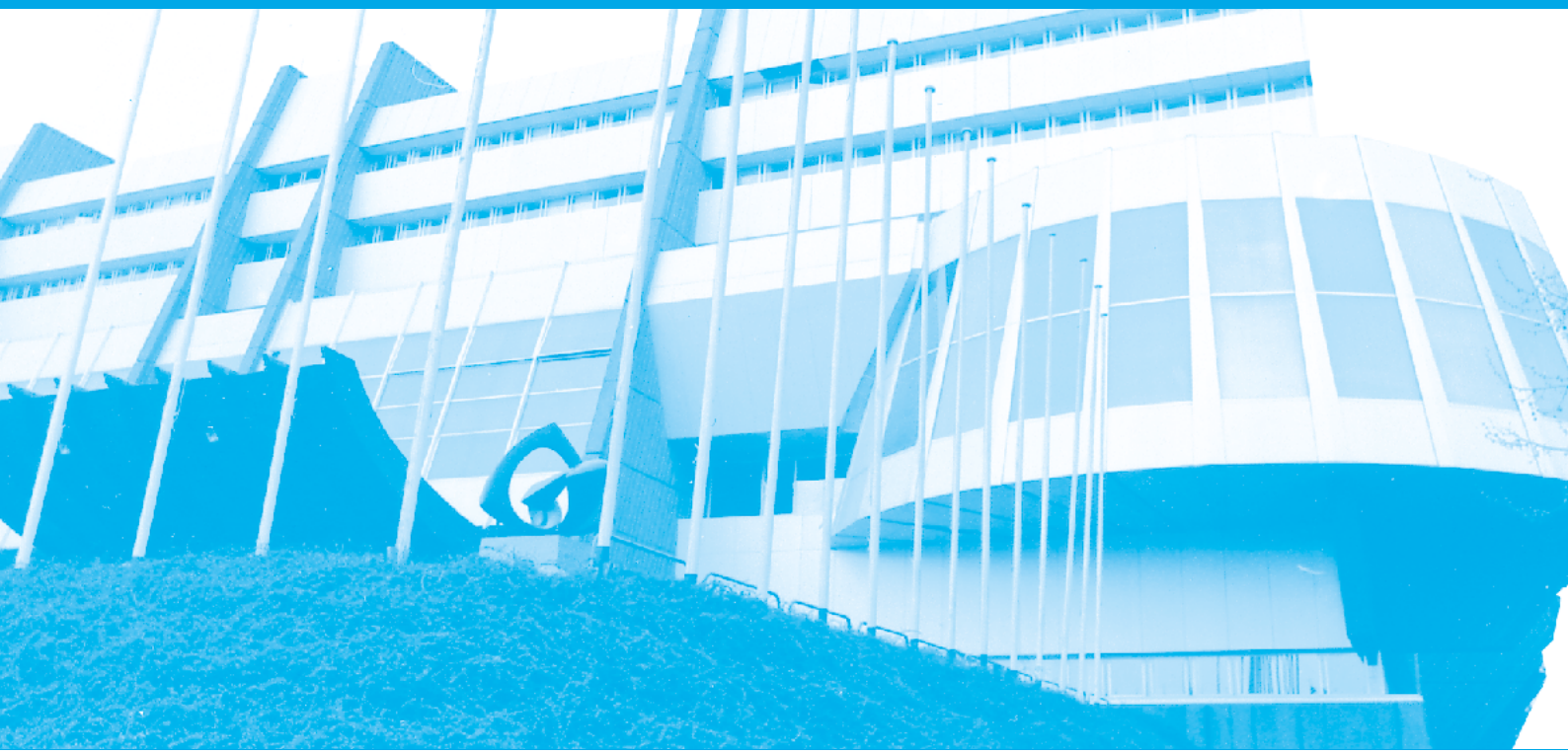
Co-operation against crime: the conventions of the Council of Europe



COUNCIL OF EUROPE

CONSEIL DE L'EUROPE

Co-operation against crime: the conventions of the Council of Europe

Council of Europe

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Foreword

For almost 60 years a series of treaties have been negotiated within the Council of Europe which establish a common basis for co-operation in criminal matters across Europe and beyond. These instruments for co-operation have been created to ensure that national borders neither limit the effectiveness of justice systems nor prevent crimes from being properly investigated, prosecuted and punished, in full compliance with our common values based on the respect of human rights and the rule of law.

This USB key brings together the main Council of Europe Conventions related to co-operation in criminal matters, as well as their explanatory reports. Not only do they cover co-operation mechanisms such as extradition, mutual legal assistance and the transfer of sentenced persons, they also address specific forms of crime which are characterised by a trans-border dimension, such as serious transnational organised crime, terrorism, cyber-crime, money laundering, trafficking in human beings and corruption.

To find out the state of ratifications of each treaty as well as the declarations and reservations issued by the States Parties, you are invited to regularly consult the website of the Council of Europe's Treaty Office: http://www.conventions.coe.int/.

European Convention on extradition – ETS No. 24

Paris, 13.XII.1957

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

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

Considering that this purpose can be attained by the conclusion of agreements and by common action in legal matters;

Considering that the acceptance of uniform rules with regard to extradition is likely to assist this work of unification,

Have agreed as follows:

Article 1 – Obligation to extradite

The Contracting Parties undertake to surrender to each other, subject to the provisions and conditions laid down in this Convention, all persons against whom the competent authorities of the requesting Party are proceeding for an offence or who are wanted by the said authorities for the carrying out of a sentence or detention order.

Article 2 – Extraditable offences

1. Extradition shall be granted in respect of offences punishable under the laws of the requesting Party and of the requested Party by deprivation of liberty or under a detention order for a maximum period of at least one year or by a more severe penalty. Where a conviction and prison sentence have occurred or a detention order has been made in the territory of the requesting Party, the punishment awarded must have been for a period of at least four months.

2. If the request for extradition includes several separate offences each of which is punishable under the laws of the requesting Party and the requested Party by deprivation of liberty or under a detention order, but of which some do not fulfil the condition with regard to the amount of punishment which may be awarded, the requested Party shall also have the right to grant extradition for the latter offences.

3. Any Contracting Party whose law does not allow extradition for certain of the offences referred to in paragraph 1 of this article may, in so far as it is concerned, exclude such offences from the application of this Convention.

4. Any Contracting Party which wishes to avail itself of the right provided for in paragraph 3 of this article shall, at the time of deposit of its instrument of ratification or accession, transmit to the Secretary General of the Council of Europe either a list of the offences for which extradition is allowed or a list of those for which it is excluded and shall at the same time indicate the legal provisions which allow or exclude extradition. The Secretary General of the Council shall forward these lists to the other signatories.

5. If extradition is subsequently excluded in respect of other offences by the law of a Contracting Party, that Party shall notify the Secretary General. The Secretary General shall inform the other signatories. Such notification shall not take effect until three months from the date of its receipt by the Secretary General.

6. Any Party which avails itself of the right provided for in paragraphs 4 or 5 of this article may at any time apply this Convention to offences which have been excluded from it. It shall inform the Secretary General of the Council of such changes, and the Secretary General shall inform the other signatories.

7. Any Party may apply reciprocity in respect of any offences excluded from the application of the Convention under this article.

Article 3 – Political offences

1. Extradition shall not be granted if the offence in respect of which it is requested is regarded by the requested Party as a political offence or as an offence connected with a political offence.

2. The same rule shall apply if the requested Party has substantial grounds for believing that a request for extradition for an ordinary criminal offence has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that that person's position may be prejudiced for any of these reasons.

3. The taking or attempted taking of the life of a Head of State or a member of his family shall not be deemed to be a political offence for the purposes of this Convention.

4. This article shall not affect any obligations which the Contracting Parties may have undertaken or may undertake under any other international convention of a multilateral character.

Article 4 – Military offences

Extradition for offences under military law which are not offences under ordinary criminal law is excluded from the application of this Convention.

Article 5 – Fiscal offences

Extradition shall be granted, in accordance with the provisions of this Convention, for offences in connection with taxes, duties, customs and exchange only if the Contracting Parties have so decided in respect of any such offence or category of offences.

Article 6 – Extradition of nationals

1. a. A Contracting Party shall have the right to refuse extradition of its nationals.

   b. Each Contracting Party may, by a declaration made at the time of signature or of deposit of its instrument of ratification or accession, define as far as it is concerned the term "nationals" within the meaning of this Convention.

   c. Nationality shall be determined as at the time of the decision concerning extradition. If, however, the person claimed is first recognised as a national of the requested Party during the period between the time of the decision and the time contemplated for the surrender, the requested Party may avail itself of the provision contained in sub-paragraph a of this article.

2. If the requested Party does not extradite its national, it shall at the request of the requesting Party submit the case to its competent authorities in order that proceedings may be taken if they are considered appropriate. For this purpose, the files, information and exhibits relating to the offence shall be transmitted without charge by the means provided for in Article 12, paragraph 1. The requesting Party shall be informed of the result of its request.

Article 7 – Place of commission

1. The requested Party may refuse to extradite a person claimed for an offence which is regarded by its law as having been committed in whole or in part in its territory or in a place treated as its territory.

2. When the offence for which extradition is requested has been committed outside the territory of the requesting Party, extradition may only be refused if the law of the requested Party does not allow prosecution

for the same category of offence when committed outside the latter Party's territory or does not allow extradition for the offence concerned.

Article 8 – Pending proceedings for the same offences

The requested Party may refuse to extradite the person claimed if the competent authorities of such Party are proceeding against him in respect of the offence or offences for which extradition is requested.

Article 9 – *Non bis in idem*

Extradition shall not be granted if final judgment has been passed by the competent authorities of the requested Party upon the person claimed in respect of the offence or offences for which extradition is requested. Extradition may be refused if the competent authorities of the requested Party have decided either not to institute or to terminate proceedings in respect of the same offence or offences.

Article 10 – Lapse of time

Extradition shall not be granted when the person claimed has, according to the law of either the requesting or the requested Party, become immune by reason of lapse of time from prosecution or punishment.

Article 11 – Capital punishment

If the offence for which extradition is requested is punishable by death under the law of the requesting Party, and if in respect of such offence the death-penalty is not provided for by the law of the requested Party or is not normally carried out, extradition may be refused unless the requesting Party gives such assurance as the requested Party considers sufficient that the death-penalty will not be carried out.

Article 12 – The request and supporting documents

1. The request shall be in writing and shall be communicated through the diplomatic channel. Other means of communication may be arranged by direct agreement between two or more Parties.

2. The request shall be supported by:

   a. the original or an authenticated copy of the conviction and sentence or detention order immediately enforceable or of the warrant of arrest or other order having the same effect and issued in accordance with the procedure laid down in the law of the requesting Party;

   b. a statement of the offences for which extradition is requested. The time and place of their commission, their legal descriptions and a reference to the relevant legal provisions shall be set out as accurately as possible; and

   c. a copy of the relevant enactments or, where this is not possible, a statement of the relevant law and as accurate a description as possible of the person claimed, together with any other information which will help to establish his identity and nationality.

Article 13 – Supplementary information

If the information communicated by the requesting Party is found to be insufficient to allow the requested Party to make a decision in pursuance of this Convention, the latter Party shall request the necessary supplementary information and may fix a time-limit for the receipt thereof.

Article 14 – Rule of speciality

1. A person who has been extradited shall not be proceeded against, sentenced or detained with a view to the carrying out of a sentence or detention order for any offence committed prior to his surrender other than that for which he was extradited, nor shall he be for any other reason restricted in his personal freedom, except in the following cases:

   a. when the Party which surrendered him consents. A request for consent shall be submitted, accompanied by the documents mentioned in Article 12 and a legal record of any statement made by the extradited person in respect of the offence concerned. Consent shall be given when the offence for which it is requested is itself subject to extradition in accordance with the provisions of this Convention;

b. when that person, having had an opportunity to leave the territory of the Party to which he has been surrendered, has not done so within 45 days of his final discharge, or has returned to that territory after leaving it.

2. The requesting Party may, however, take any measures necessary to remove the person from its territory, or any measures necessary under its law, including proceedings by default, to prevent any legal effects of lapse of time.

3. When the description of the offence charged is altered in the course of proceedings, the extradited person shall only be proceeded against or sentenced in so far as the offence under its new description is shown by its constituent elements to be an offence which would allow extradition.

Article 15 – Re-extradition to a third state

Except as provided for in Article 14, paragraph 1.b, the requesting Party shall not, without the consent of the requested Party, surrender to another Party or to a third State a person surrendered to the requesting Party and sought by the said other Party or third State in respect of offences committed before his surrender. The requested Party may request the production of the documents mentioned in Article 12, paragraph 2.

Article 16 – Provisional arrest

1. In case of urgency the competent authorities of the requesting Party may request the provisional arrest of the person sought. The competent authorities of the requested Party shall decide the matter in accordance with its law.

2. The request for provisional arrest shall state that one of the documents mentioned in Article 12, paragraph 2.a, exists and that it is intended to send a request for extradition. It shall also state for what offence extradition will be requested and when and where such offence was committed and shall so far as possible give a description of the person sought.

3. A request for provisional arrest shall be sent to the competent authorities of the requested Party either through the diplomatic channel or direct by post or telegraph or through the International Criminal Police Organisation (Interpol) or by any other means affording evidence in writing or accepted by the requested Party. The requesting authority shall be informed without delay of the result of its request.

4. Provisional arrest may be terminated if, within a period of 18 days after arrest, the requested Party has not received the request for extradition and the documents mentioned in Article 12. It shall not, in any event, exceed 40 days from the date of such arrest. The possibility of provisional release at any time is not excluded, but the requested Party shall take any measures which it considers necessary to prevent the escape of the person sought.

5. Release shall not prejudice re-arrest and extradition if a request for extradition is received subsequently.

Article 17 – Conflicting requests

If extradition is requested concurrently by more than one State, either for the same offence or for different offences, the requested Party shall make its decision having regard to all the circumstances and especially the relative seriousness and place of commission of the offences, the respective dates of the requests, the nationality of the person claimed and the possibility of subsequent extradition to another State.

Article 18 – Surrender of the person to be extradited

1. The requested Party shall inform the requesting Party by the means mentioned in Article 12, paragraph 1, of its decision with regard to the extradition.

2. Reasons shall be given for any complete or partial rejection.

3. If the request is agreed to, the requesting Party shall be informed of the place and date of surrender and of the length of time for which the person claimed was detained with a view to surrender.

4. Subject to the provisions of paragraph 5 of this article, if the person claimed has not been taken over on the appointed date, he may be released after the expiry of 15 days and shall in any case be released after the expiry of 30 days. The requested Party may refuse to extradite him for the same offence.

5. If circumstances beyond its control prevent a Party from surrendering or taking over the person to be extradited, it shall notify the other Party. The two Parties shall agree a new date for surrender and the provisions of paragraph 4 of this article shall apply.

Article 19 – Postponed or conditional surrender

1. The requested Party may, after making its decision on the request for extradition, postpone the surrender of the person claimed in order that he may be proceeded against by that Party or, if he has already been convicted, in order that he may serve his sentence in the territory of that Party for an offence other than that for which extradition is requested.

2. The requested Party may, instead of postponing surrender, temporarily surrender the person claimed to the requesting Party in accordance with conditions to be determined by mutual agreement between the Parties.

Article 20 – Handing over of property

1. The requested Party shall, in so far as its law permits and at the request of the requesting Party, seize and hand over property:

   a. which may be required as evidence, or

   b. which has been acquired as a result of the offence and which, at the time of the arrest, is found in the possession of the person claimed or is discovered subsequently.

2. The property mentioned in paragraph 1 of this article shall be handed over even if extradition, having been agreed to, cannot be carried out owing to the death or escape of the person claimed.

3. When the said property is liable to seizure or confiscation in the territory of the requested Party, the latter may, in connection with pending criminal proceedings, temporarily retain it or hand it over on condition that it is returned.

4. Any rights which the requested Party or third parties may have acquired in the said property shall be preserved. Where these rights exist, the property shall be returned without charge to the requested Party as soon as possible after the trial.

Article 21 – Transit

1. Transit through the territory of one of the Contracting Parties shall be granted on submission of a request by the means mentioned in Article 12, paragraph 1, provided that the offence concerned is not considered by the Party requested to grant transit as an offence of a political or purely military character having regard to Articles 3 and 4 of this Convention.

2. Transit of a national, within the meaning of Article 6, of a country requested to grant transit may be refused.

3. Subject to the provisions of paragraph 4 of this article, it shall be necessary to produce the documents mentioned in Article 12, paragraph 2.

4. If air transport is used, the following provisions shall apply:

   a. when it is not intended to land, the requesting Party shall notify the Party over whose territory the flight is to be made and shall certify that one of the documents mentioned in Article 12, paragraph 2.a exists. In the case of an unscheduled landing, such notification shall have the effect of a request for provisional arrest as provided for in Article 16, and the requesting Party shall submit a formal request for transit;

   b. when it is intended to land, the requesting Party shall submit a formal request for transit.

5. A Party may, however, at the time of signature or of the deposit of its instrument of ratification of, or accession to, this Convention, declare that it will only grant transit of a person on some or all of the conditions on which it grants extradition. In that event, reciprocity may be applied.

6. The transit of the extradited person shall not be carried out through any territory where there is reason to believe that his life or his freedom may be threatened by reason of his race, religion, nationality or political opinion.

Article 22 – Procedure

Except where this Convention otherwise provides, the procedure with regard to extradition and provisional arrest shall be governed solely by the law of the requested Party.

Article 23 – Language to be used

The documents to be produced shall be in the language of the requesting or requested Party. The requested Party may require a translation into one of the official languages of the Council of Europe to be chosen by it.

Article 24 – Expenses

1. Expenses incurred in the territory of the requested Party by reason of extradition shall be borne by that Party.

2. Expenses incurred by reason of transit through the territory of a Party requested to grant transit shall be borne by the requesting Party.

3. In the event of extradition from a non-metropolitan territory of the requested Party, the expenses occasioned by travel between that territory and the metropolitan territory of the requesting Party shall be borne by the latter. The same rule shall apply to expenses occasioned by travel between the non-metropolitan territory of the requested Party and its metropolitan territory.

Article 25 – Definition of "detention order"

For the purposes of this Convention, the expression "detention order" means any order involving deprivation of liberty which has been made by a criminal court in addition to or instead of a prison sentence.

Article 26 – Reservations

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 27 – Territorial application

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 the United Kingdom of Great Britain and Northern Ireland, to the Channel Islands and to the Isle of Man.

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, who shall notify the other Parties of such declaration.

4. By direct arrangement between two or more Contracting Parties, the application of this Convention may be extended, subject to the conditions laid down in the arrangement, to any territory of such Parties, other than the territories mentioned in paragraphs 1, 2 and 3 of this article, for whose international relations any such Party is responsible.

Article 28 – Relations between this Convention and bilateral Agreements

1. This Convention shall, in respect of those countries to which it applies, supersede the provisions of any bilateral treaties, conventions or agreements governing extradition between any two Contracting Parties.

2. The Contracting Parties may conclude between themselves bilateral or multilateral agreements only in order to supplement the provisions of this Convention or to facilitate the application of the principles contained therein.

3. Where, as between two or more Contracting Parties, extradition takes place on the basis of a uniform law, the Parties shall be free to regulate their mutual relations in respect of extradition exclusively in accordance with

such a system notwithstanding the provisions of this Convention. The same principle shall apply as between two or more Contracting Parties each of which has in force a law providing for the execution in its territory of warrants of arrest issued in the territory of the other Party or Parties. Contracting Parties which exclude or may in the future exclude the application of this Convention as between themselves in accordance with this paragraph shall notify the Secretary General of the Council of Europe accordingly. The Secretary General shall inform the other Contracting Parties of any notification received in accordance with this paragraph.

Article 29 – Signature, ratification and entry into force

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 30 – Accession

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 receives 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 31 – Denunciation

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 32 – Notifications

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 deposit of any instrument of ratification or accession;

b. the date of entry into force of this Convention;

c. any declaration made in accordance with the provisions of Article 6, paragraph 1, and of Article 21, paragraph 5;

d. any reservation made in accordance with Article 26, paragraph 1;

e. the withdrawal of any reservation in accordance with Article 26, paragraph 2;

f. any notification of denunciation received in accordance with the provisions of Article 31 and by the date on which such denunciation will take effect.

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

Done at Paris, this 13th day of December 1957, in English and French, both texts being equally authentic, 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 governments.

Explanatory Report

The present text is a revised edition of a confidential explanatory report on the European Convention on Extradition, which was opened for signature by member States of the Council of Europe in December 1957.

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 consideration which led to the final text of the Convention which entered into force on 18 April 1960.

INTRODUCTION

1. On 8 December 1951, during its 37th Session, the Consultative Assembly of the Council of Europe adopted Recommendation (51) 16, "on the preparatory measures to be taken to achieve the conclusion of a European Convention on Extradition".

2. The Committee of Ministers of the Council of Europe, after studying this recommendation and the governments' replies on the desirability of concluding a European Convention on Extradition and its possible form and content, instructed the Secretary General in its Resolution (53) 4 to convene a Committee of Government Experts to examine Recommendation (51) 16 with special reference to:

> "the possibility of establishing certain extradition principles acceptable to all Members of the Council, the question as to whether these principles should be implemented by the establishment of a multilateral convention on extradition or whether they should simply serve as a basis for bilateral conventions 'being reserved'."

3. The Committee of Experts, meeting at Strasbourg from 5-9 October 1953, under the chairmanship of Mr. William Fay (Ireland), found that there was a considerable measure of agreement on the principles which should govern extradition, and therefore concluded that it should be possible to embody these principles in an appropriate instrument of a multilateral or bilateral character.

4. The Assembly in the meantime continued its own work and adopted a new Recommendation 66 (1954), suggesting to the Committee of Ministers:

1. that it should instruct the Committee of Governmental Experts on Extradition to continue their work with a view to the conclusion of a European Convention on Extradition and to the inclusion therein of the Articles drafted by the Committee on Legal and Administrative Questions and approved by the Assembly, which are appended to this recommendation;
2. that, in view of the resolution adopted by the Committee of Ministers during their 9th Session in August 1951, for the signature of partial agreements, this work should continue, even if it were to appear subsequently that certain Member States find themselves unable to b ecome parties to such a convention;
3. that, should the Committee of Experts find it necessary to make important changes of substance in these Articles, such proposed changes should be discussed at joint meetings to be convened between the appropriate sub-committee of the Assembly's Committee on Legal and Administrative Questions, on the one hand, and the Committee of Governmental Experts or a sub-committee thereof, on the other hand, for the purpose of reaching a solution acceptable to both sides;

4. that the text of the proposed European Convention should be communicated to the Assembly for an opinion before being finally approved by the Committee of Ministers.

5. On the basis of the first report by the Committee of Experts, the Committee of Ministers in Resolution (54) 24 instructed it to examine the Assembly Recommendation 66 (1954) with a view to:

a. drafting a model *bilateral* convention for the use of such Members as may not be bound together under a multilateral convention on extradition and,

b. drafting a *multilateral* convention on extradition, it being understood that such convention should afford nonsignatory Members an opportunity of subsequently acceding thereto, if they so desire.

In this resolution the Committee of Ministers also agreed to a discussion being held on the conclusions of the Committee of Experts between members of the committee and the competent sub-committee of the Assembly Committee on Legal and Administrative Questions.

6. The Committee of Experts held two more sessions from 31 January to 9 February 1955, and from 15 to 25 February 1956, at Strasbourg, under the chairmanship of Mr. Mamopoulos (Greece). Mr. William Fay, who presided at the first session, having been appointed Irish ambassador to France, did not take part in the last two sessions.

7. On 23 September 1955, the joint meeting between a Sub-Committee of Experts and the competent Assembly subcommittee, to which the Ministers had agreed in Resolution (54) 24, was convened to discuss the preliminary draft multilateral convention drawn up by the experts at their 2nd Session. The suggestions put forward at the joint meeting were studied by the Committee of Experts at their 3rd Session.

During its 52nd meeting (September 1957) the Committee of Ministers, meeting at deputy level, decided to open the Multilateral European Convention on Extradition for signature by the member states.

8. The present report contains:

a. general observations on the proceedings of the committee;

b. comments on the Articles of the Multilateral European Convention on Extradition and a brief account of points which were discussed but not dealt with in this Convention;

c. the text of the Multilateral European Convention on Extradition.

GENERAL CONSIDERATIONS

9. The delegations discussed at length whether they preferred a model bilateral convention or a multilateral European convention on extradition.

During the drafting of the convention it became apparent that two different attitudes were being taken to certain principles which should govern extradition. These different points of view, which it proved impossible to reconcile, are of great importance, particularly from the point of view of doctrine. Of the two attitudes one follows the traditional view that the chief aim is to repress crime and that therefore extradition should be facilitated; the other introduces humanitarian considerations and so tends to restrict the application of extradition laws.

10. Certain experts expressed their preference for bilateral conventions on extradition. They took the view that the matter was one which lent itself better to an agreement limited to the relations between two countries, since it required that particular interests of a geographical, political and legal nature should be taken into consideration.

11. Other experts saw no objection to the drafting of a multilateral convention, but considered that it should only lay down the broad principles governing extradition and some regulations of a procedural nature. A multilateral convention of this kind could provide the general basis for extradition and all matters which it did not cover could be settled in bilateral agreements.

12. Other experts, however, were in favour of drafting a European multilateral convention containing detailed provisions. Such a convention, it was thought, would be of great interest to member countries since it would lay down common rules on extradition which States could still supplement or elaborate in bilateral agreements. This convention would also have the advantage that it would to some extent co-ordinate and standardise the regulations governing extradition in member countries and would fully conform with the provisions of Article 1 of the Statute of the Council of Europe. A multilateral convention should be so drafted,

as indeed was clearly laid down by the Committee of Ministers in the resolution quoted above, that those States which were unable to sign it at once might accede to it subsequently. The committee also considered the possibility of allowing reservations to be made, in order to facilitate acceptance of the convention by those member countries whose law made certain clauses difficult to accept.

13. An expert from the Scandinavian countries, on the basis of the preparatory work now being carried out among the Scandinavian countries on new extradition regulations, explained the new theory on this subject, referred to above, which on certain points differs appreciably from the orthodox principles still faithfully followed by a large majority of the other States. At this stage in their work the attitude of the Scandinavian countries is that, while they agree on certain general regulations governing extradition procedure, the requested State should retain the right in the last resort to decide, according to the circumstances, whether extradition should be granted or whether, on the other hand, the person claimed should be proceeded against in its own territory. The orthodox extradition conventions between these countries would then be replaced by a uniform law in each of them defining the conditions in which extradition would normally occur and giving special consideration to the need to protect the rights of the individual. The new regulations would be based on mutual confidence and on the desire of the various States to co-operate closely in combating crime. It has been possible to draft these regulations because of the great similarity between the penal codes of Scandinavian countries in their definition of offences and in the scale of penalties inflicted. He wished Member States of the Council of Europe to introduce a similar system which seemed to him perfectly possible owing to the identity of their basic conceptions of criminal law.

As these suggestions did not, however, receive the approval of the majority of the experts, the Scandinavian experts expressed their willingness to consider the conclusion of extradition conventions of the traditional type, i.e. those entailing an obligation to extradite in specific cases, on condition that such conventions allowed certain exceptional circumstances to be taken into consideration, so that in a given case extradition might be refused for imperative reasons of a humanitarian nature. These considerations also led them to propose that the requested State should have the right to ask for additional proof, if it considered that such additional proof was needed to establish that the offence had probably been committed by the person claimed. This attitude on the part of the Scandinavian experts in no way implies that they fail to recognise the importance of extradition as a means of suppressing crime, but experience has shown that a certain flexibility is desirable in the principles governing extradition.

One of these experts would therefore have liked the following provisions to appear both in the model Bilateral Convention and in the Multilateral Convention:

a. "Article 6 (a)

If the arrest and delivery of the person claimed are likely to cause him consequences of an exceptional gravity and thereby cause concern on humanitarian grounds particularly by reason of his age or state of health, extradition may be refused."

b. "Article 12, paragraph 3

When the request for extradition concerns a person proceeded against or convicted by default, the requested Party may request the requesting Party to produce evidence showing that the offence has probably been committed by the person claimed. Where this evidence appears to be insufficient, extradition may be refused."

14. Although these provisions were not acceptable to the committee, is was decided to mention them in a footnote to the Articles in question and to insert them in the comments on these Articles. It was also agreed that a reservation to this effect might be formulated in the Multilateral Convention in order that the largest possible number of States could accede to it.

15. The committee then proceeded with the work of drafting the Convention. The draft drawn up by the Assembly proved of great help and many of the Articles of the experts'draft Convention were based on this text.

COMMENTARIES ON THE ARTICLES OF THE MULTILATERAL CONVENTION ON EXTRADITION

Article 1 (Obligation to extradite)

This article was taken from the Bilateral Convention concluded between France and the Federal Republic of Germany on 23 November 1951. In it the Contracting Parties undertake in principle to apply the clauses of the Convention. Thus the Article has a general bearing on the Convention as a whole.

The term "competent authorities" in the English text corresponds to *autorités judiciaires* in the French text. These expressions cover the judiciary and the Office of the Public Prosecutor but exclude the police authorities.

Article 2 (Extraditable offences)

Paragraph 1 specifies what offences are in principle extraditable; they must be offences which are punishable under the law both of the requested Party and of the requesting Party.

This paragraph lays down the principle of compulsory extradition. The requested Party has no discretionary power to grant or refuse extradition. This rule is qualified, however, by subsequent provisions which lay down certain exceptions.

The penalty has been fixed at "a maximum period of *at least one year*". This has been possible because the countries which preferred a maximum of *more* than one year can exclude offences punishable by a penalty of one year's imprisonment in accordance with the provisions of paragraphs 3, 4 and 5 of this article, if extradition for these offences is not authorised under their laws. They may also formulate a reservation on this point under the terms of Article 26. Thus the reduction in the scale of penalties widens the scope of extradition.

The second part of this paragraph covers the case of a person who has already been convicted. In such a case the sentence must be of a certain duration, on the understanding that the condition laid down in the first part of the Article that the offence must be punishable by a certain penalty in both the requested and requesting country must also be fulfilled. Extradition is thus further limited, but this is justifiable if it is desired to exclude certain minor offences. This part of the Article covers the extradition of a person who is convicted by the Court and has not put in a defence.

Some experts considered it necessary to insert the words "or by capital punishment" in this paragraph, in order to show explicitly that a more severe punishment, in particular, the death penalty, is not excluded from its provisions, while others thought these words superfluous.

Paragraph 2 will enable the Parties concerned to grant extradition for an offence punishable by less than one year's imprisonment if extradition for such an offence is requested at the same time as extradition for another offence punishable by at least one year's imprisonment. The question is here one of "accessory" extradition which may be granted for a minor offence without thereby infringing the speciality rules. In this connection a delegation pointed out that the reasons for nonextradition in respect of certain minor offences (excessive hardship for the accused, difficulties and expense of extradition procedure) are no longer valid when the person claimed has to be extradited for a serious offence. In this case the person in question ought not to escape prosecution for lesser offences which he has also committed. Moreover, accessory extradition would enable the courts of the requesting country to take into consideration all the offences of which the extradited person was accused, so that a comprehensive judgment could be passed on him. The penalty thus inflicted would, in several countries, be less than the sum of the penalties which might be imposed for each offence separately. Owing to its permissive character this provision was accepted by all the experts.

Paragraph 3 lays down the first exception to the rule of extradition by allowing the Parties to exclude from the field of application of the Convention offences for which extradition is not authorised by their law, although they come within the provisions of Article 1 above. Paragraph 3 is primarily intended for countries which have adopted the system of listing extraditable offences, but it also concerns countries which have not adopted this system and whose laws do not authorise extradition for certain offences or classes of offences.

Under *Paragraph 4* a Party wishing to invoke paragraph 3 is required to transmit to the Secretariat General of the Council of Europe either a list of the offences for which extradition is allowed or a list of the offences for which it is forbidden. The Party in question will transmit one or other of these lists according to the system adopted in its municipal law.

Paragraph 5 provides that a Party which wishes to make any other offences non-extraditable must inform the Secretary General of the Council accordingly. Other offences may accordingly be declared non-extraditable. But the declaration will only be valid vis-à-vis another Party if it has been transmitted to the Secretary General.

Paragraph 6 may be considered as an indirect invitation to reduce the number of non-extraditable offences.

Paragraph 7 allows any Party to apply the rule of reciprocity in respect of any offences excluded from the field of application of this Convention under the terms of this Article.

The provisions of paragraphs 3, 4 and 5 are based on the provisions of Articles 6 and 14 of the European Convention on Establishment relating to the restrictions on the exercise of rights and occupations.

Article 3 (Political offences)

Paragraph 1 forbids extradition for political offences or offences connected with political offences. It allows the requested Party to decide whether the offence is political or not. As this provision was not accepted by all the delegations, owing to its mandatory character, the committee decided that a reservation with regard to it could be made under the terms of Article 26.

Paragraph 2 allows the requested Party to refuse extradition for an ordinary criminal offence if it considers that the request for extradition was made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion. The requested Party can adopt the same attitude if it considers that the position of the person claimed might be prejudiced for political reasons.

Paragraph 3 lays down that an attempt on the life of a Head of State or a member of his family shall not be considered a political offence. In such a case extradition would be compulsory. As some experts did not accept this paragraph it was recognised that all governments should have the right to make a reservation on this matter under the provisions of Article 26.

It was made clear that the heads of German *Länder* were not to be considered as "Heads of State" within the meaning of paragraph 3.

No reference is made in the text to an attempt on the life of a member of the government, as offences of this kind are not normally mentioned in extradition conventions. They are, of course, covered by paragraph 1 of this Article, under which the requested Party must refuse extradition if it considers that the offence committed is a political offence, but must grant it if it considers that the offence is not political and that the conditions of Article 2 of the Convention are fulfilled.

Paragraph 4 lays down that this Article shall not affect any obligations which the Parties may have undertaken or may undertake under any other international convention. The reference here is in particular to the four Red Cross Conventions signed at Geneva in 1949, and to the Convention on the Suppression of Genocide.

Article 4 (Military offences)

It forbids extradition for purely military offences, but extradition must be granted for an ordinary criminal offence committed by a member of the armed services if the conditions of the Convention are fulfilled.

Article 5 (Fiscal offences)

The text of this article authorises Parties to extradite for fiscal offences if they so decide among themselves. A previous arrangement is therefore necessary between the Parties. It was impossible to give this article a more mandatory form which would make it binding upon the Parties, as it appeared from the discussion that there was a considerable difference between the laws of the various countries concerned in respect of such offences. Such extradition must, however, be subject to the conditions laid down in the Convention. The offence concerned must therefore be one punishable both by the law of the requested Party and by the law of the requesting Party in accordance with Article 2. This draft of Article 5 is inspired by Article 6 of the Franco-German Convention on Extradition.

It is left to the Parties to determine the meaning to be attributed to the word "decided", which could refer just as well to an agreement requiring ratification as to a mere exchange of letters, or any other act that could be considered a joint decision.

Article 6 (Extradition of nationals)

Paragraph 1 allows the extradition of nationals if this is not contrary to the laws of the requested country. But even in this case the requested country is not obliged to extradite its nationals; it has the option of granting or refusing their extradition.

It was noted that in several States the extradition of nationals is forbidden, whereas in other States the extradition of nationals is permissive.

The committee agreed that, at the time of signature or deposit of the instrument of ratification, the Parties might make a special declaration defining what they meant by the term "national". It was also decided that nationality would be determined at the time of decision.

If one Party proposes that the extradition of nationals should be subject to reciprocity, it may in the opinion of the committee make a reservation to this effect under the terms of Article 26.

Under *paragraph 2* of Article 6, if the requested Party does not extradite a person claimed on the ground that he is a national, it is obliged at the demand of the requesting Party to submit the matter to the competent authority, in order that the person concerned may not go unpunished. Legal proceedings need not necessarily be taken, but the requested Party is obliged to submit the matter to the competent authorities. Proceedings would be taken only if the competent authorities considered that they were appropriate.

An expert, taking into consideration the desirability, in the interests of justice, of proceeding against unextradited nationals, proposed that Article 6, paragraph 2, should be drafted as follows:

> "If the extradition of these persons is so refused, the requested Party shall proceed against them in accordance with the procedure which would be followed if the offence had been committed on its own territory."

This proposal was supported by two other experts, but was not adopted by the committee.

It was suggested that the principle laid down in paragraph 2 should be extended to cover other cases in which extradition was not granted. However, several experts thought this unnecessary because if one State informs another State that a person on its territory has committed certain offences, the latter State will ipso facto make enquiries to discover whether there are grounds for proceeding against that person.

An expert proposed the adoption of an Article 6 (*a*), worded as follows:

> "If the arrest and surrender of the person claimed are likely to cause him consequences of an exceptional gravity and thereby cause concern on humanitarian grounds particularly by reason of his age or state of health, extradition may be refused."

This proposal was inspired by humanitarian considerations, but was not adopted by the committee. It was decided that a reservation could be made on this subject under the terms of Article 26; this reservation, being somewhat general in nature, could perhaps be made with reference to Article 1 of the Convention.

Article 7 (Place of commission)

Paragraph 1 permits a Party to refuse extradition for an act committed in whole or in part within its territory or in a place considered as its territory. Under this paragraph it is for the requested Party to determine in accordance with its law whether the act was committed in whole or in part within its territory or in a place considered as its territory. Thus, for example, offences committed on a ship or aircraft of the nationality of the requested Party may be considered as offences committed on the territory of that Party.

Paragraph 2 was inserted in order to take into account the law of countries which do not allow extradition for an offence committed outside the territory of the requesting Party. This paragraph provides that extradition must be granted if the offence has been committed outside the territory of the requesting Party, unless the laws of the requested Party do not authorise prosecution for an offence of the same kind committed outside its territory, or do not authorise extradition for the offence which is the subject of the request.

Under the terms of Article 26, a reservation may be made in respect of this paragraph, making it subject to reciprocity.

Article 8 (Pending proceedings for the same offences)

Under this article, which in general relates to offences committed outside the territory of the requested Party, extradition may be refused if the person claimed is already being proceeded against by the requested Party for the offences for which extradition is requested.

An expert said that when a Party had just received a request for extradition it could sti1l itself proceed against the person claimed if it was permitted by its laws to take proceedings for the offence in question. It could then refuse extradition, but must start proceedings before taking the decision to refuse extradition. All the delegations adopted this interpretation of the Article.

The proceedings referred to in this article are to be taken in the broadest sense as covering summons, arrest and all other judicial proceedings.

Article 9 (*Non bis in idem*)

The first sentence of this article, which is mandatory, covers the case of a person on whom final judgment has been passed, i.e. who has been acquitted, pardoned, or convicted. Extradition should therefore be refused because it is no longer possible to re-open the case, the judgment in question having acquired the authority of *res judicata*.

The word "final" used in this article indicates that all means of appeal have been exhausted. It was understood that judgment by the Court is not to be considered a final judgment, nor is judgment *ultra vires*.

The second sentence, which is permissive, covers the case of a person in regard to whom a decision has been taken precluding proceedings or terminating them, particularly the case in which it has been decided that there are no grounds for prosecution (*ordonnance de non-lieu*). In these circumstances extradition can be refused, but, if new facts or other matters affecting the verdict come to light, this provision cannot be applied, and the person must be extradited unless the requested Party proceeds against him under the terms of Article 8.

The case of a person proceeded against and finally acquitted or convicted was not provided for by the Committee of Experts, on the grounds that all the member States of the Council have adopted the principle of *non bis in idem* in their domestic law.

Article 10 (Lapse of time)

Under its terms, which are mandatory, extradition is refused when, under the law either of the requested Party or the requesting Party, immunity from prosecution or punishment has been acquired owing to lapse of time. The law of both the States concerned is taken into consideration.

Most experts considered that it is not for the requested Party to determine whether immunity by reason of lapse of time had been acquired in the territory of the requesting Party, but it should request a decision on this question directly from the requesting Party itself.

Article 11 (Capital punishment)

Under this article extradition may be refused if the law of the requesting Party lays down the death penalty for the offence committed by the person whose extradition is requested and if the death penalty is not provided for under the laws of the requested Party. The requested Party may, however, grant extradition if the requesting Party gives such assurance as may be considered satisfactory that the death penalty will not be carried out. The assurance given may vary according to the country concerned and even according to the particular case. It may, for example, be a formal undertaking not to carry out the death penalty, an undertaking to recommend to the Head of the State that the death penalty be commuted, a simple statement that it is intended to make such a recommendation or an undertaking to return the person extradited if he is condemned to death. It is in any case for the requested Party to decide whether the assurances given are satisfactory.

Article 12 (The request and supporting documents)

Paragraph 1 of this article concerns the means by which the request for extradition is submitted. It lays down that the request shall be communicated through diplomatic channels. It provides, however, that other means of communication may be arranged by direct agreement between Parties, thus in effect permitting communication directly between the Ministry of Justice in the requesting and requested countries or through the Consulates.

Paragraph 2 specifies at sub-paragraphs (*a*), (*b*) and (*c*) the documents which the requesting Party is required to produce in support of its request, and the information which it must supply. Some of the experts thought that the warrant of arrest or any other order having the same effect should be issued by an authority of a judicial nature. This point arises from Article 1, in which the Parties undertake to extradite persons against whom the *competent authorities* of the requesting Party are proceeding or who are wanted by them.

It was observed that the description of the person claimed is not generally given in the request itself but is attached as a separate document.

During the discussion on Article 12 it was found that most of the States represented on the Committee of Experts do not extradite a person claimed until after a decision by a judicial authority.

Article 13 (Supplementary information)

This article does not call for any special comment.

Article 14 (Rule of speciality)

Paragraph 1 of this article establishes the principle that an extradited person may not be proceeded against or sentenced or detained for an offence other than that which furnished the grounds for his extradition. Sub-paragraphs (*a*) and (*b*) of this paragraph set out the following exceptions to this principle:

Sub-paragraph (*a*): If the requested Party consents, extradition may be extended to other offences. To obtain such consent, the requesting Party must submit a request accompanied by the same documents as are required, under Article 12, in support of a request for extradition, and by an official record of the statements of the extradited person, drawn up by a judicial authority. In some countries the statement of the extradited person concerning a new offence with which he is charged is part of the legal proceedings and so might be considered to violate the principle of speciality. It would seem essential, however, that the extradited person should be given the opportunity of making a statement concerning a new charge before any decision is taken on the extension of his extradition in respect of any new offence. Since sub-paragraph (*a*) expressly lays down that an official record should be made of the statements of the extradited person, the committee were of the unanimous opinion that there was no objection to such statements being taken.

The third sentence of this sub-paragraph lays down that, if it follows from the request made and the documents produced by the requesting Party that the offence for which extension of the extradition is requested comes within the field of application of the Convention, the requested Party is obliged to agree to such extension.

It was agreed that the phrase "when the Party which surrendered him consents" in sub-paragraph (*a*) could also apply to the provisions of Article 2, paragraph 2, which provides for extradition to be extended in respect of offences which do not fulfil the condition with regard to the amount of punishment which may be inflicted. In this case, however, the extension is permissive while it is obligatory in respect of the other offences covered by the third sentence of this sub-paragraph.

Sub-paragraph (*b*) lays down that the rule of speciality shall not apply if the person extradited has not left, having had the opportunity to do so, the territory of the Party to which he was delivered within 45 days after his final discharge or if he has returned to that territory after leaving it.

The words "had the opportunity" in sub-paragraph (*b*) have been substituted for "been free" originally used, because of their more general and therefore less restrictive sense. In effect the person must not only have been free to leave the territory, but must also have had the opportunity to do so (this covers illness or lack of money).

Moreover, the provision contains two conditions that the person has been finally discharged and has had the opportunity to leave the territory.

Paragraph 2 authorises the requesting Party to take the measures necessary to interrupt any legal effects of the lapse of time. The experts recognised that such authorisation was necessary since a State would not be prevented from taking such measures even if the accused had not been extradited. Under this paragraph, the requesting Parties may, for example, sentence an extradited person by default for an offence other than that which furnished the grounds for his extradition. In that case, however, the person extradited may not be detained for such an offence without the consent of the requested Party.

Paragraph 3 deals with cases in which the description of the offence is altered in the course of proceedings. For example, a person extradited for murder is tried for homicide. The committee decided that such alterations shall only be permitted in so far as the offence under its new description is shown by its constituent elements to be an offence for which extradition would be allowed.

Article 15 (Re-extraditon to a third State)

This article provides that the requesting Party may deliver the extradited person to a third State only if the requested Party agrees or if the extradited person has not, having had an opportunity to do so, left the territory of the requesting Party within a certain period after his final discharge or has returned to that territory after leaving it.

Article 16 (Provisional arrest)

Paragraph 1 permits the requesting Party to request provisional arrest and it is for the requested Party alone to decide on this request; the requested Party will make this decision in accordance with its own law. It is understood, however, that the requesting Party is the sole judge of the "urgency" justifying the request for provisional arrest.

Paragraph 2 concerns the information which must be given with a request for provisional arrest.

Paragraph 3 lays down regulations for the transmission of the request. The end of this paragraph provides that the requesting authority shall be informed without delay of the result of its request.

Paragraph 4 deals with release from provisional arrest. Two time-limits are provided for an option limit of 18 days on the expiry of which the person arrested may be set free, and an obligatory limit of 40 days on the expiry of which the person shall be released if the requested Party has not received a proper request for extradition within that period. This paragraph also provides that provisional release is permitted even before the expiry of the time-limit. In that case, however, the requested Party should take such measures of supervision as it thinks necessary to prevent the escape of the person in question.

Under *paragraph 5* the release of the person concerned will not prejudice his re-arrest and extradition if the request for extradition is received subsequently.

With regard to the law governing the procedure and decisions in respect of provisional arrest, the committee recognised that only the law of the requested Party is applicable. This question was dealt with in Article 22.

Article 17 (Conflicting requests)

This article covers the case where extradition is requested by more than one State at a time. The requested Party must then take into account the several factors set out in this Article when giving its decision.

Article 18 (Surrender of the person to be extradited)

This article is based on Article 14 of the Franco-German Extradition Convention.

Paragraphs 1, 2, 3 and 5 do not call for special comment.

Paragraph 4 concerns the case in which the person claimed is not taken over by the requesting Party on the date indicated by the requested Party. In that case, unless circumstances outside their control have prevented one or other of the Parties from surrendering or taking over the person claimed, he may be released after 15 days and has to be released after 30 days. His extradition for the same offence may then be refused.

An expert drew the attention of the committee to the fact that according to the law of his country the authorities, after one month from the date of notification to the requesting Party of the extradition order, may no longer extradite the individual for the same offence.

Article 19 (Postponed or conditional surrender)

Paragraph 1 of this Article lays down that the surrender of the person claimed may be postponed in order that he may be proceeded against by the requested Party or serve his sentence for another offence.

Under the terms of *paragraph 2,* the requested Party may, instead of postponing surrender, temporarily surrender the person claimed to the requesting Party in accordance with conditions to be determined by mutual agreement.

Article 20 (Handing over of property)

Paragraph 1 provides that the requested Party shall seize and deliver to the requesting Party property which may be required as evidence or which may have been acquired as a result of the offence. The requested Party is only required to satisfy a request of this kind so far as its law permits. The committee also decided that property, acquired as a result of an offence, which is discovered after the arrest of the person claimed shall also be delivered to the requesting Party.

The *other paragraphs* of this article call for no special comment.

Article 21 (Transit)

The majority of the delegations were of the opinion that extradition by transit should be subject to less severe conditions than the extradition itself. Some of the experts, however, did not agree with this and requested that the same conditions should be imposed in both cases, or at least that severer conditions than those provided for in this Article should be imposed for transit. In deference to this point of view a permissive clause has been inserted in *paragraph 5*. A Party which wishes to invoke this clause must make a declaration to that effect at the time of signature or ratification of the Convention. In that case the reciprocity rule may be applied.

Under the terms of *paragraph 1,* transit must be granted provided that the offence concerned is not considered as being of a political or purely military character and is punishable by the law of the country in transit. This paragraph does not exclude the transit of a national of the country of transit.

Paragraph 2, however, entitles a Party to refuse the transit of its nationals.

Paragraph 3 lays down that only the documents referred to in Article 12, paragraph 2, need be produced in support of a request for transit.

Paragraph 4 deals with transit by air.

A full discussion took place on whether the transport of a person on board a ship or aircraft of the nationality of a country other than the requesting or requested Parties was to be considered as transit through the territory of that country. Several experts thought that it should be so considered. Others observed that the strict application of such a rule would raise difficulties, in particular when the ship called in at the ports of third States or merely went through their territorial waters; would it in such cases be necessary to request such third States to allow transit? The reply to this question would vary according to whether the ship in question belonged to a private person, a private company or a State. In view of these difficulties, the committee decided not to deal with this question in the Convention but to leave it to be settled in practice.

The committee considered that it was for the requesting Party alone to make the necessary arrangements for transit and to settle all questions connected with it in agreement with the authorities of the country of transit. It was understood that the requesting Party would inform the requested Party as soon as the transit could be effected. The latter Party was not obliged to demand any guarantees in that respect. The requested Party would decide when and where to deliver the person claimed in accordance with Article 18, paragraph 3. It would have fulfilled its obligations by the delivery of the person claimed either at the frontier or at the port of embarkation of the ship or aircraft used to transport the person.

An expert raised the case of a person taken over by the requesting Party on the territory of the requested Party with the intention of transporting him by air through a third country. In such a case, the requesting Party was alone responsible for the transit. The requested Party could not therefore demand guarantees concerning the arrangements for the transit even if an aircraft of the requested Party was used.

Article 22 (Procedure)

This article provides that the procedure and the decision regarding provisional arrest and extradition shall be governed exclusively by the law of the requested Party.

Article 23 (Language to be used)

This article provides that the documents to be produced in support of a request for extradition shall be in the language of the requesting Party or that of the requested Party. The requested Party may, however, demand a translation in one of the official languages of the Council of Europe.

It was understood that the actual request for extradition should be drafted in one of the languages generally used in the diplomatic correspondence between the two Parties.

Article 24 (Expenses)

Paragraph 1 provides that reimbursement of the expenses incurred by the requested Party on its own territory cannot be claimed from the requesting Party.

Under *paragraphs 2* and *3* the transit and transport expenses of a person claimed from non-metropolitan territory between that territory and the metropolitan territory of the requested Party or of the requesting Party, shall be borne by the latter.

Article 25 (Definition of "detention order")

This article gives a definition of the expression "detention order" contained in Articles 1, 2, 12 and 14 of this Convention. This provision is inspired by Article 21 of the Franco-German Extradition Convention. (See comments on Article 1 of the present Convention.)

Article 26 (Reservations)

The main question at issue was whether the Convention should contain some general formula permitting reservations to be made with regard to any of the provisions of the Convention or whether the Convention should specify the provisions to which reservations could be made. As most of the experts were in favour of a general formula, this has been set out in *paragraph 1*.

The committee, however, considered that only essential and justifiable reservations could be made. It agreed with the opinion expressed by members of the competent Assembly sub-committee that only reservations based on the fundamental principles of a country's judicial system should be made.

Paragraph 2 may be considered a request to the States to withdraw their reservations as soon as circumstances permit.

Paragraph 3 allows a Party to apply the reciprocity rule with regard to the Party which has made a reservation.

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 27 (Territorial application)

Paragraph 1 provides that the Convention shall apply to the metropolitan territory of the Parties. This clause is identical with Article 30, paragraph 1, of the European Convention on Establishment, signed in Paris on 13 December 1955.

Paragraph 2 indicates the territory in which the Convention applies so far as France and the United Kingdom are concerned.(Note: The reference to Algeria no longer has any purpose following her acquiring independence, which event occured after the drawing-up of the Convention.)

Paragraph 3 allows for the extension of the Convention to the Land of Berlin. This provision was taken from Section VIII of the Protocol to the Convention referred to above.

Paragraph 4 deals with the extension of the present Convention to the territories for whose international relations a Party is responsible. This extension can only be made by direct arrangement between the Parties.

Article 28 (Relations between this Convention and bilateral agreements)

The question arises whether, in cases which are covered both by the Multilateral Convention and by a bilateral agreement, a requesting State is free to invoke whichever of the two it wishes, or whether a bilateral agreement has priority over the Multilateral Convention. This point is of particular importance in the case of a political offence for which extradition might be permitted under a bilateral agreement while it was excluded under the Multilateral Convention.

After a long discussion, the committee came to the conclusion that the Multilateral Convention should take precedence over any other agreement previously concluded. In the opinion of the experts the adoption of a rule to this effect was justified by the general and multilateral nature of this Convention which could be considered as governing the whole field of extradition between the Contracting Parties. Furthermore, the adoption of a rule to the contrary would have enabled Parties wishing to conclude a bilateral agreement to include in it provisions contradicting those of the Multilateral Convention, and thus depriving the latter of its substance. In view of these considerations, the rule was adopted and set out in *paragraph 1* of this article.

With regard to agreements which might be concluded between the Parties at a later date, *paragraph 2* of this Article to a certain extent limits their freedom by providing that they may conclude bilateral and multilateral agreements to *supplement* the provisions of the present Convention, or to *facilitate the application of the principles* contained in it. This new rule is the natural consequence of the principle, formulated in paragraph 1, that the Multilateral Convention shall take precedence over bilateral agreements.

Paragraph 3 allows Parties which have an extradition system based on uniform laws, i.e. the Scandinavian countries, or Parties with a system based on reciprocity, i.e. Ireland and the United Kingdom, to regulate their mutual relations on the sole basis of that system. This provision had to be adopted because the countries do not regulate their relations in the matter of extradition on the basis of international agreements, but did so or do so by agreeing to adopt uniform or reciprocal domestic laws.

Article 29 (Signature, ratification and entry into force)

This article, which provides that the Convention should "be open", permits member countries of the Council to sign the Convention at any time. Thus States unable to approve it now will be able to sign it later.

Three ratifications were considered sufficient to bring the Convention into force.

The committee considered that Parties should be given 90 days after the deposit of their instruments of ratification to take the practical measures necessary for putting the provisions of the Convention into effect.

Article 30 (Accession)

Under this article accession is made subject to an invitation being extended by the Committee of Ministers. The invitation will take the form of a resolution adopted in accordance with the statutory provisions of the Council of Europe. It is provided, however, that such a resolution is validly adopted only if the representatives of all the Contracting Parties on the Committee of Ministers vote in favour of it.

Article 31 (Denunciation)

Similar provisions are contained in the other conventions concluded in the Council of Europe. The committee decided that denunciation would take effect six months after its receipt.

Article 32 (Notification)

This article lists the matters which the Secretary General must bring to the notice of the Contracting Parties.

SUMMARY OF QUESTIONS WHICH WERE NOT DEALT WITH IN THE MULTILAREAL EUROPEAN CONVENTION BUT WERE DISCUSSED

1. Amnesty

The question was raised whether extradition should be refused:

1. If an amnesty has been declared in the requesting country;
2. If an amnesty has been declared in the requested country for offences of the type of that for which extradition is requested.

The experts were of the opinion that the first possibility need not be considered as it seemed very unlikely. Furthermore, a request for extradition in such a case would have no basis in law and would therefore have to be refused.

As regards the second possibility, the experts thought that an amnesty generally took local or national considerations into account and should not be extended to persons whom it was not originally intended to cover. Extradition should therefore be granted.

2. Offences committed before the entry into force of the Convention

Certain experts considered excluding from the field of application of the Convention offences committed more than a certain time before its signature. The committee was not in favour of a clause of this kind, since it was the unanimous opinion of the experts that, unless otherwise provided for, a bilateral convention was applicable without any time-limit as to offences committed before its entry into force, provided that the request for provisional arrest or extradition reached the requested Party after the Convention had come into force between the two Parties.

3. Settlement of disputes

The experts considered whether the text of the Convention should include a provision concerning the settlement of disputes. Several proposals were made on this subject. The committee rejected them, however, on the grounds that such provisions are only rarely found in conventions on extradition. In practice any differences which arise over the application or interpretation of such conventions are satisfactorily settled through diplomatic channels.

Certain experts observed that, if there was no special provision made in a convention, any differences of interpretation could be settled by invoking other agreements. Several Member States of the Council had concluded bilateral treaties on arbitration and conciliation; States Party to the 1928 General Act of Geneva could invoke that Act; and those States which had accepted the permissive clause of Article 36, paragraph 2, of the Statute of the International Court of Justice could invoke that clause. States which were not bound together by any of these agreements could always agree to submit a dispute of this kind either to the International Court of Justice or to arbitration. If the European Convention on the Peaceful Settlement of Disputes were to enter into force, it would be applicable to disputes arising out of a convention on extradition.

For these reasons the committee decided not to include a clause on the settlement of disputes in the model Convention.

4. Mutual assistance in criminal proceedings

This question which is connected with the problem of extradition was referred to during the committee's discussions. The committee was generally in favour 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.

Additional Protocol to the European Convention on extradition – ETS No. 86

Strasbourg, 15.X.1975

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

Having regard to the provisions of the European Convention on Extradition opened for signature in Paris on 13 December 1957 (hereinafter referred to as "the Convention") and in particular Articles 3 and 9 thereof;

Considering that it is desirable to supplement these Articles with a view to strengthening the protection of humanity and of individuals,

Have agreed as follows:

CHAPTER I

Article 1

For the application of Article 3 of the Convention, political offences shall not be considered to include the following:

a. the crimes against humanity specified in the Convention on the Prevention and Punishment of the Crime of Genocide adopted on 9 December 1948 by the General Assembly of the United Nations;

b. the violations specified in Article 50 of the 1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Article 51 of the 1949 Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked members of Armed Forces at Sea, Article 130 of the 1949 Geneva Convention relative to the Treatment of Prisoners of War and Article 147 of the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War;

c. any comparable violations of the laws of war having effect at the time when this Protocol enters into force and of customs of war existing at that time, which are not already provided for in the above-mentioned provisions of the Geneva Conventions.

CHAPTER II

Article 2

Article 9 of the Convention shall be supplemented by the following text, the original Article 9 of the Convention becoming paragraph 1 and the under-mentioned provisions becoming paragraphs 2, 3 and 4:

"2. The extradition of a person against whom a final judgment has been rendered in a third State, Contracting Party to the Convention, for the offence or offences in respect of which the claim was made, shall not be granted:

a. if the afore-mentioned judgment resulted in his acquittal;

b. if the term of imprisonment or other measure to which he was sentenced:

i. has been completely enforced;

ii. has been wholly, or with respect to the part not enforced, the subject of a pardon or an amnesty;

c. if the court convicted the offender without imposing a sanction.

3. However, in the cases referred to in paragraph 2, extradition may be granted:

a. if the offence in respect of which judgment has been rendered was committed against a person, an institution or any thing having public status in the requesting State;

b. if the person on whom judgment was passed had himself a public status in the requesting State;

c. if the offence in respect of which judgment was passed was committed completely or partly in the territory of the requesting State or in a place treated as its territory.

4. The provisions of paragraphs 2 and 3 shall not prevent the application of wider domestic provisions relating to the effect of *ne bis in idem* attached to foreign criminal judgments."

CHAPTER III

Article 3

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 4

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 5

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 preceeding paragraph may, in respect of any territory mentioned in such declaration, be withdrawn according to the procedure laid down in Article 8 of this Protocol.

Article 6

1. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, declare that it does not accept one or the other of Chapters I or II.

2. 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.

3. No reservation may be made to the provisions of this Protocol.

Article 7

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 8

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 9

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;

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 Article 3 thereof;

d. any declaration received in pursuance of the provisions of Article 5 and any withdrawal of such a declaration;

e. any declaration made in pursuance of the provisions of Article 6, paragraph 1;

f. the withdrawal of any declaration carried out in pursuance of the provisions of Article 6, paragraph 2;

g. any notification received in pursuance of the provisions of Article 8 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 15th day of October 1975, 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 each of the signatory and acceding States.

Additional Protocol to the European Convention on extradition – ETS No. 86

Explanatory Report

I. The Additional Protocol to the European Convention on Extradition, drawn up within the Council of Europe by a committee of governmental experts under the authority of the European Committee on Crime Problems, was opened to signature by the member States of the Council on 15 October 1975.

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

HISTORY

Background

1. The European Convention on Extradition is the oldest of the conventions relating to penal matters prepared within the Council of Europe. It entered into force on 18 April 1960 and, at the time of the preparation of this report (15 October, 1975) had been ratified by Austria, Cyprus, Denmark, Greece, Ireland, Italy, the Netherlands, Norway, Sweden, Switzerland and Turkey and acceded to by Finland, Israel and Liechtenstein.

The approaching tenth anniversary of the entry into force of the convention led the Council of Europe to organise from 9 to 11 June 1969 a meeting of those responsible at national level for the application of the convention. The participants were of the opinion that the text of the convention no longer corresponded entirely to present-day requirements for inter-State co-operation in the field of criminal law but they admitted that a revision of the convention would be premature. They recommended that a number of questions should be examined at national level for the purpose of implementing the convention or at bilateral level for the purpose of the conclusion of additional agreements.

Setting up of sub-committee and terms of reference

2. At the meeting of the Bureau of the European Committee on Crime Problems (ECCP), held on 2 July 1971, following the XXth Plenary Session of that committee from 24 to 28 May 1971, the conclusions of the June 1969 meeting were re-examined and it was decided to set up a sub-committee with the following terms of reference:

a. to carry out a detailed examination of the conclusions drafted at the June 1969 meeting on the problems of the application of the European Convention on Extradition

b. to propose, having regard to the different characters of those conclusions (whether or not calling for unilateral action by a Contracting State and whether or not necessitating authentic interpretation or revision of the convention) and taking into account the variety of Contracting States (some being member States of the Council of Europe and others not), all legal means appropriate to the implementation of these conclusions such as: authentic interpretation, unilateral action, recommendations to governments (members of the Council of Europe) and model bilateral agreements between Contracting States, etc.

Dr. R. Linke (Austria) was appointed Chairman of the sub-committee and Secretariat duties were carried out by the Division of Crime Problems in the Directorate of Legal Affairs of the Council of Europe.

Working methods of the sub-committee

3. During meetings held in November 1972 and February 1973 the sub-committee examined each of the conclusions of the June 1969 meeting and the reservations made by Contracting Parties to the European Convention on Extradition. In the light of suggestions put forward and papers submitted by its members and the Secretariat,it formulated proposals to implement the conclusions of the June 1969 meeting and proposals aimed at reducing or eliminating the reservations.

These proposals were briefly examined by the ECCP at its XXIInd Plenary Session in May 1973 and revised in the light of observations made on that occasion at a meeting of the sub-committee held in November 1973.

Examination by an enlarged sub-committee

4. At its XXIInd Plenary Session, the ECCP had agreed that, from the legal point of view, participation of all Contracting Parties to the European Convention on Extradition was vital to the success of any attempt to interpret and supplement the convention. Accordingly the proposals of the sub-committee were submitted to a meeting of an enlarged sub-committee in March 1974 to which were invited representatives of all the member States of the Council of Europe and of all Contracting Parties to the convention which were not member States.

Examination by the ECCP

5. The proposals of the sub-committee, as amended by the above-mentioned enlarged sub-committee, were submitted to the XXIIIrd Plenary Session of the ECCP in May 1974. At that stage the proposals of the sub-committee were contained in several texts in different forms each bearing on specific aspects of the application of the European Convention on Extradition; one of these texts was a draft of the Protocol which is the object of this report. The Plenary Session decided that all the texts in question should be transmitted to the Committee of Ministers.

Approval by the Committee of Ministers

6. The Committee of Ministers of the Council of Europe approved the text of the draft Protocol at its meeting in May 1975 (245th meeting of the Ministers'Deputies).

Opening to signature

7. The Additional Protocol to the European Convention on Extradition was opened to signature on 15 October 1975 during the 249th meeting of the Ministers'Deputies.

GENERAL OBSERVATIONS

8. The June 1969 meeting of those responsible at national level for the application of the European Convention on Extradition formulated conclusions on numerous topics. The Protocol bears on two of these topics, namely, the meaning of "political offence" and the operation of the principle *ne bis in idem*. The desirability of affording States that had made reservations to the convention an opportunity to withdraw or restrict them was constantly in mind during the preparation of the Protocol and it is hoped that the Protocol will assist in this aim.

It should be noted that the Protocol supplements the original Articles 3 and 9 of the Extradition Convention (concerning, respectively, political offences and *ne bis in idem*) but does not modify the existing texts of those articles.

9. During the preparation of the Protocol, a number of States expressed hesitations about the provisions of Chapter I. They took the view that it was not right to lay down in advance that certain offences could never be considered "political offences" for the purposes of extradition and that this question should be left to the appropriate national authority in the light of the facts of each individual case. In order to accommodate, in particular, this view whilst at the same time enabling States who wish to do so to become Contracting Parties to the instrument as a whole, Article 6 of the Protocol provides that a Contracting Party may declare that it does not accept one or the other of Chapters I or II.

10. The commentary which follows is in three parts corresponding to the chapters of the Protocol, namely:

I. Political offence

II. *Ne bis in idem*

III. Final clauses.

In addition to a detailed analysis of articles, the commentary contains remarks of a general nature on the subject matter of each chapter.

COMMENTARY ON THE ADDITIONAL PROTOCOL

CHAPTER I – POLITICAL OFFENCE

General remarks

11. Article 3 of the convention provides that extradition shall not be granted if the offence in respect of which it is requested is regarded by the requested party as a political offence or as an offence connected with a political offence. It further excludes from the ambit of political offences the taking or attempted taking of the life of a Head of State or a member of his family and contains a saving clause for obligations which Contracting Parties may have undertaken or may undertake under any other international convention of a multilateral character.

12. The convention thus already contained certain limitations on the extent to which an individual could avail himself of the concept of political offence as a defence to a request for extradition. The June 1969 meeting had concluded that there were other circumstances in which, notwithstanding the motive underlying the offence, it would not be justifiable, in view of the nature of the offence, that the individual should be able to evade extradition; it considered that such circumstances existed when the offence in question took the form of genocide, a war crime or a crime against humanity. This suggestion was in line with what was considered to be a current trend towards defining political offences and regarding certain crimes as so abominable that no immunity could be granted. It has to be borne in mind in this context that, if extradition is refused, the offender may escape punishment since the State where he is may lack jurisdiction over the offence in question.

13. In the meantime there had been prepared within the Council of Europe the European Convention on the Non-applicability of Statutory Limitation to Crimes against Humanity and War Crimes which sets out certain obligations in the matter of limitation on the prosecution and punishment of the same types of crime as those referred to by the June 1969 meeting. This new convention contained a list of the offences to which it related and it was decided, in view of the similarity of the subject matter, to adopt subject to some changes of detail referred to in paragraph 16 below the same list for the Protocol to the European Convention on Extradition. It was noted, in this context, that the majority of the member States of the Council of Europe were parties to the international conventions cited in the aforesaid list and, indeed, the above-mentioned saving clause in Article 3 of the Extradition Convention was drafted with these conventions particularly in mind.

14. The effect of Chapter I of the Protocol is accordingly to add to the list of offences which, for the purposes of Article 3 of the Convention on Extradition, shall not be considered political offences, the following:

a. the crimes against humanity specified in the 1948 United Nations Convention on the Prevention and Punishment of the Crime of Genocide;

b. certain violations of the 1949 Geneva Conventions as the same are more particularly detailed in Article 1 of the Protocol; and

c. any comparable violations of the laws or customs of war having effect or existing when the Protocol enters into force.

Article 1

15. Article 3 of the European Convention on Extradition prohibits extradition if the offence in respect of which it is requested is regarded by the requested party as a political offence or as an offence connected with a political offence. The effect of this chapter is to prevent the requested party from so regarding an offence if it constitutes or is connected with one of the crimes or violations listed in paragraphs *a.*, *b.* and *c.* of

Article 1. In such a case the requested State would be under an obligation to extradite the offender, provided, of course, that the remaining conditions of the Extradition Convention were satisfied.

The effect of this chapter is limited to the specific context of Article 3 of the Extradition Convention; it has no bearing on the interpretation of any other treaty binding a Contracting Party nor on the interpretation of the expression "political offence" in any other context.

16. As mentioned above, the content of paragraphs *a., b.* and *c.* is based on Article 1 of the European Convention on the Non-applicability of Statutory Limitation to Crimes against Humanity and War Crimes. When that convention was drafted, it was recognised that its scope *ratione materiae* had to be very precisely defined and it was asked whether there would be advantage in making an exhaustive list of the gravest war crimes; the conclusion was reached that there was no purpose in establishing a new list of concepts or offences which might not accord with those already recognised in international law and that the best course was to define the offences by reference to what was already established in international law. It was also considered that the crimes listed in the United Nations Convention on the Prevention and Punishment of the Crime of Genocide were all of sufficient gravity to justify a departure from the rule of statutory limitation and that the desire to keep to an already existing definition in international law could best be met by making reference to this Genocide Convention. These considerations also guided, *mutatis mutandis,* the draftsmen of the Protocol to the Extradition Convention.

However, the Protocol differs from the Statutory Limitation Convention in two respects:

a. the latter convention stipulates that the violation of the Geneva Conventions or of the laws or customs of war in question must be of "a particularly grave character" before the provisions of the convention will apply. It was considered neither necessary nor justifiable for the Protocol to include such a stipulation; the gravity of the offence might be relevant to the applicability or non-applicability of statutory limitation but not to the political or non-political character of an offence which depends on whether or not it constitutes a specified crime;

b. the latter convention provides that Contracting States may, by declaration, add to the list of offences which are not subject to statutory limitation certain other violations of a rule or custom of international law established in the future. A similar provision does not appear in the Protocol since it was thought that, in the context of extradition, a list of names was preferable to a system of declarations which could lead to confusion.

17. For ease of reference, relevant extracts from the Genocide and the Geneva Conventions are set out at the end of this report. Article 1.c. of the Protocol refers to violations of comparable provisions of international law of war not specifically dealt with in the 1949 Geneva Conventions mentioned in Article 1.*b*. It appeared that those Geneva Conventions were exclusively concerned with the protection of certain categories of people and were, thus, silent as regards violations of certain aspects of the law of war (as set out, for instance, in the 1899 and 1907 Hague Conventions) not covered by the 1949 International Red Cross Conventions. It is not intended that the notion of war crimes should be interpreted as confined to violations of the rules applicable to a declared war but rather that it should include violations of the humanitarian law in armed conflict and occupation, unless, of course, the inter national instrument concerned is restricted to a declared war.

CHAPTER II – *NE BIS IN IDEM*

General remarks

18. The expression *ne bis in idem* means that a person who has once been the subject of a final judgment in a criminal case cannot be prosecuted again on the basis of the same fact.[1]

At the national level this principle is generally recognised in the laws of member States, for a final judgment delivered in a particular State debars the authorities of that State from taking new proceedings against the same person on the basis of the same body of facts.

19. At the international level, however, the position is less clear. Thus no State in which a punishable act has been committed is debarred from taking proceedings in respect of an offence merely because it has already been the object of proceedings in another State. This position results not only from the fact that the right to take proceedings in respect of offences has traditionally been considered part of sovereignty but also from

1. This principle is described in the title to Article 9 of the Extradition Convention as *non bis in idem*; the Protocol adopts the version *ne bis in idem* merely because it appears in more recent European conventions, the two versions being in fact regarded as interchangeable.

the fact that the State of the offence more often than not will be the State in which the commission of the act can best be proved; it would therefore seem unjustified for that State normally to be bound by decisions delivered in other States, where the absence of certain elements of evidence may have led to acquittal or the imposition of less severe penalties.

Against this view may be set that which considers that the offender will be subjected to a manifestly inequitable treatment if he is again prosecuted and may even be subjected to the enforcement of several judgments for the same offence. Indeed, the European Commission of Human Rights has, as early as in 1964, drawn attention to this aspect of the *ne bis in idem* problem.

20. It was this latter view that led to the inclusion in Article 9 of the European Convention on Extradition of provisions to the effect that:

a. extradition shall not be granted if final judgment has been passed by the competent authorities of the requested party upon the person claimed in respect of the offence or offences for which extradition is requested; and

b. extradition may be refused if the competent authorities of the requested party have decided either not to institute or to terminate proceedings in respect of the same offence or offences.

21. The June 1969 meeting drew attention to the fact that these provisions were limited to the *ne bis in idem* effect of a final judgment in the requested State and recommended that they be enlarged to take account of, notably, final judgments passed in a third State.

22. The recognition of a foreign judgment clearly presupposes a certain degree of confidence in foreign justice. That such confidence existed among the member States of the Council of Europe had, since the preparation of the Extradition Convention, been evidenced by later instruments, namely, the European Conventions on the International Validity of Criminal Judgments and on the Transfer of Proceedings in Criminal Matters, both of which attribute, in certain circumstances, the *ne bis in idem* effect to judgments rendered in States other than those party to the request for the type of assistance involved.

When the recommendation of the June 1969 meeting was examined, the view was taken that any additional provision concerning the *ne bis in idem* effect of judgments rendered in third States should be in conformity with the provisions in the later conventions mentioned above. In any event a rule restricting extradition should not go beyond the limits imposed on proceedings by those two conventions since it would be unjustified to authorise, or even to oblige, the requested State to refuse extradition to a requesting State which was recognised to have a right to prosecute under the other European conventions establishing the principle *ne bis in idem*.

23. Accordingly the text of the Protocol follows very closely on this point the provisions of the two later conventions mentioned above. Subject to the more detailed commentary below, the effect of the Protocol is basically to add to the existing rule prohibiting extradition where there has been a prior final judgment in the requested State a further prohibition on extradition where there has been a prior final judgment in a third State party to the Convention on Extradition) which satisfies certain conditions. This further prohibition does not apply where the offence in question had been committed in the requesting State or in the case of specified offences directed against the particular interests of the requesting State.

24. It will be noticed that a further effect of the Protocol is to differentiate between prior judgments rendered in the requested State and prior judgments rendered in a third Contracting State. The former have a *ne bis in idem* effect if they are "final"; for the latter to have such an effect, they must not only have been final but also fulfil the other conditions specified in Article 2, paragraph 2, of the Protocol. It was recognised that there might be a certain illogicality in these provisions and that the text of Article 9 of the convention (as amended by the Protocol) could be improved if the whole convention came to be re-negotiated, however, the sub-committee did not consider it within its terms of reference to attempt a wholesale revision of the convention. It wished to place on record that the combined effect of the Protocol and Article 9 of the convention was to attach greater importance to judgments in the requested State than to judgments in a third State since the former had a *ne bis in idem* effect even though, for example, they had not been enforced. Moreover, Article 9 provides a possibility of refusing extradition if there has been a decision not to prosecute in the requested State whereas the Protocol does not deal at all with similar decisions in a third State.

Article 2 – Introduction

25. The introductory paragraph of this article, dealing solely with the insertion into Article 9 of the Extradition Convention of the additional substantive provisions, calls for no particular comment except to record

that the ne bis in idem effect of a judgment in the requested State continues to be regulated solely by the original provisions of the said Article 9.

Article 2, paragraph 2

26. This new paragraph calls for the following comments:

a. as in the case of the original Article 9 of the convention, the word "final" used in this paragraph indicates that all means of appeal have been exhausted. It was understood that a judgment rendered in the accused's absence is not to be considered a final judgment, nor is a judgment *ultra vires*;

b. decisions taken in third States which are not in the form of a judgment and which preclude or terminate proceedings e.g. a decision that there are no grounds for prosecution ("ordonnance de non-lieu")) do not exclude or limit extradition. Such decisions are often based on procedural reasons or influenced by the expediency principle of prosecution. It was for this reason that the Conventions on the International Validity of Criminal Judgments and on the Transfer of Proceedings in Criminal Matters, on which this paragraph is based, attribute a *ne bis in idem* effect only to "judgments";

c. only judgments rendered in a third State "Contracting Party to the convention" preclude extradition. It was thought that to take account, in this context, of judgments rendered in other third States would unnecessarily restrict extradition and was not required to ensure reasonable protection of the individual claimed. Moreover, as is already made clear in the explanatory report on the European Convention on the International Validity of Criminal Judgments, it is desirable "to give more substance to the principle of *ne bis in idem* at the European level than at the wider international level" since "the recognition of a foreign judgment presupposes a certain degree of confidence in foreign justice". (See, however, the commentary on paragraph 4 of this article at paragraph 29 below);

d. the mere fact that the judgment rendered in the third State has become final does not suffice to preclude extradition. The judgment must also meet the requirements specified in sub-paragraphs *a.*, *b.* or *c*.

Article 2, paragraph 2, sub-paragraph a.

e. This sub-paragraph relates to acquittals. Not every judgment of acquittal would preclude extradition since it would remain possible in the two following cases:

i. if new facts come to the knowledge of the requesting State after the final judgment resulting in acquittal has been rendered in the third State and these facts are capable of being grounds for a re-trial. In such a case the third State judgment would not have been rendered "for the offence or offences in respect of which the claim was made" since the requesting State's claim would be based on facts which, ex *hypothesi,* were not before the court of the third State at the time of the acquittal

ii. if the judgment of the third State pronounced the acquittal purely for formal reasons, e.g. for lack of jurisdiction. Here again the third State judgment could not be considered as rendered "for the offence or offences in respect of which the claim was made".

In contradistinction to the case cited at *ii.* above an acquittal which is due to the fact that the particular act is not punishable under the penal legislation of the State of judgment would preclude extradition. In view of the fact that the rule of *ne bis in idem* will normally be relevant only if the judgment is delivered in the State in which the offence was committed, it will accord best with the general principle of dual criminal liability that an acquittal based on the fact that the act is not punishable in that State should also be covered by the provision of sub-paragraph *a*.

Article 2, paragraph 2, sub-paragraph b.

f. This sub-paragraph relates to judgments imposing a term of imprisonment or other measure. The general application of the principle of *ne bis in idem* to such judgments would lead to the unacceptable result that the mere fact that a State happened to take criminal proceedings first would debar other States from prosecuting for the offence. The interest of States in the effective reduction of crime has to be weighed against the general consideration requiring that a person should not be prosecuted several times for the same act.

In the member States whose legislation contains special provisions on the subject, such weighing of conflicting considerations has normally led to the result that a foreign conviction is given the effect of *res judicata* only if the sanction has been served or has been remitted. That solution reasonably meets the legitimate

interest of the convicted person not to be prosecuted several times for the same act, since – normally, in any case – new proceedings will be taken only where he has rendered himself liable thereto by evading the enforcement of the sanction in. the State of the first judgment. On the other hand, as long as the enforcement of a judgment follows a normal course, new proceedings ought not to be instituted.

Sub-paragraph *b*. has been drafted accordingly. *Res judicata* effect is given to a judgment imposing a measure which has been completely enforced or has been wholly, or with respect to the part not enforced, the subject of a pardon or an amnesty.

Having regard to the drafting of the provision, the fact that only a minor part of a sentence, or possibly a measure imposed under the judgment, has not been served in the normal way will imply that extradition is not precluded. It has not been considered possible to distinguish whether the convicted person has evaded a larger or smaller part of the sentence, it must be stressed, however, that in accordance with the view underlying this provision, States should hesitate to request extradition where only a small part of the sentence has not been served. This applies irrespective of the question whether the other State would, in its determination of sentence, have to take account of the sentence already served; the mere fact that the person already sentenced might be subject to a new prosecution may imply an inequitable aggravation of his situation.

Article 2, paragraph 2, sub-paragraph c.

g. This sub-paragraph relates to judgments where the court convicted the offender without imposing a sanction.

Article 2, paragraph 3

27. As in the case of the European Conventions on the International Validity of Criminal Judgments and on the Transfer of Proceedings in Criminal Matters, it was thought necessary to reserve special cases where it was in the special interest of the requesting State to be able to institute proceedings notwithstanding the prior judgment in a third State. Such is the purpose of this paragraph.

It should be noted that extradition in these special cases is optional rather than obligatory, this paragraph having been so drafted to avoid any conflict between its provisions and those of the saving clause for domestic law contained in paragraph 4 of Article 2 of the Protocol.

28. It was considered that a State might have a special interest in being able to take proceedings in two categories of case.

The first category (covered by sub-paragraphs *a.* and *b.* of paragraph 3) applies to cases where the offence is directed against either a person or an institution or any thing having public status in that State, or where the offender had himself a public status in that State.

Consideration was given to whether a more general term could be adopted in that provision, such as "acts directed against the interests of a State", but the term was thought too comprehensive and vague. Such a term would, for example, include offences against a large number of the trade regulations provided for in special national legislation.

As examples of offences that will be covered by sub-paragraphs *a.* and *b.,* mention may be made of assaults on public servants ("a person having public status"), espionage ("an institution having public status"), counterfeiting ("any thing having public status") and the taking of bribes ("had himself a public status").

The second category (covered by sub-paragraph c. of paragraph 3) applies to cases where the offence was committed completely or partly in the territory of the requesting State. This provision reflects the importance of the principle of territoriality which also underlies, for example, Article 7 of the Extradition Convention. Moreover, in most cases the courts of the State of the offence will be able to collect all the evidence more easily and proceedings in that State may also be of value in respect of a claim for compensation by a party injured by the offence.

Article 2, paragraph 4

29. During the preparation of the Protocol, attention was drawn to the fact that the domestic laws of some States were of broader application than the rules set out in paragraphs 2 and 3 of Article 2 of the Protocol in that there was an obligation either to recognise the *ne bis in idem* effect of a judgment rendered in a third State which was not a party to the Extradition Convention or to recognise the *ne bis in idem* effect of a judgment even if, for example, the sentence it imposed had not been enforced. For this reason a saving for wider

provisions of domestic law features in paragraph 4 of Article 2. It should be noted that this saving applies to domestic laws on the effect of judgments in any third State, even though they are parties to the Extradition Convention. The overall result is to give the provisions of Chapter II of the Protocol the nature of minimum rules, each State being free to maintain or adopt rules which give a wider effect of *ne bis in idem* to foreign judgments.

CHAPTER III – FINAL CLAUSES

General remarks

30. Articles 3 to 9 are, for the most part, based on the model final clauses of agreements and conventions which were approved by the Committee of Ministers of the Council of Europe, sitting at Deputy level, during its 113th meeting.

During the course of the preparation of the Protocol it was noted that, if the Extradition Convention itself ever came to be fully revised, it would be right to consider to what extent the final clauses of the convention should be brought into line with the more modern formulation utilised in the final clauses of the Protocol. In this context, reference was made to Article 27 of the convention (concerning territorial extension) as compared with Article 5, paragraph 2, of the Protocol. Again the convention has no provision resembling Article 7 of the Protocol on the friendly settlement of difficulties since, inter alia, the ECCP did not exist when the convention was being prepared.

The question was also raised of the relationship between the Protocol and the provisions of Article 28 of the convention restricting the content of bilateral agreements. It was agreed that the Protocol should not contain any provision that would affect existing bilateral agreements. It is, for example, known That certain States have concluded bilateral agreements setting limits on the extent to which an amnesty is a bar to extradition, such agreements would not be affected by the provisions of the Protocol. The question of the effect of future bilateral agreements bearing on a subject matter dealt with by the Protocol would, it was thought, fall to be regulated by general international law (cf. in particular, Articles 30 and 41 of the Vienna Convention on the Law of Treaties).

Most of the final clauses do not call for special comment but the following points may be mentioned.

Article 3, paragraphs 1 and 4

31. Member States of the Council of Europe that have signed but not ratified the Extradition 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 that has ratified the convention. There would be no obligation on a member State ratifying the convention in the future to ratify, accept or approve the Protocol.

Article 3, paragraph 2

32. If a State has exercised the option available under Article 6 not to accept one or the other of Chapters I or II, its instrument of ratification, acceptance or approval will be counted as one instrument for the purposes of Article 3, paragraph 2.

Article 4, paragraphs 1 and 2

33. The Protocol may be acceded to by a non-member State only if it has acceded to the Extradition Convention.

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 that 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 3, paragraph 2, is conditional on ratification, acceptance or approval by three member States.

Article 6

34. This article was inserted for the reasons indicated in paragraph 9 of this report.

The intention is that partial non-acceptance of Chapters I or II of the Protocol is not possible, from which it follows that there can be no question of a partial withdrawal under paragraph 2 of this article of a declaration made pursuant to its paragraph 1. In order to avoid any contrary argument that might he drawn from the terms of the Extradition Convention itself or from the general law of treaties, Article 6, paragraph 3, forbids the making of reservations to the Protocol.

Article 9, paragraph g.

35. It was considered that this paragraph was sufficiently wide to cover the automatic denunciation of the Protocol which, under its Article 8, was entailed by denunciation of the Extradition Convention.

Second additional Protocol to the European Convention on extradition – ETS No. 98

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 Extradition opened for signature in Paris on 13 December 1977 (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

Paragraph 2 of Article 2 of the Convention shall be supplemented by the following provision:

> "This right shall also apply to offences which are subject only to pecuniary sanctions."

CHAPTER II

Article 2

Article 5 of the Convention shall be replaced by the following provisions:

> "Fiscal offences
>
> 1. For offences in connection with taxes, duties, customs and exchange extradition shall take place between the Contracting Parties in accordance with the provisions of the Convention if the offence, under the law of the requested Party, corresponds to an offence of the same nature.
>
> 2. Extradition 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, custom or exchange regulation of the same kind as the law of the requesting Party."

CHAPTER III

Article 3

The Convention shall be supplemented by the following provisions:

"Judgments in absentia

1. When a Contracting Party requests from another Contracting Party the extradition of a person for the purpose of carrying out a sentence or detention order imposed by a decision rendered against him *in absentia*, the requested Party may refuse to extradite for this purpose if, in its opinion, the proceedings leading to the judgment did not satisfy the minimum rights of defence recognised as due to everyone charged with criminal offence. However, extradition shall be granted if the requesting Party gives an assurance considered sufficient to guarantee to the person claimed the right to a retrial which safeguards the rights of defence. This decision will authorise the requesting Party either to enforce the judgment in question if the convicted person does not make an opposition or, if he does, to take proceedings against the person extradited.

2. When the requested Party informs the person whose extradition has been requested of the judgment rendered against him *in absentia*, the requesting Party shall not regard this communication as a formal notification for the purposes of the criminal procedure in that State".

CHAPTER IV

Article 4

The Convention shall be supplemented by the following provisions:

"Amnesty

Extradition shall not be granted for an offence in respect of which an amnesty has been declared in the requested State and which that State had competence to prosecute under its own criminal law."

CHAPTER V

Article 5

Paragraph 1 of Article 12 of the Convention shall be replaced by the following provisions:

"The request shall be in writing and shall be addressed by the Ministry of Justice of the requesting Party to the Ministry of Justice of the requested Party; however, use of the diplomatic channel is not excluded. Other means of communication may be arranged by direct agreement between two or more Parties."

CHAPTER VI

Article 6

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 7

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 8

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 9

1. Reservations made by a State to a provision of the Convention shall be applicable also to this Protocol, unless that State otherwise declares at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession.

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;

   b. not to accept Chapter II, or to accept it only in respect of certain offences or certain categories of the offences referred to in Article 2;

   c. not to accept Chapter III, or to accept only paragraph 1 of Article 3;

   d. not to accept Chapter IV;

   e. not to accept Chapter V.

3. Any Contracting Party may withdraw a reservation it has made in accordance with the foregoing paragraph by means of 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 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 6 and 7;

d. any declaration received in pursuance of the provisions of paragraphs 2 and 3 of Article 8;

e. any declaration received in pursuance of the provisions of paragraph 1 of Article 9;

f. any reservation made in pursuance of the provisions of paragraph 2 of Article 9;

g. the withdrawal of any reservation carried out in pursuance of the provisions of paragraph 3 of Article 9;

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.

Second additional Protocol to the European Convention on extradition – ETS No. 98

Explanatory Report

I. The Second Additional Protocol to the European Convention on Extradition, 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 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 Second Additional Protocol although it may facilitate the understanding of the Additional Protocol's provisions.

INTRODUCTION

1. As did the Additional Protocol to the European Convention on Extradition, which was opened for signature on 15 October 1975[1], the preparation of the Second Additional Protocol has its origin in a meeting which the Council of Europe organised in June 1969 for the persons responsible at national level for the application of the Convention. The participants in that meeting discussed the various problems arising in connection with the implementation of the Convention and made a number of proposals aimed at improving its functioning[2].

2. At its 20th Plenary Session in 1971, the European Committee on Crime Problems (ECCP) examined the conclusions of the 1969 meeting and set up a sub-committee (Sub-committee No. XXXI of the ECCP) which was instructed to carry out a detailed examination of the problems dealt with and to propose the appropriate means for implementing the conclusions reached at the 1969 meeting.

Mr R. Linke (Austria) was appointed Chairman of the subcommittee. The secretariat was provided by the Division of Crime Problems of the Directorate of Legal Affairs of the Council of Europe.

3. The sub-committee first elaborated the Additional Protocol which was opened for signature on 15 October 1975. It then examined a number of other questions relating to the practical application of the Convention. During its meetings held from 24 to 27 September 1974, from 22 to 25 April 1975 and from 15 to 19 March 1976, it prepared, *inter alia,* the Protocol which is the subject of this report.

4. 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.

5. 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.

1. Council of Europe Treaty Series, No. 86.
2. cf. the publication *Legal Aspects of Extradition among European States*, Council of Europe, Strasbourg 1970.

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

GENERAL OBSERVATIONS

7. 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 include different subjects in one and the same Protocol. Following the method already adopted for the Additional Protocol to the Extradition Convention of 15 October 1975, the subcommittee decided in favour of the latter approach. Consequently, the Protocol contains provisions on a number of different topics; they relate to:

- the extension of accessory extradition to offences carrying only a pecuniary sanction (Chapter I);
- the extension of the Convention to fiscal offences (Chapter II);
- judgments *in absentia* (Chapter III);
- amnesty (Chapter IV); and
- the communication of requests for extradition (Chapter V).

8. It is to be noted that the provisions on fiscal offences and on requests for extradition (Chapters II and V) modify the existing texts of the relevant articles of the Convention, whereas the provisions on accessory extradition, on judgments *in absentia* and on amnesty (Chapters I, III and IV) complement the original articles.

COMMENTARY ON THE ARTICLES OF THE PROTOCOL

CHAPTER I – ACCESSORY EXTRADITION

9. The law of some States draws a distinction between criminal offences properly so-called and certain other types of offences. While criminal offences are punishable by criminal penalties, the other offences are dealt with by pecuniary sanctions which are not regarded as criminal penalties. In the Federal Republic of Germany, for instance, there are offences against public order *(Ordnungswidrigkeiten)* which are dealt with by a fine by the administrative authorities, but are subject to appeal to the ordinary criminal courts.

10. Under the Convention, minor criminal offences which carry only a fine as well as the other types of offences mentioned in paragraph 9 cannot give rise to accessory extradition in accordance with Article 2.2 since they do not fulfil the specified conditions regarding the nature of the sanction. Nonetheless, these offences may cause considerable social harm (e.g. violation of regulations relating to the protection of the environment). It was therefore thought desirable to include them all in the category of offences for which accessory extradition can be granted, particularly since the seriousness of the offence which is normally a condition of extradition does not give rise to concern in the case of accessory extradition.

11. Chapter I extends the scope of application of accessory extradition permissible under Article 2.2 to these offences. The requesting State is thus given the possibility of obtaining extradition also for an offence which is subject to a criminal fine or to any other pecuniary sanction.

12. As regards the principle of double criminality, all these offences must fulfil the general condition laid down in Article 2.1, i.e. they must be subject to a sanction under the laws of both the requested and the requesting States. However, it is not necessary for them to be punishable by the same kind of sanction in both States. The same principle is laid down, for instance, in Article 11.2 of the Swiss-German Agreement of 13 November 1969 supplementing the European Convention on Extradition.

13. As the offences covered by Chapter I are offences within the meaning of Article 14.1 of the Convention, the rule of speciality laid down in that provision applies to accessory extradition for such offences.

14. As regards the documents to be submitted in support of the request for accessory extradition in respect of these offences, Article 12 of the Convention applies, it being understood that the requesting State may present, instead of a warrant of arrest, any other document showing that a charge has been brought against the person concerned.

CHAPTER II – FISCAL OFFENCES

15. Article 5 of the Convention provides that extradition for fiscal offences, i.e. offences in connection with taxes, duties, customs and exchange, shall be granted only if the Contracting Parties have so decided

in respect of any such offence or category of offences. A previous arrangement between the Parties is therefore necessary.

Chapter II of the Protocol gives Article 5 of the Convention a more mandatory form: extradition shall take place irrespective of any arrangements between the Contracting Parties whenever the fiscal offence, under the law of the requesting State, corresponds, under the law of the requested State, to an offence of the same nature.

16. This new rule reflects a tendency towards no longer allowing fiscal offences to fall outside the scope of application of extradition arrangements. It was for a long time thought that fiscal offences should not be treated as ordinary offences as they were akin to military or political offences which traditionally did not give rise to extradition. States hesitated to grant extradition when the victim of the offence was not a private person but another State, because it was thought that it was not the task of one State to protect the finances of another.

However, recently the approach to criminal policy has undergone considerable changes. It is now recognised that greater attention has to be given to economic offences in view of the damage they cause to society. It is also felt that there is now a need for closer international cooperation in this field, and that it is no longer justifiable to distinguish, in the field of extradition, between "ordinary" and fiscal offences.

For the purpose of extradition, Chapter II therefore puts fiscal and "ordinary" offences on the same footing.

