing to take part in a hearing by telephone conference.
- 5 The practical arrangements regarding the hearing shall be agreed between the Parties concerned. When agreeing such arrangements, the requested Party shall undertake to:
 - a notify the witness or expert concerned of the time and the venue of the hearing;
 - b ensure the identification of the witness or expert;
 - c verify that the witness or expert agrees to the hearing by telephone conference.
- 6 The requested Party may make its agreement subject, fully or in part, to the relevant provisions of Article 9, paragraphs 5 and 7.

Article 11 – Spontaneous information

- 1 Without prejudice to their own investigations or proceedings, the competent authorities of a Party may, without prior request, forward to the competent authorities of another Party information obtained within the framework of their own investigations, when they consider that the disclosure of such information might assist the receiving Party in initiating or carrying out investigations or proceedings, or might lead to a request by that Party under the Convention or its Protocols.
- 2 The providing Party may, pursuant to its national law, impose conditions on the use of such information by the receiving Party.
- 3 The receiving Party shall be bound by those conditions.

- 4 However, any Contracting State may, at any time, by means of a declaration addressed to the Secretary General of the Council of Europe, declare that it reserves the right not to be bound by the conditions imposed by the providing Party under paragraph 2 above, unless it receives prior notice of the nature of the information to be provided and agrees to its transmission.

Article 12 – Restitution

- 1 At the request of the requesting Party and without prejudice to the rights of bona fide third parties, the requested Party may place articles obtained by criminal means at the disposal of the requesting Party with a view to their return to their rightful owners.
- 2 In applying Articles 3 and 6 of the Convention, the requested Party may waive the return of articles either before or after handing them over to the requesting Party if the restitution of such articles to the rightful owner may be facilitated thereby. The rights of bona fide third parties shall not be affected.
- 3 In the event of a waiver before handing over the articles to the requesting Party, the requested Party shall exercise no security right or other right of recourse under tax or customs legislation in respect of these articles.
- 4 A waiver as referred to in paragraph 2 shall be without prejudice to the right of the requested Party to collect taxes or duties from the rightful owner.

Article 13 – Temporary transfer of detained persons to the requested Party

- 1 Where there is agreement between the competent authorities of the Parties concerned, a Party which has requested an investigation for which the presence of a person held in custody on its own territory is required may temporarily transfer that person to the territory of the Party in which the investigation is to take place.
- 2 The agreement shall cover the arrangements for the temporary transfer of the person and the date by which the person must be returned to the territory of the requesting Party.
- 3 Where consent to the transfer is required from the person concerned, a statement of consent or a copy thereof shall be provided promptly to the requested Party.
- 4 The transferred person shall remain in custody in the territory of the requested Party and, where applicable, in the territory of the Party through which transit is requested, unless the Party from which the person was transferred applies for his or her release.
- 5 The period of custody in the territory of the requested Party shall be deducted from the period of detention which the person concerned is or will be obliged to undergo in the territory of the requesting Party.
- 6 The provisions of Article 11, paragraph 2, and Article 12 of the Convention shall apply *mutatis mutandis*.
- 7 Any Contracting State may at any time, by means of a declaration addressed to the Secretary General of the Council of Europe, declare that before an agreement is reached under paragraph 1 of this article, the consent referred to in paragraph 3 of this article will be required, or will be required under certain conditions indicated in the declaration.

Article 14 – Personal appearance of transferred sentenced persons

The provisions of Articles 11 and 12 of the Convention shall apply *mutatis mutandis* also to persons who are in custody in the requested Party, pursuant to having been transferred in order to serve a sentence passed in the requesting Party, where their personal appearance for purposes of review of the judgement is applied for by the requesting Party.

Article 15 – Language of procedural documents and judicial decisions to be served

- 1 The provisions of this article shall apply to any request for service under Article 7 of the Convention or Article 3 of the Additional Protocol thereto.
- 2 Procedural documents and judicial decisions shall in all cases be transmitted in the language, or the languages, in which they were issued.
- 3 Notwithstanding the provisions of Article 16 of the Convention, if the authority that issued the papers knows or has reasons to believe that the addressee understands only some other language, the papers, or at least the most important passages thereof, shall be accompanied by a translation into that other language.
- 4 Notwithstanding the provisions of Article 16 of the Convention, procedural documents and judicial decisions shall, for the benefit of the authorities of the requested Party, be accompanied by a short summary of their contents translated into the language, or one of the languages, of that Party.

Article 16 – Service by post

- 1 The competent judicial authorities of any Party may directly address, by post, procedural documents and judicial decisions, to persons who are in the territory of any other Party.
- 2 Procedural documents and judicial decisions shall be accompanied by a report stating that the addressee may obtain information from the authority identified in the report, regarding his or her rights and obligations concerning the service of the papers. The provisions of paragraph 3 of Article 15 above shall apply to that report.
- 3 The provisions of Articles 8, 9 and 12 of the Convention shall apply *mutatis mutandis* to service by post.
- 4 The provisions of paragraphs 1, 2 and 3 of Article 15 above shall also apply to service by post.

Article 17 – Cross-border observations

- 1 Police officers of one of the Parties who, within the framework of a criminal investigation, are keeping under observation in their country a person who is presumed to have taken part in a criminal offence to which extradition may apply, or a person who it is strongly believed will lead to the identification or location of the above-mentioned person, shall be authorised to continue their observation in the territory of another Party where the latter has authorised cross-border observation in response to a request for assistance which has previously been submitted. Conditions may be attached to the authorisation.

On request, the observation will be entrusted to officers of the Party in whose territory it is carried out.

The request for assistance referred to in the first sub-paragraph must be sent to an authority designated by each Party and having jurisdiction to grant or to forward the requested authorisation.

- 2 Where, for particularly urgent reasons, prior authorisation of the other Party cannot be requested, the officers conducting the observation within the framework of a criminal investigation shall be authorised to continue beyond the border the observation of a person presumed to have committed offences listed in paragraph 6, provided that the following conditions are met:

- a the authorities of the Party designated under paragraph 4, in whose territory the observation is to be continued, must be notified immediately, during the observation, that the border has been crossed;
- b a request for assistance submitted in accordance with paragraph 1 and outlining the grounds for crossing the border without prior authorisation shall be submitted without delay.

Observation shall cease as soon as the Party in whose territory it is taking place so requests, following the notification referred to in a. or the request referred to in b. or where authorisation has not been obtained within five hours of the border being crossed.

- 3 The observation referred to in paragraphs 1 and 2 shall be carried out only under the following general conditions:

- a The officers conducting the observation must comply with the provisions of this article and with the law of the Party in whose territory they are operating; they must obey the instructions of the local responsible authorities.
- b Except in the situations provided for in paragraph 2, the officers shall, during the observation, carry a document certifying that authorisation has been granted.
- c The officers conducting the observation must be able at all times to provide proof that they are acting in an official capacity.
- d The officers conducting the observation may carry their service weapons during the observation, save where specifically otherwise decided by the requested Party; their use shall be prohibited save in cases of legitimate self-defence.
- e Entry into private homes and places not accessible to the public shall be prohibited.
- f The officers conducting the observation may neither stop and question, nor arrest, the person under observation.
- g All operations shall be the subject of a report to the authorities of the Party in whose territory they took place; the officers conducting the observation may be required to appear in person.
- h The authorities of the Party from which the observing officers have come shall, when requested by the authorities of the Party in whose territory the observation took place, assist the enquiry subsequent to the operation in which they took part, including legal proceedings.

- 4 Parties shall at the time of signature or when depositing their instrument of ratification, acceptance, approval or accession, by means of a declaration addressed to the Secretary General of the Council of Europe, indicate both the officers and authorities that they designate for the purposes of paragraphs 1 and 2 of this article.

They subsequently may, at any time and in the same manner, change the terms of their declaration.