17. Under the Convention (Article 2), extradition is subject to the conditions of dual criminal liability: the offence in respect of which extradition is sought must be a punishable offence of the same kind within the competence of the courts in both the requesting and the requested State.

As regards fiscal offences, the laws of member States differ in respect of the constituent elements of the various offences connected with taxes, duties, customs and exchange. To avoid difficulties of interpretation in respect of "fiscal" offences within the meaning of Chapter II, the text, rather than adopt the term "fiscal offence" which has no common meaning, reproduces the words appearing in Article 5 of the Convention ("taxes, duties, customs and exchange"); furthermore it is provided in paragraph 1 that extradition shall take place "if the offence, under the law of the requested Party, corresponds to an offence of the same nature": extradition is to be granted not only where an act is punishable as the same fiscal offence in the requesting and the requested Party, but also where an act of the same nature as that underlying the request for extradition would be punishable in the requested Party.

For example, a person who intentionally evades a tax or duty in the requesting State by giving untrue information in a document which serves as a basis for a decision concerning the amount of that tax or duty, may be extradited if the same kind of deliberate misleading of tax authorities is punishable under the law of the requested State, even if the law of that State does not correspond entirely with the law of the requesting State.

18. It follows from the absence of a definition of the term "fiscal offence" that the requested State has wide discretion in evaluating the eventual nature of the offence.

19. The fact that the law of the requested Party does not impose the same kind of tax or duty as the law of the requesting Party is irrelevant by virtue of paragraph 2. Extradition may not be refused on that ground. Here again, the basic idea is that the essential constituent elements of the offence shall be decisive.

20. Extradition in respect of fiscal offences is granted "in accordance with the provisions of the Convention". It is therefore subject to the conditions laid down in the Convention, including those concerning the level of penalties for the offence in question (Article 2 of the Convention).

CHAPTER III – JUDGMENTS *IN ABSENTIA*

21. Chapter III complements the European Convention on Extradition with regard to judgments in absentia, i.e. judgments rendered after a hearing at which the sentenced person was not personally present.

(cf. the definition in Article 21.2 of the European Convention on the International Validity of Criminal Judgments). The expression "judgments *in absentia*" means judgments properly so-called and does not include for instance, *ordonnances pénales*.

22. The sub-committee had first considered whether the text of the Protocol might not be based on Articles 21 *et seq.* of the European Convention on the International Validity of Criminal Judgments, since it might be illogical to treat some judgments *in absentia* as contentious for the purpose of that Convention and not for

the purpose of the Extradition Convention. It was, however, considered that it was not possible to transfer the machinery of that Convention to a different context: that Convention concerns in particular execution of a judgment in the requested and not in the requesting State and the special procedure of notification followed by opposition would not really be appropriate as the individual claimed would, *ex hypothesi,* have to make an opposition in a State from which he was absent.

23. For these reasons the sub-committee decided to provide for a procedure proper to the Extradition Convention. Paragraph 1 of Chapter III allows the requested Party to refuse extradition if the proceedings leading to the judgment did not satisfy the rights of defence recognised as due to everyone charged with a criminal offence. An exception to this principle is made if the requesting Party gives an assurance considered sufficient to guarantee to the person concerned the right to a retrial which safeguards his rights of defence: in that case extradition shall be granted.

24. At the origin of this amendment is the Netherlands reservation to the Extradition Convention to the effect that extradition would not be granted if the individual claimed had not been enabled to exercise the rights specified in Article 6.3.c of the Human Rights Convention. The sub-committee was, however, of the opinion that any exemption from the obligation to extradite should apply if there had been a violation of any of the generally acknowledged rights of defence, in particular those specified in the whole of Article 6.3 of the Human Rights Convention and not merely those mentioned in sub-paragraph c thereof. Moreover, the Netherlands reservation refers only to extradition to enforce a judgment *in absentia;* it is essential to specify that, if there is no longer an obligation to extradite for this purpose, it will, under certain conditions, remain obligatory to extradite to permit the requesting State to take proceedings.

25. As regards the reference to the "rights of defence recognised as due to everyone charged with a criminal offence", it should be noted that on 21 May 1975, the Committee of Ministers of the Council of Europe adopted Resolution (75) 11 on the criteria governing proceedings held in the absence of the accused. This resolution recommends the governments of member States to apply a number of minimum rules when a trial is held in the absence of the accused. These minimum rules are aimed at guaranteeing the accused's rights as laid down in the European Convention for the Protection of Human Rights and Fundamental Freedoms and may serve for the purpose of determining the scope of the phrase "rights of defence" used in Chapter III. The reference to the rights of defence due to "everyone charged with a criminal offence" is indeed drawn from the Human Rights Convention and is intended to cover in particular the rights specified therein.

26. Reference is made to the purpose of the extradition request because Article 1 of the Convention makes a distinction between requests for the purpose of enforcing a judgment and requests for the purpose of taking proceedings.

27. The phrase "in its opinion" is intended to underline that it is for the requested Party to assess whether the proceedings leading to the judgment (and not the judgment itself) satisfied the rights of defence. If the requested Party has doubts on that point, the requesting Party must try to dissipate them, but otherwise it is incumbent on the requested Party to say why it considers the proceedings unsatisfactory.

28. If the requested Party finds difficulties in extraditing, to enable the requesting Party to enforce the judgment, new contacts will be necessary between the States. The requested Party is obliged to extradite if it receives an assurance of the kind indicated; such an assurance must cover not merely the availability of a remedy by way of retrial but also the effectiveness of that remedy.

Once surrendered in pursuance of the requested Party's obligations to extradite upon receipt of sufficient assurances, the person concerned may, of course, accept the judgment rendered against him in his absence or demand a retrial. This is made clear in the last sentence of Chapter III.

If the domestic law of the requesting Party does not allow a retrial, there is no obligation for the requested Party to extradite.

29. Chapter III provides a further means of strengthening the legal interests of the person to be extradited by stating, in paragraph 2, that communication of the judgment rendered *in absentia* is not to be regarded by the requesting State as a formal notification. The chief object of this provision is to ensure that the person to be extradited will not find himself with only a very short time in which to make an opposition, whereas the formalities relating to his handing over may take several weeks or months.

Furthermore, in some States the opposition entered by the person sentenced nullifies the judgment rendered *in absentia,* with the result that those States will consider only the time limitation of the criminal proceedings. Others follow the principle that the time limitation of the sentence only should be taken into account. Since it is generally true that the time limitation is reached sooner in respect of the proceedings than in respect of

the sentence, opposition by the person sentenced (in the case of formal notification in the requested State) might prevent extradition if the requesting and requested States do not follow the same principle in matters of time limitation.

It goes without saying that this provision applies only to a communication made subsequent to a request for extradition of a person referred to in a judgment rendered *in absentia*.

CHAPTER IV – AMNESTY

30. Chapter IV deals with the question whether an amnesty granted in the requested State is a ground for refusing extradition. The Convention is silent on this point. The Protocol now offers a solution following the examples already contained in some bilateral extradition agreements.

31. Chapter IV does not deal with amnesties in the requesting Party, as the sub-committee considered it unlikely that a State would ask for extradition for an offence in respect of which it had previously granted an amnesty.

32. An amnesty (referring either to criminal prosecution or to the enforcement of sentences) in the requested Party is a barrier to extradition only if that State has jurisdiction over the offence concurrently with the requesting State (e.g. by virtue of the principles of active and passive personality).

CHAPTER V – COMMUNICATION OF REQUESTS FOR EXTRADITION

33. According to Article 12.1 of the Convention, requests for extradition shall be communicated through the diplomatic channels. Experience in some States having shown that the diplomatic channel may give rise to delay, the sub-committee decided to substitute a more expeditious way of communication for the way prescribed by the convention. The sub-committee also noted that for some countries there might be difficulties in submitting a request for extradition within the minimum period of eighteen days provided for in Article 16 of the Convention where a request for provisional arrest has been made.

34. Chapter V provides for extradition requests to be communicated between the Ministries of Justice concerned without, however, excluding the use of diplomatic channels and allowing two or more Contracting Parties to resort to other specifically agreed channels.

This method of communication has been adopted in the light of similar provisions in Article 15.1 of the European Convention on Mutual Assistance in Criminal Matters.

In those States where there is no Ministry of Justice, the term is understood to mean the department of government, by whatever name it is known, which is responsible for the administration of criminal justice.

CHAPTER VI – FINAL CLAUSES

35. The provisions contained in Chapter VI are based on the model final 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.

36. As regards Article 6.4, it should be noted that member States of the Council of Europe which have signed but not ratified the Extradition 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 would be no obligation on a member State ratifying the Convention in the future to become a Contracting Party to the Protocol.

37. The Protocol may be acceded to by a non-member State only if it has acceded to the Extradition Convention (Article 7).

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 that 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 6.2, is conditional on ratification, acceptance or approval by three member States.

38. With regard to reservations, Article 9.1 lays down the principle that in the absence of a declaration to the contrary, existing reservations to the Extradition Convention apply also to the Protocol.

39. Article 9.2 refers to the possibility for Contracting Parties not to accept one or more of the four chapters and to limit their non-acceptance of Chapter II to certain offences or to certain categories of offences. Contracting States have wide discretion in defining the categories of offences in respect of which they wish to accept Chapter II, for instance by reference to the acts constituting an offence, or by reference to the fiscal regulations which are affected. As regards Chapter III, they may limit their non-acceptance to paragraph 2.

These provisions were inserted in order to enable States which, for the time being, find it impossible to accept all chapters, to become, nevertheless, Parties to the Protocol. They may withdraw any reservation made under Article 9.2 (Article 9, paragraph 3).

Third Additional Protocol to the European Convention on Extradition – CETS No. 209

Strasbourg, 10.XI.2010

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

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

Desirous of strengthening their individual and collective ability to respond to crime;

Having regard to the provisions of the European Convention on Extradition (ETS No. 24) opened for signature in Paris on 13 December 1957 (hereinafter referred to as "the Convention"), as well as the two Additional Protocols thereto (ETS Nos. 86 and 98), done at Strasbourg on 15 October 1975 and on 17 March 1978, respectively;

Considering it desirable to supplement the Convention in certain respects in order to simplify and accelerate the extradition procedure when the person sought consents to extradition,

Have agreed as follows:

Article 1 – Obligation to extradite under the simplified procedure

Contracting Parties undertake to extradite to each other under the simplified procedure as provided for by this Protocol persons sought in accordance with Article 1 of the Convention, subject to the consent of such persons and the agreement of the requested Party.

Article 2 – Initiation of the procedure

1. When the person sought is the subject of a request for provisional arrest in accordance with Article 16 of the Convention, the extradition referred to in Article 1 of this Protocol shall not be subject to the submission of a request for extradition and supporting documents in accordance with Article 12 of the Convention. The following information provided by the requesting Party shall be regarded as adequate by the requested Party for the purpose of applying Articles 3 to 5 of this Protocol and for taking its final decision on extradition under the simplified procedure:

   a. the identity of the person sought, including his or her nationality or nationalities when available;

   b. the authority requesting the arrest;

c. the existence of an arrest warrant or other document having the same legal effect or of an enforceable judgment, as well as a confirmation that the person is sought in accordance with Article 1 of the Convention;

d. the nature and legal description of the offence, including the maximum penalty or the penalty imposed in the final judgment, including whether any part of the judgment has already been enforced;

e. information concerning lapse of time and its interruption;

f. a description of the circumstances in which the offence was committed, including the time, place and degree of involvement of the person sought;

g. in so far as possible, the consequences of the offence;

h. in cases where extradition is requested for the enforcement of a final judgment, whether the judgment was rendered in absentia.

2. Notwithstanding paragraph 1, supplementary information may be requested if the information provided for in the said paragraph is insufficient to allow the requested Party to decide on extradition.

3. In cases where the requested Party has received a request for extradition in accordance with Article 12 of the Convention, this Protocol shall apply *mutatis mutandis*.

Article 3 – Obligation to inform the person

Where a person sought for the purpose of extradition is arrested in accordance with Article 16 of the Convention, the competent authority of the requested Party shall inform that person, in accordance with its law and without undue delay, of the request relating to him or her of the possibility of applying the simplified extradition procedure in accordance with this Protocol.

Article 4 – Consent to extradition

1. The consent of the person sought and, if appropriate, his or her express renunciation of entitlement to the rule of speciality shall be given before the competent judicial authority of the requested Party in accordance with the law of that Party.

2. Each Party shall adopt the measures necessary to ensure that consent and, where appropriate, renunciation, as referred to in paragraph 1, are established in such a way as to show that the person concerned has expressed them voluntarily and in full awareness of the legal consequences. To that end, the person sought shall have the right to legal counsel. If necessary, the requested Party shall ensure that the person sought has the assistance of an interpreter.

3. Consent and, where appropriate, renunciation, as referred to in paragraph 1, shall be recorded in accordance with the law of the requested Party.

4. Subject to paragraph 5, consent and, where appropriate, renunciation, as referred to in paragraph 1, shall not be revoked.

5. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, or at any later time, declare that consent and, where appropriate, renunciation of entitlement to the rule of speciality, may be revoked. The consent may be revoked until the requested Party takes its final decision on extradition under the simplified procedure. In this case, the period between the notification of consent and that of its revocation shall not be taken into consideration in establishing the periods provided for in Article 16, paragraph 4, of the Convention. Renunciation of entitlement to the rule of speciality may be revoked until the surrender of the person concerned. Any revocation of the consent to extradition or the renunciation of entitlement to the rule of speciality shall be recorded in accordance with the law of the requested Party and notified to the requesting Party immediately.

Article 5 – Renunciation of entitlement to the rule of speciality

Each State may declare, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, or at any later time, that the rules laid down in Article 14 of the Convention do not apply where the person extradited by this State, in accordance with Article 4 of this Protocol:

a. consents to extradition; or

b. consents to extradition and expressly renounces his or her entitlement to the rule of speciality.

Article 6 – Notifications in case of provisional arrest

1. So that the requesting Party may submit, where applicable, a request for extradition in accordance with Article 12 of the Convention, the requested Party shall notify it, as soon as possible and no later than ten days after the date of provisional arrest, whether or not the person sought has given his or her consent to extradition.

2. In exceptional cases where the requested Party decides not to apply the simplified procedure in spite of the consent of the person sought, it shall notify this to the requesting Party sufficiently in advance so as to allow the latter to submit a request for extradition before the period of forty days established under Article 16 of the Convention expires.

Article 7 – Notification of the decision

Where the person sought has given his or her consent to extradition, the requested Party shall notify the requesting Party of its decision with regard to the extradition under the simplified procedure within twenty days of the date on which the person consented.

Article 8 – Means of communication

For the purpose of this Protocol, communications may be forwarded through electronic or any other means affording evidence in writing, under conditions which allow the Parties to ascertain their authenticity, as well as through the International Criminal Police Organisation (Interpol). In any case, the Party concerned shall, upon request and at any time, submit the originals or authenticated copies of documents.

Article 9 – Surrender of the person to be extradited

Surrender shall take place as soon as possible, and preferably within ten days from the date of notification of the extradition decision.

Article 10 – Consent given after expiry of the deadline laid down in Article 6

Where the person sought has given his or her consent after expiry of the deadline of ten days laid down in Article 6, paragraph 1, of this Protocol, the requested Party shall apply the simplified procedure as provided for in this Protocol if it has not yet received a request for extradition within the meaning of Article 12 of the Convention.

Article 11 – Transit

In the event of transit under the conditions laid down in Article 21 of the Convention, where a person is to be extradited under a simplified procedure to the requesting Party, the following provisions shall apply:

a. the request for transit shall contain the information required in Article 2, paragraph 1, of this Protocol;

b. the Party requested to grant transit may request supplementary information if the information provided for in sub-paragraph a is insufficient for the said Party to decide on transit.

Article 12 – Relationship with the Convention and other international instruments

1. The words and expressions used in this Protocol shall be interpreted within the meaning of the Convention. As regards the Parties to this Protocol, the provisions of the Convention shall apply, *mutatis mutandis*, to the extent that they are compatible with the provisions of this Protocol.

2. The provisions of this Protocol are without prejudice to the application of Article 28, paragraphs 2 and 3, of the Convention concerning the relations between the Convention and bilateral or multilateral agreements.

Article 13 – Friendly settlement

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 necessary to facilitate a friendly settlement of any difficulty which may arise out of its interpretation and application.

Article 14 – 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 ratified, accepted or approved the Convention, or does so simultaneously. 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, this 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 15 – 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 an instrument of accession with the Secretary General of the Council of Europe.

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 16 – 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 time, 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 of the Council of Europe. The withdrawal shall become effective on the first day of the month following the expiration of a period of six months after the date or receipt of such notification by the Secretary General.

Article 17 – Declarations and reservations

1. Reservations made by a State to any provision of the Convention or the two Additional Protocols thereto shall also be applicable to this Protocol, unless that State 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 the two Additional Protocols thereto.

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 Article 2, paragraph 1, of this Protocol. No other reservation may be made.

3. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, or at any later time, make the declarations provided for in Article 4, paragraph 5, and in Article 5 of this Protocol.

4. Any State may wholly or partially withdraw a reservation or declaration it has made in accordance with this Protocol, 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.

5. Any Party which has made a reservation to Article 2, paragraph 1, of this Protocol, in accordance with paragraph 2 of this article may not claim the application of that paragraph by another Party. It may, however, if its reservation is partial or conditional, claim the application of that paragraph in so far as it has itself accepted it.

Article 18 – 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 six months after the date of receipt of the notification by the Secretary General of the Council of Europe.

3. Denunciation of the Convention automatically entails denunciation of this Protocol.

Article 19 – 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 14 and 15;

d. any declaration made in accordance with Article 4, paragraph 5, Article 5, Article 16 and Article 17, paragraph 1, and any withdrawal of such a declaration;

e. any reservation made in accordance with Article 17, paragraph 2, and any withdrawal of such a reservation;

f. any notification received in pursuance of the provisions of Article 18 and the date on which denunciation takes effect;

g. 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 10th day of November 2010, 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.

Third Additional Protocol to the European Convention on Extradition – CETS No. 209

Explanatory Report

I. The Third Additional Protocol to the European Convention on Extradition, 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), was opened for signature by the member States of the Council of Europe, in Strasbourg, on 10 November 2010.

II. The text of this Explanatory Report, prepared on the basis of that Committee's discussions does not constitute an instrument providing an authoritative interpretation of the text of the 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 on Co-operation in Criminal Matters (PC-OC) is entrusted, in particular, 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. The need for the modernisation of the legal instruments of the Council of Europe in the criminal justice field, including the European Convention on Extradition (hereinafter referred to as "the Convention"), in order to enhance international co-operation, has been highlighted on several occasions. In particular, the "New Start" report (PC-S-NS (2002) 7, presented to the CDPC by the Reflection Group on developments in international co-operation in criminal matters) approved by the CDPC in June 2002 pointed to the necessity of realising a European area of shared justice. The Warsaw declaration and the Plan of Action adopted by the third Summit of Council of Europe Heads of State and Government of the member States of the Council of Europe (Warsaw, 16-17 May 2005) underlined the commitment, at the highest political level, to making full use of the Council of Europe's standard-setting potential and to promoting implementation and further development of the Organisation's legal instruments and mechanisms of legal cooperation.

3. At the High-Level Conference of the Ministries of Justice and of the Interior entitled "Improving European Cooperation in the Criminal Justice Field" held in Moscow (Russian Federation) on 9 and 10 November 2006, the Council of Europe was encouraged to continue its efforts to improve the operation of the main conventions regulating international co-operation in criminal matters, in particular those regarding extradition, in order to identify the difficulties encountered and to consider the need for any new instruments.

4. At its 52nd meeting (October 2006) the PC-OC put forward a number of proposals relating to the modernisation of the European Convention on Extradition, as amended by the two additional protocols thereto of 1975 and 1978. The Convention, which dates from 1957, is indeed one of the oldest European conventions in the criminal law field and has a direct impact on individuals' rights and freedoms, to which the CDPC asked the PC-OC to pay particular attention.

5. In this context, the PC-OC suggested, inter alia, that the Convention be revised first of all in order to include mechanisms of simplified extradition when the person sought consents to her/his extradition, the

rationale being that if such consent is expressed, there is no need to go through all the formalities of extradition procedures. As a result, delays of surrender would in many cases be reduced substantially. This would contribute to achieve the important objective of increasing the efficiency and speed of extradition mechanisms, while respecting individuals' rights.

6. The PC-OC took account of the fact that extradition under simplified procedures already existed in practice and that it would be desirable to elaborate a treaty basis for such procedures, accessible to a large number of European States. It decided to draw inspiration from the simplified extradition mechanism provided for in the 1995 Convention on simplified extradition procedure between the Member States of the European Union.

7. The CDPC, at its 56th plenary session (June 2007), decided to mandate the PC-OC, inter alia, to draft the necessary legal instruments to give a treaty basis to simplified forms of extradition when the person sought consents, along the lines proposed by the PC-OC. Having studied various options, the PC-OC agreed that a an additional protocol to the Convention was the most appropriate solution in this respect. Consequently, it adopted a draft Third Additional Protocol to the Convention at its 56th meeting (May 2009) and submitted it to the CDPC for approval.

8. The drafts of the third Additional Protocol and the Explanatory report thereto were examined and approved by the CDPC at its 58th plenary session (12-16 October 2009) and submitted to the Committee of Ministers.

9. At the 1090th meeting of their Deputies on 7 July 2010, the Committee of Ministers adopted the text of the Third Additional Protocol and decided to open it for signature, in Strasbourg on 10 November 2010.

GENERAL CONSIDERATIONS

10. The Protocol was drafted to address the concern that, while persons concerned consent to their surrender in view of their extradition in a large number of cases, the procedure under the Convention still remains long and can last up to several months.

11. One of the central issues for the Protocol was whether, in the event that a person is arrested on the basis of a request for provisional arrest, in application of Article 16, paragraph 2 of the Convention, and consents to her/his extradition, there was a need for a formal request of extradition and for all the supporting documents requested by Article 12 of the Convention.

12. The PC-OC observed that practice varied among States. In a majority of States where a simplified procedure of extradition is applied, it is considered that it is in the interest of the person sought to be quickly surrendered once her/his consent has been given. Some States concerned often find the information they need in the request for provisional arrest. In other States however, there is a need for the extradition request and for all or some of the documents provided for in Article 12 of the Convention. The consent of the person would, in this case, be taken into account in the extradition procedure in order to have a quicker final decision and a quicker surrender.

13. This is the reason for which the Protocol establishes as a principle extradition in accordance with the simplified procedure on the basis of the information included in a request for provisional arrest (complemented, if necessary by additional information). Nevertheless, the Protocol provides the possibility for the Parties to make a reservation specifying that they still require an extradition request, including all or some of the documents mentioned in Article 12 of the Convention.

14. The consent of the person sought can be significant for the conduct of the extradition procedure in the requested Party, even if such consent has been expressed after the reception of a request of extradition and the supporting documents under Article 12 of the Convention. The scope of the Protocol therefore extends also to these situations.

15. In both cases, the consent expressed by the person sought is central for the simplified procedure of extradition and shall be voluntary, conscious and in full awareness of the legal consequences of this consent. The person concerned shall not be deprived from the procedural guarantees defined by the laws of each Party, notably the access to a defence lawyer and to an interpreter.

16. The Protocol also establishes a series of time limits which enshrine the concern for efficiency and speed in the criminal justice field and which should reduce to a minimum the delays in the proceedings in the requesting Parties awaiting surrender, when the persons concerned do not intend to oppose their surrender.

17. It is nevertheless important to note that the consent does not deprive the requested Party of the possibility of invoking a ground for refusal set forth in the Convention. That State also has full discretion as to the application of the rule of speciality, as defined under Article 14 of the Convention, in simplified extradition cases and as to the relationship between the rule of speciality and the consent of the person.

18. The Protocol does not preclude its Parties from establishing in their national legislation and applying in practice even more simplified extradition procedures as long as such procedures are compatible with the purpose and the general principles of the Protocol.

COMMENTARIES ON THE ARTICLES OF THE PROTOCOL

Article 1 – Obligation to extradite under the simplified procedure

19. This article sets out the basic principle of the Convention, namely the obligation to extradite persons sought, subject to the consent of such persons to their extradition under the simplified procedure, given in accordance with Articles 3 to 5, and the agreement of the requested Party. In accordance with established practice under the Convention, simplified extradition procedures may concern persons against whom the competent authorities of the requested Party are proceeding for an offence (including prosecution and trial), or persons wanted for the carrying out of a sentence or detention order. It is clear from the wording chosen that the consent of the person to her/his extradition does not entail an obligation for the requested Parties to extradite the person in all cases.

20. The article does not distinguish between the two types of situation for the use of the simplified procedure depending on the supporting documents, namely simplified extradition on the basis of a request for provisional arrest only or on the basis of a request for extradition.

Article 2 – Initiation of the procedure

21. This article defines the two variants for the use of the simplified procedure of extradition:

- paragraphs 1 and 2 apply when the requested Party proceeds on the basis of a request for provisional arrest only, to be complemented, if necessary, with the information mentioned under these paragraphs;
- paragraph 3 extends the scope of the Protocol to cases where there is already an extradition request submitted in accordance with Article 12 of the Convention.

▶ Paragraph 1

22. This paragraph concerns the main situation targeted by the Protocol, namely the simplified procedure following provisional arrest. It indicates that the starting-point for the simplified extradition procedure is the request for provisional arrest as provided for in Article 16 of the Convention. In accordance with Article 16, paragraph 3 of the Convention, a "red notice" or other message sent through Interpol may also be considered a request for provisional arrest for the purposes of this Protocol.

23. This paragraph also indicates the consequence of using the simplified procedure on the submission of documents, i.e. in such cases the submission of a request for extradition and the supporting documents required by Article 12 of the Convention are no longer necessary. The decision of extradition may be made on the basis of the information, specified under sub-paragraphs (a) to (h), including the confirmation that the person is sought in accordance with Article 1 of the Convention, which is either contained in the request for provisional arrest or complements it. This paragraph should not be understood as deterring the requesting Party from submitting any other information which it considers useful for allowing the requested Party to take a decision on extradition under the simplified procedure.

24. Information has to be communicated both to the arrested person, providing the basis on which consent to extradition may be given, and to the competent authority of the requested Party, providing the authority with the necessary information to enable it to take its decision on using the simplified procedure of extradition. As a rule, this information should be regarded by the competent authority of the requested Party as being sufficient for taking a decision on extraditing the person concerned. It comprises all the details needed for a proper examination of the question of the requested Party's agreement to the surrender as regards the person concerned, the summary of facts of the offence, the legal description of the offence and reference to the relevant provisions or information about the sentence which has already been delivered. As regards sub-paragraph (h), where the judgment was rendered in absentia, the drafters considered that it would be desirable for the requesting Party to send additional information on the possibility of a retrial or the relevant circumstances of

the proceedings so as to allow the requested Party to ascertain, without asking for supplementary information, whether the safeguards of the European Convention on Human Rights (ECHR) have been observed.

25. The discussions concerning these provisions showed that the majority of drafters were in favour of following the simplified extradition procedure on the basis of the request for provisional arrest, abolishing the requirement for a formal extradition request and the documents specified under Article 12 of the Convention, and indeed considered this to be the principal added value of this Protocol. However, some States wish to proceed with an extradition request in all cases. The majority of drafters agreed, therefore, that those States who cannot apply this paragraph should have the possibility of making a reservation to that effect (see Article 17, paragraph 2).

26. Thus, at the time of signature or when depositing their instrument of ratification, acceptance, approval or accession, States have the possibility of making a reservation to this paragraph, specifying that they require a request for extradition, and possibly some or all of the documents mentioned under Article 12 of the Convention, in cases of extradition under the simplified procedure.

▶ **Paragraph 2**

27. This paragraph allows for the possibility of derogating from paragraph 1 and of requesting supplementary information if the information supplied is insufficient for the competent authority of the requested Party to give agreement to the extradition. However, this derogation concerns information as opposed to documents, and should not conflict with the abolition of the requirement to submit the documents specified by Article 12 of the Convention for the purposes of the simplified procedure of extradition.

▶ **Paragraph 3**

28. This paragraph extends the scope of the Protocol to cases where the person sought consents after an extradition request has been submitted by the requesting Party, regardless of whether the request was or was not preceded by a request for provisional arrest. The Parties shall apply all the provisions of the Protocol in these cases, except for those which are only relevant to the simplified extradition procedure on the basis of a request for provisional arrest (such as Articles 6 and 10 of the Protocol).

Article 3 – Obligation to inform the person

29. The main purpose of this article is to ensure that the person sought is informed of the reasons for her/his arrest and the possibility of consenting to her/his extradition. For the purposes of this article, the drafters agreed that the term "arrested" refers to any action taken by the requested Party in accordance with Article 16 of the Convention. Depending on the national legislation, such action may include detention, as well as other measures restricting the individual freedom of the person, such as bail, house arrest or a ban to leave the country.

30. This article requires the Parties to ensure that persons arrested for the purpose of extradition are informed of the request concerning them and of the possibility of their consenting to their extradition. The information is to be given by the "competent authority", e.g. the authority empowered to take persons into custody. This does not necessarily imply the intervention of a judicial authority, and such information could for example be provided by the police at the moment of arrest. It should be given without undue delay after the person is taken into custody and in accordance with the law of the requested Party.

Article 4 – Consent to extradition

31. This article deals with the way in which consent is given. It also applies to renunciation of entitlement to the rule of speciality where the law of the requested Party provides for such renunciation, as distinct from consent to extradition, in accordance with Article 5 of the Protocol.

32. The Protocol does not specify at which point the person's consent must be established. However, where the procedure is set in motion by the provisional arrest of the person sought in accordance with Article 2, paragraph 1, the requested Party should take into account Article 6, which provides for notification of consent within 10 days from the date of the provisional arrest. This time limit does not apply where the requested Party made a reservation to Article 2, paragraph 1.

33. Consent (and, where appropriate, renunciation of entitlement to the rule of speciality) is established before the competent judicial authority of the requested Party. The competent judicial authority may be, for example, a judge, a court, a magistrate or a prosecutor, depending on the law of the requested Party.

34. The forms in which consent (and, where appropriate, renunciation of entitlement to the rule of speciality) is established are determined by the legislation of each Party. Paragraph 2, however, requires Parties to adopt the measures necessary to ensure that consent (and, where appropriate, renunciation of entitlement to the speciality rule) is established in such a way as to show that the person concerned has expressed it voluntarily and in full awareness of the legal consequences (free and informed consent). It provides that, for this purpose, the arrested person shall have the right to legal counsel, and where appropriate, to an interpreter. It is important for Parties to take all necessary measures in order to ensure that this right is efficiently implemented in practice, including through the provision of legal aid where necessary.

35. As to the legal consequences of consent, the information given to the person should include the implications of renunciation of the guarantees of the ordinary procedure, as well as the possible irrevocability of the consent given, in accordance with paragraph 4.

36. In view of the provisions of Article 5 of the Protocol, the person must also be aware of any effects of her/his consent to extradition on her/his entitlement to the rule of speciality, i.e. the possibility of being prosecuted on grounds other than those on which the simplified extradition procedure is based. As regards the effects of express renunciation of entitlement to the rule of speciality, the information given should concern the effects of such renunciation, the rule of speciality and the possible irrevocability of renunciation.

37. Paragraph 3 provides that consent to extradition (and, where appropriate, renunciation of entitlement to the rule of speciality) shall be recorded. This provision implies that the procedure for establishing consent (and, where appropriate, renunciation of entitlement to the speciality rule) must allow for subsequent verification of whether consent was given voluntarily and in full awareness of the legal consequences. However, the procedures and forms for such a record are left to the national law.

38. Paragraph 4 provides that consent to extradition (and, where appropriate, renunciation of entitlement to the rule of speciality) shall not be revoked. While the drafters chose to establish this as the rule, they were also aware that for some States the possibility of revoking either consent or renunciation to the entitlement to the rule of speciality is a very important principle. They decided therefore to include paragraph 5 of this article, which provides the possibility for these States to allow for such revocation by way of a declaration made at the time of signature or when depositing their instrument of ratification, acceptance, approval or accession, or at any later time.

39. The drafters were also aware, however, that an untimely revocation may cause legal and practical difficulties, in particular with regard to the rule of speciality. An example for this would be the revocation of renunciation of entitlement to the rule of speciality after the first hearing in the requesting Party following surrender.

40. In order to strike a balance between the possibility of revocation foreseen in paragraph 5 and the concern for the efficiency of the simplified extradition procedure, and taking into account the fact that Article 4 provides the safeguards to ensure that consent is given in full awareness of legal consequences, the drafters decided that it would be appropriate to limit the possibility of revocation in time. In doing so, the Protocol distinguishes between the revocation of consent and of renunciation. Both of these time limits are to be seen as the maximum acceptable for the simplified extradition procedure, and shorter time limits for revocation defined in national legislation would be compatible with the Protocol.

41. As regards consent to extradition, the Parties can provide for the possibility of revocation until they take their final decision on simplified extradition which they notify to the requesting Party under Article 7 of the Protocol. In this case, in order to ensure that revocation of consent by the person concerned is not prejudicial to the smooth conduct of the extradition procedure, paragraph 5 provides that the period between the notification of consent and notification of its revocation shall not be taken into consideration in establishing the periods of provisional arrest of 18 and 40 days provided for in Article 16, paragraph 4 of the Convention. This means that where a person revokes her/his consent the requesting Party will have as many days for submitting its request for extradition as it had when it received notification of the person's consent to her/his extradition and it ceased preparing the documents required under Article 12 of the Convention.

42. As for revocation of renunciation of entitlement to the rule of speciality, the Protocol limits the possibility of such revocation until the actual surrender of the person to the requesting Party. The "surrender" should be understood as the moment at which the person is taken over by the authorities of the requesting Party.

43. While the Protocol requires revocation to be recorded and notified immediately to the requesting Party, it does not prescribe details of a procedure for revocation. Thus, the requested Party does not have the obligation to follow the same procedure for dealing with revocation as for establishing consent (see paragraphs 1 and 2).

Article 5 – Renunciation of entitlement to the rule of speciality

44. Article 5 deals with the question of the application of the rule of speciality, enshrined in Article 14 of the Convention, to the simplified extradition procedure. Article 14, paragraph 1 (a) of the Convention allows the requested Party to consent to the extension of extradition to offences other than those for which the person was extradited.

45. The member States of the Council of Europe have a wide range of different practices with regard to giving such consent in simplified extradition cases. This article, while giving a legal basis for the non-application of Article 14 in the simplified extradition procedure, does not impose any obligations on the Parties in this respect. It provides that any Party may declare that the rule of speciality, as set out in Article 14 of the Convention, will not apply in the case of the simplified procedure. The main concern of the Protocol is thus one of ensuring that Parties are kept informed of this aspect of each other's national procedures.

46. To allow for the differences between legal systems, two declarations are possible: one to the effect that the rule of speciality will not apply when the person consents to her/his extradition, such consent automatically entailing renunciation of entitlement to the speciality rule; the other to the effect that the rule of speciality will not apply where the person who has consented to her/his extradition expressly and clearly renounces her/his entitlement to the rule of speciality.

47. Article 14 of the Convention continues to apply for those Parties, acting as requested States, who have not made a declaration under this article.

Article 6 – Notifications in case of provisional arrest

48. This article deals with situations where the simplified extradition procedure was initiated on the basis of a request for provisional arrest in accordance with Article 2, paragraph 1 of the Protocol. This implies naturally that its provisions do not apply when the requested Party has made a reservation to Article 2, paragraph 1 in accordance with Article 17 of the Protocol.

▶ Paragraph 1

49. Immediate notification of consent is essential to ensure the smooth conduct of the simplified procedure where its starting-point is the provisional arrest of the person sought. The reason behind stricter time limits in these cases is the fact that Article 16, paragraph 4 of the Convention requires the requested Party to terminate provisional arrest if it does not receive the request for extradition and supporting documents within 40 days following the arrest.

50. The preparation of a request for extradition and other documents mentioned in Article 12 of the Convention, with the necessary translations, can be time-consuming and expensive. The drafters considered that early notification would enable the requesting Party to suspend preparation of the documents required and save these resources, thereby increasing the added value of the Convention.

▶ Paragraph 2

51. In the case of refusal of extradition under the simplified procedure decided on by the competent authority of the requested Party in spite of the consent of the person sought, the requesting Party will have – through a combination of the two periods provided for in Articles 6, paragraph 1 and Article 7 of the Protocol – at least ten days before the expiry of the 40-day provisional arrest period laid down in Article 16 of the Convention in which to submit a request for extradition in accordance with Article 12 of the Convention.

52. Considering that this might not always be sufficient for the preparation of the request and the supporting documents, the drafters decided to emphasise that such a refusal, despite the consent of the person sought, should be exceptional and should always leave a reasonable time for the requesting Party to revert to the ordinary extradition procedure as provided for in the Convention.

53. Similarly, in exceptional cases, Parties that have made a reservation to Article 2, paragraph 1 may apply the ordinary extradition procedure despite the consent of the person concerned.

Article 7 – Notification of the decision

54. This article seeks to speed up procedures by introducing a time limit for the requested Party to notify its decision with regard to the extradition under the simplified procedure. It provides that the extradition decision taken by the competent authority of the requested Party must be notified within twenty days from the

day on which the person consented. This time limit applies regardless of whether the simplified extradition procedure was initiated on the basis of a request for provisional arrest or a request for extradition.

55. Of course, this is a maximum period and it is desirable that, where there appears to be no obstacle to extradition, just as in the case where there appears to be a major obstacle, any decision, positive or negative, should be notified as soon as possible after the person concerned has consented.

56. In some member States, a positive decision on extradition is not considered final until the time limit provided in domestic legislation for appealing against it has lapsed. As the simplified extradition procedure is based on the consent of the person concerned, any action by the person challenging a positive extradition decision, such as an appeal, is to be considered as a revocation of consent for the purposes of the Protocol and the provisions of Article 4, paragraph 5 of the Protocol apply, if the requested Party made a declaration under that paragraph. The drafters considered that, where these States are the requested Parties, it would be appropriate for them to notify the initial decision which is subject to appeal within the deadline of 20 days, in order to avoid legal uncertainty for the requesting Party, in particular where the 40-day limit of Article 16 of the Convention is applicable. Thus, even if the initial positive extradition decision is appealed against, due to the fact that the period between the date of consent and of its revocation is not taken into account for the purposes of Article 16, the requesting Party would have enough time to use the ordinary procedure by submitting a request for extradition and the supporting documents in accordance with Article 12 of the Convention.

Article 8 – Means of communication

57. Article 8 does not replace Article 12, paragraph 1 of the Convention (as modified by the Second Additional Protocol to the Convention). It completes Article 12 of the Convention in that it provides for the use of modern means of communication as well as communication through the Interpol, in order to ensure efficient communication in the context of the simplified extradition procedure.

58. This article provides a legal basis for speedy communication while ensuring a written record and its authenticity. The Parties may also request to obtain the original document or an authenticated copy, in particular by mail.

Article 9 – Surrender of the person to be extradited

59. While the provisions of the Convention concerning surrender (Article 18) remain applicable in the simplified extradition procedure, this article, in accordance with the spirit of the Protocol, highlights the importance of a speedy surrender when there is consent to extradition. The use of modern means of communication, in accordance with Article 8 of the Protocol, is an important element in the context of surrender.

60. While the drafters considered it unrealistic to set a mandatory deadline for surrender in simplified extradition cases, they nonetheless thought it necessary to send a strong signal to the Parties regarding the need to ensure surrender as quickly as possible. Accordingly, they agreed that surrender within ten days of the receipt of notification of the extradition decision by the requesting Party would be a reasonable and practicable goal in the great majority of cases.

61. As the Protocol does not regulate the issue of postponed or conditional surrender, and in accordance with its Article 12, paragraph 1, the possibility of postponed or conditional surrender remains open in accordance with Article 19 of the Convention in cases where extradition was granted following the simplified procedure.

Article 10 – Consent given after expiry of the deadline laid down in Article 6

62. This article concerns the legal arrangements applicable where the person consents independently of the conditions laid down in Articles 2 to 9 of the Protocol and in particular after the ten-day period following provisional arrest specified in Article 6 has expired. It therefore does not concern the States which have made a reservation to Article 2, paragraph 1 of the Protocol.

63. This article applies to cases where the person consents after the expiry of the initial ten-day period but before the expiry of the forty-day period stipulated in Article 16 of the Convention and before the requesting Party has submitted a formal request for extradition. It provides that the requested Party shall apply the simplified procedure provided for in the Protocol. If no consent has been given when the initial ten-day period expires, the requesting Party will of course have to prepare the request for extradition without waiting for the person to consent at a later stage in order to ensure that that request can be made within the maximum period of forty days.

Article 11 – Transit

64. This article follows on from the simplification operated by Article 2 of the Protocol. It simplifies the conditions applicable to transit as laid down by Article 21 of the Convention. It is important to underline that the new means of communication pursuant to Article 8 of the Protocol also apply in the case of transit.

65. By way of derogation from Article 21, paragraph 3 of the Convention, a request for transit may be made through electronic or any other means affording evidence in writing (such as fax or electronic mail), and the decision of the Party requested to grant transit may be made known by the same method.

66. The request does not have to be accompanied by the documents referred to in Article 12, paragraph 2 of the Convention. It is important to note that the information contained under Article 2, paragraph 1 of the Protocol may be considered sufficient in general for the purposes of granting transit, regardless of whether the Parties in question made a reservation in accordance with Article 17, paragraph 2 of the Protocol. Nevertheless, in exceptional cases where this information is not sufficient for the State of transit to reach a decision on granting transit, paragraph 2 allows for the possibility of requesting supplementary information from the Party requesting transit.

67. The drafters considered that Article 11 of the Protocol could also cover cases where only the requesting Party and the Party requested to grant transit are Parties to the Protocol. In this case, the Party requested to grant transit can ask for additional information in accordance with Article 11(b), for example in relation to safeguards foreseen in Article 4, paragraphs 1 and 2 of the Protocol.

Article 12 – Relationship with the Convention and other international instruments

68. This article clarifies the relationship between the Protocol on the one hand, and the Convention and other international agreements on the other hand.

69. Paragraph 1 ensures uniform interpretation of the Protocol and the Convention by providing that the words and expressions used in the Protocol shall be interpreted within the meaning of the Convention. The Convention should be understood as the European Convention on Extradition of 1957 (ETS No. 24), as amended between Parties concerned by the Additional Protocol (ETS No. 86) and/or the Second Additional Protocol (ETS No. 98) thereto.

70. Paragraph 1 further clarifies the relationship between the provisions of the Convention and those of the Protocol, i.e. as between the Parties to the Protocol, the provisions of the Convention shall apply to the extent that they are compatible with the provisions of the Protocol, in accordance with general principles and norms of international law.

71. Paragraph 2 clearly states that the Protocol does not alter the relation between the Convention and subsequent bilateral or multilateral agreements (Article 28, paragraph 2 of the Convention) or the possibility for Parties to regulate their mutual relations with regard to extradition exclusively in accordance with a system based on a uniform law (Article 28, paragraph 3 of the Convention).

72. This implies in particular that declarations made by EU member States in relation with the European Union Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between member States (2002/584/JHA) would automatically apply to the Protocol and would make it unnecessary for the States concerned to make new declarations to that effect.

Article 13 – Friendly settlement

73. This article makes the European Committee on Crime Problems the guardian over the interpretation and application of the Protocol and follows the precedents established in other European conventions in the criminal justice 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 Protocol, so that it may contribute to facilitating friendly settlements and proposing amendments to the Convention and its Protocols which might prove necessary.

Articles 14 to 19 – Final clauses

74. Articles 14 to 19 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.

75. Since Article 16 concerning territorial application is mainly aimed at overseas territories, it was agreed that it would be clearly against the philosophy of the Protocol for any Party to exclude parts of its main territory from the application of this instrument, and that there would be no need to lay this down explicitly in the Protocol.

76. It is underlined that under the provisions of Article 17, paragraph 1, reservations and declarations made by a State with regard to any provision of the Convention or the two Additional Protocols thereto shall also be applicable to this Protocol, unless that State declares otherwise. In accordance with Article 17, paragraph 2, only reservations made to Article 2, paragraph 1 are admitted under the Protocol.

Fourth Additional Protocol to the European Convention on Extradition – CETS No. 212

Vienna, 20.IX.2012

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

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

Desirous of strengthening their individual and collective ability to respond to crime;

Having regard to the provisions of the European Convention on Extradition (ETS No. 24) opened for signature in Paris on 13 December 1957 (hereinafter referred to as "the Convention"), as well as the three Additional Protocols thereto (ETS Nos. 86 and 98, CETS No. 209), done at Strasbourg on 15 October 1975, on 17 March 1978 and on 10 November 2010, respectively;

Considering it desirable to modernise a number of provisions of the Convention and supplement it in certain respects, taking into account the evolution of international co-operation in criminal matters since the entry into force of the Convention and the Additional Protocols thereto;

Have agreed as follows:

Article 1 – Lapse of time

Article 10 of the Convention shall be replaced by the following provisions:

"**Lapse of time**

1. Extradition shall not be granted when the prosecution or punishment of the person claimed has become statute-barred according to the law of the requesting Party.

2. Extradition shall not be refused on the ground that the prosecution or punishment of the person claimed would be statute-barred according to the law of the requested Party.

3. 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 not to apply paragraph 2:

a. when the request for extradition is based on offences for which that State has jurisdiction under its own criminal law; and/or

b. if its domestic legislation explicitly prohibits extradition when the prosecution or punishment of the person claimed would be statute-barred according to its law.

4. When determining whether prosecution or punishment of the person sought would be statute-barred according to its law, any Party having made a reservation pursuant to paragraph 3 of this article shall take into consideration, in accordance with its law, any acts or events that have occurred in the requesting Party, in so far as acts or events of the same nature have the effect of interrupting or suspending time-limitation in the requested Party."

Article 2 – The request and supporting documents

1. Article 12 of the Convention shall be replaced by the following provisions:

"**The request and supporting documents**

1. The request shall be in writing. It shall be submitted by the Ministry of Justice or other competent authority of the requesting Party to the Ministry of Justice or other competent authority of the requested Party. A State wishing to designate another competent authority than the Ministry of Justice shall notify the Secretary General of the Council of Europe of its competent authority at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, as well as of any subsequent changes relating to its competent authority.

2. The request shall be supported by:

a. a copy of the conviction and sentence or detention order immediately enforceable or of the warrant of arrest or other order having the same effect and issued in accordance with the procedure laid down in the law of the requesting Party;

b. a statement of the offences for which extradition is requested. The time and place of their commission, their legal descriptions and a reference to the relevant legal provisions, including provisions relating to lapse of time, shall be set out as accurately as possible; and

c. a copy of the relevant enactments or, where this is not possible, a statement of the relevant law and as accurate a description as possible of the person claimed, together with any other information which will help to establish his or her identity, nationality and location."

2. Article 5 of the Second Additional Protocol to the Convention shall not apply as between Parties to the present Protocol.

Article 3 – Rule of speciality

Article 14 of the Convention shall be replaced by the following provisions:

"**Rule of speciality**

1. A person who has been extradited shall not be arrested, prosecuted, tried, sentenced or detained with a view to the carrying out of a sentence or detention order, nor shall he or she be for any other reason restricted in his or her personal freedom for any offence committed prior to his or her surrender other than that for which he or she was extradited, except in the following cases:

a. when the Party which surrendered him or her consents. A request for consent shall be submitted, accompanied by the documents mentioned in Article 12 and a legal record of any statement made by the extradited person in respect of the offence concerned. Consent shall be given when the offence for which it is requested is itself subject to extradition in accordance with the provisions of this Convention. The decision shall be taken as soon as possible and no later than 90 days after receipt of the request for consent. Where it is not possible for the requested Party to comply with the period provided for in this paragraph, it shall inform the requesting Party, providing the reasons for the delay and the estimated time needed for the decision to be taken;

b. when that person, having had an opportunity to leave the territory of the Party to which he or she has been surrendered, has not done so within 30 days of his or her final discharge, or has returned to that territory after leaving it.

2. The requesting Party may, however:

a. carry out pre-trial investigations, except for measures restricting the personal freedom of the person concerned;

b. take any measures necessary under its law, including proceedings by default, to prevent any legal effects of lapse of time;

c. take any measures necessary to remove the person from its territory.

3. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession or at any later time, declare that, by derogation from paragraph 1, a requesting Party which has made the same declaration may, when a request for consent is submitted pursuant to paragraph 1.a, restrict the personal freedom of the extradited person, provided that:

a. the requesting Party notifies, either at the same time as the request for consent pursuant to paragraph 1.a, or later, the date on which it intends to apply such restriction; and

b. the competent authority of the requested Party explicitly acknowledges receipt of this notification.

The requested Party may express its opposition to that restriction at any time, which shall entail the obligation for the requesting Party to end the restriction immediately, including, where applicable, by releasing the extradited person.

4. When the description of the offence charged is altered in the course of proceedings, the extradited person shall only be proceeded against or sentenced in so far as the offence under its new description is shown by its constituent elements to be an offence which would allow extradition."

Article 4 – Re-extradition to a third State

The text of Article 15 of the Convention shall become paragraph 1 of that article and shall be supplemented by the following second paragraph:

"2 The requested Party shall take its decision on the consent referred to in paragraph 1 as soon as possible and no later than 90 days after receipt of the request for consent, and, where applicable, of the documents mentioned in Article 12, paragraph 2. Where it is not possible for the requested Party to comply with the period provided for in this paragraph, it shall inform the requesting Party, providing the reasons for the delay and the estimated time needed for the decision to be taken."

Article 5 – Transit

Article 21 of the Convention shall be replaced by the following provisions:

"**Transit**

1. Transit through the territory of one of the Contracting Parties shall be granted on submission of a request for transit, provided that the offence concerned is not considered by the Party requested to grant transit as an offence of a political or purely military character having regard to Articles 3 and 4 of this Convention.

2. The request for transit shall contain the following information:

a. the identity of the person to be extradited, including his or her nationality or nationalities when available;

b. the authority requesting the transit;

c. the existence of an arrest warrant or other order having the same legal effect or of an enforceable judgment, as well as a confirmation that the person is to be extradited;

d. the nature and legal description of the offence, including the maximum penalty or the penalty imposed in the final judgment;

e. a description of the circumstances in which the offence was committed, including the time, place and degree of involvement of the person sought.

3. In the event of an unscheduled landing, the requesting Party shall immediately certify that one of the documents mentioned in Article 12, paragraph 2.a exists. This notification shall have the effect of a request for provisional arrest as provided for in Article 16, and the requesting Party shall submit a request for transit to the Party on whose territory this landing has occurred.

4. Transit of a national, within the meaning of Article 6, of a country requested to grant transit may be refused.

5. 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 to grant transit of a person only on some or all of the conditions on which it grants extradition.

6. The transit of the extradited person shall not be carried out through any territory where there is reason to believe that his or her life or freedom may be threatened by reason of his or her race, religion, nationality or political opinion."

Article 6 – Channels and means of communication

The Convention shall be supplemented by the following provisions:

"**Channels and means of communication**

1. For the purpose of the Convention, communications may be forwarded by using electronic or any other means affording evidence in writing, under conditions which allow the Parties to ascertain their authenticity. In any case, the Party concerned shall, upon request and at any time, submit the originals or authenticated copies of documents.

2. The use of the International Criminal Police Organization (Interpol) or of diplomatic channels is not excluded.

3. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, declare that, for the purpose of Article 12 and Article 14, paragraph 1.a, of the Convention, it reserves the right to require the original or authenticated copy of the request and supporting documents."

Article 7 – Relationship with the Convention and other international instruments

1. The words and expressions used in this Protocol shall be interpreted within the meaning of the Convention. As regards the Parties to this Protocol, the provisions of the Convention shall apply, *mutatis mutandis*, to the extent that they are compatible with the provisions of this Protocol.

2. The provisions of this Protocol are without prejudice to the application of Article 28, paragraphs 2 and 3, of the Convention concerning the relations between the Convention and bilateral or multilateral agreements.

Article 8 – Friendly settlement

The Convention shall be supplemented by the following provisions:

"**Friendly settlement**

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

Article 9 – Signature and entry into force

1. This Protocol shall be open for signature by the member States of the Council of Europe which are Parties 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 ratified, accepted or approved the Convention, or does so simultaneously. 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, this 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 10 – 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 an instrument of accession with the Secretary General of the Council of Europe.

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 11 – Temporal scope

This Protocol shall apply to requests received after the entry into force of the Protocol between the Parties concerned.

Article 12 – 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 time, 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 of the Council of Europe. The withdrawal shall become effective on the first day of the month following the expiration of a period of six months after the date of receipt of such notification by the Secretary General.

Article 13 – Declarations and reservations

1. Reservations made by a State to the provisions of the Convention and the Additional Protocols thereto which are not amended by this Protocol shall also be applicable to this Protocol, unless that State 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 and the Additional Protocols thereto.

2. Reservations and declarations made by a State to any provision of the Convention which is amended by this Protocol shall not be applicable as between the Parties to this Protocol.

3. No reservation may be made in respect of the provisions of this Protocol, with the exception of the reservations provided for in Article 10, paragraph 3, and Article 21, paragraph 5, of the Convention as amended by this Protocol, and in Article 6, paragraph 3, of this Protocol. Reciprocity may be applied to any reservation made.

4. Any State may wholly or partially withdraw a reservation or declaration it has made in accordance with this Protocol, by means of a notification addressed to the Secretary General of the Council of Europe, which shall become effective as from the date of its receipt.

Article 14 – 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 six months after the date of receipt of the notification by the Secretary General of the Council of Europe.

3. Denunciation of the Convention automatically entails denunciation of this Protocol.

Article 15 – 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 9 and 10;

d. any reservation made in accordance with Article 10, paragraph 3, and Article 21, paragraph 5, of the Convention as amended by this Protocol, as well as Article 6, paragraph 3, of this Protocol, and any withdrawal of such a reservation;

e. any declaration made in accordance with Article 12, paragraph 1, and Article 14, paragraph 3, of the Convention as amended by this Protocol, as well as Article 12 of this Protocol, and any withdrawal of such a declaration;

f. any notification received in pursuance of the provisions of Article 14 and the date on which denunciation takes effect;

g. 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 Vienna, this 20th day of September 2012, 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.

Fourth Additional Protocol to the European Convention on Extradition – CETS No. 212

Explanatory Report

I. The Fourth Additional Protocol to the European Convention on Extradition, drawn up within the Council of Europe by the Committee of Experts on the Operation of European Conventions on Co-operation in Criminal Matters (PC-OC), under the authority of the European Committee on Crime Problems (CDPC), was opened for signature by the member States of the Council of Europe, in Vienna, on 20 September 2012, on the occasion of the 31st Council of Europe Conference of Ministers of Justice which took place in Vienna (Austria) on 19-21 September 2012.

II. The text of this 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 Additional 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 on Co-operation in Criminal Matters (PC-OC) is entrusted, in particular, with examining the functioning and implementation of Council of Europe conventions and agreements in the field of international co-operation in criminal matters, with a view to adapting them and improving their practical application where necessary.

2. The need for the modernisation of the legal instruments of the Council of Europe in the criminal justice field, including the European Convention on Extradition (hereinafter referred to as "the Convention"), in order to enhance international co-operation, has been highlighted on several occasions. In particular, the "New Start" report (PC-S-NS (2002) 7), presented to the CDPC by the Reflection Group on developments in international co-operation in criminal matters and approved by the CDPC in June 2002, pointed to the necessity of realising a European area of shared justice. The Warsaw declaration and the Plan of Action adopted by the Third Summit of Council of Europe Heads of State and Government of the member states of the Council of Europe (Warsaw, 16-17 May 2005) underlined the commitment, at the highest political level, to making full use of the Council of Europe's standard-setting potential and to promoting implementation and further development of the Organisation's legal instruments and mechanisms of legal co-operation.

3. At the High-Level Conference of the Ministries of Justice and of the Interior entitled "Improving European Co-operation in the Criminal Justice Field" held in Moscow (Russian Federation) on 9 and 10 November 2006, the Council of Europe was encouraged to continue its efforts to improve the operation of the main conventions regulating international co-operation in criminal matters, in particular those regarding extradition, in order to identify the difficulties encountered and to consider the need for any new instruments.

4. At its 52nd meeting (October 2006), the PC-OC put forward a number of proposals relating to the modernisation of the European Convention on Extradition, as amended by the two additional protocols thereto of 1975 and 1978. The Convention, which dates from 1957, is indeed one of the oldest European conventions in the criminal law field and has a direct impact on individuals' rights and freedoms, to which the CDPC asked the PC-OC to pay particular attention.

5. In this context, the PC-OC suggested, on the one hand, to complement the Convention in order to provide a treaty basis for simplified extradition procedures, and, on the other hand, to amend a number of provisions of the Convention in order to adapt it to modern needs. These provisions concerned, *inter alia*, the issues of lapse of time, rule of speciality and channels and means of communication.

6. The CDPC, at its 56th plenary session (June 2007), decided to mandate the PC-OC, to draft the necessary legal instruments for this purpose. Having studied various options, the PC-OC agreed to draw up two additional protocols to the Convention, a Third Additional Protocol providing for simplified extradition procedures by complementing the Convention, and a Fourth Additional Protocol amending and supplementing certain provisions of the Convention. The present Fourth Additional Protocol was finalised by the PC-OC at its 60th meeting (17 to 19 May 2011) and submitted to the CDPC for approval.

7. The drafts of the Fourth Additional Protocol and the Explanatory Report thereto were examined and approved by the CDPC at its 60th plenary session (14 to 17 June 2011) and submitted to the Committee of Ministers.

8. At the 1145th meeting of their Deputies on 13 June 2012, the Committee of Ministers adopted the text of the Fourth Additional Protocol and decided to open it for signature, in Vienna on 20 September 2012.

COMMENTARIES ON THE ARTICLES OF THE FOURTH ADDITIONAL PROTOCOL

Article 1 – Lapse of time

9. This Article is intended to replace the original Article 10 of the Convention which established lapse of time, under the law either of the requested Party or the requesting Party, as a mandatory ground for refusal. The current text takes account of changes that occurred as regards international co-operation in criminal matters since the opening to signature of the Convention in 1957, and notably the relevant provision of the Convention of 23 October 1996 relating to extradition between the member states of the European Union (Article 8).

10. The modified Article draws a distinction concerning immunity by reason of lapse of time from prosecution or punishment, depending on whether it obtains according to the law of the requesting or the requested Party.

11. As regards the law of the requesting Party, lapse of time remains a mandatory ground for refusal in accordance with paragraph 1 of this Article. The drafters considered excluding this as a ground for refusal, given that the requesting Party should, as a matter of course, not request the extradition of a person whose prosecution or punishment is statute-barred under its own law. However, they decided to keep this ground for refusal for the rare cases where a Party fails to withdraw an extradition request, despite this immunity.

12. Thus, the requested Party has an obligation to consider whether there is lapse of time under the law of the requesting Party before deciding on extradition. However, in order to allow the requested Party to fulfil this obligation, the requesting Party should provide the requested Party with a motivated statement specifying the reasons for which there is no lapse of time and including the relevant provisions of its law. In the rare cases that the requested Party has reasons to believe that immunity by reason of lapse of time might have been acquired, it should request information on this question from the requesting Party itself.

13. The requesting Party should provide this information together with the extradition request, without an explicit request to that effect from the requested Party being necessary (see also Article 12, paragraph 2, sub-paragraphs b and c of the Convention, as amended by the present protocol).

14. As regards the law of the requested Party, paragraph 2 of the modified Article 10 provides that lapse of time shall not serve as a ground for refusal in principle. This is in line with developments in international law[1], as well as European Union law[2], which have taken place since 1957.

15. Paragraph 3 qualifies the principle established under paragraph 2, by allowing the requested Party to invoke lapse of time under its own law as an optional ground for refusal in two hypotheses:

- the requested Party has jurisdiction on the relevant offences under its own criminal law;
- its domestic legislation explicitly prohibits extradition in case of lapse of time under its own law.

1. For example, the UN Model Treaty on Extradition and its revised Manual.
2. Notably, the Convention implementing the Schengen Agreement (19 June 1990) and the Convention of 23 October 1996 drawn up on the basis of Article K.3 of the Treaty on European Union, relating to extradition between the member states of the European Union.

However, the possibility of doing so is conditional on a reservation to that effect having been made at the time of signature or when depositing the instrument of ratification, acceptance, approval or accession.

16. This reservation may concern either one of the two sub-paragraphs of paragraph 2, or both. The latter case would allow a Party to make a partial withdrawal of its reservation as regards the more far-reaching ground for refusal of sub-paragraph b, while maintaining the more limited ground for refusal of sub-paragraph a.

17. Paragraph 4, is intended to apply only in respect of Parties having made a reservation under paragraph 3. The principle reflected in this provision follows from the Resolution (75) 12 of the Committee of Ministers on the practical application of the European Convention on Extradition.

18. As reflected in the wording "in accordance with its law", it is the law of the requested Party which determines if, and to what extent, acts and events in the requesting Party interrupt or suspend time-limitation in the requested Party.

Article 2 – The request and supporting documents

19. Article 12, paragraph 1 of the Convention provides that requests for extradition shall be communicated through the diplomatic channel. Chapter V of the Second Additional Protocol to the Convention simplified this system by providing for extradition requests to be sent by the Ministry of Justice of the requesting Party to the Ministry of Justice of the requested Party. However, for a number of countries the competent authority for sending and receiving extradition requests is not the Ministry of Justice, but another authority such as the Office of the Prosecutor General. The present wording is designed to accommodate this practice.

20. Any Party wishing to designate a competent authority other than the Ministry of Justice shall notify the Secretary General of the Council of Europe accordingly. The drafters agreed that any such authority shall be competent at the national level to send and receive extradition requests. In the absence of such notification, the competent authority with respect to that state is understood to be the Ministry of Justice.

21. The drafters took note of the practice of some Parties to the Convention to designate more than one competent authority. In such cases, the declaration of the Party concerned should make it clear how competences of the different authorities are apportioned in extradition cases.

22. It is important to note that Article 2, paragraph 2 of this Additional Protocol provides that Article 5 of the Second Additional Protocol shall not apply as between Parties to the Fourth Additional Protocol[3].

23. Channels and means of communication are now dealt with in Article 6 of this Fourth Additional Protocol so as to create a common system in this respect.

24. It is important to note that although Article 5 of the Second Additional Protocol will not apply, it will still be possible to conclude agreements between Parties in accordance with Article 28, paragraph 2 of the Convention, as foreseen in Article 7, paragraph 2, of the Fourth Additional Protocol.

25. As regards paragraph 2 of Article 12 of the Convention as amended by this Fourth Additional Protocol, contrary to the Convention which requires an original or authenticated copy of the documents mentioned under sub-paragraph a, this Additional Protocol only refers to "a copy". This is in line with the possibility introduced under Article 6 of the Fourth Additional Protocol to use modern means of communication. However, sub-paragraph a should also be read in conjunction with the reservation provided for under Article 6, paragraph 3 of this Additional Protocol. In cases where the requested Party has made such a reservation, the requesting Party would still have to send the originals or authenticated copies of these documents.

26. In addition, the Fourth Additional Protocol completes the original wording of paragraph 2 of Article 12 of the Convention in two respects. Firstly, Under sub-paragraph b, an explicit reference to provisions relating to lapse of time is included, with the understanding that the appraisal of lapse of time according to the law of the requesting Party, pursuant to Article 10, paragraph 1 of the Convention as amended by the Fourth Additional Protocol, should be based on the assessment made by that Party of lapse of time according to its own law. Secondly, under sub-paragraph c, the relevant information to be sent is completed with a reference to the location of the person, due to practical considerations.

3. Article 5 of the Second Additional Protocol will continue to apply in relations between Parties to the Second Additional Protocol and Parties to the Fourth Additional Protocol having ratified the Second Additional Protocol.

Article 3 – Rule of speciality

27. The rule of speciality corresponds to the principle that an extradited person may not be arrested, prosecuted, tried, sentenced or detained for an offence other than that which furnished the grounds for his or her extradition. In this context, it is important to underline the responsibility of the requesting Party to ensure that the initial request for extradition is as complete as possible and based on all available information, in order to avoid future requests for the extension of extradition to other offences committed prior to the initial request.

28. This article rewords Article 14 of the Convention, by introducing the following amendments:

1. in paragraph 1, the words "proceeded against" are replaced by the words "arrested, prosecuted, tried" and a new sub-paragraph is inserted under paragraph 2, in order to clarify the scope of the rule of speciality;
2. in paragraph 1, the sentence containing the words "nor shall he or she be for any other reason restricted in his or her personal freedom", has been restructured in order to align the English and French versions;
3. in paragraph 1, sub-paragraph a, a time limit of 90 days is introduced for the formerly requested Party to communicate its decision on the extension of the extradition to other offences;
4. in paragraph 1, sub-paragraph b, the period of 45 days is reduced to 30 days;
5. a new paragraph 3 is introduced, creating the possibility for the requested Party to authorise the requesting Party to restrict the personal freedom of the extradited person pending its decision on extension of the extradition.

29. As regards point 1, the reason for the change is the fact that there had been many different and sometimes conflicting interpretations of the words "proceeded against" in different legal systems. The replies to a questionnaire sent by the PC-OC indicated notably that the authorities of some Parties to the Convention had interpreted the words "proceeded against" to cover any measure taken by the authorities of the requesting Party, even before a case is brought to trial. This had made it impossible for those Parties to investigate and collect evidence in relation to offences committed prior to a person's extradition and which are discovered after her/his surrender. This has created significant difficulties in some Parties or led to the rejection of evidence collected on such offences by courts.

30. The drafters of the Fourth Additional Protocol were of the view that such an interpretation did not reflect the intention of the drafters of the Convention, as the requesting Party should not be barred from doing whatever is necessary in order to organise the file for a request to be addressed to the Party which surrendered the person in accordance with paragraph 1, sub-paragraph a, seeking the consent of that Party to the extension of the extradition to offences not covered in the initial extradition request. Such a request for consent should notably be accompanied by the documents mentioned in Article 12, which implies that the requesting Party may initiate or continue proceedings up to the point where it obtains the necessary documents for requesting the other Party's consent, such as a new warrant of arrest.

31. The new wording of paragraph 1, in combination with the new paragraph 2, sub-paragraph a, makes it clear that the rule of speciality does not bar the requesting Party from conducting pre-trial investigations and doing what is necessary in order to obtain the documents mentioned under paragraph 1, sub-paragraph a, while still ruling out the possibility for the requesting Party to bring the case to trial or restrict the personal freedom of the extradited person, solely based on these newly discovered offences. In this context, pre-trial investigations are to be understood to comprise intrusive measures such as wiretapping or house searches with regard to the extradited person, as well as confrontation and interrogation of persons other than the extradited person in connection with these additional offences. The extradited person may be interrogated or confronted insofar as this investigative measure does not imply coercion, i.e. the restriction of the personal freedom of the extradited person. Article 14 of the Convention, as revised by this Fourth Additional Protocol, should also not prevent the requesting Party from summoning the extradited person for the purpose of gathering evidence in order to institute proceedings against other persons who are not covered by the rule of speciality.

32. The concept of "restriction of personal freedom" is to be interpreted so as to include not only deprivation of liberty in accordance with Article 5 of the European Convention of Human Rights, but also restrictions on "liberty of movement", in accordance with Article 2 of Protocol No. 4 thereto. Thus, a ban to leave the territory of the requesting Party would for example qualify as a restriction of personal freedom.

▶ **Paragraph 1, sub-paragraph a**

33. As regards point 3, the PC-OC considered that the introduction of a time limit for the requested Party would be an added value in the context of the modernisation of the Convention. This is linked to the observation of the PC-OC that extension of extradition to new offences is sometimes characterised by co-operation which is less prompt compared to the initial request and can cause significant delays, which causes problems in the criminal procedures of requesting Parties and may also have negative consequences for the defendant. The PC-OC therefore agreed that the introduction of such a time limit would have a clear added value.

34. Even though some Parties to the Convention follow the same procedure for giving consent to the extension of the extradition decision as they do for the initial extradition request, the PC-OC observed that certain elements, such as the presence of the person already in the requesting Party or the technical nature of many extension requests, may allow for a speedy decision on extension. The drafters thus agreed that 90 days would be sufficient for the requested Party to take its decision on consenting to the extension of extradition.

35. However, in certain cases, it might not be possible for the requested Party to treat the request for consent within 90 days, in which case this period can be extended. This nonetheless constitutes progress vis-à-vis the mother Convention, as in such cases the requested Party would have an obligation to inform the requesting Party of the reasons for the delay and the time needed for reaching a decision. This would reduce uncertainty for the requesting Party and limit the disruption to its criminal procedure.

▶ **Paragraph 1, sub-paragraph b**

36. The amendment to paragraph 1, sub-paragraph b concerns the delay following the final discharge of the extradited person after which the rule of speciality ceases to apply. The Convention provides that the rule of speciality shall not apply if the person has not left, having had the opportunity to do so, the territory of the requested Party within 45 days of the person's discharge or if the person has returned to that territory after leaving it. The drafters considered that the 45-day period had no objective justification 50 years after the adoption of the Convention, given that it has become much easier to travel and leave the territory of Parties. They therefore agreed to restrict this delay to 30 days.

37. This provision also contains two conditions which have to be fulfilled for the rule of speciality to cease to apply. The person must have been "finally discharged" and had the "opportunity to leave the territory".

38. The term finally discharged should be interpreted in line with the meaning attributed to that term under the Additional Protocol to the Convention on the Transfer of Sentenced Persons. Paragraph 32 of the explanatory report to that Protocol provides that:

> "The expression "final discharge" (in French: "*élargissement définitif*") means that the person's freedom to leave the country is no longer subject to any restriction deriving directly or indirectly from the sentence. Consequently, where, for instance, the person is conditionally released, that person is finally discharged if the conditions linked to release do not prevent him or her from leaving the country; conversely, that person is not finally discharged where the conditions linked to release do prevent him or her from leaving the country."

39. With regard to the words "opportunity to leave the territory", and as clarified in the explanatory report to Article 14 of the original Convention, the person must not only be free to leave the territory, but also not be hindered from doing so for other reasons (for example, for serious health reasons).

▶ **Paragraph 3**

40. The rule of speciality prohibits any restriction of the personal freedom of the extradited person for offences committed prior to his or her extradition, other than those which furnished the grounds for this extradition. However, there might be rare cases where this principle could potentially create an impediment to the pursuit of the ends of justice, even where there is no oversight on the side of the requesting Party.

41. A typical example would be a situation where the requesting Party discovers new elements after the extradition implicating the extradited person in connection with an offence not included in the original extradition request, on the basis of new evidence or new links to existing evidence. Another example would be the situation where a third country submits a request for re-extradition after the surrender of a person. If the release of that person from custody for the initial offence is imminent, the requesting Party may have to release the person before it can obtain the consent from the requested Party to extend the extradition to the new offence.

42. Paragraph 3 contains an optional provision which will only apply between Parties to this Protocol having made a declaration to that effect. The provision introduces a special procedure within the rule of speciality for such exceptional cases, which allows the requesting Party to continue restricting the personal freedom

of the extradited person until the requested Party takes its decision on consent pursuant to paragraph 1, sub-paragraph a.

43. According to this procedure, in order to restrict the personal freedom of the extradited person on the basis of new offences, the requesting Party must notify its intention to do so to the requested Party. This notification must take place either at the same time as the request for consent pursuant to paragraph 1, sub-paragraph a, or at a later stage. No restriction on the basis of new offences can take place outside the knowledge of the requested Party and before its acquiescence, which is tacitly given by the competent authority acknowledging the receipt of the notification of the requesting Party of its intention to proceed to such a restriction. The competent authority is the authority referred to in Article 12, paragraph 1 of the Convention as modified by Article 2, paragraph 1, of the present Protocol. Parties making a declaration in favour of this optional provision are encouraged to indicate, by the notification foreseen under Article 12, paragraph 1, of the Convention as modified, who will be the competent authority delivering the acknowledgment of receipt. In the absence of such notification, the competent authority will be the Ministry of Justice (reference is made to paragraphs 19 to 21 of this Explanatory Report). An automatically generated receipt of acknowledgment can not be regarded as an explicit acknowledgment of the receipt by the competent authority.

44. This acquiescence allows the requesting Party to take measures on the basis of its warrant of arrest for new offences, according to its own law and subject to its procedural guarantees and to the control of its domestic courts. However, the requested Party may at any time express its opposition to such a restriction of personal freedom, either simultaneously with its acknowledgement of receipt or at a later stage. The requesting Party must comply with this opposition, in the former case by abstaining from taking the measure restricting the personal freedom of the extradited person, and in the latter case by putting an immediate end to the measure in question.

45. The drafters considered that the opposition of the requested Party pursuant to this paragraph may be only limited to certain types of restriction. For example, the requested Party could inform the requesting Party that the latter may not detain the person in question, but use alternative measures restricting her or his personal freedom, such as a house arrest or a ban to leave the country.

46. The drafters of the Additional Protocol considered that the changes to the rule of speciality have no impact on surrender procedures between EU member states on the basis of the EU Framework Decision on the European Arrest Warrant.

Article 4 – Re-extradition to a third State

47. The changes to Article 15 of the Convention are in line with the amendments to Article 14 of the Convention, and concern the introduction of a time limit not exceeding 90 days for the requested Party to decide whether or not it consents to a re-extradition of the person surrendered to another Party or to a third state.

Article 5 – Transit

48. This article, which was inspired by Article 11 of the Third Additional Protocol to the Convention, simplifies considerably the transit procedure foreseen in Article 21 of the Convention. The drafters of the Additional Protocol noted that, for an effective and speedy transit procedure, the request for transit should be sent as soon as possible. The drafters also took note of Recommendation No. R (80) 7 of the Committee of Ministers of the Council of Europe concerning the practical application of the European Convention on Extradition.

49. In accordance with paragraph 2, the request for transit does not have to be accompanied by the documents referred to in the new Article 12, paragraph 2 of the Convention. Accordingly, the information listed in this paragraph may be considered sufficient for the purposes of granting transit. Nevertheless, in exceptional cases where this information is not sufficient for the state of transit to reach a decision on granting transit, Article 13 of the Convention would apply and allow that Party to request supplementary information from the Party requesting transit. While information concerning lapse of time is not included in this list, the drafters agreed that such information should also be provided in cases where lapse of time is likely to be of concern, for example due to the time of commission of the offence.

50. Pursuant to Article 6 of this Fourth Additional Protocol, communications for transit purposes may be made through electronic or any other means affording evidence in writing (such as fax or electronic mail), and the decision of the Party requested to grant transit may be made known by the same method. Parties can also make use of these means of communication for practical arrangements. Thus, the Party requesting transit is encouraged to communicate, to the extent possible, information such as the intended time and

place of transit, the route, flight details, or the identity of the escorting officers, as soon as this information becomes available.

51. The drafters of this Fourth Additional Protocol considered that the new Article 21 of the Convention could also cover cases where only the Party requesting transit and the Party requested to grant transit are Parties to the Convention, and extradition has been granted on a legal basis other than the Convention.

52. It is no longer an obligation under this Fourth Additional Protocol to notify a Party whose air space will be used during transit when it is not intended to land. However, paragraph 3 foresees an emergency procedure in the event of an unscheduled landing. As soon as the requesting Party is informed of such an event, it shall notify to the Party on whose territory the unscheduled landing occurs that one of the documents mentioned in Article 12, paragraph 2, sub-paragraph a exists. While this Additional Protocol does not specify the form this notification should take, the relevant documentation carried by the escorting officers, or information contained in the INTERPOL or Schengen Information Systems could, for example, be considered sufficient in this respect.

53. Similarly to the original wording of Article 21, paragraph 4 of the Convention, the Party on whose territory the unscheduled landing occurs shall consider this notification as a request for provisional arrest, pending the submission of an ordinary request for transit in accordance with paragraphs 1 and 2.

Article 6 – Channels and means of communication

54. This Article, which is based on Article 8 of the Third Additional Protocol to the Convention, provides a legal basis for speedy communication, including electronic means of communication, while ensuring the authenticity of the documents and information transmitted. It would affect means of communication in relation to several provisions of the Convention, including Articles 12, 13, 14, 15, 16, 17, 18, 19 and 21. The Parties may also request to obtain the original document or an authenticated copy, in particular by mail.

55. The drafters of this Fourth Additional Protocol agreed that the current trend was towards a more intensive use of electronic means of communication, and that the text of the Convention should be open to future developments in this respect, including the possibility of sending all extradition documents using electronic means. However, some delegations considered that for the most essential documents, namely those referred to in Article 12, paragraph 2 and Article 14, paragraph 1, sub-paragraph a of the Convention as amended, it would be premature in the current circumstances to abolish the requirement for transmission by mail, until more reliable electronic means, such as communication with secure electronic signatures, are more widespread.

56. In order to accommodate these concerns, paragraph 3 of this Article allows states to declare that they reserve the right to require the original or authenticated copy of the request and supporting documents for these specific Articles in all cases. This reservation can be withdrawn as soon as circumstances permit.

Article 7 – Relationship with the Convention and other international instruments

57. This article clarifies the relationship between the Protocol on the one hand, and the Convention and other international agreements on the other hand.

58. Paragraph 1 ensures uniform interpretation of this Additional Protocol and the Convention by providing that the words and expressions used in the Protocol shall be interpreted within the meaning of the Convention. The Convention should be understood as the European Convention on Extradition of 1957 (ETS No. 24), as amended between Parties concerned by the Additional Protocol (ETS No. 86), the Second Additional Protocol (ETS No. 98) and/or the Third Additional Protocol (CETS No. 209) thereto.

59. Paragraph 1 further clarifies the relationship between the provisions of the Convention and those of this Fourth Additional Protocol, i.e. as between the Parties to this Protocol, the provisions of the Convention shall apply to the extent that they are compatible with the provisions of this Additional Protocol, in accordance with general principles and norms of international law.

60. Paragraph 2 is designed to ensure the smooth co-existence of this Fourth Additional Protocol with any bilateral or multilateral agreements concluded in pursuance of Article 28, paragraph 2 of the Convention. It states that the Additional Protocol does not alter the relation between the Convention and such agreements or the possibility for Parties to regulate their mutual relations with regard to extradition exclusively in accordance with a system based on a uniform law (Article 28, paragraph 3 of the Convention).

61. This implies in particular that declarations made by EU member states in relation with the European Union Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between member states (2002/584/JHA) would automatically apply to this Fourth Additional Protocol and would make it unnecessary for the states concerned to make new declarations to that effect.

Article 8 – Friendly settlement

62. This article recognises the important role of the European Committee on Crime Problems in the interpretation and application of the Convention and the Additional Protocols thereto, and follows the precedents established in other European conventions in the criminal justice field. It also follows Recommendation Rec (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 the Additional Protocols thereto, so that it may contribute to facilitating friendly settlements and proposing amendments to the Convention and the Additional Protocols thereto which might prove necessary.

Article 9 to 15 – Final clauses

63. Article 11 has been introduced to ensure clarity about the application in time between Parties to this Fourth Additional Protocol. The Protocol will only apply to new requests, received after the entry into force in each of the Parties concerned. The word "requests" covers requests for extradition, additional requests for consent and requests for transit.

64. The remaining Articles 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 European Convention on Extradition.

65. Since Article 12 concerning territorial application is mainly aimed at overseas territories, it was agreed that it would be clearly against the philosophy of this Additional Protocol for any Party to exclude parts of its main territory from the application of this instrument, and that there would be no need to lay this down explicitly in this Fourth Additional Protocol.

66. Reservations and declarations made by a state with regard to any provision of the Convention or the Additional Protocols thereto, which is not amended by this Fourth Additional Protocol, shall also be applicable to this Additional Protocol, unless that state declares otherwise in accordance with Article 13, paragraph 1.

67. It is underlined that under the provisions of Article 13, no reservation may be made with regard to the provisions of this Additional Protocol except for the reservations provided for under Article 10, paragraph 3, and Article 21, paragraph 5 of the Convention as amended by this Protocol, and Article 6, paragraph 3 of this Fourth Additional Protocol.

European Convention on mutual assistance in criminal matters – ETS No. 30

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.

European Convention on mutual assistance in criminal matters – ETS No. 30

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 *paragrah 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 *paragrah 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 *paragrah 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 commited 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 – ETS No. 99

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 categories 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.

Additional Protocol to the European Convention on mutual assistance in criminal matters – ETS No. 99

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 Planary 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 – ETS No. 182

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. 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 sub-paragraph 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 or 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.

Second additional Protocol to the European Convention on mutual assistance in criminal matters – ETS No. 182

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";

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).

– 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.

54. 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 open 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[5]; 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].

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.

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. Practise 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 loose 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 instances 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 world "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

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.

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].

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.

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.

Convention on the transfer of sentenced persons – ETS No. 112

Strasbourg, 21.III.1983

The member States of the Council of Europe and the other States, signatory hereto,

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

Desirous of further developing international co-operation in the field of criminal law;

Considering that such co-operation should further the ends of justice and the social rehabilitation of sentenced persons;

Considering that these objectives require that foreigners who are deprived of their liberty as a result of their commission of a criminal offence should be given the opportunity to serve their sentences within their own society; and

Considering that this aim can best be achieved by having them transferred to their own countries,

Have agreed as follows:

Article 1 – Definitions

For the purposes of this Convention:

a. "sentence" means any punishment or measure involving deprivation of liberty ordered by a court for a limited or unlimited period of time on account of a criminal offence;

b. "judgment" means a decision or order of a court imposing a sentence;

c. "sentencing State" means the State in which the sentence was imposed on the person who may be, or has been, transferred;

d. "administering State" means the State to which the sentenced person may be, or has been, transferred in order to serve his sentence.

Article 2 – General principles

1. The Parties undertake to afford each other the widest measure of co-operation in respect of the transfer of sentenced persons in accordance with the provisions of this Convention.

2. A person sentenced in the territory of a Party may be transferred to the territory of another Party, in accordance with the provisions of this Convention, in order to serve the sentence imposed on him. To that end, he may express his interest to the sentencing State or to the administering State in being transferred under this Convention.

3. Transfer may be requested by either the sentencing State or the administering State.

Article 3 – Conditions for transfer

1. A sentenced person may be transferred under this Convention only on the following conditions:

   a. if that person is a national of the administering State;

   b. if the judgment is final;

   c. if, at the time of receipt of the request for transfer, the sentenced person still has at least six months of the sentence to serve or if the sentence is indeterminate;

   d. if the transfer is consented to by the sentenced person or, where in view of his age or his physical or mental condition one of the two States considers it necessary, by the sentenced person's legal representative;

   e. if the acts or omissions on account of which the sentence has been imposed constitute a criminal offence according to the law of the administering State or would constitute a criminal offence if committed on its territory; and

   f. if the sentencing and administering States agree to the transfer.

2. In exceptional cases, Parties may agree to a transfer even if the time to be served by the sentenced person is less than that specified in paragraph 1.c.

3. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, by a declaration addressed to the Secretary General of the Council of Europe, indicate that it intends to exclude the application of one of the procedures provided in Article 9.1.a and b in its relations with other Parties.

4. Any State may, at any time, by a declaration addressed to the Secretary General of the Council of Europe, define, as far as it is concerned, the term "national" for the purposes of this Convention.

Article 4 – Obligation to furnish information

1. Any sentenced person to whom this Convention may apply shall be informed by the sentencing State of the substance of this Convention.

2. If the sentenced person has expressed an interest to the sentencing State in being transferred under this Convention, that State shall so inform the administering State as soon as practicable after the judgment becomes final.

3. The information shall include:

   a. the name, date and place of birth of the sentenced person;

   b. his address, if any, in the administering State;

   c. a statement of the facts upon which the sentence was based;

   d. the nature, duration and date of commencement of the sentence.

4. If the sentenced person has expressed his interest to the administering State, the sentencing State shall, on request, communicate to the State the information referred to in paragraph 3 above.

5. The sentenced person shall be informed, in writing, of any action taken by the sentencing State or by the administering State under the preceding paragraphs, as well as of any decision taken by either State on a request for transfer.

Article 5 – Requests and replies

1. Requests for transfer and replies shall be made in writing.

2. Requests shall be addressed by the Ministry of Justice of the requesting State to the Ministry of Justice of the requested State. Replies shall be communicated through the same channels.

3. Any Party may, by a declaration addressed to the Secretary General of the Council of Europe, indicate that it will use other channels of communication.

4. The requested State shall promptly inform the requesting State of its decision whether or not to agree to the requested transfer.

Article 6 – Supporting documents

1. The administering State, if requested by the sentencing State, shall furnish it with:

   a. a document or statement indicating that the sentenced person is a national of that State;

   b. a copy of the relevant law of the administering State which provides that the acts or omissions on account of which the sentence has been imposed in the sentencing State constitute a criminal offence according to the law of the administering State, or would constitute a criminal offence if committed on its territory;

   c. a statement containing the information mentioned in Article 9.2.

2. If a transfer is requested, the sentencing State shall provide the following documents to the administering State, unless either State has already indicated that it will not agree to the transfer:

   a. a certified copy of the judgment and the law on which it is based;

   b. a statement indicating how much of the sentence has already been served, including information on any pre-trial detention, remission, and any other factor relevant to the enforcement of the sentence;

   c. a declaration containing the consent to the transfer as referred to in Article 3.1.d; and

   d. whenever appropriate, any medical or social reports on the sentenced person, information about his treatment in the sentencing State, and any recommendation for his further treatment in the administering State.

3. Either State may ask to be provided with any of the documents or statements referred to in paragraphs 1 or 2 above before making a request for transfer or taking a decision on whether or not to agree to the transfer.

Article 7 – Consent and its verification

1. The sentencing State shall ensure that the person required to give consent to the transfer in accordance with Article 3.1.d does so voluntarily and with full knowledge of the legal consequences thereof. The procedure for giving such consent shall be governed by the law of the sentencing State.

2. The sentencing State shall afford an opportunity to the administering State to verify through a consul or other official agreed upon with the administering State, that the consent is given in accordance with the conditions set out in paragraph 1 above.

Article 8 – Effect of transfer for sentencing State

1. The taking into charge of the sentenced person by the authorities of the administering State shall have the effect of suspending the enforcement of the sentence in the sentencing State.

2. The sentencing State may no longer enforce the sentence if the administering State considers enforcement of the sentence to have been completed.

Article 9 – Effect of transfer for administering State

1. The competent authorities of the administering State shall:

   a. continue the enforcement of the sentence immediately or through a court or administrative order, under the conditions set out in Article 10, or

   b. convert the sentence, through a judicial or administrative procedure, into a decision of that State, thereby substituting for the sanction imposed in the sentencing State a sanction prescribed by the law of the administering State for the same offence, under the conditions set out in Article 11.

2. The administering State, if requested, shall inform the sentencing State before the transfer of the sentenced person as to which of these procedures it will follow.

3. The enforcement of the sentence shall be governed by the law of the administering State and that State alone shall be competent to take all appropriate decisions.

4. Any State which, according to its national law, cannot avail itself of one of the procedures referred to in paragraph 1 to enforce measures imposed in the territory of another Party on persons who for reasons of mental condition have been held not criminally responsible for the commission of the offence, and which is

prepared to receive such persons for further treatment may, by way of a declaration addressed to the Secretary General of the Council of Europe, indicate the procedures it will follow in such cases.

Article 10 – Continued enforcement

1. In the case of continued enforcement, the administering State shall be bound by the legal nature and duration of the sentence as determined by the sentencing State.

2. If, however, this sentence is by its nature or duration incompatible with the law of the administering State, or its law so requires, that State may, by a court or administrative order, adapt the sanction to the punishment or measure prescribed by its own law for a similar offence. As to its nature, the punishment or measure shall, as far as possible, correspond with that imposed by the sentence to be enforced. It shall not aggravate, by its nature or duration, the sanction imposed in the sentencing State, nor exceed the maximum prescribed by the law of the administering State.

Article 11 – Conversion of sentence

1. In the case of conversion of sentence, the procedures provided for by the law of the administering State apply. When converting the sentence, the competent authority:

a. shall be bound by the findings as to the facts insofar as they appear explicitly or implicitly from the judgment imposed in the sentencing State;

b. may not convert a sanction involving deprivation of liberty to a pecuniary sanction;

c. shall deduct the full period of deprivation of liberty served by the sentenced person; and

d. shall not aggravate the penal position of the sentenced person, and shall not be bound by any minimum which the law of the administering State may provide for the offence or offences committed.

2. If the conversion procedure takes place after the transfer of the sentenced person, the administering State shall keep that person in custody or otherwise ensure his presence in the administering State pending the outcome of that procedure.

Article 12 – Pardon, amnesty, commutation

Each Party may grant pardon, amnesty or commutation of the sentence in accordance with its Constitution or other laws.

Article 13 – Review of judgment

The sentencing State alone shall have the right to decide on any application for review of the judgment.

Article 14 – Termination of enforcement

The administering State shall terminate enforcement of the sentence as soon as it is informed by the sentencing State of any decision or measure as a result of which the sentence ceases to be enforceable.

Article 15 – Information on enforcement

The administering State shall provide information to the sentencing State concerning the enforcement of the sentence:

a. when it considers enforcement of the sentence to have been completed;

b. if the sentenced person has escaped from custody before enforcement of the sentence has been completed; or

c. if the sentencing State requests a special report.

Article 16 – Transit

1. A Party shall, in accordance with its law, grant a request for transit of a sentenced person through its territory if such a request is made by another Party and that State has agreed with another Party or with a third State to the transfer of that person to or from its territory.

2. A Party may refuse to grant transit:

a. if the sentenced person is one of its nationals, or

b. if the offence for which the sentence was imposed is not an offence under its own law.

3. Requests for transit and replies shall be communicated through the channels referred to in the provisions of Article 5.2 and 3.

4. A Party may grant a request for transit of a sentenced person through its territory made by a third State if that State has agreed with another Party to the transfer to or from its territory.

5. The Party requested to grant transit may hold the sentenced person in custody only for such time as transit through its territory requires.

6. The Party requested to grant transit may be asked to give an assurance that the sentenced person will not be prosecuted, or, except as provided in the preceding paragraph, detained, or otherwise subjected to any restriction on his liberty in the territory of the transit State for any offence committed or sentence imposed prior to his departure from the territory of the sentencing State.

7. No request for transit shall be required if transport is by air over the territory of a Party and no landing there is scheduled. However, each State may, by a declaration addressed to the Secretary General of the Council of Europe at the time of signature or of deposit of its instrument of ratification, acceptance, approval or accession, require that it be notified of any such transit over its territory.

Article 17 – Language and costs

1. Information under Article 4, paragraphs 2 to 4, shall be furnished in the language of the Party to which it is addressed or in one of the official languages of the Council of Europe.

2. Subject to paragraph 3 below, no translation of requests for transfer or of supporting documents shall be required.

3. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, by a declaration addressed to the Secretary General of the Council of Europe, require that requests for transfer and supporting documents be accompanied by a translation into its own language or into one of the official languages of the Council of Europe or into such one of these languages as it shall indicate. It may on that occasion declare its readiness to accept translations in any other language in addition to the official language or languages of the Council of Europe.

4. Except as provided in Article 6.2.a, documents transmitted in application of this Convention need not be certified.

5. Any costs incurred in the application of this Convention shall be borne by the administering State, except costs incurred exclusively in the territory of the sentencing State.

Article 18 – Signature and entry into force

1. This Convention shall be open for signature by the member States of the Council of Europe and non-member States which have participated in its elaboration. It is 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. This Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date on which three member States of the Council of Europe have expressed their consent to be bound by the Convention in accordance with the provisions of paragraph 1.

3. In respect of any signatory State which subsequently expresses its consent to be bound by it, the Convention 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 ratification, acceptance or approval.

Article 19 – Accession by non-member States

1. After the entry into force of this Convention, the Committee of Ministers of the Council of Europe, after consulting the Contracting States, may invite any State not a member of the Council and not mentioned in Article 18.1 to accede to this Convention, by a decision taken by the majority provided for in Article 20.d of

the Statute of the Council of Europe and by the unanimous vote of the representatives of the Contracting States entitled to sit on the Committee.

2. In respect of any acceding State, the Convention 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 of the instrument of accession with the Secretary General of the Council of Europe.

Article 20 – 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 Convention shall apply.

2. Any State may at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Convention to any other territory specified in the declaration. In respect of such territory the Convention 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 21 – Temporal application

This Convention shall be applicable to the enforcement of sentences imposed either before or after its entry into force.

Article 22 – Relationship to other Conventions and Agreements

1. This Convention does not affect the rights and undertakings derived from extradition treaties and other treaties on international co-operation in criminal matters providing for the transfer of detained persons for purposes of confrontation or testimony.

2. If two or more Parties have already concluded an agreement or treaty on the transfer of sentenced persons or otherwise have established their relations in this matter, or should they in future do so, they shall be entitled to apply that agreement or treaty or to regulate those relations accordingly, in lieu of the present Convention.

3. The present Convention does not affect the right of States party to the European Convention on the International Validity of Criminal Judgments to conclude bilateral or multilateral agreements with one another on matters dealt with in that Convention in order to supplement its provisions or facilitate the application of the principles embodied in it.

4. If a request for transfer falls within the scope of both the present Convention and the European Convention on the International Validity of Criminal Judgments or another agreement or treaty on the transfer of sentenced persons, the requesting State shall, when making the request, indicate on the basis of which instrument it is made.

Article 23 – Friendly settlement

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

Article 24 – Denunciation

1. Any Party may at any time denounce this Convention 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. The present Convention shall, however, continue to apply to the enforcement of sentences of persons who have been transferred in conformity with the provisions of the Convention before the date on which such a denunciation takes effect.

Article 25 – Notifications

The Secretary General of the Council of Europe shall notify the member States of the Council of Europe, the non-member States which have participated in the elaboration of this Convention and any State which has acceded to this Convention 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 Convention in accordance with Articles 18.2 and 3, 19.2 and 20.2 and 3;

d. any other act, declaration, notification or communication relating to this Convention.

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

Done at Strasbourg, this 21st day of March 1983, in English and 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, to the non-member States which have participated in the elaboration of this Convention, and to any State invited to accede to it.

Convention on the transfer of sentenced persons – ETS No. 112

Explanatory Report

1. The Convention of the Transfer of Sentenced Persons, drawn up within the Council of Europe by a committee of governmental experts under the authority of the European Committee on Crime Problems (CDPC), was opened for signature on 21 March 1983.

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

INTRODUCTION

1. At their 11th Conference (Copenhagen, 21 and 22 June 1978), the European Ministers of Justice discussed the problems posed by prisoners of foreign nationality, including the question of providing procedures for their transfer so that they may serve their sentence in their home country. The discussion resulted in the adoption of Resolution No. 1, by which the Committee of Ministers of the Council of Europe is invited to ask the European Committee on Crime Problems (CDPC), *inter alia,* "to consider the possibility of drawing up a model agreement providing for a simple procedure for the transfer of prisoners which could be used between member States or by member States in their relations with non-member States".

2. Following this initiative, the creation of a Select Committee of Experts on Foreign Nationals in Prison was proposed by the CDPC at its 28th Plenary Session in March 1979 and authorised by the Committee of Ministers at the 306th meeting of their Deputies in June 1979.

3. The committee's principal tasks were to study the problems relating to the treatment of foreigners in prison and to consider the possibility of drawing up a model agreement providing for a simple procedure for the transfer of foreign prisoners. With regard to the latter aspect, the CDPC (at its 29th Plenary Session in March 1980) authorised the Select Committee, at its own request, to prepare a multilateral convention rather than a model agreement, provided it would not conflict with the provisions of existing European conventions.

4. The Select Committee was composed of experts from fifteen Council of Europe member States (Austria, Belgium, Denmark, France, Federal Republic of Germany, Greece, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden, Switzerland, Turkey, United Kingdom). Canada and the United States of America as well as the Commonwealth Secretariat and the International Penal and Penitentiary Foundation were represented by observers. Mr. J. J. Tulkens (the Netherlands) was elected Chairman of the Select Committee. The secretariat was provided by the Directorate of Legal Affairs of the Council of Europe.

5. The draft for a Convention on the Transfer of Sentenced Persons was prepared during the Select Committee's first five meetings, held from 3 to 5 October 1979, 4 to 6 March 1980, 7 to 10 October 1980,1 to 4 June 1981 and 1 to 4 December 1981 (enlarged meeting to which experts from all member States were invited). In addition, a drafting group met from 7 to 9 October 1980 (during the Select Committee's 3rd meeting) and from 24 to 26 November 1980.

6. The draft convention was finalised by the CDPC at its 31st Plenary Session in May 1982 and forwarded to the Committee of Ministers.

7. At the 350th meeting of their Deputies in September 1982, the Committee of Ministers approved the text of the convention. At their 354th meeting in December 1982, the Ministers'Deputies decided to open it for signature on 21 March 1983.

GENERAL CONSIDERATIONS

8. The purpose of the Convention is to facilitate the transfer of foreign prisoners to their home countries by providing a procedure which is simple as well as expeditious. In that respect it is intended to complement the European Convention on the International Validity of Criminal Judgments of 28 May 1970 which, although allowing for the transfer of prisoners, presents two major shortcomings: it has, so far, been ratified by only a small number of member States, and the procedure it provides is not conducive to being applied in such a way as to ensure the rapid transfer of foreign prisoners.

With a view to overcoming the last-mentioned difficulty, due to the inevitable administrative complexities of an instrument as comprehensive and detailed as the European Convention on the International Validity of Criminal Judgments, the Convention on the Transfer of Sentenced Persons seeks to provide a simple, speedy and flexible mechanism for the repatriation of prisoners.

9. In facilitating the transfer of foreign prisoners, the convention takes account of modern trends in crime and penal policy. In Europe, improved means of transport and communication have led to a greater mobility of persons and, in consequence, to increased internationalisation of crime. As penal policy has come to lay greater emphasis upon the social rehabilitation of offenders, it may be of paramount importance that the sanction imposed on the offender is enforced in his home country rather than in the State where the offence was committed and the judgment rendered. This policy is also rooted in humanitarian considerations: difficulties in communication by reason of language barriers, alienation from local culture and customs, and the absence of contacts with relatives may have detrimental effects on the foreign prisoner. The repatriation of sentenced persons may therefore be in the best interests of the prisoners as well as of the governments concerned.

10. The convention distinguishes itself from the European Convention on the International Validity of Criminal Judgments in four respects:

- With a view to facilitating the rapid transfer of foreign prisoners, it provides for a simplified procedure which, in its practical application, is likely to be less cumbersome than that laid down in the European Convention on the International Validity of Criminal Judgments.
- A transfer may be requested not only by the State in which the sentence was imposed ("sentencing State"), but also by the State of which the sentenced person is a national ("administering State"), thus enabling the latter to seek the repatriation of its own nationals.
- The transfer is subject to the sentenced person's consent.
- The Convention confines itself to providing the procedural framework for transfers. It does not contain an obligation on Contracting States to comply with a request for transfer; for that reason, it was not necessary to list any grounds for refusal, nor to require the requested State to give reasons for its refusal to agree to a requested transfer.

11. Unlike the other conventions on international co-operation in criminal matters prepared within the framework of the Council of Europe, the Convention on the Transfer of Sentenced Persons does not carry the word "European" in its title. This reflects the draftsmen's opinion that the instrument should be open also to like-minded democratic States outside Europe. Two such States – Canada and the United States of America – were, in fact, represented on the Select Committee by observers and actively associated with the elaboration of the text.

COMMENTARIES ON THE ARTICLES OF THE CONVENTION

Article 1 – Definitions

12. Article 1 defines four terms which are basic to the transfer mechanism which the Convention provides.

13. The definition of "sentence" *a* makes clear that the Convention applies only to a punishment or measure which involves deprivation of liberty, and only to the extent that it does so, regardless of whether the person concerned is already serving his sentence or not.

14. It follows from the definition of "judgment" *b* that the Convention applies only to sentences imposed by a court of law.

15. The two States involved in the transfer of a sentenced person are defined as "sentencing State" and "administering State" *c* and *d*.

Article 2 – General principles

16. Paragraph 1 contains the general principle which governs the application of the Convention. Its wording is inspired by Article 1.1 of the European Convention on Mutual Assistance in Criminal Matters. The reference to "the widest measure of co-operation in respect of the transfer of sentenced persons" is intended to emphasise the convention's underlying philosophy: that it is desirable to enforce sentences in the home country of the person concerned.

17. Paragraph 2 refers the sentencing State to the possibility, afforded by the Convention, of having the sentenced person transferred to another Contracting State for the purpose of enforcing the sentence. That other State, that is the "administering State", is – by virtue of Article 3.1.*a* – the State of which the sentenced person is a national.

Although the sentenced person may not formally apply for his transfer (see paragraph 3), he may express his interest in being transferred under the Convention, and he may do so by addressing himself to either the sentencing State or the administering State.

18. According to paragraph 3, transfers may be requested by either the sentencing State or the administering State. This provision signifies an important departure from the rule of the European Convention on the International Validity of Criminal Judgments that only the sentencing State is entitled to make the request. It acknowledges the interest which the prisoner's home country may have in his repatriation for reasons of cultural, religious, family and other social ties.

Article 3 – Conditions for transfer

19. The first paragraph of Article 3 enumerates six conditions which must be fulfilled if a transfer is to be effected under the terms of the Convention.

20. The first condition a is that the person to be transferred is a national of the administering State. In an effort to render the application of the convention as easy as possible, the reference to the sentenced person's nationality was preferred to including in the convention other notions which, in their practical application, might give rise to problems of interpretation as, for instance, the terms "ordinarily resident in the other State" and "the State of origin" used in Article 5 of the European Convention on the International Validity of Criminal Judgments.

It is not necessary for the person concerned to be a national of only the administering State. Contracting States may decide to apply the convention, when appropriate, in cases of double or multiple nationality even when the other nationality (or one of the other nationalities) is that of the sentencing State. It is to be noted, however, that even where all the conditions for transfer are satisfied, the requested State remains free to agree or not to agree to a requested transfer. A sentencing State is therefore free to refuse a requested transfer if it concerns one of its own nationals.

Paragraph 1.*a* is to be read in conjunction with paragraph 4 which grants Contracting States the possibility to define, by means of a declaration, the term "national".

This possibility, corresponding with that provided in Article 6.1.*b* of the European Convention on Extradition, is to be interpreted in a wide sense: the provision is intended to enable Contracting States to extend the application of the convention to persons other than "nationals" within the strict meaning of their nationality legislation as, for instance, stateless persons or citizens of other States who have established roots in the country through permanent residence.

21. The second condition *b* is that the judgment must be final and enforceable, for instance because all available remedies have been exhausted, or because the time-limit for lodging a remedy has expired without the parties having availed themselves of it. This does not preclude the possibility of a later review of the judgment in the light of fresh evidence, as provided for under Article 13.

22. The third condition *c* concerns the length of the sentence still to be served. For the convention to be applicable, the sentence must be of a duration of at least six months at the time of receipt of the request for transfer, or be indeterminate.

Two considerations have led to the inclusion of this condition: the first is that the convention is conceived as an instrument to further the offender's social rehabilitation, an objective which can usefully be pursued only where the length of the sentence still to be served is sufficiently long. The second reason is that of the system's cost-effectiveness; the transfer of a prisoner is costly, and the considerable expenses incurred by the States concerned must therefore be proportionate to the purpose to be achieved, which excludes recourse to a transfer where the person concerned has only a short sentence to serve.

In exceptional cases, however, Contracting States may – in application of paragraph 2 – agree to a transfer even though the time to be served is less than that specified, as the general rule, in paragraph 1.*c*. The introduction of this element of flexibility was deemed useful to cover cases where the aforementioned two considerations do not fully apply, for instance where the prospects of rehabilitation are favourable despite a sentence of less than six months or where the transfer can be effected expeditiously and at low cost, for example between neighbouring States.

23. The fourth condition *d* is that the transfer must be consented to by the person concerned. This requirement which is not contained in the European Convention on the International Validity of Criminal Judgments constitutes one of the basic elements of the transfer mechanism set up by the convention. It is rooted in the convention's primary purpose to facilitate the rehabilitation of offenders: transferring a prisoner without his consent would be counter-productive in terms of rehabilitation.

This provision is to be read in conjunction with Article 7 which contains rules on the way in which consent is to be given and on the possibility for the administering State to verify that consent has been given in accordance with the conditions laid down in that article.

Consent is to be given by the sentenced person's legal representative in cases where one of the two States considers it necessary in view of the age or of the physical or mental condition of the sentenced person. The reference to the sentenced person's "legal representative" is not meant to imply that the representative must be legally qualified; it includes any person duly authorised by law to represent the sentenced person, for example a parent or someone specially authorised by the competent authority.

24. The fifth condition *e* is intended to ensure compliance with the principle of dual criminal liability.

The condition is fulfilled if the act which gave rise to the judgment in the sentencing State would have been punishable if committed in the administering State and if the person who performed the act could, under the law of the administering State, have had a sanction imposed on him.

For the condition of dual criminal liability to be fulfilled it is not necessary that the criminal offence be precisely the same under both the law of the administering State and the law of the sentencing State. There may be differences in the wording and legal classification. The basic idea is that the essential constituent elements of the offence should be comparable under the law of both States.

25. The sixth condition *f* confirms the convention's basic principle that a transfer requires the agreement of the two States concerned.

26. Paragraph 3 is to be seen in connection with Article 9 which grants the administering State a choice between two enforcement procedures: it may either continue enforcement or convert the sentence. If requested, it must inform the sentencing State as to which of these two procedures it will follow (Article 9, paragraph 2). The general rule is, therefore, that the administering State may choose between the two enforcement procedures in each individual case.

If, however, a Contracting State wishes to exclude, in a general way, the application of one of the two procedures, it can do so under the provisions of paragraph 3: by way of a declaration, it may indicate that it intends to exclude the application of either the "continued enforcement procedure" or the "conversion procedure" in its relations with other Contracting States. As the declaration made under paragraph 3 applies to the "relations with other parties" it enables the State making such a declaration to exclude one of the two enforcement procedures not only where it is in the position of the administering State but also where it is the sentencing State; in the latter case the declaration would have the effect of making that State's agreement to a requested transfer dependent on the administering State not applying the excluded procedure.

Article 4 – Obligation to furnish information

27. Article 4 concerns the transmission of various elements of information to be furnished during the course of the transfer proceedings to the sentenced person, the administering State, and the sentencing State. The provision applies to three different phases of the procedure: paragraph 1 concerns information by

the sentencing State to the sentenced person on the substance of the convention; paragraphs 2 to 4 refer to information between the two States concerned after the sentenced person has expressed an interest in being transferred; paragraph 5 concerns information to be given to the sentenced person on the action or decision taken with regard to a possible transfer.

28. According to paragraph 1, any sentenced person who may be eligible for transfer under the convention shall be informed, by the sentencing State, of the convention's substance. This is to make the sentenced person aware of the possibilities for transfer offered by the convention and the legal consequences which a transfer to his home country would have. The information will enable him to decide whether he wishes to express an interest in being transferred. It is to be noted, however, that the sentenced person cannot himself make the formal request for transfer; it follows from Article 2.3 that transfer may be requested only by the sentencing or the administering State.

The information to be given to the sentenced person must be in a language he understands.

29. Paragraphs 2 and 3 apply where the sentenced person has expressed an interest to the sentencing State in being transferred under the convention. In that event, the sentencing State informs the State of which the sentenced person is a national that he has expressed an interest in being transferred. This information has to be provided as soon as practicable after the judgment becomes final and enforceable, and it must include the elements enumerated in paragraph 3.

30. The principal purpose of conveying this information to the authorities (including the consular authorities) of the person's home country is to enable that State to decide whether it wants to request a transfer, the assumption being that normally the sentenced person's home country will take the initiative to have its own national repatriated.

31. If the sentenced person has expressed his interest in a transfer not to the sentencing State, but to the State of which he is a national, paragraph 4 applies: in that case, the sentencing State provides the information referred to in paragraph 3 only upon the express request of the State of which the person is a national.

32. By virtue of paragraph 5, the sentenced person who has expressed an interest in being transferred must be kept informed, in writing, of the follow-up action taken in his case. He must, for instance, be told whether the information referred to in paragraph 3 has been sent to his home country, whether a request for transfer has been made and by which State, and whether a decision has been taken on the request.

Article 5 – Requests and replies

33. This article specifies the form and the channels of transmission to be used for requests for transfer and replies thereto.

34. Requests and replies must be made in writing (paragraph 1). They must, in principle, be transmitted between the respective Ministries of Justice (paragraph 2), but Contracting States may declare that they will use other ways of transmission as, for instance, the diplomatic channel (paragraph 3).

35. In line with the convention's aim to provide a procedure for the speedy transfer of sentenced persons, paragraph 4 requires the requested State promptly to inform the requesting State whether it agrees to the requested transfer.

Article 6 – Supporting documents

36. Article 6 States which supporting documents must be provided, on request, by the administering State to the sentencing State (paragraph 1), and by the sentencing State to the administering State (paragraph 2). These documents must be provided before the transfer is effected. As regards the documents to be provided by the sentencing State, they may be sent to the administering State either together with the request for transfer or afterwards; they need not be sent if either State has already indicated that it will not agree to the transfer.

37. In addition, paragraph 3 provides that either of the two States may request any of the documents or statements referred to in paragraph 1 or 2 before making a request for transfer or taking a decision on whether or not to agree to the requested transfer. This provision is intended to avoid setting the transfer procedure in motion when there are doubts as to whether all the conditions for transfer are satisfied. The sentencing State may, for instance, wish to ascertain beforehand – that is before making a request for transfer or before agreeing to a requested transfer – whether the sentenced person is a national of the administering State, or the administering State may wish to ascertain beforehand that the sentenced person consented to his transfer.

Article 7 – Consent and its verification

38. The sentenced person's consent to his transfer is one of the basic elements of the transfer mechanism established by the convention. It was therefore deemed necessary to impose an obligation on the sentencing State to ensure that the consent is given voluntarily and with full knowledge of the legal consequences which the transfer would entail for the person concerned, and to give the administering State an opportunity to verify that consent has been given in accordance with these conditions.

39. Under paragraph 2, the administering State is entitled to that verification either through a Consul or through another official on which the two States agree.

40. As the convention is based on the principle that enforcement in the administering State requires the sentenced person's prior consent, it was not considered necessary to lay down a rule of speciality to the effect that the person transferred under the convention with a view to the enforcement of a sentence may not be proceeded against or sentenced or detained for an offence other than that relating to the enforcement for which the transfer has been effected. Other conventions which provide for this rule of speciality, as, for instance, the European Convention on Extradition in its Article 14 or the European Convention on the International Validity of Criminal Judgments in its Article 9, do not require the consent of the person concerned, so that in those cases the rule of speciality is a necessary safeguard for him.

The absence of a speciality rule should be included in the information on the substance of the convention which is to be given to sentenced persons under Article 4.1.

Article 8 – Effects of transfer for sentencing State

41. This article safeguards the application of the principle of *ne bis in idem* in respect of the enforcement of the sentence after a transfer has been effected.

42. To avoid the sentenced person's serving a sentence for the same acts or omissions more than once, Article 8 provides that enforcement in the sentencing State is suspended at the moment when the authoities of the administering State take the sentenced person into charge (paragraph 1), and that the sentencing State may no longer enforce the sentence once the administering State considers enforcement to have been completed (paragraph 2).

Article 9 – Effect of transfer for administering State

43. This article concerns the enforcement of the sentence in the administering State. It states the general principles which govern enforcement; the details of the different enforcement procedures are regulated in Articles 10 and 11.

44. According to paragraph 1, the administering State may choose between two ways of enforcing the sentence: it may either continue the enforcement immediately or through a court or administrative order (Article 10), or convert the sentence, through a judicial or administrative procedure, into a decision which substitutes a sanction prescribed by its own law for the sanction imposed in the sentencing State (Article 11). It is to be noted, however, that in accordance with Article 3.3, Contracting States have the possibility to exclude, in a general way, the application of one of these two procedures.

45. If requested, the administering State must inform the sentencing State as to which of these two procedures it intends to apply (paragraph 2). This obligation has been imposed on the administering State because the information may have a bearing on the sentencing State's decision on whether or not to agree to a requested transfer.

46. The basic difference between the "continued enforcement" procedure under Article 10 and the "conversion of sentence" procedure under Article 11 – commonly called "exequatur" – is that, in the first case, the administering State continues to enforce the sanction imposed in the sentencing State (possibly adapted by virtue of Article 10, paragraph 2), whereas, in the second case, the sanction is converted into a sanction of the administering State, with the result that the sentence enforced is no longer directly based on the sanction imposed in the sentencing State.

47. In both cases, enforcement is governed by the law of the administering State (paragraph 3). The reference to the law of the administering State is to be interpreted in a wide sense; it includes, for instance, the rules relating to eligibility for conditional release. To make this clear, paragraph 3 states that the administering State alone shall be competent to take all appropriate decisions.

48. Paragraph 4 refers to cases where neither of the two procedures can be applied in the administering State because the enforcement concerns measures imposed on a person who for reasons of mental condition has been held not criminally responsible for the commission of the offence. The provision allows the administering State, if it is prepared to receive such a person for further treatment, to indicate, by way of a declaration addressed to the Secretary General of the Council of Europe, the procedures which it will follow in such cases.

Article 10 – Continued enforcement

49. Where the administering State opts for the "continued enforcement" procedure, it is bound by the legal nature as well as the duration of the sentence as determined by the sentencing State (paragraph 1): the first condition ("legal nature") refers to the kind of penalty imposed where the law of the sentencing State provides for a diversity of penalties involving deprivation of liberty, such as penal servitude, imprisonment or detention. The second condition ("duration") means that the sentence to be served in the administering State, subject to any later decision of that State on, for example, conditional release or remission, corresponds to the amount of the original sentence, taking into account the time served and any remission earned in the sentencing State up to the date of transfer.

50. If the two States concerned have different penal systems with regard to the division of penalties or the minimum and maximum lengths of sentence, it might be necessary for the administering State to adapt the sanction to the punishment or measure prescribed by its own law for a similar offence. Paragraph 2 allows that adaptation within certain limits: the adapted punishment or measure must, as far as possible, correspond with that imposed by the sentence to be enforced; it must not aggravate, by its nature or duration, the sanction imposed in the sentencing State; and it must not exceed the maximum prescribed by the law of the administering State. In other words: the administering State may adapt the sanction to the nearest equivalent available under its own law, provided that this does not result in more severe punishment or longer detention. As opposed to the conversion procedure under Article 11, under which the administering State *substitutes* a sanction for that imposed in the sentencing State, the procedure under Article 10.2 enables the administering State merely to *adapt* the sanction to an equivalent sanction prescribed by its own law in order to make the sentence enforceable. The administering State thus continues to enforce the sentence imposed in the sentencing State, but it does so in accordance with the requirements of its own penal system.

Article 11 – Conversion of sentence

51. Article 11 concerns the conversion of the sentence to be enforced, that is the judicial or administrative procedure by which a sanction prescribed by the law of the administering State is substituted for the sanction imposed in the sentencing State, a procedure which is commonly called "exequatur". The provision should be read in conjunction with Article 9.1. *b*. It is essential for the smooth and efficient functioning of the convention in cases where, with regard to the classification of penalties or the length of the custodial sentence applicable for similar offence, the penal system of the administering State differs from that of the sentencing State.

52. The article does not regulate the procedure to be followed. According to paragraph 1, the conversion of the sentence is governed by the law of the administering State.

53. However, as regards the extent of the conversion and the criteria applicable to it, paragraph 1 states four conditions to be observed by the competent authority of the administering State.

54. Firstly, the authority is bound by the findings as to the facts insofar as they appear – explicitly or implicitly – from the judgment pronounced in the sentencing State a. It has, therefore, no freedom to evaluate differently the facts on which the judgment is based; this applies to "objective" facts relating to the commission of the act and its results, as well as to "subjective" facts relating, for instance, to premeditation and intent on the part of the convicted person. The reason for this condition is that the substitution by a sanction of a different nature or duration does not imply any modification of the judgment; it merely serves to obtain an enforceable sentence in the administering State.

55. Secondly, a sanction involving deprivation of liberty may not be converted into a pecuniary sanction *b*. This provision reflects the fact that the Convention applies only to the transfer of sentenced persons, "sentence" being defined in Article 1. *a* as a punishment or measure involving deprivation of liberty. However, it does not prevent conversion to a non-custodial sanction other than a pecuniary one.

56. Thirdly, any period of deprivation of liberty already served by the sentenced person must be deducted from the sentence as converted by the administering State *c*. This provision applies to any part of the sentence

already served in the sentencing State as well as any provisional detention served during remand in custody prior to conviction, or any detention served during transit.

57. Fourthly, the penal position of the sentenced person must not be aggravated *d*. This prohibition refers not only to the length of the sentence, which must not exceed that imposed in the sentencing State, but also to the kind of sanction to be enforced: it must not be harsher than that imposed in the sentencing State. If, for instance, under the law of the administering State the offence carries a more severe form of deprivation of liberty than that which the judgment imposed (e.g. penal servitude or forced labour instead of imprisonment), the administering State is precluded from enforcing this harsher kind of sanction. In addition, paragraph 1. *d* provides, in respect of the length of the sentence to be enforced, that the authority which converts that sentence is not bound by any minimum which its own law may provide for the same offence, that is, that it is allowed not to respect that minimum with the result that it can enforce the sanction imposed in the sentencing State even if it is less than the minimum laid down in its own law.

58. As the conversion procedure may take some time, paragraph 2 requires the administering State, if the procedure takes place after the transfer of the sentenced person, to keep that person in custody or otherwise ensure his presence in the administering State, pending the outcome of that procedure.

Article 12 – Pardon, amnesty, commutation

59. Whereas Article 9.3 makes the administering State solely responsible for the enforcement of the sentence, including any decisions related to it (e.g. the decision to suspend the sentence), pardon, amnesty or commutation of the sentence may be granted by either the sentencing or the administering State, in accordance with its Constitution or other laws.

Article 13 – Review of judgment

60. This article provides that the sentencing State alone has the right to take decisions on applications for review of the judgment. The exclusive competence of the sentencing State to review the judgment is justified by the fact that, technically speaking, review proceedings are not part of enforcement so that Article 9.3 does not apply. The object of an application for review is to obtain the re-examination of the final sentence in the light of any new elements of fact. As the sentencing State alone is competent to re-examine the materiality of facts, it follows necessarily that only that State has jurisdiction to examine such an application, especially as it is better placed to obtain new evidence on the point at issue.

61. The term "review" within the meaning of Article 13 covers also proceedings which in some States may result in a new examination of the legal aspects of the case, after the judgment has become final.

62. The sentencing State's competence to decide on any application for review should not be interpreted as discharging the administering State from the duty to enable the sentenced person to seek a review of the judgment. Both States must, in fact, take all appropriate steps to guarantee the effective exercise of the sentenced person's right to apply for a review.

Article 14 – Termination of enforcement

63. Article 14 concerns the termination of enforcement by the administering State in cases where the sentence ceases to be enforceable as a result of any decision or measure taken by the sentencing State (e.g. the decisions referred to in Articles 12 and 13). In such cases, the administering State must terminate enforcement as soon as it is informed by the sentencing State of any such decision or measure.

Article 15 – Information on enforcement

64. This article provides for the administering State to inform the sentencing State on the state of enforcement: *a* when it considers enforcement of the sentence to have been completed (e.g. sentence served, remission, conditional release, pardon, amnesty, commutation); *b* if the sentenced person has escaped from custody before completion of the sentence; and *c* whenever the sentencing State requests a special report.

65. It is to be noted that the information to be supplied by virtue of Article 15. *a* may be provided either for each individual case or by means of periodical – for example annual – reports covering, for a given period, all cases in which completion of sentence has occurred.

Article 16 – Transit

66. This article has been drafted on the lines of Article 21 of the European Convention on Extradition and Article 13 of the European Convention on the International Validity of Criminal Judgments. It lays down rules governing the transit of persons passing from the sentencing State to the administering State through the territory of another Contracting State.

67. Paragraph 1 imposes an obligation on Contracting States to grant requests for transit, in accordance with their national law, but this obligation is subject to a double condition: the request for transit must be made by another Contracting State, and that State must have agreed with another Contracting State or with a third State to the transfer of the sentenced person. The latter condition means that the obligation to grant transit becomes effective only when the sentencing and the administering State have agreed on the transfer of the sentenced person.

68. It is to be noted that the obligation to grant transit applies only where the request emanates from a Contracting State. If it is made by a third State, paragraph 4 applies. It contains an option, not an obligation: a request for transit *may* be granted if the requesting third State has agreed with another Contracting State to the transfer of the sentenced person.

69. Paragraph 1 does not exclude the transit of a national of the State of transit, but paragraph 2. a entitles a Contracting State to refuse transit if the person concerned is one of its own nationals. This applies also where transit is to be effected by air and the State concerned has made the declaration under paragraph 7.

Paragraph 2. *b* entitles a Contracting State to refuse to grant transit if the offence for which the sentence was imposed is not an offence under its own law.

70. As regards the channels of communication for requests for transit and replies, paragraph 3 makes the provisions of Article 5, paragraphs 2 and 3, applicable: in principle, requests and replies must pass through the Ministries of Justice of the two States concerned, but Contracting States may declare that they will use other ways of transmission.

71. Paragraph 5 provides for the State of transit to hold the sentenced person in custody only for such time as transit through its territory requires.

72. Paragraph 6 concerns the sentenced person's immunity from arrest and prosecution in the State of transit. It provides that the State requested to grant transit may be asked to give an assurance to the effect that the sentenced person will enjoy immunity in respect of any offence committed or sentence imposed prior to his departure from the territory of the sentencing State, with the exception of custody which the transit State may impose in application of paragraph 5. There is, however, no obligation on the State of transit to give such an assurance.

73. Paragraph 7 deals with transit by air where no landing in the territory of the State of transit is scheduled. In such cases, no request for transit is required. Contrary to the provisions of Article 21.4. *a* of the European Convention on Extradition which require notification of the transit State in such cases, paragraph 6 of Article 16 leaves it to each Contracting State to decide, by means of a declaration, whether it wishes to require such notification.

Article 17 – Languages and costs

74. This article deals with the questions of language (paragraphs 1 to 3), certification (paragraph 4), and costs (paragraph 5).

75. With regard to the languages to be used for the purposes of applying the Convention, Article 17 distinguishes between the information exchanged between the two States concerned in accordance with Article 4, paragraphs 2 to 4, which must be furnished in the language of the recipient State or in one of the official languages of the Council of Europe (paragraph 1), and requests for transfer and supporting documents for which it is stated that no translation is required (paragraph 2), unless the State concerned has declared that it requires requests for transfer and supporting documents to be accompanied by a translation (paragraph 3).

76. Paragraph 4 provides that with the exception of the copy of the judgment imposing the sentence – referred to in Article 6.2. *a* – supporting documents transmitted in application of the convention need not be certified.

77. As concerns costs, paragraph 5 provides that they shall be borne by the administering State, with the exception of those costs which are incurred exclusively in the territory of the sentencing Sstate. By precluding

Contracting States from claiming refund from each other of any expenses incurred during the transfer procedure, the provision intends to facilitate the practical application of the Convention.

The administering State, however, is not prevented from seeking to recover all or part of the cost of transfer from the sentenced person.

Articles 18 to 25 – Final clauses

78. With the exception of Articles 18 and 19, the provisions contained in Articles 18 to 25 are, for the most part, based on the "Model final clauses for conventions and agreements concluded within the Council of Europe" which were approved by the Committee of Ministers of the Council of Europe at the 315th meeting of their Deputies in February 1980. Most of these articles do not therefore call for specific comments, but the following points, relating to Articles 18,19,21,22 and 23, require some explanation.

79. Articles 18 and 19 have been drafted on the precedent established in Articles 19 and 20 of the Convention on the Conservation of European Wildlife and Natural Habitats of 19 September 1979 which allow for signature, before the Convention's entry into force, not only by the member States of the Council of Europe, but also by non-member States which have participated in the elaboration of the Convention. These provisions are intended to enable the maximum number of interested States, not necessarily members of the Council of Europe, to become Contracting Parties as soon as possible. As similar considerations apply in the case of the convention on the Transfer of Sentenced Persons, Article 18 provides that it is open for signature by the member States of the Council of Europe as well as by non-member States which have participated in its elaboration. The provision is intended to apply to two non-member States, Canada and the United States of America, which were represented on the Select Committee by observers and actively associated with the elaboration of the Convention. They may sign the Convention, just as the member States of the Council of Europe, before its entry into force. According to Article 18.2, the Convention enters into force when three member States have expressed their consent to be bound by it. Non-member States other than those referred to in Article 18.1 may, by virtue of Article 19, be invited by the Committee of Ministers to accede to the Convention, but only after its entry into force and after consultation of the Contracting States.

80. Article 21 ensures the convention's full temporal application. It enables Contracting States to avail themselves of the transfer mechanism with regard to any enforcement which falls within the convention's scope of application and which is to be effected after its entry into force, regardless of whether the sentence to be enforced has been imposed before or after that date.

81. Article 22 intends to ensure the smooth co-existence of the convention with other treaties – multilateral or bilateral – providing for the transfer of detained persons.

Paragraph 1 concerns extradition treaties and other treaties providing for the transfer of detained persons for purposes of confrontation or testimony. Paragraph 2 safeguards the continued application of agreements, treaties or relations relating to the transfer of sentenced persons, including uniform legislation as it exists, for instance, within the Nordic co-operation. Paragraph 3 concerns complementary agreements concluded in application of Article 64.2 of the European Convention on the International Validity of Criminal Judgments. Paragraph 4 applies where a request for transfer falls within the scope of both the present convention and the European Convention on the International Validity of Criminal Judgments or any other instrument on the transfer of sentenced persons. In such a case, the requesting State must indicate on the basis of which instrument it makes the request. Such indication is binding on the requested State.

82. Article 23 which makes the European Committee on Crime Problems of the Council of Europe the guardian over the application of the convention follows the precedents established in other European conventions in the penal field, namely in Article 28 of the European Convention on the Punishment of Road Traffic Offences, in Article 65 of the European Convention on the International Validity of Criminal Judgments, in Article 44 of the European Convention on the Transfer of Proceedings in Criminal Matters, in Article 7 of the Additional Protocol to the European Convention on Extradition, in Article 10 of the Second Additional Protocol to the European Convention on Extradition, in Article 10 of the Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, and in Article 9 of the European Convention on the Suppression of Terrorism. The reporting requirement which Article 23 lays down is intended to keep the European Committee on Crime Problems informed about possible difficulties in interpreting and applying the convention so that it may contribute to facilitating friendly settlements and proposing amendments to the convention which might prove necessary.

Additional Protocol to the Convention on the transfer of sentenced persons – ETS No. 167

Strasbourg, 18.XII.1997

Preamble

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

Desirous of facilitating the application of the Convention on the Transfer of Sentenced Persons opened for signature at Strasbourg on 21 March 1983 (hereinafter referred to as "the Convention") and, in particular, pursuing its acknowledged aims of furthering the ends of justice and the social rehabilitation of sentenced persons;

Aware that many States cannot extradite their own nationals;

Considering it desirable to supplement the Convention in certain respects,

Have agreed as follows:

Article 1 – General provisions

1. The words and expressions used in this Protocol shall be interpreted within the meaning of the Convention.

2. The provisions of the Convention shall apply to the extent that they are compatible with the provisions of this Protocol.

Article 2 – Persons having fled from the sentencing State

1. Where a national of a Party who is the subject of a sentence imposed in the territory of another Party as a part of a final judgment, seeks to avoid the execution or further execution of the sentence in the sentencing State by fleeing to the territory of the former Party before having served the sentence, the sentencing State may request the other Party to take over the execution of the sentence.

2. At the request of the sentencing State, the administering State may, prior to the arrival of the documents supporting the request, or prior to the decision on that request, arrest the sentenced person, or take any other measure to ensure that the sentenced person remains in its territory, pending a decision on the request. Requests for provisional measures shall include the information mentioned in paragraph 3 of Article 4 of the Convention. The penal position of the sentenced person shall not be aggravated as a result of any period spent in custody by reason of this paragraph.

3. The consent of the sentenced person shall not be required to the transfer of the execution of the sentence.

Article 3 – Sentenced persons subject to an expulsion or deportation order

1. Upon being requested by the sentencing State, the administering State may, subject to the provisions of this Article, agree to the transfer of a sentenced person without the consent of that person, where the sentence passed on the latter, or an administrative decision consequential to that sentence, includes an expulsion or deportation order or any other measure as the result of which that person will no longer be allowed to remain in the territory of the sentencing State once he or she is released from prison.

2. The administering State shall not give its agreement for the purposes of paragraph 1 before having taken into consideration the opinion of the sentenced person.

3. For the purposes of the application of this Article, the sentencing State shall furnish the administering State with:

a. a declaration containing the opinion of the sentenced person as to his or her proposed transfer, and

b. a copy of the expulsion or deportation order or any other order having the effect that the sentenced person will no longer be allowed to remain in the territory of the sentencing State once he or she is released from prison.

4. Any person transferred under the provisions of this Article shall not be proceeded against, sentenced or detained with a view to the carrying out of a sentence or detention order, for any offence committed prior to his or her transfer other than that for which the sentence to be enforced was imposed, nor shall he or she for any other reason be restricted in his or her personal freedom, except in the following cases:

a. when the sentencing State so authorises: a request for authorisation shall be submitted, accompanied by all relevant documents and a legal record of any statement made by the convicted person; authorisation shall be given when the offence for which it is requested would itself be subject to extradition under the law of the sentencing State or when extradition would be excluded only by reason of the amount of punishment;

b. when the sentenced person, having had an opportunity to leave the territory of the administering State, has not done so within 45 days of his or her final discharge, or if he or she has returned to that territory after leaving it.

5. Notwithstanding the provisions of paragraph 4, the administering State may take any measures necessary under its law, including proceedings *in absentia*, to prevent any legal effects of lapse of time.

6. Any contracting State may, by way of a declaration addressed to the Secretary General of the Council of Europe, indicate that it will not take over the execution of sentences under the circumstances described in this Article.

Article 4 – Signature and entry into force

1. This Protocol shall be open for signature by the member States of the Council of Europe and the other States signatory to 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 5 – Accession

1. Any non-member State which has acceded to the Convention may accede to this Protocol after it has entered into force.

2. 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 6 – 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 Contracting 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 7 – Temporal application

This Protocol shall be applicable to the enforcement of sentences imposed either before or after its entry into force.

Article 8 – Denunciation

1. Any Contracting State may at any time 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. This Protocol shall, however, continue to apply to the enforcement of sentences of persons who have been transferred in conformity with the provisions of both the Convention and this Protocol before the date on which such denunciation takes effect.

4. Denunciation of the Convention automatically entails denunciation of this Protocol.

Article 9 – Notifications

The Secretary General of the Council of Europe shall notify the member States of the Council of Europe, any Signatory, any Party and any other State which has been invited to accede to the Convention of:

a. any signature;

b. he deposit of any instrument of ratification, acceptance, approval or accession;

c. any date of entry into force of this Protocol in accordance with Articles 4 or 5;

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 eighteenth day of December 1997, 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, to the other States signatory to the Convention and to any State invited to accede to the Convention.

Additional Protocol to the Convention
on the transfer of sentenced persons – ETS No. 167

Explanatory Report

I. The Additional Protocol to the Convention on the Transfer of Sentenced Persons, 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), was opened to signature by the member States of the Council of Europe on 18 December 1997.

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 Additional Protocol although it may facilitate the understanding of the Additional Protocol's 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 criminal law, 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 the Convention on the Transfer of Sentenced Persons (ETS 112). It also identified situations bordering the area covered by ETS 112, yet not included within the scope of that Convention.

3. Having studied various options, the PC-OC agreed that an additional protocol to the Convention was the most appropriate and pragmatic response under the circumstances. It therefore approved a draft Additional Protocol, at its 34th meeting (February 1997).

4. The draft Additional Protocol was examined and approved by the CDPC at its 45th plenary session (June 1997) and submitted to the Committee of Ministers.

5. At the 601st meeting of their Deputies in September 1997 , the Committee of Ministers adopted the text of the Additional Protocol and decided to open it for signature on 18 December 1997.

GENERAL CONSIDERATIONS

6. The purpose of the Additional Protocol is to provide rules applicable to the transfer of the execution of sentences in two different cases, namely:

   a. where a sentenced person has fled the sentencing State to go to the State of his or her nationality, thus rendering it impossible in most cases for the sentencing State to execute the sentence passed; and

   b. where the sentenced person is subject to expulsion or deportation as a consequence of the sentence.

7. These situations are dealt with in Articles 2 and 3 respectively.

8. As with the mother Convention, neither Article 2 nor Article 3 imposes any obligation on the sentencing State or the administering State to agree to transfer. They set the framework within which States involved may co-operate, if they so wish, and provides a procedure for this purpose.

COMMENTARIES ON THE ARTICLES OF THE PROTOCOL

Article 1 – General provisions

9. By providing that the words and expressions used in the Protocol shall be interpreted within the meaning of the Convention, this Article ensures uniform interpretation of both.

Paragraph 2 further clarifies the relationship between the provisions of the Convention and those of the Protocol, i.e. the provisions of the Convention shall apply to the extent that they are compatible with the provisions of this Protocol. This means that, with respect to the application of both this Protocol and the Convention, the rule applies according to which "lex specialis derogat generalis".

It also follows from paragraph 2 that the Protocol, like the Convention, does not apply to conditionally sentenced or conditionally released offenders.

Article 2 – Persons having fled from the sentencing State

10. This article envisages a situation where a national of State A is sentenced in State B and subsequently leaves State B before or while serving the sentence and voluntarily enters State A. It would apply most commonly to cases where the sentenced person escapes from legal custody in the territory of the sentencing State and flees to the territory of the State of his or her nationality, seeking thereby to avoid the execution, or full execution, of the sentence.

11. Clearly, this article does not cover the situations where (a) a national of State A is tried and sentenced *in absentia* in State B, or (b) a national of State A is sentenced in State B, the execution of the sentence being suspended, and subsequently the suspension is revoked after the person has voluntarily moved to State A.

12. The mother Convention is of no use in the situation described in paragraph 10 above because the sentenced person is not present in the sentencing State and is thus unavailable for transfer. Nor can the problem in practice be dealt with under existing forms of international co-operation. For example, the normal method of returning a fugitive from justice – extradition – is generally not available because most countries do not extradite their own nationals. Apart from this, the only other option which may be available at present is for the person to be prosecuted and sentenced afresh in State A for the same facts – a process which is both expensive and cumbersome even though permitted by the internationally -recognised *ne bis in idem* principle. If neither option is available, the consequence is that the person goes unpunished and thus the ends of justice are frustrated. The Committee considered that this was not acceptable.

13. The Committee also considered whether the European Convention on the International Validity of Criminal Judgments (ETS 070) might provide a solution to the problem by allowing for the transfer of the sentence from State B to State A for execution. However, only a few States have ratified that Convention and this situation is not likely to change in the foreseeable future. Because of the difficulties with that Convention, the Committee doubted whether the elaboration of a new instrument on the enforcement of foreign judgments would meet with any greater success.

14. The Committee recognised that Convention ETS 112 is to a great extent founded on humanitarian principles and that, for this reason, the consent of the person is an integral element in it. But it concluded that where the person has deliberately sought to frustrate the judicial process by fleeing from justice, he or she has thereby taken himself or herself outside the ambit of the Convention. Consequently, the Committee considered that under such circumstances the need for his consent was no longer appropriate. The Committee therefore concluded that it would be acceptable to devise a solution not based on the consent of the person.

15. To "take over the execution" of a sentence, pursuant to a request under Article 2, means that the provisions of the Convention – save paragraph 1.(d) of Article 3 – shall apply. In particular Articles 8 to 11 of the Convention shall apply.

16. Paragraph 2 deals with provisional measures which might be taken by the administering State, at the request of the sentencing State and prior to the arrival of the documents supporting the request, or prior to the decision on that request, arresting the sentenced person or adopting any other measures to ensure that the sentenced person remains in its territory pending a decision on the request.

17. Moreover, this paragraph specifies that for the purpose of adopting a provisional measure, the sentencing State should include in the request the information mentioned in paragraph 3 of Article 4 of the Convention, i.e. the name, date and place of birth of the sentenced person, his or her address, if any, in the administering State, a statement of the facts upon which the sentence was based and, finally, the nature, duration and date of commencement of the sentence. This information should be transmitted by the sentencing State as soon as practicable.

18. The last phrase in Paragraph 2 means that, where a person is arrested under the provisions of this paragraph, the time thus spent in custody must be deducted in the administering State, in the case of continued enforcement as well as in the case of conversion of sentence. This obligation also applies to the sentencing State, should it come to enforce, or resume enforcement, of the sentence.

19. Paragraph 3 provides that the transfer of the execution shall not require the consent of the sentenced person.

20. Because Article 2 was drafted under the assumption of an implied consent of the sentenced person to remain on the territory of State A, the drafters did not consider it necessary to provide for the application of the principle of speciality.

Article 3 – Sentenced persons subject to an expulsion or deportation order

21. The Committee considered that it does not serve the objective of rehabilitation of the sentenced person to keep such a person in the sentencing State when it is likely that, once he or she has completed the sentence to be served, he or she will no longer be permitted to remain in that State.

22. The situation described in this Article is one where the person is subject to deportation or expulsion as a consequence of the sentence. The verbs "to expel" and "to deport" are both used in order to accommodate varying terminologies of member States. The meaning given to both in this Protocol is such as to include any measure as a result of which the person is subject to removal from the territory of the sentencing State at some point in time. It includes expulsion orders given by administrative authorities.

23. It is envisaged that a transfer under this Article will only take place after all rights of appeal against the expulsion or deportation order or other measure referred to in paragraph 1 have been exhausted.

24. Acknowledging that the Convention operates on the basis of a three-fold consent, i.e. the sentencing State, the administering State and the sentenced person, the Committee considered that provision could be made for the Convention to operate on the basis of a two-fold consent, namely the consent of both the sentencing State and the administering State, where the person concerned as a consequence of the sentence passed is subject to deportation or expulsion from the sentencing State.

25. Because transfer under the provisions of this Article neither requires nor assumes the sentenced person's consent, the Committee considered that the rights and interests of the person should be otherwise protected. Hence the provisions extending to such persons the benefit of the principle of speciality, as well as the requirement for the person's opinion to be examined and taken into account prior to any decision being taken.

26. Indeed, Paragraphs 2 and 3 require respectively that the opinion of the sentenced person as to his proposed transfer be taken into consideration and, for that purpose, that it is included in a formal declaration addressed by the sentencing to the administering State. It follows that the provisions of the Convention on the verification of the consent (Article 7) should apply, mutatis mutandis, when taking the person's opinion.

27. The Committee considered that the person's opinion must be examined and taken into account prior to any decision being taken by the sentencing or the administering States. However, this requirement is written *expressis verbis* into the Protocol only with respect to the administering State. The Committee felt that one could safely presume that States governed by the rule of law duly respect the person's right to be heard before a decision on that person's transfer is taken.

28. The sentenced person's opinion may be of particular relevance inter alia where that person has more than one nationality, or otherwise may take advantage of the possibility of being deported to a country other than the country of his or her nationality.

29. Moreover, the procedure laid down is not one of automatic transfer upon the consent of both Parties involved. It requires, in addition to the States' consent to transfer, their agreement to dispense with the consent of the sentenced person.

30. It should be recalled that persons may be expelled only subject to the provisions laid down in Article 1 of Protocol N. 7 to the European Convention on Human Rights.

31. Paragraph 4 makes provision for the principle of speciality (cf. *inter alia* Article 14 of the European Convention on Extradition). The wording draws largely on the provisions of Article V.12 of the Draft European Comprehensive Convention on International Co-operation in Criminal Matters. In substance, it grants any sentenced person transferred under the provisions of Article 3 immunity against prosecution – and indeed against being sentenced or detained – for any offence committed prior to transfer, other than that for which the sentence to be enforced was imposed. Such immunity however ceases:

a. where the sentencing State so authorises;

b. where the person, having had the opportunity to leave legally the territory of the administering State, has not done so within 45 days of final discharge;

c. where the person has returned voluntarily to the territory of the administering State after having left it.

32. The expression "final discharge" (in French: "*élargissement définitif*") means that the person's freedom to leave the country is no longer subject to any restriction deriving directly or indirectly from the sentence. Consequently, where, for instance, the person is conditionally released, that person is finally discharged if the conditions linked to release do not prevent him or her from leaving the country; conversely, that person is not finally discharged where the conditions linked to release do prevent him or her from leaving the country.

33. Paragraph 5 makes it clear that the administering State may take such measures as may be necessary in order to prevent any legal effects of the lapse of time; it may take such measures as it would have been able to take had the person concerned not been transferred.

34. Under the Protocol, Parties are not under an obligation to take over the execution of foreign sentences. Therefore, there is no justification to provide for the possibility of States entering any unilateral statement by which they would exclude or modify the legal effect of any provisions of the Protocol, i.e. entering reservations.

35. Conversely, it follows from the principle of bona fides, that, unless otherwise stated, Parties to a treaty must be ready to apply it, regardless of any undertaking to do so.

36. The Committee thought that some States might be ready to become a Party to the Protocol in order to apply the provisions of Article 2, but not necessarily, or not necessarily at the same time, those of Article 3 which will often require major changes in domestic law. With a view to ensuring compliance with the bona fides principle, but also for practical purposes relating to the convenience of Parties in having a clear picture of other Parties' attitudes, paragraph 6 opens the way for States to make a declaration indicating that they will not take over the execution of sentences under the circumstances described in Article 3.

Articles 4 to 9 – Final clauses

37. Articles 4 to 9 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. These articles do not call for specific comments.

European Convention on the transfer of proceedings in criminal matters – ETS No. 73

Strasbourg, 15.V.1972

The member States of the Council of Europe, signatory hereto,

Considering that the aim of the Council of Europe is the achievement of greater unity between its members;

Desiring to supplement the work which they have already accomplished in the field of criminal law with a view to arriving at more just and efficient sanctions;

Considering it useful to this end to ensure, in a spirit of mutual confidence, the organisation of criminal proceedings on the international level, in particular, by avoiding the disadvantages resulting from conflicts of competence,

Have agreed as follows:

PART I – DEFINITIONS

Article 1

For the purposes of this Convention:

"offence" comprises acts dealt with under the criminal law and those dealt with under the legal provisions listed in Appendix III to this Convention on condition that where an administrative authority is competent to deal with the offence it must be possible for the person concerned to have the case tried by a court;

a. "sanction" means any punishment or other measure incurred or pronounced in respect of an offence or in respect of a violation of the legal provisions listed in Appendix III.

PART II – COMPETENCE

Article 2

1. For the purposes of applying this Convention, any Contracting State shall have competence to prosecute under its own criminal law any offence to which the law of another Contracting State is applicable.

2. The competence conferred on a Contracting State exclusively by virtue of paragraph 1 of this Article may be exercised only pursuant to a request for proceedings presented by another Contracting State.

Article 3

Any Contracting State having competence under its own law to prosecute an offence may, for the purposes of applying this Convention, waive or desist from proceedings against a suspected person who is being or will be prosecuted for the same offence by another Contracting State. Having regard to Article 21, paragraph 2, any such decision to waive or to desist from proceedings shall be provisional pending a final decision in the other Contracting State.

Article 4

The requested State shall discontinue proceedings exclusively grounded on Article 2 when to its knowledge the right of punishment is extinguished under the law of the requesting State for a reason other than time-limitation, to which Articles 10.c, 11.f and g, 22, 23 and 26 in particular apply.

Article 5

The provisions of Part III of this Convention do not limit the competence given to a requested State by its municipal law in regard to prosecutions.

PART III – TRANSFER OF PROCEEDINGS

Section 1 – Request for proceedings

Article 6

1. When a person is suspected of having committed an offence under the law of a Contracting State, that State may request another Contracting State to take proceedings in the cases and under the conditions provided for in this Convention.

2. If under the provisions of this Convention a Contracting State may request another Contracting State to take proceedings, the competent authorities of the first State shall take that possibility into consideration.

Article 7

1. Proceedings may not be taken in the requested State unless the offence in respect of which the proceedings are requested would be an offence if committed in its territory and when, under these circumstances, the offender would be liable to sanction under its own law also.

2. If the offence was committed by a person of public status or against a person, an institution or any thing of public status in the requesting State, it shall be considered in the requested State as having been committed by a person of public status or against such a person, an institution or any thing corresponding, in the latter State, to that against which it was actually committed.

Article 8

1. A Contracting State may request another Contracting State to take proceedings in any one or more of the following cases:

   a. if the suspected person is ordinarily resident in the requested State;

   b. if the suspected person is a national of the requested State or if that State is his State of origin;

   c. if the suspected person is undergoing or is to undergo a sentence involving deprivation of liberty in the requested State;

   d. if proceedings for the same or other offences are being taken against the suspected person in the requested State;

   e. if it considers that transfer of the proceedings is warranted in the interests of arriving at the truth and in particular that the most important items of evidence are located in the requested State;

   f. if it considers that the enforcement in the requested State of a sentence if one were passed is likely to improve the prospects for the social rehabilitation of the person sentenced;

g. if it considers that the presence of the suspected person cannot be ensured at the hearing of proceedings in the requesting State and that his presence in person at the hearing of proceedings in the requested State can be ensured;

h. if it considers that it could not itself enforce a sentence if one were passed, even by having recourse to extradition, and that the requested State could do so;

2. Where the suspected person has been finally sentenced in a Contracting State, that State may request the transfer of proceedings in one or more of the cases referred to in paragraph 1 of this article only if it cannot itself enforce the sentence, even by having recourse to extradition, and if the other Contracting State does not accept enforcement of a foreign judgment as a matter of principle or refuses to enforce such sentence.

Article 9

1. The competent authorities in the requested State shall examine the request for proceedings made in pursuance of the preceding articles. They shall decide, in accordance with their own law, what action to take thereon.

2. Where the law of the requested State provides for the punishment of the offence by an administrative authority, that State shall, as soon as possible, so inform the requesting State unless the requested State has made a declaration under paragraph 3 of this article.

3. Any Contracting State may at the time of signature, or when depositing its instrument of ratification, acceptance or accession, or at any later date indicate, by declaration addressed to the Secretary General of the Council of Europe, the conditions under which its domestic law permits the punishment of certain offences by an administrative authority. Such a declaration shall replace the notification envisaged in paragraph 2 of this article.

Article 10

The requested State shall not take action on the request:

a. if the request does not comply with the provisions of Articles 6, paragraph 1, and 7, paragraph 1;

b. if the institution of proceedings is contrary to the provisions of Article 35;

c. if, at the date on the request, the time-limit for criminal proceedings has already expired in the requesting State under the legislation of that State.

Article 11

Save as provided for in Article 10 the requested State may not refuse acceptance of the request in whole or in part, except in any one or more of the following cases:

a. if it considers that the grounds on which the request is based under Article 8 are not justified;

b. if the suspected person is not ordinarily resident in the requested State;

c. if the suspected person is not a national of the requested State and was not ordinarily resident in the territory of that State at the time of the offence;

d. if it considers that the offence for which proceedings are requested is an offence of a political nature or a purely military or fiscal one;

e. if it considers that there are substantial grounds for believing that the request for proceedings was motivated by considerations of race, religion, nationality or political opinion;

f. if its own law is already applicable to the offence and if at the time of the receipt of the request proceedings were precluded by lapse of time according to that law; Article 26, paragraph 2, shall not apply in such a case;

g. if its competence is exclusively grounded on Article 2 and if at the time of the receipt of the request proceedings would be precluded by lapse of time according to its law, the prolongation of the time-limit by six months under the terms of Article 23 being taken into consideration;

h. if the offence was committed outside the territory of the requesting State;

i. if proceedings would be contrary to the international undertakings of the requested State;

j. if proceedings would be contrary to the fundamental principles of the legal system of the requested State;

k. if the requesting State has violated a rule of procedure laid down in this Convention.

Article 12

1. The requested State shall withdraw its acceptance of the request if, subsequent to this acceptance, a ground mentioned in Article 10 of this Convention for not taking action on the request becomes apparent.

2. The requested State may withdraw its acceptance of the request:

a. if it becomes apparent that the presence in person of the suspected person cannot be ensured at the hearing of the proceedings in that State or that any sentence, which might be passed, could not be enforced in that State;

b. if one of the grounds for refusal mentioned in Article 11 becomes apparent before the case is brought before a court; or

c. in other cases, if the requesting State agrees.

Section 2 – Transfer procedure

Article 13

1. All requests specified in this Convention shall be made in writing. They, and all communications necessary for the application of this Convention, shall be sent either by the Ministry of Justice of the requesting State to the Ministry of Justice of the requested State or, by virtue of special mutual arrangement, direct by the authorities of the requesting State to those of the requested State; they shall be returned by the same channel.

2. In urgent cases, requests and communications may be sent through the International Criminal Police Organisation (Interpol).

3. Any Contracting State may, by declaration addressed to the Secretary General of the Council of Europe, give notice of its intention to adopt in so far as it itself is concerned rules of transmission other than those laid down in paragraph 1 of this article.

Article 14

If a Contracting State considers that the information supplied by another Contracting State is not adequate to enable it to apply this Convention, it shall ask for the necessary additional information. It may prescribe a date for the receipt of such information.

Article 15

1. A request for proceedings shall be accompanied by the original, or a certified copy, of the criminal file and all other necessary documents. However, if the suspected person is remanded in custody in accordance with the provisions of Section 5 and if the requesting State is unable to transmit these documents at the same time as the request for proceedings, the documents may be sent subsequently.

2. The requesting State shall also inform the requested State in writing of any procedural acts performed or measures taken in the requesting State after the transmission of the request which have a bearing on the proceedings. This communication shall be accompanied by any relevant documents.

Article 16

1. The requested State shall promptly communicate its decision on the request for proceedings to the requesting State.

2. The requested State shall also inform the requesting State of a waiver of proceedings or of the decision taken as a result of proceedings. A certified copy of any written decision shall be transmitted to the requesting State.

Article 17

If the competence of the requested State is exclusively grounded on Article 2 that State shall inform the suspected person of the request for proceedings with a view to allowing him to present his views on the matter before that State has taken a decision on the request.

Article 18

1. Subject to paragraph 2 of this article, no translation of the documents relating to the application of this Convention shall be required.

2. Any Contracting State may, at the time of signature or when depositing its instrument of ratification, acceptance or accession, by declaration addressed to the Secretary General of the Council of Europe, reserve the right to require that, with the exception of the copy of the written decision referred to in Article 16, paragraph 2, the said documents be accompanied by a translation. The other Contracting States shall send the translations in either the national language of the receiving State or such one of the official languages of the Council of Europe as the receiving State shall indicate. However, such an indication is not obligatory. The other Contracting States may claim reciprocity.

3. This article shall be without prejudice to any provisions concerning translation of requests and supporting documents that may be contained in agreements or arrangements now in force or that may be concluded between two or more Contracting States.

Article 19

Documents transmitted in application of this Convention need not be authenticated.

Article 20

Contracting Parties shall not claim from each other the refund of any expenses resulting from the application of this Convention.

Section 3 – Effects in the requesting State of a request for proceedings

Article 21

1. When the requesting State has requested proceedings, it can no longer prosecute the suspected person for the offence in respect of which the proceedings have been requested or enforce a judgment which has been pronounced previously in that State against him for that offence. Until the requested State's decision on the request for proceedings has been received, the requesting State shall, however, retain its right to take all steps in respect of prosecution, short of bringing the case to trial, or, as the case may be, allowing the competent administrative authority to decide on the case.

2. The right of prosecution and of enforcement shall revert to the requesting State:

   a. if the requested State informs it of a decision in accordance with Article 10 not to take action on the request;

   b. if the requested State informs it of a decision in accordance with Article 11 to refuse acceptance of the request;

   c. if the requested State informs it of a decision in accordance with Article 12 to withdraw acceptance of the request;

   d. if the requested State informs it of a decision not to institute proceedings or discontinue them;

   e. if it withdraws its request before the requested State has informed it of a decision to take action on the request.

Article 22

A request for proceedings, made in accordance with the provisions of this Part, shall have the effect in the requesting State of prolonging the time-limit for proceedings by six months.

Section 4 – Effects in the requested State of a request for proceedings

Article 23

If the competence of the requested State is exclusively grounded on Article 2 the time-limit for proceedings in that State shall be prolonged by six months.

Article 24

1. If proceedings are dependent on a complaint in both States the complaint brought in the requesting State shall have equal validity with that brought in the requested State.

2. If a complaint is necessary only in the requested State, that State may take proceedings even in the absence of a complaint if the person who is empowered to bring the complaint has not objected within a period of one month from the date of receipt by him of notice from the competent authority informing him of his right to object.

Article 25

In the requested State the sanction applicable to the offence shall be that prescribed by its own law unless that law provides otherwise. Where the competence of the requested State is exclusively grounded on Article 2, the sanction pronounced in that State shall not be more severe than that provided for in the law of the requesting State.

Article 26

1. Any act with a view to proceedings, taken in the requesting State in accordance with its law and regulations, shall have the same validity in the requested State as if it had been taken by the authorities of that State, provided that assimilation does not give such act a greater evidential weight than it has in the requesting State.

2. Any act which interrupts time-limitation and which has been validly performed in the requesting State shall have the same effects in the requested State and vice versa.

Section 5 – Provisional measures in the requested State

Article 27

1. When the requesting State announces its intention to transmit a request for proceedings, and if the competence of the requested State would be exclusively grounded on Article 2, the requested State may, on application by the requesting State and by virtue of this Convention, provisionally arrest the suspected person:

   a. if the law of the requested States authorises remand in custody for the offence, and

   b. if there are reasons to fear that the suspected person will abscond or that he will cause evidence to be suppressed.

2. The application for provisional arrest shall state that there exists a warrant of arrest or other order having the same effect, issued in accordance with the procedure laid down in the law of the requesting State; it shall also state for what offence proceedings will be requested and when and where such offence was committed and it shall contain as accurate a description of the suspected person as possible. It shall also contain a brief statement of the circumstances of the case.

3. An application for provisional arrest shall be sent direct by the authorities in the requesting State mentioned in Article 13 to the corresponding authorities in the requested State, by post or telegram or by any other means affording evidence in writing or accepted by the requested State. The requesting State shall be informed without delay of the result of its application.

Article 28

Upon receipt of a request for proceedings accompanied by the documents referred to in Article 15, paragraph 1, the requested State shall have jurisdiction to apply all such provisional measures, including remand

in custody of the suspected person and seizure of property, as could be applied under its own law if the offence in respect of which proceedings are requested had been committed in its territory.

Article 29

1. The provisional measures provided in Articles 27 and 28 shall be governed by the provisions of this Convention and the law of the requested State. The law of that State, or the Convention shall also determine the conditions on which the measures may lapse.

2. These measures shall lapse in the cases referred to in Article 21, paragraph 2.

3. A person in custody shall in any event be released if he is arrested in pursuance of Article 27 and the requested State does not receive the request for proceedings within 18 days from the date of the arrest.

4. A person in custody shall in any event be released if he is arrested in pursuance of Article 27 and the documents which should accompany the request for proceedings have not been received by the requested State within 15 days from the receipt of the request for proceedings.

5. The period of custody applied exclusively by virtue of Article 27 shall not in any event exceed 40 days.

PART IV – PLURALITY OF CRIMINAL PROCEEDINGS

Article 30

1. Any Contracting State which, before the institution or in the course of proceedings for an offence which it considers to be neither of a political nature nor a purely military one, is aware of proceedings pending in another Contracting State against the same person in respect of the same offence shall consider whether it can either waive or suspend its own proceedings, or transfer them to the other State.

2. If it deems it advisable in the circumstances not to waive or suspend its own proceedings it shall so notify the other State in good time and in any event before judgment is given on the merits.

Article 31

1. In the eventuality referred to in Article 30, paragraph 2, the States concerned shall endeavour as far as possible to determine, after evaluation in each of the circumstances mentioned in Article 8, which of them alone shall continue to conduct proceedings. During this consultative procedure the States concerned shall postpone judgment on the merits without however being obliged to prolong such postponement beyond a period of 30 days as from the despatch of the notification provided for in Article 30, paragraph 2.

2. The provisions of paragraph 1 shall not be binding:

   a. on the State despatching the notification provided for in Article 30, paragraph 2, if the main trial has been declared open there in the presence of the accused before despatch of the notification;

   b. on the State to which the notification is addressed, if the main trial has been declared open there in the presence of the accused before receipt of the notification.

Article 32

In the interests of arriving at the truth and with a view to the application of an appropriate sanction, the States concerned shall examine whether it is expedient that one of them alone shall conduct proceedings and, if so, endeavour to determine which one, when:

   a. several offences which are materially distinct and which fall under the criminal law of each of those States are ascribed either to a single person or to several persons having acted in unison;

   b. a single offence which falls under the criminal law of each of those States is ascribed to several persons having acted in unison.

Article 33

All decisions reached in accordance with Articles 31, paragraph 1, and 32 shall entail, as between the States concerned, all the consequences of a transfer of proceedings as provided for in this Convention. The State which waives its own proceedings shall be deemed to have transferred them to the other State.

Article 34

The transfer procedure provided for in Section 2 of Part III shall apply in so far as its provisions are compatible with those contained in the present Part.

PART V – *NE BIS IN IDEM*

Article 35

1. A person in respect of whom a final and enforceable criminal judgment has been rendered may for the same act neither be prosecuted nor sentenced nor subjected to enforcement of a sanction in another Contracting State:

   a. if he was acquitted;

   b. if the sanction imposed:

   i. has been completely enforced or is being enforced, or

   ii. has been wholly, or with respect to the part not enforced, the subject of a pardon or an amnesty, or

   iii. can no longer be enforced because of lapse of time;

   c. if the court convicted the offender without imposing a sanction.

2. Nevertheless, a Contracting State shall not, unless it has itself requested the proceedings, be obliged to recognise the effect of *ne bis in idem* if the act which gave rise to the judgment was directed against either a person or an institution or any thing having public status in that State, or if the subject of the judgment had himself a public status in that State.

3. Furthermore, a Contracting State where the act was committed or considered as such according to the law of that State shall not be obliged to recognise the effect of *ne bis in idem* unless that State has itself requested the proceedings.

Article 36

If new proceedings are instituted against a person who in another Contracting State has been sentenced for the same act, then any period of deprivation of liberty arising from the sentence enforced shall be deducted from the sanction which may be imposed.

Article 37

This Part shall not prevent the application of wider domestic provisions relating to the effect of *ne bis in idem* attached to foreign criminal judgments.

PART VI – FINAL CLAUSES

Article 38

1. This Convention shall be open to signature by the member States of the Council of Europe. It shall be subject to ratification or acceptance. Instruments of ratification or acceptance shall be deposited with the Secretary General of the Council of Europe.

2. This Convention shall enter into force three months after the date of the deposit of the third instrument of ratification or acceptance.

3. In respect of a signatory State ratifying or accepting subsequently, the Convention shall come into force three months after the date of the deposit of its instrument of ratification or acceptance.

Article 39

1. After the entry into force of this Convention, the Committee of Ministers of the Council of Europe may invite any non-member State to accede thereto provided that the resolution containing such invitation received the unanimous agreement of the Members of the Council who have ratified the Convention.

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 three months after the date of its deposit.

Article 40

1. Any Contracting State may, at the time of signature or when depositing its instrument of ratification, acceptance or accession, specify the territory or territories to which this Convention shall apply.

2. Any Contracting State may, when depositing its instrument of ratification, acceptance or accession or at any later date, by declaration addressed to the Secretary General of the Council of Europe, extend this Convention 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 according to the procedure laid down in Article 45 of this Convention.

Article 41

1. Any Contracting State may, at the time of signature or when depositing its instrument of ratification, acceptance or accession, declare that it avails itself of one or more of the reservations provided for in Appendix I or make a declaration provided for in Appendix II to this Convention.

2. Any Contracting State may wholly or partly withdraw a reservation or 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.

3. A Contracting State which has made a reservation in respect of any provision of this Convention may not claim the application of that provision by any other Contracting State; 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 42

1. Any Contracting State may at any time, by declaration addressed to the Secretary General of the Council of Europe, set out the legal provisions to be included in Appendix III to this Convention.

2. Any change of the national provisions listed in Appendix III shall be notified to the Secretary General of the Council of Europe if such a change renders the information in this appendix incorrect.

3. Any changes made in Appendix III in application of the preceding paragraphs shall take effect in each Contracting State one month after the date of their notification by the Secretary General of the Council of Europe.

Article 43

1. This Convention affects neither the rights and the undertakings derived from extradition treaties and international multilateral conventions concerning special matters, nor provisions concerning matters which are dealt with in the present Convention and which are contained in other existing conventions between Contracting States.

2. The Contracting States may not conclude bilateral or multilateral agreements with one another on the matters dealt with in this Convention, except in order to supplement its provisions or facilitate application of the principles embodied in it.

3. Should two or more Contracting States, however, have already established their relations in this matter on the basis of uniform legislation, or instituted a special system of their own, or should they in future do so, they shall be entitled to regulate those relations accordingly, notwithstanding the terms of this Convention.

4. Contracting States ceasing to apply the terms of this Convention to their mutual relations in this matter in accordance with the provisions of the preceding paragraph shall notify the Secretary General of the Council of Europe to that effect.

Article 44

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

Article 45

1. This Convention shall remain in force indefinitely.

2. Any Contracting State may, in so far as it is concerned, denounce this Convention by means of a notification addressed to the Secretary General of the Council of Europe.

3. Such denunciation shall take effect six months after the date of receipt by the Secretary General of such notification.

Article 46

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

a. any signature;

b. any deposit of an instrument of ratification, acceptance or accession;

c. any date of entry into force of this Convention in accordance with Article 38 thereof;

d. any declaration received in pursuance of the provisions of Article 9, paragraph 3;

e. any declaration received in pursuance of the provisions of Article 13, paragraph 3;

f. any declaration received in pursuance of the provisions of Article 18, paragraph 2;

g. any declaration received in pursuance of the provisions of Article 40, paragraphs 2 and 3;

h. any reservation or declaration made in pursuance of the provisions of Article 41, paragraph 1;

i. the withdrawal of any reservation or declaration carried out in pursuance of the provisions of Article 41, paragraph 2;

j. any declaration received in pursuance of Article 42, paragraph 1, and any subsequent notification received in pursuance of paragraph 2 of that article;

k. any notification received in pursuance of the provisions of Article 43, paragraph 4;

l. any notification received in pursuance of the provisions of Article 45 and the date on which denunciation takes effect.

Article 47

This Convention and the notifications and declarations authorised thereunder shall apply only to offences committed after the Convention comes into effect for the Contracting States involved.

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

Done at Strasbourg, this 15th day of May, 1972, 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 shall transmit certified copies to each of the signatory and acceding governments.

APPENDIX I

Each Contracting State may declare that it reserves the right:

a. to refuse a request for proceedings, if it considers that the offence is a purely religious offence;

b. to refuse a request for proceedings for an act the sanctions for which, in accordance with its own law, can be imposed only by an administrative authority;

c. not to accept Article 22;

d. not to accept Article 23;

e. not to accept the provisions contained in the second sentence of Article 25 for constitutional reasons;

f. not to accept the provisions laid down in Article 26, paragraph 2, where it is competent by virtue of its own law;

g. not to apply Articles 30 and 31 in respect of an act for which the sanctions, in accordance with its own law or that of the other State concerned, can be imposed only by an administrative authority.

h. not to accept Part V.

APPENDIX II

Any Contracting State may declare that for reasons arising out of its constitutional law it can make or receive requests for proceedings only in circumstances specified in its municipal law.

Any Contracting State may, by means of a declaration, define as far as it is concerned the term "national" within the meaning of this Convention.

APPENDIX III

List of offences other than offences dealt with under criminal law

The following offences shall be assimilated to offences under criminal law

- in France:
  any unlawful behaviour sanctioned by a *contravention de grande voirie*.
- in the Federal Republic of Germany:
  any unlawful behaviour dealt with according to the procedure laid down in the Act of Violations of Regulations (*Gesetz über Ordnungswidrigkeiten* of 24 May 1968 - BGB1 1968, I, 481).
- in Italy:
  any unlawful behaviour to which is applicable Act No. 317 of 3 March 1967.

European Convention on the transfer
of proceedings in criminal matters – ETS No. 73

Explanatory Report

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

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

INTRODUCTION

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

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

The recommendation reads as follows

> "The Assembly,
>
> 1. Noting that under international law each State possesses various kinds of criminal jurisdiction: territorial, ratione personae, or universal, or jurisdiction to punish offences that jeopardise its safety or its credit; that, whenever an offence involves some foreign element, there may be overlapping of two or more of these jurisdictional powers, giving rise to positive conflicts of jurisdiction;
>
> 2. Noting that, when territorial jurisdiction is involved, that jurisdiction itself may give rise to conflict regarding determination of the place of the offence;
>
> 3. Whereas such conflict of jurisdiction is undesirable and may, in particular, have the consequence, unacceptable in law, that a single person may be tried successively by courts in several States for the same offence;
>
> 4. Whereas it is of unquestionable value to find a solution for these problems;
>
> 5. Whereas this solution can only be found in an agreement between States by means of an international convention;
>
> 6. Having considered the report of its Legal Committee and the draft European Convention on conflicts of jurisdiction in criminal matters prepared by that committee (Doc. 1873),
>
> Recommends the Committee of Ministers:
>
> 7. To instruct the European Committee on Crime Problems to prepare a draft European Convention on conflicts of jurisdiction in criminal matters, taking the attached draft as a basis;
>
> 8. To submit to the Assembly for an opinion the draft Convention prepared by the European Committee on Crime Problems before it is signed by the member governments."

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

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

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

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

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

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

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

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

GENERAL OBSERVATIONS

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

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

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

ANALYSIS OF SYSTEMS OF JURISDICTION

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

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

a. the territorial jurisdiction of the State where the offence was committed;

b. i. jurisdiction founded on the active personality principle, that is jurisdiction exercised by the State over its own nationals or persons domiciled in its territory, without regard to the place of the offence;

ii. jurisdiction founded on the passive personality principle, that is jurisdiction exercised by the State for the protection of its nationals abroad in respect of offences of which they may have been the victims;

c. jurisdiction exercised by the State for the punishment of offences against its sovereignty or its security;

d. jurisdiction founded on the principle of universality, which reflects the concern to ensure the punishment of certain offences creating a common danger in a plurality of States.

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

A. Territorial jurisdiction

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

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

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

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

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

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

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

B. Jurisdiction based on the personality principles

(a) Active personality principle

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

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

(b) Passive personality principle

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

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

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

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

D. Principle of universality

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

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

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

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

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

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

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

The following conclusions emerged from these studies and reports:

a. The rules governing jurisdiction in the various member States are based on broadly analogous concepts.
b. Almost every one of their legislations recognises the following grounds on which jurisdiction may be determined: the place of the offence, the nationality of the offender, the need to protect the State from offences against its sovereignty or security and universal jurisdiction. Some legislations recognise also the nationality of the victim, and the habitual residence of the offender.
c. Territorial jurisdiction remains the fundamental form of jurisdiction; the concept of territory appears to be gradually widened.
d. The nationality of the offender is recognised as a ground of jurisdiction by almost all legislations; but in many cases it is of a secondary character being subject to procedural conditions, and proceedings may be barred if the case has already been heard elsewhere.

e. The need. to protect the State from offences against its sovereignty or its safety is always recognised as a principal ground of jurisdiction.

f. Universal jurisdiction is recognised for certain offences only.

g. The nationality of the victim is not recognised as a ground of jurisdiction by all countries; the procedural conditions to which it is usually subject tend to make it a secondary ground.

h. jurisdiction based on the offender's habitual residence is recognised by some States.

SOLUTIONS ADOPTED

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

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

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

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

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

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

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

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

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

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

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

PLAN OF THE CONVENTION

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

Part I – Definitions – Article 1

Part II – Competence – Articles 2-5

Part III – Transfer of Proceedings – Articles 6-29

Part IV – Plurality of Criminal Proceedings – Articles 30-34

Part V – *Ne bis in idem* – Articles 35-37

Part VI – Final clauses – Articles 38-47

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

PARTICULAR OBSERVATIONS

Preamble

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

PART I – DEFINITIONS

Article 1

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

The terms are "offence" and "sanction".

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

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

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

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

PARTS II AND III – COMPETENCE AND TRANSFER OF PROCEEDINGS

A. General remarks

Framework and history

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

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

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

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

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

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

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

Notion and scope

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

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

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

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

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

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

Basic problems

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

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

Basic solutions

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

1. Conditions under which proceedings may be transferred

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

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

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

2. Judicial competence and applicable law

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

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

- to make a request for proceedings have the automatic effect of making the criminal law of the requested State applicable;

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

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

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

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

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

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

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

– Article 6 (2) stipulates that the competent authorities of a Contracting State shall take into consideration the possibility of a transfer of proceedings wherever such a possibility is offered by the present Convention;

– if the authorities reach the conclusion that transfer is desirable, communications shall be sent either by the Ministries of Justice or -where special agreements exist- direct by the authorities named in these agreements.

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

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

In all cases in which a request for the transfer of proceedings is presented, an enquiry has already been carried out in the requesting State and evidence gathered. This information will almost always be necessary in order to render a decision in the requested State; that State may even require additional Information. A good system of mutual legal assistance is therefore indispensable. for the transfer of proceedings. Moreover, it is important to attribute to official proceedings conducted in the requesting State the same value as if they had been conducted in the requested State. Mention must be made here, in particular, of the evidential value of records and reports drawn up by the competent authorities. Article 26 (1) lays down the same rules in the matter as Article 27 (4) of the European Convention on the International Validity of Criminal Judgments.

6. Statutory limitation

The three problems under this heading are

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

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

Article 10 provides that the requested State cannot take action on the request if at the date of the request the timelimit for criminal proceedings had already expired in the requesting State in accordance with the

legislation of that State. It is self-evident that a transfer of proceedings is impossible if the time-limit for prosecution has expired in the requesting State. It is indeed a general condition for the application of this Part that the offence may be prosecuted in the requesting State.

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

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

(c) Acts interrupting time-limitation

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

7. Complaint

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

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

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

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

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

B. Notes on the articles

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

PART II

Article 2

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

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

Paragraph 2 specifies that the exercise of any jurisdiction grounded exclusively on this Convention (subsidiary jurisdiction) and consequently not contained in a provision of a national law, such as the Penal Code or

the Code of Penal Procedure (this means that the State has no original jurisdiction) depends on the presentation of a request for proceedings.

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

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

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

Article 3

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

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

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

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

Article 4

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

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

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

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

Article 5

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

PART III: SECTION 1

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

Article 6

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

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

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

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

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

Article 7

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

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

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

This condition is fulfilled if an offence which is punishable in a given State would have been punishable if committed in the State requested to prosecute the accused and if the perpetrator of that offence would have been liable to a sanction under the legislation of the requested State. Paragraph 1 covers this notion since it refers expressly to the punishability of the particular act, viewed as a complex of objective and subjective elements as well as to the punishability of the perpetrator.

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

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

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

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

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

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

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

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

Article 8

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

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

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

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

These conditions call for the following comments

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

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

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

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

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

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

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

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

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

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

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

Article 9

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

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

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

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

However, criminal offences and violations of regulations have in common that a particular kind of unlawful behaviour is punished by the State in the interests of protection of the law. Both kinds of violation form part of criminal law in the traditional sense: the only acts considered as violations of regulations since 1952 are those that formerly were or would have been punishable as petty or correctional offences.

Criminal offences and violations of regulations are treated as separate categories because it seems unreasonable to make a particular conduct which is not morally reprehensible but must, in the public interest, be combated (e.g. parking offence) punishable in the same way as a criminal offence, such as murder, theft and false pretences. In distinguishing between criminal offences and violations of regulations, criminal offences are applied only to morally blameworthy conduct, thus strengthening the effect of criminal Judgments. This distinction also has the advantage that because of the lesser sanctions applicable, violations of regulations can be punished by an administrative authority in the course of simplified and accelerated proceedings. The judicial authorities are thereby relieved of a great number of insignificant cases.

The person found guilty of a violation of regulations may not accept the decision given by the administrative authority, and the case may be brought before the judicial authorities (the ordinary courts).

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

a. Can transfer be requested where an offence is the subject of administrative proceedings in the requesting State but of judicial proceedings in the requested State?

b. Can transfer be requested where an offence is the subject of judicial proceedings in the requesting State but of administrative proceedings in the requested State?

c. In the latter case, is the requesting State obliged to recognise the effects resulting from the decision of the administrative authority in the requested State?

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

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

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

Article 10

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

Article 11

This article lists the grounds of optional refusal.

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

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

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

Sub-paragraph (d): The nature of the offence only comes into play in the case of political, purely military and purely fiscal offences. As there is a clear trend against giving international effect to the punishment of these offences, the requested State has the right to refuse the request. Such offences are at times committed under the influence of strong emotion and in circumstances difficult for other States to judge; their objective existence as offences may depend on situations and aims which may even be in opposition to the policies of other States. This is the reason for the systematic refusal of extradition for political and purely military offences and the frequent refusal of extradition for purely fiscal offences.

This article does not exclude offences of a religious nature; it was thought preferable, in view of the different aims and values which apply in this sphere, to allow each State to make reservations (Appendix I).

Sub-paragraph (e) is similar to Article 3 (2) of the European Convention on Extradition, and is concerned with ensuring that there will be no conflict between obligations under this Convention and under conventions in the field of human rights.

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

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

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

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

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

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

Article 12

The acceptance by the requested State of the request for proceedings is not irrevocable. It may happen that new facts which call in question the soundness of the initial decision come to light during the proceedings in that State. Article 12 (1) requires the requested State, in such cases, to withdraw its acceptance where it notes the existence of one or another of the situations outlined in Article 10, and Article 12 (2) entitles it to

do so where the proceedings would result in a judgment *in absentia* or in a judgment which the said State would be unable to enforce or where a ground for refusal mentioned in Article 11 becomes apparent. The term "court" in paragraph 2 (b) of Article 12 also includes competent administrative authorities. The third sub-paragraph makes it clear that the two States can always agree upon a re-transfer to the requesting State.

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

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

PART III: SECTION 2

Article 13

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

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

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

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

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

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

Article 14

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

Article 15

This article concerns the documents which must accompany the request.

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

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

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

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

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

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

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

Article 16

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

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

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

Article 17

The intention behind the requirement that the authorities of the requested State shall inform the suspected person Of the request for proceedings against him is that the suspected person shall be entitled to be heard or, in any event, to present such views as he deems to be relevant, before a decision is taken. On the one hand, this provision is prompted by the need to respect the individual's right to defend himself, since the decision – even when within the province of an administrative authority – is liable to affect the outcome of the criminal proceedings to a very considerable degree; on the other, it is prompted by the need for the information provided by the requesting State to he supplemented and, where appropriate, disputed by the person actually concerned, so as to preclude so far as possible the danger of decisions based on erroneous evidence, which might possibly give rise at a later stage to a withdrawal of acceptance (see Article 12, (2) (b)).

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

Article 18

The provisions of this article correspond to those of Article 19 of the European Convention on the Punishment of Road Traffic Offences and to those of Article 29 of the European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders. This article states the principle that documents relating to the application of this Convention need not be translated. A State may, however, by express declaration, require translations of these documents. It can never insist upon the exclusive use of its own language, unless it happens to be an official language of the Council of Europe. If the requested State has not specified which of these official languages should be used, the requesting State is free to choose whichever

of these languages it prefers. It shall not be prevented, however, from using a non-official language which is the language of the requested State if this solution is easier for its authorities. It is open to other States to apply the rules of reciprocity. Provisions concerning translation of documents contained in agreements between Contracting States are not affected. Translations do not render superfluous the dispatch of original documents.

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

Article 19

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

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

Article 20

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

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

PART III: SECTION 3

Article 21

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

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

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

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

Article 22

As already stated (see Article 21) the examination of the request in the requested State may take some time. Suppose that the request for proceedings is made just before the time-limit for prosecution has expired and that the requested State decides not to take action on the request or to refuse to accept it, then by the time the requested State's decision becomes known the requesting State will be prevented by statutory limitation

from taking procedings itself. In order to remedy this situation, Article 22 provides for the exceptional extension of the time-limit for prosecution by six months. It entails of course at least a moral obligation for the requested State to decide within that period. See "General remarks" (paragraph 31, 6). A possibility of making reservations to this article has been provided.

PART IV: SECTION 4

Article 23

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

Article 24

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

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

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

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

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

Article 25

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

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

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

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

Article 26

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

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

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

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

PART III: SECTION 5

Article 27 and 28

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

Two situations may arise:

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

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

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

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

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

Article 29

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

Rules other than those which may be contained in national law are designed to safeguard the accused person against abusive detention. If he is arrested at the request of the requesting State in pursuance of Article 27 he must be released 18 days after his arrest if the requested State has then not yet received the request for proceedings. If a request has been received but without the necessary documents he must be released 1,5 days after the

receipt of the request for proceedings if the requested State has then not yet received these documents. On the assumption that the request for proceedings is received on the eighteenth day after his arrest, it follows that he may still be detained for a further 15 days, i.e. 33 days in toto, in accordance with his Convention. In order to allow an adequate examination of the case in the light of information submitted, a total period of custody of 40 days is allowed. Even if such examination is not completed by that time, the accused person must be released.

PART IV – PLURALITY OF CRIMINAL PROCEEDINGS

A. General remarks

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

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

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

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

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

B. Notes on the articles

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

Article 30

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

a. waive its own prosecution in the given case, or

b. provisionally stop or interrupt the proceedings in order to wait for the outcome of the proceedings pending in the other State, or

c. transfer the proceedings to the other State, i.e. request the other State to take proceedings in accordance with Article 8.

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

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

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

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

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

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

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

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

Article 31

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

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

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

It might be asked in the light of modern penal policy whether in the case of a juvenile offender a criterion, according to which priority should be given to the State of the habitual residence of the offender, should

prevail. For various reasons of principle it is not advisable to ere-ate an obligation for the State of the offence to waive its own jurisdiction in favour of the State of the habitual residence of the offender, although it is true that such a renunciation would be in the interest of the juvenile offender in many cases.

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

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

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

It may be that the consultative procedure envisaged in paragraph 1 cannot start earlier than at a stage of proceedings, when, for procedural or practical reasons, it would be no longer advisable to relinquish jurisdiction in favour of the other State. The opening of the trial in the presence of the accused was chosen as the decisive moment. Consideration was given also to an earlier moment, i.e. the filing of the indictment. It was felt, however, that the right of the accused to be judged should for the purposes of the Convention become effective not earlier than at the beginning of the trial. Until that moment, a transfer of the criminal proceedings should be possible.

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

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

Article 32

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

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

Article 32 states two reasons for doing so:

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

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

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

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

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

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

Article 33

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

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

Article 34

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

PART V – *NE BIS IN IDEM*

A. General remarks

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

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

37. At the national level the principle is generally recognised in the law of member States, for a final judgment delivered in a particular State has the effect of debarring the authorities of that State from taking once more proceedings against the same person on the basis of the same body of facts.

38. At the international level, on the other hand, the principle of *ne bis in idem is* not generally recognised. By way of example, no State in which a punishable act has been committed is debarred from prosecuting the offence only because the same offence has already been prosecuted in another State.

It is not difficult to understand the considerations underlying this legal position. Traditionally, the right to prosecute offences has been considered part of sovereignty. To this must be added, however, that the State of the offence more often than not will be the State in which the commission of the act by the accused can be best proved; it would therefore seem unjustified for that State normally to be bound by decisions delivered in other States, where the absence of certain elements of evidence may have led to acquittal or the imposition of less severe penalties.

Against this view may be that which considers that the offender will be subjected to a manifestly inequitable treatment if he is again prosecuted and may even be subjected to the enforcement of several judgments for the same offence.

39. It might be argued that the need for a reasonable protection of the offender might be dealt with through a protocol to the Europe-an Convention for the Protection of Human Rights and Fundamental Freedoms. It is preferable, however, to include the provisions in a convention regulating the co-operation between the States in penal matters.

Two reasons justify this solution.

The recognition of a foreign judgment presupposes a certain degree of confidence in foreign justice. Such confidence exists among the member States of the Council of Europe but is, at the present time, hardly equally apparent in wider international relations between States. For this reason it is possible to give more substance to the principle of *ne bis in idem* at the European level than at the wider international level. But the insertion of this principle in the European Convention for the Protection of Human Rights and Fundamental Freedoms would have an effect *erga omnes*, and would thereby be liable to be deprived of most of its content and hence its usefulness.

It has also been claimed that such an insertion in the Human Rights Convention would result in a more advanced degree of unification. But at the present moment such a degree of unification appears to be difficult to obtain in view of the pronounced differences between the technical rules of criminal procedure.

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

First, it should be pointed out that the provisions are in the nature of minimum rules, each State being free to maintain or adopt rules which to a wider extent give the effect of *ne bis in idem* to foreign judgments. This is apparent from the provisions of Article 37.

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

The system in the Convention which corresponds to the system adopted in the European Convention on the International Validity of Criminal Judgments is that, where a State has itself requested another State to take proceedings, the requesting State shall always recognise the judgment delivered ,as a result of these proceedings. Apart from this, European Criminal Judgments never have the effect of *ne bis in idem* in relation to the State in which the offence was committed (paragraph 3), or-in the case of specified offences directed against the particular interests of a State in relation to that State (paragraph 2).

Where none of these special situations exists-that is, notably, in cases where judgment was delivered in the State where the offence was committed-the judgment has the effect of *ne bis in idem* in relation to other States in the event of an acquittal or a conviction where the sanction imposed is enforced in the normal manner or where the court has convicted the offender without imposing a sanction (paragraph 1).

42. For those cases where the principle of *ne bis in idem* does not apply in accordance with this Convention a supplementary rule has been laid down. According to this rule any period of deprivation of liberty already served in one Contracting State as part of the enforcement of a sanction shall be deducted from the sanction which may be imposed in another Contracting State (Article 36).

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

B. Notes on the articles

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

Article 35

For a decision to obtain the force of *ne bis in idem* it must be final. It is evident, however, that it will normally be contrary to the factual considerations underlying the provision of paragraph 1 if another State should commence prosecution in the period of time between the pronouncement of the first judgment and the expiration of the time allowed for appeal.

Under certain legal systems there may he cases 'where a decision will never be final. In such cases it is inconceivable that a non-final sentence should prevent any subsequent prosecution being instituted by another State.

Sub-paragraph *(a)* relates to acquittals. The question has arisen whether an acquittal which is not due to the absence of evidence showing that the prosecuted act was committed by the accused, but to the fact that the

particular act is not punishable under the penal legislation of the State of judgment, should also debar other States, in which the act would be punishable, from prosecuting. In view of the fact that the rule of *ne bis in idem* will normally be relevant only if the judgment is delivered in the State in which the offence was committed, it will accord best with the general principle of dual criminal liability (see the comments on Article 7 (1)) that an acquittal based on the fact that the act is not punishable in that State should also be covered by the provision of paragraph 1.

Sub-paragraph (b) relates to judgments imposing a sanction. For the meaning of the term "sanction", reference is made to Article 1 (b). The general Application of the principle of *ne bis in idem* would in respect of these judgments lead to the unacceptable result that the mere fact that a State happened to take criminal proceedings first would debar other States from prosecuting the offence. The interest of the States in the effective reduction of crime has to be weighed Against the general consideration requiring that a person should not be prosecuted several times for the same act.

In the member States whose legislation contains special provisions on the subject, such weighing of conflicting considerations has normally led to the result that a foreign conviction is given the effect of *res judicata* only if the sanction has been served, or has been remitted or is time-barred under the law of the State of judgment.

That solution reasonably meets the legitimate interest of the convicted person not to be prosecuted several times for the same act, since-normally, in any case new proceedings will be taken only where he has rendered himself liable thereto by evading the enforcement of the sanction in the State of the first judgment. On the other hand, as long as the enforcement of a judgment follows a normal course, new proceedings ought not to be instituted.

The term "sanction" also covers special conditions which may be imposed in a suspended sentence. Thus the principle *ne bis in idem* applies as long as the sentenced person complies with the conditions imposed in the suspended sentence.

The fact that only a minor part of a sanction, or possibly a measure imposed under the judgment, has not been served in the normal way will entail that another State will be free to open new proceedings. It has not been considered possible to distinguish whether the convicted person has evaded a larger or smaller part of the sanction; it must be stressed, however, that in accordance with the view underlying this provision, States should hesitate to open new proceedings where only a small part of the sanction has not been served. This applies irrespective of the question whether the other State would, in its determination of sanction, have to take account of the sanction already served; the mere fact that the person already sentenced might he subject to a new prosecution may imply an inequitable aggravation of his situation.

Sub-paragraph (c) relates to judgments where the court convicted the offender without imposing a sanction. By this provision and the provision of sub-paragraph (b) (i), any form of suspension or exclusion of sanctions is covered.

Paragraph 2 relates to certain special cases where a particular State has a quite special interest in being able to prosecute the offence, since it cannot be supposed that other States will adopt the same strict view of the offence. The cases concerned are those where the offence is directed against either a person or an institution or any thing having public status in that State, or where the offender had himself a public status in that State.

Sub-paragraph (b) has been drafted accordingly. The *res judicata* effect is given to a sanction which

(i) has been completely enforced or is being enforced,

(ii) has been wholly or with respect to the part not enforced the subject of a pardon or an amnesty or

(iii) can no longer be enforced because of lapse of time.

Consideration was given to whether a more general term could he applied in that provision, such as ".acts directed against the interests of a State-, but the term was thought too comprehensive and vague. Such a term would, for example, include offences against a large number of the trade regulations provided for in special national legislation.

As examples of offences that will be covered by the provision of this paragraph, mention may be made of assaults on public servants ("a person ... having public status"), espionage ("an institution ... having public status"), counterfeiting ("any thing having public status") and the taking of bribes ("had himself a public status").

Paragraph 3 arises out of the notion that in most cases the State of offence has a special interest in judging the offender by its own courts, which can more easily collect all the evidence. Such criminal procedure may also be of value in respect of civil proceedings for the purpose of compensating an injured party.

In view of the differences between the laws of member States on the criteria determining the place of the offence, it has been considered advisable to provide that the question whether an offence was committed on the territory of a particular State, shall he decided in accordance with the domestic law of that State.