- 5 The Parties may, at bilateral level, extend the scope of this article and adopt additional measures in implementation thereof.
- 6 The observation referred to in paragraph 2 may take place only for one of the following criminal offences:
 - assassination;
 - murder;
 - rape;
 - arson;
 - counterfeiting;
 - armed robbery and receiving of stolen goods;
 - extortion;
 - kidnapping and hostage taking;
 - traffic in human beings;
 - illicit traffic in narcotic drugs and psychotropic substances;
 - breach of the laws on arms and explosives;
 - use of explosives;
 - illicit carriage of toxic and dangerous waste;
 - smuggling of aliens;
 - sexual abuse of children.

Article 18 – Controlled delivery

- 1 Each Party undertakes to ensure that, at the request of another Party, controlled deliveries may be permitted on its territory in the framework of criminal investigations into extraditable offences.
- 2 The decision to carry out controlled deliveries shall be taken in each individual case by the competent authorities of the requested Party, with due regard to the national law of that Party.
- 3 Controlled deliveries shall take place in accordance with the procedures of the requested Party. Competence to act, direct and control operations shall lie with the competent authorities of that Party.
- 4 Parties shall at the time of signature or when depositing their instrument of ratification, acceptance, approval or accession, by means of a declaration addressed to the Secretary General of the Council of Europe, indicate the authorities that are competent for the purposes of this article. They subsequently may, at any time and in the same manner, change the terms of their declaration.

Article 19 – Covert investigations

- 1 The requesting and the requested Parties may agree to assist one another in the conduct of investigations into crime by officers acting under covert or false identity (covert investigations).
- 2 The decision on the request is taken in each individual case by the competent authorities of the requested Party with due regard to its national law and procedures. The duration of the covert investigation, the detailed conditions, and the legal status of the officers concerned during covert investigations shall be agreed between the Parties with due regard to their national law and procedures.
- 3 Covert investigations shall take place in accordance with the national law and

procedures of the Party on the territory of which the covert investigation takes place. The Parties involved shall co-operate to ensure that the covert investigation is prepared and supervised and to make arrangements for the security of the officers acting under covert or false identity.

- 4 Parties shall at the time of signature or when depositing their instrument of ratification, acceptance, approval or accession, by means of a declaration addressed to the Secretary General of the Council of Europe, indicate the authorities that are competent for the purposes of paragraph 2 of this article. They subsequently may, at any time and in the same manner, change the terms of their declaration.

Article 20 – Joint investigation teams

- 1 By mutual agreement, the competent authorities of two or more Parties may set up a joint investigation team for a specific purpose and a limited period, which may be extended by mutual consent, to carry out criminal investigations in one or more of the Parties setting up the team. The composition of the team shall be set out in the agreement.

A joint investigation team may, in particular, be set up where:

- a a Party's investigations into criminal offences require difficult and demanding investigations having links with other Parties;
- b a number of Parties are conducting investigations into criminal offences in which the circumstances of the case necessitate co-ordinated, concerted action in the Parties involved.

A request for the setting up of a joint investigation team may be made by any of the Parties concerned. The team shall be set up in one of the Parties in which the investigations are expected to be carried out.

- 2 In addition to the information referred to in the relevant provisions of Article 14 of the Convention, requests for the setting up of a joint investigation team shall include proposals for the composition of the team.
- 3 A joint investigation team shall operate in the territory of the Parties setting up the team under the following general conditions:
 - a the leader of the team shall be a representative of the competent authority participating in criminal investigations from the Party in which the team operates. The leader of the team shall act within the limits of his or her competence under national law;
 - b the team shall carry out its operations in accordance with the law of the Party in which it operates. The members and seconded members of the team shall carry out their tasks under the leadership of the person referred to in subparagraph a, taking into account the conditions set by their own authorities in the agreement on setting up the team;
 - c the Party in which the team operates shall make the necessary organisational arrangements for it to do so.
- 4 In this article, members of the joint investigation team from the Party in which the team operates are referred to as "members", while members from Parties other than the Party in which the team operates are referred to as "seconded members".
- 5 Seconded members of the joint investigation team shall be entitled to be present

- when investigative measures are taken in the Party of operation. However, the leader of the team may, for particular reasons, in accordance with the law of the Party where the team operates, decide otherwise.
- 6 Seconded members of the joint investigation team may, in accordance with the law of the Party where the team operates, be entrusted by the leader of the team with the task of taking certain investigative measures where this has been approved by the competent authorities of the Party of operation and the seconding Party.
- 7 Where the joint investigation team needs investigative measures to be taken in one of the Parties setting up the team, members seconded to the team by that Party may request their own competent authorities to take those measures. Those measures shall be considered in that Party under the conditions which would apply if they were requested in a national investigation.
- 8 Where the joint investigation team needs assistance from a Party other than those which have set up the team, or from a third State, the request for assistance may be made by the competent authorities of the State of operation to the competent authorities of the other State concerned in accordance with the relevant instruments or arrangements.
- 9 A seconded member of the joint investigation team may, in accordance with his or her national law and within the limits of his or her competence, provide the team with information available in the Party which has seconded him or her for the purpose of the criminal investigations conducted by the team.
- 10 Information lawfully obtained by a member or seconded member while part of a joint investigation team which is not otherwise available to the competent authorities of the Parties concerned may be used for the following purposes:
- a for the purposes for which the team has been set up;
 - b subject to the prior consent of the Party where the information became available, for detecting, investigating and prosecuting other criminal offences. Such consent may be withheld only in cases where such use would endanger criminal investigations in the Party concerned or in respect of which that Party could refuse mutual assistance;
 - c for preventing an immediate and serious threat to public security, and without prejudice to sub-paragraph b. if subsequently a criminal investigation is opened;
 - d for other purposes to the extent that this is agreed between Parties setting up the team.
- 11 This article shall be without prejudice to any other existing provisions or arrangements on the setting up or operation of joint investigation teams.
- 12 To the extent that the laws of the Parties concerned or the provisions of any legal instrument applicable between them permit, arrangements may be agreed for persons other than representatives of the competent authorities of the Parties setting up the joint investigation team to take part in the activities of the team. The rights conferred upon the members or seconded members of the team by virtue of this article shall not apply to these persons unless the agreement expressly states otherwise.

Article 21 – Criminal liability regarding officials

During the operations referred to in Articles 17, 18, 19 or 20, unless otherwise agreed upon by the Parties concerned, officials from a Party other than the Party of operation shall be regarded as officials of the Party of operation with respect to offences committed against them or by them.

Article 22 – Civil liability regarding officials

- 1 Where, in accordance with Articles 17, 18, 19 or 20, officials of a Party are operating in another Party, the first Party shall be liable for any damage caused by them during their operations, in accordance with the law of the Party in whose territory they are operating.
- 2 The Party in whose territory the damage referred to in paragraph 1 was caused shall make good such damage under the conditions applicable to damage caused by its own officials.
- 3 The Party whose officials have caused damage to any person in the territory of another Party shall reimburse the latter in full any sums it has paid to the victims or persons entitled on their behalf.
- 4 Without prejudice to the exercise of its rights vis-à-vis third parties and with the exception of paragraph 3, each Party shall refrain in the case provided for in paragraph 1 from requesting reimbursement of damages it has sustained from another Party.
- 5 The provisions of this article shall apply subject to the proviso that the Parties did not agree otherwise.

Article 23 – Protection of witnesses

Where a Party requests assistance under the Convention or one of its Protocols in respect of a witness at risk of intimidation or in need of protection, the competent authorities of the requesting and requested Parties shall endeavour to agree on measures for the protection of the person concerned, in accordance with their national law.

Article 24 – Provisional measures

- 1 At the request of the requesting Party, the requested Party, in accordance with its national law, may take provisional measures for the purpose of preserving evidence, maintaining an existing situation or protecting endangered legal interests.
- 2 The requested Party may grant the request partially or subject to conditions, in particular time limitation.

Article 25 – Confidentiality

The requesting Party may require that the requested Party keep confidential the fact and substance of the request, except to the extent necessary to execute the request. If the requested Party cannot comply with the requirement of confidentiality, it shall promptly inform the requesting Party.