Article 36

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

Consideration has been given to whether it would be possible to provide a wider protection of offenders so that not only enforced sanctions involving deprivation of liberty but all enforced sanctions, e.g. also fines, should have the effect of reducing the new sanction. lit is evident, however, that the need for a rule of protection is particularly urgent in regard to sanctions involving deprivation of liberty. Besides, providing for a possible reduction where the sanctions to be compared are of different types presents special difficulties. Since the cases where a State wishes to prosecute an offence for a second time which has already been decided and enforced in another State are likely to be the more serious ones where the new judgment will generally imply a sanction involving deprivation of liberty, a provision to the effect that foreign sanctions of fine should also cause a reduction would typically lead to difficult comparisons in practice between sanctions of different types. Furthermore, taking into consideration that the provisions concerned are minimum rules, so that each State is free to provide a wider protection, it was considered that, at the present time, no steps should be taken to insert a wider rule in the Convention. For the same reason also deduction of any period during which the sentenced person was detained pending trial was left to national legislation.

Article 37

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

PART VI – FINAL PROVISIONS

A. General remarks

45. Articles 38-47 are, for the most part, based on the model final clauses of agreements and conventions which were approved by the Committee of Ministers of the Council of Europe, sitting at Deputy level during its 113th meeting. Most of these articles do not call for specific comments; Articles 43 and 44 have been inserted by express decision.

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

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

Article 44 provides that the European Committee on Crime Problems shall assist the Contracting States, if necessary, in the application of this Convention.

COMMENTS ON APPENDIX I

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

The reason for these reservations are stated above; see

- as to reservation (a) - comments relating to Article 11, subparagraph (d);
- as to reservation (b) - comments relating to Article 9;
- as to reservation (c) -comments relating to Article 22;
- as to reservation (d) - comments relating to Article 23;

- as to reservation (e) - comments relating to Article 25;
- as to reservation (f) - comments relating to Article 26;
- as to reservation (g) - comments relating to Articles 30 and 31;
- as to reservation (h) - comments relating to Part V.

COMMENTS ON APPENDIX II

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

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

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

COMMENTS ON APPENDIX III

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

European Convention on the suppression of terrorism – ETS No. 90

Strasbourg, 27.I.1977

The member States of the Council of Europe, signatory hereto,

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

Aware of the growing concern caused by the increase in acts of terrorism;

Wishing to take effective measures to ensure that the perpetrators of such acts do not escape prosecution and punishment;

Convinced that extradition is a particularly effective measure for achieving this result,

Have agreed as follows;

Article 1

For the purposes of extradition between Contracting States, none of the following offences shall be regarded as a political offence or as an offence connected with a political offence or as an offence inspired by political motives:

a. an offence within the scope of the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970;

b. an offence within the scope of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 23 September 1971;

c. a serious offence involving an attack against the life, physical integrity or liberty of internationally protected persons, including diplomatic agents;

d. an offence involving kidnapping, the taking of a hostage or serious unlawful detention;

e. an offence involving the use of a bomb, grenade, rocket, automatic firearm or letter or parcel bomb if this use endangers persons;

f. an attempt to commit any of the foregoing offences or participation as an accomplice of a person who commits or attempts to commit such an offence.

Article 2

1. For the purpose of extradition between Contracting States, a Contracting State may decide not to regard as a political offence or as an offence connected with a political offence or as an offence inspired by political motives a serious offence involving an act of violence, other than one covered by Article 1, against the life, physical integrity or liberty of a person.

2. The same shall apply to a serious offence involving an act against property, other than one covered by Article 1, if the act created a collective danger for persons.

3. The same shall apply to an attempt to commit any of the foregoing offences or participation as an accomplice of a person who commits or attempts to commit such an offence.

Article 3

The provisions of all extradition treaties and arrangements applicable between Contracting States, including the European Convention on Extradition, are modified as between Contracting States to the extent that they are incompatible with this Convention.

Article 4

For the purpose of this Convention and to the extent that any offence mentioned in Article 1 or 2 is not listed as an extraditable offence in any extradition convention or treaty existing between Contracting States, it shall be deemed to be included as such therein.

Article 5

Nothing in this Convention shall be interpreted as imposing an obligation to extradite if the requested State has substantial grounds for believing that the request for extradition for an offence mentioned in Article 1 or 2 has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that that person's position may be prejudiced for any of these reasons.

Article 6

1. Each Contracting State shall take such measures as may be necessary to establish its jurisdiction over an offence mentioned in Article 1 in the case where the suspected offender is present in its territory and it does not extradite him after receiving a request for extradition from a Contracting State whose jurisdiction is based on a rule of jurisdiction existing equally in the law of the requested State.

2. This Convention does not exclude any criminal jurisdiction exercised in accordance with national law.

Article 7

A Contracting State in whose territory a person suspected to have committed an offence mentioned in Article 1 is found and which has received a request for extradition under the conditions mentioned in Article 6, paragraph 1, shall, if it does not extradite that person, submit the case, without exception whatsoever and without undue delay, to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any offence of a serious nature under the law of that State.

Article 8

1. Contracting States shall afford one another the widest measure of mutual assistance in criminal matters in connection with proceedings brought in respect of the offences mentioned in Article 1 or 2. The law of the requested State concerning mutual assistance in criminal matters shall apply in all cases. Nevertheless this assistance may not be refused on the sole ground that it concerns a political offence or an offence connected with a political offence or an offence inspired by political motives.

2. Nothing in this Convention shall be interpreted as imposing an obligation to afford mutual assistance if the requested State has substantial grounds for believing that the request for mutual assistance in respect of an offence mentioned in Article 1 or 2 has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion or that that person's position may be prejudiced for any of these reasons.

3. The provisions of all treaties and arrangements concerning mutual assistance in criminal matters applicable between Contracting States, including the European Convention on Mutual Assistance in Criminal Matters, are modified as between Contracting States to the extent that they are incompatible with this Convention.

Article 9

1. The European Committee on Crime Problems of the Council of Europe shall be kept informed regarding the application of this Convention.

2. It shall do whatever is needful to facilitate a friendly settlement of any difficulty which may arise out of its execution.

Article 10

1. Any dispute between Contracting States concerning the interpretation or application of this Convention, which has not been settled in the framework of Article 9, paragraph 2, shall, at the request of any Party to the dispute, be referred to arbitration. Each Party shall nominate an arbitrator and the two arbitrators shall nominate a referee. If any Party has not nominated its arbitrator within the three months following the request for arbitration, he shall be nominated at the request of the other Party by the President of the European Court of Human Rights. If the latter should be a national of one of the Parties to the dispute, this duty shall be carried out by the Vice-President of the Court or if the Vice-President is a national of one of the Parties to the dispute, by the most senior judge of the Court not being a national of one of the Parties to the dispute. The same procedure shall be observed if the arbitrators cannot agree on the choice of referee.

2. The arbitration tribunal shall lay down its own procedure. Its decisions shall be taken by majority vote. Its award shall be final.

Article 11

1. This Convention shall be open to signature by the member States of the Council of Europe. 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 Convention shall enter into force three months 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 Convention shall come into force three months after the date of the deposit of its instrument of ratification, acceptance or approval.

Article 12

1. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance or approval, specify the territory or territories to which this Convention shall apply.

2. Any State may, when depositing its instrument of ratification, acceptance or approval or at any later date, by declaration addressed to the Secretary General of the Council of Europe, extend this Convention 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 immediately or at such later date as may be specified in the notification.

Article 13

1. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance or approval, declare that it reserves the right to refuse extradition in respect of any offence mentioned in Article 1 which it considers to be a political offence, an offence connected with a political offence or an offence inspired by political motives, provided that it undertakes to take into due consideration, when evaluating the character of the offence, any particularly serious aspects of the offence, including:

   a. that it created a collective danger to the life, physical integrity or liberty of persons; or

   b. that it affected persons foreign to the motives behind it; or

   c. that cruel or vicious means have been used in the commission of the offence.

2. Any State may wholly or partly withdraw a reservation 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.

3. A State which has made a reservation in accordance with paragraph 1 of this article may not claim the application of Article 1 by any other State; it may, however, if its reservation is partial or conditional, claim the application of that article in so far as it has itself accepted it.

Article 14

Any Contracting State may denounce this Convention by means of a written notification addressed to the Secretary General of the Council of Europe. Any such denunciation shall take effect immediately or at such later date as may be specified in the notification.

Article 15

This Convention ceases to have effect in respect of any Contracting State which withdraws from or ceases to be a member of the Council of Europe.

Article 16

The Secretary General of the Council of Europe shall notify the member States of the Council of:

a. any signature;

b. any deposit of an instrument of ratification, acceptance or approval;

c. any date of entry into force of this Convention in accordance with Article 11 thereof;

d. any declaration or notification received in pursuance of the provisions of Article 12;

e. any reservation made in pursuance of the provisions of Article 13, paragraph 1;

f. the withdrawal of any reservation effected in pursuance of the provisions of Article 13, paragraph 2;

g. any notification received in pursuance of Article 14 and the date on which denunciation takes effect;

h. any cessation of the effects of the Convention pursuant to Article 1

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

Done at Strasbourg, this 27th day of January 1977, 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 States.

European Convention on the suppression of terrorism – ETS No. 90

Explanatory Report

I. The European Convention on the Suppression of Terrorism, 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 27 January 1977.

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

INTRODUCTION

1. During its 25th Session in May 1973, the Consultative Assembly of the Council of Europe adopted Recommendation 703 (1973) on international terrorism "condemning international terrorist acts which, regardless of their cause, should be punished as serious criminal offences involving the killing or endangering of the lives of innocent people" and accordingly calling on the Committee of Ministers of the Council to invite the governments of member States *inter alia* "to establish a common definition for the notion of 'political offence' in order to be able to refute any 'political' justification whenever an act of terrorism endangers the life of innocent persons".

2. Having examined this recommendation, the Committee of Ministers of the Council of Europe adopted at its 53rd meeting on 24 January 1974, Resolution (74) 3 on international terrorism [1] which recommends the governments of member States to take into account certain principles when dealing with requests for extradition of persons accused or convicted of terrorist acts.

The idea underlying this resolution is that certain crimes are so odious in their methods or results in relation to their motives, that it is no longer justifiable to classify them as "political offences" for which extradition is not possible. States receiving extradition requests related to terrorist acts are therefore recommended to take into account the particular gravity of these acts. If extradition is not granted, States should submit the case to their competent authorities for the purpose of prosecution. As many States have only limited jurisdiction over crimes committed abroad it is furthermore recommended that they envisage the possibility of establishing it in these cases to ensure that terrorists do not escape both extradition and prosecution.

3. At a meeting in Obernai (France) on 22 May 1975, the Ministers of Justice of the member States of the Council of Europe stressed the need for co-ordinated and forceful action in this field. They drew attention to the fact that acts of terrorism were today indigenous, i.e. committed for specific "political" objectives within the member States of the Council of Europe, which may threaten the very existence of the State by paralysing its democratic institutions and striking at the rule of law. Accordingly, they called for specifically European action.

4. Following this initiative, the 24th Plenary Session of the European Committee on Crime Problems (ECCP) held in May 1975, decided to propose to the Committee of Ministers of the Council of Europe the setting up of a committee of governmental experts to study the problems raised by certain new forms of concerted acts of violence.

5. At the 246th meeting of their Deputies in June 1975, the Committee of Ministers authorised the convocation of a committee of governmental experts.

6. Mrs S. Oschinsky (Belgium) was elected Chairman of the committee. The Secretariat was provided by the Directorate of Legal Affairs of the Council of Europe.

7. During its first two meetings, held from 6 to 8 October 1975 and from 2 to 6 February 1976, the committee prepared a European Convention on the Suppression of Terrorism.

8. The draft convention was submitted to the 25th Plenary Session of the ECCP in May 1976 which decided to forward the result of the committee's work to the Committee of Ministers for approval.

9. At their 10th Conference, held on 3 and 4 June 1976 in Brussels, the European Ministers of Justice took note of the draft convention and expressed the hope that its examination by the Committee of Ministers be completed as quickly as possible.

10. At the 262nd meeting of their Deputies in November 1976, the Committee of Ministers approved the text which is the subject of this report and decided to open the Convention to the signature of member States.

GENERAL CONSIDERATIONS

11. The purpose of the Convention is to assist in the suppression of terrorism by complementing and, where necessary, modifying existing extradition and mutual assistance arrangements concluded between member States of the Council of Europe, including the European Convention on Extradition of 13 December 1957 and the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959, in that it seeks to overcome the difficulties which may arise in the case of extradition or mutual assistance concerning persons accused or convicted of acts of terrorism.

12. It was felt that the climate of mutual confidence among the likeminded member States of the Council of Europe, their democratic nature and their respect for human rights safeguarded by the institutions set up under the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, justify opening the possibility and, in certain cases, imposing an obligation to disregard, for the purposes of extradition, the political nature of the particularly odious crimes mentioned in Articles 1 and 2 of the Convention. The human rights to which regard has to be had are not only the rights of those accused or convicted of acts of terrorism but also of the victims or potential victims of those acts (cf. Article 17 of the European Convention on Human Rights).

13. One of the characteristics of these crimes is their increasing internationalisation; their perpetrators are frequently found in a State other than that in which the act was committed. For that reason extradition is a particularly effective measure for combating terrorism.

14. If the act is an offence which falls within the scope of application of existing extradition treaties the requested State will have no difficulty, subject to the provisions of its extradition law, in complying with a request for extradition from the State which nas jurisdiction to prosecute. However, terrorist acts might be considered "political offences", and it is a principle – laid down in most existing extradition treaties as well as in the European Convention on Extradition (cf. Article 3 paragraph 1) – that extradition shall not be granted in respect of a political offence.

Moreover, there is no generally accepted definition of the term "political offence". It is for the requested State to interpret it.

15. It follows that there is a serious lacuna in existing international agreements with regard to the possibility of extraditing persons accused or convicted of acts of terrorism.

16. The European Convention on the Suppression of Terrorism aims at filling this lacuna by eliminating or restricting the possibility for the requested State of invoking the political nature of an offence in order to oppose an extradition request. This aim is achieved by providing that, for extradition purposes, certain specified offences *shall never* be regarded as "political" (Article 1) and other specified offences *may not* be (Article 2), notwithstanding their political content or motivation.

17. The system established by Articles 1 and 2 of the Convention reflects the consensus which reconciles the arguments put forward in favour of an obligation, on the one hand, and an option, on the other hand, not to consider, for the purposes of the application of the Convention, certain offences as political.

18. In favour of an obligation, it was pointed out that it alone would give States new and really effective possibilities for extradition, by eliminating explicitly the plea of "political offence", a solution that was perfectly feasible in the climate of mutual confidence that reigned amongst the member States of the Council of Europe having similar democratic institutions. It would ensure that terrorists were extradited for trial to the State which had jurisdiction to prosecute. A mere option could never provide a guarantee that extradition would take place and, moreover, the criteria concerning the seriousness of the offence would not be precise.

19. In favour of an option, reference was made to the difficulty in accepting a rigid solution which would amount to obligatory extradition for political offences. Each case should be examined on its merits.

20. The solution adopted consists of an obligation for some offences (Article 1), and an option for others (Article 2).

21. The Convention applies only to particularly odious and serious acts often affecting persons foreign to the motives behind them. The seriousness of these acts and their consequences are such that their criminal element outweighs their possible political aspects.

22. This method, which was already applied to genocide, war crimes and other comparable crimes in the Additional Protocol to the European Convention on Extradition of 15 October 1975 as well as to the taking or attempted taking of the life of a head of State or a member of his family in Article 3.3 of the European Convention on Extradition, accordingly overcomes for acts of terrorism not only the obstacles to extradition due to the plea of the political nature of the offence but also the difficulties inherent in the absence of a uniform interpretation of the term "political offence".

23. Although the Convention is clearly aimed at not taking into consideration the political character of the offence for the purposes of extradition, it does recognise that a Contracting State might be impeded, e.g. for legal or constitutional reasons, from fully accepting the obligations arising from Article 1. For this reason Article 13 expressly allows Contracting States to make certain reservations.

24. It should be noted that there is no obligation to extradite if the requested State has substantial grounds for believing that the request for extradition has been inspired by the considerations mentioned in Article 5, or that the position of the person whose extradition is requested may be prejudiced by these considerations.

25. In the case of an offence mentioned in Article 1, a State refusing extradition would have to submit the case to its competent authorities for the purpose of prosecution, after having taken the measures necessary to establish its jurisdiction in these circumstances (Articles 6 and 7).

26. These provisions reflect the maxim *aut dedere aut judicare*. It is to be noted, however, that the Convention does not grant Contracting States a general choice either to extradite or to prosecute. The obligation to submit the case to the competent authorities for the purpose of prosecution is subsidiary in that it is conditional on the preceding refusal of extradition in a given case, which is possible only under the conditions laid down by the Convention or by other relevant treaty or legal provisions.

27. In fact, the Convention is not an extradition treaty as such. Whilst the character of an offence may be modified by virtue of Articles 1 and 2, the legal basis for extradition remains the extradition treaty or other law concerned. It follows that a State which has been asked to extradite a terrorist may, notwithstanding the provisions of the Convention, still not do so if the other conditions for extradition are not fulfilled; for example, the offender may be a national of the requested State, or there may be time limitation.

28. On the other hand, the Convention is not exhaustive in the sense that it does not prevent States, if their law so allows, extraditing in cases other than those provided for by the Convention, or to take other measures such as expelling the offender or sending him back, if in a specific case the State concerned is not in possession of an extradition request made in accordance with the Convention, or if it considers that a measure other than extradition is warranted under another international agreement or particular arrangement.

29. The obligation which Contracting States undertake by adhering to the Convention are closely linked with the special climate of mutual confidence among the Members of the Council of Europe which is based on their collective recognition of the rule of law and the protection of human rights manifested by Article 3 of the Council's Statute and by the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 which all member States have signed.

For that reason it was thought necessary to restrict the circle of Contracting Parties to the member States of the Council, in spite of the fact that terrorism is a global problem.

30. It goes without saying that the Convention does not affect the traditional rights of political refugees and of persons enjoying political asylum in accordance with other international undertakings to which the member States are party.

COMMENTARIES ON THE ARTICLES OF THE CONVENTION

Article 1

31. Article 1 lists the offences each of which, for the purposes of extradition, shall not be regarded as a political offence, or as an offence connected with a political offence, or as an offence inspired by political motives.

It thus modifies the consequences of existing extradition agreements and arrangements as concerns the evaluation of the nature of these offences. It eliminates the possibility for the requested State of invoking the political nature of the offence in order to oppose an extradition request. It does not, however, create for itself an obligation to extradite, as the Convention is not an extradition treaty as such. The legal basis for extradition remains the extradition treaty, arrangement or law concerned.

32. The phrases "political offence" and "offence connected with a political offence" were taken from Article 3.1 of the European Convention on Extradition which is modified to the effect that Contracting Parties to the European Convention on the Suppression of Terrorism may no longer consider as "political" any of the offences enumerated in Article 1.

33. The phrase "offence inspired by political motives" is meant to complement the list of cases in which the political nature of an offence cannot be invoked; reference to the political motives of an act of terrorism is made in Resolution (74) 3 on international terrorism, adopted by the Committee of Ministers of the Council of Europe on 24 January 1974.

34. Article 1 reflects a tendency not to allow the requested State to invoke the political nature of the offence in order to oppose requests for extradition in respect of certain particularly odious crimes. This tendency has already been implemented in international treaties, for instance in Article 3.3 of the European Convention on Extradition for the taking or attempted taking of the life of a Head of State or of a member of his family, in Article 1 of the Additional Protocol to the European Convention on Extradition for certain crimes against humanity and for violations of the laws and customs of war, as well as in Article VII of the United Nations Convention on the Prevention and Punishment of the Crime of Genocide.

35. Article 1 lists two categories of crimes: the first, contained in paragraphs *a, b* and *c*, comprises offences which are already included in international treaties, the second, contained in paragraphs *d* and *e*, concerns offences which were considered as serious so that it was deemed necessary to assimilate them to the offences of the first category. Paragraph *f* concerns attempt to commit any of the offences listed in Article 1 and the participation therein.

36. While in paragraphs a and b the offences in question are described by simple reference to the titles of the Hague Convention of 16 December 1970 and the Montreal Convention of 23 September 1971, paragraph c enumerates some of the offences which are contained in the New York Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, of 14 December 1973 instead of referring to the Convention by name. This was done because the New York Convention had not entered into force when the European Convention was drafted, and several Council of Europe member States have not ratified it. Another reason for enumerating the acts to which paragraph c is to apply rather than merely referring to the title of the New York Convention is the wider scope of application of that Convention: it covers attacks on premises, accomodation and means of transport of internationally protected persons which Article 1.c does not. The phrase "serious offence" is meant to limit the application of the provision to particularly odious forms of violence. This idea is furthermore emphasised by the use of the term "attack" taken from the New York Convention.

37. Paragraph *d* uses the phrase "an offence involving..." to cover the case of a State whose laws do not include the specific offences of kidnapping or taking of a hostage. In the English text the phrase "unlawful detention" has been qualified by adding the word "serious" so as to ensure conformity with the French expression *séquestration arbitraire* which always implies a serious offence.

38. Paragraph e covers offences involving the use of bombs and other instruments capable of killing indiscriminately. It applies only if the use endangered persons, i.e. created a risk for persons, even without actually injuring them.

39. The attempt to commit any of the offences listed in paragraphs a to e, as well as the participation as an accomplice in their commission or attempt, are covered by virtue of paragraph f. Provisions of a similar nature are to be found in the Hague Convention on Seizure of Aircraft, the Montreal Convention on Safety of Civil Aircraft and the New York Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons.

"Attempt" means only a punishable attempt; under some laws not all attempts to commit an offence constitute punishable offences.

The English expression "accomplice" covers both *co-auteur* and *complice* in the French text.

Article 2

40. Paragraph 1 of Article 2 opens the possibility for Contracting Parties not to consider "political" certain serious offences which, without falling within the scope of the obligatory rule in Article 1, involve an act of violence against the life, physical integrity or liberty of a person. This possibility derogates from the traditional principle according to which the refusal to extradite is obligatory in political matters.

The term "act of violence" used to describe the offences which may be regarded as "non-political" was drafted along the lines of Article 4 of the Hague Convention for the Suppression of Unlawful Seizure of Aircraft.

41. By virtue of paragraph 2, inspired by Resolution (74) 3 of the Committee of Ministers, an act against property is covered only if it created a "collective" danger for persons, e.g. as the result of an explosion of a nuclear installation or of a dam.

42. The flexible wording of Article 2 allows three possibilities for acting on a request for extradition:

- the requested State may not regard the offence as "political" within the meaning of Article 2 and extradite the person concerned;
- it may not regard the offence as "political" within the meaning of Article 2, but nevertheless refuse extradition for a reason other than political;
- it may regard the offence as "political", but refuse extradition.

43. It is obvious that a State may always decide on the extradition request independently of Article 2, i.e. without expressing an opinion on whether the conditions of this Article are fulfilled.

Article 3

44. Article 3 concerns the Convention's effects on existing extradition treaties and arrangements.

45. The word "arrangements" is intended to include extradition procedures which are not enshrined in a formal treaty, such as those in force between Ireland and the United Kingdom. For that reason, the term accords in the French text is not to be understood as meaning a formal international instrument.

46. One of the consequences of Article 3 is the modification of Article 3.1 of the European Convention on Extradition; between States which are Parties to both the European Convention on the Suppression of Terrorism and the European Convention on Extradition, Article 3.1 of the latter Convention is modified insofar as it is incompatible with the obligations arising from the former. The same applies to similar provisions contained in bilateral treaties and arrangements which are applicable between States Parties to this Convention.

Article 4

47. Article 4 provides for the automatic inclusion, as an extraditable offence, of any of the offences referred to in Articles 1 and 2 in any existing extradition treaty concluded between Contracting States which does not contain such an offence as an extraditable offence.

Article 5

48. Article 5 is intended to emphasise the aim of the Convention which is to assist in the suppression of acts of terrorism where they constitute an attack on the fundamental rights to life and liberty of persons. The Convention is to be interpreted as a means of strengthening the protection of human rights. In conformity with this basic idea, Article 5 ensures that the Convention complies with the requirements of the protection of human rights and fundamental freedoms as they are enshrined in the European Convention of 4 November 1950.

49. One of the purposes of Article 5 is to safeguard the traditional right of asylum. Although in the member States of the Council of Europe of which all but one have ratified the European Convention on Human Rights, the prosecution, punishment or discrimination of a person on account of his race, religion, nationality or political opinion is unlikely to occur, it was deemed appropriate to insert this traditional clause also in this Convention; it is already contained in Article 3.2 of the European Convention on Extradition.

50. If, in a given case, the requested State has substantial grounds for believing that the real purpose of an extradition request, made for one of the offences mentioned in Article 1 or 2, is to enable the requesting State to prosecute or punish the person concerned for the political opinions he holds, the requested State may refuse extradition.

The same applies where the requested State has substantial grounds for believing that the person's position may be prejudiced for political or any of the other reasons mentioned in Article 5. This would be the case, for instance, if the person to be extradited would, in the requesting State, be deprived of the rights of defence as they are guaranteed by the European Convention on Human Rights.

51. It is obvious that a State applying this Article should provide the requesting State with reasons for its having refused to comply with the extradition request. It is by virtue of the same principle that Article 18.2 of the European Convention on Extradition provides that "reasons shall be given for any complete or partial rejection" and that Article 19 of the European Convention on Mutual Assistance in Criminal Matters states that "reasons shall be given for any refusal of mutual assistance".

52. If extradition is refused, Article 7 applies: the requested State must submit the case to its competent authorities for the purpose of prosecution.

Article 6

53. Paragraph 1 of Article 6 concerns the obligation on Contracting States to establish jurisdiction in respect of the offences mentioned in Article 1.

54. This jurisdiction is exercised only where:

- the suspected offender is present in the territory of the requested State, and
- that State does not extradite him after receiving a request for extradition from a Contracting State "whose jurisdiction is based on a rule of jurisdiction existing equally in the law of the requested State".

55. In order to comply with the second requirement there must be a correspondence between the rules of jurisdiction applied by the requesting State and by the requested State.

The principal effect of this limitation appears in relation to the differences in the principles of jurisdiction between those States whose domestic courts have, under their criminal law, jurisdiction over offences committed by nationals wherever committed and those where the competence of the domestic courts is based generally on the principle of territoriality (i. e. where the offence is committed within its own territory, including offences committed on ships, aircraft and offshore installations, treated as part of the territory). Thus, in the case where there has been a refusal of a request for extradition received from a State wishing to exercise its jurisdiction to try a national for an offence committed outside its territory, the obligation under Article 6 arises only if the law of the requested State also provides as a domestic rule of jurisdiction for the trial by its courts of its own nationals for offences committed outside its territory.

56. This provision is not be interpreted as requiring complete correspondence of the rules of jurisdiction of the States concerned. Article 6 requires this correspondence only insofar as it relates to the circumstances and nature of the offence for which extradition was requested. Where, for example, the requested State has jurisdiction over some offences committed abroad by its own nationals, the obligation under Article 6 would arise if it refused extradition to a State wishing to exercise a similar jurisdiction in respect of any of those offences.

For example, the United Kingdom extradition arrangements are generally based on the territorial principle. Similarly the jurisdiction of the domestic courts is generally based on the territorial principle. In general there is no jurisdiction over offences committed by nationals abroad but there are certain exceptions, notably murder. Because of this jurisdictional limitation the United Kingdom in most cases cannot claim extradition of a national for an offence committed abroad. In the reverse situation there would be no obligation for the United Kingdom under Article 6 arising from a request for extradition from a State able to exercise such a jurisdiction. If, however, the request was for extradition of a national for a murder falling under Article 1 and

committed abroad, the obligation under Article 6 would apply because the United Kingdom has a similar jurisdiction in respect of this offence.

57. Paragraph 2 makes clear that any criminal jurisdiction exercised in accordance with national law is not excluded by the Convention.

58. In the case of a refusal to extradite in respect of an offence referred to in Article 2, the Convention contains neither obligation nor impediment for the requested State to take, in the light of the rules laid down in Articles 6 and 7, the measures necessary for the prosecution of the offender.

Article 7

59. Article 7 establishes an obligation for the requested State to submit the case to its competent authorities for the purpose of prosecution if it refuses extradition.

60. This obligation is subject to conditions similar to those laid down in paragraph 1 of Article 6: the suspected offender must have been found in the territory of the requested State which must have received a request for extradition from a Contracting State whose jurisdiction is based on a rule of jurisdiction existing equally in its own law.

61. The case must be submitted to the prosecuting authority without undue delay, and no exception may be invoked. Prosecution itself follows the rules of law and procedure in force in the requested State for offences of comparable seriousness.

Article 8

62. Article 8 deals with mutual assistance, within the meaning of the European Convention on Mutual Assistance in Criminal Matters, in connection with criminal proceedings concerning the offences mentioned in Articles 1 and 2. The Article lays down an obligation to grant assistance whether it concerns an offence under Article 1 or an offence under Article 2.

63. Under paragraph 1, Contracting States undertake to afford each other the widest measure of mutual assistance (first sentence); the wording of this provision was taken from Article 1.1 of the European Convention on Mutual Assistance in Criminal Matters. Mutual assistance granted in compliance with Article 8 is governed by the relevant law of the requested State (second sentence), but may not be refused on the sole ground that the request concerns an offence of a political character (third sentence), the description of the political character of the offence being the same as in Article 1 (cf. paragraphs 32 and 33 of this report).

64. Paragraph 2 repeats for mutual assistance the rule of Article 5. The scope and meaning of this provision being the same, the comments on Article 5 apply *mutatis mutandis* (cf. paragraphs 48 to 51 of this report).

65. Paragraph 3 concerns the Convention's effects on existing treaties and arrangements in the field of mutual assistance. It repeats the rules laid down in Article 3 for extradition treaties and arrangements (cf. paragraphs 45 and 46 of this report).

66. The principal consequence of paragraph 3 is the modification of Article 2.a of the European Convention on Mutual Assistance in Criminal Matters insofar as it permits refusal of assistance "if the request concerns an offence which the requested Party considers a political offence" or "an offence connected with a political offence". Consequently this provision and similar provisions in bilateral treaties on mutual assistance between Contracting Parties to this Convention can no longer be invoked in order to refuse assistance with regard to an offence mentioned in Articles 1 and 2.

Article 9

67. This Article which makes the European Committee on Crime Problems of the Council of Europe the guardian over the application of the Convention follows the precedents established in other European Conventions in the penal field as, for instance, in Article 28 of the European Convention on the Punishment of Road Traffic Offences, in Article 65 of the European Convention on the International Validity of Criminal Judgments, in Article 44 of the European Convention on the Transfer of Proceedings in Criminal Matters, and in Article 7 of the Additional Protocol to the European Convention on Extradition.

68. The reporting requirement which Article 9 lays down is intended to keep the European Committee on Crime Problems informed about possible difficulties in interpreting and applying the Convention so that it

may contribute to facilitating friendly settlements and proposing amendments to the Convention which might prove necessary.

Article 10

69. Article 10 concerns the settlement, by means of arbitration, of those disputes over the interpretation or application of the Convention which have not been already settled through the intervention of the European Committee on Crime Problems according to Article 9.2.

70. The provisions of Article 10 which are self-explanatory provide for the setting up of an arbitration tribunal on the lines of Article 47.2 of the European Convention for the Protection of Animals during International Transport of 13 December 1968 where this system of arbitration was for the first time introduced.

Articles 11 to 16

71. These Articles are, for the most part, based on the model final clauses of agreements and conventions which were approved by the Committee of Ministers of the Council of Europe at the 113th meeting of Deputies. Most of these Articles do not call for specific comments, but the following points require some explanation.

72. *Article 13,* paragraph 1, allows Contracting States to make reservations in respect of the application of Article 1. The Convention thus recognises that a Contracting State might be impeded, e.g. for legal or constitutional reasons, from fully accepting the obligations arising from Article 1 whereby certain offences cannot be regarded as political for the purposes of extradition.

73. The offence or offences in respect of which the reservation is to apply should be stated in the declaration.

74. If a State avails itself of this possibility of making a reservation it can, in respect of the offences mentioned in Article 1, refuse extradition. Before deciding on the request for extradition it must, however, when evaluating the nature of the offence, take into due consideration a number of elements relative to the character and effects of the offence in question which are enumerated by way of example in Article 13.1 paragraphs a to c. Having taken these elements into account the requested State remains free to grant or to refuse extradition.

75. These elements which describe some of the particularly serious aspects of the offence were drafted along the lines of paragraph 1 of the recommendation contained in Resolution (74) 3 of the Committee of Ministers. As regards the phrase "collective danger to the life, physical integrity or liberty of persons" used in Article 13.1.*a*, examples have been given in paragraph 41 of this report.

76. If extradition is refused on the grounds of a reservation made in accordance with Article 13, Articles 6 and 7 apply.

77. Paragraph 3 of Article 13 which lays down the rule of reciprocity in respect of the application of Article 1 by a State having availed itself of a reservation, repeats the provisions contained in Article 26.3 of the European Convention on Extradition.

The rule of reciprocity applies equally to reservations not provided for in Article 13.

78. *Article 14* which is unusual among the final clauses of conventions elaborated within the Council of Europe aims at allowing any Contracting State to denounce this Convention in exceptional cases, in particular if in another Contracting State the effective democratic regime within the meaning of the European Convention on Human Rights is overthrown. This denunciation may, at the choice of the State declaring it, take effect immediately, i.e. as from the reception of the notification by the Secretary General of the Council of Europe, or at a later date.

79. *Article 15* which ensures that only Members of the Council of Europe can be Parties to the Convention is the consequence of the closed character of the Convention (cf. paragraph 29 of this report).

80. *Article 16* concerns notifications to member States. It goes without saying that the Secretary General must inform States also of any other acts, notifications and communications within the meaning of Article 77 of the Vienna Convention on the Law of Treaties relating to the Convention and not expressly provided for by Article 16.

Protocol amending the European Convention on the suppression of terrorism – ETS No. 190

Strasbourg, 15.V.2003

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

Bearing in mind the Committee of Ministers of the Council of Europe's Declaration of 12 September 2001 and its Decision of 21 September 2001 on the Fight against International Terrorism, and the Vilnius Declaration on Regional Co-operation and the Consolidation of Democratic Stability in Greater Europe adopted by the Committee of Ministers at its 110th Session in Vilnius on 3 May 2002;

Bearing in mind the Parliamentary Assembly of the Council of Europe's Recommendation 1550 (2002) on Combating terrorism and respect for human rights;

Bearing in mind the General Assembly of the United Nations Resolution A/RES/51/210 on measures to eliminate international terrorism and the annexed Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism, and its Resolution A/RES/49/60 on measures to eliminate international terrorism and the Declaration on Measures to Eliminate International Terrorism annexed thereto;

Wishing to strengthen the fight against terrorism while respecting human rights, and mindful of the Guidelines on human rights and the fight against terrorism adopted by the Committee of Ministers of the Council of Europe on 11 July 2002;

Considering for that purpose that it would be appropriate to amend the European Convention on the Suppression of Terrorism (ETS No. 90) opened for signature in Strasbourg on 27 January 1977, hereinafter referred to as "the Convention";

Considering that it would be appropriate to update the list of international conventions in Article 1 of the Convention and to provide for a simplified procedure to subsequently update it as required;

Considering that it would be appropriate to strengthen the follow-up of the implementation of the Convention;

Considering that it would be appropriate to review the reservation regime;

Considering that it would be appropriate to open the Convention to the signature of all interested States,

Have agreed as follows:

Article 1

1. The introductory paragraph to Article 1 of the Convention shall become paragraph 1 of this article. In sub-paragraph b of this paragraph, the term "signed" shall be replaced by the term "concluded" and sub-paragraphs c, d, e and f of this paragraph shall be replaced by the following sub-paragraphs:

c. "an offence within the scope of the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, adopted at New York on 14 December 1973;

d. an offence within the scope of the International Convention Against the Taking of Hostages, adopted at New York on 17 December 1979;

e. an offence within the scope of the Convention on the Physical Protection of Nuclear Material, adopted at Vienna on 3 March 1980;

f. an offence within the scope of the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, done at Montreal on 24 February 1988;".

2. Paragraph 1 of Article 1 of the Convention shall be supplemented by the following four sub-paragraphs:

g. "an offence within the scope of the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, done at Rome on 10 March 1988;

h. an offence within the scope of the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, done at Rome on 10 March 1988;

i. an offence within the scope of the International Convention for the Suppression of Terrorist Bombings, adopted at New York on 15 December 1997;

j. an offence within the scope of the International Convention for the Suppression of the Financing of Terrorism, adopted at New York on 9 December 1999.".

3. The text of Article 1 of the Convention shall be supplemented by the following paragraph:

2. "Insofar as they are not covered by the conventions listed under paragraph 1, the same shall apply, for the purpose of extradition between Contracting States, not only to the commission of those principal offences as a perpetrator but also to:

a. the attempt to commit any of these principal offences;

b. the participation as an accomplice in the perpetration of any of these principal offences or in an attempt to commit any of them;

c. organising the perpetration of, or directing others to commit or attempt to commit, any of these principal offences.".

Article 2

Paragraph 3 of Article 2 of the Convention shall be amended to read as follows:

"3 The same shall apply to:

a. the attempt to commit any of the foregoing offences;

b. the participation as an accomplice in any of the foregoing offences or in an attempt to commit any such offence;

c. organising the perpetration of, or directing others to commit or attempt to commit, any of the foregoing offences.".

Article 3

1. The text of Article 4 of the Convention shall become paragraph 1 of this article and a new sentence shall be added at the end of this paragraph as follows: "Contracting States undertake to consider such offences as extraditable offences in every extradition treaty subsequently concluded between them.".

2. The text of Article 4 of the Convention shall be supplemented by the following paragraph:

"2 When a Contracting State which makes extradition conditional on the existence of a treaty receives a request for extradition from another Contracting State with which it has no extradition treaty, the requested Contracting State may, at its discretion, consider this Convention as a legal basis for extradition in relation to any of the offences mentioned in Articles 1 or 2.".

Article 4

1. The text of Article 5 of the Convention shall become paragraph 1 of this article.

2. The text of Article 5 of the Convention shall be supplemented by the following paragraphs:

"2 Nothing in this Convention shall be interpreted as imposing on the requested State an obligation to extradite if the person subject of the extradition request risks being exposed to torture.

3. Nothing in this Convention shall be interpreted either as imposing on the requested State an obligation to extradite if the person subject of the extradition request risks being exposed to the death penalty or, where the law of the requested State does not allow for life imprisonment, to life imprisonment without the possibility of parole, unless under applicable extradition treaties the requested State is under the obligation to extradite if the requesting State gives such assurance as the requested State considers sufficient that the death penalty will not be imposed or, where imposed, will not be carried out, or that the person concerned will not be subject to life imprisonment without the possibility of parole.".

Article 5

A new article shall be inserted after Article 8 of the Convention and shall read as follows:

"Article 9

The Contracting States may conclude between themselves bilateral or multilateral agreements in order to supplement the provisions of this Convention or to facilitate the application of the principles contained therein.".

Article 6

1. Article 9 of the Convention shall become Article 10.

2. Paragraph 1 of new Article 10 shall be amended to read as follows:

"The European Committee on Crime Problems (CDPC) is responsible for following the application of the Convention. The CDPC:

a. shall be kept informed regarding the application of the Convention;

b. shall make proposals with a view to facilitating or improving the application of the Convention;

c. shall make recommendations to the Committee of Ministers concerning the proposals for amendments to the Convention, and shall give its opinion on any proposals for amendments to the Convention submitted by a Contracting State in accordance with Articles 12 and 13;

d. shall, at the request of a Contracting State, express an opinion on any question concerning the application of the Convention;

e. shall do whatever is necessary to facilitate a friendly settlement of any difficulty which may arise out of the execution of the Convention;

f. shall make recommendations to the Committee of Ministers concerning non-member States of the Council of Europe to be invited to accede to the Convention in accordance with Article 14, paragraph 3;

g. shall submit every year to the Committee of Ministers of the Council of Europe a report on the follow-up given to this article in the application of the Convention.".

3. Paragraph 2 of new Article 10 shall be deleted.

Article 7

1. Article 10 of the Convention shall become Article 11.

2. In the first sentence of paragraph 1 of new Article 11, the terms "Article 9, paragraph 2" shall be replaced by the terms "Article 10.e, or by negotiation". In the second sentence of this paragraph, the term "two" shall be deleted. The remaining sentences of this paragraph shall be deleted.

3. Paragraph 2 of new Article 11 shall become paragraph 6 of this article. The sentence "Where a majority cannot be reached, the referee shall have a casting vote" shall be added after the second sentence and in the last sentence the terms "Its award" shall be replaced by the terms "The tribunal's judgement".

4. The text of new Article 11 shall be supplemented by the following paragraphs:

"2 In the case of disputes involving Parties which are member States of the Council of Europe, where a Party fails to nominate its arbitrator in pursuance of paragraph 1 of this article within three months following the request for arbitration, an arbitrator shall be nominated by the President of the European Court of Human Rights at the request of the other Party.

3. In the case of disputes involving any Party which is not a member of the Council of Europe, where a Party fails to nominate its arbitrator in pursuance of paragraph 1 of this article within three months following the request for

arbitration, an arbitrator shall be nominated by the President of the International Court of Justice at the request of the other Party.

4. In the cases covered by paragraphs 2 and 3 of this article, where the President of the Court concerned is a national of one of the Parties to the dispute, this duty shall be carried out by the Vice-President of the Court, or if the Vice-President is a national of one of the Parties to the dispute, by the most senior judge of the Court who is not a national of one of the Parties to the dispute.

5. The procedures referred to in paragraphs 2 or 3 and 4 above apply, *mutatis mutandis*, where the arbitrators fail to agree on the nomination of a referee in accordance with paragraph 1 of this article.".

Article 8

A new article shall be introduced after new Article 11 and shall read as follows:

"Article 12

1. Amendments to this Convention may be proposed by any Contracting State, or by the Committee of Ministers. Proposals for amendment shall be communicated by the Secretary General of the Council of Europe to the Contracting States.

2. After having consulted the non-member Contracting States and, if necessary, the CDPC, the Committee of Ministers may adopt the amendment in accordance with the majority provided for in Article 20.d of the Statute of the Council of Europe. The Secretary General of the Council of Europe shall submit any amendments adopted to the Contracting States for acceptance.

3. Any amendment adopted in accordance with the above paragraph shall enter into force on the thirtieth day following notification by all the Parties to the Secretary General of their acceptance thereof.".

Article 9

A new article shall be introduced after new Article 12 and shall read as follows:

"Article 13

1. In order to update the list of treaties in Article 1, paragraph 1, amendments may be proposed by any Contracting State or by the Committee of Ministers. These proposals for amendment shall only concern treaties concluded within the United Nations Organisation dealing specifically with international terrorism and having entered into force. They shall be communicated by the Secretary General of the Council of Europe to the Contracting States.

2. After having consulted the non-member Contracting States and, if necessary the CDPC, the Committee of Ministers may adopt a proposed amendment by the majority provided for in Article 20.d of the Statute of the Council of Europe. The amendment shall enter into force following the expiry of a period of one year after the date on which it has been forwarded to the Contracting States. During this period, any Contracting State may notify the Secretary General of any objection to the entry into force of the amendment in its respect.

3. If one-third of the Contracting States notifies the Secretary General of an objection to the entry into force of the amendment, the amendment shall not enter into force.

4. If less than one-third of the Contracting States notifies an objection, the amendment shall enter into force for those Contracting States which have not notified an objection.

5. Once an amendment has entered into force in accordance with paragraph 2 of this article and a Contracting State has notified an objection to it, this amendment shall come into force in respect of the Contracting State concerned on the first day of the month following the date on which it has notified the Secretary General of the Council of Europe of its acceptance.".

Article 10

1. Article 11 of the Convention shall become Article 14.

2. In the first sentence of paragraph 1 of new Article 14 the terms "member States of the Council of Europe" shall be replaced by the terms "member States of and Observer States to the Council of Europe" and in the second and third sentences, the terms "or approval" shall be replaced by the terms ", approval or accession".

3. The text of new Article 14 shall be supplemented by the following paragraph:

"3 The Committee of Ministers of the Council of Europe, after consulting the CDPC, may invite any State not a member of the Council of Europe, other than those referred to under paragraph 1 of this article, to accede to the Convention. The decision shall be taken by the majority provided for in Article 20.*d* of the Statute of the Council of Europe and by the unanimous vote of the representatives of the Contracting States entitled to sit on the Committee of Ministers.".

4. Paragraph 3 of new Article 14 shall become paragraph 4 of this article, and the terms "or approving" and "or approval" shall be replaced respectively by the terms ", approving or acceding" and ", approval or accession".

Article 11

1. Article 12 of the Convention shall become Article 15.

2. In the first sentence of paragraph 1 of new Article 15, the terms "or approval" shall be replaced by the terms ", approval or accession".

3. In the first sentence of paragraph 2 of new Article 15, the terms "or approval" are replaced by the terms ", approval or accession".

Article 12

1. Reservations to the Convention made prior to the opening for signature of the present Protocol shall not be applicable to the Convention as amended by the present Protocol.

2. Article 13 of the Convention shall become Article 16.

3. In the first sentence of paragraph 1 of new Article 16 the terms "Party to the Convention on 15 May 2003" shall be added before the term "may" and the terms "of the Protocol amending the Convention" shall be added after the term "approval". A second sentence shall be added after the terms "political motives" and shall read: "The Contracting State undertakes to apply this reservation on a case-by-case basis, through a duly reasoned decision and taking into due consideration, when evaluating the character of the offence, any particularly serious aspects of the offence, including:". The remainder of the first sentence shall be deleted, with the exception of sub-paragraphs a, b and c.

4. The text of new Article 16 shall be supplemented by the following paragraph:

> "2 When applying paragraph 1 of this article, a Contracting State shall indicate the offences to which its reservation applies.".

5. Paragraph 2 of new Article 16 shall become paragraph 3 of this article. In the first sentence of this paragraph, the term "Contracting" shall be added before the term "State" and the terms "the foregoing paragraph" shall be replaced by the terms "paragraph 1.".

6. Paragraph 3 of new Article 16 shall become paragraph 4 of this article. In the first sentence of this paragraph, the term "Contracting" shall be added before the term "State".

7. The text of new Article 16 shall be supplemented by the following paragraphs:

> "5 The reservations referred to in paragraph 1 of this article shall be valid for a period of three years from the day of the entry into force of this Convention in respect of the State concerned. However, such reservations may be renewed for periods of the same duration.
>
> 6. Twelve months before the date of expiry of the reservation, the Secretariat General of the Council of Europe shall give notice of that expiry to the Contracting State concerned. No later than three months before expiry, the Contracting State shall notify the Secretary General of the Council of Europe that it is upholding, amending or withdrawing its reservation. Where a Contracting State notifies the Secretary General of the Council of Europe that it is upholding its reservation, it shall provide an explanation of the grounds justifying its continuance. In the absence of notification by the Contracting State concerned, the Secretary General of the Council of Europe shall inform that Contracting State that its reservation is considered to have been extended automatically for a period of six months. Failure by the Contracting State concerned to notify its intention to uphold or modify its reservation before the expiry of that period shall cause the reservation to lapse.
>
> 7. Where a Contracting State does not extradite a person, in application of a reservation made in accordance with paragraph 1 of this article, after receiving a request for extradition from another Contracting State, it shall submit the case, without exception whatsoever and without undue delay, to its competent authorities for the purpose of prosecution, unless the requesting State and the requested State otherwise agree. The competent authorities, for the purpose of prosecution in the requested State, shall take their decision in the same manner as in the case of any offence of a serious nature under the law of that State. The requested State shall communicate, without undue delay, the final outcome of the proceedings to the requesting State and to the Secretary General of the Council of Europe, who shall forward it to the Conference provided for in Article 17.
>
> 8. The decision to refuse the extradition request, on the basis of a reservation made in accordance with paragraph 1 of this article, shall be forwarded promptly to the requesting State. If within a reasonable time no judicial decision on the merits has been taken in the requested State according to paragraph 7, the requesting State may

communicate this fact to the Secretary General of the Council of Europe, who shall submit the matter to the Conference provided for in Article 17. This Conference shall consider the matter and issue an opinion on the conformity of the refusal with the Convention and shall submit it to the Committee of Ministers for the purpose of issuing a declaration thereon. When performing its functions under this paragraph, the Committee of Ministers shall meet in its composition restricted to the Contracting States.".

Article 13

A new article shall be introduced after new Article 16 of the Convention, and shall read as follows:

"Article 17

1. Without prejudice to the application of Article 10, there shall be a Conference of States Parties against Terrorism (hereinafter referred to as the "COSTER") responsible for ensuring:

a. the effective use and operation of this Convention including the identification of any problems therein, in close contact with the CDPC;

b. the examination of reservations made in accordance with Article 16 and in particular the procedure provided in Article 16, paragraph 8;

c. the exchange of information on significant legal and policy developments pertaining to the fight against terrorism;

d. the examination, at the request of the Committee of Ministers, of measures adopted within the Council of Europe in the field of the fight against terrorism and, where appropriate, the elaboration of proposals for additional measures necessary to improve international co-operation in the area of the fight against terrorism and, where co-operation in criminal matters is concerned, in consultation with the CDPC;

e. the preparation of opinions in the area of the fight against terrorism and the execution of the terms of reference given by the Committee of Ministers.

2. The COSTER shall be composed of one expert appointed by each of the Contracting States. It will meet once a year on a regular basis, and on an extraordinary basis at the request of the Secretary General of the Council of Europe or of at least one-third of the Contracting States.

3. The COSTER will adopt its own Rules of Procedure. The expenses for the participation of Contracting States which are member States of the Council of Europe shall be borne by the Council of Europe. The Secretariat of the Council of Europe will assist the COSTER in carrying out its functions pursuant to this article.

4. The CDPC shall be kept periodically informed about the work of the COSTER.".

Article 14

Article 14 of the Convention shall become Article 18.

Article 15

Article 15 of the Convention shall be deleted.

Article 16

1. Article 16 of the Convention shall become Article 19.

2. In the introductory sentence of new Article 19, the terms "member States of the Council" shall be replaced by the terms "Contracting States".

3. In paragraph b of new Article 19, the terms "or approval" shall be replaced by the terms ", approval or accession".

4. In paragraph c of new Article 19, the number "11" shall read "14".

5. In paragraph d of new Article 19, the number "12" shall read "15".

6. Paragraphs e and f of new Article 19 shall be deleted.

7. Paragraph g of new Article 19 shall become paragraph e of this article and the number "14" shall read "18".

8. Paragraph h of new Article 19 shall be deleted.

Article 17

1. This Protocol shall be open for signature by member States of the Council of Europe signatories to the Convention, which may express their consent to be bound by:

   a. signature without reservation as to ratification, acceptance or approval; or

   b. signature subject to ratification, acceptance or approval, followed by ratification, acceptance or approval.

2. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

Article 18

This Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date on which all Parties to the Convention have expressed their consent to be bound by the Protocol, in accordance with the provisions of Article 17.

Article 19

The Secretary General of the Council of Europe shall notify the member States of the Council of Europe of:

   a. any signature;

   b. the deposit of any instrument of ratification, acceptance or approval;

   c. the date of entry into force of this Protocol, in accordance with Article 18;

   d. any other act, notification or communication relating to this Protocol.

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

Done at Strasbourg, this 15th day of May 2003, 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 of the signatory States.

Protocol amending the European Convention on the suppression of terrorism – ETS No. 190

Explanatory Report

(as it will be revised by the Protocol amending the Convention (ETS No. 190) upon its entry into force)

I. The European Convention on the Suppression of Terrorism (hereafter referred to as "the Convention"), drawn up within the Council of Europe by a committee of governmental experts under the authority of the European Committee on Crime Problems (ECCP, later renamed CDPC), was opened for signature by the member States of the Council of Europe on 27 January 1977. At the time of drafting the present explanatory report (hereafter referred to as the "report"), it had been ratified by thirty-eight member States of the Council of Europe and signed by five.

II. The Convention was subsequently revised by an Amending Protocol, prepared by a committee of governmental experts – the Multidisciplinary Group on International Action against Terrorism (GMT) – under the authority of the Committee of Ministers.

III. The text of this explanatory report refers to the Convention as revised by the Amending Protocol. Therefore, references in this text to articles or to the Convention concern the Convention as amended and not to the Amending Protocol itself. However, where necessary, the report deals with articles which are specific to the Amending Protocol. Moreover, where the protocol did not amend an existing provision of the Convention, this is indicated by the terms "unchanged".

IV. The present explanatory report was prepared on the basis of the explanatory report to the European Convention on the Suppression of Terrorism and the GMT's discussions. It was submitted to the Committee of Ministers of the Council of Europe, which authorised its publication. It does not constitute an authoritative interpretation of the text of the Convention as it will be revised by its amending Protocol, although it may facilitate the understanding of the Convention's provisions.

INTRODUCTION

1. The Council of Europe's response to the terrorist attacks of unprecedented violence committed in the United States of America on 11 September 2001 was both firm and immediate. In its declaration of 12 September 2001, the Committee of Ministers immediately condemned "with the utmost force the terrorist attacks" committed against the American people and expressed its "sympathy and solidarity" with them. At the same time, the Committee of Ministers commenced consideration of specific action which could be taken by the Council of Europe within its field of expertise to counter "such monstrous acts".

2. With this in mind, in a decision of 21 September 2001, the Ministers' Deputies "noted with interest a proposal for the establishment of a Multidisciplinary Group on Terrorism (GMT) dealing with criminal, civil and administrative matters" and "invited the Secretary General, (…) to propose (…) draft terms of reference for such a group".

3. During the fourth part of its session in September 2001, the Parliamentary Assembly of the Council of Europe also condemned "in the strongest possible terms these barbaric terrorist acts" and adopted two important texts: Resolution 1258 (2001) and Recommendation 1534 (2001) on democracies facing terrorism. The Assembly underlined, *inter alia*, that "these attacks have shown clearly the real face of terrorism and the need for a new kind of response" and made a number of important suggestions to be considered in order to strengthen the international fight against terrorism.

4. The European Ministers of Justice, at their 24th Conference held in Moscow, on 4 and 5 October 2001, adapted their agenda at the last moment in order to address terrorist issues and stressed that the Council of Europe should take immediate action to combat "all forms of terrorism", with a view to preventing in the future "the loss of life and the injuries suffered by thousands of innocent people". The ministers of justice also agreed on the need for a multidisciplinary approach to the problem of terrorism, involving all relevant legal aspects.

5. Against the background of these strong and unconditional political commitments, the Committee of Ministers, at its 109th Session on 8 November 2001, "agreed to take steps rapidly to increase the effectiveness of the existing international instruments within the Council of Europe on the fight against terrorism by, *inter alia*, setting up a Multidisciplinary Group on International Action against Terrorism (GMT)".

6. The multidisciplinary nature of this Group showed that from the outset there was wide consensus on the fact that a sectorial approach would not be conducive to adequate and prompt results to solve the problems posed by the new forms of terrorism, and that there was a need for a comprehensive approach, comprising criminal, civil, commercial, administrative and other legal issues.

7. The tasks of the GMT were contained in its terms of reference adopted by the Committee of Ministers on 8 November 2001. They included, *inter alia*, reviewing the implementation of, and examining the possibility of updating, existing Council of Europe international instruments relating to the fight against terrorism, in particular the European Convention on the Suppression of Terrorism, in view also of a possible opening of the Convention to non-member States, and the other relevant instruments.

8. The GMT carried out its work taking account of the relevant declarations and decisions of the Committee of Ministers and of the resolutions of both the Parliamentary Assembly and the Conference of European Ministers of Justice on the Fight against Terrorism, as well as of the Council of Europe's standards in the fields of the rule of law and human rights. The GMT also took due account of the activities of other international institutions and of other relevant Council of Europe committees and groups.

9. The work of the GMT was based, on the one hand, on measures already existing or under way at national and international levels to fight terrorism which the GMT followed closely and, on the other hand, on existing Council of Europe activities included in the report on terrorism (SG/Inf(2001)35) presented by the Secretary General to the 109th Session of the Committee of Ministers.

10. Two texts of the Council of Europe adopted after the setting up of the GMT were particularly significant for the work of the GMT, namely: Recommendation 1550 (2002) on combating terrorism and respect for human rights, adopted by the Parliamentary Assembly during the first part of its session in January 2002, and the Guidelines on human rights and the fight against terrorism adopted by the Committee of Ministers on 11 July 2002.

11. Mr de Koster (Belgium) was elected Chairman of the GMT. The Secretariat was provided by the Directorate General of Legal Affairs of the Council of Europe.

12. The GMT held six meetings from December 2001 to December 2002. During its first meeting, it decided on its working methods and set up two working parties, the GMT-Rev and the GMT-Rap (subsequently renamed GMT-Rap/Suivi), respectively chaired by Mr Favre (France) – later replaced by Mr Galicki (Poland) – and Mr Papaioannou (Greece), the former responsible for reviewing the operation of and examining the possibility of updating, existing Council of Europe international instruments applicable to the fight against terrorism, in particular the European Convention on the Suppression of Terrorism, the latter for proposing to the Committee of Ministers supplementary action that the Council of Europe could carry out in order to contribute to the efforts of the international community against terrorism.

13. During its following four meetings, held in February, April, June and October 2002, the GMT prepared a draft protocol amending the European Convention on the Suppression of Terrorism, subsequently submitted to the Committee of Ministers which agreed to its content at its 111th ministerial session on 7 November 2002, authorised consultation of the Parliamentary Assembly of the Council of Europe and asked the GMT to prepare the draft explanatory report.

14. During its last meeting from 11 to 13 December 2002, the GMT finalised the draft protocol and approved the present explanatory report. It submitted both texts to the Committee of Ministers, asking it to adopt the Amending Protocol and open it for signature, and to authorise the publication of the explanatory report.

15. At the 828th meeting of the Ministers' Deputies on 13 February 2003, the Committee of Ministers approved the text which is the subject of this report and decided to open the Amending Protocol for signature by the member States of the Council of Europe.

GENERAL CONSIDERATIONS

16. The purpose of the Convention is to assist the suppression of terrorism by supplementing and, where necessary, modifying existing extradition and mutual assistance arrangements concluded between member States of the Council of Europe, including the European Convention on Extradition of 13 December 1957 (ETS No. 24) and its Additional Protocols of 15 October 1975 and 17 March 1978 (ETS Nos. 86 and 98), and the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959 (ETS No. 30) and its Additional Protocols of 17 March 1978 and 8 November 2001 (ETS Nos. 99 and 182), in that it seeks to overcome the difficulties which may arise in the case of extradition or mutual assistance concerning persons accused or convicted of acts of terrorism.

17. It was felt that the climate of mutual confidence among likeminded States, namely the member States and Observer States of the Council of Europe, their democratic nature and their respect for human rights, in the case of the member States of the Council of Europe, safeguarded by the institutions set up under the European Convention on Human Rights of 4 November 1950, justify introducing the possibility and, in certain cases, imposing an obligation to disregard, for the purposes of extradition, the political nature of the particularly odious crimes mentioned in Articles 1 and 2 of the Convention. The human rights which must be respected are not only the rights of those accused or convicted of acts of terrorism, but also those of the victims, or potential victims, of those acts (see Article 17 of the European Convention on Human Rights).

18. One of the characteristics of these crimes is their increasing internationalisation: their perpetrators are frequently found in a State other than that in which the act was committed. For this reason, extradition is a particularly effective measure for combating terrorism.

19. If the terrorist act is an offence which falls within the scope of application of existing extradition treaties, the requested State will have no difficulty, subject to the relevant provisions of its extradition law, in complying with a request for extradition from the State which has jurisdiction to prosecute.

20. However, terrorist acts might be considered "political offences", and it is a principle laid down in most existing extradition treaties as well as in the European Convention on Extradition (Article 3, paragraph 1) that extradition shall not be granted in respect of a political offence.

21. Moreover, there is no generally accepted definition of the term "political offence". It is for the requested State to interpret it.

22. It follows that there is a serious lacuna in existing international agreements with regard to the possibility of extraditing persons accused or convicted of acts of terrorism, although the most recent United Nations international conventions – namely the International Convention for the Suppression of Terrorist Bombings of 15 December 1997 and the International Convention for the Suppression of the Financing of Terrorism of 9 December 1999 – as well as the efforts by the United Nations to draft a comprehensive convention on international terrorism attempt to fill that gap.

23. The European Convention on the Suppression of Terrorism aims at filling this lacuna by eliminating or restricting the possibility for the requested State of invoking the political nature of an offence in order to oppose an extradition request. This aim is achieved by providing that, for extradition purposes, certain specified offences shall never be regarded as "political" (Article 1) and other specified offences may not be regarded as such (Article 2), notwithstanding their political content or motivation.

24. It should be noted that when the GMT undertook the updating of the 1977 European Convention on the Suppression of Terrorism, it agreed from the outset to retain the general nature of the Convention as an instrument of "de-politicisation" for the purposes of extradition. Therefore, none of the provisions of the Convention should be considered as setting forth or implying, directly or indirectly, any obligations upon States Parties to establish as criminal offences acts or actions provided in Article 1, paragraph 2, of the Convention. Similarly, the Convention should not be considered as limiting the application of the grounds for refusal of extradition contained in the European Convention on Extradition, except with respect to its Article 3 concerning political offences. Therefore, the other grounds, such as the requirement of double criminality, continue to apply.

25. The system established by Articles 1 and 2 of the Convention reflects a consensus reconciling the arguments put forward in favour on the one hand of an obligation, and on the other hand of an option not to consider, for the purposes of the application of the Convention, certain offences as political.

26. In favour of an obligation, it was pointed out that this alone would give States new and really effective possibilities for extradition, by eliminating explicitly the plea of "political offence" that was feasible in the climate of mutual confidence that reigned amongst the member and Observer States to the Council of Europe with similar democratic institutions. It would ensure that terrorists were extradited for trial to the State which had jurisdiction to prosecute. An option alone could never provide the guarantee of extradition and, moreover, the criteria for assessing the seriousness of the offence would not be precise.

27. In favour of an option, reference was made to the difficulty of accepting a rigid solution which would amount to obligatory extradition for political offences. Each case should be examined on its merits.

28. The solution adopted consists of an obligation for some offences not to be considered as political, the list of which has been considerably enlarged by the Amending Protocol (Article 1), and an option for others (Article 2).

29. The Convention applies only to particularly odious and serious acts, often affecting persons foreign to the motives behind them. Most of these acts are criminalised by international conventions. Their gravity and their consequences are such that their criminal element outweighs their possible political aspects.

30. This method, which was already applied to genocide, war crimes and other comparable crimes in the Additional Protocol to the European Convention on Extradition of 15 October 1975, as well as to the taking, or attempted taking, of the life of a head of State or a member of his family under Article 3 paragraph 3 of the European Convention on Extradition, accordingly, with regard to terrorism, overcomes not only the obstacles to extradition due to the plea of the political nature of the offence, but also the difficulties inherent in the absence of a uniform interpretation of the term "political offence".

31. Although the Convention's intention is clearly not to take into consideration the political character of the offence for the purposes of extradition, it does recognise that a Contracting State might be impeded, for example, for legal or constitutional reasons, from fully accepting the obligations arising from Article 1. For this reason, Article 16 expressly allows Contracting States to make certain reservations. However, the Amending Protocol has significantly reduced this possibility by circumscribing it with a specific conditions and providing for a follow-up mechanism.

32. It should be noted that there is no obligation to extradite if the requested State has substantial grounds for believing that the request for extradition has been inspired by the considerations mentioned in Article 5, or that the position of the person whose extradition is requested may be prejudiced by these considerations. Paragraphs 2 and 3 have been added to Article 5, as requested in Parliamentary Assembly Recommendation 1550 (2002), to make clear that there is equally no obligation to extradite where to do so would be inconsistent with other grounds for refusal based on human rights. As stated above, the revised Article 5 is not intended to be exhaustive as to the grounds on which extradition may be refused.

33. In the case of an offence mentioned in Article 1, a State refusing extradition would have to submit the case to its competent authorities for the purpose of prosecution, after having taken the measures necessary to establish its jurisdiction in these circumstances (Articles 6 and 7).

34. These provisions reflect the principle of *aut dedere aut judicare*. It is to be noted, however, that the Convention does not grant Contracting States a general choice either to extradite or to prosecute. The obligation to submit the case to the competent authorities for the purpose of prosecution is subsidiary, in that it is conditional on a prior refusal to extradite in a given case, which is possible only under the conditions laid down by the Convention or by other relevant treaty or legal provisions.

35. In fact, the Convention is not an extradition treaty as such. Whilst the character of an offence may be modified by virtue of Articles 1 and 2, the legal basis for extradition remains the extradition treaty or other relevant law. It follows that a State which has been asked to extradite a terrorist may, notwithstanding the provisions of the Convention, still not do so if the other conditions for extradition are not fulfilled; for example, the offender may be a national of the requested State, or there may be time limitation. Nevertheless, Article 4, paragraph 2, of the Convention authorises a Contracting State which makes extradition conditional on the existence of a treaty to consider, at its discretion, this Convention as a legal basis for extradition.

36. On the other hand, the Convention is not exhaustive, in the sense that it does not prevent States, if their law so allows, extraditing in cases other than those provided for by the Convention, or to take other measures

such as expelling the offender or sending him or her back, if in a specific case the State concerned is not in possession of an extradition request made in accordance with the Convention, or if it considers that a measure other than extradition is warranted under another international agreement or particular arrangement.

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

38. It goes without saying that the Convention does not affect the traditional rights of political refugees and of persons enjoying political asylum in accordance with other international undertakings to which the member States are Parties.

COMMENTARIES ON THE ARTICLES OF THE CONVENTION

Article 1

39. Article 1 lists the offences which, for the purposes of extradition, shall not be regarded as political, as connected with a political offence, or inspired by political motives.

40. It thus modifies the consequences of existing extradition agreements and arrangements with regard to the evaluation of the nature of these offences. It eliminates the possibility for the requested State of invoking the political nature of the offence in order to oppose an extradition request. It does not, however, create an obligation to extradite, as the Convention is not an extradition treaty as such. The legal basis for extradition remains the extradition treaty, arrangement or law concerned. Nevertheless, under Article 4, paragraph 2 of the Convention, a Contracting State may use the Convention as a legal basis for extradition at its discretion.

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

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

43. Article 1 reflects the will not to allow the requested State to invoke the political nature of an offence in order to oppose requests for extradition in respect of certain particularly odious crimes. This will is already reflected in international treaties, for instance, in Article 3 paragraph 3 of the European Convention on Extradition relating to the taking, or attempted taking, of the life of a head of State or of a member of his family, in Article 1 of the Additional Protocol to the European Convention on Extradition for certain crimes against humanity and for violations of the laws and customs of war, as well as in Article VII of the United Nations Convention on the Prevention and Punishment of the Crime of Genocide.

44. When the GMT examined the possibility of updating this article, it bore in mind Parliamentary Assembly Recommendation 1550 (2002) which requested that the GMT consider using the definition of terrorism adopted by the European Union in the European Council Common Position of 7 December 2001 on the application of specific measures to combat terrorism (2001/931/CFSP)[1]. The GMT decided not to do so, given that the European Union definition had been agreed upon "for the purpose of the Common Position" and because it did not wish to change in any manner the nature of the Convention as an instrument of de-politicisation for the purposes of extradition.

45. Article 1 lists two categories of crimes. The first, contained in paragraph 1, comprises offences already included in international treaties, the second, contained in paragraph 2, concerns accessory offences connected with the offences covered in paragraph 1: these offences were considered so serious that it was necessary to include them in the first category.

1. In the European Union context, this definition was subsequently agreed upon for the purpose of the approximation of the legislation of the European Union member states in the Framework Decision of the Council of 13 June 2002 (2002/475/JAI, JO L 164 of 22.6.2002, p. 3).

46. In paragraph 1, the offences in question are described by simple reference to the titles of the relevant international instruments. The reference to the Hague Convention for the Suppression of Unlawful Seizure of Aircraft of 16 December 1970 and the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation of 23 September 1971, the only ones mentioned in the original Convention, has been completed in the Amending Protocol by a reference to other international conventions, most of which were adopted subsequently, namely: the New York Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents of 14 December 1973, the New York International Convention Against the Taking of Hostages of 17 December 1979, the Vienna Convention on the Physical Protection of Nuclear Material of 3 March 1980, the Montreal Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation of 24 February 1988, the Rome Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation of 10 March 1988, the Rome Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf of 10 March 1988, the New York International Convention for the Suppression of Terrorist Bombings of 15 December 1997 and the New York International Convention for the Suppression of the Financing of Terrorism of 9 December 1999.

47. Offences connected with the principal offences listed in paragraph 1 including the attempt, the participation as an accomplice in their commission or attempt, and the organisation of others, or directing others to commit or attempt to commit them, are covered by paragraph 2. Provisions of a similar nature are to be found in several international instruments including, most recently, the International Convention for the Suppression of Terrorist Bombings of 15 December 1997 (Article 2, paragraph 3) and the International Convention for the Suppression of the Financing of Terrorism of 9 December 1999 (Article 2, paragraph 5).

48. "Attempt" means only a punishable attempt, as under some laws not all attempts to commit an offence constitute punishable offences.

49. The English expression "accomplice" covers both " *co-auteur*" and "*complice*" in the French text.

Article 2

50. Paragraph 1 (unchanged) of Article 2 introduces the possibility for Contracting Parties not to consider "political" certain serious offences which, without falling within the scope of the mandatory rule in Article 1, involve an act of violence against the life, physical integrity or liberty of a person. This possibility derogates from the traditional principle according to which the refusal to extradite is obligatory in political matters.

51. The term "act of violence" used to describe the offences which may be regarded as non-political was drafted along the lines of Article 4 of the Hague Convention for the Suppression of Unlawful Seizure of Aircraft.

52. Under paragraph 2 (unchanged), inspired by Resolution (74) 3 of the Committee of Ministers, an act against property is covered only if it represents a "collective" danger for persons, such as the explosion of a nuclear installation or of a dam.

53. Paragraph 3 has been extended by the Amending Protocol in the same manner as paragraph 2 of Article 1 (see paragraph 47 above).

54. The flexible wording of Article 2 allows three possibilities of acting on a request for extradition:

- the requested State may not regard the offence as political within the meaning of Article 2 and grant the extradition of the person concerned;
- it may not regard the offence as political within the meaning of Article 2, but nevertheless refuse extradition on grounds other than political;
- it may regard the offence as political, but refuse extradition.

55. It is obvious that the State's decision to grant or refuse extradition is taken independently of Article 2, that is, it is not required to express an opinion on whether the conditions of this article are fulfilled.

Article 3 (unchanged)

56. Article 3 concerns the Convention's effects on existing extradition treaties and arrangements.

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

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

Article 4

59. Paragraph 1 of Article 4 provides for the automatic inclusion, as an extraditable offence, of any of the offences referred to in Articles 1 and 2 into any existing extradition treaty concluded between Contracting States.

60. Furthermore, paragraph 2, added by the Amending Protocol, introduces the possibility for a Contracting State which makes extradition conditional on the existence of a treaty, and receives a request for extradition from another Contracting State with which it has no extradition treaty, to consider the Convention as a legal basis for extradition in relation to any of the offences mentioned in Articles 1 or 2. Such a decision is at the discretion of the requested State. This formula is taken from existing international instruments, including the most recent ones: the International Convention for the Suppression of Terrorist Bombings of 15 December 1997 (Article 9, paragraph 2) and the International Convention for the Suppression of the Financing of Terrorism of 9 December 1999 (Article 11, paragraph 2).

61. Article 4 does not preclude the refusal to extradite on grounds other than the political character of the offence. A requested Contracting State may refuse extradition on other grounds, such as the requirement of double criminality, not specifically provided for by this Convention but contained in its domestic legislation or in applicable international treaties.

62. Moreover, this article does not impose any obligation upon Contracting States to include as extraditable offences in subsequent bilateral extradition treaties that they may conclude, offences which are not provided as such in the national law of the State concerned.

Article 5

63. Article 5 is intended to emphasise the aim of the Convention, which is to assist in the suppression of acts of terrorism where they constitute an attack on the fundamental rights to life and liberty of persons. The Convention is to be interpreted as a means of strengthening the protection of human rights. In conformity with this basic idea, Article 5 ensures that the Convention complies with the requirements of the protection of human rights and fundamental freedoms as they are enshrined in the European Convention on Human Rights.

64. In this connection, it should be recalled that the Convention does not seek to determine the grounds on which extradition may be refused, other than by reference to the exception regarding political offences. Article 5 is intended to make this clear by reference to certain existing grounds on which extradition may be refused. The article is not, however, intended to be exhaustive as to the possible grounds for refusal.

65. One of the purposes of Article 5 is to safeguard the traditional right of asylum. Although the prosecution, punishment or discrimination of a person on account of his or her race, religion, nationality or political opinion is unlikely to occur in the member States of the Council of Europe which, at the time of the adoption of this Protocol, have all, with the exception of one State, ratified the European Convention on Human Rights, it was considered appropriate to insert this traditional provision (paragraph 1) in this Convention also, particularly in view of the opening of the Convention to non-member States (see Article 14 below). It is already contained in Article 3 paragraph 2 of the European Convention on Extradition.

66. If a requested State has substantial grounds for believing that the real purpose of an extradition request, made for one of the offences mentioned in Article 1 or 2, is to enable the requesting State to prosecute or punish the person concerned for the political opinions he or she holds, the requested State may refuse to grant extradition.

67. The same applies where the requested State has substantial grounds for believing that the person's position may be prejudiced for political reasons, or for any of the other reasons mentioned in Article 5. This would be the case, for instance, if the person to be extradited would, in the requesting State, be deprived of the rights of defence as they are guaranteed by the European Convention on Human Rights.

68. Two additional paragraphs have been added to this article, bearing in mind, in particular, Parliamentary Assembly Recommendation 1550 (2002) on Combating terrorism and respect for human rights (paragraph 7.i) and the Guidelines on human rights and the fight against terrorism (Guidelines IV, X, XIII and XV) adopted by the Committee of Ministers on 11 July 2002. These paragraphs explicitly recognise the right of a Contracting State to refuse extradition where the subject of the extradition request risks being exposed to torture (paragraph 2) or, in certain circumstance, where the person sought risks being exposed to the death penalty or to life imprisonment without the possibility of parole (paragraph 3). As stated above, these grounds for refusal already exist independently of the Convention. For instance, the possibility of refusing extradition where there is a risk of the death penalty being carried out is provided in Article 11 of the European Convention on Extradition. The GMT nevertheless considered it necessary to state them explicitly, in order to stress the necessity to reconcile an efficient fight against terrorism with respect for fundamental rights, particularly in view of the opening of the Convention to non-member States.

69. In paragraph 2, only the risk of torture is mentioned. However, as stated above, this article is not intended to be exhaustive with regard to the circumstances in which extradition may be refused.

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

71. If extradition is refused on human rights grounds, Article 7 of the Convention applies: the requested State must submit the case to its competent authorities for the purpose of prosecution.

Article 6 (unchanged)

72. Paragraph 1 of Article 6 concerns the obligation on Contracting States to establish jurisdiction in respect of the offences mentioned in Article 1.

73. This jurisdiction is exercised only where the suspected offender is present in the territory of the requested State, and that State does not extradite after receiving a request for extradition from a Contracting State "whose jurisdiction is based on a rule of jurisdiction existing equally in the law of the requested State".

74. In order to comply with the second requirement there must be a correspondence between the rules of jurisdiction applied by the requesting State and by the requested State.

75. The principal effect of this limitation appears in relation to the differences in the principles of jurisdiction between those States whose domestic courts have, under their criminal law, jurisdiction over offences committed by nationals wherever they are committed and those where the competence of the domestic courts is based on the principle of territoriality (i.e. where the offence is committed within its own territory, including offences committed on ships, aircraft and offshore installations, treated as part of the territory). Thus, when a State wishing to exercise its jurisdiction to try a national for an offence committed outside its territory makes a request for extradition which is refused, the obligation under Article 6 arises only if the law of the requested State also provides for the trial by its courts of its own nationals for offences committed outside its territory.

76. Article 6 is not be interpreted as requiring the complete correspondence of the rules of jurisdiction of the States concerned. It requires this correspondence only insofar as it relates to the circumstances and nature of the offence for which extradition is requested. Where, for example, the requested State has jurisdiction over certain offences committed abroad by its own nationals, the obligation under Article 6 arises if it refuses extradition to a State wishing to exercise a similar jurisdiction in respect of any of those offences.

77. Paragraph 2 makes clear that the Convention does not exclude any criminal jurisdiction exercised in accordance with national law.

78. In the case of a refusal to extradite in respect of an offence referred to in Article 2, the Convention contains neither an obligation nor an impediment for the requested State to take, in the light of the rules laid down in Articles 6 and 7, the measures necessary for the prosecution of the offender.

Article 7 (unchanged)

79. Article 7 establishes an obligation for the requested State to submit the case to its competent authorities for the purpose of prosecution if it refuses extradition *(aut dedere aut judicare)*.

80. This obligation is subject to conditions similar to those laid down in paragraph 1 of Article 6: the suspected offender must have been found in the territory of the requested State, which must have received a request for extradition from a Contracting State whose jurisdiction is based on a rule of jurisdiction existing equally in its own law.

81. Subject to Article 16, paragraph 7, the case must be submitted to the prosecuting authority without exception and without undue delay. Prosecution itself follows the rules of law and procedure in force in the requested State for offences of comparable seriousness.

82. The principle of *aut dedere aut judicare* is restated in the context of Article 16, where it is subject to the possibility of the requesting and the requested State agreeing to proceed otherwise.

Article 8 (unchanged)

83. Article 8 deals with mutual assistance within the meaning of the European Convention on Mutual Assistance in Criminal Matters in criminal proceedings concerning the offences mentioned in Articles 1 and 2. The article lays down an obligation to grant assistance in relation to any offence contained in either Article 1 or Article 2.

84. In accordance with paragraph 1, Contracting States undertake to afford each other the widest measure of mutual assistance (first sentence); the wording of this provision was taken from Article 1 paragraph 1 of the European Convention on Mutual Assistance in Criminal Matters. Mutual assistance granted in compliance with Article 8 is governed by the relevant law of the requested State (second sentence), but may not be refused on the sole ground that the request concerns a political offence (third sentence). The definition of the political character of an offence is that given in Article 1 (see paragraphs 41 and 42 of this report).

85. Paragraph 2 repeats the rule set out in Article 5, paragraph 1, here in relation to mutual assistance. As the scope and meaning of this provision are the same, the comments on Article 5, paragraph 1, apply *mutatis mutandis* (see paragraphs 63 to 67 and 70 and 71 of this report).

86. Paragraph 3 concerns the Convention's effects on existing treaties and arrangements in the field of mutual assistance. It repeats the rules laid down in Article 3 for extradition treaties and arrangements (see paragraphs 57 and 58 of this report).

87. The principal consequence of paragraph 3 is the modification of Article 2.*a* of the European Convention on Mutual Assistance in Criminal Matters, in so far as it permits refusal of assistance "if the request concerns an offence which the requested Party considers a political offence" or "an offence connected with a political offence". Consequently, this provision and similar provisions in bilateral treaties on mutual assistance between Contracting Parties to this Convention can no longer be invoked in order to refuse assistance with regard to an offence mentioned in Articles 1 and 2.

88. Article 8 does not preclude grounds for refusal of mutual assistance other than the political character of the offence.

Article 9

89. A new Article 9 has been introduced in the Convention, stating that the Contracting States may conclude between themselves agreements to supplement the provisions of this Convention or to facilitate the application of the principles contained therein. This provision does not impose an obligation on States Parties, but restates the possibility for them to further the attainment of the objectives of the Convention.

Article 10

90. This article confers on the European Committee on Crime Problems (CDPC) a general competence to follow up the application of the Convention and reflects the precedents established in other European Conventions in the penal field as, for instance, in Article 28 of the European Convention on the Punishment of Road Traffic Offences, Article 65 of the European Convention on the International Validity of Criminal Judgments, Article 44 of the European Convention on the Transfer of Proceedings in Criminal Matters, and Article 7 of the Additional Protocol to the European Convention on Extradition.

91. The reporting requirement under Article 10 is intended to allow the CDPC to keep informed about any difficulties in interpreting and applying the Convention, so that it may contribute to facilitating friendly settlements and proposing amendments to the Convention which might prove necessary.

92. The two tasks that the Convention originally assigned to the CDPC – "be kept informed regarding the application of this Convention" and "do what ever is needful to facilitate the friendly settlement of any difficulty which may arise out of its execution" – have been developed by providing a series of additional tasks that the committee may carry out in relation to the Convention, namely: making proposals with a view to facilitating or improving the application of the Convention; making recommendations to the Committee of Ministers concerning the proposals for amendments to the Convention, and giving its opinion on any proposals for amendments to the Convention submitted by a Contracting State in accordance with Articles 12 and 13; expressing, at the request of a Contracting State, an opinion on any question concerning the application of the Convention; making recommendations to the Committee of Ministers concerning non-member States of the Council of Europe to be invited to accede to the Convention in accordance with Article 14, paragraph 3, and submitting to the Committee of Ministers of the Council of Europe an annual report on the follow-up given to this article in the application of the Convention.

93. Notwithstanding these additional tasks as set out above, the CDPC continues to perform a general follow-up function regarding the Convention and without prejudice to a more specific follow-up competence assigned to the committee provided for in Article 17 – the Conference of States Parties against Terrorism (COSTER, see below) in respect of certain provisions of the Convention. The CDPC and the COSTER are both called upon to contribute to the efficiency of the Convention, each in their own way and from their own position, the CDPC as a governmental committee of experts responsible, under the authority of the Committee of Ministers, for implementing and following up international co-operation in the criminal field, and the COSTER as a conventional committee set up specifically for the purposes of this Convention. Obviously, where appropriate, the CDPC and the COSTER are required to co-operate with each other.

Article 11

94. Article 11 concerns the settlement, by means of arbitration, of those disputes over the interpretation or application of the Convention which have not already been settled through the intervention of the CDPC according to Article 10.e or through negotiation.

95. The provisions of Article 11 provide for the setting up of an arbitration tribunal. Each Party shall nominate an arbitrator and the arbitrators shall nominate a referee (paragraph 1). Where a Party fails to nominate its arbitrator within three months following the request for arbitration, or where the arbitrators fail to nominate a referee, the arbitrator or referee shall, at the request of the other Party, be nominated respectively by the President of the International Court of Justice or by the President of the European Court of Human Rights, depending on whether or not the dispute involves member State of the Council of Europe (paragraphs 2 and 3). Provision is made for cases where the president of the international court concerned is a national of one of the parties to the dispute (paragraph 4). The possible role of the president of these two international courts does not have any impact whatsoever on the applicable law.

96. Traditionally, Council of Europe conventions which are open exclusively to member States of the Council of Europe, as was this Convention originally, assigned a role to the President of the European Court of Human Rights (see, for instance, Article 47 paragraph 2 of the European Convention for the Protection of Animals during International Transport of 13 December 1968, in which the system was first introduced). This was because all the member States of the Council of Europe were Parties to the European Convention on Human Rights and therefore subject to the jurisdiction of the European Court of Human Rights. However, the fact that the Convention is now open to non-member States (see Article 14 below) required that arbitration procedures provide for the settlement of disputes involving non-member States by an international court outside the structure of the Council of Europe.

97. Although it is explicitly established that the arbitration tribunal shall lay down its own procedure, the Convention provides some of the rules, namely: that the tribunal's decisions shall be taken by majority vote and that the referee shall have a casting vote where a majority cannot be reached.

98. The casting vote of the referee is explained by the fact that a dispute may involve more than two Contracting States. The tribunal's decision shall be final.

Articles 12 and 13

99. These new articles have been introduced in the Convention in order to regulate subsequent amendments thereto. The GMT tried to solve the problem of possible future amendments to the Convention by providing two procedures: a simplified amendment procedure that will allow new conventions to be added

to the list in Article 1, paragraph 1 (Article 13) and a general amendment procedure for amendments concerning any other provisions of the Convention (Article 12).

Article 12

100. This provision concerns amendments to the Convention other than those relating to Article 1, paragraph 1. It aims to simplify the amendment procedure by replacing the negotiation of an additional protocol with an accelerated procedure.

101. It provides that amendments may be proposed by any Contracting State or by the Committee of Ministers in accordance with standard Council of Europe treatymaking procedures.

102. The Committee of Ministers may then adopt the proposed amendments in accordance with the majority provided for in Article 20.d of the Statute of the Council of Europe, that is: a two-thirds majority of the representatives casting a vote and of a majority of the representatives entitled to sit on the Committee, and the amendments are then submitted to the Contracting States for acceptance (paragraph 2).

103. Paragraph 2 provides for two forms of consultation that the Committee of Ministers should carry out before proceeding to the formal adoption of any amendment. The first consists of a mandatory consultation of non-member States Parties to the Convention. This consultation is mandatory and justified because non-member Contracting States do not sit in the Committee of Minister and therefore some form of participation in the adoption procedure was necessary. A second, optional consultation is held with the CDPC if the Committee of Ministers considers such consultation to be necessary. The CDPC then gives an opinion in pursuance of Article 10.*c*.

104. Once accepted by all the Contracting Parties, the amendment enters into force on the thirtieth day following notification of acceptance by the last Contracting Party (paragraph 3).

105. In accordance with standard Council of Europe practice and in keeping with the role of the Secretary General of the Council of Europe as depositary of European Conventions, the Secretary General receives the proposed amendments (paragraph 1), communicates them to the Contracting Parties for acceptance (paragraph 2), receives notification of acceptance by the Parties and notifies them of the entry into force of the amendments (paragraph 3).

Article 13

106. Article 13 introduces a new simplified amendment procedure for updating the list of treaties in Article 1, paragraph 1. This procedure represents a development in European conventions. This innovation is nevertheless inspired by existing anti-terrorist conventions, such as the International Convention for the Suppression of the Financing of Terrorism of 9 December 1999 (Article 23).

107. Article 13, paragraph 1 provides a number of substantive conditions that have to be met in order to have recourse to this procedure. Firstly, the amendment can only concern the list of treaties in Article 1, paragraph 1. Secondly, such amendments can only concern treaties concluded within the United Nations Organisation, dealing specifically with international terrorism and having entered into force.

108. In line with Article 12, amendments may be proposed by any Contracting Party or by the Committee of Ministers and are communicated by the Secretary General of the Council of Europe to the Contracting States (paragraph 1).

109. The forms of consultation and adoption by the Committee of Ministers of a proposed amendment provided in the general amendment procedure of Article 12 are provided in Article 13 also, for the simplified procedure (paragraph 2).

110. However, contrary to the general procedure under Article 12, in the simplified procedure an amendment, once adopted by the Committee of Ministers, enters into force after the expiry of a period of one year from the date on which it has been communicated to the Contracting States by the Secretary General (paragraph 2), provided that one third or more Contracting States do not object to it and notify the Secretary General accordingly. Any objection from a Contracting State shall be without prejudice to the other Parties' tacit acceptance. Where one third or more Contracting States object to the entry into force of the amendment, the proposed amendment does not enter into force (paragraph 3).

111. The acceptance by all the Contracting Parties is therefore not required for the entry into force of the amendment, which enters into force for all those Contracting States which have not objected to it (paragraph 4). For those States which have objected, the amendment comes into force on the first day of the

month following the date on which they have notified the Secretary General of the Council of Europe of their subsequent acceptance (paragraph 5).

Articles 14 to 19

112. These articles are, for the most part, based on the model final clauses of agreements and conventions which were approved by the Committee of Ministers of the Council of Europe at the 113th meeting of the Deputies. Nevertheless, some of the provisions contained therein require some explanation.

Article 14

113. Article 14 has been amended in order to allow for non-member States of the Council of Europe to be parties to the Convention. It should be recalled that the original Convention did not provide for such participation, since it was restricted to member States of the Council of Europe.

114. When the GMT was set up by the Committee of Ministers, its terms of reference provided that the GMT should "review the operation of and examine the possibility of updating, existing Council of Europe international instruments applicable to the fight against terrorism, in particular the European Convention on the Suppression of Terrorism, in view also of a possible opening of the Convention to non-member States, and the other relevant instruments".

115. Article 14 now provides for the participation of member and non-member States of the Council of Europe. However, there are some differences regarding the participation of non-member States.

116. While paragraph 1 provides automatically for the participation of member States and non-member States of the Council of Europe which are Observers to the Organisation, paragraph 3 provides for the possibility for other non-member States to become Parties to the Convention upon an invitation by the Committee of Ministers of the Council of Europe, after mandatory consultation of the CDPC. The Committee of Ministers' decision has to be taken by the majority provided for in Article 20.d of the Statute of the Council of Europe – a two-thirds majority of the representatives casting a vote and of a majority of the representatives entitled to sit on the Committee – and by the unanimous vote of the representatives of the Contracting States entitled to sit on the Committee of Ministers.

117. The procedure for non-member States to become parties to the Convention is different due to the special status of Observer States to the Council of Europe, status which presupposes a decision by the Committee of Ministers.

118. Finally, it should be recalled that the opening of the Convention to Observer States occurs, as from the entry into force of the Amending Protocol, in accordance with Article 18 of the Amending Protocol which provides that 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 on which all Parties to the Convention have expressed their consent to be bound by the Protocol, in accordance with the provisions of Article 17" which in turn provides that the "Protocol shall be open for signature by member States of the Council of Europe signatories to the Convention, which may express their consent to be bound by: a. signature without reservation as to ratification, acceptance or approval; or b. signature subject to ratification, acceptance or approval, followed by ratification, acceptance or approval".

119. In respect of States which were not Parties to the original Convention and become Parties to the amended Convention, the Convention comes into force three months after the date of the deposit of its instrument of ratification, acceptance, approval or accession (paragraph 4).

Article 15

120. This article has been left unchanged by the Amending Protocol, except with respect to the reference to accession, which takes into account the fact that once the Amending Protocol has entered into force, States which were not Parties to the original Convention will have to accede to it.

121. The wording of Article 15, paragraph 1, is based on the model final clauses approved by the Deputies at their 315th meeting. During discussions within the GMT, the proposal was put forward to modify this territorial clause by replacing the words "shall apply" by "shall or shall not apply". Ultimately, the GMT decided to retain the original formula of the final clause in order to conform with the long-standing practice of the Council of Europe aiming at ensuring the uniform application of European Treaties upon the territory of each

State Party (the scope of the standard territorial clause being limited to overseas territories and territories with a special status).

122. It was stated that the wording of Article 15, paragraph 1, would not, however, constitute an obstacle for States Parties claiming not to have the control over their entire national territory to make unilateral statements declaring that they would not be able to ensure the application of the treaty in a certain territory. Any such declarations would not be considered as territorial declarations, but statements of factual character, prompted by exceptional circumstances making full compliance with a treaty temporarily impossible.

Article 16

123. Article 16 contains the reservation regime of the Convention, which was one of the key issues the GMT sought to address. It appeared essential to allow Contracting Parties to preserve some of their fundamental legal concepts, while ensuring the progressive implementation of this instrument and complying with paragraph 3.*g* of United Nations Security Council Resolution 1373 (2001) of 28 September 2001, which "calls upon all States (…) to ensure, in conformity with international law, (…) that claims of political motivation are not recognised as grounds for refusing requests for the extradition of alleged terrorists". As a result, the original regime provided in Article 13 of the original Convention has been reviewed and made subject to a number of conditions and a follow-up procedure.

124. Article 16, paragraph 1, allows Contracting States to make reservations in respect of the application of Article 1. The Convention thus recognises that a Contracting State might be impeded, for instance for legal or constitutional reasons, from fully accepting the obligations arising from Article 1, whereby certain offences cannot be regarded as political for the purposes of extradition. However, this possibility has been made subject to a number of conditions. First of all, the possibility of formulating a reservation is limited to those member States Parties to the Convention on the date of entry into force of the Amending Protocol, in accordance with its Article 18 (see paragraph 118 of this report). The reservations that such States may have made by virtue of Article 13 of the original Convention lapse on the date of entry into force of the Amending Protocol, and these States have the possibility of entering their reservation at the time of signature or when depositing their instrument of ratification, acceptance or approval of the Amending Protocol.

125. If a State avails itself of this possibility of making a reservation it can subsequently refuse extradition in respect of the offences mentioned in Article 1. However, it is under the obligation to apply the reservation on a case-by-case basis, to give reasons for its decision and take into due consideration, when evaluating the character of the offence, any particularly serious aspects of the offence. Before making its decision on the request for extradition, it must give due consideration in its evaluation of the nature of the offence, to a number of elements related to the character and effects of the offence in question which are enumerated by way of example in Article 16, paragraph 1 sub-paragraphs a to c. These elements, which describe some particularly serious aspects of the offence, were drafted along the lines of paragraph 1 of Committee of Ministers Resolution (74) 3. As regards the phrase "collective danger to the life, physical integrity or liberty of persons" used in Article 16 paragraph 1.a, examples have been given in paragraph 52 of this report.

126. Having taken these elements into account, the requested State remains free to grant or to refuse extradition, subject to the conditions referred to in the other paragraphs of that article.

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

128. Paragraph 2 provides explicitly that the offence or offences in respect of which the reservation is to apply should be stated in the declaration.

129. Paragraphs 3 and 4 have been left unchanged. They provide, respectively, for the withdrawal of reservations made in pursuance of paragraph 1 and with partial or conditional reservations. Paragraph 4 in particular lays down the rule of reciprocity in respect of the application of Article 1 by a State having availed itself of a reservation. This provision repeats the provisions contained in Article 26 paragraph 3 of the European Convention on Extradition. The rule of reciprocity applies equally to reservations not provided for in Article 16.

130. In contrast with the original reservation regime, which provided for the indefinite validity of reservations made in pursuance of paragraph 1, paragraph 5 provides that reservations have a limited validity of three years from the date of entry into force of the Amending Protocol. After this deadline they will lapse, unless they are expressly renewed. Paragraph 6 provides a procedure for the automatic lapsing of non-renewed reservations. Where a Contracting State upholds its reservation, it shall provide an explanation of the grounds justifying its continuance. Paragraphs 5 and 6 reflect provisions of the Criminal Law Convention on Corruption

of 27 January 1999 (ETS No. 173, Article 38, paragraphs 1 and 2). They have been added with a view to ensuring that reservations are regularly reviewed by Contracting States which have entered them.

131. If extradition is refused on the grounds of a reservation made in accordance with Article 16, Articles 6 and 7 apply. This is explicitly stated in paragraph 7, which reflects and reinforces the principle of *aut dedere aut judicare* by a duty to forward the decision promptly to the requesting State as provided in paragraph 8.

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

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

134. Where a requesting State considers that a requested reserving State has disregarded the conditions of paragraphs 1, 2 and/or 7 because, for instance, no judicial decision on the merits has been taken within a reasonable time in the requested State in accordance with paragraph 7, it has the possibility of bringing the matter before the COSTER. The COSTER is competent to consider the matter and issue an opinion on the conformity of the refusal with the Convention. This opinion is submitted to the Committee of Ministers for the purpose of issuing a declaration thereon. When performing its functions under paragraph 7, the Committee of Ministers shall meet in its composition restricted to the Contracting States to the Convention.

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

Article 17

136. This article provides for the setting up of a conventional committee, the COSTER (an acronym derived from the title Conference of States Parties against Terrorism) responsible for a number of conventional follow-up tasks. This committee is modelled on that of the Convention on Cybercrime of 23 November 2001 (ETS No. 185, Article 46) and provides for the participation of all Contracting States.

137. The setting up of this specific follow-up committee is without prejudice to the functions of the CDPC in pursuance of Article 10, with whom the COSTER is called upon to co-operate closely in discharging its duties. The role of the COSTER is particularly significant in relation to the reservations made under Article 16. In this context, the COSTER is responsible for carrying out the procedure provided in Article 16, paragraph 8. Beyond its purely conventional functions, the COSTER has a broader role in the Council of Europe's anti-terrorist legal activities. The COSTER is thus called upon to act as a forum for exchanges of information on legal and policy developments and, at the request of the Committee of Ministers, for examining additional legal measures with regard to terrorism adopted within the Council of Europe, making proposals for other necessary measures, in particular with a view to improving international co-operation in this area, for preparing opinions, and for the execution of any terms of reference given by the Committee of Ministers.

Article 18 (unchanged)

138. This provision, which is unusual among the final clauses of conventions elaborated within the Council of Europe, aims to allow any Contracting State to denounce this Convention in exceptional cases, particularly if in another Contracting State the effective democratic regime within the meaning of the European

Convention on Human Rights is overthrown. This denunciation may, at the discretion of the State declaring it, take effect immediately, that is, as from the reception of the notification by the Secretary General of the Council of Europe, or at a later date.

Article 19

139. This provision, which is a standard final clause in Council of Europe treaties, concerns notifications to Contracting States. It goes without saying that the Secretary General must inform States also of any other acts, notifications and communications within the meaning of Article 77 of the Vienna Convention on the Law of Treaties relating to the Convention and not expressly provided for by Article 19, such as those provided for in Articles 12 to 18.

Council of Europe Convention on the Prevention of Terrorism – CETS No. 196

Warsaw, 16.V.2005

The member States of the Council of Europe and the other Signatories hereto,

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

Recognising the value of reinforcing co-operation with the other Parties to this Convention;

Wishing to take effective measures to prevent terrorism and to counter, in particular, public provocation to commit terrorist offences and recruitment and training for terrorism;

Aware of the grave concern caused by the increase in terrorist offences and the growing terrorist threat;

Aware of the precarious situation faced by those who suffer from terrorism, and in this connection reaffirming their profound solidarity with the victims of terrorism and their families;

Recognising that terrorist offences and the offences set forth in this Convention, by whoever perpetrated, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature, and recalling the obligation of all Parties to prevent such offences and, if not prevented, to prosecute and ensure that they are punishable by penalties which take into account their grave nature;

Recalling the need to strengthen the fight against terrorism and reaffirming that all measures taken to prevent or suppress terrorist offences have to respect the rule of law and democratic values, human rights and fundamental freedoms as well as other provisions of international law, including, where applicable, international humanitarian law;

Recognising that this Convention is not intended to affect established principles relating to freedom of expression and freedom of association;

Recalling that acts of terrorism have the purpose by their nature or context to seriously intimidate a population or unduly compel a government or an international organisation to perform or abstain from performing any act or seriously destabilise or destroy the fundamental political, constitutional, economic or social structures of a country or an international organisation;

Have agreed as follows:

Article 1 – Terminology

1. For the purposes of this Convention, "terrorist offence" means any of the offences within the scope of and as defined in one of the treaties listed in the Appendix.

2. On depositing its instrument of ratification, acceptance, approval or accession, a State or the European Community which is not a party to a treaty listed in the Appendix may declare that, in the application of this Convention to the Party concerned, that treaty shall be deemed not to be included in the Appendix. This declaration shall cease to have effect as soon as the treaty enters into force for the Party having made such a declaration, which shall notify the Secretary General of the Council of Europe of this entry into force.

Article 2 – Purpose

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

Article 3 – National prevention policies

1. Each Party shall take appropriate measures, particularly in the field of training of law enforcement authorities and other bodies, and in the fields of education, culture, information, media and public awareness raising, with a view to preventing terrorist offences and their negative effects while respecting human rights obligations as set forth in, where applicable to that Party, the Convention for the Protection of Human Rights and Fundamental Freedoms, the International Covenant on Civil and Political Rights, and other obligations under international law.

2. Each Party shall take such measures as may be necessary to improve and develop the co-operation among national authorities with a view to preventing terrorist offences and their negative effects by, *inter alia*:

a. exchanging information;

b. improving the physical protection of persons and facilities;

c. enhancing training and coordination plans for civil emergencies.

3. Each Party shall promote tolerance by encouraging inter-religious and cross-cultural dialogue involving, where appropriate, non-governmental organisations and other elements of civil society with a view to preventing tensions that might contribute to the commission of terrorist offences.

4. Each Party shall endeavour to promote public awareness regarding the existence, causes and gravity of and the threat posed by terrorist offences and the offences set forth in this Convention and consider encouraging the public to provide factual, specific help to its competent authorities that may contribute to preventing terrorist offences and offences set forth in this Convention.

Article 4 – International co-operation on prevention

Parties shall, as appropriate and with due regard to their capabilities, assist and support each other with a view to enhancing their capacity to prevent the commission of terrorist offences, including through exchange of information and best practices, as well as through training and other joint efforts of a preventive character.

Article 5 – Public provocation to commit a terrorist offence

1. For the purposes of this Convention, "public provocation to commit a terrorist offence" means the distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of a terrorist offence, where such conduct, whether or not directly advocating terrorist offences, causes a danger that one or more such offences may be committed.

2. Each Party shall adopt such measures as may be necessary to establish public provocation to commit a terrorist offence, as defined in paragraph 1, when committed unlawfully and intentionally, as a criminal offence under its domestic law.

Article 6 – Recruitment for terrorism

1. For the purposes of this Convention, "recruitment for terrorism" means to solicit another person to commit or participate in the commission of a terrorist offence, or to join an association or group, for the purpose of contributing to the commission of one or more terrorist offences by the association or the group.

2. Each Party shall adopt such measures as may be necessary to establish recruitment for terrorism, as defined in paragraph 1, when committed unlawfully and intentionally, as a criminal offence under its domestic law.

Article 7 – Training for terrorism

1. For the purposes of this Convention, "training for terrorism" means to provide instruction in the making or use of explosives, firearms or other weapons or noxious or hazardous substances, or in other specific methods or techniques, for the purpose of carrying out or contributing to the commission of a terrorist offence, knowing that the skills provided are intended to be used for this purpose.

2. Each Party shall adopt such measures as may be necessary to establish training for terrorism, as defined in paragraph 1, when committed unlawfully and intentionally, as a criminal offence under its domestic law.

Article 8 – Irrelevance of the commission of a terrorist offence

For an act to constitute an offence as set forth in Articles 5 to 7 of this Convention, it shall not be necessary that a terrorist offence be actually committed.

Article 9 – Ancillary offences

1. Each Party shall adopt such measures as may be necessary to establish as a criminal offence under its domestic law:

a. Participating as an accomplice in an offence as set forth in Articles 5 to 7 of this Convention;

b. Organising or directing others to commit an offence as set forth in Articles 5 to 7 of this Convention;

c. Contributing to the commission of one or more offences as set forth in Articles 5 to 7 of this Convention by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

i. be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of an offence as set forth in Articles 5 to 7 of this Convention; or

ii. be made in the knowledge of the intention of the group to commit an offence as set forth in Articles 5 to 7 of this Convention.

2. Each Party shall also adopt such measures as may be necessary to establish as a criminal offence under, and in accordance with, its domestic law the attempt to commit an offence as set forth in Articles 6 and 7 of this Convention.

Article 10 – Liability of legal entities

1. Each Party shall adopt such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal entities for participation in the offences set forth in Articles 5 to 7 and 9 of this Convention.

2. Subject to the legal principles of the Party, the liability of legal entities may be criminal, civil or administrative.

3. Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offences.

Article 11 – Sanctions and measures

1. Each Party shall adopt such measures as may be necessary to make the offences set forth in Articles 5 to 7 and 9 of this Convention punishable by effective, proportionate and dissuasive penalties.

2. Previous final convictions pronounced in foreign States for offences set forth in the present Convention may, to the extent permitted by domestic law, be taken into account for the purpose of determining the sentence in accordance with domestic law.

3. Each Party shall ensure that legal entities held liable in accordance with Article 10 are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.

Article 12 – Conditions and safeguards

1. Each Party shall ensure that the establishment, implementation and application of the criminalisation under Articles 5 to 7 and 9 of this Convention are carried out while respecting human rights obligations, in particular the right to freedom of expression, freedom of association and freedom of religion, as set forth in, where applicable to that Party, the Convention for the Protection of Human Rights and Fundamental Freedoms, the International Covenant on Civil and Political Rights, and other obligations under international law.

2. The establishment, implementation and application of the criminalisation under Articles 5 to 7 and 9 of this Convention should furthermore be subject to the principle of proportionality, with respect to the legitimate aims pursued and to their necessity in a democratic society, and should exclude any form of arbitrariness or discriminatory or racist treatment.

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

Each Party shall adopt such measures as may be necessary to protect and support the victims of terrorism that has been committed within its own territory. These measures may include, through the appropriate national schemes and subject to domestic legislation, *inter alia*, financial assistance and compensation for victims of terrorism and their close family members.

Article 14 – Jurisdiction

1. Each Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in this Convention:

   a. when the offence is committed in the territory of that Party;

   b. when the offence is committed on board a ship flying the flag of that Party, or on board an aircraft registered under the laws of that Party;

   c. when the offence is committed by a national of that Party.

2. Each Party may also establish its jurisdiction over the offences set forth in this Convention:

   a. when the offence was directed towards or resulted in the carrying out of an offence referred to in Article 1 of this Convention, in the territory of or against a national of that Party;

   b. when the offence was directed towards or resulted in the carrying out of an offence referred to in Article 1 of this Convention, against a State or government facility of that Party abroad, including diplomatic or consular premises of that Party;

   c. when the offence was directed towards or resulted in an offence referred to in Article 1 of this Convention, committed in an attempt to compel that Party to do or abstain from doing any act;

   d. when the offence is committed by a stateless person who has his or her habitual residence in the territory of that Party;

   e. when the offence is committed on board an aircraft which is operated by the Government of that Party.

3. Each Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in this Convention in the case where the alleged offender is present in its territory and it does not extradite him or her to a Party whose jurisdiction is based on a rule of jurisdiction existing equally in the law of the requested Party.

4. This Convention does not exclude any criminal jurisdiction exercised in accordance with national law.

5. When more than one Party claims jurisdiction over an alleged offence set forth in this Convention, the Parties involved shall, where appropriate, consult with a view to determining the most appropriate jurisdiction for prosecution.

Article 15 – Duty to investigate

1. Upon receiving information that a person who has committed or who is alleged to have committed an offence set forth in this Convention may be present in its territory, the Party concerned shall take such measures as may be necessary under its domestic law to investigate the facts contained in the information.

2. Upon being satisfied that the circumstances so warrant, the Party in whose territory the offender or alleged offender is present shall take the appropriate measures under its domestic law so as to ensure that person's presence for the purpose of prosecution or extradition.

3. Any person in respect of whom the measures referred to in paragraph 2 are being taken shall be entitled to:

a. communicate without delay with the nearest appropriate representative of the State of which that person is a national or which is otherwise entitled to protect that person's rights or, if that person is a stateless person, the State in the territory of which that person habitually resides;

b. be visited by a representative of that State;

c. be informed of that person's rights under subparagraphs a. and b.

4. The rights referred to in paragraph 3 shall be exercised in conformity with the laws and regulations of the Party in the territory of which the offender or alleged offender is present, subject to the provision that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under paragraph 3 are intended.

5. The provisions of paragraphs 3 and 4 shall be without prejudice to the right of any Party having a claim of jurisdiction in accordance with Article 14, paragraphs 1.c and 2.d to invite the International Committee of the Red Cross to communicate with and visit the alleged offender.

Article 16 – Non application of the Convention

This Convention shall not apply where any of the offences established in accordance with Articles 5 to 7 and 9 is committed within a single State, the alleged offender is a national of that State and is present in the territory of that State, and no other State has a basis under Article 14, paragraph 1 or 2 of this Convention, to exercise jurisdiction, it being understood that the provisions of Articles 17 and 20 to 22 of this Convention shall, as appropriate, apply in those cases.

Article 17 – International co-operation in criminal matters

1. Parties shall afford one another the greatest measure of assistance in connection with criminal investigations or criminal or extradition proceedings in respect of the offences set forth in Articles 5 to 7 and 9 of this Convention, including assistance in obtaining evidence in their possession necessary for the proceedings.

2. Parties shall carry out their obligations under paragraph 1 in conformity with any treaties or other agreements on mutual legal assistance that may exist between them. In the absence of such treaties or agreements, Parties shall afford one another assistance in accordance with their domestic law.

3. Parties shall co-operate with each other to the fullest extent possible under relevant law, treaties, agreements and arrangements of the requested Party with respect to criminal investigations or proceedings in relation to the offences for which a legal entity may be held liable in accordance with Article 10 of this Convention in the requesting Party.

4. Each Party may give consideration to establishing additional mechanisms to share with other Parties information or evidence needed to establish criminal, civil or administrative liability pursuant to Article 10.

Article 18 – Extradite or prosecute

1. The Party in the territory of which the alleged offender is present shall, when it has jurisdiction in accordance with Article 14, if it does not extradite that person, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without undue delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that Party. Those authorities shall take their decision in the same manner as in the case of any other offence of a serious nature under the law of that Party.

2. Whenever a Party is permitted under its domestic law to extradite or otherwise surrender one of its nationals only upon the condition that the person will be returned to that Party to serve the sentence imposed as a result of the trial or proceeding for which the extradition or surrender of the person was sought, and this Party and the Party seeking the extradition of the person agree with this option and other terms they may deem appropriate, such a conditional extradition or surrender shall be sufficient to discharge the obligation set forth in paragraph 1.

Article 19 – Extradition

1. The offences set forth in Articles 5 to 7 and 9 of this Convention shall be deemed to be included as extraditable offences in any extradition treaty existing between any of the Parties before the entry into force of this Convention. Parties undertake to include such offences as extraditable offences in every extradition treaty to be subsequently concluded between them.

2. When a Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another Party with which it has no extradition treaty, the requested Party may, if it so decides, consider this Convention as a legal basis for extradition in respect of the offences set forth in Articles 5 to 7 and 9 of this Convention. Extradition shall be subject to the other conditions provided by the law of the requested Party.

3. Parties which do not make extradition conditional on the existence of a treaty shall recognise the offences set forth in Articles 5 to 7 and 9 of this Convention as extraditable offences between themselves, subject to the conditions provided by the law of the requested Party.

4. Where necessary, the offences set forth in Articles 5 to 7 and 9 of this Convention shall be treated, for the purposes of extradition between Parties, as if they had been committed not only in the place in which they occurred but also in the territory of the Parties that have established jurisdiction in accordance with Article 14.

5. The provisions of all extradition treaties and agreements concluded between Parties in respect of offences set forth in Articles 5 to 7 and 9 of this Convention shall be deemed to be modified as between Parties to the extent that they are incompatible with this Convention.

Article 20 – Exclusion of the political exception clause

1. None of the offences referred to in Articles 5 to 7 and 9 of this Convention, shall be regarded, for the purposes of extradition or mutual legal assistance, as a political offence, an offence connected with a political offence, or as an offence inspired by political motives. Accordingly, a request for extradition or for mutual legal assistance based on such an offence may not be refused on the sole ground that it concerns a political offence or an offence connected with a political offence or an offence inspired by political motives.

2. Without prejudice to the application of Articles 19 to 23 of the Vienna Convention on the Law of Treaties of 23 May 1969 to the other Articles of this Convention, any State or the European Community may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession of the Convention, declare that it reserves the right to not apply paragraph 1 of this Article as far as extradition in respect of an offence set forth in this Convention is concerned. The Party undertakes to apply this reservation on a case-by-case basis, through a duly reasoned decision.

3. Any Party may wholly or partly withdraw a reservation it has made in accordance with paragraph 2 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 Party which has made a reservation in accordance with paragraph 2 of this Article may not claim the application of paragraph 1 of this Article by any other Party; it may, however, if its reservation is partial or conditional, claim the application of this article in so far as it has itself accepted it.

5. The reservation shall be valid for a period of three years from the day of the entry into force of this Convention in respect of the Party concerned. However, such reservation may be renewed for periods of the same duration.

6. Twelve months before the date of expiry of the reservation, the Secretary General of the Council of Europe shall give notice of that expiry to the Party concerned. No later than three months before expiry, the Party shall notify the Secretary General of the Council of Europe that it is upholding, amending or withdrawing its reservation. Where a Party notifies the Secretary General of the Council of Europe that it is upholding its reservation, it shall provide an explanation of the grounds justifying its continuance. In the absence of notification by the Party concerned, the Secretary General of the Council of Europe shall inform that Party that its reservation is considered to have been extended automatically for a period of six months. Failure by the Party concerned to notify its intention to uphold or modify its reservation before the expiry of that period shall cause the reservation to lapse.

7. Where a Party does not extradite a person in application of this reservation, after receiving an extradition request from another Party, it shall submit the case, without exception whatsoever and without undue

delay, to its competent authorities for the purpose of prosecution, unless the requesting Party and the requested Party agree otherwise. The competent authorities, for the purpose of prosecution in the requested Party, shall take their decision in the same manner as in the case of any offence of a grave nature under the law of that Party. The requested Party shall communicate, without undue delay, the final outcome of the proceedings to the requesting Party and to the Secretary General of the Council of Europe, who shall forward it to the Consultation of the Parties provided for in Article 30.

8. The decision to refuse the extradition request on the basis of this reservation shall be forwarded promptly to the requesting Party. If within a reasonable time no judicial decision on the merits has been taken in the requested Party according to paragraph 7, the requesting Party may communicate this fact to the Secretary General of the Council of Europe, who shall submit the matter to the Consultation of the Parties provided for in Article 30. This Consultation shall consider the matter and issue an opinion on the conformity of the refusal with the Convention and shall submit it to the Committee of Ministers for the purpose of issuing a declaration thereon. When performing its functions under this paragraph, the Committee of Ministers shall meet in its composition restricted to the States Parties.

Article 21 – Discrimination clause

1. Nothing in this Convention shall be interpreted as imposing an obligation to extradite or to afford mutual legal assistance, if the requested Party has substantial grounds for believing that the request for extradition for offences set forth in Articles 5 to 7 and 9 or for mutual legal assistance with respect to such offences has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin or political opinion or that compliance with the request would cause prejudice to that person's position for any of these reasons.

2. Nothing in this Convention shall be interpreted as imposing an obligation to extradite if the person who is the subject of the extradition request risks being exposed to torture or to inhuman or degrading treatment or punishment.

3. Nothing in this Convention shall be interpreted either as imposing an obligation to extradite if the person who is the subject of the extradition request risks being exposed to the death penalty or, where the law of the requested Party does not allow for life imprisonment, to life imprisonment without the possibility of parole, unless under applicable extradition treaties the requested Party is under the obligation to extradite if the requesting Party gives such assurance as the requested Party considers sufficient that the death penalty will not be imposed or, where imposed, will not be carried out, or that the person concerned will not be subject to life imprisonment without the possibility of parole.

Article 22 – 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 Party receiving the information in initiating or carrying out investigations or proceedings, or might lead to a request by that Party under this Convention.

2. The Party providing the information may, pursuant to its national law, impose conditions on the use of such information by the Party receiving the information.

3. The Party receiving the information shall be bound by those conditions.

4. However, any Party 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 Party providing the information under paragraph 2 above, unless it receives prior notice of the nature of the information to be provided and agrees to its transmission.

Article 23 – Signature and entry into force

1. This Convention shall be open for signature by the member States of the Council of Europe, the European Community and by non-member States which have participated in its elaboration.

2. This Convention is subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

3. This Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date on which six Signatories, including at least four member States of the Council of Europe, have expressed their consent to be bound by the Convention in accordance with the provisions of paragraph 2.

4. In respect of any Signatory which subsequently expresses its consent to be bound by it, the Convention 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 expression of its consent to be bound by the Convention in accordance with the provisions of paragraph 2.

Article 24 – Accession to the Convention

1. After the entry into force of this Convention, the Committee of Ministers of the Council of Europe, after consulting with and obtaining the unanimous consent of the Parties to the Convention, may invite any State which is not a member of the Council of Europe and which has not participated in its elaboration to accede to this convention. The decision shall be taken by the majority provided for in Article 20.d of the Statute of the Council of Europe and by the unanimous vote of the representatives of the Parties entitled to sit on the Committee of Ministers.

2. In respect of any State acceding to the convention under paragraph 1 above, the Convention 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 of the instrument of accession with the Secretary General of the Council of Europe.

Article 25 – Territorial application

1. Any State or the European Community 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 Convention shall apply.

2. Any Party may, at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Convention to any other territory specified in the declaration. In respect of such territory the Convention 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 the 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 of the Council of Europe. 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 26 – Effects of the Convention

1. The present Convention supplements applicable multilateral or bilateral treaties or agreements between the Parties, including the provisions of the following Council of Europe treaties:

- European Convention on Extradition, opened for signature, in Paris, on 13 December 1957 (ETS No. 24);
- European Convention on Mutual Assistance in Criminal Matters, opened for signature, in Strasbourg, on 20 April 1959 (ETS No. 30);
- European Convention on the Suppression of Terrorism, opened for signature, in Strasbourg, on 27 January 1977 (ETS No. 90);
- Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, opened for signature in Strasbourg on 17 March 1978 (ETS No. 99);
- Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, opened for signature in Strasbourg on 8 November 2001 (ETS No. 182);
- Protocol amending the European Convention on the Suppression of Terrorism, opened for signature in Strasbourg on 15 May 2003 (ETS No. 190).

2. If two or more Parties have already concluded an agreement or treaty on the matters dealt with in this Convention or have otherwise established their relations on such matters, or should they in future do so, they shall also be entitled to apply that agreement or treaty or to regulate those relations accordingly. However, where Parties establish their relations in respect of the matters dealt with in the present Convention other

than as regulated therein, they shall do so in a manner that is not inconsistent with the Convention's objectives and principles.

3. Parties which are members of the European Union shall, in their mutual relations, apply Community and European Union rules in so far as there are Community or European Union rules governing the particular subject concerned and applicable to the specific case, without prejudice to the object and purpose of the present Convention and without prejudice to its full application with other Parties. [1]

4. Nothing in this Convention shall affect other rights, obligations and responsibilities of a Party and individuals under international law, including international humanitarian law.

5. The activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this Convention, and the activities undertaken by military forces of a Party in the exercise of their official duties, inasmuch as they are governed by other rules of international law, are not governed by this Convention.

Article 27 – Amendments to the Convention

1. Amendments to this Convention may be proposed by any Party, the Committee of Ministers of the Council of Europe or the Consultation of the Parties.

2. Any proposal for amendment shall be communicated by the Secretary General of the Council of Europe to the Parties.

3. Moreover, any amendment proposed by a Party or the Committee of Ministers shall be communicated to the Consultation of the Parties, which shall submit to the Committee of Ministers its opinion on the proposed amendment.

4. The Committee of Ministers shall consider the proposed amendment and any opinion submitted by the Consultation of the Parties and may approve the amendment.

5. The text of any amendment approved by the Committee of Ministers in accordance with paragraph 4 shall be forwarded to the Parties for acceptance.

6. Any amendment approved in accordance with paragraph 4 shall come into force on the thirtieth day after all Parties have informed the Secretary General of their acceptance thereof.

Article 28 – Revision of the Appendix

1. In order to update the list of treaties in the Appendix, amendments may be proposed by any Party or by the Committee of Ministers. These proposals for amendment shall only concern universal treaties concluded within the United Nations system dealing specifically with international terrorism and having entered into force. They shall be communicated by the Secretary General of the Council of Europe to the Parties.

2. After having consulted the non-member Parties, the Committee of Ministers may adopt a proposed amendment by the majority provided for in Article 20.d of the Statute of the Council of Europe. The amendment shall enter into force following the expiry of a period of one year after the date on which it has been forwarded to the Parties. During this period, any Party may notify the Secretary General of the Council of Europe of any objection to the entry into force of the amendment in respect of that Party.

3. If one third of the Parties notifies the Secretary General of the Council of Europe of an objection to the entry into force of the amendment, the amendment shall not enter into force.

4. If less than one third of the Parties notifies an objection, the amendment shall enter into force for those Parties which have not notified an objection.

5. Once an amendment has entered into force in accordance with paragraph 2 and a Party has notified an objection to it, this amendment shall come into force in respect of the Party concerned on the first day of the month following the date on which it notifies the Secretary General of the Council of Europe of its acceptance.

Article 29 – Settlement of disputes

In the event of a dispute between Parties as to the interpretation or application of this Convention, they shall seek a settlement of the dispute through negotiation or any other peaceful means of their choice, including

submission of the dispute to an arbitral tribunal whose decisions shall be binding upon the Parties to the dispute, or to the International Court of Justice, as agreed upon by the Parties concerned.

Article 30 – Consultation of the Parties

1. The Parties shall consult periodically with a view to:

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

   b. formulating its opinion on the conformity of a refusal to extradite which is referred to them in accordance with Article 20, paragraph 8;

   c. making proposals for the amendment of this Convention in accordance with Article 27;

   d. formulating their opinion on any proposal for the amendment of this Convention which is referred to them in accordance with Article 27, paragraph 3;

   e. expressing an opinion on any question concerning the application of this Convention and facilitating the exchange of information on significant legal, policy or technological developments.

2. The Consultation of the Parties shall be convened by the Secretary General of the Council of Europe whenever he finds it necessary and in any case when a majority of the Parties or the Committee of Ministers request its convocation.

3. The Parties shall be assisted by the Secretariat of the Council of Europe in carrying out their functions pursuant to this article.

Article 31 – Denunciation

1. Any Party may, at any time, denounce this Convention 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.

Article 32 – Notification

The Secretary General of the Council of Europe shall notify the member States of the Council of Europe, the European Community, the non-member States which have participated in the elaboration of this Convention as well as any State which has acceded to, or has been invited to accede to, this Convention 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 Convention in accordance with Article 23;

   d. any declaration made under Article 1, paragraph 2, 22, paragraph 4, and 25;

   e. any other act, notification or communication relating to this Convention.

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

Done at Warsaw, this 16th day of May 2005, 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, to the European Community, to the non-member States which have participated in the elaboration of this Convention, and to any State invited to accede to it.

APPENDIX

1. Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970;

2. Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, concluded at Montreal on 23 September 1971;

3. Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, adopted in New York on 14 December 1973;

4. International Convention Against the Taking of Hostages, adopted in New York on 17 December 1979;

5. Convention on the Physical Protection of Nuclear Material, adopted in Vienna on 3 March 1980;

6. Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, done at Montreal on 24 February 1988;

7. Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, done at Rome on 10 March 1988;

8. Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, done at Rome on 10 March 1988;

9. International Convention for the Suppression of Terrorist Bombings, adopted in New York on 15 December 1997;

10. International Convention for the Suppression of the Financing of Terrorism, adopted in New York on 9 December 1999;

11. International Convention for the Suppression of Acts of Nuclear Terrorism, adopted in New York on 13 April 2005[1].

1. Amendment to the Appendix adopted by the Ministers' Deputies at their 1034th meeting (11 September 2008, item 10.1) and entered into force on 13 September 2009 in accordance with Article 28 of the Convention.

Council of Europe Convention
on the Prevention of Terrorism – CETS No. 196

Explanatory Report

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

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

INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

particularly in the context of the ongoing discussions relating to the preparation of new international instruments on terrorism.

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

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

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

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

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

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

GENERAL CONSIDERATIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

38. At the same time, in Article 21 safeguards are provided with respect to extradition and mutual legal assistance that make clear that this Convention does not derogate from important traditional grounds for refusal of co-operation under applicable treaties and laws; for example, refusal of extradition where the person will be subjected to torture or to inhuman or degrading treatment or punishment, or to the death penalty, or refusal of either extradition or mutual legal assistance where the person will be prosecuted for

political or other impermissible purposes. Where the person is not extradited for these or other reasons, the Party in which he or she is found has the obligation to submit the case for domestic prosecution pursuant to Article 18.

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

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

SPECIFIC COMMENTARIES ON THE ARTICLES OF THE CONVENTION

Preamble

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

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

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

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

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

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

Article 1 – Terminology

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

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

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

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

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

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

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

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

Article 2 – Purpose

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

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

Article 3 – National prevention policies

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Article 4 – International co-operation on prevention

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

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

Articles 5 to 7 – criminalisation provisions – common aspects

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

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

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

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

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

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

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

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

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

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

Article 5 – Public provocation to commit a terrorist offence

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

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

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

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

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

or interference with, the exercise of freedom of expression are admissible under the ECHR, while Article 15 of the ECHR provides for possible derogations in time of emergency.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Article 6 – Recruitment for terrorism

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

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

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

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

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

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

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

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

Article 7 – Training for terrorism

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

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

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

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

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

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

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

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

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

Article 8 – Irrelevance of the commission of a terrorist offence

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

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

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

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

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

Article 9 – Ancillary offences

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

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

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

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

132. Paragraph 1 requires Parties to establish as a criminal offence the participation as an accomplice in the commission of any of the offences under Articles 5 to 7. Liability for such complicity arises where the person who commits a crime established in the Convention is aided by another person who also intends that the crime be committed. For example, although public provocation to commit a terrorist offence through the

Internet requires the assistance of service providers as a conduit, a service provider that does not have criminal intent cannot incur liability under this provision.

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

Article 10 – Liability of legal entities

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

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

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

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

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

Article 11 – Sanctions and measures

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

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

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

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

Article 12 – Conditions and safeguards

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Article 14 – Jurisdiction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

173. Thus, in order to avoid duplication of effort, unnecessary inconvenience for witnesses, or competition among law enforcement officials of the Parties concerned, or to otherwise facilitate the efficiency and fairness of the proceedings, the affected Parties are to consult in order to determine the proper venue for prosecution. In some cases, it will be most effective for the Parties concerned to choose a single venue for prosecution; in others, it may be best for one Party to prosecute some participants, while one or more other Parties pursue others. Either result is permitted under this paragraph. Finally, the obligation to consult is not absolute, but is to take place "where appropriate." Thus, for example, if one of the Parties knows that consultation is not necessary (for example, it has received confirmation that the other Party is not planning to take action), or if a Party is of the view that consultation may impair its investigation or proceedings, it may delay or decline consultation.

Article 15 – Duty to investigate

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

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

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

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

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

Article 16 – Non application of the Convention

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

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

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

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

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

Article 17 – International co-operation in criminal matters

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

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

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

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

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

Article 18 – Extradite or prosecute

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

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

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

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

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

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

Article 19 – Extradition

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

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

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

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

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

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

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

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

Article 20 – Exclusion of the political exception clause

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Article 21 – Discrimination clause

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

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

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

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

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

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

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

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

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

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

232. As stated above, these grounds for refusal already exist independently of the Convention. For instance, the possibility of refusing extradition where there is a risk of the death penalty being carried out is provided

in Article 11 of the European Convention on Extradition, and Article 3 of the United Nations Convention against Torture governs the issue of non-extradition where there is a danger of torture. Nevertheless, like the GMT before it, the CODEXTER considered it necessary to state them explicitly, in order to stress the necessity to reconcile an efficient fight against terrorism with respect for fundamental rights, particularly in view of the opening of the Convention to non-member States.

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

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

Article 22 – Spontaneous information

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

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

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

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

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

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

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

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

Articles 23 to 32 – the final clauses

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

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

245. However, certain modifications of the standard model clauses or some new provisions require some explanation. It is noted in this context that the model clauses have been adopted as a non-binding set of

provisions. As the Introduction to the model clauses points out, "these model final clauses are only intended to facilitate the task of committees of experts and avoid textual divergences which would not have any real justification. The model is in no way binding and different clauses may be adapted to fit particular cases."

Article 23 – Signature and entry into force

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

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

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

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

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

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

Article 24 – Accession to the Convention

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

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

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

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

256. However, an express requirement that the Committee of Ministers consult with and obtain the unanimous consent of all Parties – not just member States of the Council of Europe – before inviting a non-member

State to accede to the Convention, has been inserted in paragraph 1. This new practice was established with the Cybercrime Convention which contains an identical provision (Article 37).

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

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

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

Article 25 – Territorial application

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

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

Article 26 – Effects of the Convention

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

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

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

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

266. Therefore, regarding general matters, such agreements or arrangements should in principle be applied by the Parties to this Convention. Regarding specific matters only dealt with by this Convention, the rule of

interpretation *lex specialis derogat legi generali* provides that the Parties should give precedence to the rules contained in the Convention and, where such specificity exists, this Convention, as *lex specialis*, should provide a rule of first resort over provisions in more general mutual assistance agreements.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Articles 27 and 28 – Amendment procedures

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

Article 27 – Amendments to the Convention

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

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

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

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

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

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

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

Article 28 – Revision of the Appendix

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

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

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

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

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

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

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

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

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

Article 29 – Settlement of disputes

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

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

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

Article 30 – Consultation of the Parties

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

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

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

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

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

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

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

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

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

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

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

Article 31 – Denunciation

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

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

Article 32 – Notification

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

Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism – CETS No. 217

Riga, 22.X.2015

The member States of the Council of Europe and the other Parties to the Council of Europe Convention on the Prevention of Terrorism (CETS No. 196), signatory to this Protocol,

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

Desiring to further strengthen the efforts to prevent and suppress terrorism in all its forms, both in Europe and globally, while respecting human rights and the rule of law;

Recalling human rights and fundamental freedoms enshrined, in particular, in the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5) and its protocols, as well as in the International Covenant on Civil and Political Rights;

Expressing their grave concern about the threat posed by persons travelling abroad for the purpose of committing, contributing to or participating in terrorist offences, or the providing or receiving of training for terrorism in the territory of another State;

Having regard in this respect to Resolution 2178 (2014) adopted by the Security Council of the United Nations at its 7272nd meeting on 24 September 2014, in particular paragraphs 4 to 6 thereof;

Considering it desirable to supplement the Council of Europe Convention on the Prevention of Terrorism in certain respects,

Have agreed as follows:

Article 1 – Purpose

The purpose of this Protocol is to supplement the provisions of the Council of Europe Convention on the Prevention of Terrorism, opened for signature in Warsaw on 16 May 2005 (hereinafter referred to as "the Convention") as regards the criminalisation of the acts described in Articles 2 to 6 of this Protocol, thereby enhancing the efforts of Parties in preventing terrorism and its negative effects on the full enjoyment of human rights, in particular the right to life, both by measures to be taken at national level and through international co-operation, with due regard to the existing applicable multilateral or bilateral treaties or agreements between the Parties.

Article 2 – Participating in an association or group for the purpose of terrorism

1. For the purpose of this Protocol, "participating in an association or group for the purpose of terrorism" means to participate in the activities of an association or group for the purpose of committing or contributing to the commission of one or more terrorist offences by the association or the group.

2. Each Party shall adopt such measures as may be necessary to establish "participating in an association or group for the purpose of terrorism", as defined in paragraph 1, when committed unlawfully and intentionally, as a criminal offence under its domestic law.

Article 3 – Receiving training for terrorism

1. For the purpose of this Protocol, "receiving training for terrorism" means to receive instruction, including obtaining knowledge or practical skills, from another person in the making or use of explosives, firearms or other weapons or noxious or hazardous substances, or in other specific methods or techniques, for the purpose of carrying out or contributing to the commission of a terrorist offence.

2. Each Party shall adopt such measures as may be necessary to establish "receiving training for terrorism", as defined in paragraph 1, when committed unlawfully and intentionally, as a criminal offence under its domestic law.

Article 4 – Travelling abroad for the purpose of terrorism

1. For the purpose of this Protocol, "travelling abroad for the purpose of terrorism" means travelling to a State, which is not that of the traveller's nationality or residence, for the purpose of the commission of, contribution to or participation in a terrorist offence, or the providing or receiving of training for terrorism.

2. Each Party shall adopt such measures as may be necessary to establish "travelling abroad for the purpose of terrorism", as defined in paragraph 1, from its territory or by its nationals, when committed unlawfully and intentionally, as a criminal offence under its domestic law. In doing so, each Party may establish conditions required by and in line with its constitutional principles.

3. Each Party shall also adopt such measures as may be necessary to establish as a criminal offence under, and in accordance with, its domestic law the attempt to commit an offence as set forth in this article.

Article 5 – Funding travelling abroad for the purpose of terrorism

1. For the purpose of this Protocol, "funding travelling abroad for the purpose of terrorism" means providing or collecting, by any means, directly or indirectly, funds fully or partially enabling any person to travel abroad for the purpose of terrorism, as defined in Article 4, paragraph 1, of this Protocol, knowing that the funds are fully or partially intended to be used for this purpose.

2. Each Party shall adopt such measures as may be necessary to establish the "funding of travelling abroad for the purpose of terrorism", as defined in paragraph 1, when committed unlawfully and intentionally, as a criminal offence under its domestic law.

Article 6 – Organising or otherwise facilitating travelling abroad for the purpose of terrorism

1. For the purpose of this Protocol, "organising or otherwise facilitating travelling abroad for the purpose of terrorism" means any act of organisation or facilitation that assists any person in travelling abroad for the purpose of terrorism, as defined in Article 4, paragraph 1, of this Protocol, knowing that the assistance thus rendered is for the purpose of terrorism.

2. Each Party shall adopt such measures as may be necessary to establish "organising or otherwise facilitating travelling abroad for the purpose of terrorism", as defined in paragraph 1, when committed unlawfully and intentionally, as a criminal offence under its domestic law.

Article 7 – Exchange of information

1. Without prejudice to Article 3, paragraph 2, sub-paragraph a, of the Convention and in accordance with its domestic law and existing international obligations, each Party shall take such measures as may be necessary in order to strengthen the timely exchange between Parties of any available relevant information

concerning persons travelling abroad for the purpose of terrorism, as defined in Article 4. For that purpose, each Party shall designate a point of contact available on a 24-hour, seven-days-a-week basis.

2. A Party may choose to designate an already existing point of contact under paragraph 1.

3. A Party's point of contact shall have the capacity to carry out communications with the point of contact of another Party on an expedited basis.

Article 8 – Conditions and safeguards

1. Each Party shall ensure that the implementation of this Protocol, including the establishment, implementation and application of the criminalisation under Articles 2 to 6, is carried out while respecting human rights obligations, in particular the right to freedom of movement, freedom of expression, freedom of association and freedom of religion, as set forth in, where applicable to that Party, the Convention for the Protection of Human Rights and Fundamental Freedoms, the International Covenant on Civil and Political Rights and other obligations under international law.

2. The establishment, implementation and application of the criminalisation under Articles 2 to 6 of this Protocol should furthermore be subject to the principle of proportionality, with respect to the legitimate aims pursued and to their necessity in a democratic society, and should exclude any form of arbitrariness or discriminatory or racist treatment.

Article 9 – Relation between this Protocol and the Convention

The words and expressions used in this Protocol shall be interpreted within the meaning of the Convention. As between the Parties, all the provisions of the Convention shall apply accordingly, with the exception of Article 9.

Article 10 – Signature and entry into force

1. This Protocol shall be open for signature by Signatories to 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 ratified, accepted or approved the Convention, or does so simultaneously. 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 sixth instrument of ratification, acceptance or approval, including at least four member States of the Council of Europe.

3. In respect of any Signatory which subsequently deposits its instrument of ratification, acceptance or approval, this 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 ratification, acceptance or approval.

Article 11 – Accession to the Protocol

1. After the entry into force of this Protocol, any State, which has acceded to the Convention, may also accede to this Protocol or do so simultaneously.

2. In respect of any State acceding to the Protocol under paragraph 1 above, 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 with the Secretary General of the Council of Europe.

Article 12 – Territorial application

1. Any State or the European Union 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 Party may, at any later time, 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 the 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 of the Council of Europe.

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 13 – Denunciation

1. Any Party may, at any time, 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 of the Council of Europe.

3. Denunciation of the Convention automatically entails denunciation of this Protocol.

Article 14 – Notifications

The Secretary General of the Council of Europe shall notify the member States of the Council of Europe, the European Union, the non-member States which have participated in the elaboration of this Protocol as well as any State which has acceded to, or has been invited to accede 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 10 and 11;

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 Riga, this 22nd day of October 2015, 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, to the European Union, to the non-member States which have participated in the elaboration of this Protocol, and to any State invited to accede to it.

Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism – CETS No. 217

Explanatory Report

The text of this Explanatory Report does not constitute an instrument providing an authoritative interpretation of the Additional Protocol, although it may be of such nature as to facilitate the application of the provisions contained therein.

INTRODUCTION

1. Many States in Europe and around the world are faced with a growing terrorist threat posed by individuals, who travel abroad for the purposes of terrorism. These individuals are often referred to as "foreign terrorist fighters".

2. On 24 September 2014, the Security Council of the United Nations, acting under Chapter VII of the Charter of the United Nations, unanimously adopted Resolution 2178 (2014) on "Threats to international peace and security caused by terrorist acts" (hereinafter UNSCR 2178).

3. In the Resolution, the Security Council called on member States of the United Nations to take a series of measures aimed at preventing and curbing the flow of foreign terrorist fighters to conflict zones. In particular, all States shall ensure that their domestic laws and regulations establish serious criminal offences sufficient to provide the ability to prosecute and to penalise in a manner duly reflecting the seriousness of the offence, those travelling abroad for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts, or the providing or receiving of terrorist training, as well as the wilful provision or collecting of funds for, and the wilful organisation or other facilitation of, such travels.

4. At the occasion of its 27th plenary meeting (November 2014), the Committee of Experts on Terrorism (CODEXTER), the steering committee of the Council of Europe responsible for the formulation of counter-terrorism policies, examined the issue of radicalisation and foreign terrorist fighters.

5. The Secretary General of the Council of Europe, who opened the debate of the Steering Committee, supported the CODEXTER's activities on these important issues and its proposal to submit to the Committee of Ministers draft terms of reference for a committee to be set up for the purpose of drafting an Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism (CETS No. 196) from 2005. The main objective of the Additional Protocol should be to supplement the aforesaid Convention with a series of provisions aimed at implementing the criminal law aspects of UNSCR 2178.

6. On 22 January 2015, the Committee of Ministers, at the proposal of the CODEXTER, adopted the terms of reference for the Committee on Foreign Terrorist Fighters and Related Issues (COD-CTE).

7. The COD-CTE, under the authority of the CODEXTER, was tasked with preparing an Additional Protocol supplementing the Council of Europe Convention on the Prevention of Terrorism (CETS No. 196). In particular, the COD-CTE, when preparing the Additional Protocol, should examine:

The criminalisation of the following acts when committed intentionally:

- being recruited, or attempting to be recruited, for terrorism;
- receiving training, or attempting to receive training, for terrorism;
- travelling, or attempting to travel, to a State other than the State of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts, or the providing or receiving of terrorist training;
- providing or collecting funds for such travels;
- organising and facilitating (other than "recruitment for terrorism") such travels;
- whether any other act relevant for the purpose of effectively combating the phenomenon of foreign terrorist fighters, in the light of UNSCR 2178, should be included in the draft Additional Protocol.

8. The COD-CTE held, in total, three meetings on 23-26 February, on 9-12 March and on 23-26 March 2015, respectively. After the last meeting, the outcome of the work of the COD-CTE was presented to the CODEXTER, which examined and adopted the draft Additional Protocol on 8-10 April 2015.

9. The CODEXTER submitted the draft Additional Protocol to the Committee of Ministers on 10 April 2015. The Parliamentary Assembly, at the invitation of the Committee of Ministers, adopted Opinion No. 289 on the draft Additional Protocol on 23 April 2015. The Committee of Ministers adopted the Additional Protocol to the Convention at its 125th Session in Brussels (Belgium) on 19 May 2015. At the same time, it took note of the present Explanatory Report to the Additional Protocol.

RELATIONSHIP BETWEEN THE PROTOCOL AND THE COUNCIL OF EUROPE CONVENTION ON THE PREVENTION OF TERRORISM

10. The Protocol is intended to supplement the Council of Europe Convention on the Prevention of Terrorism (hereinafter "the Convention") by adding some provisions on the criminalisation of a number of acts which are related to terrorist offences and a provision on the exchange of information. The offences set forth in the Protocol, like those in the Convention, are mainly of a preparatory nature in relation to terrorist acts.

11. The provisions of the Convention apply to the Protocol, with the exception of Article 9 of the Convention, and the provisions of the Protocol shall be interpreted within the meaning of the Convention. In the case of Article 8 of the Protocol (Conditions and safeguards), the drafters considered it necessary, for reasons of clarity and its importance in the context of the subject matter of the Protocol, to repeat the provision already contained in Article 12 of the Convention almost *verbatim* and with the addition of a reference to the right of freedom of movement.

12. Thus, for example, the provisions of the Convention on national prevention policies, international co-operation on prevention and international co-operation on criminal matters fully apply to the Protocol.

SPECIFIC COMMENTARIES ON THE PREAMBLE AND THE ARTICLES OF THE PROTOCOL THE PREAMBLE

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

14. The Preamble recalls the determination of the member States of the Council of Europe and the other Parties to the Council of Europe Convention on the Prevention of Terrorism to prevent and suppress terrorism, in Europe and globally.

15. It further refers to the grave concern raised by persons travelling abroad for the purpose of terrorism – the so-called foreign terrorist fighters – and the actions of the United Nations Security Council to counter the threat posed by foreign terrorist fighters.

16. The Preamble finally describes the specific purpose of the Protocol, namely to supplement the Council of Europe Convention on the Prevention of Terrorism with a series of provisions assisting Parties to the Protocol in the implementation of the criminal law obligations flowing from the United Nations Security Council Resolution 2178 (2014), while fully respecting the rule of law and human rights and fundamental freedoms, as these have been set forth in the European and global human rights instruments, such as the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child and the 1951 Convention and the 1967 Protocol relating to the Status of Refugees. The Council of Europe Convention on the Prevention of Terrorism recalls that all measures taken to prevent or suppress terrorist offences have to respect the rule of law and democratic values, human rights and fundamental freedoms as well as other provisions of international law, including, where applicable, international humanitarian law. It was noted that while there are possible restrictions to some of these rights provided by the aforesaid international human rights instruments, a number of rights, such as prohibition against the retrospective operation of criminal laws and freedom from torture and other cruel, inhuman or degrading treatment or punishment, are absolute and non-derogable.

17. Among these human rights and fundamental freedoms, particular mention should be made of the right to freedom of movement, freedom of expression, freedom of association and freedom of religion. Moreover, the reference to respect for the principle of "rule of law" underlines the fact that any measures taken by Parties must be in conformity with this principle.

18. Hence the Protocol contains a legally binding provision in Article 8 (Conditions and safeguards) concerning the protection of human rights and fundamental freedoms, both in respect of information exchange and as an integral part of the new criminalisation provisions.

Article 1 – Purpose

19. The article describes the purpose of the Protocol, which is to supplement the Convention with provisions obliging Parties to criminalise certain acts which are related to terrorist offences and to facilitate international co-operation through information exchange. It has to be borne in mind that no universal legal definition of "terrorism" and "terrorist offences" exist. The UNSCR 2178 also does not contain a definition of "terrorism". The terms of reference of the COD-CTE did not allow for the elaboration of definitions of a "terrorist offence" and "terrorism". The notions of "terrorist offence" and "terrorism" used in the Protocol are therefore the same as those used in the Convention, which refers to "any of the offences within the scope of and defined in the treaties listed in the Appendix" of the Convention.

20. In line with the Convention, the article also makes reference to the aim of enhancing the efforts of Parties in preventing terrorism and its negative impact on the enjoyment of basic human rights, in particular the right to life.

Article 2 to 6 – Criminalisation provisions – common aspects

21. Articles 2 to 6 provide the core provisions of the Protocol, which require Parties to ensure that criminal offences are in place sufficient to provide the ability to prosecute acts covered by the provisions of the Protocol, namely "Participating in an association or group for the purpose of terrorism" (Article 2), "Receiving training for terrorism" (Article 3), "Travelling abroad for the purpose of terrorism" (Article 4), "Funding travelling abroad for the purpose of terrorism" (Article 5) and "Organising or otherwise facilitating travelling abroad for the purpose of terrorism" (Article 6). The obligation to adopt, where necessary, criminal offences for certain conduct does not require the Parties to establish self-standing offences to the extent that under the relevant legal system these acts may be considered as preparatory acts to the commission of terrorist offences or are criminalised under other provisions, including those related to attempt.

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

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

24. The offences set forth in Articles 2 to 6 have several elements in common: they must be committed unlawfully and intentionally.

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

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

27. The Protocol, therefore, leaves unaffected conduct which is otherwise lawful under the domestic law of the Parties, such as conduct undertaken pursuant to lawful government authority.

28. Furthermore, the offences must be committed "intentionally" for criminal liability to apply. The drafters of the Protocol agreed that the exact meaning of "intentionally" in accordance with established practice of the Council of Europe in the drafting of legally binding criminal law instruments should be left to interpretation under domestic law. In addition to the general requirement that offences must be committed "intentionally", the offences in Articles 2 to 6 require a further subjective element, being either a terrorist purpose (as defined in Articles 2 to 4) or the knowledge about the terrorist purpose (as defined in Articles 5 and 6).

29. When transposing the Protocol into domestic law, Parties shall take into account that Articles 2 to 6 criminalise behaviour at a stage preceding the actual commission of a terrorist offence but already having the potential to lead to the commission of such acts. The conditions under which the conduct in question is criminalised need to be foreseeable with legal certainty.

30. When applying their domestic law in such cases, equal care should be taken by Parties to ensure that the right to a fair trial in all its aspects is respected. As always, the principle of the presumption of innocence should be respected, and the burden of proof lies with the State. This also implies special attention to the purpose/intent of a perpetrator to commit (contribute to, or participate in) a terrorist offence, which is an essential element of a criminal offence as defined by Articles 2-6 and should be proven in accordance with domestic law.

Article 2 – Participating in an association or group for the purpose of terrorism

31. The COD-CTE was tasked with examining the criminalisation of "being recruited, or attempting to be recruited, for terrorism". This has its origin in Article 6 of the Convention, criminalising the "active recruitment" of others, which as a starting point was intended to be mirrored in a provision on "passive recruitment" in the Protocol. During their deliberations, it became clear to the drafters of the Protocol that the criminalisation of a "passive" behaviour ("being recruited for terrorism") would create problems in some legal systems. Finding an appropriate definition of "being recruited for terrorism" which comprised a sufficiently "active" behaviour also posed certain problems. In the end, the drafters decided to criminalise behaviour closely related to that of "being recruited for terrorism", namely "participating in an association or group for the purpose of terrorism".

32. The criminal offence is defined in Article 2, paragraph 1, as "to participate in the activities of an association or group for the purpose of committing or contributing to the commission of one or more terrorist offences by the association or group".

33. These activities must have as their purpose the contribution to the commission of one or more terrorist offences by the association or group, or the commission of one or more such offences on behalf of the association or group. The criminalisation of the mere passive membership of a terrorist association or a group, or the membership of an inactive terrorist association or group, is thus not required under Article 2.

34. Furthermore, the offence must be committed intentionally and unlawfully.

35. Participation in the activities of an association or group for the purpose of terrorism may be the result of contacts established via the Internet, including social media, or through other IT-based platforms.

36. The drafters did not consider it necessary to criminalise the attempt or the aiding or abetting of this offence, cf. also Article 9 of the Protocol. Parties are however free to do so, if they consider it appropriate in their domestic legal systems.

37. Article 2 does not define the precise nature of the association or group, as the criminalisation depends on the commission of terrorist offences by the group regardless of its officially proclaimed activities. It should be noted that there is no internationally binding definition of a "terrorist association or group". For the purposes of paragraph 1, a Party may qualify or define the associations or groups within the meaning of this

provision, including by interpreting the terms "association or group" to mean "proscribed" (i.e. prohibited by law) organisations or groups in accordance with its domestic law.

Article 3 – Receiving training for terrorism

38. This provision of the Protocol is to a certain extent intended to mirror Article 7 of the Convention (Training for terrorism), by obliging Parties to criminalise the receiving of training enabling the recipient to carry out or contribute to the commission of terrorist offences. The wording and terminology used in Article 3 of the Protocol is therefore largely the same as that used in Article 7 of the Convention.

39. The Group of Parties to the Council of Europe Convention on the Prevention of Terrorism has in its assessment from 2014 of the implementation of Article 7 of the Convention pointed to the possibility of criminalising at international level the receiving of training for terrorism, taking into account the developing trends in terrorism and counter-terrorism since the drafting of the Convention in 2004-2005. The CODEXTER considered this suggestion by the Group of Parties at its 27th plenary meeting on 13-14 November 2014 and decided to include the criminalisation of the receiving of training for terrorism among the issues to be examined by COD-CTE. The criminalisation of this offence will provide the Parties with additional tools to tackle the threats resulting from potential perpetrators, including those ultimately acting alone, by offering the possibility to investigate and prosecute training activities having the potential to lead to the commission of terrorist offences.

40. The COD-CTE decided to include receiving of training for terrorism among the acts criminalised through the Protocol. The drafters noted that the receiving of training for terrorism may take place in person, e.g. by attending a training camp run by a terrorist association or group, or through various electronic media, including through the Internet. However, the mere fact of visiting websites containing information or receiving communications, which could be used for training for terrorism, is not enough to commit the crime of receiving training for terrorism under the Protocol. The perpetrator must normally take an active part in the training. An example would be the participation of the perpetrator in interactive training sessions via the Internet. Parties may choose to criminalise forms of "self-study" in their domestic law.

41. Furthermore, the purpose of the receiving of training for terrorism must be to carry out or contribute to the commission of a terrorist offence, cf. paragraph 1 of Article 3, and the perpetrator must have the intention to do so, as well as acting "unlawfully", cf. paragraph 2 of Article 3. The participation in otherwise lawful activities, such as taking a chemistry course at university, taking flying lessons or receiving military training provided by a State, may also be considered as unlawfully committing the criminal offence of receiving training for terrorism, if it can be demonstrated that the person receiving the training has the required criminal intent to use the training thus acquired to commit a terrorist offence.

42. The drafters did not consider it necessary to criminalise the attempt or the aiding or abetting of this offence, cf. also Article 9 of the Protocol. Parties are however free to do so, if they consider it appropriate in their domestic legal systems.

Article 4 – Travelling abroad for the purpose of terrorism

43. Article 4 of the Protocol is intended to provide the legal framework for facilitating the implementation at the regional European level of the obligations for member States contained in Operative Paragraph 6 (a) of UNSCR 2178 of 24 September 2014.

44. The aim of the provision is to oblige a Party to criminalise the act of travelling to a State other than that of the nationality or residence of the traveller from the territory of the Party in question, or by its nationals, if the purpose of that travel is to commit, contribute to or participate in terrorist offences, or to provide or receive training for terrorism as defined in Article 7 of the Convention and Article 3 of this Protocol. The travel to the State of destination may be direct or by transiting other States *en route*.

45. The drafters took due note of the fact that the right to freedom of movement is enshrined in Article 2 of Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms of the Council of Europe, as well as in Article 12 of the International Covenant on Civil and Political Rights of the United Nations. However, both of the aforesaid international human rights instruments allow for the right to freedom of movement to be restricted under certain conditions, including the protection of national security, and (as regards Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms) for the prevention of crime.

46. It was the view of the drafters of this Protocol, that the seriousness of the threat posed by foreign terrorist fighters warrants a robust response which, on the other hand, should be fully compatible with human rights and the rule of law.

47. In this context, it should be emphasised that Article 4 does not contain an obligation for Parties to introduce a blanket ban on, or criminalisation of, all travels to certain destinations. Neither does Article 4 oblige Parties to introduce administrative measures, such as the withdrawal of passports. Article 4 is only concerned with the criminalisation of the act of travelling under very particular conditions. That these conditions are met in a concrete case must be proven in accordance with the domestic law of a Party through evidence submitted to an independent court for scrutiny in accordance with the specific, applicable criminal procedures of the Party and the general principle of the rule of law.

48. In order for a Party to criminalise behaviour under Article 4 of the Protocol, two basic requirements must thus be fulfilled: firstly, the real purpose of the travel must be for the perpetrator to commit or participate in terrorist offences, or to receive or provide training for terrorism, in a State other than that of nationality or residence, cf. Article 4, paragraph 1; secondly, the perpetrator must commit the crime intentionally and unlawfully, cf. Article 4, paragraph 2. Such purpose and intention are essential elements of the criminal offence as defined by Article 4. They must be proven in accordance with the domestic law of a Party.

49. When elaborating this provision, the drafters opted to closely follow the scope of Operative Paragraph 6 (a) of UNSCR 2178, criminalising the act of travelling to a State other than that of nationality or residence of the traveller for the purpose of terrorism. The obligation to criminalise this act will in accordance with UNSCR 2178 only apply to travels undertaken from the territory of the Party, or by its nationals, cf. Article 4, paragraph 2. It follows that all individuals travelling to a State other than that of their nationality or residence from the territory of the Party in question will be covered by the obligation to criminalise the act of travelling abroad for the purpose of terrorism under the Protocol. In so far as nationals of the Party in question are concerned, the obligation to criminalise however covers all travels to a State other than the State of nationality or residence of the traveller, irrespective of the geographical location of the starting point of the travel.

50. The drafters considered it appropriate to allow Parties to establish conditions when adopting the measures mentioned in Article 4, paragraph 2, where such conditions are required by their constitutional principles. In establishing such conditions, the overall purpose of the offence in Article 4 needs to be taken into account, i.e. to implement Operative Paragraph 6 (a) of UNSCR 2178 in order to effectively prevent and deter those travelling with the intention to carry out terrorist offences or the intention to participate in activities having the potential for future terrorist acts to be committed (i.e. participation in terrorist training activities as defined in the Protocol and the Convention), and to have the necessary measures in place to be able to investigate and prosecute those traveling or attempting to travel. Conditions that Parties could contemplate for constitutional reasons when implementing Article 4, paragraph 2 of the Protocol include the further qualification of the destination of the travel for a terrorist purpose where this is justified to achieve the beforementioned objectives.

51. In some legal systems, the act of travelling for the purpose of terrorism could normally be criminalised as a preparatory act to the main terrorist offence, or – depending on the circumstances – as an attempt to commit a terrorist offence. However, having examined this issue, the drafters of the Protocol held that the wording of Operative Paragraph 6 (a) of UNSCR 2178, does not contain an obligation for States to criminalise the act of travelling "for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts, or the providing or receiving of terrorist training" as a separate criminal offence; nor does the wording of Operative Paragraph 6 (a) of UNSCR 2178 preclude States from treating this activity under their domestic laws as a preparatory act to a terrorist offence or an attempt to commit a terrorist offence.

52. Bearing in mind the differences in legal systems referred to in the previous paragraph, the Parties are free to choose the manner including the language in which Article 4 of the Protocol is transposed in their domestic legislations. The drafters decided to use language in line with the Convention itself as substitute for the formulation "the perpetration, planning, or preparation of, or participation in, terrorist acts, or the providing or receiving of terrorist training" contained in Operative Paragraph 6 (a) of UNSCR 2178. Thus, the word "commission" has been used instead of "perpetration", and "contribution" has been used to replace both "planning" and "preparation". The phrase "terrorist offences" is used instead of "terrorist acts". Finally, the phrase "terrorist training" has been replaced by "training for terrorism". It should be underlined that this slightly different wording of Article 4, paragraph 1, of the Protocol is not intended to add to, or subtract from, the meaning contained in the formulation used by the UN Security Council and cited above.

53. In the case of this offence, the drafters considered it necessary to criminalise attempt, cf. Article 4, paragraph 3. The offence of attempt must be established not only under but also in accordance with the domestic law of a Party. Parties may choose to criminalise the attempt to travel under existing provisions as a preparatory act or an attempt to the main terrorist offence. In so far as the mental elements required for attempt are furnished by domestic law, the notion of attempt may differ from Party to Party. However, the drafters decided not to criminalise the aiding or abetting of the offence. Parties are however free to do so, if they consider it appropriate in their domestic legal systems.

54. Finally, the drafters noted that Article 26, paragraphs 4 and 5 of the Convention apply accordingly to the Protocol. The activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by the provisions of this Protocol, neither are the activities undertaken by military forces of a Party in the exercise of their official duties, inasmuch as they are governed by other rules of international law.

Article 5 – Funding travelling abroad for the purpose of terrorism

55. The wording of Article 5, paragraph 1, is based on wording found in Operative Paragraph 6 (b) of UNSCR 2178 and in Article 2, paragraph 1, of the International Convention for the Suppression of the Financing of Terrorism of the United Nations of 1999.

56. Article 5 of the Protocol provides for the criminalisation of the act of funding "travelling abroad for the purpose of terrorism" as defined in Article 4, paragraph 1, of the Protocol. The criminal act is committed by "providing or collecting" funds fully or partially enabling any person to commit the crime of travelling abroad for the purpose of terrorism. The drafters noted that according to wording of the provision, the funds may come from a single source, e.g. as a loan or a gift which is provided to the traveller by a person or legal entity, or from various sources through some kind of collection organised by one or more persons or legal entities. The funds may be provided or collected "by any means, directly or indirectly". In addition to acting intentionally and unlawfully, cf. Article 5, paragraph 2, of the Protocol, the perpetrator must "know" that the funds are fully or partially intended to finance the travelling abroad for the purpose of terrorism, cf. Article 5, paragraph 1 *in fine*. As regards the definition of "funds", the drafters refer to the definition contained in Article 1, paragraph 1 of the International Convention for the Suppression of the Financing of Terrorism.

57. Article 5 of the Protocol shall be applied without prejudice to Article 2, paragraph 1, of the International Convention for the Suppression of the Financing of Terrorism.

58. The offence in Article 5 can be criminalised as a preparatory act or as aiding or abetting to the main offence.

59. The drafters did not consider it necessary to criminalise the attempt or the aiding or abetting of this offence, cf. also Article 9 of the Protocol. Parties are however free to do so, if they consider it appropriate in their domestic legal systems.

Article 6 – Organising or otherwise facilitating travelling abroad for the purpose of terrorism

60. The wording of Article 6 of the Protocol is based on Operative Paragraph 6 (c) of UNSCR 2178. It provides for the criminalisation any act of "organisation or facilitation" which assists a person who is committing the crime described in Article 4, paragraph 1, of the Protocol. The term "organisation" is self-explanatory and covers a variety of conducts related to practical arrangements connected with travelling, such as the purchase of tickets and the planning of itineraries. The term "facilitation" is used to cover any other conduct than those falling under "organisation" which assists the traveller in reaching his or her destination. As an example, the act of assisting the traveller in unlawfully crossing a border could be mentioned. In addition to acting intentionally and unlawfully, cf. Article 6, paragraph 2, of the Protocol, the perpetrator must "know" that the assistance is rendered for the purpose of terrorism.

61. The offence in Article 6 can be criminalised as a preparatory act or as aiding or abetting to the main offence.

62. The drafters did not consider it necessary to criminalise the attempt or the aiding or abetting of this offence, cf. also Article 9 of the Protocol. Parties are however free to do so, if they consider it appropriate in their domestic legal systems.

Article 7 – Exchange of information

63. This provision, which is, to some degree, inspired by Article 35 of the Budapest Convention on Cybercrime (ETS No. 185), takes as is basis the call by the Security Council of the United Nations for States "to intensify and accelerate the exchange of operational information regarding actions or movements of terrorists or terrorist networks, including foreign terrorist fighters, especially with their States of residence or nationality, through bilateral or multilateral mechanisms, in particular the United Nations" (cf. Operative Paragraph 3, of UNSCR 2178).

64. The 24/7 points of contact are conceived as a very light mechanism, essentially a list of contact points designated by the Parties to the Protocol, which is kept and updated by the Secretariat of the Council of Europe. The contact points are only intended for the exchange of police information between Parties concerning persons alleged to have committed the crime of travelling abroad for the purpose of terrorism, cf. Article 4. Unlike what applies to the aforementioned 24/7 network under the Budapest Convention on Cybercrime, the 24/7 points of contact are not intended to act as a communication channel for exchanging requests for mutual legal assistance, including spontaneous information and extradition. Co-operation on such matters is regulated in Articles 17, 19 and 22 of the Convention.

65. The wording "without prejudice to Article 3, paragraph 2, letter a, of the Convention" at the very beginning of Article 7, paragraph 1, is meant to exclude any effect of this latter provision on the national exchange of information provided for in Article 3, paragraph 2, letter a, of the Convention.

66. The provisions of sentences 1 and 2 of paragraph 1, Article 7, should be read in conjunction with each other. Both the operation of the exchange of information and the 24/7 points of contact shall be in accordance with the domestic legislation of Parties and international obligations. The notion of domestic legislation encompasses in some legal systems also regulations at a lower level. The respect of domestic legislation or international obligations may include the possibility for Parties to impose conditions on the use of the information. Parties, which are also Parties to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108), or other international instruments providing an equivalent protection, shall observe the rules governing the protection of personal data, as laid down in these instruments.

67. When designating a contact point, Parties may use already existing contact points or other relevant mechanisms for the purpose of Article 7 of the Protocol, and the actual operation of the points of contact is left to their discretion.

68. Parties must ensure that their designated contact points have the capacity to communicate with their counterparts on an expedited basis.

Article 8 – Conditions and safeguards

69. Even though the corresponding provision in the Convention, namely Article 12, would normally apply automatically to the Protocol, the drafters considered that there was a need to further strengthen the visibility of the human rights and the rule of law principles stated in that provision in the Protocol itself.

70. Hence it was decided to repeat the wording of Article 12 of the Convention *verbatim* in Article 8 of the Protocol, with the important addition of the right to freedom of movement, which the drafters considered essential in the context of the Protocol. For the comments on Article 8, reference is made to paragraphs 143 to 152 of the Explanatory Report to the Convention, reproduced hereafter.

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

72. This article requires Parties to ensure respect for human rights in establishing and applying the offences set forth in Articles 2 to 6.

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

74. These instruments include the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and its additional Protocols Nos. 1, 4, 6, 7, 12 and 13 (ETS Nos. 005, 009, 046, 114, 117, 177 and 187), in respect of European States that are Parties to them. Of particular relevance for this Protocol are Articles 6 and 7 of the ECHR which encompass, inter alia, the principle of legality covering the requirement of

non-retroactivity, precision, clarity and foreseeability in criminal law, as well as the presumption of innocence which requires that the burden of proof lies with the prosecution. This is particularly relevant for instance in relation to the element of "purpose" in the criminalisation under Articles 2 to 6.

75. They also include other applicable human rights instruments in respect of States in other regions of the world (for example, the 1969 American Convention on Human Rights and the 1981 African Charter on Human Rights and Peoples' Rights) which are Parties to these instruments, as well as the International Covenant on Civil and Political Rights (ICCPR) and other universal human rights instruments, including the Convention on the Rights of the Child which may be of particular relevance due to the young age of some persons traveling with terrorist purpose. In addition, similar protection is provided under the legislation of most States.

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

77. An additional safeguard is provided by paragraph 2, which requires that the establishment, implementation and application of the criminalisation under Articles 2 to 6 "be subject to the principle of proportionality, with respect to the legitimate aims pursued and to their necessity in a democratic society", while excluding "any form of arbitrariness or discriminatory or racist treatment".

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

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

Article 9 – Relation between this Protocol and the Convention

80. This article clarifies the relationship between the Protocol and the Convention.

81. This article ensures uniform interpretation of this Additional Protocol and the Convention by providing that the words and expressions used in the Protocol shall be interpreted within the meaning of the Convention.

82. This article further clarifies the relationship between the provisions of the Convention and those of this Additional Protocol, i.e. as between the Parties to this Protocol, the provisions of the Convention, with the exception of its Article 9, "Ancillary offences", shall apply to the extent that they are compatible with the provisions of this Additional Protocol, in accordance with the general principles and norms of international law.

83. The drafters have decided to specifically include the exception of Article 9 of the Convention, "Ancillary offences". Thus, for the Parties to the Protocol, it is expressly provided in Article 4, paragraph 3 of the Protocol that attempt shall apply to the offence defined in this article ("travelling abroad for the purpose of terrorism"). On the contrary, the drafters have decided to exclude the application of attempt from the other provisions of substantial criminal law provided in Articles 2, 3, 5 and 6 of the Protocol. Moreover, concerning the other ancillary offences set forth in Article 9 of the Convention (Participating as an accomplice in an offence; Organising or directing others to commit an offence; Contributing to the commission of one or more offences covered by the Convention by a group of persons acting with a common purpose), the drafters considered that it was not appropriate to extend their application to the provisions of substantial criminal law set out in the Protocol.

84. However, this should not prevent Parties from introducing specific provisions in their national law should they wish to do so.

Article 10 to 14 – The Final Clauses

85. With some exceptions, the provisions contained in Articles 10 to 14 of the Additional Protocol are, for the most part, based both on the "Model final clauses for conventions and agreements concluded within the Council of Europe" (http://conventions.coe.int/Treaty/EN/Treaties/Html/ClausesFinales.htm), which were approved by the Committee of Ministers at the 315th meeting of their Deputies in February 1980, and the final clauses of the Council of Europe Convention on the Prevention of Terrorism (CETS No. 196).

86. As most of Articles 10 to 14 either use the standard language of the model clauses or are based on long-standing treaty-making practice at the Council of Europe, they do not call for specific comments.

Article 10 – Signature and entry into force

87. This article provides the conditions for signature and entry into force of the Protocol.

88. It establishes that this Protocol shall be open for signature by Signatories to the Convention and that a Signatory may not ratify, accept or approve this Protocol unless it has previously ratified, accepted or approved the Convention, or does so simultaneously.

89. Since the provisions of the mother Convention apply to the Protocol, it is worth referring to its Article 23, paragraph 1, which provides for the possibility of the Convention being signed by member States of the Council of Europe, by the European Union and by the non-member States which have participated in its elaboration. Therefore, the same Signatories are also intended to be Signatories to the Additional Protocol.

90. This Protocol will enter into force three months after six Parties to the Convention have expressed their consent to be bound by it, including at least four member States of the Council of Europe.

91. Concerning any Signatory which subsequently deposits its instrument of ratification, acceptance or approval, paragraph 3 sets out the same period of three months after the date of the deposit for the Protocol to enter into force in its regard.

Article 11 – Accession to the Protocol

92. Taking into account the fact that the provisions of the mother Convention apply to the Additional Protocol, the procedure governing the accession to the Convention is intended to regulate the accession to the Additional Protocol. In this respect, it is worth referring to the Article 24 of the Convention, and to paragraphs 253 to 258 of its Explanatory Report, which describe the procedure.

93. Paragraph 2 defines the date of entry into force of the Protocol for the acceding State using the same terms as Article 10, paragraph 2.

Article 12 – Territorial application

94. The provisions contained in this article reproduce entirely the wording used in the Council of Europe Convention on the Prevention of Terrorism (Article 25).

Article 13 – Denunciation

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

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

97. Pursuant to paragraph 3 of this article, denunciation of the Convention automatically entails denunciation of this Protocol.

Article 14 – Notifications

98. This provision, which is a standard final clause in Council of Europe treaties, concerns notifications to Parties. The Secretary General must inform Parties also of any other acts, notifications and communications, within the meaning of Article 77 of the Vienna Convention on the Law of Treaties, relating to the Protocol and not expressly provided for by this article.

Convention on insider trading[1] – ETS No. 130

Strasbourg, 20.IV.1989

Preamble

The member States of the Council of Europe, signatories hereto,

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

Considering that certain financial transactions in securities traded on stock exchanges are carried out by persons seeking to avoid losses or to make profits by using the privileged information available to them, thus undermining equality of opportunity as between investors and the credibility of the market;

Considering that such behaviour is also proving dangerous for the economies of the member States concerned and in particular for the proper functioning of the stock markets;

Considering that, because of the internationalisation of markets and the ease of present-day communications, operations of this nature are carried out sometimes on the market of a State by persons not resident in that State or acting through persons not resident there;

Considering that efforts to counter such practices which are already being made on the domestic level in many member States make it essential to set up specific machinery to deal with these situations and co-ordinate endeavours at international level,

Have agreed as follows:

CHAPTER I - DEFINITIONS

Article 1

1. For the purposes of this Convention an irregular operation of insider trading means an irregular operation carried out by a person:

   a. who is the president or chairman, or a member of a board of directors or other administrative or supervisory organ, or is the authorised agent or in the employment of an issuer of securities, and has effected or caused to be effected an operation on an organised stock market knowingly using information not yet disclosed to the public, the possession of which he obtained by reason of his occupation and the disclosure of which was likely to have a significant influence on the stock market, with a view to securing an advantage for himself or a third party;

   b. who has entered into the transactions described above knowingly using not yet disclosed information which he obtained in the performance of his duties or in the course of his occupation;

1. *Text amended according to the provisions of Protocol (ETS No. 133), which entered into force on 1 October 1991*

c. who has entered into the transactions described above knowingly using not yet disclosed information communicated to him by one of the persons mentioned in a or b above.

2. For the purposes of applying this Convention:

a. the expression "organised stock market" signifies stock markets subject to regulations established by authorities recognised by the government for this purpose;

b. the term "stock" signifies transferable securities issued according to the national legislation of each Party by business firms or companies or other issuers, where such securities may be bought and sold on a market organised in accordance with the provisions of paragraph a above, as well as other transferable securities admitted on that market in conformity with the national rules applicable to it;

c. the expression "operation" signifies any act on an organised stock market which gives or may give entitlement to stock as provided for in paragraph b above.

CHAPTER II - EXCHANGE OF INFORMATION

Article 2

The Parties undertake, in accordance with the provisions of this chapter, to provide each other with the greatest possible measure of mutual assistance in the exchange of information relating to matters establishing or giving rise to the belief that irregular operations of insider trading have been carried out.

Article 3

Each Party may, by a declaration to the Secretary General of the Council of Europe, undertake to provide other Parties, subject to reciprocity, with the greatest possible measure of mutual assistance in the exchange of information necessary for the surveillance of operations carried out in the organised stock markets which could adversely affect equal access to information for all users of the stock market or the quality of the information supplied to investors in order to ensure honest dealing.

Article 4

1. Each Party shall designate one or more authorities actually responsible for submitting any request for assistance, and for receiving and taking action on requests for assistance from the corresponding authorities designated by each Party.

2. Each Party shall, in a declaration addressed to the Secretary General of the Council of Europe, indicate the name and address of the authority or authorities designated in accordance with the provisions of this article and any modification thereto.

3. The Secretary General shall notify these declarations to the other Parties.

Article 5

1. Reasons shall be given for making a request for assistance.

2. The request shall contain a description of the facts establishing or giving rise to the belief that irregular operations of insider trading have been carried out or, if assistance is requested according to the rules laid down by Parties under Article 3, reference to the principles mentioned in that article which have been violated.

3. The request shall contain reference to the provisions by virtue of which the operations are irregular in the State of the requesting authority.

4. The request shall be in or translated into one of the official languages of the State of the requested authority, or in one of the official languages of the Council of Europe.

5. The request shall specify:

a. the requesting authority and the requested authority;

b. the information sought by the requesting authority, the persons or bodies which may be in possession of it, or the place where it may be available;

c. the reasons for and the purpose of the requesting authority's application, and the use it will make of the information under its national law; and

d. how soon a response is required and, in cases of urgency, the reasons therefor.

Article 6

1. The execution of requests for assistance by the requested authority is carried out in accordance with the rules and procedures laid down by the law of the Party in which that authority operates.

2. When the search for information so requires, and in the absence of specific provisions, the rules laid down by national law for obtaining evidence shall be capable of being applied by the requested authority or on its behalf. Sanctions laid down for breaches of professional secrecy shall not apply in regard to the information provided compulsorily in the course of enquiries.

3. These provisions shall not prejudice the rights accorded to the defendant by national law.

4. Save to the extent strictly necessary to carry out the request, the requested authority and the persons seeking the information requested are bound to maintain secrecy about the request, the component parts of the request and the information so gathered.

5. However, at the time of the designation of the authority, provided for by Article 4, each Party shall declare the derogations to the principle set forth in paragraph 4 of this article possibly imposed or permitted by national law:

- either to guarantee free access of citizens to the files of the administration;
- or when the designated authority is obliged to denounce to other administrative or judicial authorities information communicated or gathered within the framework of the request;
- or, provided the requesting authority has been informed, to investigate violations of the law of the requested Party or to secure compliance with such law.

Article 7

1. The requesting authority may not use the information supplied for purposes other than those set out in its request.

2. The requested authority may refuse to supply the requested information or subsequently oppose its use for purposes set out in the request or fix certain conditions unless:

a. the facts are within the scope of Article 1 and

b. the purposes set out are in conformity with the aims defined in Article 2 and

c. the facts constitute in each State an irregularity as regards the rules of both States.

3. When the requesting authority wishes to use the information supplied for purposes other than those set out in the initial request it must inform in advance the requested authority who may refuse to consent to such use unless the conditions in paragraph 2 above are fulfilled.

4. The information supplied may be used before a criminal court only in cases where it could have been obtained by application of chapter III.

5. No authority of the requesting Party may use or transmit this information for tax, customs or currency purposes unless otherwise provided in a declaration by the requested Party.

Article 8

The requested authority may refuse to give effect to the request for assistance or to supply the information obtained, if:

a. the request is not in conformity with this Convention;

b. the communication of the information obtained might constitute an infringement of the sovereignty, security, essential interests or public policy (*ordre public*) of the requested Party;

c. the irregularities to which the requested information relates or the sanctions provided for such irregularities are time-barred under the law of the requesting or of the requested Party;

d. the requested information relates to matters which arose before the Convention entered into force for the requesting or the requested Party;

e. proceedings have already been commenced before the authorities in the requested Party in respect of the same matters and against the same persons, or if they have been finally adjudicated upon in respect of the same matters by the competent authorities of the requested Party;

f. the authorities of the requested Party have decided not to commence proceedings or to stop proceedings in respect of the same matters.

Article 9

The requested authority shall, in so far as it is able to do so, supply the information requested by the requesting authority in the form desired by that authority or in the form currently in use between them.

Article 10

1. Any Party which has ascertained that there has been a substantial breach by the requesting authority of the confidentiality of the information provided may suspend the application of chapter II of this Convention with respect to the Party which has failed to discharge its obligation and shall notify the Secretary General of the Council of Europe of its decision. The Party may lift the suspension at any time and shall notify the Secretary General accordingly.

2. Any Party which intends to make use of the procedure provided for in paragraph 1 must first give an opportunity to the Party concerned to make observations on the alleged breach of confidentiality.

3. The Secretary General of the Council of Europe shall inform the member States and the Parties to this Convention of any use made of the procedure provided for in paragraph 1.

Article 11

Parties may agree that, notwithstanding the provisions of paragraph 4 of Article 5, requests for assistance and replies thereto may be drawn up in the language of their choice and made according to simplified procedures or by employing means of communication other than the exchange of written correspondence.

CHAPTER III - MUTUAL ASSISTANCE IN CRIMINAL MATTERS

Article 12

1. The Parties undertake to afford each other the widest measure of mutual assistance in criminal matters relating to offences involving insider trading.

2. Nothing in this Convention shall be construed as restricting or prejudicing the application of the European Convention on Mutual Assistance in Criminal Matters and the Additional Protocol thereto among States party to these instruments or of specific agreements or arrangements on mutual assistance in criminal matters in force between Parties.

CHAPTER IV - FINAL PROVISIONS

Article 13

This Convention shall be open for signature by the member States of the Council of Europe. 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.

Article 14

1. This Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date on which three member States of the Council of Europe have expressed their consent to be bound by the Convention in accordance with the provisions of Article 13.

2. In respect of any member State which subsequently expresses its consent to be bound by it, the Convention 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 ratification, acceptance or approval.

Article 15

1. After the entry into force of this Convention, the Committee of Ministers of the Council of Europe may invite any State not a member of the Council of Europe or any international intergovernmental organisation to accede to this Convention, by a decision taken by the majority provided for in Article 20.d of the Statute of the Council of Europe and by the unanimous vote of the representatives of the Contracting States entitled to sit on the Committee.

2. In respect of any acceding State or international intergovernmental organisation, the Convention 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 of the instrument of accession with the Secretary General of the Council of Europe.

Article 16

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 Convention shall apply.

2. Any State may, at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Convention to any other territory specified in the declaration. In respect of such territory the Convention 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 16bis[2]

In their mutual relations, Parties which are members of the European Economic Community shall apply Community rules and shall therefore not apply the rules arising from this Convention except in so far as there is no Community rule governing the particular subject concerned."

Article 17

Without prejudice to the application of Article 6, no reservation may be made to the Convention.

Article 18

1. After the entry into force of the present Convention, a group of experts representing the Parties to the Convention and the member States of the Council of Europe not being Parties to the Convention shall be convened at the request of at least two Parties or on the initiative of the Secretary General of the Council of Europe.

2. This group shall have the task of preparing an evaluation of the application of the Convention and making appropriate suggestions.

Article 19

Difficulties with regard to the interpretation and application of this Convention shall be settled by direct consultation between the competent administrative authorities and, if the need arises, through diplomatic channels.

Article 20

1. Any Party may at any time denounce this Convention 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; denunciation shall not prejudice requests already in progress at the time of denunciation.

2. Article added by the Protocol to the Convention on Insider Trading (ETS No. 133), which entered into force on 1 October 1991.

Article 21

The Secretary General of the Council of Europe shall notify the member States of the Council of Europe and any Party to this Convention 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 Convention in accordance with Articles 14, 15 and 16;

d. any other act, notification or communication relating to this Convention.

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

Done at Strasbourg, the 20th April 1989 in English and 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 any State and any international intergovernmental organisation invited to accede to this Convention.

Convention on insider trading[1] – ETS No. 130

Explanatory Report

I. The Convention on Insider Trading was drawn up within the Council of Europe by a committee of experts subordinate to the European Committee on Legal Co-operation (CDCJ).

The Convention was opened for signature by the member States of the Council of Europe on 20 April 1989.

After the opening for signature of the Convention and on the request of the Council of the European Communities, the Committee of Ministers of the Council of Europe adopted an additional Protocol. Under this Protocol, Article 16 bis is inserted in the Convention, containing a provision called «disconnection clause» as regards the Parties to the Convention who are also members of the European Economic Community. This additional Protocol was opened for signature by the member States of the Council of Europe on 11 September 1989.

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

INTRODUCTION

Public opinion is becoming more and more aware of the recent phenomenon of insider trading which often embitters business relationships. Moreover, insider trading presents a challenge for the legislature.

In order to take stock of the existing national regulations and legislation and to show the deficiencies in international law, a colloquy was organised in Milan from 16 to 18 November 1983 by the Council of Europe, the University of Bologna and the Commercial University Bocconi of Milan, under the chairmanship of Professor Joseph Voyame, Director of the Swiss Federal Office of Justice.

Following the conclusions of this colloquy, the Committee of Ministers of the Council of Europe set up a committee of experts, under the chairmanship of Professor Lutz Krauskopf, Vice-Director of the Swiss Federal Office of Justice, and the vice-chairmanship of Mr André Dupont-Jubien, Head of the Legal Service of the COB in Paris. The committee held four meetings from June 1985 to June 1987 and submitted a draft convention on insider trading to the European Committee on Legal Co-operation (CDCJ). The committee also benefited from the opinion given by the Committee of experts on the operation of European conventions in the penal field (PC-OC), one of the sub-committees of the European Committee on Crime Problems (CDPC). After examination, the CDCJ adopted the draft convention on 6 May 1988 and sent it to the Committee of Ministers which adopted it during the 423rd meeting of the Ministers' Deputies in January 1989 and decided to open it for signature on 20 April 1989.

The observers from Finland and the United States of America and from the Commission of the European Communities also participated in the work of the committee which prepared the draft convention and explanatory report.

1. *Text amended according to the provisions of Protocol (ETS No. 133), which entered into force on 1 October 1991*

Organised stock markets are based primarily on the principles of equal access to information for all market users and the quality of the information provided to investors. Respect for those principles is necessary to ensure fairness in dealings.

This Convention is intended to alleviate the difficulties which have emerged at international level in obtaining information and facts and punishing persons carrying out operations on organised stock market securities which are at variance with those principles.

On the one hand, such operations are carried out sometimes by persons operating, directly or indirectly, in the market of a country where they are not resident. On the other hand, the existing instruments for international co-operation are not adapted to obtaining information about such facts and the punishment of offenders.

In order to counter such behaviour effectively, therefore, it is necessary to remove the obstacles which prevent national authorities from discovering such operations and dealing with them in accordance with the provisions of the applicable national legislation.

One of the most important obstacles is ignorance of the identity and status of the persons actually involved who act through persons resident outside the country concerned.

The offence of insider trading is not characterised by the nature of the transaction. The unlawful transaction is identical to a regular transaction. It is because the person who carries out the operation possesses, by virtue of his position or by reason of circumstances, information not known to the public that the operation which he carries out or causes to be carried out becomes unlawful.

The essential aim of the Convention is therefore not to organise international mutual assistance in the institution of proceedings to deal with these effects; this is especially the aim of the European Convention on Mutual Assistance in Criminal Matters (European Treaty Series, No. 30). On the other hand, the present Convention is intended to create mutual assistance by exchanges of information between Contracting Parties, to enable supervision of securities markets to be carried out effectively and to establish whether persons carrying out certain financial transactions on the stock markets are or are not insiders, which would reveal whether their transactions were fraudulent or proper.

The Convention does not require Parties to set up control or supervisory bodies for the stock markets. However, co-operation by the exchange of information assumes the existence at national level of an adequate structure both in the field of legislation and in the field of institutions capable of ensuring the collection, the examination and the transmission of information. Without such a structure, it would be difficult for states to ensure an effective implementation of the Convention with the necessary speed and discretion.

The machinery of the Convention has intentionally been made extremely flexible. It is possible that some states do not wish to take part or do not feel the need, for the moment, to participate; such an attitude on the part of certain states should not prevent others from fully applying the Convention in their mutual relations. For this reason, it has been provided that the Convention shall enter into force as soon as a very limited number of states have ratified it.

Account was taken, when drafting the Convention, of the fact that the exchanges of information between the Parties would have to deal with technical developments. In addition, the evolution of the domestic legislation of the Parties may lead to a review of the procedures laid down in the Convention which constitute only what is. possible in the present state of these laws.

Chapter I gives definitions of certain terms used in the Convention.

Chapter II introduces a system of mutual collaboration between the authorities of the various Parties, such as to ensure the necessary clarity whenever a stock market transaction appears suspect in relation to the principles mentioned above. This collaboration preserves the legitimate rights of the persons involved and the superior interests of the Parties concerned, respecting the requirements of discretion and confidentiality which are mandatory in such circumstances.

Chapter III enables this international co-operation to extend, if appropriate, to any criminal proceedings. To that end, Parties in which such proceedings are brought can obtain the assistance of the authorities in the other Parties, under the conditions provided for in the European Convention on Mutual Assistance in Criminal Matters. That mutual assistance will be provided if the conditions defined in the present Convention are satisfied. Those conditions constitute a common definition of «insider trading» in respect of which the Parties believe they need to co-operate in order to combat such improper dealings.

Chapter IV contains the final clauses which appear in most Council of Europe conventions and agreements.

COMMENTARY ON THE PROVISIONS OF THE CONVENTION AND ITS PROTOCOL

CHAPTER I – DEFINITIONS

Article 1

Article 1 defines the meaning and scope of certain terms used in the Convention which relate to the operations effected.

The first paragraph defines the irregular financial operation effected by an «insider». It is the operation effected by a person who has had direct knowledge of the privileged information through his personal position. The different cases are listed in sub-paragraph a. It also concerns an operation carried out by another person who, by reason of his occupation or profession cannot be unaware of the confidential nature of the information which he has acquired which excludes purely accidental circumstances (for example, a taxi-driver), sub-paragraph b. In addition, sub-paragraph c includes persons who, in effecting such operations, make use of confidential information received from one of the persons mentioned under sub-paragraph a or b.

The term «president or chairman» must be taken as meaning not only the holders of these offices but also the vice-president or vicechairman, and the term «member of a board of directors» includes alternate members. «Member of a (...) supervisory organ» is to be interpreted as including internal or external auditors and their alternates.

The term «market» mentioned in sub-paragraph a covers not only the price, but also the fluctuation of the negotiated quantities and the general position and movement of the stock and other elements such as negotiable options on securities or indices.

Finally, insider dealing involves operations which upset the market itself and are not limited to the «profit» element but cover every operation which produces or attempts to produce an advantage.

Paragraph 2 provides some additional definitions:

- he term «stock» signifies transferable securities issued or admitted on the organised stock market in accordance with the law applicable to that market (which may include, for instance, certain non-paper securities);
- he term «other issuer» includes, as the case may be, the state or the public authorities.

CHAPTER II – EXCHANGE OF INFORMATION

Article 2

Article 2 contains the undertaking of the Contracting Parties to provide each other with the greatest possible measure of mutual assistance when facts might constitute proof or simply give rise to the belief that an irregular trading operation has been effected by an insider. This article does not establish supervision of the markets with a systematic exchange of information, nor does it oblige the Contracting States to set up a supervisory commission such as COB or CONSOB. The assistance is limited to operations effected by insiders.

Article 3

This article is intended to enable Contracting Parties to extend assistance by the exchange of information covering not only insider trading, but all operations effected which are likely to affect equal access to information for all users of the stock market or if the quality of the information given to potential investors is not adequate to ensure honest dealing. In that way, the States who so desire may extend their co-operation to other operations on the organised stock market, as for example in the case of price manipulation or in the case of non-respect of the duty of information.

This exchange of information is optional; by a simple declaration to the Secretary General of the Council of Europe a State can undertake to provide information, subject, however, to reciprocity.

The reciprocity is necessarily established between Parties who have made similar declarations to the Secretary General of the Council of Europe. This does not exclude these Parties co-operating with other States in accordance with Article 3 without such a formal declaration.

Article 4

The Parties may designate one or several authorities either according to their federal structures or according to the organisation of their services. These authorities may be either administrative or judicial bodies. However, the Parties have the obligation to designate at least one authority.

It is desirable that the authorities entrusted with the execution of the request should communicate directly between themselves.

When designating these authorities, the necessary details should be given so that the other Contracting Parties know which is the authority directly responsible for acting upon the requests. For this purpose, each Party shall make a declaration to the Secretary General of the Council of Europe who shall notify it to the other Parties.

Article 5

Article 5 indicates what explanations must accompany a request for assistance.

According to paragraph 1, a request for assistance must explain the reasons for the request.

According to paragraph 2, the request must include a description of the facts giving rise to the suspicion that irregular operations of insider dealing may have been committed or, in a case failing within Article 3, the facts which establish or give rise to the belief that the principles of equal access to information or honest dealings have not been respected. In order to avoid difficulties in carrying it out, the request must be sufficiently detailed.

According to paragraph 3, the request must specify what provisions have not been respected and therefore warrant sanctions.

Paragraph 4 states that an official language of the requested authority or one of the official languages of the Council of Europe must be used; this limits the need to use the translation services which might affect not only the speed of the exchange of information, but also confidentiality. Derogations from this provision are possible under Article 11, simply by arrangement between two authorities.

Paragraph 5 lists the details to be supplied with the request for assistance. Here too, if by its nature the enquiry requires other details, they must obviously be included with the request; in other words, the list given in paragraph 5 is not exhaustive.

Article 6

Article 6 concerns the action to be taken upon the request and sets forth the undertakings entered into by the Parties.