Article 26 – Data protection

- 1 Personal data transferred from one Party to another as a result of the execution of a request made under the Convention or any of its Protocols, may be used by the Party to which such data have been transferred, only:

- a for the purpose of proceedings to which the Convention or any of its Protocols apply;
 - b for other judicial and administrative proceedings directly related to the proceedings mentioned under (a);
 - c for preventing an immediate and serious threat to public security.
- 2 Such data may however be used for any other purpose if prior consent to that effect is given by either the Party from which the data had been transferred, or the data subject.
- 3 Any Party may refuse to transfer personal data obtained as a result of the execution of a request made under the Convention or any of its Protocols where
- such data is protected under its national legislation, and
 - the Party to which the data should be transferred is not bound by the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, done at Strasbourg on 28 January 1981, unless the latter Party undertakes to afford such protection to the data as is required by the former Party.
- 4 Any Party that transfers personal data obtained as a result of the execution of a request made under the Convention or any of its Protocols may require the Party to which the data have been transferred to give information on the use made with such data.
- 5 Any Party may, by a declaration addressed to the Secretary General of the Council of Europe, require that, within the framework of procedures for which it could have refused or limited the transmission or the use of personal data in accordance with the provisions of the Convention or one of its Protocols, personal data transmitted to another Party not be used by the latter for the purposes of paragraph 1 unless with its previous consent.

Article 27 – Administrative authorities

Parties may at any time, by means of a declaration addressed to the Secretary General of the Council of Europe, define what authorities they will deem administrative authorities for the purposes of Article 1, paragraph 3, of the Convention.

Article 28 – Relations with other treaties

The provisions of this Protocol are without prejudice to more extensive regulations in bilateral or multilateral agreements concluded between Parties in application of Article 26, paragraph 3, of the Convention.

Article 29 – Friendly settlement

The European Committee on Crime Problems shall be kept informed regarding the interpretation and application of the Convention and its Protocols, and shall do whatever is necessary to facilitate a friendly settlement of any difficulty which may arise out of their application.

Chapter III

Article 30 – Signature and entry into force

- 1 This Protocol shall be open for signature by the member States of the Council of Europe which are a Party to or have signed the Convention. It shall be subject to ratification, acceptance or approval. A signatory may not ratify, accept or approve this Protocol unless it has previously or simultaneously ratified, accepted or approved the Convention. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.
- 2 This Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the deposit of the third instrument of ratification, acceptance or approval.
- 3 In respect of any signatory State which subsequently deposits its instrument of ratification, acceptance or approval, the Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date of deposit.

Article 31 – Accession

- 1 Any non-member State, which has acceded to the Convention, may accede to this Protocol after it has entered into force.
- 2 Such accession shall be effected by depositing with the Secretary General of the Council of Europe an instrument of accession.
- 3 In respect of any acceding State, the Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date of the deposit of the instrument of accession.

Article 32 – Territorial application

- 1 Any State may at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, specify the territory or territories to which this Protocol shall apply.
- 2 Any State may, at any later date, by declaration addressed to the Secretary General of the Council of Europe, extend the application of this Protocol to any other territory specified in the declaration. In respect of such territory the Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date of receipt of such declaration by the Secretary General.
- 3 Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declaration, be withdrawn by a notification addressed to the Secretary General. The withdrawal shall become effective on the first day of the month following the expiration of a period of three months after the date of receipt of such notification by the Secretary General.

Article 33 – Reservations

- 1 Reservations made by a Party to any provision of the Convention or its Protocol shall be applicable also to this Protocol, unless that Party otherwise declares at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession. The same shall apply to any declaration made in respect or by virtue of any provision of the Convention or its Protocol.
- 2 Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, declare that it avails itself of the right not to accept wholly or in part any one or more of Articles 16, 17, 18, 19 and 20. No other reservation may be made.

- 3 Any State may wholly or partially withdraw a reservation it has made in accordance with the foregoing paragraphs, by means of a declaration addressed to the Secretary General of the Council of Europe, which shall become effective as from the date of its receipt.
- 4 Any Party which has made a reservation in respect of any of the articles of this Protocol mentioned in paragraph 2 above, may not claim the application of that article by another Party. It may, however, if its reservation is partial or conditional, claim the application of that provision in so far as it has itself accepted it.

Article 34 – Denunciation

- 1 Any Party may, in so far as it is concerned, denounce this Protocol by means of a notification addressed to the Secretary General of the Council of Europe.
- 2 Such denunciation shall become effective on the first day of the month following the expiration of a period of three months after the date of receipt of the notification by the Secretary General.
- 3 Denunciation of the Convention entails automatically denunciation of this Protocol.

Article 35 – Notifications

The Secretary General of the Council of Europe shall notify the member States of the Council of Europe and any State which has acceded to this Protocol of:

- a any signature;
- b the deposit of any instrument of ratification, acceptance, approval or accession;
- c any date of entry into force of this Protocol in accordance with Articles 30 and 31;
- d any other act, declaration, notification or communication relating to this Protocol.

In witness whereof the undersigned, being duly authorised thereto, have signed this Protocol.

Done at Strasbourg, this 8th day of November 2001, in English and in French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe and to the non-member States which have acceded to the Convention.

Explanatory Report

I. The Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, drawn up within the Council of Europe by the Committee of Experts on the Operation of European Conventions in the Penal Field (PC-OC), under the authority of the European Committee on Crime Problems (CDPC), has been opened for signature by the member States of the Council of Europe, in Strasbourg, on 8 November 2001, on the occasion of the 109th Session of the Committee of Ministers of the Council of Europe.

II. 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 this Protocol although it may facilitate the understanding of its provisions.

Introduction

1. Under the authority of the European Committee on Crime Problems (CDPC), the Committee of Experts on the Operation of European Conventions in the Penal Field (PC-OC) is entrusted *inter alia* with examining the functioning and implementation of Council of Europe Conventions and Agreements in the field of crime problems, with a view to adapting them and improving their practical application where necessary.
2. Within the framework of its tasks, the PC-OC identified certain difficulties that States met when operating under the European Convention on Mutual Assistance in Criminal Matters, as well as its Protocol. It also identified situations bordering the area covered by that Convention, yet not included in its scope.
3. Having studied various options, the PC-OC agreed that a second additional protocol to the Convention was the most appropriate and pragmatic response for some of the difficulties encountered, while other difficulties could be dealt with by way of recommendations. It therefore prepared a draft Second Additional Protocol.
4. The draft Second Additional Protocol was examined and approved by the CDPC at its 50th plenary session (June 2001) and submitted to the Committee of Ministers.
5. At the 765th meeting of their Deputies on 19 September 2001, the Committee of Ministers adopted the text of the Second Additional Protocol and decided to open it for signature, in Strasbourg, on 8 November 2001, on the occasion of its 109th Session.

General considerations

6. The purpose of this Protocol is to reinforce the ability of member States, as well as partner States, adequately to respond to crime. This purpose is intended to be reached by improving and supplementing the EUROPEAN CONVENTION ON MUTUAL ASSISTANCE IN CRIMINAL MATTERS done at Strasbourg on 20 April 1959, (henceforth "the Convention") as well as the ADDITIONAL PROTOCOL thereto, done at Strasbourg on 17 March 1978 (henceforth Protocol 1). [At the same time, it takes into consideration the need to protect individual rights within the processing of personal data.]
7. That purpose is achieved by way of modernising the existing provisions governing mutual assistance, extending the range of circumstances in which mutual assistance may be requested, facilitating assistance and making it quicker and more flexible.
8. It takes due account of political and social developments in Europe and technological changes worldwide.
9. Thus, in many provisions it follows very closely, often literally, the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the member States of the European Union (henceforth EU), while in other provisions it follows the Convention of 14 June 1990 (henceforth Schengen) implementing the Schengen Agreement of 14 June 1985. It also follows, as indicated, the draft European Comprehensive Convention on International Co-operation in Criminal Matters (henceforth Comprehensive).