Paragraph 1 indicates that the procedures to be followed by the requested authority in complying with the request are those laid down in the national legislation governing that authority.

According to paragraph 2, the requested authority must, if necessary, be able to implement or to make provision for the implementation of the procedure laid down by national law for obtaining evidence. Within these procedures, the sanctions laid down by national law for breaches of confidentiality shall not apply to the obtaining from a witness, in the course of an enquiry, of information which he may not refuse.

The above-mentioned provisions shall in no case affect the national law also applying to the protection of the rights of defence of persons, physical or legal, involved in an insider trading operation, or concerned by the request.

According to paragraph 4, secrecy must be maintained about any request and any assistance provided. It must be remembered that any information divulged, if only concerning the request itself, might be prejudicial to the reputation of the person or body concerned. The rule of secrecy is intended to ensure that the procedures instituted by the Convention operate smoothly.

However, in certain States, citizens must have access to the files of the administration, and in this case secrecy cannot be guaranteed. In addition, some civil servants and some departments are under an obligation to inform the competent authority of any action liable to prosecution. In this case, the Parties concerned must declare this when designating the authorities responsible for dealing with requests (see Article 4). This declaration will make it possible to evade the obligation of secrecy, provided, however, that this exception derives

from the national legislation of the State making the declaration. In such a situation, the other Parties could invoke reciprocity.

Therefore, if the requesting Party has not been given the assurance that the requested authority will keep secret information received during the enquiry which it has carried out, the requesting Party will be entitled to consider itself to be no longer bound by the guarantee of secrecy with regard to this other Party when it has itself received a request in any other enquiry from this other Party.

The provisions of this paragraph, in contrast to Article 7 which deals with the requesting authority, concern the derogation of the confidentiality rule imposed upon the requested authority who might discover a violation of its penal law committed in its territory. Therefore, the one article does not neutralise the other.

Article 7

This article deals with the obligations of the requesting authority.

Paragraph 1 meets the principle of specificity: the information obtained through the request for assistance cannot be used for purposes other than those mentioned in the request.

Paragraph 2 indicates that the requested Party may, as a general rule, refuse to supply the information requested or subsequently, for new reasons not known before, oppose its use for purposes set out in the request or fix certain conditions. However, this possibility cannot be used in any case where the matters which are the subject of the request and which clearly fall within the scope of the Convention are considered an irregularity by both Parties. It is not required that these matters should be subject to identical sanctions in the two countries. It is sufficient that they constitute, for those countries, a criminal offence or an infraction subject to administrative, disciplinary or civil sanctions but not infractions for which damages are the only civil sanctions.

Certain delegations were of the opinion that this possibility of objecting to the use of the information furnished, even if the conditions for refusal laid down in Article 8 were not met, could form an obstacle to the good implementation of assistance. However, they considered that this provision was an acceptable point of departure in the present state of legislation in the various member states.

Paragraph 3 indicates clearly that the requesting Party can use the information for purposes other than those mentioned in the initial request only after informing the requested authority of this and that the requested authority can object or impose special conditions in the circumstances described above.

Paragraph 4 concerns the problem of using information obtained through this administrative co-operation before the criminal courts, where *actes internationaux d'instruction* are normally regulated by the procedures of the European Convention on Mutual Assistance in Criminal Matters. The committee of experts considered that information obtained by administrative means may be used before the criminal courts where this information could have been obtained within the framework of Chapter Ill of this Convention. Therefore, where the requesting authority wishes to use the information for a criminal prosecution, it should be sure that the information would have been provided by the requested authority under Article 12, paragraph 1.

By virtue of paragraph 5 of this article, both the use and transmission of information for fiscal, customs or exchange control purposes are prohibited, unless the requested Party has made a declaration allowing the use of information to be extended to such purposes.

Article 8

Article 8 lists the cases in which the requested authority may refuse to accede to the request for assistance, namely:

- when the request is not in conformity with the substantive or procedural provisions of the Convention;
- when it may be harmful to the sovereignty, security, essential interests or public policy of the requested Party to do so (the interpretation of these expressions, particularly «essential interests», being left to the discretion of the requested authorities and reasons being given for refusal on any of these grounds);
- when the irregularities are time-barred in the requesting or requested Party;
- when the matters arose before the Convention entered into force for the requesting or the requested Party;

- when the requested Party has already instituted proceedings against a person or body in respect of the facts which are the subject of the request for information; or
- when the requested Party has already pronounced or has, for example, decided not to start proceedings or to stop proceedings already begun.

Article 9

Article 9 states that the requesting Party must indicate how it wishes to receive the information; the requested Party must comply in so far as it is able to do so, and to this effect it shall use the technical means at its disposal.

Article 10

Article 10, paragraph 1, guarantees respect for the confidentiality provided for in Article 6, by permitting the requested State, having ascertained that confidentiality has been breached by the requesting State, to suspend the application of Chapter II vis-à-vis that State. This decision shall be notified to the Secretary General of the Council of Europe by simple letter. This suspension may be lifted at any time, which shall be also notified to the Secretary General.

Paragraph 2 subjects the application of paragraph 1 to a preliminary procedure during which the accused Party will be able to make its comments on the alleged breach of confidentiality.

Paragraph 3 instructs the Secretary General to inform not only the Parties but all member States of the cases where paragraph 1 has been applied. The object of this provision is to improve good collaboration between the Parties.

Article 11

Article 11 in fact leaves authorities corresponding with each other across frontiers free to choose the form and/or language which suits them best. This can involve simpler procedures, means of communication other than the exchange of correspondence and languages other than the official languages of the Council of Europe or that of the requested State.

CHAPTER III – MUTUAL ASSISTANCE IN CRIMINAL MATTERS

Article 12

Paragraph 1 contains the undertaking by the Parties to afford each other the widest assistance possible in criminal matters related to offences involving insider trading. This is the general principle.

Paragraph 2 indicates however that the existing agreements in the field of legal co-operation relating to criminal proceedings, and in particular the European Convention on Mutual Assistance in Criminal Matters and the Additional Protocol thereto, and other specific agreements or arrangements in this field in force between Parties, shall be respected.

CHAPTER IV – FINAL PROVISIONS

Articles 13 to 21

In general, these provisions follow the model final clauses adopted by the Committee of Ministers of the Council of Europe for conventions and agreements drawn up within the Organisation.

Articles 14 and 18

The number of ratifications requested for the entry into force of the Convention was intentionally fixed at three so as to allow an early entry into force and not to object to its application by a few States who want to use the procedures set up. Moreover, an early entry into force will make it possible to discover if there is any reason for the application of the procedure set up by Article 18.

Article 15

Paragraph 1 of this article is aimed at allowing, *inter alia*, the accession of international intergovernmental organisations such as the European Economic Community.

Article 16 bis

See Protocol hereafter.

Article 17

The Convention allows no reservation. However, the text of Article 6 as it stands shows that certain Parties, by application of their legal provisions, some of which are constitutional, may not be in a position to give full application to certain provisions. In such a case, they are invited to declare it under Article 6. In so far as such a declaration may be considered as a reservation, it should be the only one allowed under the Convention.

Article 18

The evolution of the domestic legislation of the Parties, technical developments and new situations may make it necessary to adapt the Convention.

On the other hand, the Parties to the Convention may encounter difficulties in mutual collaboration that are difficult to foresee now.

Moreover, some member states might wish to take part in the mutual assistance system, but find difficulties in their way – for example domestic legal arrangements. It might be possible to obviate these difficulties by adjustments to the Convention without causing any problems for the other Parties.

Finally, in the opinion of some experts, this Convention constitutes only a point of departure in the present state of legislation in the various member states.

For these reasons, it is provided that, at the request of two or more Parties, a meeting shall necessarily be convened by the Secretary General of the Council of Europe with the task not of directly modifying the Convention but of making the appropriate suggestions. The meeting shall be attended by experts representing the member states and the Parties which are not member States of the Council of Europe.

The possibility for the Secretary General to take the initiative of such a meeting is aimed at meeting the need of more information on behalf of states not yet Parties to the Convention.

PROTOCOL

Article 16 bis is designed to cover the particular situation of those Parties which are members of the European Economic Community. It states that, in their mutual relations, those Parties shall apply Community rules and shall not therefore apply the rules arising from the Convention except in so far as there is no Community rule governing the particular subject concerned. Since it governs exclusively the internal relations between the Parties members of the European Economic Community, this paragraph is without prejudice to the application of this Convention between those Parties and Parties which are not members of the European Economic Community.

Convention on laundering, search, seizure and confiscation of the proceeds from crime – ETS No. 141

Strasbourg, 8.XI.1990

Preamble

The member States of the Council of Europe and the other States signatory hereto,

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

Convinced of the need to pursue a common criminal policy aimed at the protection of society;

Considering that the fight against serious crime, which has become an increasingly international problem, calls for the use of modern and effective methods on an international scale;

Believing that one of these methods consists in depriving criminals of the proceeds from crime;

Considering that for the attainment of this aim a well-functioning system of international co-operation also must be established,

Have agreed as follows:

CHAPTER I – USE OF TERMS

Article l – Use of terms

For the purposes of this Convention:

a. "proceeds" means any economic advantage from criminal offences. It may consist of any property as defined in sub-paragraph b of this article;

b. "property" includes property of any description, whether corporeal or incorporeal, movable or immovable, and legal documents or instruments evidencing title to, or interest in such property;

c. "instrumentalities" means any property used or intended to be used, in any manner, wholly or in part, to commit a criminal offence or criminal offences;

d. "confiscation" means a penalty or a measure, ordered by a court following proceedings in relation to a criminal offence or criminal offences resulting in the final deprivation of property;

e. "predicate offence" means any criminal offence as a result of which proceeds were generated that may become the subject of an offence as defined in Article 6 of this Convention.

CHAPTER II – MEASURES TO BE TAKEN AT NATIONAL LEVEL

Article 2 – Confiscation measures

1. Each Party shall adopt such legislative and other measures as may be necessary to enable it to confiscate instrumentalities and proceeds or property the value of which corresponds to such proceeds.

2. Each Party may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, by a declaration addressed to the Secretary General of the Council of Europe, declare that paragraph 1 of this article applies only to offences or categories of offences specified in such declaration.

Article 3 – Investigative and provisional measures

Each Party shall adopt such legislative and other measures as may be necessary to enable it to identify and trace property which is liable to confiscation pursuant to Article 2, paragraph 1, and to prevent any dealing in, transfer or disposal of such property.

Article 4 – Special investigative powers and techniques

1. Each Party shall adopt such legislative and other measures as may be necessary to empower its courts or other competent authorities to order that bank, financial or commercial records be made available or be seized in order to carry out the actions referred to in Articles 2 and 3. A Party shall not decline to act under the provisions of this article on grounds of bank secrecy.

2. Each Party shall consider adopting such legislative and other measures as may be necessary to enable it to use special investigative techniques facilitating the identification and tracing of proceeds and the gathering of evidence related thereto. Such techniques may include monitoring orders, observation, interception of telecommunications, access to computer systems and orders to produce specific documents.

Article 5 – Legal remedies

Each Party shall adopt such legislative and other measures as may be necessary to ensure that interested parties affected by measures under Articles 2 and 3 shall have effective legal remedies in order to preserve their rights.

Article 6 – Laundering offences

1. Each Party shall adopt such legislative and other measures as may be necessary to establish as offences under its domestic law, when committed intentionally:

   a. the conversion or transfer of property, knowing that such property is proceeds, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of the predicate offence to evade the legal consequences of his actions;

   b. the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of, property, knowing that such property is proceeds; and, subject to its constitutional principles and the basic concepts of its legal system;

   c. the acquisition, possession or use of property, knowing, at the time of receipt, that such property was proceeds;

   d. participation in, association or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with this article.

2. For the purposes of implementing or applying paragraph 1 of this article:

   a. it shall not matter whether the predicate offence was subject to the criminal jurisdiction of the Party;

   b. it may be provided that the offences set forth in that paragraph do not apply to the persons who committed the predicate offence;

   c. knowledge, intent or purpose required as an element of an offence set forth in that paragraph may be inferred from objective, factual circumstances.

3. Each Party may adopt such measures as it considers necessary to establish also as offences under its domestic law all or some of the acts referred to in paragraph 1 of this article, in any or all of the following cases where the offender:

a. ought to have assumed that the property was proceeds;

b. acted for the purpose of making profit;

c. acted for the purpose of promoting the carrying on of further criminal activity.

4. Each Party may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, by declaration addressed to the Secretary General of the Council of Europe declare that paragraph 1 of this article applies only to predicate offences or categories of such offences specified in such declaration.

CHAPTER III – INTERNATIONAL CO-OPERATION

Section 1 – Principles of international co-operation

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

1. The Parties shall co-operate with each other to the widest extent possible for the purposes of investigations and proceedings aiming at the confiscation of instrumentalities and proceeds.

2. Each Party shall adopt such legislative or other measures as may be necessary to enable it to comply, under the conditions provided for in this chapter, with requests:

a. for confiscation of specific items of property representing proceeds or instrumentalities, as well as for confiscation of proceeds consisting in a requirement to pay a sum of money corresponding to the value of proceeds;

b. for investigative assistance and provisional measures with a view to either form of confiscation referred to under a above.

Section 2 – Investigative assistance

Article 8 – Obligation to assist

The Parties shall afford each other, upon request, the widest possible measure of assistance in the identification and tracing of instrumentalities, proceeds and other property liable to confiscation. Such assistance shall include any measure providing and securing evidence as to the existence, location or movement, nature, legal status or value of the aforementioned property.

Article 9 – Execution of assistance

The assistance pursuant to Article 8 shall be carried out as permitted by and in accordance with the domestic law of the requested Party and, to the extent not incompatible with such law, in accordance with the procedures specified in the request.

Article 10 – Spontaneous information

Without prejudice to its own investigations or proceedings, a Party may without prior request forward to another Party information on instrumentalities and proceeds, when it considers 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 this chapter.

Section 3 – Provisional measures

Article 11 – Obligation to take provisional measures

1. At the request of another Party which has instituted criminal proceedings or proceedings for the purpose of confiscation, a Party shall take the necessary provisional measures, such as freezing or seizing, to prevent any dealing in, transfer or disposal of property which, at a later stage, may be the subject of a request for confiscation or which might be such as to satisfy the request.

2. A Party which has received a request for confiscation pursuant to Article 13 shall, if so requested, take the measures mentioned in paragraph 1 of this article in respect of any property which is the subject of the request or which might be such as to satisfy the request.

Article 12 – Execution of provisional measures

1. The provisional measures mentioned in Article 11 shall be carried out as permitted by and in accordance with the domestic law of the requested Party and, to the extent not incompatible with such law, in accordance with the procedures specified in the request.

2. Before lifting any provisional measure taken pursuant to this article, the requested Party shall, wherever possible, give the requesting Party an opportunity to present its reasons in favour of continuing the measure.

Section 4 – Confiscation

Article 13 – Obligation to confiscate

1. A Party, which has received a request made by another Party for confiscation concerning instrumentalities or proceeds, situated in its territory, shall:

   a. enforce a confiscation order made by a court of a requesting Party in relation to such instrumentalities or proceeds; or

   b. submit the request to its competent authorities for the purpose of obtaining an order of confiscation and, if such order is granted, enforce it.

2. For the purposes of applying paragraph 1.b of this article, any Party shall whenever necessary have competence to institute confiscation proceedings under its own law.

3. The provisions of paragraph 1 of this article shall also apply to confiscation consisting in a requirement to pay a sum of money corresponding to the value of proceeds, if property on which the confiscation can be enforced is located in the requested Party. In such cases, when enforcing confiscation pursuant to paragraph 1, the requested Party shall, if payment is not obtained, realise the claim on any property available for that purpose.

4. If a request for confiscation concerns a specific item of property, the Parties may agree that the requested Party may enforce the confiscation in the form of a requirement to pay a sum of money corresponding to the value of the property.

Article 14 – Execution of confiscation

1. The procedures for obtaining and enforcing the confiscation under Article 13 shall be governed by the law of the requested Party.

2. The requested Party shall be bound by the findings as to the facts in so far as they are stated in a conviction or judicial decision of the requesting Party or in so far as such conviction or judicial decision is implicitly based on them.

3. Each Party may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, by a declaration addressed to the Secretary General of the Council of Europe, declare that paragraph 2 of this article applies only subject to its constitutional principles and the basic concepts of its legal system.

4. If the confiscation consists in the requirement to pay a sum of money, the competent authority of the requested Party shall convert the amount thereof into the currency of that Party at the rate of exchange ruling at the time when the decision to enforce the confiscation is taken.

5. In the case of Article 13, paragraph 1.a, the requesting Party alone shall have the right to decide on any application for review of the confiscation order.

Article 15 – Confiscated property

Any property confiscated by the requested Party shall be disposed of by that Party in accordance with its domestic law, unless otherwise agreed by the Parties concerned.

Article 16 – Right of enforcement and maximum amount of confiscation

1. A request for confiscation made under Article 13 does not affect the right of the requesting Party to enforce itself the confiscation order.

2. Nothing in this Convention shall be so interpreted as to permit the total value of the confiscation to exceed the amount of the sum of money specified in the confiscation order. If a Party finds that this might occur, the Parties concerned shall enter into consultations to avoid such an effect.

Article 17 – Imprisonment in default

The requested Party shall not impose imprisonment in default or any other measure restricting the liberty of a person as a result of a request under Article 13, if the requesting Party has so specified in the request.

Section 5 – Refusal and postponement of co-operation

Article 18 – Grounds for refusal

1. Co-operation under this chapter may be refused if:

   a. the action sought would be contrary to the fundamental principles of the legal system of the requested Party; or

   b. the execution of the request is likely to prejudice the sovereignty, security, *ordre public* or other essential interests of the requested Party; or

   c. in the opinion of the requested Party, the importance of the case to which the request relates does not justify the taking of the action sought; or

   d. the offence to which the request relates is a political or fiscal offence; or

   e. the requested Party considers that compliance with the action sought would be contrary to the principle of *ne bis in idem*; or

   f. the offence to which the request relates would not be an offence under the law of the requested Party if committed within its jurisdiction. However, this ground for refusal applies to co-operation under Section 2 only in so far as the assistance sought involves coercive action.

2. Co-operation under Section 2, in so far as the assistance sought involves coercive action, and under Section 3 of this chapter, may also be refused if the measures sought could not be taken under the domestic law of the requested Party for the purposes of investigations or proceedings, had it been a similar domestic case.

3. Where the law of the requested Party so requires, co-operation under Section 2, in so far as the assistance sought involves coercive action, and under Section 3 of this chapter may also be refused if the measures sought or any other measures having similar effects would not be permitted under the law of the requesting Party, or, as regards the competent authorities of the requesting Party, if the request is not authorised by either a judge or another judicial authority, including public prosecutors, any of these authorities acting in relation to criminal offences.

4. Co-operation under Section 4 of this chapter may also be refused if:

   a. under the law of the requested Party confiscation is not provided for in respect of the type of offence to which the request relates; or

   b. without prejudice to the obligation pursuant to Article 13, paragraph 3, it would be contrary to the principles of the domestic laws of the requested Party concerning the limits of confiscation in respect of the relationship between an offence and:

   i. an economic advantage that might be qualified as its proceeds; or

   ii. property that might be qualified as its instrumentalities; or

   c. under the law of the requested Party confiscation may no longer be imposed or enforced because of the lapse of time; or

d. the request does not relate to a previous conviction, or a decision of a judicial nature or a statement in such a decision that an offence or several offences have been committed, on the basis of which the confiscation has been ordered or is sought; or

e. confiscation is either not enforceable in the requesting Party, or it is still subject to ordinary means of appeal; or

f. the request relates to a confiscation order resulting from a decision rendered *in absentia* of the person against whom the order was issued and, in the opinion of the requested Party, the proceedings conducted by the requesting Party leading to such decision did not satisfy the minimum rights of defence recognised as due to everyone against whom a criminal charge is made.

5. For the purpose of paragraph 4.f of this article a decision is not considered to have been rendered *in absentia* if:

a. it has been confirmed or pronounced after opposition by the person concerned; or

b. it has been rendered on appeal, provided that the appeal was lodged by the person concerned.

6. When considering, for the purposes of paragraph 4.f of this article if the minimum rights of defence have been satisfied, the requested Party shall take into account the fact that the person concerned has deliberately sought to evade justice or the fact that that person, having had the possibility of lodging a legal remedy against the decision made *in absentia*, elected not to do so. The same will apply when the person concerned, having been duly served with the summons to appear, elected not to do so nor to ask for adjournment.

7. A Party shall not invoke bank secrecy as a ground to refuse any co-operation under this chapter. Where its domestic law so requires, a Party may require that a request for co-operation which would involve the lifting of bank secrecy be authorised by either a judge or another judicial authority, including public prosecutors, any of these authorities acting in relation to criminal offences.

8. Without prejudice to the ground for refusal provided for in paragraph 1.a of this article:

a. the fact that the person under investigation or subjected to a confiscation order by the authorities of the requesting Party is a legal person shall not be invoked by the requested Party as an obstacle to affording any co-operation under this chapter;

b. the fact that the natural person against whom an order of confiscation of proceeds has been issued has subsequently died or the fact that a legal person against whom an order of confiscation of proceeds has been issued has subsequently been dissolved shall not be invoked as an obstacle to render assistance in accordance with Article 13, paragraph 1.a.

Article 19 – Postponement

The requested Party may postpone action on a request if such action would prejudice investigations or proceedings by its authorities.

Article 20 – Partial or conditional granting of a request

Before refusing or postponing co-operation under this chapter, the requested Party shall, where appropriate after having consulted the requesting Party, consider whether the request may be granted partially or subject to such conditions as it deems necessary.

Section 6 – Notification and protection of third parties' rights

Article 21 – Notification of documents

1. The Parties shall afford each other the widest measure of mutual assistance in the serving of judicial documents to persons affected by provisional measures and confiscation.

2. Nothing in this article is intended to interfere with:

a. the possibility of sending judicial documents, by postal channels, directly to persons abroad;

b. the possibility for judicial officers, officials or other competent authorities of the Party of origin to effect service of judicial documents directly through the consular authorities of that Party or through judicial officers, officials or other competent authorities of the Party of destination,

unless the Party of destination makes a declaration to the contrary to the Secretary General of the Council of Europe at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession.

3. When serving judicial documents to persons abroad affected by provisional measures or confiscation orders issued in the sending Party, this Party shall indicate what legal remedies are available under its law to such persons.

Article 22 – Recognition of foreign decisions

1. When dealing with a request for co-operation under Sections 3 and 4, the requested Party shall recognise any judicial decision taken in the requesting Party regarding rights claimed by third parties.

2. Recognition may be refused if:

   a. third parties did not have adequate opportunity to assert their rights; or

   b. the decision is incompatible with a decision already taken in the requested Party on the same matter; or

   c. it is incompatible with the *ordre public* of the requested Party; or

   d. the decision was taken contrary to provisions on exclusive jurisdiction provided for by the law of the requested Party.

Section 7 – Procedural and other general rules

Article 23 – Central authority

1. The Parties shall designate a central authority or, if necessary, authorities, which shall be responsible for sending and answering requests made under this chapter, the execution of such requests or the transmission of them to the authorities competent for their execution.

2. Each Party shall, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, communicate to the Secretary General of the Council of Europe the names and addresses of the authorities designated in pursuance of paragraph 1 of this article.

Article 24 – Direct communication

1. The central authorities shall communicate directly with one another.

2. In the event of urgency, requests or communications under this chapter may be sent directly by the judicial authorities, including public prosecutors, of the requesting Party to such authorities of the requested Party. In such cases a copy shall be sent at the same time to the central authority of the requested Party through the central authority of the requesting Party.

3. Any request or communication under paragraphs 1 and 2 of this article may be made through the International Criminal Police Organisation (Interpol).

4. Where a request is made pursuant to paragraph 2 of this article and the authority is not competent to deal with the request, it shall refer the request to the competent national authority and inform directly the requesting Party that it has done so.

5. Requests or communications under Section 2 of this chapter, which do not involve coercive action, may be directly transmitted by the competent authorities of the requesting Party to the competent authorities of the requested Party.

Article 25 – Form of request and languages

1. All requests under this chapter shall be made in writing. Modern means of telecommunications, such as telefax, may be used.

2. Subject to the provisions of paragraph 3 of this article, translations of the requests or supporting documents shall not be required.

3. At the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, any Party may communicate to the Secretary General of the Council of Europe a declaration that

it reserves the right to require that requests made to it and documents supporting such requests be accompanied by a translation into its own language or into one of the official languages of the Council of Europe or into such one of these languages as it shall indicate. It may on that occasion declare its readiness to accept translations in any other language as it may specify. The other Parties may apply the reciprocity rule.

Article 26 – Legalisation

Documents transmitted in application of this chapter shall be exempt from all legalisation formalities.

Article 27 – Content of request

1. Any request for co-operation under this chapter shall specify:

   a. the authority making the request and the authority carrying out the investigations or proceedings;

   b. the object of and the reason for the request;

   c. the matters, including the relevant facts (such as date, place and circumstances of the offence) to which the investigations or proceedings relate, except in the case of a request for notification;

   d. in so far as the co-operation involves coercive action:

   i. the text of the statutory provisions or, where this is not possible, a statement of the relevant law applicable; and

   ii. an indication that the measure sought or any other measures having similar effects could be taken in the territory of the requesting Party under its own law;

   e. where necessary and in so far as possible:

   i. details of the person or persons concerned, including name, date and place of birth, nationality and location, and, in the case of a legal person, its seat; and

   ii. the property in relation to which co-operation is sought, its location, its connection with the person or persons concerned, any connection with the offence, as well as any available information about other persons, interests in the property; and

   f. any particular procedure the requesting Party wishes to be followed.

2. A request for provisional measures under Section 3 in relation to seizure of property on which a confiscation order consisting in the requirement to pay a sum of money may be realised shall also indicate a maximum amount for which recovery is sought in that property.

3. In addition to the indications mentioned in paragraph 1, any request under Section 4 shall contain:

   a. in the case of Article 13, paragraph 1.a:

   i. certified true copy of the confiscation order made by the court in the requesting Party and a statement of the grounds on the basis of which the order was made, if they are not indicated in the order itself;

   ii. an attestation by the competent authority of the requesting Party that the confiscation order is enforceable and not subject to ordinary means of appeal;

   iii. information as to the extent to which the enforcement of the order is requested; and

   iv. information as to the necessity of taking any provisional measures;

   b. in the case of Article 13, paragraph 1.b, a statement of the facts relied upon by the requesting Party sufficient to enable the requested Party to seek the order under its domestic law;

   c. when third parties have had the opportunity to claim rights, documents demonstrating that this has been the case.

Article 28 – Defective requests

1. If a request does not comply with the provisions of this chapter or the information supplied is not sufficient to enable the requested Party to deal with the request, that Party may ask the requesting Party to amend the request or to complete it with additional information.

2. The requested Party may set a time-limit for the receipt of such amendments or information.

3. Pending receipt of the requested amendments or information in relation to a request under Section 4 of this chapter, the requested Party may take any of the measures referred to in Sections 2 or 3 of this chapter.

Article 29 – Plurality of requests

1. Where the requested Party receives more than one request under Sections 3 or 4 of this chapter in respect of the same person or property, the plurality of requests shall not prevent that Party from dealing with the requests involving the taking of provisional measures.

2. In the case of plurality of requests under Section 4 of this chapter, the requested Party shall consider consulting the requesting Parties.

Article 30 – Obligation to give reasons

The requested Party shall give reasons for any decision to refuse, postpone or make conditional any co-operation under this chapter.

Article 31 – Information

1. The requested Party shall promptly inform the requesting Party of:

   a. the action initiated on a request under this chapter;

   b. the final result of the action carried out on the basis of the request;

   c. a decision to refuse, postpone or make conditional, in whole or in part, any co-operation under this chapter;

   d. any circumstances which render impossible the carrying out of the action sought or are likely to delay it significantly; and

   e. in the event of provisional measures taken pursuant to a request under Sections 2 or 3 of this chapter, such provisions of its domestic law as would automatically lead to the lifting of the provisional measure.

2. The requesting Party shall promptly inform the requested Party of:

   a. any review, decision or any other fact by reason of which the confiscation order ceases to be wholly or partially enforceable; and

   b. any development, factual or legal, by reason of which any action under this chapter is no longer justified.

3. Where a Party, on the basis of the same confiscation order, requests confiscation in more than one Party, it shall inform all Parties which are affected by an enforcement of the order about the request.

Article 32 – Restriction of use

1. The requested Party may make the execution of a request dependent on the condition that the information or evidence obtained will not, without its prior consent, be used or transmitted by the authorities of the requesting Party for investigations or proceedings other than those specified in the request.

2. Each Party may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, by declaration addressed to the Secretary General of the Council of Europe, declare that, without its prior consent, information or evidence provided by it under this chapter may not be used or transmitted by the authorities of the requesting Party in investigations or proceedings other than those specified in the request.

Article 33 – Confidentiality

1. The requesting Party may require that the requested Party keep confidential the facts 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.

2. The requesting Party shall, if not contrary to basic principles of its national law and if so requested, keep confidential any evidence and information provided by the requested Party, except to the extent that its disclosure is necessary for the investigations or proceedings described in the request.

3. Subject to the provisions of its domestic law, a Party which has received spontaneous information under Article 10 shall comply with any requirement of confidentiality as required by the Party which supplies the information. If the other Party cannot comply with such requirement, it shall promptly inform the transmitting Party.

Article 34 – Costs

The ordinary costs of complying with a request shall be borne by the requested Party. Where costs of a substantial or extraordinary nature are necessary to comply with a request, the Parties shall consult in order to agree the conditions on which the request is to be executed and how the costs shall be borne.

Article 35 – Damages

1. When legal action on liability for damages resulting from an act or omission in relation to co-operation under this chapter has been initiated by a person, the Parties concerned shall consider consulting each other, where appropriate, to determine how to apportion any sum of damages due.

2. A Party which has become subject of a litigation for damages shall endeavour to inform the other Party of such litigation if that Party might have an interest in the case.

CHAPTER IV – FINAL PROVISIONS

Article 36 – Signature and entry into force

1. This Convention shall be open for signature by the member States of the Council of Europe and non-member States which have participated in its elaboration. Such States may express their consent to be bound by:

   a. signature without reservation as to ratification, acceptance or approval; or

   b. signature subject to ratification, acceptance or approval, followed by ratification, acceptance or approval.

2. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

3. This Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date on which three States, of which at least two are member States of the Council of Europe, have expressed their consent to be bound by the Convention in accordance with the provisions of paragraph 1.

4. In respect of any signatory State which subsequently expresses its consent to be bound by it, the Convention 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 expression of its consent to be bound by the Convention in accordance with the provisions of paragraph 1.

Article 37 – Accession to the Convention

1. After the entry into force of this Convention, the Committee of Ministers of the Council of Europe, after consulting the Contracting States to the Convention, may invite any State not a member of the Council and not having participated in its elaboration to accede to this Convention, by a decision taken by the majority provided for in Article 20.d. of the Statute of the Council of Europe and by the unanimous vote of the representatives of the Contracting States entitled to sit on the Committee.

2. In respect of any acceding State the Convention 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 of the instrument of accession with the Secretary General of the Council of Europe.

Article 38 – 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 Convention shall apply.

2. Any State may, at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Convention to any other territory specified in the declaration. In

respect of such territory the Convention 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 39 – Relationship to other conventions and agreements

1. This Convention does not affect the rights and undertakings derived from international multilateral conventions concerning special matters.

2. The Parties to the Convention may conclude bilateral or multilateral agreements with one another on the matters dealt with in this Convention, for purposes of supplementing or strengthening its provisions or facilitating the application of the principles embodied in it.

3. If two or more Parties have already concluded an agreement or treaty in respect of a subject which is dealt with in this Convention or otherwise have established their relations in respect of that subject, they shall be entitled to apply that agreement or treaty or to regulate those relations accordingly, in lieu of the present Convention, if it facilitates international co-operation.

Article 40 – Reservations

1. 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 one or more of the reservations provided for in Article 2, paragraph 2, Article 6, paragraph 4, Article 14, paragraph 3, Article 21, paragraph 2, Article 25, paragraph 3 and Article 32, paragraph 2. No other reservation may be made.

2. Any State which has made a reservation under the preceding paragraph may wholly or partly withdraw it by means of a notification addressed to the Secretary General of the Council of Europe. The withdrawal shall take effect on the date of receipt of such notification by the Secretary General.

3. A Party which has made a reservation in respect of a provision of this Convention may not claim the application of that provision by any other 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 41 – Amendments

1. Amendments to this Convention may be proposed by any Party, and shall be communicated by the Secretary General of the Council of Europe to the member States of the Council of Europe and to every non-member State which has acceded to or has been invited to accede to this Convention in accordance with the provisions of Article 37.

2. Any amendment proposed by a Party shall be communicated to the European Committee on Crime Problems which shall submit to the Committee of Ministers its opinion on that proposed amendment.

3. The Committee of Ministers shall consider the proposed amendment and the opinion submitted by the European Committee on Crime Problems and may adopt the amendment.

4. The text of any amendment adopted by the Committee of Ministers in accordance with paragraph 3 of this article shall be forwarded to the Parties for acceptance.

5. Any amendment adopted in accordance with paragraph 3 of this article shall come into force on the thirtieth day after all Parties have informed the Secretary General of their acceptance thereof.

Article 42 – Settlement of disputes

1. The European Committee on Crime Problems of the Council of Europe shall be kept informed regarding the interpretation and application of this Convention.

2. In case of a dispute between Parties as to the interpretation or application of this Convention, they shall seek a settlement of the dispute through negotiation or any other peaceful means of their choice, including submission of the dispute to the European Committee on Crime Problems, to an arbitral tribunal whose

decisions shall be binding upon the Parties, or to the International Court of Justice, as agreed upon by the Parties concerned.

Article 43 – Denunciation

1. Any Party may, at any time, denounce this Convention 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. The present Convention shall, however, continue to apply to the enforcement under Article 14 of confiscation for which a request has been made in conformity with the provisions of this Convention before the date on which such a denunciation takes effect.

Article 44 – Notifications

The Secretary General of the Council of Europe shall notify the member States of the Council and any State which has acceded to this Convention 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 Convention in accordance with Articles 36 and 37;

d. any reservation made under Article 40, paragraph 1;

e. any other act, notification or communication relating to this Convention.

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

Done at Strasbourg, the 8th day of November 1990, 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, to the non-member States which have participated in the elaboration of this Convention, and to any State invited to accede to it.

Convention on laundering, search, seizure and confiscation of the proceeds from crime – ETS No. 141

Explanatory Report

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

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

INTRODUCTION

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

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

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

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

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

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

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

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

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

GENERAL CONSIDERATIONS

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

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

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

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

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

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

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

This goal is attained in the Convention through the adoption of several types of measures. It is important that States give each other assistance in order to secure evidence about instrumentalities and proceeds. States are also called upon to co-operate, even without a request, when they learn about events in relation to

criminal activity which might be of interest to another State. This and other kinds of investigative assistance are provided for in Section 2 of Chapter III of the Convention.

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

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

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

12. In order to protect the legitimate interests of third parties, the Convention provides in Section 6 of Chapter III for certain notification requirements and for situations where it may not be possible to recognise decisions concerning third parties. Moreover, the Convention imposes an obligation on each Party to provide in its domestic legislation for effective legal remedies available to third parties to have their rights (which may be affected by provisional or confiscation measures) preserved.

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

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

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

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

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

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

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

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

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

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

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

COMMENTARY ON THE ARTICLES OF THE CONVENTION

CHAPTER I – USE OF TERMS

Article 1 – Use of terms

19. Article 1 defines certain terms which form the basis of the mechanism of international co-operation provided for in the Convention and the scope of application of Chapter II. Following practice from other

conventions elaborated within the framework of the Council of Europe, the number of terms requiring a definition has been limited to what is absolutely necessary for the correct application of the Convention. Several of the definitions are drafted in a broad manner in order to ensure that particular features of national legislation are not excluded from the application of the Convention.

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

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

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

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

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

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

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

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

23. The committee discussed whether it was necessary to define "confiscation" or "confiscation order" under the Convention. Such a definition exists in the United Nations Convention where "confiscation", which includes forfeiture where applicable, means the permanent deprivation of property by order of a court or

other competent authority. The European Convention on the International Validity of Criminal Judgments defines a "European criminal judgment" as any final decision delivered by a criminal court of a contracting State as a result of criminal proceedings and a "sanction" as any punishment or other measure expressly imposed on a person, in respect of an offence, in a European criminal judgment or in an *ordonnance pénale*.

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

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

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

CHAPTER II – MEASURES AT NATIONAL LEVEL

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

Article 2 – Confiscation measures

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

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

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

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

Article 3 – Investigative and provisional measures

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

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

Article 4– Special investigative powers and techniques

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

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

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

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

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

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

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

Article 5 – Legal remedies

31. Interested parties are basically all persons who claim that their rights with respect to property subject to provisional measures and confiscation are unjustifiably affected. These claims should in principle be honoured in cases where the innocence or *bona fides* of the party concerned is likely or beyond reasonable doubt. As long as no final confiscation order has been made against him, the accused may also qualify as an interested party. The legal provisions required by this article should guarantee "effective" legal remedies for interested third parties. This implies that there should be a system where such parties, if known, are duly

informed by the authorities of the possibilities to challenge decisions or measures taken, that such challenges may be made even if a confiscation order has already become enforceable, if the party had no earlier opportunity to do so, that such remedies should allow for a hearing in court, that the interested party has the right to be assisted or represented by a lawyer and to present witnesses and other evidence, and that the party has a right to have the court decision reviewed.

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

Article 6 – Laundering offences

32. The first paragraph of the article is based on the United Nations Convention. However, the wording differs slightly from that convention in respect of the element of "participation" which is found in the United Nations Convention, and also as regards the predicate offences to which the proceeds relate. Participation has not been included in paragraph 1, sub-paragraphs *a, b* and *c*, of the article since, because of the different approach taken by the committee, it appeared to be redundant. The present Convention is not limited to proceeds from drug offences. The experts considered that it was not necessary to provide that States could not limit the scope of application *vis-à-vis* the United Nations Convention, which had become a universally recognised instrument in the fight against drugs.

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

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

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

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

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

CHAPTER III – INTERNATIONAL CO-OPERATION

Section 1 – Principles of international co-operation

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

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

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

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

Section 2 – Investigative assistance

Article 8 – Obligation to assist

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

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

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

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

The assistance also includes seizure for evidentiary purposes.

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

Article 9 – Execution of assistance

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

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

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

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

Article 10 – Spontaneous information

38. This article introduces a novelty in the field of legal assistance in criminal matters: a possibility for States to forward without prior request information about investigations or proceedings or which might become relevant in relation to co-operation under the Convention. Such information must of course not be

transmitted if it might harm or endanger investigations or proceedings in the sending Party. As regards confidentiality, see Article 33, paragraph 3.

Section 3 – Provisional measures

Article 11 – Obligation to take provisional measures

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

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

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

Article 12 – Execution of provisional measures

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

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

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

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

could for instance require that a provisional measure be lifted if a prosecutor has not applied for a renewal of the measure within a specified time-limit.

Section 4 – Confiscation

Article 13 – Obligation to confiscate

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Article 14 – Execution of confiscation

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

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

51. The question of limitation of actions is particularly complicated in respect of confiscation. Some countries may not provide for any rules in this respect, whereas others may have provided for a set of rules relating to the original offence, the service of summons, the enforcement of the confiscation order, etc. In the view of the experts, such limitations, where they exist, should always be interpreted under the law of the requested State in conformity with what is provided under Article 14. If a confiscation order is statute-barred under the law of the requesting State, this would normally mean that it is not enforceable in the requesting Party.

Confiscation may then be refused under Article 18. There should therefore be no room for doubt. Under Article 27, paragraph 3.*a*.ii, the competent authority of the requesting Party should certify that the confiscation order is enforceable and not subject to ordinary means of appeal. In addition, the requesting Party is obliged to inform the requested Party of any development by reason of which the confiscation order ceases to be wholly or partially enforceable (see Article 31, paragraph 2.*a*).

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

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

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

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

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

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

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

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

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

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

Article 15 – Confiscated property

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

Article 16 – Right of enforcement and maximum amount of confiscation

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

Article 17– Imprisonment in default

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

Section 5 – Refusal and postponement of co-operation

Article 18 – Grounds for refusal

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

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

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

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

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

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

- where the proceedings on which the request are based do not meet basic procedural requirements for the protection of human rights such as the ones contained in Articles 5 and 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms;
- where there are serious reasons for believing that the life of a person would be endangered;
- where in particular cases it is forbidden under the domestic law of the requested Party to confiscate certain types of property;
- cases of exorbitant jurisdictional claims asserted by the requesting Party;
- where the confiscation order is determined on the basis of an assumption that certain property represents proceeds, whereas the burden of proof as to its legitimate origin was incumbent upon the convicted person, and such a determination would, under the law of the requested Party, be contrary to the fundamental principles of its legal system. It follows from this that, if a State recognises this principle in respect of one category of offence, it cannot apply this ground for refusal for another category of offences;
- where interests of the requested State's own nationals could be jeopardised. One example is when a request for enforcement concerns property which is already subject to a restraint order for the benefit of a privileged creditor in a bankruptcy or concerns property which is subject to litigation in a fiscal matter. Such priority problems should be solved according to the requested State's own legislation.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

69. Paragraph 3 provides for the possibility of refusing co-operation where a Party requests another Party to take measures which would not have been permitted under the law of the requesting Party. Not all the

experts considered that it was necessary to draft a ground for refusal for this situation. The latter part of the paragraph refers to the competence of the authorities in the requesting Party. The experts thought that a request for measures involving coercive action should always be authorised by a judicial authority, including public prosecutors, competent in criminal matters. This would exclude administrative courts or judges or courts competent in civil cases only.

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

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

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

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

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

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

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

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

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

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

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

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

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

Article 19 – Postponement

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

Article 20 – Partial or conditional granting of a request

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

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

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

Section 6 – Notification and protection of third parties' rights

Article 21 – Notification of documents

80. This article has been drafted on the basis of the Hague Convention on the serving of legal documents in civil or commercial matters but differs slightly from that convention. Notification requirements

are in particular relevant to rights of third parties. The article has therefore been placed in this section to stress this fact.

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

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

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

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

Article 22 – Recognition of foreign decisions

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

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

The rights of third parties could either have been considered in the requesting State or not considered in that State. In the latter case, the affected third party will always have the right to put forward his claim in the requested State according to its law. In fact, this could often happen since, in some States such as the United Kingdom, third party rights are safeguarded at the stage of the execution of the confiscation order and not at the stage of decision. A consequence of this is that States cannot in this case invoke any of the grounds for refusal, such as Article 18, paragraph 1*a*, on the grounds that third party rights had not been examined.

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

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

Section 7 – Procedural and other general rules

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

82. Article 23 gives the Parties a right to designate several central authorities where necessary. This possibility should be used restrictively so as not to create unnecessary confusion and to promote close cooperation between States. Even if not expressly stated in the Convention, the Parties should, depending on internal

organisational matters, have the right to change central authorities when appropriate. The powers of the central authorities are determined by national law.

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

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

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

85. Article 27 states the important rules pertaining to the contents of the request for co-operation. If the rules are not strictly followed, it is clear that international co-operation will be difficult. In particular, it is absolutely necessary that the requesting Party follow conscientiously the provisions of paragraph 1, sub-paragraphs *c* and *e*. In particular, with regard to banks, it is necessary to indicate in detail the relevant branch office and its address. It is however not the intention of the committee that the article should be interpreted as implying a requirement on a requesting Party to furnish *prima facie* evidence.

Paragraph 1.*f* refers to Articles 9 and 12.

Paragraph 2 requires an indication of a maximum amount for which recovery is sought. It concerns, in particular, requests for provisional measures with a view to the eventual enforcement of value confiscation orders.

Paragraph 3, sub-paragraph *a*.iii, may in particular be relevant to the enforcement of a value confiscation order which has already been partly enforced. It may also be relevant when requests for enforcement are made in several States or when the requesting State seeks to execute part of the order.

Paragraph 3, sub-paragraph *a*.iv, might in some States amount to a request for the taking of provisional measures.

Paragraph 3.*b* is of a general nature. In order to fully understand its implications in a specific case, the Parties should read this paragraph in conjunction with the preceding paragraphs of the article.

86. Article 28 makes it possible for a Party to ask for additional information. It may do so but, at the same time, it may take necessary provisional measures if the request for co-operation would cease to have any purpose if the provisional measures were not taken.

87. Article 29 seeks to avoid any adverse effects of requests concerning the same property or person. It may happen, particularly when the system of value confiscation is used, that the same property is subject to confiscation. In cases concerning requests for confiscation, Article 29 obliges the requested Party to consider consulting the other Parties.

88. Article 31, paragraph 1.*a*, requires the requested Party to promptly inform the requesting Party of the action initiated. Such obligation to inform concerns in particular cases where a Party undertakes measures which might continue for some time and where the requesting Party has a legitimate interest in being kept informed that action is taken and of its continued results, for instance in respect of telephone tapping, monitoring orders, etc. Paragraph 1.*b* might include communications relating to events affecting the final result of the co-operation. Paragraph 2 deals with the obligation for the requesting Party to inform the requested Party of any development by reason of which any action under the Convention is not justified, for instance a decision by the requesting Party on amnesty or pardon. When such an event occurs, the requested Party is obliged to discontinue the procedures. This is usually the case under the law of the requested Party (see Article 14, paragraph 1). The requesting Party always has the possibility of withdrawing its request for co-operation.

89. Article 32 indicates the rule of speciality which is contained in several other European conventions. The committee did not wish, however, to make the rule compulsory in all the cases to which the Convention applies. It provided therefore, in paragraph 1, for the possibility that the requested Party may make the

execution of a request dependent upon the rule of speciality. Certain Parties would always use this possibility. The experts provided therefore, in paragraph 2, for the possibility of declaring that the rule of speciality would always be applied in relation to other Parties to the Convention.

90. Article 33 deals with confidentiality both in the requesting Party and the requested Party. It is important that national law be adapted so that, for instance, financial institutions are not able to warn their clients that criminal investigations or proceedings are being carried out. Disclosure of such facts is a criminal offence in certain States. The degree of confidentiality in international co-operation coincides with the degree of confidentiality in national cases. The term "confidential" might have different legal connotations under the law of some States.

91. Article 34 refers only to "costs" of the action sought. The experts discussed whether Article 34 should also refer to "expenses", but decided against it.

92. Article 35, paragraph 1, requires Parties, in principle, to enter into consultations in the case of any liability for damages. Such consultations shall be without prejudice to any obligation of a Party to promptly pay the damages due to the injured person pursuant to a judicial decision to that effect. Consultations are however not always necessary when a question has arisen on how such damages should be paid. If a Party decides to pay damages to a victim because of an error made by that Party, no obligation to consult the other Party exists.

If another Party might have an interest in a case, it is normal that that Party should have an opportunity to be able to take care of its interests. The Party against whom legal action has been taken should therefore, whenever possible, endeavour to inform the other Party of the matter.

CHAPTER IV – FINAL PROVISIONS

93. With some exceptions, the provisions contained in this chapter are, for the most part, based on the "Model final clauses for conventions and agreements concluded within the Council of Europe" which were approved by the Committee of Ministers of the Council of Europe at the 31 5th meeting of their Deputies in February 1980. Most of these articles do not therefore call for specific comments, but the following points require some explanation.

94. Articles 36 and 37 have been drafted on several precedents established in other conventions elaborated within the framework of the Council of Europe, for instance the Convention on the Transfer of Sentenced Persons, which allow for signature, before the convention's entry into force, not only by the member States of the Council of Europe, but also by non-member States which have participated in the elaboration of the convention. These provisions are intended to enable the maximum number of interested States, not necessarily members of the Council of Europe, to become Parties as soon as possible. The provision in Article 36 is intended to apply to three non-member States, Australia, Canada and the United States of America, which were represented on the Select Committee by observers and were actively associated with the elaboration of the Convention.

95. Article 39 is intended to ensure the coexistence of the Convention with other treaties – multilateral or bilateral – dealing with matters which are also dealt with in the present Convention.

Paragraph 1 concerns, *inter alia*, the United Nations Convention. It is possible that a request made under the present Convention might be dealt with under either of the two conventions. The same is valid for requests which might fall within the scope of application of both the present Convention and the Mutual Assistance Convention or the Validity Convention. Paragraph 2 expresses in a positive way that Parties may, for certain purposes, conclude bilateral or multilateral agreements relating to matters dealt with in the Convention. The drafting permits the *a contrario* deduction that Parties may not conclude agreements which derogate from the Convention. Paragraph 3 safeguards the continued application of agreements, treaties or relations relating to subjects which are dealt with in the present Convention, for instance in the Nordic co-operation.

96. Article 41 is an innovation in respect of the penal law conventions elaborated within the framework of the Council of Europe. The amendment procedure is mostly thought to be for minor changes of a procedural character. The experts considered that major changes to the Convention should be made in the form of additional protocols. It was noted that, in accordance with paragraph 5, any amendment adopted would come into force only when all Parties had informed the Secretary General of their acceptance.

97. The Committee of Ministers, which adopted the original text of this Convention, is also competent to adopt any amendments.

98. Article 42, paragraph 1, is slightly redrafted in comparison with other penal law conventions elaborated within the framework of the Council of Europe, without there being, however, any intention to change the substance of the paragraph. The experts thought it appropriate to clarify that the CDPC should also be kept informed about the interpretation of the provisions of the Convention.

Paragraph 2 imposes an obligation on the Parties to seek a peaceful settlement of any dispute concerning the interpretation or the application of the Convention. Any procedure for solving disputes should be agreed upon by the Parties concerned.

Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism – CETS No. 198

Warsaw, 16.V.2005

Preamble

The member States of the Council of Europe and the other Signatories hereto,

Considering that the aim of the Council of Europe is to achieve a greater unity between its members;

Convinced of the need to pursue a common criminal policy aimed at the protection of society;

Considering that the fight against serious crime, which has become an increasingly international problem, calls for the use of modern and effective methods on an international scale;

Believing that one of these methods consists in depriving criminals of the proceeds from crime and instrumentalities;

Considering that for the attainment of this aim a well-functioning system of international co-operation also must be established;

Bearing in mind the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS No. 141 – hereinafter referred to as "the 1990 Convention");

Recalling also Resolution 1373(2001) on threats to international peace and security caused by terrorist acts adopted by the Security Council of the United Nations on 28 September 2001, and particularly its paragraph 3.d;

Recalling the International Convention for the Suppression of the Financing of Terrorism, adopted by the General Assembly of the United Nations on 9 December 1999 and particularly its Articles 2 and 4, which oblige States Parties to establish the financing of terrorism as a criminal offence;

Convinced of the necessity to take immediate steps to ratify and to implement fully the International Convention for the Suppression of the Financing of Terrorism, cited above,

Have agreed as follows:

CHAPTER I – USE OF TERMS

Article 1 – Use of terms

For the purposes of this Convention:

a. "proceeds" means any economic advantage, derived from or obtained, directly or indirectly, from criminal offences. It may consist of any property as defined in sub-paragraph b of this article;

b. "property" includes property of any description, whether corporeal or incorporeal, movable or immovable, and legal documents or instruments evidencing title to or interest in such property;

c. "instrumentalities" means any property used or intended to be used, in any manner, wholly or in part, to commit a criminal offence or criminal offences;

d. "confiscation" means a penalty or a measure, ordered by a court following proceedings in relation to a criminal offence or criminal offences resulting in the final deprivation of property;

e. "predicate offence" means any criminal offence as a result of which proceeds were generated that may become the subject of an offence as defined in Article 9 of this Convention.

f. "financial intelligence unit" (hereinafter referred to as "FIU") means a central, national agency responsible for receiving (and, as permitted, requesting), analysing and disseminating to the competent authorities, disclosures of financial information

i. concerning suspected proceeds and potential financing of terrorism, or

ii. required by national legislation or regulation,

in order to combat money laundering and financing of terrorism;

g. "freezing" or "seizure" means temporarily prohibiting the transfer, destruction, conversion, disposition or movement of property or temporarily assuming custody or control of property on the basis of an order issued by a court or other competent authority;

h. "financing of terrorism" means the acts set out in Article 2 of the International Convention for the Suppression of the Financing of Terrorism, cited above.

CHAPTER II – FINANCING OF TERRORISM

Article 2 – Application of the Convention to the financing of terrorism

1. Each Party shall adopt such legislative and other measures as may be necessary to enable it to apply the provisions contained in Chapters III, IV and V of this Convention to the financing of terrorism.

2. In particular, each Party shall ensure that it is able to search, trace, identify, freeze, seize and confiscate property, of a licit or illicit origin, used or allocated to be used by any means, in whole or in part, for the financing of terrorism, or the proceeds of this offence, and to provide co-operation to this end to the widest possible extent.

CHAPTER III – MEASURES TO BE TAKEN AT NATIONAL LEVEL

Section 1 – General provisions

Article 3 – Confiscation measures

1. Each Party shall adopt such legislative and other measures as may be necessary to enable it to confiscate instrumentalities and proceeds or property the value of which corresponds to such proceeds and laundered property.

2. Provided that paragraph 1 of this article applies to money laundering and to the categories of offences in the appendix to the Convention, each Party may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, by a declaration addressed to the Secretary General of the Council of Europe, declare that paragraph 1 of this article applies

a. only in so far as the offence is punishable by deprivation of liberty or a detention order for a maximum of more than one year. However, each Party may make a declaration on this provision in respect of the confiscation of the proceeds from tax offences for the sole purpose of being able to confiscate such proceeds, both nationally and through international cooperation, under national and international tax-debt recovery legislation; and/or

b. only to a list of specified offences.

3. Parties may provide for mandatory confiscation in respect of offences which are subject to the confiscation regime. Parties may in particular include in this provision the offences of money laundering, drug trafficking, trafficking in human beings and any other serious offence.

4. Each Party shall adopt such legislative or other measures as may be necessary to require that, in respect of a serious offence or offences as defined by national law, an offender demonstrates the origin of alleged proceeds or other property liable to confiscation to the extent that such a requirement is consistent with the principles of its domestic law.

Article 4 – Investigative and provisional measures

Each Party shall adopt such legislative and other measures as may be necessary to enable it to identify, trace, freeze or seize rapidly property which is liable to confiscation pursuant to Article 3, in order in particular to facilitate the enforcement of a later confiscation.

Article 5 – Freezing, seizure and confiscation

Each Party shall adopt such legislative and other measures as may be necessary to ensure that the measures to freeze, seize and confiscate also encompass:

a. the property into which the proceeds have been transformed or converted;

b. property acquired from legitimate sources, if proceeds have been intermingled, in whole or in part, with such property, up to the assessed value of the intermingled proceeds;

c. income or other benefits derived from proceeds, from property into which proceeds of crime have been transformed or converted or from property with which proceeds of crime have been intermingled, up to the assessed value of the intermingled proceeds, in the same manner and to the same extent as proceeds.

Article 6 – Management of frozen or seized property

Each Party shall adopt such legislative or other measures as may be necessary to ensure proper management of frozen or seized property in accordance with Articles 4 and 5 of this Convention.

Article 7 – Investigative powers and techniques

1. Each Party shall adopt such legislative and other measures as may be necessary to empower its courts or other competent authorities to order that bank, financial or commercial records be made available or be seized in order to carry out the actions referred to in Articles 3, 4 and 5. A Party shall not decline to act under the provisions of this article on grounds of bank secrecy.

2. Without prejudice to paragraph 1, each Party shall adopt such legislative and other measures as may be necessary to enable it to:

a. determine whether a natural or legal person is a holder or beneficial owner of one or more accounts, of whatever nature, in any bank located in its territory and, if so obtain all of the details of the identified accounts;

b. obtain the particulars of specified bank accounts and of banking operations which have been carried out during a specified period through one or more specified accounts, including the particulars of any sending or recipient account;

c. monitor, during a specified period, the banking operations that are being carried out through one or more identified accounts; and,

d. ensure that banks do not disclose to the bank customer concerned or to other third persons that information has been sought or obtained in accordance with sub-paragraphs a, b, or c, or that an investigation is being carried out.

Parties shall consider extending this provision to accounts held in non-bank financial institutions.

3. Each Party shall consider adopting such legislative and other measures as may be necessary to enable it to use special investigative techniques facilitating the identification and tracing of proceeds and the gathering of evidence related thereto, such as observation, interception of telecommunications, access to computer systems and order to produce specific documents.

Article 8 – Legal remedies

Each Party shall adopt such legislative and other measures as may be necessary to ensure that interested parties affected by measures under Articles 3, 4 and 5 and such other provisions in this Section as are relevant, shall have effective legal remedies in order to preserve their rights.

Article 9 – Laundering offences

1. Each Party shall adopt such legislative and other measures as may be necessary to establish as offences under its domestic law, when committed intentionally:

   a. the conversion or transfer of property, knowing that such property is proceeds, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of the predicate offence to evade the legal consequences of his actions;

   b. the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of, property, knowing that such property is proceeds;

and, subject to its constitutional principles and the basic concepts of its legal system;

   c. the acquisition, possession or use of property, knowing, at the time of receipt, that such property was proceeds;

   d. participation in, association or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with this article.

2. For the purposes of implementing or applying paragraph 1 of this article:

   a. it shall not matter whether the predicate offence was subject to the criminal jurisdiction of the Party;

   b. it may be provided that the offences set forth in that paragraph do not apply to the persons who committed the predicate offence;

   c. knowledge, intent or purpose required as an element of an offence set forth in that paragraph may be inferred from objective, factual circumstances.

3. Each Party may adopt such legislative and other measures as may be necessary to establish as an offence under its domestic law all or some of the acts referred to in paragraph 1 of this Article, in either or both of the following cases where the offender

   a. suspected that the property was proceeds,

   b. ought to have assumed that the property was proceeds.

4. Provided that paragraph 1 of this article applies to the categories of predicate offences in the appendix to the Convention, each State or the European Community may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, by a declaration addressed to the Secretary General of the Council of Europe, declare that paragraph 1 of this article applies:

   a. only in so far as the predicate offence is punishable by deprivation of liberty or a detention order for a maximum of more than one year, or for those Parties that have a minimum threshold for offences in their legal system, in so far as the offence is punishable by deprivation of liberty or a detention order for a minimum of more than six months; and/or

   b. only to a list of specified predicate offences; and/or

   c. to a category of serious offences in the national law of the Party.

5. Each Party shall ensure that a prior or simultaneous conviction for the predicate offence is not a prerequisite for a conviction for money laundering.

6. Each Party shall ensure that a conviction for money laundering under this Article is possible where it is proved that the property, the object of paragraph 1.a or b of this article, originated from a predicate offence, without it being necessary to establish precisely which offence.

7. Each Party shall ensure that predicate offences for money laundering extend to conduct that occurred in another State, which constitutes an offence in that State, and which would have constituted a predicate offence had it occurred domestically. Each Party may provide that the only prerequisite is that the conduct would have constituted a predicate offence had it occurred domestically.

Article 10 – Corporate liability

1. Each Party shall adopt such legislative and other measures as may be necessary to ensure that legal persons can be held liable for the criminal offences of money laundering established in accordance with this Convention, committed for their benefit by any natural person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on:

   a. a power of representation of the legal person; or

   b. an authority to take decisions on behalf of the legal person; or

   c. an authority to exercise control within the legal person,

as well as for involvement of such a natural person as accessory or instigator in the above-mentioned offences.

2. Apart from the cases already provided for in paragraph 1, each Party shall take the necessary measures to ensure that a legal person can be held liable where the lack of supervision or control by a natural person referred to in paragraph 1 has made possible the commission of the criminal offences mentioned in paragraph 1 for the benefit of that legal person by a natural person under its authority.

3. Liability of a legal person under this Article shall not exclude criminal proceedings against natural persons who are perpetrators, instigators of, or accessories to, the criminal offences mentioned in paragraph 1.

4. Each Party shall ensure that legal persons held liable in accordance with this Article, shall be subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.

Article 11 – Previous decisions

Each Party shall adopt such legislative and other measures as may be necessary to provide for the possibility of taking into account, when determining the penalty, final decisions against a natural or legal person taken in another Party in relation to offences established in accordance with this Convention.

Section 2 - Financial intelligence unit (FIU) and prevention

Article 12 – Financial intelligence unit (FIU)

1. Each Party shall adopt such legislative and other measures as may be necessary to establish an FIU as defined in this Convention.

2. Each Party shall adopt such legislative and other measures as may be necessary to ensure that its FIU has access, directly or indirectly, on a timely basis to the financial, administrative and law enforcement information that it requires to properly undertake its functions, including the analysis of suspicious transaction reports.

Article 13 – Measures to prevent money laundering

1. Each Party shall adopt such legislative and other measures as may be necessary to institute a comprehensive domestic regulatory and supervisory or monitoring regime to prevent money laundering and shall take due account of applicable international standards, including in particular the recommendations adopted by the Financial Action Task Force on Money Laundering (FATF).

2. In that respect, each Party shall adopt, in particular, such legislative and other measures as may be necessary to:

   a. require legal and natural persons which engage in activities which are particularly likely to be used for money laundering purposes, and as far as these activities are concerned, to:

   i. identify and verify the identity of their customers and, where applicable, their ultimate beneficial owners, and to conduct ongoing due diligence on the business relationship, while taking into account a risk based approach;

   ii. report suspicions on money laundering subject to safeguard;

   iii. take supporting measures, such as record keeping on customer identification and transactions, training of personnel and the establishment of internal policies and procedures, and if appropriate, adapted to their size and nature of business;

b. prohibit, as appropriate, the persons referred to in sub-paragraph a from disclosing the fact that a suspicious transaction report or related information has been transmitted or that a money laundering investigation is being or may be carried out;

c. ensure that the persons referred to in sub-paragraph a are subject to effective systems for monitoring, and where applicable supervision, with a view to ensure their compliance with the requirements to combat money laundering, where appropriate on a risk sensitive basis.

3. In that respect, each Party shall adopt such legislative or other measures as may be necessary to detect the significant physical cross border transportation of cash and appropriate bearer negotiable instruments.

Article 14 – Postponement of domestic suspicious transactions

Each Party shall adopt such legislative and other measures as may be necessary to permit urgent action to be taken by the FIU or, as appropriate, by any other competent authorities or body, when there is a suspicion that a transaction is related to money laundering, to suspend or withhold consent to a transaction going ahead in order to analyse the transaction and confirm the suspicion. Each party may restrict such a measure to cases where a suspicious transaction report has been submitted. The maximum duration of any suspension or withholding of consent to a transaction shall be subject to any relevant provisions in national law.

CHAPTER IV – INTERNATIONAL CO-OPERATION

Section 1 – Principles of international co-operation

Article 15 – General principles and measures for international co-operation

1. The Parties shall mutually co-operate with each other to the widest extent possible for the purposes of investigations and proceedings aiming at the confiscation of instrumentalities and proceeds.

2. Each Party shall adopt such legislative or other measures as may be necessary to enable it to comply, under the conditions provided for in this chapter, with requests:

a. for confiscation of specific items of property representing proceeds or instrumentalities, as well as for confiscation of proceeds consisting in a requirement to pay a sum of money corresponding to the value of proceeds;

b. for investigative assistance and provisional measures with a view to either form of confiscation referred to under a above.

3. Investigative assistance and provisional measures sought in paragraph 2.b shall be carried out as permitted by and in accordance with the internal law of the requested Party. Where the request concerning one of these measures specifies 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 the fundamental principles of its law.

4. Each Party shall adopt such legislative or other measures as may be necessary to ensure that the requests coming from other Parties in order to identify, trace, freeze or seize the proceeds and instrumentalities, receive the same priority as those made in the framework of internal procedures.

Section 2 – Investigative assistance

Article 16 – Obligation to assist

The Parties shall afford each other, upon request, the widest possible measure of assistance in the identification and tracing of instrumentalities, proceeds and other property liable to confiscation. Such assistance shall include any measure providing and securing evidence as to the existence, location or movement, nature, legal status or value of the aforementioned property.

Article 17 – Requests for information on bank accounts

1. Each Party shall, under the conditions set out in this article, take the measures necessary to determine, in answer to a request sent by another Party, whether a natural or legal person that is the subject of a criminal

investigation holds or controls one or more accounts, of whatever nature, in any bank located in its territory and, if so, provide the particulars of the identified accounts.

2. The obligation set out in this article shall apply only to the extent that the information is in the possession of the bank keeping the account.

3. In addition to the requirements of Article 37, the requesting party shall, in the request:

   a. state why it considers that the requested information is likely to be of substantial value for the purpose of the criminal investigation into the offence;

   b. state on what grounds it presumes that banks in the requested Party hold the account and specify, to the widest extent possible, which banks and/or accounts may be involved; and

   c. include any additional information available which may facilitate the execution of the request.

4. The requested Party may make the execution of such a request dependant on the same conditions as it applies in respect of requests for search and seizure.

5. Each State or the European Community may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, by a declaration addressed to the Secretary General of the Council of Europe, declare that this article applies only to the categories of offences specified in the list contained in the appendix to this Convention.

6. Parties may extend this provision to accounts held in non-bank financial institutions. Such extension may be made subject to the principle of reciprocity.

Article 18 – Requests for information on banking transactions

1. On request by another Party, the requested Party shall provide the particulars of specified bank accounts and of banking operations which have been carried out during a specified period through one or more accounts specified in the request, including the particulars of any sending or recipient account.

2. The obligation set out in this Article shall apply only to the extent that the information is in the possession of the bank holding the account.

3. In addition to the requirements of Article 37, the requesting Party shall in its request indicate why it considers the requested information relevant for the purpose of the criminal investigation into the offence.

4. The requested Party may make the execution of such a request dependant on the same conditions as it applies in respect of requests for search and seizure.

5. Parties may extend this provision to accounts held in non-bank financial institutions. Such extension may be made subject to the principle of reciprocity.

Article 19 – Requests for the monitoring of banking transactions

1. Each Party shall ensure that, at the request of another Party, it is able to monitor, during a specified period, the banking operations that are being carried out through one or more accounts specified in the request and communicate the results thereof to the requesting Party.

2. In addition to the requirements of Article 37, the requesting Party shall in its request indicate why it considers the requested information relevant for the purpose of the criminal investigation into the offence.

3. The decision to monitor shall be taken in each individual case by the competent authorities of the requested Party, with due regard for the national law of that Party.

4. The practical details regarding the monitoring shall be agreed between the competent authorities of the requesting and requested Parties.

5. Parties may extend this provision to accounts held in non-bank financial institutions.

Article 20 – Spontaneous information

Without prejudice to its own investigations or proceedings, a Party may without prior request forward to another Party information on instrumentalities and proceeds, when it considers 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 this chapter.

Section 3 – Provisional measures

Article 21 – Obligation to take provisional measures

1. At the request of another Party which has instituted criminal proceedings or proceedings for the purpose of confiscation, a Party shall take the necessary provisional measures, such as freezing or seizing, to prevent any dealing in, transfer or disposal of property which, at a later stage, may be the subject of a request for confiscation or which might be such as to satisfy the request.

2. A Party which has received a request for confiscation pursuant to Article 23 shall, if so requested, take the measures mentioned in paragraph 1 of this article in respect of any property which is the subject of the request or which might be such as to satisfy the request.

Article 22 – Execution of provisional measures

1. After the execution of the provisional measures requested in conformity with paragraph 1 of Article 21, the requesting Party shall provide spontaneously and as soon as possible to the requested Party all information which may question or modify the extent of these measures. The requesting Party shall also provide without delays all complementary information requested by the requested Party and which is necessary for the implementation of and the follow up to the provisional measures.

2. Before lifting any provisional measure taken pursuant to this article, the requested Party shall, wherever possible, give the requesting Party an opportunity to present its reasons in favour of continuing the measure.

Section 4 – Confiscation

Article 23 – Obligation to confiscate

1. A Party, which has received a request made by another Party for confiscation concerning instrumentalities or proceeds, situated in its territory, shall:

   a. enforce a confiscation order made by a court of a requesting Party in relation to such instrumentalities or proceeds; or

   b. submit the request to its competent authorities for the purpose of obtaining an order of confiscation and, if such order is granted, enforce it.

2. For the purposes of applying paragraph 1.b of this article, any Party shall whenever necessary have competence to institute confiscation proceedings under its own law.

3. The provisions of paragraph 1 of this article shall also apply to confiscation consisting in a requirement to pay a sum of money corresponding to the value of proceeds, if property on which the confiscation can be enforced is located in the requested Party. In such cases, when enforcing confiscation pursuant to paragraph 1, the requested Party shall, if payment is not obtained, realise the claim on any property available for that purpose.

4. If a request for confiscation concerns a specific item of property, the Parties may agree that the requested Party may enforce the confiscation in the form of a requirement to pay a sum of money corresponding to the value of the property.

5. The Parties shall co-operate to the widest extent possible under their domestic law with those Parties which request the execution of measures equivalent to confiscation leading to the deprivation of property, which are not criminal sanctions, in so far as such measures are ordered by a judicial authority of the requesting Party in relation to a criminal offence, provided that it has been established that the property constitutes proceeds or other property in the meaning of Article 5 of this Convention.

Article 24 – Execution of confiscation

1. The procedures for obtaining and enforcing the confiscation under Article 23 shall be governed by the law of the requested Party.

2. The requested Party shall be bound by the findings as to the facts in so far as they are stated in a conviction or judicial decision of the requesting Party or in so far as such conviction or judicial decision is implicitly based on them.

3. Each State or the European Community may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, by a declaration addressed to the Secretary General of the Council of Europe, declare that paragraph 2 of this article applies only subject to its constitutional principles and the basic concepts of its legal system.

4. If the confiscation consists in the requirement to pay a sum of money, the competent authority of the requested Party shall convert the amount thereof into the currency of that Party at the rate of exchange ruling at the time when the decision to enforce the confiscation is taken.

5. In the case of Article 23, paragraph 1.a, the requesting Party alone shall have the right to decide on any application for review of the confiscation order.

Article 25 – Confiscated property

1. Property confiscated by a Party pursuant to Articles 23 and 24 of this Convention, shall be disposed of by that Party in accordance with its domestic law and administrative procedures.

2. When acting on the request made by another Party in accordance with Articles 23 and 24 of this Convention, Parties shall, to the extent permitted by domestic law and if so requested, give priority consideration to returning the confiscated property to the requesting Party so that it can give compensation to the victims of the crime or return such property to their legitimate owners.

3. When acting on the request made by another Party in accordance with Articles 23 and 24 of this Convention, a Party may give special consideration to concluding agreements or arrangements on sharing with other Parties, on a regular or case-by-case basis, such property, in accordance with its domestic law or administrative procedures.

Article 26 – Right of enforcement and maximum amount of confiscation

1. A request for confiscation made under Articles 23 and 24 does not affect the right of the requesting Party to enforce itself the confiscation order.

2. Nothing in this Convention shall be so interpreted as to permit the total value of the confiscation to exceed the amount of the sum of money specified in the confiscation order. If a Party finds that this might occur, the Parties concerned shall enter into consultations to avoid such an effect.

Article 27 – Imprisonment in default

The requested Party shall not impose imprisonment in default or any other measure restricting the liberty of a person as a result of a request under Article 23, if the requesting Party has so specified in the request.

Section 5 – Refusal and postponement of co-operation

Article 28 – Grounds for refusal

1. Co-operation under this chapter may be refused if:

   a. the action sought would be contrary to the fundamental principles of the legal system of the requested Party; or

   b. the execution of the request is likely to prejudice the sovereignty, security, ordre public or other essential interests of the requested Party; or

   c. in the opinion of the requested Party, the importance of the case to which the request relates does not justify the taking of the action sought; or

   d. the offence to which the request relates is a fiscal offence, with the exception of the financing of terrorism;

   e. the offence to which the request relates is a political offence, with the exception of the financing of terrorism; or

   f. the requested Party considers that compliance with the action sought would be contrary to the principle of *ne bis in idem*; or

g. the offence to which the request relates would not be an offence under the law of the requested Party if committed within its jurisdiction. However, this ground for refusal applies to co-operation under Section 2 only in so far as the assistance sought involves coercive action. Where dual criminality is required for co-operation under this chapter, that requirement shall be deemed to be satisfied regardless of whether both Parties place the offence within the same category of offences or denominate the offence by the same terminology, provided that both Parties criminalise the conduct underlying the offence.

2. Co-operation under Section 2, in so far as the assistance sought involves coercive action, and under Section 3 of this chapter, may also be refused if the measures sought could not be taken under the domestic law of the requested Party for the purposes of investigations or proceedings, had it been a similar domestic case.

3. Where the law of the requested Party so requires, co-operation under Section 2, in so far as the assistance sought involves coercive action, and under Section 3 of this chapter may also be refused if the measures sought or any other measures having similar effects would not be permitted under the law of the requesting Party, or, as regards the competent authorities of the requesting Party, if the request is not authorised by either a judge or another judicial authority, including public prosecutors, any of these authorities acting in relation to criminal offences.

4. Co-operation under Section 4 of this chapter may also be refused if:

a. under the law of the requested Party confiscation is not provided for in respect of the type of offence to which the request relates; or

b. without prejudice to the obligation pursuant to Article 23, paragraph 3, it would be contrary to the principles of the domestic law of the requested Party concerning the limits of confiscation in respect of the relationship between an offence and:

i. an economic advantage that might be qualified as its proceeds; or

ii. property that might be qualified as its instrumentalities; or

c. under the law of the requested Party confiscation may no longer be imposed or enforced because of the lapse of time; or

d. without prejudice to Article 23, paragraph 5, the request does not relate to a previous conviction, or a decision of a judicial nature or a statement in such a decision that an offence or several offences have been committed, on the basis of which the confiscation has been ordered or is sought; or

e. confiscation is either not enforceable in the requesting Party, or it is still subject to ordinary means of appeal; or

f. the request relates to a confiscation order resulting from a decision rendered in absentia of the person against whom the order was issued and, in the opinion of the requested Party, the proceedings conducted by the requesting Party leading to such decision did not satisfy the minimum rights of defence recognised as due to everyone against whom a criminal charge is made.

5. For the purpose of paragraph 4.f of this article a decision is not considered to have been rendered *in absentia* if:

a. it has been confirmed or pronounced after opposition by the person concerned; or

b. it has been rendered on appeal, provided that the appeal was lodged by the person concerned.

6. When considering, for the purposes of paragraph 4.f of this article if the minimum rights of defence have been satisfied, the requested Party shall take into account the fact that the person concerned has deliberately sought to evade justice or the fact that that person, having had the possibility of lodging a legal remedy against the decision made *in absentia*, elected not to do so. The same will apply when the person concerned, having been duly served with the summons to appear, elected not to do so nor to ask for adjournment.

7. A Party shall not invoke bank secrecy as a ground to refuse any co-operation under this chapter. Where its domestic law so requires, a Party may require that a request for co-operation which would involve the lifting of bank secrecy be authorised by either a judge or another judicial authority, including public prosecutors, any of these authorities acting in relation to criminal offences.

8. Without prejudice to the ground for refusal provided for in paragraph 1.a of this article:

a. the fact that the person under investigation or subjected to a confiscation order by the authorities of the requesting Party is a legal person shall not be invoked by the requested Party as an obstacle to affording any co-operation under this chapter;

b. the fact that the natural person against whom an order of confiscation of proceeds has been issued has died or the fact that a legal person against whom an order of confiscation of proceeds has been issued has subsequently been dissolved shall not be invoked as an obstacle to render assistance in accordance with Article 23, paragraph 1.a.

c. the fact that the person under investigation or subjected to a confiscation order by the authorities of the requesting Party is mentioned in the request both as the author of the underlying criminal offence and of the offence of money laundering, in accordance with Article 9.2.b of this Convention, shall not be invoked by the requested Party as an obstacle to affording any co-operation under this chapter.

Article 29 – Postponement

The requested Party may postpone action on a request if such action would prejudice investigations or proceedings by its authorities.

Article 30 – Partial or conditional granting of a request

Before refusing or postponing co-operation under this chapter, the requested Party shall, where appropriate after having consulted the requesting Party, consider whether the request may be granted partially or subject to such conditions as it deems necessary.

Section 6 – Notification and protection of third parties' rights

Article 31 – Notification of documents

1. The Parties shall afford each other the widest measure of mutual assistance in the serving of judicial documents to persons affected by provisional measures and confiscation.

2. Nothing in this article is intended to interfere with:

a. the possibility of sending judicial documents, by postal channels, directly to persons abroad;

b. the possibility for judicial officers, officials or other competent authorities of the Party of origin to effect service of judicial documents directly through the consular authorities of that Party or through judicial officers, officials or other competent authorities of the Party of destination,

unless the Party of destination makes a declaration to the contrary to the Secretary General of the Council of Europe at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession.

3. When serving judicial documents to persons abroad affected by provisional measures or confiscation orders issued in the sending Party, this Party shall indicate what legal remedies are available under its law to such persons.

Article 32 – Recognition of foreign decisions

1. When dealing with a request for co-operation under Sections 3 and 4, the requested Party shall recognise any judicial decision taken in the requesting Party regarding rights claimed by third parties.

2. Recognition may be refused if:

a. third parties did not have adequate opportunity to assert their rights; or

b. the decision is incompatible with a decision already taken in the requested Party on the same matter; or

c. it is incompatible with the ordre public of the requested Party; or

d. the decision was taken contrary to provisions on exclusive jurisdiction provided for by the law of the requested Party.

Section 7 – Procedural and other general rules

Article 33 – Central authority

1. The Parties shall designate a central authority or, if necessary, authorities, which shall be responsible for sending and answering requests made under this chapter, the execution of such requests or the transmission of them to the authorities competent for their execution.

2. Each Party shall, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, communicate to the Secretary General of the Council of Europe the names and addresses of the authorities designated in pursuance of paragraph 1 of this article.

Article 34 – Direct communication

1. The central authorities shall communicate directly with one another.

2. In the event of urgency, requests or communications under this chapter may be sent directly by the judicial authorities, including public prosecutors, of the requesting Party to such authorities of the requested Party. In such cases a copy shall be sent at the same time to the central authority of the requested Party through the central authority of the requesting Party.

3. Any request or communication under paragraphs 1 and 2 of this article may be made through the International Criminal Police Organisation (Interpol).

4. Where a request is made pursuant to paragraph 2 of this article and the authority is not competent to deal with the request, it shall refer the request to the competent national authority and inform directly the requesting Party that it has done so.

5. Requests or communications under Section 2 of this chapter, which do not involve coercive action, may be directly transmitted by the competent authorities of the requesting Party to the competent authorities of the requested Party.

6. Draft requests or communications under this chapter may be sent directly by the judicial authorities of the requesting Party to such authorities of the requested Party prior to a formal request to ensure that it can be dealt with efficiently upon receipt and contains sufficient information and supporting documentation for it to meet the requirements of the legislation of the requested Party.

Article 35 – Form of request and languages

1. All requests under this chapter shall be made in writing. They may be transmitted electronically, or by any other means of telecommunication, provided that the requesting Party is prepared, upon request, to produce at any time a written record of such communication and the original. However each Party may, at any time, by a declaration addressed to the Secretary General of the Council of Europe, indicate the conditions in which it is ready to accept and execute requests received electronically or by any other means of communication.

2. Subject to the provisions of paragraph 3 of this article, translations of the requests or supporting documents shall not be required.

3. At the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, any State or the European Community may communicate to the Secretary General of the Council of Europe a declaration that it reserves the right to require that requests made to it and documents supporting such requests be accompanied by a translation into its own language or into one of the official languages of the Council of Europe or into such one of these languages as it shall indicate. It may on that occasion declare its readiness to accept translations in any other language as it may specify. The other Parties may apply the reciprocity rule.

Article 36 – Legalisation

Documents transmitted in application of this chapter shall be exempt from all legalisation formalities.

Article 37 – Content of request

1. Any request for co-operation under this chapter shall specify:

   a. the authority making the request and the authority carrying out the investigations or proceedings;

b. the object of and the reason for the request;

c. the matters, including the relevant facts (such as date, place and circumstances of the offence) to which the investigations or proceedings relate, except in the case of a request for notification;

d. in so far as the co-operation involves coercive action:

   i. the text of the statutory provisions or, where this is not possible, a statement of the relevant law applicable; and

   ii. an indication that the measure sought or any other measures having similar effects could be taken in the territory of the requesting Party under its own law;

e. where necessary and in so far as possible:

   i. details of the person or persons concerned, including name, date and place of birth, nationality and location, and, in the case of a legal person, its seat; and

   ii. the property in relation to which co-operation is sought, its location, its connection with the person or persons concerned, any connection with the offence, as well as any available information about other persons, interests in the property; and

f. any particular procedure the requesting Party wishes to be followed.

2. A request for provisional measures under Section 3 in relation to seizure of property on which a confiscation order consisting in the requirement to pay a sum of money may be realised shall also indicate a maximum amount for which recovery is sought in that property.

3. In addition to the indications mentioned in paragraph 1, any request under Section 4 shall contain:

a. in the case of Article 23, paragraph 1.a:

   i. a certified true copy of the confiscation order made by the court in the requesting Party and a statement of the grounds on the basis of which the order was made, if they are not indicated in the order itself;

   ii. an attestation by the competent authority of the requesting Party that the confiscation order is enforceable and not subject to ordinary means of appeal;

   iii. information as to the extent to which the enforcement of the order is requested; and

   iv. information as to the necessity of taking any provisional measures;

b. in the case of Article 23, paragraph 1.b, a statement of the facts relied upon by the requesting Party sufficient to enable the requested Party to seek the order under its domestic law;

c. when third parties have had the opportunity to claim rights, documents demonstrating that this has been the case.

Article 38 – Defective requests

1. If a request does not comply with the provisions of this chapter or the information supplied is not sufficient to enable the requested Party to deal with the request, that Party may ask the requesting Party to amend the request or to complete it with additional information.

2. The requested Party may set a time-limit for the receipt of such amendments or information.

3. Pending receipt of the requested amendments or information in relation to a request under Section 4 of this chapter, the requested Party may take any of the measures referred to in Sections 2 or 3 of this chapter.

Article 39 – Plurality of requests

1. Where the requested Party receives more than one request under Sections 3 or 4 of this chapter in respect of the same person or property, the plurality of requests shall not prevent that Party from dealing with the requests involving the taking of provisional measures.

2. In the case of plurality of requests under Section 4 of this chapter, the requested Party shall consider consulting the requesting Parties.

Article 40 – Obligation to give reasons

The requested Party shall give reasons for any decision to refuse, postpone or make conditional any co-operation under this chapter.

Article 41 – Information

1. The requested Party shall promptly inform the requesting Party of:

   a. the action initiated on a request under this chapter;

   b. the final result of the action carried out on the basis of the request;

   c. a decision to refuse, postpone or make conditional, in whole or in part, any co-operation under this chapter;

   d. any circumstances which render impossible the carrying out of the action sought or are likely to delay it significantly; and

   e. in the event of provisional measures taken pursuant to a request under Sections 2 or 3 of this chapter, such provisions of its domestic law as would automatically lead to the lifting of the provisional measure.

2. The requesting Party shall promptly inform the requested Party of:

   a. any review, decision or any other fact by reason of which the confiscation order ceases to be wholly or partially enforceable; and

   b. any development, factual or legal, by reason of which any action under this chapter is no longer justified.

3. Where a Party, on the basis of the same confiscation order, requests confiscation in more than one Party, it shall inform all Parties which are affected by an enforcement of the order about the request.

Article 42 – Restriction of use

1. The requested Party may make the execution of a request dependent on the condition that the information or evidence obtained will not, without its prior consent, be used or transmitted by the authorities of the requesting Party for investigations or proceedings other than those specified in the request.

2. Each State or the European Community may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, by declaration addressed to the Secretary General of the Council of Europe, declare that, without its prior consent, information or evidence provided by it under this chapter may not be used or transmitted by the authorities of the requesting Party in investigations or proceedings other than those specified in the request.

Article 43 – Confidentiality

1. The requesting Party may require that the requested Party keep confidential the facts 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.

2. The requesting Party shall, if not contrary to basic principles of its national law and if so requested, keep confidential any evidence and information provided by the requested Party, except to the extent that its disclosure is necessary for the investigations or proceedings described in the request.

3. Subject to the provisions of its domestic law, a Party which has received spontaneous information under Article 20 shall comply with any requirement of confidentiality as required by the Party which supplies the information. If the other Party cannot comply with such requirement, it shall promptly inform the transmitting Party.

Article 44 – Costs

The ordinary costs of complying with a request shall be borne by the requested Party. Where costs of a substantial or extraordinary nature are necessary to comply with a request, the Parties shall consult in order to agree the conditions on which the request is to be executed and how the costs shall be borne.

Article 45 – Damages

1. When legal action on liability for damages resulting from an act or omission in relation to co-operation under this chapter has been initiated by a person, the Parties concerned shall consider consulting each other, where appropriate, to determine how to apportion any sum of damages due.

2. A Party which has become subject of a litigation for damages shall endeavour to inform the other Party of such litigation if that Party might have an interest in the case.

CHAPTER V – CO-OPERATION BETWEEN FIUS

Article 46 – Co-operation between FIUs

1. Parties shall ensure that FIUs, as defined in this Convention, shall cooperate for the purpose of combating money laundering, to assemble and analyse, or, if appropriate, investigate within the FIU relevant information on any fact which might be an indication of money laundering in accordance with their national powers.

2. For the purposes of paragraph 1, each Party shall ensure that FIUs exchange, spontaneously or on request and either in accordance with this Convention or in accordance with existing or future memoranda of understanding compatible with this Convention, any accessible information that may be relevant to the processing or analysis of information or, if appropriate, to investigation by the FIU regarding financial transactions related to money laundering and the natural or legal persons involved.

3. Each Party shall ensure that the performance of the functions of the FIUs under this article shall not be affected by their internal status, regardless of whether they are administrative, law enforcement or judicial authorities.

4. Each request made under this article shall be accompanied by a brief statement of the relevant facts known to the requesting FIU. The FIU shall specify in the request how the information sought will be used.

5. When a request is made in accordance with this article, the requested FIU shall provide all relevant information, including accessible financial information and requested law enforcement data, sought in the request, without the need for a formal letter of request under applicable conventions or agreements between the Parties.

6. An FIU may refuse to divulge information which could lead to impairment of a criminal investigation being conducted in the requested Party or, in exceptional circumstances, where divulging the information would be clearly disproportionate to the legitimate interests of a natural or legal person or the Party concerned or would otherwise not be in accordance with fundamental principles of national law of the requested Party. Any such refusal shall be appropriately explained to the FIU requesting the information.

7. Information or documents obtained under this article shall only be used for the purposes laid down in paragraph 1. Information supplied by a counterpart FIU shall not be disseminated to a third party, nor be used by the receiving FIU for purposes other than analysis, without prior consent of the supplying FIU.

8. When transmitting information or documents pursuant to this article, the transmitting FIU may impose restrictions and conditions on the use of information for purposes other than those stipulated in paragraph 7. The receiving FIU shall comply with any such restrictions and conditions.

9. Where a Party wishes to use transmitted information or documents for criminal investigations or prosecutions for the purposes laid down in paragraph 7, the transmitting FIU may not refuse its consent to such use unless it does so on the basis of restrictions under its national law or conditions referred to in paragraph 6. Any refusal to grant consent shall be appropriately explained.

10. FIUs shall undertake all necessary measures, including security measures, to ensure that information submitted under this article is not accessible by any other authorities, agencies or departments.

11. The information submitted shall be protected, in conformity with the Council of Europe Convention of 28 January 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108) and taking account of Recommendation No R(87)15 of 15 September 1987 of the Committee of Ministers of the Council of Europe Regulating the Use of Personal Data in the Police Sector, by at least the same rules of confidentiality and protection of personal data as those that apply under the national legislation applicable to the requesting FIU.

12. The transmitting FIU may make reasonable enquiries as to the use made of information provided and the receiving FIU shall, whenever practicable, provide such feedback.

13. Parties shall indicate the unit which is an FIU within the meaning of this article.

Article 47 – International co-operation for postponement of suspicious transactions

1. Each Party shall adopt such legislative or other measures as may be necessary to permit urgent action to be initiated by a FIU, at the request of a foreign FIU, to suspend or withhold consent to a transaction going ahead for such periods and depending on the same conditions as apply in its domestic law in respect of the postponement of transactions.

2. The action referred to in paragraph 1 shall be taken where the requested FIU is satisfied, upon justification by the requesting FIU, that:

a. the transaction is related to money laundering; and

b. the transaction would have been suspended, or consent to the transaction going ahead would have been withheld, if the transaction had been the subject of a domestic suspicious transaction report.

CHAPTER VI – MONITORING MECHANISM AND SETTLEMENT OF DISPUTES

Article 48 – Monitoring mechanism and settlement of disputes

1. The Conference of the Parties (COP) shall be responsible for following the implementation of the Convention. The COP:

a. shall monitor the proper implementation of the Convention by the Parties;

b. shall, at the request of a Party, express an opinion on any question concerning the interpretation and application of the Convention.

2. The COP shall carry out the functions under paragraph 1.a above by using any available Select Committee of Experts on the Evaluation of Anti-Money Laundering Measures (Moneyval) public summaries (for Moneyval countries) and any available FATF public summaries (for FATF countries), supplemented by periodic self assessment questionnaires, as appropriate. The monitoring procedure will deal with areas covered by this Convention only in respect of those areas which are not covered by other relevant international standards on which mutual evaluations are carried out by the FATF and Moneyval.

3. If the COP concludes that it requires further information in the discharge of its functions, it shall liaise with the Party concerned, taking advantage, if so required by the COP, of the procedure and mechanism of Moneyval. The Party concerned shall then report back to the COP. The COP shall on this basis decide whether or not to carry out a more in-depth assessment of the position of the Party concerned. This may, but need not necessarily, involve, a country visit by an evaluation team.

4. In case of a dispute between Parties as to the interpretation or application of the Convention, they shall seek a settlement of the dispute through negotiation or any other peaceful means of their choice, including submission of the dispute to the COP, to an arbitral tribunal whose decisions shall be binding upon the Parties, or to the International Court of Justice, as agreed upon by the Parties concerned.

5. The COP shall adopt its own rules of procedure.

6. The Secretary General of the Council of Europe shall convene the COP not later than one year following the entry into force of this Convention. Thereafter, regular meetings of the COP shall be held in accordance with the rules of procedure adopted by the COP.

CHAPTER VII – FINAL PROVISIONS

Article 49 – Signature and entry into force

1. The Convention shall be open for signature by the member States of the Council of Europe, the European Community and non-member States which have participated in its elaboration. Such States or the European Community may express their consent to be bound by:

a. signature without reservation as to ratification, acceptance or approval; or

b. signature subject to ratification, acceptance or approval, followed by ratification, acceptance or approval.

2. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

3. This Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date on which 6 signatories, of which at least four are member States of the Council of Europe, have expressed their consent to be bound by the Convention in accordance with the provisions of paragraph 1.

4. In respect of any Signatory which subsequently expresses its consent to be bound by it, the Convention 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 expression of its consent to be bound by the Convention in accordance with the provisions of paragraph 1.

5. No Party to the 1990 Convention may ratify, accept or approve this Convention without considering itself bound by at least the provisions corresponding to the provisions of the 1990 Convention to which it is bound.

6. As from its entry into force, Parties to this Convention, which are at the same time Parties to the 1990 Convention:

a. shall apply the provisions of this Convention in their mutual relationships;

b. shall continue to apply the provisions of the 1990 Convention in their relations with other Parties to the said Convention, but not to the present Convention.

Article 50 – Accession to the Convention

1. After the entry into force of this Convention, the Committee of Ministers of the Council of Europe, after consulting the Parties to the Convention, may invite any State not a member of the Council and not having participated in its elaboration to accede to this Convention, by a decision taken by the majority provided for in Article 20.d. of the Statute of the Council of Europe and by the unanimous vote of the representatives of the Parties entitled to sit on the Committee.

2. In respect of any acceding State, the Convention 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 of the instrument of accession with the Secretary General of the Council of Europe.

Article 51 – Territorial application

1. Any State or the European Community may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, specify the territory or territories to which the Convention shall apply.

2. Any Party may, at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of the Convention to any other territory specified in the declaration. In respect of such territory the Convention 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 52 – Relationship to other conventions and agreements

1. This Convention does not affect the rights and undertakings of Parties derived from international multilateral instruments concerning special matters.

2. The Parties to this Convention may conclude bilateral or multilateral agreements with one another on the matters dealt with in this Convention, for the purposes of supplementing or strengthening its provisions or facilitating the application of the principles embodied in it.

3. If two or more Parties have already concluded an agreement or treaty in respect of a subject which is dealt with in this Convention or otherwise have established their relations in respect of that subject, they shall be entitled to apply that agreement or treaty or to regulate these relations accordingly, in lieu of the Convention, if it facilitates international co-operation.

4. Parties which are members of the European Union shall, in their mutual relations, apply Community and European Union rules in so far as there are Community or European Union rules governing the particular subject concerned and applicable to the specific case, without prejudice to the object and purpose of the present Convention and without prejudice to its full application with other Parties.

Article 53 – Declarations and reservations

1. Any State or the European Community may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, make one or more of the declaration provided for in Article 3, paragraph 2, Article 9, paragraph 4, Article 17, paragraph 5, Article 24, paragraph 3, Article 31, paragraph 2, Article 35, paragraphs 1 and 3 and Article 42, paragraph 2.