10. The draft Comprehensive Convention is a text prepared by the PC-OC and submitted in due time to the CDPC. While the CDPC did not approve the text, it decided that drafters of future treaty provisions should take inspiration on that text.

11. With regard to the interpretation of the provisions of this Protocol that follow the EU Convention, the reader is directed to the Explanatory Report of the latter.

12. Article 30 of the Vienna Convention on the Law of Treaties, concerning the application of successive treaties relating to the same subject-matter, regulates the relations between this Protocol and, respectively, the Convention and Protocol I.

13. The provisions of this Protocol are grouped in three chapters. Chapter I contains the provisions that replace the wording of articles of the mother Convention. Chapter II contains all the other operational articles of the Protocol. Chapter III contains the final provisions.

Commentaries on the Articles of the Protocol

Chapter I

Article 1 – Scope

14. This article amends Article 1 of the Convention in three ways.

15. Firstly, by adding the adverb "promptly" to the wording of the Convention, it introduces a requirement of swiftness in responding to requests for mutual assistance.

16. Secondly, it (paragraph 3) extends the scope of the Convention to cover the whole field of "administrative criminal law".

17. Thirdly, paragraph 4 makes it clear that the scope of the Convention covers mutual assistance in proceedings against legal persons or in proceedings in respect of facts for which a legal person may be held liable.

18. Concerning paragraph 1, the requirement of swiftness is one of a general nature. In particular, this Protocol does not follow the EU Convention in requiring that deadlines indicated by the requesting Party be met by the requested Party. However, the drafters wished to underline that tardiness will often defeat the purpose of mutual assistance, while risking to violate Article 6, paragraph 1, of the European Convention on Human Rights.

19. Again concerning paragraph 1, the drafters discussed and refused a proposal to the effect of inserting the words underlined, as follows "The Parties undertake promptly to afford each other, in accordance with the provisions of this Convention, the widest measure of mutual assistance in all stages of proceedings [...]". The drafters deemed that throughout the life of the Convention no difficulties had arisen that could be solved by adding the proposed words. It has indeed always been understood by all that the Convention applies at all stages of proceedings.

20. The final phrase of paragraph 1 should not be read to exclude from the scope of the Convention or its Protocols mutual assistance in respect of offences the punishment of which falls within the jurisdiction of the judicial authorities of two or more States.

21. Concerning paragraph 3, the legal category of "administrative criminal law" is often described by reference to its German variety, namely the *Ordnungswidrigkeit*. Although unknown to the legal systems of a number of member and partner States, it is largely followed in many other countries and thus is familiar to practitioners of international mutual assistance. According to its Explanatory Report, already the drafters of the Convention had *Ordnungswidrigkeiten* in their minds over forty years ago.

22. The purpose of paragraph 3 is to bring under the same treaty provisions on mutual assistance applicable to two types of national proceedings, namely (a) proceedings in respect of criminal offences and (b) proceedings in respect of infringements (sometimes called regulatory offences) punishable under criminal/administrative law. The rationale lies in that the same facts (e.g. severe pollution due to negligence, or traffic offences) are often the subject of criminal proceedings in one State and the subject of criminal/administrative proceedings in another State.

23. Because criminal/administrative offences are unknown to some States, there is no common language to express such a concept. Thus paragraph 3 describes the concept. Because the drafters were aware of the risk that it be misinterpreted to include administrative procedures not of a "criminal" nature, they worded paragraph 3 in such a way as to leave behind any doubts.

24. Under paragraph 3, the Convention applies regardless of whether initially the proceedings in question fall within the jurisdiction of an administrative or a criminal authority in one State or the other, if only, at a later stage, it is legally possible to bring such proceedings before a court having jurisdiction in particular in criminal matters. The inclusion of "in particular" at the end of the paragraph makes it clear that the court before which the proceedings may be brought does not have to be one that deals exclusively with criminal cases.

25. Mutual assistance in administrative matters, including administrative/criminal matters, is presently covered by Conventions ETS 94 ⁽¹⁾ and ETS 100 ⁽²⁾.

26. The drafters intended paragraph 3 to have the same meaning and effect as Article 49 (a) of Schengen. Thus they used the same language, save for the words "or both" which were not reproduced for reasons of pure logic. The drafters were aware that the Schengen language is possibly not the clearest language available. However they measured the advantages of following Schengen against the disadvantages of finding new language and opted for the former course of action.

27. The qualification of the facts under the law of the requested Party, in particular the question of whether the facts are punishable or not, is entirely irrelevant for purposes of mutual assistance under the Convention and its Protocols. The phrase "punishable under the national law of the [...] requested Party" must therefore be read under that proviso. In particular that phrase does not conceal any intention of introducing a requirement for double incrimination. As it does not in any way change the existing rules concerning the execution of letters rogatory for search or seizure of property under Article 5 of the Convention.

28. For the definition of "administrative authorities" for the purposes of this Protocol, see Article 26.

29. References: Article 3 / EU; Article 1 / ETS 70 ⁽³⁾; Article 1 / ETS 73 ⁽⁴⁾; Art. III.1 / Comprehensive; Art. 49.a / Schengen.

Article 2 – Presence of officials of the requesting Party

30. This article introduces a new paragraph (paragraph 2) in Article 4 of the Convention.

31. This article is based on the assumption that in many instances, the presence of officials or interested persons, as provided for in Article 4 of the Convention, will contribute to the efficiency of mutual assistance. To that extent, such presence should be facilitated.

Article 3 – Temporary transfer of detained persons to the requesting Party

32. This article rewords Article 11 of the Convention.

33. This article introduces the following changes in Article 11 of the Convention:

- in paragraph 1, it replaces the words "personal appearance as a witness or for purposes of confrontation" for the words "personal appearance for evidentiary purposes other than for standing trial";

- in paragraph 4 it replaces the words "unless the Party from whom transfer is requested applies for his release" for the words "unless the Party from whom transfer is requested applies for his or her release".

34. In the first case, the reason for the change is that the replies to a questionnaire launched by the Committee that drafted this Protocol indicated that there are many different and sometimes conflicting interpretations of the original wording, whereas the wording taken from the Comprehensive Convention translates a more straightforward and unambiguous meaning.

35. In the other case, changes endeavour to clarify without interfering with the substance.

36. "Standing trial" is used in its restrictive meaning to include only the last phase of criminal proceedings, where the person is brought before a court for the purpose of being at that time tried by that court.

37. In the minds of the drafters, the transfer of a person for the purpose of standing trial amounts to extradition, while the transfer of a person for "evidentiary purposes other than for standing trial" excludes the idea of extradition.

38. The provisions of this article apply equally to nationals and not nationals. This implies in particular that even in the cases where a person is transferred to the country of his or her nationality, that country must be ready to live up to its obligation under paragraph 1 of Article 11 (newly drafted) to "send back" the person.

39. Even countries that do not extradite their own nationals should, or may, contribute to proceedings taken in any other country against any national of theirs because (a) the proceedings against one person / national may also concern other persons / not nationals and (b) the proceedings may lead to their being transferred (transfer of proceedings), as opposed to leading to a request for extradition.

40. References: Article III.9 / Comprehensive.

Article 4 – Channels of communication

41. This article rewords Article 15 of the Convention. In particular it introduces language more familiar to member States of the Council of Europe than that used in Article 15 of the Convention.

42. The reference to the "return" of requests is to be read under the proviso that the nature of the request calls for a "return".

43. This article establishes in particular that:

- as a general rule, requests are in writing;
- as a general rule requests are channelled via Ministries of Justice;
- communications as mentioned in Para 2 must always be channelled via Ministries of Justice;
- as a general rule requests may always be forwarded directly from judicial authority to judicial authority;
- where applicable requests concerning "administrative/criminal" offences may be forwarded directly from administrative authority to administrative authority – or to judicial authority where that authority is the competent authority. It is not excluded that a judicial authority may forward to an administrative authority.

44. Finally, this article opens the way to the use of telecommunications in the transmission of requests and other communications.

45. It should be noted that the Interpol channel is left open for urgent cases only.

46. References: Article 15 / Convention; Article 6.8.b / EU.

Article 5 – Costs

47. This article rewords Article 20 of the Convention.

48. The drafters underlined the importance of keeping mutual assistance disconnected from costs, the general rule being that of gratuity.

49. The provisions of paragraph 1 (c) of this article apply only to costs that are both significant (not minor) and reasonable (not excessive when measured against the service provided or when compared with prices usually due for comparable services).

50. The extraordinary nature of the costs may result, for example, from requests requiring a given formality or procedure, unfamiliar to the requested Party, to be followed. The same would apply to costs entailed with storing, keeping, protecting or transporting property under seizure.

51. References: Article I.6 / Comprehensive

Article 6 – Judicial authorities

52. This article rewords Article 24 of the Convention mainly in order to:

- introduce an obligation for States always to indicate which authorities are deemed to be judicial authorities for the purposes of the Convention; In fact, such an indication facilitates the application of the Convention;
- authorise Parties to change their initial declaration each time that the law or the circumstances change.

Chapter II

Article 7 – Postponed execution of requests

53. This article permits the requested Party to postpone, rather than refuse, assistance where immediate action on the request would be prejudicial to investigations or proceedings in the requested Party. For example, where the requesting Party has sought to obtain evidence or witness testimony for purposes of investigation or trial, and the same evidence or witness are needed for use at a trial that is about to commence in the requested Party, the requested Party would be justified in postponing the providing of assistance.

51. It further provides that where the assistance sought would otherwise be refused or postponed, the requested Party may instead provide assistance subject to conditions. If the conditions are not agreeable to the requesting Party, the requested Party may modify them, or it may exercise its right to refuse or postpone assistance. Since the requested Party has an obligation to provide the widest possible measure of assistance, it was agreed that both grounds for refusal and conditions should be exercised with restraint.

55. Finally, it obliges the requested Party to give reasons in case of postponement of assistance. To give reasons can, inter alia, assist the requesting Party in understanding how the requested Party interprets the requirements of this Article, provide a basis for consultation in order to improve the future efficiency of mutual assistance, and provide to the requesting Party previously unknown factual information about the availability or condition of witnesses or evidence.

56. This article supplements Article 19 of the Convention; it does not replace it.

57. References: Article 27, paragraphs 5, 6 and 7 of the draft Convention on Cybercrime.

Article 8 – Procedure

58. The underlying philosophy of mutual assistance is that the requested Party carries out action on behalf of the requesting Party, for purposes relating only to proceedings pending in the latter: "in its place".

59. Where mutual legal assistance is requested, the main interest at stake is that justice be done. Admittedly that interest is shared by both States; however it is predominantly held by the State where proceedings have been engaged, i.e. the requesting Party. The requesting Party alone would carry out the proceedings if it were not for the fact that the sovereignty of another State stops it at some border. Hence the reason for requesting another State to assist in carrying out its proceedings.

60. Possibly for practical reasons, the Convention did not integrate the implications of this philosophy. Though not precluding Parties from carrying out the action requested where such action was not provided for by their law, the Convention indeed provided (Article 3) that the requested Party should carry out the action requested to it "in the manner provided for by its law".

61. In strict legal terms, that provision is inapplicable unless the law of the requested Party provides for the manner in which to carry out actions that belong to the criminal procedure of third States.

62. Presently, the need is recognised by all to open new frontiers to judicial co-operation. The first such new frontier consists in coming back to basics and executing what is requested, as opposed to executing equivalent actions. What is requested is often no more than what is legally required in the requesting

Party for evidentiary purposes. Equivalent action executed instead of what is requested often is not admissible in the requesting Party for evidentiary purposes.

63. Obviously, States cannot undertake to carry out action in just any manner requested. There must be a limit. That limit is to be found in the requirement that the action sought is not contrary to fundamental principles of the legal system of the requested Party.

64. Such a limit is broad enough to ensure that most requests will be executed; yet it fulfils its role of freeing States from any obligation to take action that would go against their "nature".

65. "Formalities or procedures » should be interpreted in a broad sense to include, for example:

- "Miranda warnings";
- formalities relating to formulae or documents;
- requirements to the effect that the defence counsel be present;
- requirements to the effect that the person whose hearing is sought be examined and cross-examined, either directly or through the examining authority, by the defence counsel and the prosecution.

66. "Fundamental principles of its law" means "fundamental principles of its legal system".

67. Considering the burden that this article places on requested Parties, requesting Parties are expected to require only those formalities and procedures which are indispensable for their investigations.

68. This article does not affect declarations made by Contracting States under Article 5 of the Convention.

69. References: Article 4 / EU; Article 6.1.b / ETS 94.

Article 9 – Hearing by video conference

70. This article reproduces almost entirely Article 10 of the EU Convention.

71. The development of technology has made it largely possible for persons located in different points around the globe to communicate with each other, in such a way that they all can simultaneously hear each other and see each other in real-time, via a video link.

72. The drafters considered that video links would probably be more and more used henceforth, in the framework of proceedings involving persons located in different points, either in the same country or in two or more different countries. This is especially true where it is not possible, or desirable, or practical, or economic to bring such persons together in the same point.

73. This article is designed to serve as a basis for the use across borders of this procedure.

74. In paragraph 1, "not desirable" could apply for example to cases where the witness is very young, very old or in bad health; "not possible" could apply for example to cases where the witness would be exposed to serious danger if appearing in the requesting Party.

75. Paragraphs 1 and 3 both incorporate a requirement concerning the desirability and possibility of a given course of action. Those requirements must be assessed against the law of the requesting Party.

76. In the context of paragraph 2 the reference to "fundamental principles of law" implies that a request may not be refused for the sole reason that hearing of witnesses and experts by videoconference is not provided under the law of the requested Party, or that one or more detailed conditions for a hearing by videoconference would not be met under national law.

77. The word "minutes" in paragraph 6 – as most other words in this Article – was taken from the EU Convention. In the context of this Protocol, this word is intended to mean a record in writing ascertaining that the hearing took place and indicating the date and place of the hearing, the identity of the person heard, the identities and functions of all other persons participating in the hearing, any oaths taken and the technical conditions under which the hearing took place. The word is not intended to mean any summary of what was said at the hearing.

78. In contrast with Article 10 of the EU Convention, this article makes no reference to costs. In this Protocol, all provisions relating to costs are included in Article 14.

79. Concerning paragraph 7, efficiency commands that the law applicable be the law of the State where the person is, i.e. the place where the person may immediately, without further steps, be prosecuted, if appropriate, for perjury. Moreover, this paragraph is intended to guarantee that the witness, in case of non-compliance with an obligation to testify, is subject to consequences similar to those applicable in a domestic case not involving videoconference.

80. Where the difficulties mentioned in paragraph 7 occur, the requesting and the requested Parties may communicate with each other in relation to the application of the paragraph. This will normally imply that the authority of the requesting Party conducting the hearing as soon as possible provides the authority of the requested Party with the information necessary to enable the latter to take appropriate measures against the witness or expert.

81. This article applies generally to hearings of experts and witnesses. However, under paragraph 8, it may, under certain conditions, also apply to hearings of the accused persons.

82. Paragraph 8 borrows from paragraph 9 of Article 10 of the EU text. However, it was not taken word by word. The differences are:

- where the EU text reads "videoconference involving an accused person", this Protocol reads "video conference involving the accused person or the suspect";
- this Protocol does not make provision for any notification by Parties declaring that they "will not apply" paragraph 8, the reason being that paragraph 8 is already abundantly clear in that respect when it states that "Parties may at their discretion also apply the provisions of this article".

83. Concerning the first difference, it must be clear that the provision does not apply to any "accused person" but solely to the person who is the accused person in the criminal proceedings in respect of which mutual assistance was requested. Furthermore, because, from one country to another, the concept of "accused person" largely overlaps with neighbouring concepts, in particular the concept of "suspect", the drafters wished to clarify that there was no intent to exclude the latter category.