2. Any State or the European Community may also, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, by a declaration addressed to the Secretary General, reserve its right not to apply, in part or in whole, the provisions of Article 7, paragraph 2, sub-paragraph c; Article 9, paragraph 6; Article 46, paragraph 5; and Article 47.

3. Any State or the European Community may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, declare the manner in which it intends to apply Articles 17 and 19 of this Convention, particularly taking into account applicable international agreements in the field of international co-operation in criminal matters. It shall notify any changes in this information to the Secretary General of the Council of Europe.

4. Any State or the European Community may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, declare:

a. that it will not apply Article 3, paragraph 4 of this Convention; or

b. that it will apply Article 3, paragraph 4 of this Convention only partly; or

c. the manner in which it intends to apply Article 3, paragraph 4 of this Convention.

It shall notify any changes in this information to the Secretary General of the Council of Europe.

5. No other reservation may be made.

6. Any Party which has made a reservation under this article may wholly or partly withdraw it by means of a notification addressed to the Secretary General of the Council of Europe. The withdrawal shall take effect on the date of receipt of such notification by the Secretary General.

7. A Party which has made a reservation in respect of a provision of the Convention may not claim the application of that provision by any other 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 54 – Amendments

1. Amendments to the Convention may be proposed by any Party, and shall be communicated by the Secretary General of the Council of Europe to the member States of the Council of Europe, to the European Community and to every non-member State which has acceded to or has been invited to accede to this Convention in accordance with the provisions of Article 50.

2. Any amendment proposed by a Party shall be communicated to the European Committee on Crime Problems (CDPC) which shall submit to the Committee of Ministers its opinion on that proposed amendment.

3. The Committee of Ministers shall consider the proposed amendment and the opinion submitted by the CDPC and may adopt the amendment by the majority provided for in Article 20.d of the Statute of the Council of Europe.

4. The text of any amendment adopted by the Committee of Ministers in accordance with paragraph 3 of this article shall be forwarded to the Parties for acceptance.

5. Any amendment adopted in accordance with paragraph 3 of this article shall come into force on the thirtieth day after all Parties have informed the Secretary General of their acceptance thereof.

6. In order to update the categories of offences contained in the appendix, as well as amend Article 13, amendments may be proposed by any Party or by the Committee of Ministers. They shall be communicated by the Secretary General of the Council of Europe to the Parties.

7. After having consulted the Parties which are not members of the Council of Europe and, if necessary the CDPC, the Committee of Ministers may adopt an amendment proposed in accordance with paragraph 6 by the majority provided for in Article 20.d of the Statute of the Council of Europe. The amendment shall enter into force following the expiry of a period of one year after the date on which it has been forwarded to the Parties. During this period, any Party may notify the Secretary General of any objection to the entry into force of the amendment in its respect.

8. If one-third of the Parties notifies the Secretary General of an objection to the entry into force of the amendment, the amendment shall not enter into force.

9. If less than one-third of the Parties notifies an objection, the amendment shall enter into force for those Parties which have not notified an objection.

10. Once an amendment has entered into force in accordance with paragraphs 6 to 9 of this article and a Party has notified an objection to it, this amendment shall come into force in respect of the Party concerned on the first day of the month following the date on which it has notified the Secretary General of the Council of Europe of its acceptance. A Party which has made an objection may withdraw it at any time by notifying it to the Secretary General of the Council of Europe.

11. If an amendment has been adopted by the Committee of Ministers, a State or the European Community may not express their consent to be bound by the Convention, without accepting at the same time the amendment.

Article 55 – Denunciation

1. Any Party may, at any time, denounce the Convention 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. The present Convention shall, however, continue to apply to the enforcement under Article 23 of confiscation for which a request has been made in conformity with the provisions of the Convention before the date on which such a denunciation takes effect.

Article 56 – Notifications

The Secretary General of the Council of Europe shall notify the member States of the Council of Europe, the European Community, the non-member States which have participated in the elaboration of the Convention, any State invited to accede to it and any other Party to the Convention of:

a. any signature;

b. the deposit of any instrument of ratification, acceptance, approval or accession;

c. any date of entry into force of the Convention in accordance with Articles 49 and 50;

d. any declaration or reservation made under Article 53;

e. any other act, notification or communication relating to the Convention.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at Warsaw, this 16th day of May 2005, 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, to the European Community, to the non-member States which have participated in the elaboration of the Convention and to any State invited to accede to it.

APPENDIX

a. participation in an organised criminal group and racketeering;

b. terrorism, including financing of terrorism;

c. trafficking in human beings and migrant smuggling;

d. sexual exploitation, including sexual exploitation of children;

e. illicit trafficking in narcotic drugs and psychotropic substances;
f. illicit arms trafficking;
g. illicit trafficking in stolen and other goods;
h. corruption and bribery;
i. fraud;
j. counterfeiting currency;
k. counterfeiting and piracy of products;
l. environmental crime;
m. murder, grievous bodily injury;
n. kidnapping, illegal restraint and hostage-taking;
o. robbery or theft;
p. smuggling;
q. extortion;
r. forgery;
s. piracy; and
t. insider trading and market manipulation.

Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism – CETS No. 198

Explanatory Report

I – INTRODUCTION

1. Money laundering is not a new phenomenon – criminals have always tried to hide their bounty – but it is taking new forms. The proceeds of crime, particularly cash, must be laundered for reinvestment. This involves a series of complicated financial operations (deposit, withdrawals, bank transfers, etc.) which ultimately results in criminal money becoming "clean" and acceptable for legitimate business purposes.

2. The problem of money laundering, however, has grown dramatically in recent years, to keep pace with the magnitude of the funds involved and invested. Several billions of Euros are available for laundering every year. This laundered criminal money is recycled through normal businesses and thus may penetrate legitimate markets and corrupt entire economies.

3. Misuse of the financial system is not, however, limited to money laundering schemes designed to preserve and maximise proceeds from crimes which have been committed. As we now know, to our cost, the financial system is misused in similar ways to fund terrorist atrocities. In the wake of the terrible attacks on the United States of America on September 11, 2001, the international community rapidly recognised the important similarities between the processes involved in money laundering and in the financing of terrorism. The phenomenon of the financing of terrorism is also not new. Terrorist groups have always sought funds – in various ways – to support their actions. Traditionally, such activities were also illegal, eg. bank robberies, weapons and drug trafficking, etc. However, in recent years, a new phenomenon has grown: the carrying out of legitimate activities to finance terrorist actions. In this case, the phenomenon is the opposite of money laundering: the "clean" money collected through charities, legitimate commercial activities and so on, can be used to finance terrorist actions.

4. The Council of Europe was well ahead of its time in 1980 when it adopted the first international instrument against money laundering (Recommendation No. R(80)10 on measures against the transfer and the safekeeping of funds of criminal origin). In 1990, the Convention on laundering, search, seizure and confiscation of the proceeds from crime (ETS 141 – hereinafter referred to as "the 1990 Convention") was approved by the Committee of Ministers and opened for signature in November of that year. It entered into force in September 1993. While the initial pace of ratification was relatively slow, recent years have witnessed a significant upsurge of activity. As of December 2004, 47 States had become parties to it, including one non-European State, ie. Australia.

5. One of the major purposes of the 1990 Convention is to facilitate international cooperation in this area in a manner which complements existing Council of Europe instruments. The Select Committee of Experts which elaborated the text of the 1990 Convention was of the view that this goal could only be accomplished if steps were taken to minimise the significant differences of approach which then existed in the domestic legal systems of member States. Consequently Chapter II of the 1990 Convention addresses measures to be taken at the national level while the focus of Chapter III is on issues of international cooperation. As is noted in paragraph 10 of the Explanatory Report to the 1990 Convention: "the Convention seeks to provide a complete set of rules, covering all the stages of the procedure from the first investigations to the imposition and enforcement of confiscation sentences and to allow for flexible but effective mechanisms of international cooperation to the widest extent possible in order to deprive criminals of the instruments and fruits of their illegal activities". This Convention has left the general structure of the 1990 Convention untouched.

6. In the years since its conclusion, the 1990 Convention has come to be regarded as a key point of reference in anti-money laundering policy discussions, political declarations, and practical programmes of activity both in Europe and beyond.

7. Notwithstanding the recognition which the 1990 Convention has achieved there have been calls over the years for a process to be put in place to review its adequacy in the light of present-day requirements. In this regard it should be recalled that at the time of its elaboration the Select Committee of Experts which drafted the 1990 Convention was not in a position to draw upon a settled and developed body of domestic law and practice. International cooperation in this sphere was relatively unknown. Indeed, save for the limited scope provided by the 1988 UN Convention against illicit traffic in narcotic drugs and psychotropic substances, the area was a new one for the vast majority of members of the international community.

8. In the period of over ten years which has elapsed since the text of the 1990 Convention was adopted, valuable experience has been gained. The mutual evaluation procedures of the FATF and, more recently, the similar work undertaken by the Council of Europe Select Committee of Experts on the Evaluation of Anti-Money Laundering Measures (MONEYVAL), have provided valuable insights into the problems which have arisen both in the domestic implementation of anti-money laundering measures, and in international cooperation. The remits of these two evaluative bodies have also today been extended also to cover assessment of the effectiveness of measures taken in jurisdictions to counter terrorist financing.

9. Further debate on this issue has also been stimulated by developments in other *fora*. Of relevance in this context was the adoption by the European Union, on 26 June 2001, of the Framework Decision on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds from crime. This includes, *inter alia*, significant movement towards a harmonised implementation of certain critical provisions of the 1990 Convention concerning action at the domestic level (such as Articles 3 and 7) as well as embodying agreement on practices designed to enhance the effectiveness of international cooperation.

10. It should also be noted that the review and revision of other key reference texts in the fight against money laundering, which were adopted in the early and mid 1990s have been completed. In relation to the latter, it will be recalled that, following an extensive "stocktaking exercise", the FATF amended its package of 40 Recommendations in 2003. The previous 40 FATF Recommendations earlier had been supplemented by the Special Recommendations of the FATF on the Financing of Terrorism.

11. The European Union Council Directive of June 1991 on prevention of the use of the financial system for the purpose of money laundering was also substantially amended in December 2001. The Commission presented a proposal for a Third Money Laundering Directive and a Regulation on control of cash entering or leaving the Community. These proposals are in the process of being discussed in the European Parliament and the Council of the EU.

12. Other important initiatives that have taken place in recent years include the development and expansion of the Egmont Group of Financial Intelligence Units, the adoption of the United Nations Conventions against Transnational Organised Crime and Corruption and the Convention on the Suppression of the Financing of Terrorism as well as the emergence of international pressure through the imposition of counter-measures on "non-cooperative countries and territories", which were not in conformity with international standards.

13. Discussion within the Council of Europe started as early as 1998 on the advisability of drafting an updating Protocol to the 1990 Convention and on the scope of such an exercise should it be undertaken. Given differences of view among member States, a questionnaire-based enquiry was conducted on the subject in 2000. It emerged from this enquiry that a clear majority of States were in support of an early opening of negotiations on a protocol. The Reflection Group on the advisability of drawing up an additional protocol to

the Convention on laundering, search, seizure and confiscation of the proceeds from crime (PC-S-ML) submitted its report to the CDPC at its 51st plenary session on 17-21 June 2002 and made specific suggestions as to the possible content of such a treaty.

14. The European Committee on crime problems (CDPC) entrusted at the end of 2003, the Committee of experts on the revision of the Convention on laundering, search, seizure and confiscation of the proceeds from crime (PC-RM) to draw up such a protocol.

15. These terms of reference were revised in March 2004 and read as follows:

> "On the basis of the final activity report on the advisability of drawing up an additional protocol to the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS No. 141) (doc. CDPC(2002)5), in particular, its Chapter III, Section 3 (recommendations) and bearing in mind recent developments and existing international instruments related to money laundering matters in the Council of Europe as well as in other international fora (e.g. Financial Action Task Force on Money Laundering, European Union, Egmont Group, United Nations), the Committee shall draw up an additional protocol to Convention ETS No. 141, in order to update and complement it as necessary.
>
> Within the context of the negotiations of the draft Protocol, consideration should be given to the introduction of provisions concerning the prevention of money laundering and the financing of terrorism:
>
> a. as regards preventive measures, consideration should be given, for instance, to introducing a context-setting provision or provisions on measures of prevention to facilitate subsequent coverage of the treatment of the powers and duties of FIUs, particularly those dealing with the duty to control (identification and verification of the identity of clients, identification of beneficial owners, suspicious transactions' reports), the definition of FIUs and the principles of co-operation between them, as well as transparency of legal entities. Such provision or provisions, if introduced, should make appropriate reference to existing international standards and, particularly, a reference to the FATF recommendations on money laundering and terrorist financing either in the Preamble to the Protocol or as a self-standing provision;
>
> b. as regards financing of terrorism, consideration should be given to introducing one or several provisions ensuring the application of the provisions of the 1990 Money Laundering Convention to the fight against the financing of terrorism and which, while giving added value, are in full conformity with internationally accepted standards, including the UN International Convention on the suppression of the financing of terrorism;
>
> c. a mechanism should also be found to ensure that the Convention, as revised by the Protocol, could be adapted accordingly, should the internationally accepted standards referred to therein be changed."

16. The PC-RM developed a text which both adds to and modifies provisions of the 1990 Convention. Owing to the extent of the modifications envisaged and the enlargement of the scope of the treaty to include issues concerning the financing of terrorism, the drafters felt that this text should be a (self-standing) Convention, rather then a Protocol to 1990 Convention.

17. The PC-RM held 7 meetings from December 2003 to February 2005 and finalized this Convention, taking into account also Opinion N° 254(2005) of the Parliamentary Assembly of 28 January 2005. The CDPC approved this Convention on 11 March 2005 and transmitted it to the Committee of Ministers for adoption. The Committee of Ministers adopted this Convention on 3 May 2005.

18. From a methodological point of view, this Explanatory Report in places repeats, though sometimes with necessary amendments to avoid confusion as to which text (the 1990 Convention or this Convention) reference is being made, the paragraphs of the Explanatory Report of the 1990 Convention when the provisions are the same in this Convention.

II – GENERAL CONSIDERATIONS

19. There is at present no single dedicated international treaty covering both the prevention and the control of money laundering and the financing of terrorism. The existing legally binding international instruments provide for a range of specific measures which focus on law enforcement and international cooperation (e.g. criminalisation of money laundering, confiscation, provisional measures, international cooperation), but the preventative aspects are mostly left unregulated by international law or, at best, are addressed in somewhat general terms.

20. The 1990 Council of Europe Convention did not address a certain number of issues which, though closely related to its subject matter, were not considered as directly relevant to its original objective (e.g. measures related to the prevention of money laundering). Other issues have arisen since the adoption of the 1990 Convention or have grown substantially in importance (e.g. Financial Intelligence Units, asset-sharing and recovery).

21. Furthermore, the 1990 Convention needed to be modernised and updated: since the adoption of the Convention, money laundering techniques and anti-money laundering strategies have significantly evolved. For example, laundering techniques increasingly target the non-bank sector and use professional intermediaries to invest criminal proceeds in the legitimate economy. Many jurisdictions have set up Financial Intelligence Units to process suspicious or unusual transaction reports and thus trigger more laundering investigations. Those changes needed to be followed up by reassessing the Convention's focus, adjusting some of its requirements and supplementing it with additional provisions. In addition, some of these changes have already been or are currently being included in standards set by other international *fora* (EU, UN, FATF), which the new Convention cannot ignore. Rather, the text of the new Convention must be brought into line with these new developments to ensure mutual consistency with these standards and to make possible harmonised domestic responses in an appropriate legal format.

22. The 1990 Convention also needed to be comprehensive and user-friendly so as to enable practitioners to use a single instrument, both domestically and internationally, instead of a series of texts that regulate various aspects of money laundering-prevention and control, and related international co-operation. This would encourage its use; help practitioners to better understand and use the Convention's provisions; and also help to minimise fragmentation in domestic anti-laundering policies.

23. Owing to the efficiency shown in practice of anti-money laundering techniques to combat also the financing of terrorism, the 1990 Convention also needed to be expanded to be used in the fight against terrorism and its financing, while taking into account existing international instruments (eg. the 1999 UN Convention on the suppression of the financing of terrorism). The events of 11 September 2001 forced countries around the globe to take quick action to freeze terrorist funds and it appears that many of them had serious difficulties in coping with this requirement: some were unable to rapidly trace property or bank accounts; others had to stretch the limits of legality to respond to requests or provide the evidence requested. The world has realised that quick access to financial information or information on assets held by criminal organisations, including terrorist groups, is a key to successful preventive and repressive measures, and, ultimately, for disrupting their activities. Practice shows that Financial Intelligence Units often obtain access to such information more readily than other agencies and by exchanging such information with foreign counterparts they can speed up procedures of restraint, seizure or confiscation targeting terrorist or criminal assets.

24. The main reasons for including provisions concerning the financing of terrorism in this Convention are the following:

a. the clear link between the financing of terrorism and money laundering is internationally recognised, particularly in the context of the mandate of the FATF and its 40 + 9 Recommendations, the UN, the EU, the World Bank, the IMF and the mandate of MONEYVAL;

b. the tools which have proved effective to counter money laundering should be equally effective in combating the financing of terrorism;

c. the current co-operation between FIUs already covers, in practice, questions relating to the financing of terrorism;

d. as this Convention includes provisions on the role and functioning of FIUs, it would have been difficult to de-couple questions relating to the financing of terrorism;

e. information exchanged by FIUs is now used and may also be used in the future for the purposes of fighting the financing of terrorism.

25. This Convention therefore has a larger scope as compared to the 1990 Convention, as it covers laundering and confiscation, as the 1990 Convention, but also financing of terrorism. As to the latter, the Convention first stresses the necessity for States to take immediate steps to ratify and implement fully the 1999 UN Convention on the suppression of the financing of terrorism, thereby recognizing its fundamental value in defining an international legal framework to cut terrorists off from their funds. The reference to the UN Convention aims at stressing the crucial importance of this treaty in the global fight against the financing of terrorism. It recognises that the 1999 UN International Convention for the Suppression of the Financing of Terrorism provides, for the first time, an agreed global framework within which the international community can collaborate more effectively in seeking to fight the financing of terrorism.

26. Finally, the 1990 Convention needed to be improved in the parts concerning international co-operation, so as to ensure a corrective and extensive application by the Parties and in order to take into account the development of new investigative techniques adopted in other international *fora*, as those foreseen in the framework of the EU Protocol of 16 October 2001 to the Convention on mutual legal assistance in criminal matters.

27. This Convention therefore seeks to achieve all these objectives and will be complemented by a mechanism to ensure the proper implementation by Parties of its provisions.

28. The drafters of this Convention, like the Parliamentary Assembly in its Opinion 254(2005), underlined that the fight against money laundering and the financing of terrorism, should not have the effect of reducing the guarantees contained in the Convention on Human Rights and its Protocols.

III – COMMENTARY TO THE ARTICLES OF THE CONVENTION

CHAPTER I – USE OF TERMS

Article 1 – Use of terms

29. Article 1 defines certain terms which form the basis of the mechanism of international co-operation provided for in the 1990 Convention and in this Convention and the scope of application of Chapter II. Following practice from other conventions elaborated within the framework of the Council of Europe, the number of terms requiring a definition has been limited to what is absolutely necessary for the correct application of the 1990 Convention and this Convention. Several of the definitions are drafted in a broad manner in order to ensure that particular features of national legislation are not excluded from the application of the 1990 Convention and this Convention[1].

30. It was the opinion of the drafters of the 1990 Convention that the terminology used in it did not, as a rule, refer to a specific legal system or a particular law. Rather they intended to create an autonomous terminology which, in the light of the national laws involved, should be so interpreted as to ensure the most efficient and faithful application of the 1990 Convention. If, as an example, a foreign confiscation order referred to a "forfeiture" instead of a "confiscation", this should not prevent the authorities of the requested state from applying the 1990 Convention and this Convention. Likewise, if the "freezing" of a bank account has been requested, the requested state should not refuse to co-operate merely on the ground that the national law only provided for "seizure" in the case under question. The Committee that drafted the 1990 Convention recognised that national procedural laws could sometimes differ widely but the end result would often be the same despite formal differences. In addition, the Committee that drafted the 1990 Convention thought it wise that all definitions should, as far as possible, be in harmony with the aforementioned 1988 United Nations anti-drug trafficking Convention. This was justified since a number of cases that were to be dealt with under the 1990 Convention would concern drug offences[2].This has not been questioned by the drafters of the present Convention, as the main definitions adopted in the framework of the 1988 UN Convention against drug trafficking have been used in subsequent instruments (eg. UN Conventions against transnational organised crime and corruption).

31. The definition of "proceeds" was intended to be as broad as possible since the experts agreed that it was important to deprive the offender of any economic advantage from his criminal activity. By adopting a broad definition, this ultimate goal would be made possible. Also, the experts drafting the 1990 Convention felt that by adopting this approach they could avoid a discussion as to whether, for example, substitutes or indirectly derived proceeds would in principle be subject to international co-operation. If a Party could not, in a particular case, accept international co-operation because of the remote relationship between the confiscated property and the offence that Party could instead invoke Article 18, paragraph 4.b, of the 1990 Convention (now Article 28, paragraph 4.b) which provides for the possibility of refusing co-operation in such a case[3]. This approach has also been confirmed by the drafters of this Convention. They have however considered it appropriate to deal specifically with substitution and derived proceeds in Article 5 of this Convention.

32. The committee drafting the 1990 Convention discussed whether the words "economic advantage" implied that the cost of making the profit (for instance the purchase price of narcotic drugs) should be deducted from the gross profit. It discovered that national legislation varied considerably on this point; there were even differences within the same legal system depending on the categories of offences. The experts also considered that differences in national legislation or legal practice in this respect between Parties should not be invoked as an obstacle to international co-operation. As regards drug offences, the experts agreed that the value of drugs initially purchased would always be subsumed within the definition of proceeds[4].

1. Paragraph 19-23 of the Explanatory Report to Convention 141.
2. Paragraph 19-23 of the Explanatory Report to Convention 141.
3. Paragraph 19-23 of the Explanatory Report to Convention 141.
4. Paragraph 19-23 of the Explanatory Report to Convention 141.

33. The committee drafting the 1990 Convention deliberately chose to speak of "criminal offences" to make it clear that the scope of application of the Convention is limited to criminal activity. It was therefore not necessary to define the term "offences"[5].

34. The wording of the definition of "proceeds" does not rule out the inclusion of property and assets that may have been transferred to third parties[6]. The definition of "proceeds" has been broadened so as to include any economic advantage, derived from or obtained, directly or indirectly, from criminal offences. This definition is drawn from the definition of proceeds to be found in the UN Convention against transnational organised crime.

35. In the broad definition of property, the drafters of the 1990 Convention deleted the initially proposed terms "tangible or intangible" since it was found that those terms could be subsumed under the definition. They also considered adding the term "assets" but decided against it for the same reasons[7].

36. In respect of "instrumentalities", the experts drafting the 1990 Convention discussed whether instrumentalities that were used to facilitate the commission of an offence or intended to be used to commit an offence were covered by the definition. In respect of instrumentalities that were used in the preparatory acts leading to the commission of an offence or to hinder the detection of an offence, the experts agreed that such questions should be resolved according to the national law of the requested Party while taking account of the differences in national law and the need for efficient international co-operation. The term "instrumentalities" should, for the purposes of international co-operation, be interpreted as broadly as possible. Property which facilitates the commission of the offence, for instance, could in some cases be included in the definition[8].

37. The drafters of the 1990 Convention discussed whether it was necessary to include "objects of offences" under the scope of application of the Convention but decided against it. The terms "proceeds" and "instrumentalities" are sufficiently broadly defined to include objects of offences whenever necessary. The broad definition of "proceeds" could include in the scope of application, for instance, stolen property such as works of art or trading in endangered species[9]. However, it should be noted that, for the avoidance of any doubt on the issue as to whether laundered property, can be confiscated, upon conviction for an autonomous money laundering offence, as an instrumentality or as proceeds (given that in some legal systems it may be considered the object of such an offence), the drafters of this Convention added the words "laundered property", in Article 3, paragraph 1 of this Convention (see below for further explanation). However, it should be noted that "laundered properties" and "proceeds" are not necessarily identical in all legal systems and, to that extent, both may be subject to confiscation.

38. The committee drafting the 1990 Convention discussed whether it was necessary to define "confiscation" or "confiscation order" under the 1990 Convention. Such a definition exists in the 1988 United Nations Convention where "confiscation", which includes forfeiture where applicable, means the permanent deprivation of property by order of a court or other competent authority. The European Convention on the International Validity of Criminal Judgments defines a "European criminal judgment" as any final decision delivered by a criminal court of a contracting state as a result of criminal proceedings and a "sanction" as any punishment or other measure expressly imposed on a person, in respect of an offence, in a European criminal judgment or in an *ordonnance pénale*[10].

39. The definition of "confiscation" was drafted in order to make it clear that, on the one hand, the 1990 Convention only deals with criminal activities or acts connected therewith, such as acts related to civil *in rem* actions and, on the other hand, that differences in the organisation of the judicial systems and the rules of procedure do not exclude the application of the 1990 Convention and this Convention. For instance, the fact that confiscation in some states is not considered as a penal sanction but as a security or other measure is irrelevant to the extent that the confiscation is related to criminal activity. It is also irrelevant that confiscation might sometimes be ordered by a judge who is, strictly speaking, not a criminal judge, as long as the decision was taken by a judge. The term "court" has the same meaning as in Article 6 of the European Convention on Human Rights. The experts agreed that purely administrative confiscation was not included in the scope of application of the Convention[11].

40. The use of the word "confiscation" includes also, where applicable, "forfeiture"[12].

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5. Paragraph 19-23 of the Explanatory Report to Convention 141.
6. Paragraph 19-23 of the Explanatory Report to Convention 141.
7. Paragraph 19-23 of the Explanatory Report to Convention 141.
8. Paragraph 19-23 of the Explanatory Report to Convention 141.
9. Paragraph 19-23 of the Explanatory Report to Convention 141.
10. Paragraph 19-23 of the Explanatory Report to Convention 141.
11. Paragraph 19-23 of the Explanatory Report to Convention 141.
12. Paragraph 19-23 of the Explanatory Report to Convention 141.

41. Predicate offence" refers to the offence which is at the origin of a laundering offence, that is, the offence which generated the proceeds. The expression is found in Article 9, paragraphs 1, 2 and 4[13].

42. Article 1, sub-paragraph f, constitutes the first new part of this Convention, ie the definition of "Financial Intelligence Units (hereinafter referred to as " FIUs"). At the beginning of the 1990s, States began to set up anti-money laundering systems placing specific suspicious or unusual transaction reporting duties on persons and/or institutions that are deemed vulnerable to money laundering. Since then, the experts noted that States have developed various types of disclosure receiving units and that various international institutions (such as the FATF, the EU, the UN, the Council of Europe, etc.) have encouraged States to create such units. Since the 1990 Convention was adopted, the Egmont Group, which brings together financial intelligence units which meet its requirements in a world wide network, came into being. The definition contained in the Convention has been drawn from the Egmont Group definition of FIUs, which itself developed the first internationally agreed definition of FIUs.

43. The definition of FIUs is linked to the requirement to set up an FIU contained in Article 12, paragraph 1. This provision requires Parties to set up one agency per territory or autonomous jurisdiction recognized by international boundaries, to serve as a disclosure receiving agency and as a contact point for information exchanges. It must operate in a jurisdiction that is covered by the law of that territory. The use of the phrase "central, national agency" carries with it no political designation or recognition of any kind. In federal systems, the use of the phrase "central, national agency" implies that only one government agency may be considered an FIU. Even if federal systems have multiple subdivisions, only one centralized agency serves as a contact point for information exchange.

44. The term "responsible for" indicates that the legal framework which establishes the FIU authorizes at a minimum the functions outlined in the definition.

45. The term "receiving" means that FIUs serve as a central reception point for receiving financial disclosures concerning money laundering and the financing of terrorism. This takes into account FIUs that have more than one office and FIUs that receive disclosures from different domestic agencies. This concept also distinguishes FIUs from law enforcement agencies with a general (overall) law enforcement mission.

46. The terms "(and, as permitted, requesting)" means that some, but not all, FIUs have the ability to seek additional information from financial institutions and other non financial institutions beyond the information in the disclosures which the FIUs receive from reporting entities. For this reason the language is in parenthesis.

47. The term "analyzing" involves an initial evaluation of the relevance of disclosures received from reporting agencies. Analysis of information reported to FIUs may occur at different stages and may take different forms. The analysis of disclosure leads to a decision as to which reports will be sent to law enforcement for investigation. In these cases, the distinction is thus drawn between the analytical stage and the investigative stage.

48. The term "disseminating" means that FIUs at a minimum must be able to share information from financial disclosures and the result of their analysis regarding money laundering and related crimes, as determined by national legislation, and the financing of terrorism, firstly with domestic authorities and, secondly, with other FIUs.

49. "Disclosure of financial information" refers to the materials that FIUs use and share with each other to detect and combat money laundering and the financing of terrorism.

50. "Concerning suspected proceeds of crime and potential financing of terrorism" refers to the fact that the first type of disclosure of financial information concerns the reporting of transactions that are suspected of being money laundering in accordance with FATF Recommendation 13 or of being intended to support terrorist activities. The term "potential" does not mean that less or weaker evidence of a crime is needed; it rather means that there are suspicions to believe that funds are going to be used to finance terrorism.

51. The terms "required by national legislation or regulation" encompass all other mandated types of reporting requirements required by law, whether involving currency, checks, wires or other transactions.

52. The final phrase "in order to combat money laundering and the financing of terrorism" cover the common purpose of every FIU.

13. Paragraph 19-23 of the Explanatory Report to Convention 141.

53. Article 1, sub-paragraph g, defines the terms "freezing" or "seizure". This definition has been drawn from the UN Conventions against transnational organised crime and corruption (Article 2.f) and appears also in Article 2 of the Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence.

54. Article 1, sub-paragraph h of this Convention follows the definition of "financing of terrorism" which is contained in Article 2 of the 1999 UN Convention and which reads as follows:

> 1. "Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out:
>
> a. An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex; or
>
> b. Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act.
>
> 2. a. In depositing its instrument of ratification, acceptance, approval or accession, a State Party which is not a party to a treaty listed in the annex may declare that, in the application of this Convention to the State Party, the treaty shall be deemed not to be included in the annex referred to in paragraph 1, subparagraph (a). The declaration shall cease to have effect as soon as the treaty enters into force for the State Party, which shall notify the depositary of this fact;
>
> b. When a State Party ceases to be a party to a treaty listed in the annex, it may make a declaration as provided for in this article, with respect to that treaty.
>
> 3. For an act to constitute an offence set forth in paragraph 1, it shall not be necessary that the funds were actually used to carry out an offence referred to in paragraph 1, subparagraph (a) or (b).
>
> 4. Any person also commits an offence if that person attempts to commit an offence as set forth in paragraph 1 of this article.
>
> 5. Any person also commits an offence if that person:
>
> a. Participates as an accomplice in an offence as set forth in paragraph 1 or 4 of this article;
>
> b. Organizes or directs others to commit an offence as set forth in paragraph 1 or 4 of this article;
>
> c. Contributes to the commission of one or more offences as set forth in paragraph 1 or 4 of this article by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
>
> i. Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of an offence as set forth in paragraph 1 of this article; or
>
> ii. Be made in the knowledge of the intention of the group to commit an offence as set forth in paragraph 1 of this article."

55. The drafters of this Convention, while agreeing on the need to extend its application to the fight against the financing of terrorism, wished to base themselves on the text of the 1999 Convention, including the definition of the financing of terrorism as reproduced above, which has been agreed internationally. They also wished to recall in the Preamble the commitments of the international community resulting from relevant Security Council Resolutions, to implement rapidly and without restrictions this UN Convention and in particular to take the necessary measures to criminalise the financing of terrorism.

56. The prohibition contained in Article 2 of the 1999 UN Convention extends, among other things, to attempts to commit such offences as well as to their organisation. Importantly, however, "for an act to constitute an offence set forth in paragraph 1, it shall not be necessary that the funds were actually used to carry out an offence referred to in paragraph 1, sub-paragraphs (a) or (b)".

CHAPTER II – FINANCING OF TERRORISM

Article 2 – Application of the Convention to the financing of terrorism

57. This new Chapter constitutes an enlargement of the scope of application of the Convention to include questions relating to the financing of terrorism.

58. Paragraph 1 of this article 2 requires Parties to ensure the application of the provisions of the Convention concerning measures to be taken at a national level and at an international level, to the financing

of terrorism. This includes, for instance, provisions concerning the prevention of the financing of terrorism, confiscation measures and international co-operation. These provisions apply therefore to both money laundering and the financing of terrorism.

59. Paragraph 2 of Article 2 more specifically requires Parties to ensure that they are able to search, trace, identify, freeze, seize and confiscate property, of a licit or illicit origin, used or allocated to be used by any means, in whole or in part, for the financing of terrorism, or the proceeds of this offence, and to provide co-operation to this end to the widest possible extent. This paragraph, inspired by Article 8 of the 1999 Convention, has been inserted in order to adapt the conditions of application of this Convention, including its safeguards, to the specificities of the financing of terrorism which, in many cases, is not based on the use of criminally acquired funds, but rather on the use of licit funds for criminal purposes.

60. The main aim of this provision is to ensure that law enforcement authorities are able to use the instruments described in Chapters III and IV also in those cases where the property concerned is used as an instrumentality to commit a terrorist act or where it is the proceeds of such an offence.

CHAPTER III – MEASURES TO BE TAKEN AT A NATIONAL LEVEL

Section 1 – General provisions

61. The wording of the articles in the chapter makes it clear that if States already possess the necessary measures, it is not necessary to take further legislative steps[14].

Article 3 – Confiscation measures

62. Paragraph 1 was drafted because several States do not yet possess sufficiently broad and effective legal provisions in respect of confiscation. It seeks to create an effective scheme for confiscation. It should be seen as a positive obligation for states to enact legislation which would enable them to confiscate instrumentalities and proceeds. This would also enable states to co-operate in accordance with the terms of the Convention, see Article 15, paragraph 2[15].

63. The expression "property the value of which corresponds to such proceeds" refers to the obligation to introduce measures which enable Parties to execute value confiscation orders by satisfying the claims on any property, including such property which is legally acquired. Value confiscation is, of course, still based on an assessment of the value of illegally acquired proceeds. The expression is also found in the United Nations Convention(s)[16].

64. This Convention introduces also a new notion in paragraph 1, ie. "laundered property". As there may be an overlap with the notions of proceeds and instrumentalities (already contained in this provision), each Party is free to choose the system which is more adapted, in so far as all the assets contained in this provision are susceptible to be confiscated.

65. As regards the reference to instrumentalities in paragraph 1 of this article, the drafters of this Convention made it clear that a Party may limit confiscation to instrumentalities which are specifically adapted for committing offences or may exclude confiscation which the value of the object in question is out of proportion to the gravity of the offence.

66. The committee which drafted the 1990 Convention discussed whether it was possible to define certain offences to which the Convention should always be applicable. The experts agreed then that Parties should not limit themselves to offences as defined by the United Nations Convention. The offences would include drug trafficking, terrorist offences, those committed by organised crime, violent crimes, offences involving the sexual exploitation of children and young persons, extortion, kidnapping, environmental offences, economic fraud, insider trading and other serious offences. Offences which generate huge profits could also be included in such a list. When drafting the 1990 Convention, the experts thought however that the scope of application of the Convention should in principle be made as wide as possible. For that purpose, the 1990 Convention created an obligation to introduce measures of confiscation in relation to all kinds of offences. At the same time, the drafters of the 1990 Convention felt that this approach required a possibility for States to restrict co-operation under the Convention to certain offences or categories of offences. The possibility of entering a reservation was therefore introduced in the 1990 Convention.

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14. Paragraph 24 of the Explanatory Report to Convention 141.
15. Paragraphs 25-27 of the Explanatory Report to Convention 141.
16. Paragraphs 25-27 of the Explanatory Report to Convention 141.

67. Paragraph 2 of Article 3 of the new Convention substantially limits this approach, by prohibiting Parties from making declarations that would have the effect of excluding the categories of offences listed in the Appendix, as well as money laundering. The drafters of this Convention pointed out the need for this provision to limit the extent to which declarations may be made with respect to the confiscation measures contained in paragraph 1 of this article. In doing so, this Convention takes into account all the various approaches.

68. This provision allows for an all-crimes approach to confiscation, as well as explicitly providing for an enumerated list of categories of offences approach and a threshold approach. The drafters of this Convention have added a list of categories of offences in the Appendix, which constitutes for the Parties a minimal list of offences to which confiscation must apply and which cannot be excluded by a declaration contained in paragraph 2. The list of categories of offences contained in the Appendix is identical to the one contained in the glossary to the revised FATF Recommendations of 20 June 2003.

69. When deciding on the range of categories of offences listed in the Appendix, see the comments under the Appendix below.

70. Paragraph 3 of Article 3 deals with the question of mandatory confiscation. It should be noted from the outset that this provision is not mandatory for Parties, which are therefore free to decide whether to implement it or not. The drafters of this Convention however intended to send a signal that mandatory confiscation for offences which are subject to the confiscation regime, may be advisable for particularly serious offences and for offences where there is no victim claiming to be compensated (such as drug trafficking), but also frauds with a large number of unknown victims.

71. Paragraph 4 of Article 3 requires Parties to provide the possibility for the burden of proof to be reversed regarding the lawful origin of alleged proceeds or other property liable to confiscation in serious offences. The definition of the notion of serious offence for the purpose of the implementation of this provision is left to the internal law of the Parties. This possibility is however subordinate to the fact that it is compatible with the internal law of the Party concerned. The conclusion of the Party on this issue shall not be challenged in the course of the monitoring procedure. It should also be noted in this context that Article 53, paragraph 4 of this Convention provides for the possibility to make a declaration concerning the provision of Article 3, paragraph 4.

72. This provision also cannot be interpreted as an obligation to introduce the reversal of the burden of proof in a criminal prosecution to find the defendant guilty of an offence. In the case of *Phillips v. the United Kingdom* of 5 July 2001, the European Court of Human Rights "considers that, in addition to being specifically mentioned in Article 6 § 2, a person's right in a criminal case to be presumed innocent and to require the prosecution to bear the onus of proving the allegations against him or her forms part of the general notion of a fair hearing under Article 6 § 1 (see, *mutatis mutandis*, *Saunders v. the United Kingdom*, judgment of 17 December 1996, *Reports* 1996-VI, p. 2064, § 68). This right is not, however, absolute, since presumptions of fact or of law operate in every criminal-law system and are not prohibited in principle by the Convention, as long as States remain within certain limits, taking into account the importance of what is at stake and maintaining the rights of the defence (see *Salabiaku v. France*, judgment of 7 October 1988, Series A no. 141-A, pp. 15-16, § 28)". In the Phillips case the statutory assumption was not applied in order to facilitate finding the defendant guilty of a drug trafficking offence, but to enable the court to assess the amount at which a confiscation order should be properly fixed after a drug trafficking conviction. The European Court of Human Rights held that the use of statutory assumptions with proper safeguards (which it found to be in place) in such circumstances did not violate the ECHR or Protocol N° 1 to it.

Article 4 – Investigative and provisional measures

73. This provision is intended to minimize the risk of assets being dissipated, thereby ensuring that a later confiscation request is not frustrated.

74. To this end, Article 4 requires Parties to be able to identify, trace, freeze or seize rapidly property which is liable to confiscation pursuant to Article 3.

Article 5 – Freezing, seizure or confiscation

75. This provision exists in other international legal instruments and more particularly, Article 12 of the UN Convention against transnational organised crime.

76. This provision underlines in particular the need to apply such measures also to proceeds which have been intermingled with property acquired from legitimate sources or which has been otherwise transformed or converted.

Article 6 – Management of frozen or seized property

77. This provision aims at ensuring that seized assets and instrumentalities are properly managed and preserved.

78. Parties remain free to determine the best way of ensuring an adequate management of the assets and systems exist already in the national laws of many States. For instance, the setting up of a national body in charge of this may constitute an appropriate way of implementing this provision.

Article 7 – Special investigative powers and techniques

79. Article 7, paragraph 1, is the same as Article 4, paragraph 1 of the 1990 Convention and has the same object in mind as Articles 3 and 4. Bank secrecy should not constitute an obstacle to domestic criminal investigations or the taking of provisional measures in the member states of the Council of Europe, in particular when the lifting of bank secrecy is ordered by a judge, a grand jury, an investigating judge or a prosecutor. The sentence should, for the purposes of international co-operation, be read in conjunction with Article 28, paragraph 7.

80. Paragraph 2 of this article is new as compared to the 1990 Convention. The additions made to the provision on special investigative powers and techniques, aim at ensuring at a national level a consistency with the relevant provisions (Articles 17-19 of this Convention) contained in the international co-operation part on requests for information on bank accounts, requests for information on banking transactions and requests for the monitoring of banking transactions.

81. Some jurisdictions are already in a position to use such special investigative powers and techniques nationally on the basis of their national legislation. However, the drafters of this Convention included these paragraphs in the text to ensure that all Parties will be in a position to do nationally, what they may be requested to do internationally. For EU States such an obligation exists in the area of international co-operation on the basis of Articles 1 to 3 of the Protocol of 16 October 2001 to the EU Convention on mutual legal assistance in criminal matters of 29 May 2000.

82. Paragraph 2 was drafted to make it mandatory on States to adopt at a national level, procedures enabling them, in the conditions foreseen in such procedures, to identify accounts held by specified beneficiaries and to obtain information on specified accounts. In this context, Paragraph 2a requires the tracing of any accounts that may be held by specified beneficiaries and it indirectly requires States to have procedures in place that enable them to trace any such accounts. While this provision obliges States to have procedures in place to comply with this obligation, the paragraph leaves it free States to decide how to comply with this obligation and does not impose an obligation on States to create, for instance, a *centralised bank accounts register*. Paragraphs 2b and 2c, on the other hand, require the obtaining of information and the monitoring of accounts that have already been identified. The wording is also intended to afford to the Contracting Parties a broad level of discretion as to how best to satisfy the requirements of these sub-paragraphs.

83. The committee drafting this Convention discussed whether it would be appropriate to extend the obligations under Article 7 to include also *accounts* in non-bank financial institutions. A number of experts held that financial services are extended by a number of other institutions which do not provide banking services but still provide for the maintenance of certain types of accounts (e.g. securities accounts) and undertake transactions on such accounts for their customers and could therefore be used for money laundering. Experts agreed that the application of the obligations under this article, which are mandatory for accounts held by banks, should, at national level, remain optional for non-bank financial institutions (NBFIs). The interpretation of this term, the financial activity and the accounts to be covered remain within the domestic law of the Party.

84. The measures to be taken under paragraph 2 of Article 7 will also enable effect to be given to the provisions of the corresponding Articles in Section 2 of Chapter IV of the Convention.

85. Paragraph 3 of the Article largely corresponds to paragraph 2 of Article 4 of the 1990 Convention. It was drafted to make States aware of new investigative techniques which are common practice in some states but which are not yet implemented in other states. The paragraph imposes an obligation on States at least to consider the introduction of new techniques which in some states, while safeguarding fundamental human rights, have proved successful in combating serious crime. Such techniques could then also be used for the

purposes of international cooperation. In such cases, Articles 15.3 and 16 would, for instance, apply. The enumeration of the techniques is not exhaustive[17].

86. Observation is an investigative technique, employed by the law enforcement agencies, consisting in covertly watching the movements of persons, without hearing them[18].

87. Interception of telecommunications, as defined in the Convention on cybercrime (ETS No. 185), usually refers to traditional telecommunications networks. These networks can include cable infrastructures, whether wire or optical cable, as well as inter-connections with wireless networks, including mobile telephone systems and microwave transmission systems. Today, mobile communications are facilitated also by a system of special satellite networks. Computer networks may also consist of an independent fixed cable infrastructure, but are more frequently operated as a virtual network by connections made through telecommunication infrastructures, thus permitting the creation of computer networks or linkages of networks that are global in nature. The distinction between telecommunications and computer communications, and the distinctiveness between their infrastructures, is blurring with the convergence of telecommunication and information technologies.

88. Access to computer systems is addressed in the Convention on cybercrime (ETS No. 185). The Cybercrime Convention defines two means of access to computer systems by law enforcement authorities: real-time collection of traffic data and the real-time interception of content data associated with specified communications transmitted by a computer system.

89. Production orders instruct individuals to produce specific records, documents or other items of property in their possession. Failure to comply with such an order may result in an order for search and seizure. The order might require that records or documents be produced in a specific form, as when the order concerns computer-generated material (see also the Convention on cybercrime)[19].

90. The procedural powers contained in the Convention on cybercrime are particularly relevant in this context. Indeed, the powers and procedures established in accordance with the Convention on cybercrime are to be applied to: (i) criminal offences established by the Convention on cybercrime; (ii) other criminal offences (including money laundering and the financing of terrorism) committed by means of a computer system; and (iii) the collection of evidence in electronic form of a criminal offence (including money laundering and the financing of terrorism). This ensures that evidence in electronic form of any criminal offence can be obtained or collected by means of the powers and procedures set out in the Convention on cybercrime. It ensures an equivalent or parallel capability for the obtaining or collection of computer data as exists under traditional powers and procedures for non-electronic data.

Article 8 – Legal remedies

91. This provision remained almost unchanged as compared to the 1990 Convention. Interested parties are basically all persons who claim that their rights with respect to property subject to provisional measures and confiscation are unjustifiably affected. These claims should in principle be honoured in cases where the innocence or *bona fides* of the party concerned is likely or beyond reasonable doubt. As long as no final confiscation order has been made against him or her, the accused may also qualify as an interested party. The legal provisions required by this article should guarantee "effective" legal remedies for interested third parties. This implies that there should be a system where such parties, if known, are duly informed by the authorities of the possibilities to challenge decisions or measures taken, that such challenges may be made even if a confiscation order has already become enforceable, if the party had no earlier opportunity to do so, that such remedies should allow for a hearing in court, that the interested party has the right to be assisted or represented by a lawyer and to present witnesses and other evidence, and that the party has a right to have the court decision reviewed[20].

92. This article does not bestow upon private citizens any right beyond those normally permitted by the domestic law of the Party. In any case, minimum rights of the defence are safeguarded by the Convention for the Protection of Human Rights and Fundamental Freedoms[21].

17. Paragraph 30 of the Explanatory Report to Convention 141.
18. Paragraph 30 of the Explanatory Report to Convention 141.
19. Paragraph 30 of the Explanatory Report to Convention 141.
20. Paragraph 31 of the Explanatory Report to Convention 141.
21. Paragraph 31 of the Explanatory Report to Convention 141.

Article 9 – Laundering offence

93. The first paragraph of the article is based on the 1988 United Nations Convention. However, the wording differs slightly from that convention in respect of the element of "participation" which is found in the 1988 United Nations Convention, and also as regards the predicate offences to which the proceeds relate. Participation has not been included in paragraph 1, sub-paragraphs a, b and c, of the article since, because of the different approach taken by the committee, it appeared to be redundant. The 1990 Convention and this Convention are not limited to proceeds from drug offences. The experts drafting the 1990 Convention considered that it was not necessary to provide that States could not limit the scope of application *vis-à-vis* the 1988 United Nations Convention, which had become a universally recognised instrument in the fight against drugs[22].

94. The first part of paragraph 1 establishes an obligation to criminalise laundering. The second part makes this obligation in respect of certain categories of laundering offences dependent on the constitutional principles and the basic concepts of the legal system of the ratifying State. To the extent that criminalisation of the act is not contrary to such principles or concepts, the State is under an obligation to criminalise the acts which are described in the paragraph. A further explanation of what is meant by basic concepts of the legal system is found in the explanatory report in respect of Article 28, paragraph 1.a[23].

95. The provision of paragraph 2, with the exception of paragraph 2.*c,* is not found in the 1988 United Nations Convention. Paragraph 2.*b* takes into account that in some states the person who committed the predicate offence will not, according to basic principles of domestic penal law, commit a further offence when laundering the proceeds. On the other hand, in other states laws to such effect have already been enacted[24].

96. The rest of this provision is new as compared with the 1990 Convention.

97. Paragraph 3 of this article concerns the *mens rea*. The evaluation process has shown that proving the mental element of a money laundering offence can be very difficult, as the courts often require (or are thought to require) a high level of knowledge as to the origin of the proceeds by the alleged launderers. The addition of this paragraph in this Convention will enable Parties also to establish a criminal offence where the offender (a) suspected that the property was proceeds and/or (b) ought to have assumed that the property was proceeds. Paragraph 3.a provides for a lesser subjective mental element and could cover a person who gives the origin of the proceeds some thought (it is sufficient that he/she suspects the property was proceeds) but has not firm knowledge that the property is proceeds. Paragraph 3.b suggests the criminalisation of negligent behaviour where the court objectively weights the evidence and determines whether the offender should have assumed the property was proceeds, whether or not he/she gave any thought to the matter.

98. Paragraph 3 criminalises acts other than those designated in the 1988 United Nations Convention. Paragraph 3 is optional. It follows that the fact that a Party decides not to adopt it in its internal law cannot be raised or criticised during the monitoring process envisaged by the Convention.

99. As regards the possibility of reservation to the predicate offences of money laundering contained in paragraph 4 of this Article, the drafters of this Convention took into account Recommendation 1 of the FATF which provides that "whichever approach is adopted, each country should at a minimum include a range of offences within each of the designated categories of offences", as these categories of offences are contained in the Appendix of this Convention, which reproduces textually the glossary appended to the FATF Recommendations. In doing so, they indicated the need to take into account all the various approaches. More particularly the drafters stressed that this provision should allow for an all crimes approach, as well as for an enumerated list of offences and threshold approaches. In any event, the categories of offences contained in the Appendix to this Convention have to be considered as predicate offences for the purposes of money laundering and therefore cannot be excluded from the scope of application of the money laundering offence through a declaration provided by this provision. When deciding on the range of offences to be covered as predicate offences under each of the categories listed in the Appendix, see the comments under the Appendix below.

100. Paragraph 5 addresses another major practical problem in money laundering prosecutions exposed in evaluations in several countries – the perceived need for a conviction for the underlying predicate offence as a basis for a money laundering prosecution. This Convention now requires the Parties to ensure that a prior or

22. Paragraph 32 of the Explanatory Report to Convention 141.
23. Paragraph 32 of the Explanatory Report to Convention 141.
24. Paragraph 32 of the Explanatory Report to Convention 141.

simultaneous conviction for the predicate offence is not a prerequisite for a conviction for money laundering. The drafters of this Convention considered that, by clarifying this in paragraph 5, it should then be possible, in a money laundering prosecution, for the predicate offence (whether domestic or foreign) to be established on the basis of circumstantial or other evidence. This was considered by the drafters to be important as the perceived need for such a conviction frequently inhibited the prosecution of money laundering as an autonomous offence – particularly laundering by third parties on behalf of others.

101. Paragraph 6 concerns the question of proof of the predicate offence in a money laundering prosecution. To facilitate prosecution, the drafters of this Convention pointed out the importance for prosecutors not to have to prove in a money laundering prosecution all the factual elements of the specific particularised predicate offence, if the proof of the illicit origin of the property could be gathered from any circumstance. By specifying that this paragraph applies to convictions for money laundering "under this article", the drafters of this Convention wished to indicate that this provision is to be seen in the context of the definition of money laundering as contained in Article 9 and in particular its paragraph 1, which refers to "intentional" behaviours. Therefore, Parties may implement Article 9.6 by requiring that the author of the money laundering offence knew that the assets came from a predicate offence, without it being necessary to prove which specific predicate offence applied.

102. Paragraph 7 aims at ensuring that a procedure against money laundering may be started even if the predicate offence has been committed abroad. Each Party keeps however the possibility to require that the offence corresponds to a predicate offence of money laundering in its internal law. This provision is drawn from FATF Recommendation 1.

Article 10 – Corporate liability

103. Article 10 deals with the liability of legal persons. It is a fact that legal persons are often involved in money laundering and financing of terrorism offences, especially in business transactions, while practice reveals serious difficulties in prosecuting natural persons acting on behalf of these legal persons. For example, in view of the size of corporations and the complexity of organizational structures, it becomes more and more difficult to identify a natural person who may be held responsible (in a criminal sense) for a money laundering offence. Legal persons thus sometimes escape their liability due to their collective decision-making process. On the other hand, money laundering and financing of terrorism practices often continue after the arrest of individual members of management, because the company as such is not deterred by individual sanctions.

104. The international trend at present seems to support the general recognition of corporate liability, even in countries, which are applying the principle according to which corporations cannot commit criminal offences. Therefore, the present provision of the Convention is in harmony with these recent developments.

105. Paragraph 1 does not stipulate the type of liability it requires for legal persons. Therefore this provision does not impose an obligation on States to establish that legal persons will be held criminally liable for the offences mentioned therein. It should be made clear however that by virtue of this provision Contracting Parties undertake to establish some form of liability for legal persons engaging in money laundering practices, liability that could be criminal, administrative or civil in nature. Thus, criminal and non-criminal –administrative, civil- sanctions are suitable, provided that they are "effective, proportionate and dissuasive" as specified by paragraph 4 of this article. Legal persons shall be held liable if three conditions are met. The first is that a money laundering or a financing of terrorism offence must have been committed. The second condition is that the offence must have been committed for the benefit or on behalf of the legal person. The third condition, which serves to limit the scope of this form of liability, requires the involvement of "any person who has a leading position". The leading position can be assumed to exist in the three situations described –a power of representation or an authority to take decisions or to exercise control- which demonstrate that such a physical person is legally able to engage the liability of the legal person.

106. Paragraph 2 expressly mentions the Contracting Parties' obligation to extend corporate liability to cases where the lack of supervision within the legal person makes it possible to commit the money laundering offences. It aims at holding legal persons liable for the omission by persons in a leading position to exercise supervision over the acts committed by subordinate persons acting on behalf of the legal person. A similar provision also exists in Article 3 of the Second Protocol to the European Union Convention on the Protection of the financial interest of the European Community of 19 June 1997. As with paragraph 1, it does not impose an obligation to establish criminal liability in such cases but some form of liability to be decided by the Contracting Party itself.

107. Paragraph 3 clarifies that corporate liability does not exclude individual liability. In a concrete case, different spheres of liability may be established at the same time, for example the responsibility of an organ etc. separately from the liability of the legal person as a whole. Individual liability may be combined with any of these categories of liability.

108. Paragraph 4 requires that legal persons be subject to "effective, proportionate and dissuasive" sanctions, which can be penal, administrative or civil in nature. This paragraph compels Contracting Parties to provide for the possibility of imposing monetary sanctions of a certain level to legal persons held liable for a money laundering offence.

109. It is obvious that the obligation to make money laundering and financing of terrorism offences punishable would lose much of its effect if it was not supplemented by an obligation to provide for adequately severe sanctions. While prescribing that pecuniary sanctions should be the sanctions that can be imposed for the relevant offences, the article leaves open the possibility that other sanctions reflecting the seriousness of the offences are provided for. It cannot, of course, be the aim of this Convention to give detailed provisions regarding the sanctions to be linked to the different offences mentioned in the Convention. On this point the Parties inevitably need the discretionary power to create a system of offences and sanctions that is in coherence with their existing national legal systems.

Article 11 – Previous decisions

110. Money laundering and the financing of terrorism are often carried out transnationally by criminal organisations whose members may have been tried and convicted in more than one country. At domestic level, many legal systems provide for a harsher penalty where someone has previous convictions.

111. The principle of international recidivism is established in a number of international legal instruments. Under Article 36(2)(iii) of the Single *Convention of 30 March 1961 on Narcotic Drugs*, for example, foreign convictions have to be taken into account for the purpose of establishing recidivism, subject to each Party's constitutional provisions, legal system and national law. Under Article 1 of the *Council Framework Decision of 6 December 2001 amending Framework Decision 2000/383/JHA on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro*, European Union member States must recognise, under the conditions of their national law, as establishing habitual criminality final decisions handed down in another member state for counterfeiting of currency.

112. The fact remains that there is no harmonised notion at an international level of recidivism and that certain legislations do not contain such a notion. In addition, the fact that foreign judgments are not brought to the attention of judges constitutes an additional complication. Accordingly, Article 11 provides for the possibility to take into account final decisions taken by another Party in assessing a sentence. To comply with the provision Parties may provide in their domestic law that previous convictions by foreign courts – like convictions by the domestic courts – will result in a harsher penalty. They may also provide that, under their general powers to assess the individual's circumstances in setting the sentence, courts should take convictions into account.

113. This provision does not place any positive obligation on courts or prosecution services to take steps to find out whether persons being prosecuted have received final sentences from another Party's courts. It should nevertheless be noted that, under Article 13 of the *European Convention on Mutual Assistance in Criminal Matters* (ETS No. 30) of 20 April 1959, a Party's judicial authorities may request from another Party extracts from and information relating to judicial records, if needed in a criminal matter.>

Section 2 – Financial Intelligence Units (FIUs)

114. The drafters of this Convention have been in favour of including relevant related preventive standards in the Convention with a "focused approach", particularly within the context of the elaboration of the role and functioning of FIUs. Indeed, as there was broad consensus on the need to include the role and functioning of FIUs in the Convention, their essential preventive role cannot be ignored and should be strengthened.

Article 12 – Financial Intelligence Units (FIUs)

115. This article introduces the concept of FIUs and recognizes their crucial role in the prevention of money laundering and the financing of terrorism. Paragraph 1 introduces a mandatory obligation for signatory States to establish an FIU on the basis of the definition in the Convention which adopts the definition of

the Egmont Group. FIUs should be provided with adequate financial, human and technical resources, whilst ensuring that staff are of high integrity.

116. Paragraph 2 has been drafted by drawing on the definition of an FIU. Committee experts drafting this Convention discussed the functions of an FIU and agreed that the timely access to financial, administrative and law enforcement information is of paramount importance for an FIU to effectively discharge its functions. Although the paragraph is drafted in mandatory terms, yet it leaves it at the discretion of signatory Parties as to the methodology used to access such data either directly or indirectly. Experts drafting this Convention also discussed and agreed that FIUs, law enforcement and supervisory and other authorities that have a responsibility in combating money laundering have mechanisms in place that enable them to co-operate and co-ordinate with each other domestically.

Article 13 – Measures to prevent money laundering

117. As regards the prevention of money laundering and the financing of terrorism, the drafters of this Convention considered it necessary to ensure conformity of the provisions included in this instrument with those adopted by other international bodies. In that respect, they wished explicitly, in paragraph 1, to refer to the revised Recommendations of the FATF, which are integrated in the Council of Europe *acquis* through MONEYVAL.

118. Paragraphs 2 and 3 of this provision detail the fundamental principles which guide the prevention of money laundering and the financing of terrorism, in conformity with agreed international standards and more particularly the FATF Recommendations (identification and verification of the identity of customers, identification of the ultimate beneficial owner, obligation to report suspicious transactions, record keeping, training of personnel and internal audit, monitoring of anti-money laundering measures, detection of significant physical cross border transportation of cash).

119. For the determination of the "legal and natural persons which engage in activities which are particularly likely to be used for money laundering purposes", the intention of the drafters of this Convention is that it covers at least the financial institutions and the non-financial professions contained in the FATF Recommendations 5 and 12 and, as regards the latter, in the framework of the activities mentioned in these two FATF Recommendations. In addition, the list and provisions contained in relevant EU Directives concerning this issue should be considered by EU States.

120. Moreover, the expression "subject to safeguards" in paragraph 2.a.ii primarily means that it is in respect of the independent legal professions, that the restriction "resulting from professional secrecy or legal professional privilege" contained in FATF Recommendation 16 (and its Explanatory Note) is relevant. Paragraph 2.b was inserted to require Parties to ensure that the fact that a suspicious report or other information has been transmitted to the FIU or that an investigation is being or may be carried out is not disclosed to the persons involved or, as appropriate, to third parties according to domestic law. The paragraph imposes this obligation on legal and natural persons whose activities are particularly likely to be used for money laundering purposes. The obligation should also be extended to all directors, officers and employees of the aforementioned legal and natural persons as applicable. Such prohibition on 'tipping off' should not however be construed or interpreted in a way that it may hinder the necessary exchange of information between relevant authorities for the proper analysis or investigation to proceed.

121. Finally, as far as paragraph 3 is concerned, to the extent that the Contracting Party is the European Community or a member of a customs union, "border" should be understood as meaning the external border of the Community or of that member. In that respect, the borders between EU States or between Contracting Parties constituting a customs union shall not be concerned by the Convention. The obligation under paragraph 3 can either be met by a declaration or a disclosure system as defined in the Interpretative Note to FATF Special Recommendation 9.

Article 14 – Postponement of domestic suspicious transactions

122. This provision requires Parties to take measures to permit urgent action to be taken by FIUs or, if appropriate, other competent authorities or bodies, including the persons referred to under Article 13 above, in order to postpone a domestic suspicious transaction. The duration of such measures shall be determined by national law. Parties are free to permit those obliged to make the suspicious transaction report to carry out the transaction in urgent cases before the suspicious transaction report is transmitted. The term "where there is a suspicion" should not be understood as requiring the responsible authority to suspend or withhold consent to a transaction going ahead, if the authority does not find it appropriate. It should also be added that

the measures of postponement only makes sense when the disclosures are made in a timely manner, so the general principle of *a priori* reporting (ie. before executing the financial operation) to enable FIUs, or if appropriate, other competent authorities or bodies, to take immediate action, if necessary, should be emphasised.

CHAPTER IV – INTERNATIONAL CO-OPERATION

Section 1 – Principles of international co-operation

Article 15 – General principles and measures for international co-operation

123. Paragraph 1 of this introductory article was drafted by the drafters of the 1990 to indicate the scope and the aims of the international co-operation which is detailed in the following sections. Those sections should, in principle, exclusively define the scope of international co-operation, but Section 1 will affect the interpretation of the other sections. Where co-operation concerns investigations or proceedings which aim at confiscation, Parties should co-operate with each other to the widest extent possible[25], including on the basis of relevant national and international legislation. Co-operation under this Convention covers both legal and natural persons.

124. Paragraph 2 of this provision should also be considered in connection with the obligation provided for under Article 23. If a state has only the system of value confiscation of proceeds, it would be necessary for it to take legislative measures which would enable it to grant a request from a state which applies property confiscation. The converse would be true, since the two systems are equal under the 1990 Convention and this Convention[26].

125. So-called "fishing expeditions" (general and not determined investigations which are carried out sometimes even without the existence of a suspicion that an offence has been committed) lie outside the scope of application of the 1990 Convention and this Convention. If the requesting Party has no indication of where the property might be found, the requested Party is not obliged to search, for instance, all banks in a country (see Article 37, paragraph 1, sub-paragraph e.ii)[27].

126. The drafters of this Convention decided to add two new paragraphs to this article, so as to ensure smooth co-operation concerning investigative assistance and provisional measures with a view to confiscation. Paragraph 3 of this article provides that the requested Party must respect the formalities and the procedures contained in the request of the requesting Party, even if the formalities or procedures are unfamiliar to the requested Party. This obligation rests with the requested Party providing that these formalities or procedures are not contrary to the fundamental principles of the law of the requested Party. In addition, in accordance with paragraph 4, requests to identify, trace, seize or freeze proceeds or instrumentalities shall receive the same priority as national requests. In the light of these additions, the drafters of this Convention agreed to delete the provision on the execution of requests.

Section 2 – Investigative assistance

Article 16 – Obligation to assist

127. As regards the obligation to assist, the drafters of this Convention kept the same provision as in the 1990 Convention.

128. This article should be interpreted in a broad manner since the committee drafting the 1990 referred to the "widest possible measure of assistance". Such assistance could relate to criminal proceedings, but it could also be proceedings for the purpose of confiscation which are related to a criminal activity[28].

129. The latter part of the paragraph should only be seen as giving examples of assistance and does not limit its application. For example, if monitoring or telephone tapping orders may be made under the law of the requested Party, they should also be granted in international co-operation[29].

130. The article relates to "identification and tracing" of property. In that respect, the wording should also be interpreted broadly so that, for instance, notifications relating to investigations as well as evaluation of property are included in the scope of application. To the extent that the scope of application of the 1990

25. Paragraph 35 of the Explanatory Report to Convention 141.
26. Paragraph 35 of the Explanatory Report to Convention 141.
27. Paragraph 35 of the Explanatory Report to Convention 141.
28. Paragraph 36 of the Explanatory Report to Convention 141.
29. Paragraph 36 of the Explanatory Report to Convention 141.

Convention and the European Convention on Mutual Assistance in Criminal Matters converge, Parties should, if no reasons to the contrary exist, endeavour to use the latter convention[30].

131. The words "other property liable to confiscation" have been added to make it clear that investigative assistance should also be rendered when the requesting Party applies value confiscation and the assistance relates to property which might be of licit origin. The assistance also includes seizure for evidentiary purposes[31].

132. The wording of this provision does not exclude the possibility of the investigative assistance referred to in this paragraph also being rendered to authorities other than judicial ones, such as police or customs authorities, in so far as such assistance does not involve coercive action (see Article 34, paragraph 5)[32].

133. The primary purpose of the provisions of Chapter IV is that Parties should co-operate with each other to the widest extent possible for the purpose of investigations and criminal proceedings aiming at the confiscation of instrumentalities and proceeds. However, the fact that the provisions of requests for bank information in Articles 17-19 does not prohibit Parties from co-operating for the same purposes under applicable instruments that more generally deal with mutual legal assistance in criminal matters (see also Article 52.1 and 53.3).

Article 17 – Requests for information on bank accounts

134. This provision, as well as Articles 18 and 19, is largely drawn from EU Protocol of 16 October 2001 to the Convention on mutual assistance in criminal matters between the Member States of the European Union. The text of the Explanatory report of the said Protocol has been approved by the Council of the EU on 14 October 2002. The provisions of Articles 17 – 19 offer the possibility to the Parties to extend their application to Non-Bank Financial Institutions (NBFIs). For explanation on this issue, reference should be made to Article 7 above. Moreover, when it comes to NBFIs, the implementation of this extension may be subject to reciprocity. Reference to the principle of reciprocity is made as a matter of abundance of clarity. Indeed, while is some countries such a principle is contained in the national law (including constitutional law), in others it is implicit.

135. This article obliges Parties, upon request in concrete cases, to trace bank accounts that are located in its territory, and thereby indirectly obliges the Parties to have in place the means of complying with such requests.

136. Paragraph 1 does not oblige the Parties to set up a centralised register of bank accounts, but leaves it to each Party to decide how to comply with the provision in an efficient way. If the requested Party manages to trace any bank accounts in its territory it is under an obligation to provide the requesting State with the bank account numbers and, subject to paragraph 2, all its details. The obligation is restricted to accounts that are held, or controlled, by a natural or legal person that is the subject of a criminal investigation. It was understood during the negotiations that accounts that are controlled by the person under investigation include accounts of which that person is the true economic beneficiary and that this applies irrespective of whether those accounts are held by a natural person, a legal person or a body acting in the form of, or on behalf of, trust funds or other instruments for administering special purpose funds, the identity of the settlers or beneficiaries of which is unknown.

137. Paragraph 2 clarifies that the obligation to supply information only applies to the extent that the information is available to the bank keeping the account. Accordingly, this Convention does not place any new obligations on Parties or banks to retain information relating to bank accounts.

138. The text in paragraph 3 was included bearing in mind the amount of work that the execution of requests for information may involve. It places certain obligations on the requesting Party. The intention is to restrict the request where possible to certain banks and/or accounts and to facilitate the execution of the request. It puts an obligation on the requesting Party to consider carefully if the information "is likely to be of substantial value for the purpose of the investigation into the offence" and to state this expressly in its request (first indent), and also to consider carefully to which Party or Parties it should send the request (second indent).

139. Paragraph 3 implies that the requesting Party may not use this measure as a means to "fish" information (see comment under Article 15 above) from just any – or all – Parties but that it must direct the request to a Party which is likely to be able to provide the requested information. The request should also include information relating to the banks it is thought may hold relevant accounts, if such information is available (second

30. Paragraph 36 of the Explanatory Report to Convention 141.
31. Paragraph 36 of the Explanatory Report to Convention 141.
32. Paragraph 36 of the Explanatory Report to Convention 141.

indent). From this it follows that the requesting Party should target its request and try to limit it to certain types of bank accounts only and/or accounts kept by certain banks only. This will enable the requested Party to restrict the execution of the request accordingly. However, the provision does not allow the requested Party to question whether the requested information is likely to be of substantial value for the purpose of the criminal investigation concerned pursuant to the first indent of the paragraph.

140. According to the third indent, the requesting Party shall also provide the requested Party with any other information, which may facilitate the execution of the request. Again, this provision was included having regard to the amount of work that the execution may involve.

141. Paragraph 4 provides that Parties may equate requests under paragraph 1 with requests for search and seizure and thereby apply the same conditions that they apply in relation to requests for search and seizure. This allows the Parties to require dual criminality and consistency with its law to the same extent that they may apply these requirements in relation to requests for search and seizure.

142. Paragraph 5 of this article contains a reservation possibility to limit the scope of application of this provision only to the categories of offences listed in the Appendix. When deciding on the range of offences to be covered as offences under each of the categories listed in the Appendix, see the comments under the Appendix below.

Article 18 – Requests for information on banking transactions

143. Article 18 contains provisions on assistance relating to the particulars of specified, already identified, bank accounts and to banking operations that have been carried out through them during a specified period.

144. There is a link between Article 17 and Article 18 in that the requesting Party may have obtained the details of the account by means of the measure provided for in Article 17 and subsequently may ask for information on banking operations that have taken place on the account. However, the measure is self-standing and may also be requested in respect of a bank account that has become known to the investigating authorities of the requesting Party by any other means or channels.

145. As regards the reference to "banks", Parties, in the context of the application of this provision, may also extend co-operation also to information which is held non-bank financial institutions. Banks do not have to change their retention policies on the basis of this article.

146. Paragraph 1 does not – unlike Article 17 – make any references to accounts linked to a person that is the subject of a criminal investigation. There is no need to make a reference to a person the subject of a criminal investigation, being a measure of mutual legal assistance in criminal matters, it applies necessarily to judicial procedures concerning criminal offences. The absence of a reference to a person that is the subject of a criminal investigation clarifies that Parties are obliged to assist also in respect of accounts held by third persons, persons who are not themselves the subject of any criminal proceedings but whose accounts are, in one way or another, linked to a criminal investigation. Any such link must be accounted for by the requesting Party in the request.

147. Paragraph 1 gives provisions on assistance not only relating to the particulars of a specified bank account and to banking operations that have been carried out through it during a specified period but also provides that the requested Party shall provide assistance relating to "the particulars of any sending or recipient account". The purpose of this is to clarify that it is not enough that the requested Party, in response to a request, provides information that a certain amount of money was sent to/from the account or from/to another account on a certain date but also to provide the requesting Party with information relating to the recipient/sending account, i.e. the bank account number and other details necessary to enable the requesting Party to proceed with a request for assistance in respect of that account. This will enable the requesting Party to trace the movements of money from account to account. When providing the particulars of any sending or recipient account, as mentioned here, the requested Party will take into account its obligations under the 1981 European Convention for the protection of individuals with regard to automatic processing of personal data.

148. As paragraphs 2 and 4 correspond to Article 17, paragraphs 2 and 4, the comments above will apply, *mutatis mutandis*, to this paragraph.

Article 19 – Requests for the monitoring of banking transactions

149. This article provides a new measure and, this being the case, it is discretionary in nature. The Article is worded in a different manner to the two previous provisions and leaves it to each Party to decide if and under what conditions the assistance may be given in a specific case.

150. Paragraph 1 only obliges Parties to set up a mechanism whereby they are able, upon request, to monitor any banking operations that take place in the future on a specified bank account during a specified period.

151. As far as paragraph 3 is concerned, the requested Party may apply conditions, including penalty thresholds and dual criminality, which would have to be observed in a similar domestic case.

152. Paragraph 4 states that the practical details regarding the monitoring shall be agreed between the competent authorities of the requesting and the requested Party. This gives the requested Party full control of the conditions under which the monitoring shall take place and allows the requesting and requested Party to agree, for example, on monitoring on a day-by-day basis or that monitoring on a weekly basis is sufficient having regard to the circumstances of the case. It is left to the requested Party to decide if real-time monitoring can be provided or not.

Article 20 – Spontaneous information

153. The drafters of this Convention have kept this provision unchanged from the 1990 Convention.

154. This article introduced a novelty (in 1990) in the field of legal assistance in criminal matters: a possibility for Parties to forward without prior request information about investigations or proceedings, which might become relevant in relation to co-operation under the 1990 Convention. Such information must of course not be transmitted if it might harm or endanger investigations or proceedings in the sending Party. As regards confidentiality, see Article 43, paragraph 3[33].

Section 3 – Provisional measures

Article 21 – Obligation to take provisional measures

155. The drafters of this Convention have kept this provision unchanged from compared to the 1990 Convention.

156. Paragraph 1 of the article concerns cases where a confiscation order has not yet been rendered by the requesting Party but where proceedings have been instituted. The experts drafting the 1990 Convention agreed that, in respect of this paragraph, an obligation to take the provisional measures exists, subject of course to the provisions on grounds for refusal and postponement. Freezing and seizing are only examples of provisional measures. They do not refer to any specific legal instrument as defined by national law. The words "to prevent any dealing in, transfer or disposal..." indicate the aim of the provisional measures. The wording "which, at a later stage, may be the subject of a request... or which might be such as to satisfy the request" makes it clear that both systems of confiscation are subject to the provision. Any property, including legally acquired property, in cases of value confiscation is envisaged. Of course, such property should be made subject to provisional measures only in cases where this is explicitly requested by the requesting Party[34].

157. Paragraph 2 deals with the case where a Party has already received a request for confiscation pursuant to Article 23. The requested Party shall then, when requested, take the necessary provisional measures so hat the request for confiscation can be executed. The requesting Party should indicate necessary provisional measures in accordance with Article 37, paragraph 3, sub-paragraph a.iv. Since the words "pursuant to Article 23" are used, it follows that both systems of international cooperation apply[35].

158. The "measures" under paragraph 2 of the article are the same as those mentioned in the previous paragraph. As to the term "property", the same considerations apply as to paragraph 1 of the article[36].

33. Paragraph 38 of the Explanatory Report to Convention 141.
34. Paragraphs 39 and 40 of the Explanatory Report to Convention 141.
35. Paragraphs 39 and 40 of the Explanatory Report to Convention 141.
36. Paragraphs 39 and 40 of the Explanatory Report to Convention 141.

Article 22 – Execution of provisional measures

159. The drafters of this Convention agreed to add a new paragraph 1 in this provision, to ensure smooth co-operation between the Parties. Although this provision may seem to be an expression of good practice, the experts felt it necessary to include it anyway, to ensure an update of the information available to the requested Party, for the execution of provisional measures which may have sometimes a certain duration.

160. The national law of the requested Party governs when the provisional measures may or must be lifted. Paragraph 2 of the article institutes an obligation for the requested Party to give the requesting Party an opportunity to present its reasons in favour of continuing the provisional measure. This could be done either directly to the court, for example, as an intervention *amicus curiae*, if permitted by national law, or as a notification through official channels. Unless the requesting Party has had the opportunity of presenting its views, the provisional measure may not be lifted if special reasons do not exist. Such reasons may be that the property concerned has been the subject of a bankruptcy, in which case the property comes into the custody of the receiver, or that the measure must automatically be lifted because an event has or has not occurred. In the latter case, the requesting State will know in advance that the measure might be lifted since the requested State is obliged to inform it of the provisions of the national law. Reference is made to Article 41, paragraph 1.e, which obliges the requested Party to inform the requesting Party about such provisions of its domestic law as would automatically lead to the lifting of the provisional measure. Such laws could for instance require that a provisional measure be lifted if a prosecutor has not applied for a renewal of the measure within a specified time-limit[37].

Section 4 – Confiscation

Article 23 – Obligation to confiscate

161. The first four paragraphs of this provision of the 1990 Convention have been left unchanged by the drafters of this Convention. Article 23, paragraph 1, describes the two forms of international cooperation regarding confiscation. Paragraph 1.a concerns the enforcement of an order made by a judicial authority in the requesting state; paragraph 1.b creates an obligation for a state to institute confiscation proceedings in accordance with the domestic law of the requested Party, if requested to do so, and to execute an order pursuant to such proceedings. This dual scheme of international co-operation follows the 1988 United Nations Convention, Article 5, paragraph 4[38].

162. From the wording of the article, it follows that the request must concern instrumentalities or proceeds from offences. In respect of value confiscation, see the commentary on Article 23, paragraph 3[39].

163. It also follows from the article that the request concerns a confiscation which by its very nature is criminal and thus excludes a request which is not connected with an offence, for example administrative confiscation. However, the decision of a court to confiscate need not be taken by a court of criminal jurisdiction following criminal proceedings[40].

164. The Explanatory Report to the 1990 Convention stated that any type of proceedings, independently of their relationship with criminal proceedings and of applicable procedural rules, might qualify in so far as they may result in a confiscation order, provided that they are carried out by judicial authorities and that they are criminal in nature, that is, that they concern instrumentalities or proceeds. Such types of proceedings (which include, for instance, the so called" *in rem* proceedings") are referred to in the text of the 1990 Convention and of this Convention as "proceedings for the purpose of confiscation"[41].

165. However, the drafters of this Convention included a new paragraph 5 in Article 23 to ensure that Parties co-operate, to the widest possible extent under their domestic law, for the execution of measures leading to confiscation, which are not criminal sanctions in so far as the measures are ordered by a judicial authority in relation to a criminal offence and that it was established that the property constitutes proceeds or other property in the meaning of Article 5. Therefore, the main difference between the 1990 Convention and this Convention on this particular issue, is that this Convention has made it clear in the body of the text of the treaty that co-operation concerning the execution of measures leading to confiscation, which are not criminal sanctions, has to be provided to the widest extent possible.

37. Paragraph 42 of the Explanatory Report to Convention 141.
38. Paragraphs 43-49 of the Explanatory Report to Convention 141.
39. Paragraphs 43-49 of the Explanatory Report to Convention 141.
40. Paragraphs 43-49 of the Explanatory Report to Convention 141.
41. Paragraphs 43-49 of the Explanatory Report to Convention 141.

166. Paragraph 1.a speaks of "courts" whereas paragraph 1.b refers to "competent authorities". This means that a limit is set to the scope of application of the 1990 Convention and this Convention. The term "competent authorities" in paragraph 1.b may include authorities responsible for prosecution, who in their turn are to bring the case before their judicial authorities (courts). It has not been considered necessary to restrict the 1990 Convention and this Convention with respect to the procedure under Article 23, paragraph 1.b, since such confiscation entirely follows national law[42].

167. The obligation to co-operate for the purpose of confiscation under Article 23, paragraph 1, is fulfilled when the requested Party acts in accordance with at least one of the two methods of co-operation specified in the paragraph. The requested Party has the possibility, in general or in relation to a specific case, of excluding the use of one of the two methods. However, the simultaneous use of both methods is admissible. Nothing in the 1990 Convention and this Convention prevents Parties from providing for the possibility of applying both systems under their law. Exceptional cases may occur when a state requests co-operation under paragraph 1.a in respect of a certain type of property and under paragraph 1.*b* for some other property, irrespective of the fact that the underlying offence might be the same. This may be the case where property has been substituted, where third party interests are involved or where the request concerns indirectly derived proceeds or intermingled property (licitly acquired property intermingled with illicitly acquired property). Moreover, the competent authorities of the requested Party should in such a case ensure that the scope of a confiscation order to be obtained does not go beyond the objectives specified in the request of the requesting Party[43].

168. If a State requests co-operation under paragraph 1.a, nothing prevents the requested State from granting co-operation under paragraph 1.b instead, since the choice of the form of co-operation rests with the requested Party. In such cases, the foreign order of confiscation might serve as proof or presumption, depending on the legal practices under the domestic law of the requested Party. Article 24, paragraph 2, is however still valid in such cases[44].

169. The way paragraph 1.b is drafted implies an obligation for the requested State always to submit the request to its competent authorities for the purpose of obtaining an order of confiscation. The question arises as to whether the government of the requested State has to submit the request in a case where it intends to invoke one of the grounds for refusal under Article 28. This was not, however, the intention of the experts drafting the 1990 Convention. An obligation to submit the request to the competent authorities should only exist if the competent authority of the requested Party, after a summary test, considers that there are no immediate obstacles to granting the request. This does not prevent the competent authority, if it subsequently finds obstacles, from deciding not to pursue the matter, provided of course that the conditions of this Convention are met[45].

170. Paragraph 2 is modelled on Article 2 of the European Convention on the Transfer of Proceedings in Criminal Matters. If the requested state already has competence under its own law to institute confiscation proceedings, the provisions of the paragraph are superfluous. If, however, no such jurisdiction exists, the necessary competence follows, on the basis of this paragraph, directly from the request of the requesting Party made under paragraph 1. Such jurisdiction need not have been expressly established by the domestic law of the requested Party. It goes without saying that this paragraph can only be applicable to the procedure envisaged in paragraph 1.b[46].

171. It follows necessarily that the requested Party has competence to render investigative assistance and to take provisional measures also in cases where it may be foreseen that assistance under Article 23 will be rendered in accordance with paragraph 1.Articles 16 and 21 contain an obligation to take measures without making a distinction between the two systems of international co-operation[47].

172. The application of the procedure under paragraph 1.b presupposes that the requested state, at least for international cases, is equipped to undertake proceedings for the purposes of confiscation (independently of the trial of the offender)[48].

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42. Paragraphs 43-49 of the Explanatory Report to Convention 141.
43. Paragraphs 43-49 of the Explanatory Report to Convention 141.
44. Paragraphs 43-49 of the Explanatory Report to Convention 141.
45. Paragraphs 43-49 of the Explanatory Report to Convention 141.
46. Paragraphs 43-49 of the Explanatory Report to Convention 141.
47. Paragraphs 43-49 of the Explanatory Report to Convention 141.
48. Paragraphs 43-49 of the Explanatory Report to Convention 141.

173. The committee that prepared the 1990 Convention drafted paragraph 3 of the article in order to make it clear that value confiscation, consisting of a requirement to pay a sum of money to the state corresponding to the value of the proceeds, is covered by the Convention. The requested Party, acting under paragraph 1, sub-paragraph a or b, will ask for payment of the sum due and, if payment is not obtained, then realise the claim on any property available. The wording "any property available" shows that the claim might be realised on either legally or illegally acquired property. It also indicates that property which is in the possession of third parties, such as ostensible persons or in cases where a so-called *Actio Pauliana* might be invoked under national law, is affected. The expression "if payment is not obtained" also includes part-payments[49].

174. According to this paragraph, Parties must, for purposes of international co-operation in the confiscation of proceeds, be able to apply both the system of property confiscation and the system of value confiscation. This is made clear by Article 15, paragraph 2.a. It may imply that Parties which have only a system of property confiscation in domestic cases have to introduce legislation providing for a system of value confiscation of proceeds, including the taking of provisional measures on any realisable property, in order to be able to comply with requests to that effect from value confiscation countries. On the other hand, Parties which have only a system of value confiscation of proceeds in domestic cases must introduce legislation providing for a system of property confiscation of proceeds in order to be able to comply with requests to that effect from property confiscation countries[50].

175. Paragraph 4 plays only a subsidiary role in that, failing agreement, paragraph 1 of the article applies. If a request for confiscation of a specific property has been made, a country which applies value confiscation must also enforce the decision on that particular property[51].

176. In the 1990 Convention it was made clear that the Parties may choose whatever legislative approach to confiscation they wish, including the civil *in rem* route. The term "civil *in rem* actions" is used in the Explanatory Report to the 1990 Convention for illustrative purposes and there is no suggestion that the Convention only covers this sort of civil confiscation action.

177. Moreover, the measures under Article 23 may be used to provide compensation or restitution for an injured party or a rightful owner.

Article 24 – Execution of confiscation

178. The drafters of this Convention kept this provision unchanged from the 1990 Convention.

179. Article 24, paragraph 1, states the fundamental rule that, once the authorities of a State have accepted a request for enforcement or a request under Article 23, paragraph 1.b, everything relating to the request must be done in accordance with that State's law and through its authorities. This rule of *lex fori* is normally interpreted to the effect that the law of the forum governs matters of procedure, mode of confiscation proceedings, matters relating to evidence and also limitation of actions based on time bars (see, however, Article 28, paragraph 4.e). In the case of remedies in respect of cases relating to Article 23, paragraph 1.a, a special rule is provided in Article 24, paragraph 5, which preserves the right to deal with applications for review of confiscation orders, originally issued by the requesting Party, for that Party alone[52].

180. As one of the consequences of the interpretation of paragraph 1, the experts drafting the 1990 Convention agreed that, if the law of the requested Party requires notification of a confiscation order and such notification was not given, the requested Party would not be in a position to execute the order since the execution is governed by the law of the requested Party. In addition, the paragraph covers possible interventions by the requested Party which might lead to the mitigation of confiscation orders which have already been issued[53].

181. The question of limitation of actions is particularly complicated in respect of confiscation. Some countries may not provide for any rules in this respect, whereas others may have provided for a set of rules relating to the original offence, the service of summons, the enforcement of the confiscation order, etc. In the view of the experts, such limitations, where they exist, should always be interpreted under the law of the requested State in conformity with what is provided under Article 16. If a confiscation order is statute-barred under the law of the requesting State, this would normally mean that it is not enforceable in the requested Party. Confiscation may then be refused under Article 28. There should therefore be no room for doubt. Under

49. Paragraphs 43-49 of the Explanatory Report to Convention 141.
50. Paragraphs 43-49 of the Explanatory Report to Convention 141.
51. Paragraphs 43-49 of the Explanatory Report to Convention 141.
52. Paragraphs 50-54 of the Explanatory Report to Convention 141.
53. Paragraphs 50-54 of the Explanatory Report to Convention 141.

Article 37, paragraph 3.a.ii, the competent authority of the requesting Party should certify that the confiscation order is enforceable and not subject to ordinary means of appeal. In addition, the requesting Party is obliged to inform the requested Party of any development by reason of which the confiscation order ceases to be wholly or partially enforceable (see Article 41, paragraph 2.a)[54].

182. Paragraph 2 was inspired by Article 42 of the European Convention on the International Validity of Criminal Judgments. Similar wording is found also in Article 11, paragraph 1.a, of the Convention on the Transfer of Sentenced Persons. The experts drafting the 1990 Convention considered this provision to be of crucial importance in the field of co-operation in penal matters, but provided a possibility of making a reservation in paragraph 3 to assure a sufficient degree of flexibility to the 1990 Convention and of this Convention. Such possibility is however limited only to those few states which, for constitutional or similar reasons, would otherwise have had difficulties in ratifying the 1990 Convention and this Convention[55].

183. Without prejudice to the principle of review of a confiscation order provided for in Article 24, paragraph 5, the following could be stated in order to clarify the meaning of paragraph 2[56].

184. Paragraph 2 is in principle only applicable to a request for enforcement of a confiscation order under Article 23, paragraph 1a. If, for instance, the requested state chooses to initiate its own proceedings under Article 23, paragraph 1.b, despite the fact that an enforceable confiscation order by the requesting state exists, the present paragraph applies equally to those proceedings. The purpose of the paragraph is that, if a factual situation has already been tried by the competent authorities of one state, then the competent authorities should not once again try those facts. It should place confidence in the foreign authorities' decision. Regarding the additional protection provided for innocent third parties, see also Article 32[57].

185. It is another matter if a party invokes new facts which, since they occurred later, were not tried by the authorities of the requesting Party (*factum superveniens*) or facts that existed but, for a valid reason (for example they were not known), were not brought before the authorities of the requesting Party. In such cases, the authorities of the requested Party are, of course, free to decide on such facts[58], or may refer them back to the requesting Party for consideration.

186. The requested State is bound by the "findings as to the facts". It is not immediately apparent what may constitute facts and what may constitute legal consequences of such facts. An example would be the case where the courts of the requesting State have found a person guilty of illegal trafficking of 100 kg of cocaine. In consequence, property equal to the proceeds of trafficking 100 kg was confiscated. The offender cannot, in such a case, in proceedings before the authorities of the requested State argue that he had only trafficked 10 kg since the authorities of the requested State are bound by the findings of the authorities of the requesting State[59].

187. Legal consequence, on the other hand, is not binding upon the requested State. If, for instance, mental deficiency does not constitute a ground for non-confiscation in the requesting state, the requested state might still examine the confiscation order and take into account the mental deficiency. The requested State may even examine whether the facts relating to the mental deficiency, as stated in the decision by the court in the requesting state, amount to mental deficiency under the law of the requested State[60].

188. If there is a difference between the legal systems to the effect that a certain fact constitutes a legitimate defence in the requested but not in the requesting State, the requested State would in some circumstances be in a position to refuse enforcement if it finds such a fact to be present. Such refusal would then be based on Article 28, paragraph 1.f. Thus, it may be necessary for the court or authority in the requested State to conduct a supplementary investigation into facts not determined by the decision in the requesting state. However, the court of the requested State is not allowed to proceed to the hearing of new evidence in respect of facts contained in the decision of the requesting State, unless such evidence was not produced for valid reasons, for instance because the evidence was not known[61].

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54. Paragraphs 50-54 of the Explanatory Report to Convention 141.
55. Paragraphs 50-54 of the Explanatory Report to Convention 141.
56. Paragraphs 50-54 of the Explanatory Report to Convention 141.
57. Paragraphs 50-54 of the Explanatory Report to Convention 141.
58. Paragraphs 50-54 of the Explanatory Report to Convention 141.
59. Paragraphs 50-54 of the Explanatory Report to Convention 141.
60. Paragraphs 50-54 of the Explanatory Report to Convention 141.
61. Paragraphs 50-54 of the Explanatory Report to Convention 141.

189. It follows from the above that the court of the requested State cannot make any independent assessment of evidence bearing upon the guilt of the person convicted and contained in the decision of the requesting State[62].

190. The rate of exchange in paragraph 4 refers to the official middle rate of exchange. Paragraph 5 is inspired by Article 10, paragraph 2, of the Validity Convention. Since the requesting State took the decision to confiscate, it seems logical that it should also have the right to review its decision. This implies of course a review of the conviction as well as the judicial decision on the basis of which the confiscation was made. The term "review" also covers extraordinary proceedings which in some States may result in a new examination of the legal aspects of a case and not only of the facts[63].

191. When elaborating the text of Article 24, the committee that drafted the 1990 Convention discussed whether it was necessary to draft a ground for refusal in respect of the case where the confiscation order had been the subject of amnesty or pardon. This question, which is of little significance, might be covered by other grounds for refusal and needed not be treated expressly in the 1990 Convention. Under Article 41, paragraph 2.a, the requesting Party is obliged to inform the requested Party of any decision by reason of which the confiscation ceases to be enforceable[64].

Article 25 – Confiscated property

192. The basic idea behind this new provision (which is inspired by Article 14 of the UN Convention against transnational organized crime) in paragraph 1 is that proceeds from the confiscation of illegally obtained profits or assets in a criminal case in the requesting State remain in the hands of a Party to the extent that those proceeds are found in that Party. It is up to that Party to decide whether it is willing to transfer (all or part of) those proceeds to another Party. Paragraph 1 provides that it shall dispose of them in conformity with its internal law and its administrative procedures.

193. This approach, which is reflected also in Article 15 of the 1990 Convention, provided a basis, but left the further implementation entirely up to the Parties. However, the drafters of this Convention considered that an agreement in this field may have advantages. After all, sharing of confiscated property often concerns large sums and an agreement will also provide a more solid basis than the conclusion of an *ad hoc* arrangement.

194. It seems logical that if provisions in a convention are deemed necessary, such a provision should also relate to the method of distribution of the confiscated property. Therefore, the drafters of this Convention gave a first indication in paragraph 2 of Article 25, which provides that priority consideration should be given to returning the confiscated property to the requesting Party, in order to compensate victims or return the property to the legitimate owner.

195. Paragraph 3 provides for the possibility of Parties to conclude agreements or arrangements to share confiscated properties with other Parties when the request is made in accordance with Articles 23 and 24 of this Convention.

Article 26 – Right of enforcement and maximum amount of confiscation

196. Paragraph 1 of this article states the general principle that the requesting State maintains its right to enforce the confiscation, whereas paragraph 2 seeks to avoid adverse effects of a value confiscation which is enforced simultaneously in two or more States, including the requesting State. This solution departs from the one adopted in Article 11 of the Validity Convention[65].

Article 27 – Imprisonment by default

197. In some States it is possible to imprison persons who have not complied with an order of confiscation of a sum of money or where the confiscated property is out of reach of the law enforcement agencies of the State. Also, other measures restricting the liberty of the affected person exist in some States. Imprisonment or such measures may in other States have been declared unconstitutional[66].

Section 5 – Refusal and postponement of co-operation

62. Paragraphs 50-54 of the Explanatory Report to Convention 141.
63. Paragraphs 50-54 of the Explanatory Report to Convention 141.
64. Paragraphs 50-54 of the Explanatory Report to Convention 141.
65. Paragraph 56 of the Explanatory Report to Convention 141.
66. Paragraph 57 of the Explanatory Report to Convention 141.