84. Paragraph 8 should be interpreted and applied on the understanding that it must not prevent the provisions of paragraph 4 from applying to a video-conference whereby a witness in one country is "confronted" with a suspect in another country. Otherwise, video-conferences would not be possible during a trial.

85. Hearings by videoconference in respect of the accused person or the suspect may not take place unless the Parties concerned specifically agree to it. Parties that do not intend ever to agree on such a course of action, may declare so and thus avoid useless initiatives from their partners.

86. References: Article 10 / EU

Article 10 – Hearing by telephone conference

87. This article reproduces almost entirely Article 11 of the EU Convention.

88. This article does not include a threshold provision – as is the case with Article 9 – because its application is limited to both the requirements of national law and the consent of the person concerned. Moreover, it is up to the national law of the requesting Party to regulate or not telephone conferences, hence opening or closing the way to international co-operation in this field.

89. According to paragraph 1, where a person is in the territory of the requested Party and has to be heard as a witness or expert by judicial authorities of the requesting Party, the requesting Party may, where its national law so provides, request assistance from the requested Party to enable the hearing to take place by telephone conference.

90. The drafters discussed a proposal for the Protocol to include provisions designed to harmonise domestic legislation in the field of telephone conference. They thought that such an exercise would better be done by way of recommendations.

91. In contrast with Article 11 of the EU Convention, this article makes no reference to costs. In this Protocol, all provisions relating to costs are included in Article 14.

92. References: Article 11 / EU.

Article 11 – Spontaneous information

93. This article extends to mutual assistance in general what was until now only recognised in the limited field of money laundering, namely the possibility for Parties, without prior request, to forward to each other information about investigations or proceedings which might contribute to the common aim of responding to crime.

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

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

96. In accordance with paragraph 2, conditions may be attached to the use of information provided under this article, and paragraph 3 provides that, if that should be the case, the receiving Party is bound by those conditions. In reality, the sending Party only binds the receiving Party to the extent that the receiving Party accepts the unsolicited information. By accepting the information, it also accepts to be bound by the conditions attached to the transmission of that information. In this sense, Article 7 creates a "take it or leave it" situation.

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

98. Because some States might have difficulties in not accepting the information once it has been transmitted, for example where their national law puts a positive duty upon authorities who have access to such information, paragraph 4 opens the possibility for States to declare that information must not be transmitted without their prior consent should the sending State attach conditions on the use of such information.

99. References: Concerning paragraph 1: Article 10 / ETS 141 ⁽⁶⁾; concerning paragraphs 2 and 3: Article 6 / EU.

Article 12 – Restitution

100. The terminology used in this article is familiar to Council of Europe texts. The term "restitution" is used to mean "return", in particular return of articles to their rightful owners; it is not used with any meaning carrying a connotation of "compensation".

101. This article applies to property in general, tangible as well as intangible, goods as well as money (*objets et valeurs*);

102. The provisions of this article do not in any way carry any implicit obligation for the requesting State to take any action.

103. In many States it is one of the Prosecutor's duties to lay hands on the instrumentalities as well as the proceeds of each offence under his or her jurisdiction.

104. This article introduces arrangements whereby mutual assistance requests may be made in order to have articles obtained by criminal means, stolen goods for example, placed at the disposal of the requesting Party with a view to returning them to their rightful owners. Paragraph 1 permits, but does not oblige, a requested Party to give effect to such a request. The requested Party may, for example, refuse to grant such a request where property has been seized for evidential purposes in that Party.

105.& Paragraph 1 is not intended to bring about any change in national law with respect to confiscation.

106. Paragraph 1 is intended to apply only in cases where there is no dispute as to who rightful owns the property. It also operates without prejudice to the rights of bona fide third parties. This ensures that legitimate claims involving the property will be fully preserved.

107. References : Article 8 / EU; Articles III.5.bis and III.6.3 / Comprehensive ; Article 1 of Resolution (77) 36 ⁽⁶⁾.

Article 13 – Temporary transfer of detained persons to the requested Party

108. The substance of this article is intended to be the same as that of Article 11 of the Convention – as amended by Article 3 of this Protocol - except that the transfer in question is operated the other way round.

109. Paragraph 1 is intended to mean that, where any requesting Party requires that a person held under custody on its territory be present on the territory of the requested Party for the purposes of the assistance sought, the first mentioned Party may temporarily transfer that person to the territory of the second mentioned Party, subject to an agreement to that effect between the competent authorities of both Parties. Practice has shown that in certain cases it is not possible to carry out the assistance sought in the requested Party, in a satisfactory way, unless by transferring the person to the territory of that Party.

110. According to paragraph 2, such agreement must cover the arrangements to be made for the transfer and specify a date for the return of the person concerned.

111. References: Article 9 / EU.

Article 14 – Personal appearance of transferred sentenced persons

112. This article aims at fulfilling a gap in the Convention on the Transfer of Sentenced Persons. It is in no way related to extradition. The purpose of this article is to put States in a situation where they can meet the legitimate expectations of transferred prisoners not to jeopardise, on account of their absence, the review of their judgement, if and where such a review takes place.

113. The assumption is that review of judgments is a procedure which is engaged in the interest of the sentenced person. Where that should not be the case and where the person concerned does not consent to his temporary transfer, this Article should not apply.

114. It should be recalled that, under the Protocol to the Convention on the Transfer of Sentenced Persons, the person concerned may under certain conditions be transferred without his or her consent.

115. The restrictions set out in Article 12 of the Convention shall not apply to the act or omission for which the person has been sentenced in the sentencing State and which is the subject of the review.

Article 15 – Language of procedural documents and judicial decisions to be served

116. This article is designed to supplement Articles 7 et seq. of the Convention. It should be read in conjunction with Article 16 of the Convention. It applies to any request, irrespective of the channel or form of communication used, save where otherwise provided for in this Protocol.

117. In using, both in this article and in Article 16, the terms "procedural documents" and "judicial decisions", the drafters' intention was not to depart from the scope of Article 7, but rather to use a form of words which they thought reflects the present situation in a large number of countries, as compared with the language used in Article 7 ("writs and records of judicial verdicts") of the Convention which is very much based in one only legal system.

118. The term "judicial decisions" means both judicial decisions and records of judicial decisions. The term "paper" is used to encompass both "procedural documents" and "judicial decisions".

119. This article does not prevent Article 16 of the Convention from applying to the request. This means that, with respect to languages, Article 16 of the Convention applies to the request proper, while this article applies to papers or "annexed documents" as Article 16 names them.

120. Experience shows that papers the service of which is requested are often produced in the original language only. This raises two questions, namely (a) the requested Party's interest in having access to a

translation and (b) the interest – or the right – of the person concerned in that the paper served to him is drafted in a language that he understands.

121. As to the first question, the drafters thought that, in accepting direct service by post, the States show that their interest in having access to the paper served is not a major interest. Furthermore, once Article 16 of the Convention continues to apply to the request, Parties do not lose the right to require a translation of the request – provided of course that they made in good time a declaration to that effect. Access to a translation of the request accommodates to a great extent the Parties' interest in having access to the papers proper.

122. Moreover, the requested Party's interest in having access to the contents of the papers served is met with the provisions of paragraph 4 that require a "short summary of its contents". In the view of the drafters, this means not more than some lines explaining what the papers are about.

123. The drafters gave priority to the second question. Under Article 6.3.(a) of the European Convention on Human Rights (ECHR), everyone charged with a criminal offence has the minimum right *inter alia* "to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him". Article 6 of the ECHR applies both (a) where the person concerned is in that way being served with charges for a criminal offence and (b) where the person is charged with a criminal offence and immediate access to the document served is instrumental in organising his defence. Even if Article 6 will not apply to every instance in which papers are served, it is practical to rule with respect to all instances that, where there are indications that the person served does not have a good command of the language in which the papers to be served were drawn up, the requesting Party must enclose a translation of the papers, or at least of its main passages, into a language comprehensible to the person concerned.

124. The law of the requested Party applies to the conditions under which the person may refuse the service.

125. References: Article 5 / EU; Article 52, paragraphs 1 and 2, / Schengen.

Article 16 – Service by post

126. Mutual assistance, as provided for in the Convention and in this Protocol, usually translates into action taken by one State at the request of another. In the particular case of this article, the assistance takes the form of an implied authorisation by State A for State B to take action which has effect on the territory of State A.

127. The objective of this article is to ensure that procedural documents and judicial decisions can be sent and served as speedily as possible by a Party where the recipient is present in the territory of another Party.

128. This article applies also to papers served under Article 3 (a) of Protocol 1.

129. The law of the requested Party applies to the conditions under which the person may refuse the service.

130. This article is open to reservations.

131. References: Article 5 / EU.

Article 17 – Cross-border observations

132. This article reproduces almost entirely Article 40 of the above-mentioned Schengen Convention. The drafters would have wished to improve on the language borrowed. However, for lack of time, they abstained from doing so.

133. Two changes were introduced.

134. Firstly, in paragraph 1, one phrase was added to the Schengen version, in order to extend the scope of the article to cases in which the police are keeping under observation "a person who it is strongly believed will lead to the identification or location" of an otherwise wanted person. This can be particularly useful in practice. The drafters had in mind in particular in cases of kidnapping where a member of the family, or a bank employee, is carrying across a border the money to pay the ransom with.

135. Secondly, two offences were added to the list in paragraph 6, namely smuggling of aliens and sexual abuse of children.

136. The purpose of the drafters when taking account of cross-border observations in this Protocol was not to include police or other forms of non-judicial co-operation within the scope of this Protocol, but rather to take in cross-border observations as a form of mutual legal assistance.

137. For the purposes of this article, the word "border" includes any border, be it on land, sea or air.

138. In paragraph 1, the phrase "conditions may be attached to the authorisation" should be read to mean *inter alia* that the requested State may impose conditions as to the or the territorial limitation of the observation.

139. Extraditable offences are offences with respect to which, *in abstracto*, extradition is possible either under a treaty or under domestic legislation. The concrete circumstances of the case, such as the nationality of the person concerned, may not be used in order to characterise an offence as extraditable or not.

140. Reservations may be made to the whole of or part of this article.

141. References: Article 40 / Schengen.

Article 18 – Controlled delivery

142. This article reproduces almost entirely Article 12 of the EU Convention.

143. The purpose of the drafters when taking account of controlled delivery in this Protocol was not to include police or other forms of non-judicial co-operation within the scope of this Protocol, but rather to take in controlled delivery as a form of mutual legal assistance.

144. This article applies to the controlled delivery of goods and money.

145. Under Article 1 (g) of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna,1988), "controlled delivery" means the technique of allowing illicit or suspect consignments of goods or money, or items substituted for them, to pass out of, through or into the territory of one or more States, with the knowledge and under the supervision of their competent authorities, with a view to identifying persons involved in the commission of offences.

146. That definition, while providing a general guideline, cannot entirely apply to the concept used in this article, in particular because it does not necessarily cover offences such as smuggling of aliens or traffic in human beings.

147. This article imposes on Parties an obligation to make, in law or in practice, controlled deliveries possible in their respective territories. Once that obligation met, Parties are free to accept or to refuse requests to carry out controlled deliveries.

148. The law applicable is the law of the requested Party.

149. Paragraph 2 provides that it is for the requested Party to decide whether or not a controlled delivery should take place on its territory. These decisions must be taken on a case-by-case basis and within the framework of the relevant domestic rules of the requested Party.

150. While the practical arrangements to be undertaken for controlled deliveries will require close consultation and co-operation between the relevant agencies and authorities of the Parties concerned, paragraph 3 makes it clear that such deliveries must be made in conformity with the procedures of the requested Party, thus derogating from the general rule.

151. Reservations may be made to the whole of or part of this article.

152. References: Article 12 / EU.

Article 19 – Covert investigations

153. This article reproduces almost entirely Article 14 of the EU Convention.

154. The purpose of the drafters when taking account of covert investigations in this Protocol was not to include police or other forms of non-judicial co-operation within the scope of this Protocol, but rather to take in covert investigations as a form of mutual legal assistance.

155. In the mind of the drafters the requesting Party should not make a request under this article unless it would be impossible or very difficult to investigate the facts without resorting to covert investigations;

156. Covert investigations should be limited to precise missions of a precise duration .

157. Reservations may be made to the whole of or part of this article. In particular, States may reserve their right not to apply this article unless to criminal proceedings in respect of extraditable offences.

158. References: Article 14 / EU.

Article 20 – Joint investigation teams

159. This article reproduces almost entirely Article 13 of the EU Convention.

160. Experience has shown that where a State is investigating an offence with a cross-border dimension, particularly in relation to organised crime, the investigation can benefit from the participation of authorities from other States in which there are links to the offences in question, or where co-ordination is otherwise useful.

161. One of the obstacles which has arisen insofar as joint investigation teams (JIT) are concerned has been the lack of a specific framework within which such teams should be established and operate. This article aims at meeting that concern.

162. Paragraph 1 places no limitation on the number of Parties which may be involved in a JIT.

163. JITs operate for a specified period of time. It may be extended by mutual consent. The composition of the JIT should be specified in the agreement. Depending on the States concerned and the nature of the facts under investigation, membership is likely to include prosecutors, judges, law enforcement officers and experts.

164. Where agreement is achieved on the setting up of a JIT, the JIT will normally be established in the State in which the main part of the investigations is expected to be carried out. The States concerned will have to take into account the question of costs, including the daily allowances for the members of the team.

165. Paragraph 3 establishes that a JIT will operate on the basis that its leader will be a representative of the competent authority participating in criminal investigations for the State in which the JIT operates. This means, in particular, that the leadership of the JIT will change, for the specific purposes concerned, if investigations are carried out by the JIT in more than one State. The leader of the JIT must act within the requirements of his or her national law. In addition, the JIT must fully abide to the law of the State where it operates.

166. When compared with the EU text, the scope of paragraph 3.b was enlarged to include the seconded members of the team. In fact, it appears that such had been the intention of the drafters of the EU text.

167. Members of a JIT who are not operating in their own State (seconded members) are permitted, under paragraph 5, to be present when investigative measures are taken in the State of operation. However, the JIT leader may, for particular reasons, in accordance with the law of the State where the JIT is operating, decide otherwise. In this context, the expression "particular reasons" has not been defined but it can be taken to include, for example, situations where evidence is being taken in cases involving sexual crimes, especially where the victims are children. Any decision to exclude a seconded member from being present may not be based on the sole fact that the member is a foreigner. In certain cases operational reasons may form the basis for such decisions.

168. Paragraph 6 permits seconded members to carry out investigative measures in the State of operation, in accordance with the national law of that State. This will be done on the instructions of the JIT leader. They may not carry it out unless they have the approval of the competent authorities of the State of operation and the seconding State. Such approval may be included in the agreement

establishing the JIT, or it may be granted at a later stage. It may also apply in general terms or it may be restricted to specific cases or circumstances.

169. One of the most innovative aspects of this article is provided for in paragraph 7. The effect of this provision is that it enables a seconded member to request his or her own national authorities to take measures which are required by the JIT. In that case it will not be necessary for the State of operation to submit a request for assistance and the relevant measures will be considered in the State in question in accordance with the conditions that would apply if they had been sought in a national investigation.

170. Paragraph 8 covers the situation where assistance is required from a State which was not involved in establishing the team or a third State. In these circumstances the assistance will be sought by the State of operation, according to the rules normally applicable.

171. Paragraph 9 facilitates the work of the JITs by opening the way for a seconded member to share with the JIT information which is available in his or her State and is relevant to the investigations being conducted by the JIT. However, this will only be possible where it can be undertaken within the scope of the seconded member's national law and the limits of his or her competence.

172. Paragraph 10 is concerned with the conditions for the use of information lawfully obtained by a member or a seconded member of a JIT where the information in question would not otherwise be available to the competent authorities of the States concerned.

173. Paragraph 12 paves the way for the States that have established a JIT to agree that persons who are not representatives of their competent authorities can take part in the activities of the JIT. What the drafters had in mind was that additional assistance and expertise could be provided to a joint investigation team by appropriate persons from other States or international organisations (e.g. Interpol or Europol)

174. Persons who are authorised to participate in a JIT under paragraph 12 will act primarily in a supportive or advisory role and are not permitted to exercise the functions conferred on members or seconded members of the JIT or to use the information referred to in paragraph 10 unless this is permitted under the relevant agreement between the States concerned.

175. Reservations may be made to the whole of or part of this article.

176. References: Article 13 / EU.

Article 21 – Criminal liability regarding officials

177. This article reproduces almost entirely Article 15 of the EU Convention.

178. In this article the expression "Party of operation" is intended to mean the Party where the operation is taking place.

179. References: Article 42 / Schengen ; Article 15 / EU.

Article 22 – Civil liability regarding officials

180. This article reproduces almost entirely Article 16 of the EU Convention.

181. Nothing in this article should be read to mean that the rights of victims, in particular the right to exclaim compensation or damages from public authorities or private persons, can in any way be infringed by any agreement between States.

182. The word "liability" is used here with the meaning of responsibility (in French "*responsabilité civile*").

183. References: Article 26 / ETS 156 ⁽⁷⁾; Article 43 / Schengen ; Article 16 / EU.

Article 23 – Protection of witnesses

184. In the understanding of the drafters, this article is to apply only where a request for assistance has been made under the Convention or one of its Protocols in respect of a witness at risk of intimidation or in need of protection.

185. It belongs primarily to the requesting Party, not to the person concerned, to evaluate whether or not the witness is at risk of intimidation or in need of protection.

186. This article clearly subordinates any practical effects deriving from its application to an agreement between the Parties involved. The obligation deriving from the article is not one to act with practical effects, but rather one to endeavour to agree.

187. Thus in no way does this article imply any obligation for Parties to take legislative or other measures of a general nature in the field of witness protection.

188. The drafters used the terms "witness" and "intimidation" with the meaning given to them in Recommendation R (97) 13 concerning intimidation of witnesses and the rights of the defence, as follows:

– "witness" means any person, irrespective of his status under national criminal procedural law, who possesses information relevant to criminal proceedings. This definition includes experts as well as interpreters;

– "intimidation" means any direct, indirect or potential threat to a witness, which may lead to interference with his duty to give testimony free from influence of any kind whatsoever. This includes intimidation resulting either (i) from the mere existence of a criminal organisation having a strong reputation of violence and reprisal, or (ii) from the mere fact that the witness belongs to a closed social group and is in a position of weakness therein;

189. References : Recommendation R (97) 13 ⁽⁸⁾

Article 24 – Provisional measures

190. This article enables the requested Party, upon a demand from the requesting Party, to take provisional measures. The fact that provisional measures have been taken is an indication that the requirements dictated by the law of the requested Party are met. In practice, it has been observed that the success of an investigation often depends on the speed with which provisional measures are taken by the requested Party.

191. References: Article I.15 / Comprehensive; Article 27 of the draft Convention on Cybercrime

Article 25 – Confidentiality

192. This article aims at recognising that the requesting State is entitled to impose a duty of confidentiality on the requested State.

193. References: Article III.6 bis / Comprehensive

Article 26 – Data protection

194. This article applies to personal data transferred from one Party to another as a result of the execution of a request made under the Convention or any of its Protocols. It applies regardless of whether data are transferred because they are communicated by a "sending State" or because they are otherwise obtained by a "receiving State".

195. This article does not apply to personal data that is obtained by a Party as a result of the execution of a request made under the Convention or any of its Protocols, by that Party or any other Party, where that data are not transferred from one Party to another.

196. The expression "personal data" is used within the meaning of Article 2(a) of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, of 28 January 1981. According to Article 2(a) "'personal data" means any information relating to an identified or identifiable individual ("data subject")".

197. That definition applies irrespective of the way in which the personal data concerned are filed or processed. Consequently, Article 24 of this Protocol applies both to data processed automatically and to data not processed automatically.

198. The definition is to be understood as implying that an identifiable person is one who can be identified, directly or indirectly, by reference to an identification number or to one or more factors specific to his or her physical, mental, economic, cultural or social identity.

199. This article does not affect the obligations of States under the 1981 Convention.

200. References: Article 23 / EU

Article 27 – Administrative authorities

201. This article calls for no comments.

Article 28 – Relations with other treaties

202. This article, as is the case with Article 9 of the Additional Protocol to the Convention, is designed to ensure the smooth co-existence of this Second Protocol with any bilateral or multilateral agreements concluded in pursuance of Article 26.3 of the Convention.

203. References: Article 9 / Protocol 1.

Article 29 – Friendly settlement

204. This article which makes the European Committee on Crime Problems the guardian over the interpretation and application of the Convention and its Protocols follows the precedents established in other European conventions in the penal field. It also follows Recommendation (99) 20 of the Committee of Ministers, concerning the friendly settlement of any difficulty that may arise out of the application of the Council of Europe conventions in the penal field. The reporting requirement which it lays down is intended to keep the European Committee on Crime Problems informed about possible difficulties in interpreting and applying the Convention and its Protocols, so that it may contribute to facilitating friendly settlements and proposing amendments to the Convention and its Protocols which might prove necessary.

205. References : Article 23 / ETS 112 ⁽⁹⁾; Recommendation (99) 20 ⁽¹⁰⁾.

Chapter III

Articles 30 to 35 – Final clauses

206. Articles 30 to 35 are based both on the "Model final clauses for conventions and agreements concluded within the Council of Europe" which were approved by the Committee of Ministers at the 315th meeting of their Deputies in February 1980, and the final clauses of the Convention.

207. Concerning Article 33 (reservations), the drafters gave consideration to the possibility of introducing provisions aimed at limiting in time the validity of reservations and thus encouraging States periodically to examine the possibility of lifting or softening reservations. Inspiration was taken from Article VI.7 of the Comprehensive Convention, Article 38 of the Criminal Law Convention on Corruption, Article 25 of the Convention on the Adoption of Children and Article 14 of the Convention on the Legal Status of Children Born out of Wedlock.

208. That idea finally could not be put into practice because of the specific nature of this Protocol, which does not replace the Convention or Protocol I, but rather supplements them. And reservations have already been registered with respect to each of them.

209. It is underlined that under the provisions of Article 33.1 ratification of this Protocol does not automatically entail any change in the reservations entered by States to provisions of the mother Convention which are amended by this Protocol.

210. References in respect of Article 32: Article 8.1 / Protocol 1.

Notes :

(1) **ETS 94** : European Convention on the service abroad of documents relating to Administrative Matters (1977).

- (2) **ETS 100** : European Convention on the obtaining abroad of information and evidence in Administrative Matters (1978).
- (3) **ETS 70** : European Convention on the International Validity of Criminal Judgments (1970), **EXPLANATORY REPORT** (1970).
- (4) **ETS 73** : European Convention on the Transfer of Proceedings in Criminal Matters (1972), **EXPLANATORY REPORT** (1972).
- (5) **ETS 141**: Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (1990), **EXPLANATORY REPORT** (1991).
- (6) Resolution (77) 36 on the practical application of the European Convention on Mutual Assistance in Criminal Matters.
- (7) **ETS 156**: Agreement on Illicit Traffic by Sea, implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1995), **EXPLANATORY REPORT** (1995).
- (8) Recommendation R (97) 13 of the Committee of Ministers to the governments of member States concerning intimidation of witnesses and the rights of the defence.
- (9) **ETS 112**: Convention on the Transfer of Sentenced Persons (1983), **EXPLANATORY REPORT** (1983).
- (10) Recommendation No. R (99) 20 of the Committee of Ministers to the governments of members States, concerning the friendly settlement of any difficulty that may arise out of the application of the Council of Europe conventions in the penal field.