Article 28 – Grounds for refusal

198. The drafters of this Convention have left this provision basically unchanged from the 1990 Convention. There are however three notable modifications: (i) the fiscal and political offence exception cannot now be invoked for the offence of financing of terrorism as defined in this Convention (Article 28(1)(d and e)), (ii) a refusal to assist under this Convention cannot be made on the basis that the person subject to the request is at the same time identified as responsible for money laundering and for the predicate offence (Article 28(8)(c)) and (iii) the condition of dual criminality has to be examined with respect to the act which is at the basis of the offence, regardless of whether both Parties place the offence within the same category of offences or denominate the offence by the same terminology (Article 28(1)g).

199. In order to set up an efficient but at the same time flexible system, the committee that drafted the 1990 Convention chose not to elaborate a system of conditions coupled with mandatory grounds for refusal. It considered instead that the 1990 Convention should provide for a system which would, to the fullest extent possible, place states wishing to co-operate in a position to do so. No grounds for refusal are therefore mandatory in the relationship between States. However, this does not exclude states from providing that some of the grounds for refusal will be mandatory at the domestic level. This is especially true for the two first grounds listed in paragraph 1, subparagraphs a and b[67].

200. There are two sides to Article 28. On the one hand, the requested State may always claim that a ground for refusal exists and the requesting state will usually not be in a position to contest that assessment. On the other hand, the requested State may not claim any other grounds for refusal than those enumerated in the article. If no grounds for refusal exist or if it is not possible to postpone action in accordance with Article 29, the requested State is bound to comply with the request for cooperation. Moreover, the requested Party is obliged to consider, before refusing co-operation, whether the request may be granted partially or subject to conditions[68].

201. It goes without saying that the requested State is not obliged to invoke a ground for refusal even if it has the power to do so. On the contrary, several of the grounds for refusal are drafted in such a way that it will be a matter of discretion for the competent authorities of the requested State to decide whether to refuse co-operation[69].

202. Paragraph 1 is valid for all kinds of international co-operation under Chapter III of the 1990 Convention and Chapter IV of this Convention. Paragraphs 2 and 3 concern only measures involving coercive action, whereas paragraph 4 only concerns confiscation. Paragraphs 5 and 6 concern proceedings *in absentia*, paragraph 7 contains a special rule for bank secrecy and paragraph 8 limits the possibility of invoking the ground for refusal in paragraph 1.a in two particular situations[70].

203. The ground for refusal contained in paragraph 1, sub-paragraph a, is also found in Article 11, paragraph j, of the European Convention on the Transfer of Proceedings in Criminal Matters and Article 6, paragraph a, of the European Convention on the International Validity of Criminal Judgments. As stated in the explanatory reports to those conventions, it is impossible to conceive of an obligation to enforce a foreign judgment (the Validity Convention) or to make prosecution compulsory (the Transfer Convention) if it contravenes the constitutional or other fundamental laws of the requested State. Observance of these fundamental principles underlying domestic legislation constitutes for each state an overriding obligation which it may not evade. It is therefore the duty of the organs of the requested state to see that this condition is fulfilled in practice. This ground for refusal takes account of particular cases of incompatibility by means of a reference to the distinctive characteristics of each State's legislation, for it is impossible, in general regulations, to enumerate individual cases[71].

204. The committee of experts that drafted the 1990 Convention on several occasions discussed possible cases when this ground might come into play. During these discussions, the following examples were mentioned:

a. where the proceedings on which the request are based do not meet basic procedural requirements for the protection of human rights such as the ones contained in Articles 5 and 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

b. where there are serious reasons for believing that the life of a person would be endangered;

67. Paragraphs 58-77 of the Explanatory Report to Convention 141.
68. Paragraphs 58-77 of the Explanatory Report to Convention 141.
69. Paragraphs 58-77 of the Explanatory Report to Convention 141.
70. Paragraphs 58-77 of the Explanatory Report to Convention 141.
71. Paragraphs 58-77 of the Explanatory Report to Convention 141.

c. where in particular cases it is forbidden under the domestic law of the requested Party to confiscate certain types of property;

d. cases of exorbitant jurisdictional claims asserted by the requesting Party;

e. where the confiscation order is determined on the basis of an assumption that certain property represents proceeds, whereas the burden of proof as to its legitimate origin was incumbent upon the convicted person, and such a determination would, under the law of the requested Party, be contrary to the fundamental principles of its legal system. It follows from this that, if a State recognises this principle in respect of one category of offence, it cannot apply this ground for refusal for another category of offences;

f. where interests of the requested State's own nationals could be jeopardised. One example is when a request for enforcement concerns property which is already subject to a restraint order for the benefit of a privileged creditor in a bankruptcy or concerns property which is subject to litigation in a fiscal matter. Such priority problems should be solved according to the requested state's own legislation[72].

205. The scope of application of sub-paragraph a is limited by Article 28, paragraphs 5 and 6[73].

206. The ground for refusal in sub-paragraph b is also found in Article 2, paragraph b, of the European Convention on Mutual Assistance in Criminal Matters. It is however slightly reworded in the present Convention to indicate that the criterion is judged objectively[74].

207. The phrase "essential interests" refers to the interests of the state, not of individuals. Economic interests may, however, be covered by this concept[75].

208. Sub-paragraph c is intended to cover three different cases of grounds for refusal. This is why the committee drafting the 1990 Convention deliberately chose the general term "importance". The first concerns cases when there is an apparent disproportion between the action sought and the offence to which it relates. If, for example, a State is requested to confiscate a large sum of money when the offence to which it relates is of a minor nature, international co-operation could in most cases be refused on the basis of the principle of proportionality. In addition, if the costs of confiscation outweigh the law enforcement benefit at which the confiscation action is directed, the requested Party may refuse co-operation, unless an agreement to share costs is reached[76].

209. The second case relates to requests where the sum in itself is minor. It is clear that the often expensive system of international co-operation should not be burdened with such requests[77].

210. The third case concerns offences which are inherently minor (see Recommendation No. R (87) 18 on the simplification of criminal justice). The system of international co-operation provided under the 1990 Convention and this Convention should not be used for such cases[78].

211. Where the request gives rise to extraordinary costs, Article 44 will apply. It is clear that the present paragraph can be applied if no such agreement as is envisaged under Article 44 can be reached[79].

212. The committee drafting the 1990 Convention agreed that the terms "political" and "fiscal" should be interpreted in conformity with other European penal law conventions elaborated under the auspices of the Council of Europe. The experts agreed that no offence defined as a drug offence or a laundering offence under the 1988 United Nations Convention should be considered a political or fiscal offence[80].

213. The Convention makes it clear that the fiscal offence exception may no longer be invoked in respect of co-operation concerning the financing of terrorism.

214. Moreover, the drafters of this Convention considered that the financing of terrorism can never be considered a political (sub-paragraph e) offence, thereby justifying refusal of co-operation under this Convention. By referring to the notion of the financing of terrorism, as defined in the Convention, the drafters wanted to recall the definition of the financing of terrorism as contained in the 1999 UN Convention and through that Articles 14 and 15 of the 1999 UN Convention. Since the scope of application of this Convention, as defined in

72. Paragraphs 58-77 of the Explanatory Report to Convention 141.
73. Paragraphs 58-77 of the Explanatory Report to Convention 141.
74. Paragraphs 58-77 of the Explanatory Report to Convention 141.
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78. Paragraphs 58-77 of the Explanatory Report to Convention 141.
79. Paragraphs 58-77 of the Explanatory Report to Convention 141.
80. Paragraphs 58-77 of the Explanatory Report to Convention 141.

the terms of reference of the expert committee drafting it, is restricted to crimes having a financial element, the grounds of refusal in this article relate to the financing of terrorism. Co-operation in respect of specific criminal offences related to terrorism is covered by other relevant instruments.

215. The principle of *ne bis in idem* is generally recognised in domestic cases. It also plays an important role in cases with a foreign element, but its application may vary from country to country. Sub-paragraph f refers only to the principle as such without defining its content. The principle and its limits must be interpreted in the light of the domestic law of the requested Party[81].

216. *Ne bis in idem* will usually be interpreted in relation to the facts in a specific case. If, in a given case, other facts were involved than the ones relied upon in the request, it would be possible to postpone co-operation on the basis of Article 29[82].

217. The ground for refusal contained in sub-paragraph g indicates the requirement of double criminality. It is not, however, a requirement which is valid for all kinds of assistance under the 1990 Convention and this Convention. In respect of assistance under Section 2, the requirement is only valid when coercive action is implied[83]. The provision also states that where dual criminality is required for co-operation under this chapter, that requirement shall be deemed to be satisfied regardless of whether both Parties place the offence within the same category of offences or denominate the offence by the same terminology, provided that both Parties criminalise the conduct underlying the offence. This provision follows textually the second sentence of FATF Recommendation 37 which relates to activities covered by the FATF mandate.

218. In the field of international co-operation in criminal matters, the principle of double criminality may be *in abstracto* or *in concreto*. It was agreed, for the purpose of requests under Section 4 of Chapter III of the 1990 Convention and of Chapter IV of this Convention, to consider the principle *in concreto*, as in the case of the Validity Convention and the European Convention on the Transfer of Proceedings in Criminal Matters. In cases where double criminality is required for assistance to be afforded under Articles 16 and 22, it is sufficient to consider the principle *in abstracto*. For requests under Articles 21 and 22, it may depend on whether the request is one covered by paragraph 1 of Article 21, or by paragraph 2 of that article. For requests under Article 21, paragraph 2, double criminality *in concreto* would be necessary[84].

219. This condition is fulfilled if an offence which is punishable in a given State would have been punishable if committed in the jurisdiction of the requested State and if the perpetrator of that offence had been liable to a sanction under the legislation of the requested State[85].

220. This rule means that the *nomen juris* need not necessarily be identical, since the laws of two or more states cannot be expected to coincide to the extent that certain facts should invariably be considered as constituting the same offence. Besides, the general character of the wording of the clause indicates that such identity is not, in fact, necessary, which implies that differences in the legal classification of an offence are unimportant where the condition considered here is concerned. The requirement of double criminality should thus be applied flexibly to ensure that co-operation under the 1990 Convention and this Convention stresses substance over form. The technical title of the offence or the penalty carried by that offence should not be a basis for refusal if the actions criminalised in both states are approximately the same or seek to redress the same injury[86].

221. It is for the authorities of the requested State to establish whether or not there is double criminality *in concreto*. Article 38 gives the requested state the possibility of asking for additional information if the information supplied is not sufficient to deal with the request[87].

222. When coercive action is sought, the requesting State might not be in a position to give a full account of the facts on which the request is based simply because that state does not yet possess information in respect of all relevant elements. This implies that the requested State must consider such a request liberally in respect of the requirement of double criminality[88].

223. "Coercive action" must be defined by the requested Party. It is in the interest of that Party that the requirement of double criminality is upheld[89].

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81. Paragraphs 58-77 of the Explanatory Report to Convention 141.
82. Paragraphs 58-77 of the Explanatory Report to Convention 141.
83. Paragraphs 58-77 of the Explanatory Report to Convention 141.
84. Paragraphs 58-77 of the Explanatory Report to Convention 141.
85. Paragraphs 58-77 of the Explanatory Report to Convention 141.
86. Paragraphs 58-77 of the Explanatory Report to Convention 141.
87. Paragraphs 58-77 of the Explanatory Report to Convention 141.
88. Paragraphs 58-77 of the Explanatory Report to Convention 141.
89. Paragraphs 58-77 of the Explanatory Report to Convention 141.

224. Paragraph 2 concerns only provisional measures and investigative assistance involving coercive action. The paragraph should be read in conjunction with Article 15, paragraph 3. It affords to the requested Party the possibility of refusing co-operation if the measure could not be taken under its law if the case had been a purely domestic one. By mentioning a "similar" domestic case, it becomes clear that not all objective elements need to be the same. The requested Party must also take account of the urgency of the measures requested. It will be obliged sometimes to consider a request liberally in respect of the requirement in this paragraph[90].

225. During the elaboration of the 1990 Convention, the experts drafting the 1990 Convention discussed whether it was necessary to draft similar grounds for refusal for these measures to the ones contained in Article 28, paragraph 4, sub-paragraphs a to c. The drafters of the 1990 agreed however that the wording of Article 28, paragraph 2, would also cover such situations[91].

226. Paragraph 3 provides for the possibility of refusing co-operation where a Party requests another Party to take measures which would not have been permitted under the law of the requesting Party. Not all the experts drafting the 1990 Convention considered that it was necessary to draft a ground for refusal for this situation. The latter part of the paragraph refers to the competence of the authorities in the requesting Party. The experts drafting the 1990 Convention thought that a request for measures involving coercive action should always be authorised by a judicial authority, including public prosecutors, competent in criminal matters. This would exclude administrative courts or judges or courts competent in civil cases only[92].

227. With regard to Article 28, paragraph 4, sub-paragraph a, the expression "type of offence" is meant to cover cases where confiscation is not at all provided for in respect of a certain offence in the requested Party. The sub-paragraph applies to the categories of offences which are excluded from the scope of application of Article 3, paragraph 1, pursuant to a declaration under Article 3, paragraph 2[93].

228. Sub-paragraph b refers to laws other than those relating to fundamental principles of the legal system (paragraph 1.a of Article 28). When a request for confiscation relates to a case that, had it been a domestic case, would not result in a confiscation because of those laws, the requested Party should have the possibility of refusing cooperation[94].

229. The committee drafting the 1990 Convention discussed the interaction between this paragraph and the obligation under Article 23, paragraph 3. In this connection, the drafters of the 1990 Convention agreed, on the one hand, that the paragraph will apply only when a request emanates from States which apply property confiscation or when it concerns a request from a value confiscation country to a value confiscation country and, on the other hand, if, at the stage of realising the claim, there is no relationship between an offence and the property, which can be the case in the system of value confiscation, that that alone is no ground for refusal since the expression "advantage that might be qualified as proceeds" refers to the assessment stage. Another way of expressing this would be to state that co-operation may be refused when the assessment of the proceeds made by the requesting Party would run counter to the principles of the domestic law of the requested Party, because of the remote relationship between the offence and the proceeds[95].

230. Drafters of the 1990 Convention from States which mainly use the system of value confiscation expressed misgivings, during the elaboration of this provision in 1990, that it might be misinterpreted in a way which would exclude the application of value confiscation orders. In order to remedy this, the beginning of the sub-paragraph was added to make it clear that the application of the provision should be without prejudice to the value confiscation system. Experts drafting the 1990 Convention were also reminded of the general principle embodied in the 1990 Convention and in this Convention that the two systems were equal under the 1990 Convention and this Convention[96].

231. The committee that drafted the 1990 Convention also concluded that, where the confiscation is not at all based on an assessment of proceeds but only of the capital of the convicted person, such cases were outside the scope of application of the 1990 Convention and this Convention. It was noted that, besides confiscation of instrumentalities, Articles 3 and 4 refer to confiscation procedures essentially based on an assessment of the existence and quantity of illicit proceeds. This is valid both for property confiscation (when the property assessed as proceeds is usually also the object of the enforcement of the confiscation) and for

90. Paragraphs 58-77 of the Explanatory Report to Convention 141.
91. Paragraphs 58-77 of the Explanatory Report to Convention 141.
92. Paragraphs 58-77 of the Explanatory Report to Convention 141.
93. Paragraphs 58-77 of the Explanatory Report to Convention 141.
94. Paragraphs 58-77 of the Explanatory Report to Convention 141.
95. Paragraphs 58-77 of the Explanatory Report to Convention 141.
96. Paragraphs 58-77 of the Explanatory Report to Convention 141.

value confiscation (where the confiscation order may ultimately be satisfied by realising the claim on property which does not constitute proceeds, but where in any case the "value" to be confiscated is determined by assessing the proceeds from offences)[97].

232. Sub-paragraph c need not be commented on in great detail. In respect of the enforcement of a foreign confiscation order (Article 23, paragraph 1.a), it is obvious that the requested Party must make an assessment as if the confiscation had been a similar national case. In cases where confiscation procedures are initiated in accordance with Article 23, paragraph 1.b, the requested Party may wish to recognise any acts performed by the requesting Party which may have had the effect of interrupting running periods of time-limitations under its law[98].

233. Sub-paragraph d was discussed at great length by the experts drafting the 1990 Convention. It is probable that most requests for co-operation under Chapter IV, Section 4, will concern cases where a previous conviction exists already. However, it is also possible in some States to confiscate proceeds without a formal conviction of the offender, sometimes because the offender is a fugitive or because he is deceased. In certain other States, the legislation makes it possible to take into account, when confiscating, offences other than the one which is adjudicated without a formal charge being made. The latter possibility concerns in particular certain states' drug legislation. The experts drafting the 1990 Convention agreed that international co-operation should not be excluded in such cases, provided however that a decision of a judicial nature exists or that a statement to the effect that an offence has or several offences have been committed is included in such a decision. The expression "decision of a judicial nature" is meant to exclude purely administrative decisions. Decisions by administrative courts are however included. The statements referred to in this article do not concern decisions of a provisional nature[99].

234. Sub-paragraph e describes the case where confiscation is not possible because of the rules relating to the enforceability of a decision or because the decision might not be final. Although in most cases a decision is enforceable if it is final, recourse to an extraordinary remedy may preclude enforcement. On the other hand, an enforceable decision may not be final, for instance in cases where the decision has been rendered *in absentia*. The lodging of an opposition or appeal against such a decision may have an interruptive effect as to its enforceability, but need not affect the part of the decision which may already have been enforced, nor necessarily imply the lifting of any seizure of realisable property. Thus, enforceability cannot be completely identified with finality and for this reason it was held essential to differentiate between the two possibilities. Under Article 37, paragraph 3.a.ii, the competent authority of the requesting Party should certify that the confiscation order is enforceable and not subject to ordinary means of appeal[100].

235. Sub-paragraph f concerns *in absentia* proceedings. The paragraph is inspired by the Second Additional Protocol to the European Convention on Extradition. The committee drafting the 1990 Convention had in mind, when drafting the provision, Resolution (75) 11 of the Committee of Ministers on the criteria governing proceedings held in the absence of the accused as well as Article 6 of the ECHR[101].

236. Paragraphs 5 and 6 were drafted to limit the possibility of criminals escaping justice by simply refusing to answer the summons to appear in court. Paragraph 6 is, however, not compulsory. It is a matter for the authorities of the requested state to assess the fact that the decision was taken *in absentia* and the weight of the circumstances mentioned in the paragraph in the light of the domestic law of the requested Party[102].

237. Paragraph 7 deals with bank secrecy in the framework of international co-operation. As regards the national level, see Article 7, paragraph 1, and the explanatory report on that article[103].

238. In most states, the lifting of bank secrecy requires the decision of a judge, an investigating judge, a prosecutor or a grand jury. The experts drafting the 1990 Convention considered it natural that a Party may require that international cooperation should be limited to instances where the decision to lift bank secrecy had been ordered or authorised by such authority[104].

239. Under the 1988 United Nations Convention, bank secrecy may never be invoked to refuse co-operation in respect of proceeds from drug or laundering offences. The 1990 Convention and this Convention are not intended to restrict international co-operation for such offences[105].

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97. Paragraphs 58-77 of the Explanatory Report to Convention 141.
98. Paragraphs 58-77 of the Explanatory Report to Convention 141.
99. Paragraphs 58-77 of the Explanatory Report to Convention 141.
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101. Paragraphs 58-77 of the Explanatory Report to Convention 141.
102. Paragraphs 58-77 of the Explanatory Report to Convention 141.
103. Paragraphs 58-77 of the Explanatory Report to Convention 141.
104. Paragraphs 58-77 of the Explanatory Report to Convention 141.
105. Paragraphs 58-77 of the Explanatory Report to Convention 141.

240. Paragraph 8.a of this article implies that co-operation under this Chapter shall include co-operation in relation to legal persons.

241. As noted earlier (in paragraph 198), sub-paragraph c of paragraph 8 is new as compared with the 1990 Convention and prevents refusal to co-operate internationally on the grounds that, on the basis of the internal law of the requesting Party, the subject is the author of both the predicate offence and the money laundering offence. The underlying assumption that self or own funds laundering is not only permissible but essential in money laundering criminalization was controversial in 1990 and some jurisdictions state that such a form of criminalization remains contrary to the fundamental principles of their domestic law.

242. Nonetheless, in the years since 1990, there has been a steady growth in the number of jurisdictions which have elected to subject own funds laundering to criminal sanctions. It has also become common place for mutual evaluation reports by MONEYVAL to call for consideration to be given to the introduction of such an offence when none presently exists. Notwithstanding this trend, the continuing diversity of practice has given rise to concerns that the absence of double criminality in such circumstances can have an adverse impact on the availability of international co-operation.

243. In order to address this problem, this Convention retains the possibility for States not to apply own funds laundering in domestic money laundering criminalization, but requires them not to invoke this element to refuse any co-operation under this Convention.

244. This provision does not however affect the right of a Party to refer to the ground for refusal set forth in Article 28.1.a.

Article 29 – Postponement

245. This provision is unchanged from the 1990 Convention. A decision to postpone will usually indicate a time-limit. The requested Party may therefore postpone action on a request several times. According to Article 30, the requested Party must also consider whether the request may be granted partially or subject to conditions before taking a decision to postpone. It is normal that any such decision be taken in consultation with the requesting Party. If the requested Party decides to postpone action, Articles 40 and 41, paragraph 1.*c*, will apply[106].

Article 30 – Partial or conditional granting of a request

246. This provision is also unchanged from the 1990 Convention. Reference is made to the commentary under Article 29 above. The words "where appropriate" indicate that consultation should be the rule; immediate decisions should be the exception unless they are purely based on questions of law, because it is usually appropriate to seek consultations with the Party that requests international co-operation. The 1990 Convention and this Convention do not prescribe any form for such consultations. They may also be informal, via a simple telephone call for instance between the competent authorities[107].

247. Conditions can be laid down either by the central authorities of the requested Party or, where applicable, by any other authority which decides upon the request. Such conditions may for instance concern the rights of third parties or they may require that a question of ownership of a certain property be resolved before a final decision as to the disposal of the property is taken[108].

248. The paragraph also covers partial refusal which could take the form of admitting only confiscation of certain property or enforcing only part of the sum of a value confiscation order[109]

Section 6 – Notification and protection of third parties' rights

Article 31 – Notification of documents

249. This provision is unchanged from the 1990 Convention. This article has been drafted on the basis of the Hague Convention on the serving of legal documents in civil or commercial matters but differs slightly from that convention. Notification requirements are in particular relevant to rights of third parties. The article has therefore been placed in this section to stress this fact[110].

106. Paragraph 78 of the Explanatory Report to Convention 141.
107. Paragraph 79 of the Explanatory Report to Convention 141.
108. Paragraph 79 of the Explanatory Report to Convention 141.
109. Paragraph 79 of the Explanatory Report to Convention 141.
110. Paragraph 80 of the Explanatory Report to Convention 141.

250. As to the relationship between this article and other conventions, see Article 52[111].

251. The Convention provides the legal basis, if such does not exist on the basis of other instruments, for international co-operation in the fulfilment of notification requirements. Among the notifications that might be required, depending on domestic law, can be mentioned a court order to seize property, the execution of such an order, seizure of property in which third party rights are vested, seizure of registered property, etc. The type of judicial documents that might be served must always be determined under the national law[112].

252. In cases where it is important to act quickly or in respect of notifications of judicial documents which are of a less important nature, the law of the notifying State might permit the sending of such documents directly or the use of direct, official channels. Provided that a Party to the 1990 Convention or to this Convention does not object to this procedure, by entering a reservation under Article 31, paragraph 2, States should have the possibility of using such direct means of communication[113].

253. In respect of the indication of legal remedies, the experts drafting the 1990 Convention agreed that it is sufficient to indicate the court of the sending State to which the person served has direct access and the time-limits, if any, within which such court has to be accessed. It should also be indicated whether this has to be done by the person himself or whether he may be represented by a lawyer for this purpose. No indication of further possibilities of appeal is necessary[114].

Article 32 – Recognition of foreign decisions

254. This provision is unchanged from the 1990 Convention. Article 32 describes how third party rights should be considered under the 1990 Convention and this Convention. Practice has shown that criminals often use ostensible "buyers" to acquire property. Relatives, wives, children or friends might be used as decoys. Nevertheless, the third parties might be persons who have a legitimate claim on property which has been subject to a confiscation order or a seizure. Article 9 obliges the Parties to this Convention to protect the rights of third parties[115].

255. By third party the committee that drafted the 1990 Convention understood any person affected by the enforcement of a confiscation order or involved in confiscation proceedings under Article 23, paragraph 1.b, but who is not the offender. This could also include, depending on national law, persons against whom the confiscation order could be directed. See also the commentary under Article 8[116].

256. The rights of third parties could either have been considered in the requesting state or not considered in that state. In the latter case, the affected third party will always have the right to put forward his claim in the requested state according to its law. In fact, this could often happen since, in some states such as the United Kingdom, third party rights are safeguarded at the stage of the execution of the confiscation order and not at the stage of decision. A consequence of this is that States cannot in this case invoke any of the grounds for refusal, such as Article 28, paragraph 1.a, on the grounds that third party rights had not been examined[117].

257. In the case where third party rights had already been dealt with in the requesting state, the 1990 Convention and this Convention are based on the principle that the foreign decision should be recognised. However, when any of the situations enumerated in paragraph 2 exist, recognition may be refused. In particular, when the third parties did not have adequate opportunity to assert their rights, recognition may be refused. This does not however mean that the request for co-operation must be refused. It might be appropriate to remedy the situation in the requested Party, in which case refusal does not seem necessary. Article 30 could also be used in so far as the requested Party may make co-operation conditional on the protection of the rights of third parties[118].

258. It follows that Article 24, paragraph 2, does not concern the adjudication of rights in respect of third parties. The present article deals exclusively with the rights of third parties. Nothing in the 1990 Convention and in this Convention shall be construed as prejudicing the rights of *bona fide* third parties[119].

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111. Paragraph 80 of the Explanatory Report to Convention 141.
112. Paragraph 80 of the Explanatory Report to Convention 141.
113. Paragraph 80 of the Explanatory Report to Convention 141.
114. Paragraph 80 of the Explanatory Report to Convention 141.
115. Paragraph 81 of the Explanatory Report to Convention 141.
116. Paragraph 81 of the Explanatory Report to Convention 141.
117. Paragraph 81 of the Explanatory Report to Convention 141.
118. Paragraph 81 of the Explanatory Report to Convention 141.
119. Paragraph 81 of the Explanatory Report to Convention 141.

Section 7 – Procedural and other general rules[120]

259. Most of the provisions of this Section are unchanged as compared to the 1990 Convention and their content is evident and need no further comments. The following should however be explained.

260. Article 33 gives the Parties a right to designate several central authorities where necessary. This possibility should be used restrictively so as not to create unnecessary confusion and to promote close cooperation between states. Even if not expressly stated in the 1990 Convention and in this Convention, the Parties should, depending on internal organisational matters, have the right to change central authorities when appropriate. The powers of the central authorities are determined by national law.

261. Article 34 describes the communication channels. Normally, the central authority should be used. The application of paragraph 2 is optional. However, the judicial authority is obliged to send a copy of the request to its own central authority which must forward it to the central authority of the requested Party. For the purposes of the 1990 Convention and of this Convention, the term "judicial authority" also includes public prosecutors. Requests or communications referred to in paragraph 5 of the article are mostly intended for simple requests for information, for instance information from a land register.

262. The drafters of this Convention added a new paragraph 6 to this provision in this Convention. It aims at speeding up communications between the authorities of the Parties to render more effective international co-operation under this Convention.

263. Article 35 permits an evolution if techniques change. The term "telecommunications" should therefore be interpreted broadly. Paragraph 1 of Article 35 has been re-drafted in this Convention as compared to the 1990 Convention, to open the way to the use of electronic telecommunications in the transmission of requests and other communications.

264. In the event of urgency, States might prefer to make the first contact by telephone. Requests for co-operation must however in any case be confirmed in writing. States should pay attention to the security aspects of using public networks, for instance by protecting the communication through encryption. It should be possible to send a copy of the certificate by telefax but confirm such certification by sending the original at a later stage.

265. Article 37 States the important rules pertaining to the contents of the request for co-operation. If the rules are not strictly followed, it is clear that international co-operation will be difficult. In particular, it is absolutely necessary that the requesting Party follow conscientiously the provisions of paragraph 1, sub-paragraphs c and e. In particular, with regard to banks, it is necessary to indicate in detail the relevant branch office and its address. It is however not the intention of the committee that the article should be interpreted as implying a requirement on a requesting Party to furnish *prima facie* evidence.

266. Paragraph 1.f refers to Article 15, paragraph 3.

267. Paragraph 2 requires an indication of a maximum amount for which recovery is sought. It concerns, in particular, requests for provisional measures with a view to the eventual enforcement of value confiscation orders.

268. Paragraph 3, sub-paragraph a.iii, may in particular be relevant to the enforcement of a value confiscation order which has already been partly enforced. It may also be relevant when requests for enforcement are made in several states or when the requesting state seeks to execute part of the order.

269. Paragraph 3, sub-paragraph a.iv, might in some states amount to a request for the taking of provisional measures.

270. Paragraph 3.b is of a general nature. In order to fully understand its implications in a specific case, the Parties should read this paragraph in conjunction with the preceding paragraphs of the article.

271. Article 38 makes it possible for a Party to ask for additional information. It may do so but, at the same time, it may take necessary provisional measures if the request for co-operation would cease to have any purpose if the provisional measures were not taken.

272. Article 39 seeks to avoid any adverse effects of requests concerning the same property or person. It may happen, particularly when the system of value confiscation is used, that the same property is subject to confiscation. In cases concerning requests for confiscation, Article 39 obliges the requested Party to consider consulting the other Parties.

120. For the whole of this Section, see paragraphs 82 to 92 of the Explanatory Report to Convention 141.

273. Article 41, paragraph 1.a, requires the requested Party to promptly inform the requesting Party of the action initiated. Such obligation to inform concerns in particular cases where a Party undertakes measures which might continue for some time and where the requesting Party has a legitimate interest in being kept informed that action is taken and of its continued results, for instance in respect of telephone tapping, monitoring orders, etc. Paragraph 1.b might include communications relating to events affecting the final result of the co-operation. Paragraph 2 deals with the obligation for the requesting Party to inform the requested Party of any development by reason of which any action under the Convention is not justified, for instance a decision by the requesting Party on amnesty or pardon. When such an event occurs, the requested Party is obliged to discontinue the procedures. This is usually the case under the law of the requested Party (see Article 24, paragraph 1). The requesting Party always has the possibility of withdrawing its request for co-operation.

274. Article 42 indicates the rule of speciality which is contained in several other European conventions. The committee drafting the 1990 Convention did not wish, however, to make the rule compulsory in all the cases to which the 1990 Convention applied. It provided therefore, in paragraph 1, for the possibility that the requested Party may make the execution of a request dependent upon the rule of speciality. Certain Parties would always use this possibility. The experts drafting the 1990 Convention provided therefore, in paragraph 2, for the possibility of declaring that the rule of speciality would always be applied in relation to other Parties to the 1990 Convention and this Convention.

275. Article 43 deals with confidentiality both in the requesting Party and the requested Party. It is important that national law be adapted so that, for instance, financial institutions are not able to warn their clients that criminal investigations or proceedings are being carried out. Disclosure of such facts is a criminal offence in certain states. The degree of confidentiality in international co-operation coincides with the degree of confidentiality in national cases. The term "confidential" might have different legal connotations under the law of some states.

276. Article 44 refers only to "costs" of the action sought. The experts drafting the 1990 Convention discussed whether Article 44 should also refer to "expenses", but decided against it.

277. Article 45, paragraph 1, requires Parties, in principle, to enter into consultations in the case of any liability for damages. Such consultations shall be without prejudice to any obligation of a Party to promptly pay the damages due to the injured person pursuant to a judicial decision to that effect. Consultations are however not always necessary when a question has arisen on how such damages should be paid. If a Party decides to pay damages to a victim because of an error made by that Party, no obligation to consult the other Party exists.

278. If another Party might have an interest in a case, it is normal that that Party should have an opportunity to be able to take care of its interests. The Party against whom legal action has been taken should therefore, whenever possible, endeavour to inform the other Party of the matter.

CHAPTER V – CO-OPERATION BETWEEN FIUS AND PREVENTION

Article 46 – Co-operation between FIUs

279. This provision is a new element in this Convention, as it includes in the text new provisions concerning FIUs and their role in preventing and combating money laundering and the financing of terrorism. The purpose of FIUs co-operation in the context of this Convention is therefore to combat both money laundering and the financing of terrorism.

280. The drafters of this Convention underlined that the provision concerning FIUs was different from the ones concerning mutual legal assistance. They therefore noted that the grounds for refusal only apply to mutual legal assistance requests and do not apply to the provision concerning FIU co-operation.

281. The provisions contained in Article 46 are largely drawn from the Council Decision of 17 October 2000 concerning arrangements for co-operation between FIUs of the (EU) member States in respect of exchanging information.

282. Paragraph 1 obliges each Party to ensure that its FIU is able to co-operate in the collection and analysis of information on a fact which might be an indication of money laundering. The obligation to co-operate extends to co-operation between FIUs of different Parties to the Convention. The national powers of the FIU also relate to the definition in the domestic law of the offences in relation to which the FIU has the competence to assemble, analyse or, where applicable, investigate information on the national level. Therefore, the extent of co-operation that can be afforded to the FIU of another Party will be subject to such definition. The

term "investigation" used in this provision needs to be distinguished from the common activity of collecting intelligence and the analysis function performed by the FIUs (both police and non-police type).

283. Paragraph 2 introduces the possibility for States to forward or exchange information without any prior request, whilst recognising that such exchange of information, even if upon request, can be either in accordance with the Convention or in accordance with the provisions of memoranda of understanding. To this end, the requested FIU should be able to exercise its full authority as if it had received a disclosure. An FIU should at least exchange the kinds of information it has the competence to assemble, analyse or, where applicable, investigate on the national level. This refers to any information the FIU has access to under its own authority, ie without having to address the court for authorisation. This paragraph is to be construed in conjunction with paragraph 5 of this Article (see the explanations below).

284. The committee of experts discussed problems that arise in the exchange of information between different types of FIUs. A situation should be avoided whereby FIUs are only allowed to co-operate with counterpart units of a similar internal status, as has been the case in the past. Paragraph 3 has been drafted with the scope that such limitations are removed thus broadening the possibility of international co-operation between all types of FIUs.

285. From the wording of Paragraph 4 it follows that the requesting FIU must facilitate the exchange of information by the submission of a brief statement of relevant facts already known to it whilst specifying how the information sought will be used. The last sentence of the paragraph on the use of requested information should be read in conjunction with Paragraph 8 which allows the transmitting FIU to impose restrictions and conditions on the use of information.

286. Relevant information under paragraph 5 includes accessible financial information and requested law enforcement data according to national law. The wording of paragraph 5 indicates that the information must be available or accessible to the FIU under its own authority. Moreover, although there are different types of FIUs, FIUs co-operation cannot circumvent mutual legal assistance.

287. Paragraph 6 provides for instances where the requested FIU may refuse to divulge information, including cases when divulging can jeopardize sovereignty or other essential interests of the requested Party. In carrying out requests under this article, the requested Party, however, must appropriately explain the grounds for refusal to the requesting FIU, who cannot challenge the refusal.

288. Paragraph 7 limits the use of information or documents exchanged under the Convention for the purposes laid down in Paragraph 1. Paragraph 7, however, when read in conjunction with Paragraph 8 does not exclude the use of information for purposes other than those stipulated in Paragraph 1. It follows, from this reading that such other use is subject to the consent of the transmitting FIU. The indication of the intended use of the information sought should enable the requested FIU to determine whether the request complies with its domestic law.

289. Paragraph 8 has been drafted with the objective of broadening the use of transmitted information beyond the purposes stipulated under paragraph 1 as required under paragraph 7. However, in doing so, paragraph 8 provides for the transmitting FIU to impose restrictions and conditions on such use. Subject to the provisions of paragraph 9, therefore, the transmitting FIU may refuse to give its consent for the use of information for purposes other than those stipulated in paragraph 1. In this context, it is also important to underline the need for feedback on the use of, or in relation to, information by requesting FIUs to requested FIUs.

290. Paragraph 9 further establishes the specific use of transmitted information or documents for criminal investigation or prosecution for the purposes laid down in paragraph 1. The scope of broadening the use of transmitted information and documents subject to the consent of the transmitting Party, is to facilitate further assistance in criminal investigations. In subjecting such use to the consent of the transmitting Party, the paragraph, therefore, limits the refusal of consent to such use to restrictions under national law or the conditions specified in paragraph 6. It follows, therefore, that unless one of these two elements is present, the transmitting Party cannot refuse consent and, if it does, it must appropriately explain the grounds for a refusal.

291. The scope of Paragraph 10 is to ensure the protection of information submitted under the Convention from being accessed by an unauthorised body. It follows, from paragraph 7, therefore, that access to this information by other authorities, agencies or departments is subject to the consent of the transmitting FIU.

292. Paragraph 11 ensures that information submitted are duly protected in conformity with the Council of Europe Convention of 28 January 1981 for the protection of individuals with regard to automatic processing of personal data (ETS N° 108).

293. Paragraph 12 seeks to ensure that adequate feedback is provided on the use of the information transmitted and the result which came out of such a transmission. Such a provision has a broader meaning and includes, for instance, also information and feedback as to whether a case went to court and the result of the court procedure.

294. Paragraph 13 requires Parties to facilitate co-operation, to indicate the unit which is an FIU within the meaning of this provision. Notification has to be made to the Secretary General of the Council of Europe in accordance with Article 56.e.

Article 47 – International co-operation for postponement of transactions

295. This provision requires measures to be put in place to permit urgent action to be initiated by a FIU at the request of a foreign FIU to postpone a suspicious transaction. The term "initiated" means that the requested FIU is the point of contact for the foreign requesting FIU and that the authority making the decision on postponement may not be the FIU itself. The postponement is carried out if the requested FIU (or indeed the competent authority making the decision on postponement) is satisfied that the transaction in question is indeed related to money laundering or the financing of terrorism and it would have suspended the transaction had it been reported to it domestically. This provision, while reserving to the requested authority a degree of discretion, contains clear criteria which should guide the requested authority in taking a decision on the request. These criteria are to be found in particular in paragraph 2 of this provision.

CHAPTER VI – MONITORING MECHANISM

Article 48 – Monitoring mechanism

296. This Convention, contrary to the 1990 Convention, contains a provision monitoring the proper implementation of the Convention by the Parties, which certainly constitutes an important added-value of this new instrument.

297. In order to ensure equality between the Parties in the monitoring process, the latter will be carried out by a Conference of the Parties (COP) which will adopt its own Rules of Procedure, which will have to ensure such equality in the monitoring decision-making process (paragraph 5). Moreover, in order to ensure added-value of the monitoring procedure under this Convention and avoid any overlap with existing monitoring systems (such as MONEYVAL or FATF), while at the same time taking advantage of them, the monitoring procedure will cover the areas dealt with in this Convention which are not also covered by other evaluation mechanisms and will make use of the public summaries available of the FATF and MONEYVAL.

298. Owing to the fact that this is an opened Convention and that States which are not covered either by the FATF or by MONEYVAL may become Parties to this Convention, the COP may, consistent with the object and scope of the Convention, deem public summaries from other FSRBs or IFIs as being the functional equivalent of public summaries for the purpose of this Convention (paragraph 2).

299. Paragraph 3 allows the COP, if it needs further information, to liaise with the Party concerned taking advantage, if so requested by the COP, of the procedure and mechanism of MONEYVAL. After the report to the COP, the latter may decide on a more in-depth assessment of the Party concerned, including by country visits by an evaluation team. Paragraph 3 makes it clear that country visits should be carried out only in exceptional cases when really necessary and should not be carried out as a matter of routine.

300. Paragraph 4 contains a settlement of disputes provision which was already contained in the 1990 Convention, while paragraph 5 requires the Secretary General of the Council of Europe to convene the COP within 1 year from the entry into force of the Convention.

CHAPTER VII – FINAL CLAUSES

301. With some exceptions, the provisions contained in this chapter are, for the most part, based on the "Model final clauses for conventions and agreements concluded within the Council of Europe" which were approved by the Committee of Ministers of the Council of Europe at the 315th meeting of their Deputies in February 1980. Most of these articles do not therefore call for specific comments, but the following points require some explanation.

302. Articles 49 and 50 have been drafted on several precedents established in other conventions elaborated within the framework of the Council of Europe, for instance the Convention on the Transfer of Sentenced Persons, which allow for signature, before the convention's entry into force, not only by the member States of the Council of Europe, but also by non-member States which have participated in the elaboration of this Convention. These provisions are intended to enable the maximum number of interested States, not necessarily members of the Council of Europe, to become Parties as soon as possible.

303. As regards the relationship between this Convention and the 1990 Convention, in order to avoid legal *lacunae* for the (numerous) Parties to the 1990 Convention, the drafters of this Convention provided for a provision which enables Parties to the 1990 Convention to ratify the new Convention, while at the same time remaining bound by the 1990 Convention. As a consequence, for those Parties which ratify this Convention, this new treaty will apply in their mutual relationship (even if they are both Parties to the 1990 Convention). In the relationship between a Party to this Convention (which is also a Party to the 1990 Convention) and a Party to the 1990 Convention, the latter will apply (including any reservation which has been made).

304. Non-member States of the Council of Europe which have not participated in the elaboration of this Convention and which so request, could be invited rather to accede to this new Convention which is intended to review and update the 1990 Convention.

305. In addition, this Convention – contrary to the 1990 Convention - is opened to the signature of the European Community.

306. In conformity with Article 30 of the 1969 Vienna Convention on the Law of Treaties, Article 52 is intended to ensure the coexistence of this Convention with other (including existing) international legal instruments dealing with matters which are also dealt with in this Convention. Article 52, paragraph 4, relates to the mutual relations between the Parties to the Convention which are members of the European Union. In relation to paragraph 4 of Article 52, upon the adoption of the Convention, the European Community and the member States of the European Union, made the following declaration:

> "The European Community/European Union and its Member States reaffirm that their objective in requesting the inclusion of a "disconnection clause" is to take account of the institutional structure of the Union when acceding to international conventions, in particular in case of transfer of sovereign powers from the Member States to the Community.
>
> This clause is not aimed at reducing the rights or increasing the obligations of a non-European Union party vis-à-vis the European Community/European Union and its Member States, inasmuch as the latter are also parties to this Convention.
>
> The disconnection clause is necessary for those parts of the convention which fall within the competence of the Community / Union, in order to indicate that European Union Member States cannot invoke and apply the rights and obligations deriving from the Convention directly among themselves (or between themselves and the European Community / Union). This does not detract from the fact that the Convention applies fully between the European Community/European Union and its Member States on the one hand, and the other Parties to the Convention, on the other; the Community and the European Union Members States will be bound by the Convention and will apply it like any party to the Convention, if necessary, through Community / Union legislation. They will thus guarantee the full respect of the Convention's provisions vis-à-vis non-European Union parties."

As an instrument made in connection with the conclusion of a treaty, within the meaning of Article 31, paragraph 2(b) of the Vienna Convention on the Law of Treaties, this declaration forms part of the "context" of the Convention.

307. The European Community would be in a position to provide, for the sole purpose of transparency, necessary information about the division of competence between the Community and its Member States in the area covered by the present Convention, inasmuch as this does not lead to additional monitoring obligations placed on the Community.

308. Article 53 contains provisions for Parties to make declarations and reservations in respect of specific articles, or declare the manner in which certain articles will apply.

309. Article 54 contains a simplified amendment procedure, in order to take into account the fact that Article 13 of the Convention refers to existing international standards (eg. the FATF recommendations) which may evolve with time and that this Convention contains an Appendix with a list of categories of offences which is textually taken from the Glossary to the FATF Recommendations which may also evolve with time. The drafters of this Convention therefore wanted to develop a simplified amendment procedure to ensure that the Convention follows the times and evolution of international law and standards in the area of counter money laundering and the financing of terrorism.

310. The Convention contains an Appendix containing a list of categories of offences to which reference is made to in articles 3.2, 9.4 and 17.5, and which is textually taken from the Glossary to the FATF Recommendations. When deciding on the range of offences to be covered in each of the categories contained in the Appendix, each Party may decide, in accordance with its domestic law, how it will define these offences and the nature of any particular elements of these offences that make them serious offences.

Criminal law Convention on corruption – ETS No. 173

Strasbourg, 27.I.1999

Preamble

The member States of the Council of Europe and the other States signatory hereto,

Considering that the aim of the Council of Europe is to achieve a greater unity between its members;

Recognising the value of fostering co-operation with the other States signatories to this Convention;

Convinced of the need to pursue, as a matter of priority, a common criminal policy aimed at the protection of society against corruption, including the adoption of appropriate legislation and preventive measures;

Emphasising that corruption threatens the rule of law, democracy and human rights, undermines good governance, fairness and social justice, distorts competition, hinders economic development and endangers the stability of democratic institutions and the moral foundations of society;

Believing that an effective fight against corruption requires increased, rapid and well-functioning international co-operation in criminal matters;

Welcoming recent developments which further advance international understanding and co-operation in combating corruption, including actions of the United Nations, the World Bank, the International Monetary Fund, the World Trade Organisation, the Organisation of American States, the OECD and the European Union;

Having regard to the Programme of Action against Corruption adopted by the Committee of Ministers of the Council of Europe in November 1996 following the recommendations of the 19th Conference of European Ministers of Justice (Valletta, 1994);

Recalling in this respect the importance of the participation of non-member States in the Council of Europe's activities against corruption and welcoming their valuable contribution to the implementation of the Programme of Action against Corruption;

Further recalling that Resolution No. 1 adopted by the European Ministers of Justice at their 21st Conference (Prague, 1997) recommended the speedy implementation of the Programme of Action against Corruption, and called, in particular, for the early adoption of a criminal law convention providing for the co-ordinated incrimination of corruption offences, enhanced co-operation for the prosecution of such offences as well as an effective follow-up mechanism open to member States and non-member States on an equal footing;

Bearing in mind that the Heads of State and Government of the Council of Europe decided, on the occasion of their Second Summit held in Strasbourg on 10 and 11 October 1997, to seek common responses to the challenges posed by the growth in corruption and adopted an Action Plan which, in order to promote co-operation in the fight against corruption, including its links with organised crime and money laundering, instructed the Committee of Ministers, *inter alia*, to secure the rapid completion of international legal instruments pursuant to the Programme of Action against Corruption;

Considering moreover that Resolution (97) 24 on the 20 Guiding Principles for the Fight against Corruption, adopted on 6 November 1997 by the Committee of Ministers at its 101st Session, stresses the need rapidly to complete the elaboration of international legal instruments pursuant to the Programme of Action against Corruption;

In view of the adoption by the Committee of Ministers, at its 102nd Session on 4 May 1998, of Resolution (98) 7 authorising the partial and enlarged agreement establishing the "Group of States against Corruption – GRECO", which aims at improving the capacity of its members to fight corruption by following up compliance with their undertakings in this field,

Have agreed as follows:

CHAPTER I – USE OF TERMS

Article 1 – Use of terms

For the purposes of this Convention:

a. "public official" shall be understood by reference to the definition of "official", "public officer", "mayor", "minister" or "judge" in the national law of the State in which the person in question performs that function and as applied in its criminal law;

b. the term "judge" referred to in sub-paragraph a above shall include prosecutors and holders of judicial offices;

c. in the case of proceedings involving a public official of another State, the prosecuting State may apply the definition of public official only insofar as that definition is compatible with its national law;

d. "legal person" shall mean any entity having such status under the applicable national law, except for States or other public bodies in the exercise of State authority and for public international organisations.

CHAPTER II – MEASURES TO BE TAKEN AT NATIONAL LEVEL

Article 2 – Active bribery of domestic public officials

Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally, the promising, offering or giving by any person, directly or indirectly, of any undue advantage to any of its public officials, for himself or herself or for anyone else, for him or her to act or refrain from acting in the exercise of his or her functions.

Article 3 – Passive bribery of domestic public officials

Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally, the request or receipt by any of its public officials, directly or indirectly, of any undue advantage, for himself or herself or for anyone else, or the acceptance of an offer or a promise of such an advantage, to act or refrain from acting in the exercise of his or her functions.

Article 4 – Bribery of members of domestic public assemblies

Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law the conduct referred to in Articles 2 and 3, when involving any person who is a member of any domestic public assembly exercising legislative or administrative powers.

Article 5 – Bribery of foreign public officials

Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law the conduct referred to in Articles 2 and 3, when involving a public official of any other State.

Article 6 – Bribery of members of foreign public assemblies

Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law the conduct referred to in Articles 2 and 3, when involving any person who is a member of any public assembly exercising legislative or administrative powers in any other State.

Article 7 – Active bribery in the private sector

Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally in the course of business activity, the promising, offering or giving, directly or indirectly, of any undue advantage to any persons who direct or work for, in any capacity, private sector entities, for themselves or for anyone else, for them to act, or refrain from acting, in breach of their duties.

Article 8 – Passive bribery in the private sector

Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally, in the course of business activity, the request or receipt, directly or indirectly, by any persons who direct or work for, in any capacity, private sector entities, of any undue advantage or the promise thereof for themselves or for anyone else, or the acceptance of an offer or a promise of such an advantage, to act or refrain from acting in breach of their duties.

Article 9 – Bribery of officials of international organisations

Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law the conduct referred to in Articles 2 and 3, when involving any official or other contracted employee, within the meaning of the staff regulations, of any public international or supranational organisation or body of which the Party is a member, and any person, whether seconded or not, carrying out functions corresponding to those performed by such officials or agents.

Article 10 – Bribery of members of international parliamentary assemblies

Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law the conduct referred to in Article 4 when involving any members of parliamentary assemblies of international or supranational organisations of which the Party is a member.

Article 11 – Bribery of judges and officials of international courts

Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law the conduct referred to in Articles 2 and 3 involving any holders of judicial office or officials of any international court whose jurisdiction is accepted by the Party.

Article 12 – Trading in influence

Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally, the promising, giving or offering, directly or indirectly, of any undue advantage to anyone who asserts or confirms that he or she is able to exert an improper influence over the decision-making of any person referred to in Articles 2, 4 to 6 and 9 to 11 in consideration thereof, whether the undue advantage is for himself or herself or for anyone else, as well as the request, receipt or the acceptance of the offer or the promise of such an advantage, in consideration of that influence, whether or not the influence is exerted or whether or not the supposed influence leads to the intended result.

Article 13 – Money laundering of proceeds from corruption offences

Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law the conduct referred to in the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Products from Crime (ETS No. 141), Article 6, paragraphs 1 and 2, under the conditions referred to therein, when the predicate offence consists of any of the criminal offences established in accordance with Articles 2 to 12 of this Convention, to the extent that the Party has not made a reservation or a declaration with respect to these offences or does not consider such offences as serious ones for the purpose of their money laundering legislation.

Article 14 – Account offences

Each Party shall adopt such legislative and other measures as may be necessary to establish as offences liable to criminal or other sanctions under its domestic law the following acts or omissions, when committed

intentionally, in order to commit, conceal or disguise the offences referred to in Articles 2 to 12, to the extent the Party has not made a reservation or a declaration:

a. creating or using an invoice or any other accounting document or record containing false or incomplete information;

b. unlawfully omitting to make a record of a payment.

Article 15 – Participatory acts

Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law aiding or abetting the commission of any of the criminal offences established in accordance with this Convention.

Article 16 – Immunity

The provisions of this Convention shall be without prejudice to the provisions of any Treaty, Protocol or Statute, as well as their implementing texts, as regards the withdrawal of immunity.

Article 17 – Jurisdiction

1. Each Party shall adopt such legislative and other measures as may be necessary to establish jurisdiction over a criminal offence established in accordance with Articles 2 to 14 of this Convention where:

a. the offence is committed in whole or in part in its territory;

b. the offender is one of its nationals, one of its public officials, or a member of one of its domestic public assemblies;

c. the offence involves one of its public officials or members of its domestic public assemblies or any person referred to in Articles 9 to 11 who is at the same time one of its nationals.

2. Each State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, by a declaration addressed to the Secretary General of the Council of Europe, declare that it reserves the right not to apply or to apply only in specific cases or conditions the jurisdiction rules laid down in paragraphs 1 b and c of this article or any part thereof.

3. If a Party has made use of the reservation possibility provided for in paragraph 2 of this article, it shall adopt such measures as may be necessary to establish jurisdiction over a criminal offence established in accordance with this Convention, in cases where an alleged offender is present in its territory and it does not extradite him to another Party, solely on the basis of his nationality, after a request for extradition.

4. This Convention does not exclude any criminal jurisdiction exercised by a Party in accordance with national law.

Article 18 – Corporate liability

1. Each Party shall adopt such legislative and other measures as may be necessary to ensure that legal persons can be held liable for the criminal offences of active bribery, trading in influence and money laundering established in accordance with this Convention, committed for their benefit by any natural person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on:

- a power of representation of the legal person; or
- an authority to take decisions on behalf of the legal person; or
- an authority to exercise control within the legal person;

as well as for involvement of such a natural person as accessory or instigator in the above-mentioned offences.

2. Apart from the cases already provided for in paragraph 1, each Party shall take the necessary measures to ensure that a legal person can be held liable where the lack of supervision or control by a natural person referred to in paragraph 1 has made possible the commission of the criminal offences mentioned in paragraph 1 for the benefit of that legal person by a natural person under its authority.

3. Liability of a legal person under paragraphs 1 and 2 shall not exclude criminal proceedings against natural persons who are perpetrators, instigators of, or accessories to, the criminal offences mentioned in paragraph 1.

Article 19 – Sanctions and measures

1. Having regard to the serious nature of the criminal offences established in accordance with this Convention, each Party shall provide, in respect of those criminal offences established in accordance with Articles 2 to 14, effective, proportionate and dissuasive sanctions and measures, including, when committed by natural persons, penalties involving deprivation of liberty which can give rise to extradition.

2. Each Party shall ensure that legal persons held liable in accordance with Article 18, paragraphs 1 and 2, shall be subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.

3. Each Party shall adopt such legislative and other measures as may be necessary to enable it to confiscate or otherwise deprive the instrumentalities and proceeds of criminal offences established in accordance with this Convention, or property the value of which corresponds to such proceeds.

Article 20 – Specialised authorities

Each Party shall adopt such measures as may be necessary to ensure that persons or entities are specialised in the fight against corruption. They shall have the necessary independence in accordance with the fundamental principles of the legal system of the Party, in order for them to be able to carry out their functions effectively and free from any undue pressure. The Party shall ensure that the staff of such entities has adequate training and financial resources for their tasks.

Article 21 – Co-operation with and between national authorities

Each Party shall adopt such measures as may be necessary to ensure that public authorities, as well as any public official, co-operate, in accordance with national law, with those of its authorities responsible for investigating and prosecuting criminal offences:

a. by informing the latter authorities, on their own initiative, where there are reasonable grounds to believe that any of the criminal offences established in accordance with Articles 2 to 14 has been committed, or

b. by providing, upon request, to the latter authorities all necessary information.

Article 22 – Protection of collaborators of justice and witnesses

Each Party shall adopt such measures as may be necessary to provide effective and appropriate protection for:

a. those who report the criminal offences established in accordance with Articles 2 to 14 or otherwise co-operate with the investigating or prosecuting authorities;

b. witnesses who give testimony concerning these offences.

Article 23 – Measures to facilitate the gathering of evidence and the confiscation of proceeds

1. Each Party shall adopt such legislative and other measures as may be necessary, including those permitting the use of special investigative techniques, in accordance with national law, to enable it to facilitate the gathering of evidence related to criminal offences established in accordance with Article 2 to 14 of this Convention and to identify, trace, freeze and seize instrumentalities and proceeds of corruption, or property the value of which corresponds to such proceeds, liable to measures set out in accordance with paragraph 3 of Article 19 of this Convention.

2. Each Party shall adopt such legislative and other measures as may be necessary to empower its courts or other competent authorities to order that bank, financial or commercial records be made available or be seized in order to carry out the actions referred to in paragraph 1 of this article.

3. Bank secrecy shall not be an obstacle to measures provided for in paragraphs 1 and 2 of this article.

CHAPTER III – MONITORING OF IMPLEMENTATION

Article 24 – Monitoring

The Group of States against Corruption (GRECO) shall monitor the implementation of this Convention by the Parties.

CHAPTER IV – INTERNATIONAL CO-OPERATION

Article 25 – General principles and measures for international co-operation

1. The Parties shall co-operate with each other, in accordance with the provisions of relevant international instruments on international co-operation in criminal matters, or arrangements agreed on the basis of uniform or reciprocal legislation, and in accordance with their national law, to the widest extent possible for the purposes of investigations and proceedings concerning criminal offences established in accordance with this Convention.

2. Where no international instrument or arrangement referred to in paragraph 1 is in force between Parties, Articles 26 to 31 of this chapter shall apply.

3. Articles 26 to 31 of this chapter shall also apply where they are more favourable than those of the international instruments or arrangements referred to in paragraph 1.

Article 26 – Mutual assistance

1. The Parties shall afford one another the widest measure of mutual assistance by promptly processing requests from authorities that, in conformity with their domestic laws, have the power to investigate or prosecute criminal offences established in accordance with this Convention.

2. Mutual legal assistance under paragraph 1 of this article may be refused if the requested Party believes that compliance with the request would undermine its fundamental interests, national sovereignty, national security or *ordre public*.

3. Parties shall not invoke bank secrecy as a ground to refuse any co-operation under this chapter. Where its domestic law so requires, a Party may require that a request for co-operation which would involve the lifting of bank secrecy be authorised by either a judge or another judicial authority, including public prosecutors, any of these authorities acting in relation to criminal offences.

Article 27 – Extradition

1. The criminal offences established in accordance with this Convention shall be deemed to be included as extraditable offences in any extradition treaty existing between or among the Parties. The Parties undertake to include such offences as extraditable offences in any extradition treaty to be concluded between or among them.

2. If a Party that makes extradition conditional on the existence of a treaty receives a request for extradition from another Party with which it does not have an extradition treaty, it may consider this Convention as the legal basis for extradition with respect to any criminal offence established in accordance with this Convention.

3. Parties that do not make extradition conditional on the existence of a treaty shall recognise criminal offences established in accordance with this Convention as extraditable offences between themselves.

4. Extradition shall be subject to the conditions provided for by the law of the requested Party or by applicable extradition treaties, including the grounds on which the requested Party may refuse extradition.

5. If extradition for a criminal offence established in accordance with this Convention is refused solely on the basis of the nationality of the person sought, or because the requested Party deems that it has jurisdiction over the offence, the requested Party shall submit the case to its competent authorities for the purpose of prosecution unless otherwise agreed with the requesting Party, and shall report the final outcome to the requesting Party in due course.

Article 28 – Spontaneous information

Without prejudice to its own investigations or proceedings, a Party may without prior request forward to another Party information on facts when it considers that the disclosure of such information might assist the receiving Party in initiating or carrying out investigations or proceedings concerning criminal offences established in accordance with this Convention or might lead to a request by that Party under this chapter.

Article 29 – Central authority

1. The Parties shall designate a central authority or, if appropriate, several central authorities, which shall be responsible for sending and answering requests made under this chapter, the execution of such requests or the transmission of them to the authorities competent for their execution.

2. Each Party shall, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, communicate to the Secretary General of the Council of Europe the names and addresses of the authorities designated in pursuance of paragraph 1 of this article.

Article 30 – Direct communication

1. The central authorities shall communicate directly with one another.

2. In the event of urgency, requests for mutual assistance or communications related thereto may be sent directly by the judicial authorities, including public prosecutors, of the requesting Party to such authorities of the requested Party. In such cases a copy shall be sent at the same time to the central authority of the requested Party through the central authority of the requesting Party.

3. Any request or communication under paragraphs 1 and 2 of this article may be made through the International Criminal Police Organisation (Interpol).

4. Where a request is made pursuant to paragraph 2 of this article and the authority is not competent to deal with the request, it shall refer the request to the competent national authority and inform directly the requesting Party that it has done so.

5. Requests or communications under paragraph 2 of this article, which do not involve coercive action, may be directly transmitted by the competent authorities of the requesting Party to the competent authorities of the requested Party.

6. Each State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, inform the Secretary General of the Council of Europe that, for reasons of efficiency, requests made under this chapter are to be addressed to its central authority.

Article 31 – Information

The requested Party shall promptly inform the requesting Party of the action taken on a request under this chapter and the final result of that action. The requested Party shall also promptly inform the requesting Party of any circumstances which render impossible the carrying out of the action sought or are likely to delay it significantly.

CHAPTER V – FINAL PROVISIONS

Article 32 – Signature and entry into force

1. This Convention shall be open for signature by the member States of the Council of Europe and by non-member States which have participated in its elaboration. Such States may express their consent to be bound by:

   a. signature without reservation as to ratification, acceptance or approval; or

   b. signature subject to ratification, acceptance or approval, followed by ratification, acceptance or approval.

2. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

3. This Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date on which fourteenth States have expressed their consent to be bound by the

Convention in accordance with the provisions of paragraph 1. Any such State, which is not a member of the Group of States against Corruption (GRECO) at the time of ratification, shall automatically become a member on the date the Convention enters into force.

4. In respect of any signatory State which subsequently expresses its consent to be bound by it, the Convention 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 expression of their consent to be bound by the Convention in accordance with the provisions of paragraph 1. Any signatory State, which is not a member of the Group of States against Corruption (GRECO) at the time of ratification, shall automatically become a member on the date the Convention enters into force in its respect.

Article 33 – Accession to the Convention

1. After the entry into force of this Convention, the Committee of Ministers of the Council of Europe, after consulting the Contracting States to the Convention, may invite the European Community as well as any State not a member of the Council and not having participated in its elaboration to accede to this Convention, by a decision taken by the majority provided for in Article 20d of the Statute of the Council of Europe and by the unanimous vote of the representatives of the Contracting States entitled to sit on the Committee of Ministers.

2. In respect of the European Community and any State acceding to it under paragraph 1 above, the Convention 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 of the instrument of accession with the Secretary General of the Council of Europe. The European Community and any State acceding to this Convention shall automatically become a member of GRECO, if it is not already a member at the time of accession, on the date the Convention enters into force in its respect.

Article 34 – 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 Convention shall apply.

2. Any Party may, at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Convention to any other territory specified in the declaration. In respect of such territory the Convention 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 of the Council of Europe. 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 35 – Relationship to other conventions and agreements

1. This Convention does not affect the rights and undertakings derived from international multilateral conventions concerning special matters.

2. The Parties to the Convention may conclude bilateral or multilateral agreements with one another on the matters dealt with in this Convention, for purposes of supplementing or strengthening its provisions or facilitating the application of the principles embodied in it.

3. If two or more Parties have already concluded an agreement or treaty in respect of a subject which is dealt with in this Convention or otherwise have established their relations in respect of that subject, they shall be entitled to apply that agreement or treaty or to regulate those relations accordingly, in lieu of the present Convention, if it facilitates international co-operation.

Article 36 – Declarations

Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, declare that it will establish as criminal offences the active and passive bribery of foreign public officials under Article 5, of officials of international organisations under Article 9 or of judges and officials of international courts under Article 11, only to the extent that the public official or judge acts or refrains from acting in breach of his duties.

Article 37 – Reservations

1. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, reserve its right not to establish as a criminal offence under its domestic law, in part or in whole, the conduct referred to in Articles 4, 6 to 8, 10 and 12 or the passive bribery offences defined in Article 5.

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 reservation provided for in Article 17, paragraph 2.

3. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession declare that it may refuse mutual legal assistance under Article 26, paragraph 1, if the request concerns an offence which the requested Party considers a political offence.

4. No State may, by application of paragraphs 1, 2 and 3 of this article, enter reservations to more than five of the provisions mentioned thereon. No other reservation may be made. Reservations of the same nature with respect to Articles 4, 6 and 10 shall be considered as one reservation.

Article 38 – Validity and review of declarations and reservations

1. Declarations referred to in Article 36 and reservations referred to in Article 37 shall be valid for a period of three years from the day of the entry into force of this Convention in respect of the State concerned. However, such declarations and reservations may be renewed for periods of the same duration.

2. Twelve months before the date of expiry of the declaration or reservation, the Secretariat General of the Council of Europe shall give notice of that expiry to the State concerned. No later than three months before the expiry, the State shall notify the Secretary General that it is upholding, amending or withdrawing its declaration or reservation. In the absence of a notification by the State concerned, the Secretariat General shall inform that State that its declaration or reservation is considered to have been extended automatically for a period of six months. Failure by the State concerned to notify its intention to uphold or modify its declaration or reservation before the expiry of that period shall cause the declaration or reservation to lapse.

3. If a Party makes a declaration or a reservation in conformity with Articles 36 and 37, it shall provide, before its renewal or upon request, an explanation to GRECO, on the grounds justifying its continuance.

Article 39 – Amendments

1. Amendments to this Convention may be proposed by any Party, and shall be communicated by the Secretary General of the Council of Europe to the member States of the Council of Europe and to every non-member State which has acceded to, or has been invited to accede to, this Convention in accordance with the provisions of Article 33.

2. Any amendment proposed by a Party shall be communicated to the European Committee on Crime Problems (CDPC), which shall submit to the Committee of Ministers its opinion on that proposed amendment.

3. The Committee of Ministers shall consider the proposed amendment and the opinion submitted by the CDPC and, following consultation of the non-member States Parties to this Convention, may adopt the amendment.

4. The text of any amendment adopted by the Committee of Ministers in accordance with paragraph 3 of this article shall be forwarded to the Parties for acceptance.

5. Any amendment adopted in accordance with paragraph 3 of this article shall come into force on the thirtieth day after all Parties have informed the Secretary General of their acceptance thereof.

Article 40 – Settlement of disputes

1. The European Committee on Crime Problems of the Council of Europe shall be kept informed regarding the interpretation and application of this Convention.

2. In case of a dispute between Parties as to the interpretation or application of this Convention, they shall seek a settlement of the dispute through negotiation or any other peaceful means of their choice, including submission of the dispute to the European Committee on Crime Problems, to an arbitral tribunal whose decisions shall be binding upon the Parties, or to the International Court of Justice, as agreed upon by the Parties concerned.

Article 41 – Denunciation

1. Any Party may, at any time, denounce this Convention 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.

Article 42 – Notification

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 Convention 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 Convention in accordance with Articles 32 and 33;

d. any declaration or reservation made under Article 36 or Article 37;

e. any other act, notification or communication relating to this Convention.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at Strasbourg, this 27th day of January 1999, 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, to the non-member States which have participated in the elaboration of this Convention, and to any State invited to accede to it.

Explanatory Report

I. INTRODUCTION

1. Corruption has existed ever since antiquity as one of the worst and, at the same time, most widespread forms of behaviour, which is inimical to the administration of public affairs. Naturally, over time, customs as well as historical and geographical circumstances have greatly changed public sensitivity to such behaviour, in terms of the significance and attention attached to it. As a result, its treatment in laws and regulations has likewise changed substantially. In some periods of history, certain "corrupt" practices were actually regarded as permissible, or else the penalties for them were either fairly light, or generally not applied. In Europe, the French Napoleonic Code of 1810 may be regarded as a landmark at which tough penalties were introduced to combat corruption in public life, comprising both acts which did not conflict with one's official duties and acts which did. Thus, the arrival of the modern State-administration in the 19th century made public officials' misuse of their offices a serious offence against public confidence in the administration's probity and impartiality.

2. Notwithstanding the long history and the apparent spread of the phenomenon of corruption in today's society, it seemed difficult to arrive at a common definition and it was rightly said, "no definition of corruption will be equally accepted in every nation". Possible definitions have been discussed for a number of years in different fora but it has not been possible for the international community to agree to on a common definition. Instead international fora have preferred to concentrate on the definition of certain forms of corruption, e.g. "illicit payments" (UN), "bribery of foreign public officials in international business transactions" (OECD), "corruption involving officials of the European Communities or officials of Member States of the European Union" (EU).

3. Even if no common definition has yet been found by the international community to describe corruption as such, everyone seems at least to agree that certain political, social or commercial practices are corrupt. The qualification of some practices as "corrupt" and their eventual moral reprobation by public opinion vary however from country to country and do not necessarily imply that they are criminal offences under national criminal law.

4. More recently, the deepening interest and concern shown in such matters everywhere have produced national and international reactions. From the beginning of the 90s corruption has always been in the headlines of the press. Although it had always been present in the history of humanity, it does appear to have virtually exploded across the newspaper columns and law reports of a number of States from all corners of the world, irrespective of their economic or political regime. Countries of Western, Central and Eastern Europe have been literally shaken by huge corruption scandals and some consider that corruption now represents one of the most serious threats to the stability of democratic institutions and the functioning of the market economy.

5. This illustrates that corruption needs to be taken seriously by Governments and Parliaments. The fact that corruption is widely talked of in some States and not at all in others, is in no way indicative that corruption is not present in the latter because no system of government and administration is immune to corruption. In such countries corruption may be either non-existent (which seems in most cases rather improbable), or so efficiently organised as not to give rise to suspicion. In some cases silence over corrupt activities is merely the result of citizen’s resignation in face of widespread corruption. In such situations corruption is seen no longer not as unacceptable criminal behaviour, liable to severe sanctions, but as a normal or at least necessary or tolerated practice. The survival of the State is at stake in such extreme cases of endemic corruption.

II. THE PREPARATORY WORK

6. At their 19th Conference held in Valletta in 1994, the European Ministers of Justice considered that corruption was a serious threat to democracy, to the rule of law and to human rights. The Council of Europe, being the pre-eminent European institution defending these fundamental values, was called upon to respond to that threat. The Ministers were convinced that the fight against corruption should take a multidisciplinary approach and that it was necessary to adopt appropriate legislation in this area as soon as possible. They expressed the belief that an effective fight against corruption required increased cross-border co-operation between States, as well as between States and international institutions, through the promotion of co-ordinated measures at European level and beyond, which in turn implied involving States which were not members of the Council of Europe. The Ministers of Justice recommended to the Committee of Ministers the setting up of a Multidisciplinary Group on Corruption, under the responsibility of the European Committee on Crime Problems (CDPC) and the European Committee on Legal Co-operation (CDCJ), with the task of examining what measures might be suitable to be included in a programme of action at international level as well as examining the possibility of drafting model laws or codes of conduct, including international conventions, on this subject. The Ministers expressly referred to the importance of elaborating a follow-up mechanism to implement the undertakings contained in such instruments.

7. In the light of these recommendations, the Committee of Ministers set up, in September 1994, the Multidisciplinary Group on Corruption (GMC) and gave it terms of reference to examine what measures might be suitable to be included in an international programme of action against corruption. The GMC was also invited to make proposals to the Committee of Ministers before the end of 1995 as to appropriate priorities and working structures, taking due account of the work of other international organisations. It was furthermore invited to examine the possibility of drafting model laws or codes of conduct in selected areas, including the elaboration of an international convention on this subject, as well as the possibility of elaborating a follow-up mechanism to implement undertakings contained in such instruments.

8. The GMC started work in March 1995 and prepared a draft Programme of Action against Corruption, an ambitious document covering all aspects of the international fight against this phenomenon. This draft Programme was submitted to the Committee of Ministers, which, in January 1996, took note of it, invited the European Committee on Crime Problems (CDPC) and the European Committee on Legal Co-operation (CDCJ) to express their opinions thereon and, in the meantime, gave interim terms of reference to the GMC, authorising it to start some of the actions contained in the said Programme, such as work on one or several international instruments.

9. The Committee of Ministers finally adopted the Programme of Action in November 1996 and instructed the GMC to implement it before 31 December 2000. The Committee of Ministers welcomed in particular the GMC's intention to elaborate, as a matter of priority, one or more international Conventions to combat corruption and a follow-up mechanism to implement undertakings contained in such instruments or any other legal instrument in this area. According to the terms of reference given to the GMC, the CDPC and CDCJ were to be consulted on any draft legal text relating to corruption and their views taken into account.

10. The GMC's terms of reference are as follows:

> "Under the responsibility of the European Committee on Crime Problems (CDPC) and the European Committee on Legal Co-operation (CDCJ),
>
> – to elaborate as a matter of priority one or more international conventions to combat corruption, and a follow-up mechanism to implement undertakings contained in such instruments, or any other legal instrument in this area;
>
> – to elaborate as a matter of priority a draft European Code of Conduct for Public Officials;
>
> – after consultation of the appropriate Steering Committee(s) to initiate, organise or promote research projects, training programmes and the exchange at national and international level of practical experiences of corruption and the fight against it;
>
> – to implement the other parts of the Programme of Action against Corruption, taking into account the priorities set out therein;
>
> – to take into account the work of other international organisations and bodies with a view to ensuring a coherent and co-ordinated approach;
>
> – to consult the CDCJ and/or CDPC on any draft legal text relating to corruption and take into account its/their views."

11. The Ministers participating in the 21st Conference of European Ministers of Justice, held in Prague in June 1997, expressed their concern about the new trends in modern criminality and, in particular, by the organised, sophisticated and transnational character of certain criminal activities. They declared themselves persuaded that the fight against organised crime necessarily implies an adequate response to corruption and emphasised that corruption represents a major threat to the rule of law, democracy, human rights, fairness and social justice, that it hinders economic development and endangers the stability of democratic institutions and the moral foundations of society. Therefore, the Ministers recommended to speed up the implementation of the Programme of Action against Corruption and, with this in mind, to intensify the efforts with a view to an early adoption of, inter alia, a criminal law Convention providing for the co-ordinated criminalisation of corruption offences and for enhanced co-operation in the prosecution of such offences. They further recommended the Committee of Ministers to ensure that the relevant international instruments would provide for an effective follow-up mechanism open to member-States and non-member States of the Council of Europe on an equal footing.

12. At their Second Summit, held in Strasbourg on 10-11 October 1997, the Heads of State and Government of the member States of the Council of Europe decided to seek common responses to the challenges posed by the growth in corruption and organised crime. The Heads of State and Government adopted an Action Plan in which, with a view to promoting co-operation in the fight against corruption, including its links with organised crime and money laundering, they instructed the Committee of Ministers, inter alia, to adopt guiding principles to be applied in the development of domestic legislation and practice, to secure the rapid completion of international legal instruments pursuant to the Programme of Action against Corruption and to establish without delay an appropriate and efficient mechanism, for monitoring observance of the guiding principles and the implementation of the said international instruments.

13. At its 101st Session on 6 November 1997 the Committee of Ministers of the Council of Europe adopted the 20 Guiding Principles for the Fight against Corruption. Firmly resolved to fight corruption by joining their countries' efforts, the Ministers agreed, inter alia, to ensure co-ordinated criminalisation of national and international corruption (Principle 2), to ensure that those in charge of prevention, investigation, prosecution and adjudication of corruption offences enjoy the independence and autonomy appropriate to their functions, are free from improper influence and have effective means for gathering evidence, protecting the persons who help the authorities in combating corruption and preserving the confidentiality of investigations (Principle 3), to provide appropriate measures for the seizure and deprivation of the proceeds of corruption offences (Principle 4), to prevent legal persons being used to shield corruption offences (Principle 5), to promote the specialisation of persons or bodies in charge of fighting corruption and to provide them with appropriate means and training to perform their tasks (Principle 7) and to develop to the widest extent possible international co-operation in all areas of the fight against corruption (Principle 20).

14. Moreover, the Committee of Ministers instructed the GMC rapidly to complete the elaboration of international legal instrument pursuant to the Programme of Action against Corruption and to submit without delay a draft text proposing the establishment of an appropriate and efficient mechanism for monitoring the observance of the Guiding principles and the implementation of the international legal instruments to be adopted.

15. At its 102nd Session (5 May 1998), the Committee of Ministers adopted Resolution (98) 7 authorising the establishment of the "Group of States against Corruption- GRECO" in the form of a partial and enlarged agreement. In this Resolution the Committee of Ministers invited member States and non-member States of the Council of Europe having participated in the elaboration of the Agreement to notify to the Secretary General their intention to join the GRECO, the agreement setting up the GRECO being considered as adopted as soon as fourteen member States of the Council of Europe made such a notification.

16. The agreement establishing the GRECO and containing its Statute was adopted on 5 May 1998. GRECO is a body called to monitor, through a process of mutual evaluation and peer pressure, the observance of the Guiding Principles in the Fight against Corruption and the implementation of international legal instruments adopted in pursuance of the Programme of Action against Corruption. Full membership of the GRECO is reserved to those who participate fully in the mutual evaluation process and accept to be evaluated.

17. The GRECO has been conceived as a flexible and efficient follow-up mechanism, which will contribute to the development of an effective and dynamic process for preventing and combating corruption. The agreement provides for the participation in the GRECO, on an equal footing, of member States, of those non-member States which have participated in the elaboration of the agreement, and of other non-member States that are invited to join.

18. In accordance with the objectives set by the Programme of Action and on the basis of the interim terms of reference referred in paragraph 8 above, the Criminal Law Working Group of the GMC (GMCP) started work on a draft criminal law convention in February 1996. Between February 1996 and November 1997, the GMCP held 10 meetings and completed two full readings of the draft Convention. In November 1997 it transmitted the text to the GMC for consideration.

19. The GMC started the examination of the draft submitted by the GMCP at its 11th (November 1997) plenary meeting. It pursued its work at its 12th (January 1998), 13th (March 1998) and 14th meetings (September 1998). In February 1998, the GMC consulted the CDPC on the first reading version of the draft Convention. The Bureau of the CDPC, having consulted in writing the heads of delegation to the CDPC, formulated an opinion on the draft in March 1998 (see Appendix II, document CDPC-BU (98) 3). The GMC took account of the views expressed by the CDPC at its 13th meeting (March 1998) and finalised the second reading on that occasion. In view of the wish expressed by the CDPC to be consulted again on the final version, the GMC agreed to transmit the second reading version of the draft Convention to the CDPC. Moreover, in view of the request made by the President of the Parliamentary Assembly on 11 February 1998 to the Chairman-in-office of the Minister’s Deputies, the GMC transmitted the second reading text to the Committee of Ministers with a view to enabling it to accede to that request. At the 628th meeting of the Ministers’ Deputies (April 1998), the Committee of Ministers agreed to consult the Parliamentary Assembly on the draft Convention and instructed the GMC to examine the opinions formulated by the Assembly and by the CDPC.

20. At its 47th Plenary Session, the CDPC formulated a formal opinion on the draft Convention. The Parliamentary Assembly, for its part, adopted its opinion in the third part of its 1998 Session in June 1998. In conformity with its terms of reference the GMC considered both opinions at its 14th plenary meeting in September 1998. On that occasion it approved the final draft and submitted it to the Committee of Ministers. At its 103rd Session at ministerial level (November 1998) the Committee of Ministers adopted the Convention, decided to open it for signature on … and authorised the publication of the present explanatory report.

III. THE CONVENTION

21. The Convention aims principally at developing common standards concerning certain corruption offences, though it does not provide a uniform definition of corruption. In addition, it deals with substantive and procedural law matters, which closely relate to these corruption offences and seeks to improve international co-operation. Recent practice shows that international co-operation meets two kinds of difficulties in the prosecution of transnational corruption cases, particularly that of bribery of foreign public officials: one relates to the definition of corruption offences, often diverging because of the meaning of "public official" in domestic laws; the other relates to means and channels of international co-operation, where procedural and sometimes political obstacles delay or prevent the prosecution of the offenders. By harmonising the definition of corruption offences, the requirement of dual criminality will be met by the Parties to the Convention, while the provisions on international co-operation are designed to facilitate direct and swift communication between the relevant national authorities.

22. The European Union Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union (Council Act of 26 May 1997) defines active corruption as "the deliberate action of whosoever promises or gives, directly or through an intermediary, an advantage of any kind whatsoever to an official for himself or for a third party for him to act or refrain from acting in accordance with his duty or in the exercise of his functions in breach of his official duties" (Article 3). Passive corruption is defined along the same lines.

23. The Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (adopted within the OECD on 17 December 1997) defines, for its part, active corruption, as the act by any person of "intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business".

24. The GMC started its work on the basis of the following provisional definition: "Corruption as dealt with by the Council of Europe's GMC is bribery and any other behaviour in relation to persons entrusted with responsibilities in the public or private sector, which violates their duties that follow from their status as a public official, private employee, independent agent or other relationship of that kind and is aimed at obtaining undue advantages of any kind for themselves or for others".

25. The purpose of this definition was to ensure that no matter would be excluded from its work. While such a definition would not necessarily match the legal definition of corruption in most member States, in particular not the definition given by the criminal law, its advantage was that it would not restrict the discussion to excessively narrow confines. As the drafting of the Convention's text progressed, that general definition translated into several common operational definitions of corruption which could be transposed into national laws, albeit, in certain cases, with some amendment to those laws. It is worth underlining, in this respect, that the present Convention not only contains a commonly agreed definition of bribery, both from the passive and active side, which serves as the basis of various forms of criminalisation but also defines other forms of corrupt behaviour, such as private sector corruption and trading in influence, closely linked to bribery and commonly understood as specific forms of corruption. Thus, the present Convention has, as one of its main characteristics, its wide scope, which reflects the Council of Europe’s comprehensive approach to the fight against corruption as a threat to democratic values, the rule of law, human rights and social and economic progress.

IV. COMMENTARY

CHAPTER I – USE OF TERMS

Article 1 – Use of terms

26. Only three terms are defined under Article 1, as all other notions are addressed at the appropriate place in the Explanatory Report.

27. The drafters of this Convention wanted to cover all possible categories of public officials in order to avoid, as much as possible, loopholes in the criminalisation of public sector bribery. This, however, does not necessarily mean that States have to redefine their concept of "public official" in general. In reference to the "national law" it should be noted that it was the intention of the drafters of the Convention that Contracting parties assume obligations under this Convention only to the extent consistent with their Constitution and the fundamental principles of their legal system, including, where appropriate, the principles of federalism.

28. The term "public official" is used in Articles 2 and 3 as well as in Article 5. Littera a. of Article 1 defines the concept of "public official" in terms of an official or public officer, a mayor, a minister or judge as defined in the national law of the State, for the purposes of its own criminal law. The criminal law definition is therefore given priority. Where a public official of the prosecuting State is involved, this means that its national definition is applicable. However, the term "public official" should include "mayor" and "minister". In many countries mayors and ministers are assimilated to public officials for the purpose of criminal offences committed in the exercise of their powers. In order to avoid any loopholes that could have left such important public figures outside the scope of the present Convention, express reference is made to them in Article 1 littera a.

29. Also, the term "public official" encompasses, for the purpose of this Convention, "judges", who are included in point (b) as holders of judicial office, whether elected or appointed. This notion is to be interpreted to the widest extent possible: the decisive element being the functions performed by the person, which should be of a judicial nature, rather than his or her official title. Prosecutors are specifically mentioned as falling under this definition, although in some States they are not considered as members of the "judiciary". Members of the judiciary -Judges and, in some countries, prosecutors- are an independent and impartial authority separated from the executive branch of Government. It is obvious that the definition found in Article 1, littera a is solely for the purpose of the present Convention and only requires Contracting Parties to consider or treat judges or prosecutors as public officials for the purposes of the application of this Convention.

30. Where any of the offences under the Convention involves a public official of another State, Article 1 littera (c) applies. It means that the definition in the law of the latter State is not necessarily conclusive where the person concerned would not have had the status of public official under the law of the prosecuting State. This follows from point (c) of Article 1, according to which a State may determine that corruption offences involving public officials of another State refer only to such officials whose status is compatible with that of national public officials under the national law of the prosecuting State. This reference to the law of the public official's State means that due account can be taken of specific national situations regarding the status of persons exercising public functions.

31. The term "legal person" appears in Article 18 (Corporate liability). Again, the Convention does not provide an autonomous definition, but refers back to national laws. Littera d. of Article 1 thus permits States to use their own definition of "legal person", whether such definition is contained in company law or in criminal law. For the purpose of active corruption offences however, it expressly excludes from the scope of the

definition the State or other public bodies exercising State authority, such as ministries or local government bodies as well as public international organisations such as the Council of Europe. The exception refers to the different levels of government: State, Regional or Local entities exercising public powers. The reason is that the responsibilities of public entities are subject to specific regulations or agreements/treaties, and in the case of public international organisations, are usually embodied in administrative law. It is not aimed at excluding the responsibility of public enterprises. A contracting State may, however, go further as to allow the imposition of criminal law or administrative law sanctions on public bodies as well. It goes without saying that this provision does not restrict, in any manner, the responsibility of individuals employed by the different State organs for passive corruption offences under Articles 3 to 6 and 9 to 12 of the present Convention.

CHAPTER II – MEASURES TO BE TAKEN AT NATIONAL LEVEL

Article 2 – Active bribery of domestic public officials

32. Article 2 defines the elements of the active bribery of domestic public officials. It is intended to ensure in particular that public administration functions properly, i.e. in a transparent, fair and impartial manner and in pursuance of public interests, and to protect the confidence of citizens in their Administration and the officials themselves from possible manoeuvres against them. The definition of active bribery in Article 2 draws its inspiration from national and international definitions of bribery/corruption e.g. the one contained in the Protocol to the European Union Convention on the protection of the European Communities' financial interests (Article 3). This offence, in current criminal law theory and practice and in the view of the drafters of the Convention, is mirrored by passive bribery, though they are considered to be separate offences for which prosecutions can be brought independently. It emerges that the two types of bribery are, in general, two sides of the same phenomenon, one perpetrator offering, promising or giving the advantage and the other perpetrator accepting the offer, promise or gift. Usually, however, the two perpetrators are not punished for complicity in the other one's offence.

33. The definition provided in Article 2 is referred to in subsequent provisions of the Convention, e.g. in Articles 4, 5, 6, 9 and, through a double reference, in Article 10. These provisions do not repeat the substantive elements but extend the criminalisation of the active bribery to further categories of persons.

34. The offence of active bribery can only be committed intentionally under Article 2 and the intent has to cover all other substantive elements of the offence. Intent must relate to a future result: the public official acting or refraining from acting as the briber intends. It is, however, immaterial whether the public official actually acted or refrained from acting as intended.

35. The briber can be anyone, whatever his capacity (businessman, public official, private individual etc). If, however, the briber acts for the account or on behalf of a company, corporate liability may also apply in respect of the company in question (Article 18). Nevertheless, the liability of the company does not exclude in any manner criminal proceedings against the natural person (paragraph 3 of Article 18). The bribed person must be a public official, as defined under Article 1, irrespective of whether the undue advantage is actually for himself or for someone else.

36. The material components of the offence are promising, offering or giving an undue advantage, directly or indirectly for the official himself or for a third party. The three actions of the briber are slightly different. "Promising" may, for example, cover situations where the briber commits himself to give an undue advantage later (in most cases only once the public official has performed the act requested by the briber) or where there is an agreement between the briber and the bribee that the briber will give the undue advantage later. "Offering" may cover situations where the briber shows his readiness to give the undue advantage at any moment. Finally, "giving" may cover situations where the briber transfers the undue advantage. The undue advantage need not necessarily be given to the public official himself: it can be given also to a third party, such as a relative, an organisation to which the official belongs, the political party of which he is a member. When the offer, promise or gift is addressed to a third party, the public official must at least have knowledge thereof at some point. Irrespective of whether the recipient or the beneficiary of the undue advantage is the public official himself or a third party, the transaction may be performed through intermediaries.

37. The undue advantages given are usually of an economic nature but may also be of a non-material nature. What is important is that the offender (or any other person, for instance a relative) is placed in a better position than he was before the commission of the offence and that he is not entitled to the benefit. Such advantages may consist in, for instance, money, holidays, loans, food and drink, a case handled within a swifter time, better career prospects, etc.

38. What constitutes "undue" advantage will be of central importance in the transposition of the Convention into national law. "Undue" for the purposes of the Convention should be interpreted as something that the recipient is not lawfully entitled to accept or receive. For the drafters of the Convention, the adjective "undue" aims at excluding advantages permitted by the law or by administrative rules as well as minimum gifts, gifts of very low value or socially acceptable gifts.

39. Bribery provisions of certain member States of the Council of Europe make some distinctions, as to whether the act, which is solicited, is a part of the official's duty or whether he is going beyond his duties. In this connection, attention should be drawn to the work currently carried out by the GMC to draft a European model code of conduct for public officials specifying professional duties and standards for public officials in order to prevent corruption. As far as criminal law is concerned, if an official receives a benefit in return for acting in accordance with his duties, this would already constitute a criminal offence. Should the official act in a manner, which is prohibited or arbitrary, he would be liable for a more serious offence. If he should not have handled the case at all, for instance a licence should not have been given, the official would be liable to having committed a more serious form of bribery which usually carries a heavier penalty. Such an extra-element of 'breach of duty' was, however, not considered to be necessary for the purposes of this Convention. The drafters of the Convention considered that the decisive element of the offence was not whether the official had any discretion to act as requested by the briber, but whether he had been offered, given or promised a bribe in order to obtain something from him. The briber may not even have known whether the official had discretion or not, this element being, for the purpose of this provision, irrelevant. Thus, the Convention aims at safeguarding the confidence of citizens in the fairness of Public Administration which would be severely undermined, even if the official would have acted in the same way without the bribe. In a democratic State public servants are, as a general rule, remunerated from public budgets and not directly by the citizens or by private companies. In addition, the notion of "breach of duty" adds an element of ambiguity that makes more difficult the prosecution of this offence, by requiring to prove that the public official was expected to act against his duties or was expected to exercise his discretion for the benefit of the briber. States that require such an extra-element for bribery would therefore have to ensure that they could implement the definition of bribery under Article 2 of this Convention without hindering its objective.

Article 3 – Passive bribery of domestic public officials

40. Article 3 defines passive bribery of public officials. As this offence is closely linked with active bribery, some comments made thereon, e.g. in respect of the mental element and the undue advantage apply accordingly here as well. The "perpetrator" in Article 3 can only be a public official, in the meaning of Article 1. The material elements of his act include requesting or receiving an undue advantage or accepting the offer or the promise thereof.

41. "Requesting" may for example refer to a unilateral act whereby the public official lets another person know, explicitly or implicitly, that he will have to "pay" to have some official act done or abstained from. It is immaterial whether the request was actually acted upon, the request itself being the core of the offence. Likewise, it does not matter whether the public official requested the undue advantage for himself or for anyone else.

42. "Receiving" may for example mean the actual taking the benefit, whether by the public official himself or by someone else (spouse, colleague, organisation, political party, etc) for himself or for someone else. The latter case supposes at least some kind of acceptance by the public official. Again, intermediaries can be involved: the fact that an intermediary is involved, which would extend the scope of passive bribery to include indirect action by the official, necessarily entails identifying the criminal nature of the official's conduct, irrespective of the good or bad faith of the intermediary involved.

43. If there is a unilateral request or a corrupt pact, it is essential that the act or the omission of acting by the public official takes place after the request or the pact, whereas it is immaterial in such a case at what point in time the undue advantage is actually received. Thus, it is not a criminal offence under the Convention to receive a benefit after the act has been performed by the public official, without prior offer, request or acceptance. Moreover, the word "receipt" means keeping the advantage or gift at least for some time so that the official who, having not requested it, immediately returns the gift to the sender would not be committing an offence under Article 3. This provision is not applicable either to benefits unrelated to a specific subsequent act in the exercise of the public official's duties.

Article 4 – Bribery of members of domestic public assemblies

44. This article extends the scope of the active and passive bribery offences defined in Articles 2 and 3 to members of domestic public assemblies, at local, regional and national level, whether elected or appointed. This category of persons is also vulnerable to bribery and recent corruption scandals, sometimes combined with illegal financing of political parties, showed that it was important to make it also criminally liable for bribery. Concerning the active bribery-side, the protected legal interest is the same as that protected by Article 2. However, it is different as regards the passive bribery-side, i.e. when a member of a domestic public assembly is bribed: here this provision protects the transparency, the fairness and impartiality of the decision-making process of domestic public assemblies and their members from corrupt manoeuvres. Obviously, the financial support granted to political parties in accordance with national law falls outside the scope of this provision.

45. Since the definition of "public official" refers to the applicable national definition, it is understood that Contracting Parties would apply, in a similar manner, their own definition of "members of domestic public assemblies". This category of persons should primarily cover members of Parliament (where applicable, in both houses), members of local and regional assemblies and members of any other public body whose members are elected or appointed and which "exercise legislative or administrative powers" (Article 4, paragraph 1, in fine). As indicated in paragraph 21 above, this broad notion could cover, in some countries, also mayors, as members of local councils, or ministers, as members of Parliament. The expression "administrative powers" is aimed at bringing into the scope of this provision members of public assemblies which do not have legislative powers, as it could be the case with regional or provincial assemblies or local councils. Such public assemblies, although not competent to enact legislation, may have considerable powers, for instance in the planning, licensing or regulatory areas.

46. Apart from the persons who are bribed, i.e. members of domestic public assemblies, the substance of this bribery offence is identical to the one defined under Articles 2 and 3.

Article 5 – Bribery of foreign public officials

47. Corruption not only undermines good governance and destroys public trust in the fairness and impartiality of public administrations but it may also seriously distort competition and endanger economic development when foreign public officials are bribed, e.g. by corporations to obtain businesses. With the globalisation of economic and financial structures and the integration of domestic markets into the world-market, decisions taken on capital movements or investments in one country may and do exert effects in others. Multinational corporations and international investors play a determining role in nowadays economy and know of no borders. It is both in their interest and the interest of the global economy in general to keep competition rules fair and transparent.

48. The international community has for long been considering the introduction of a specific criminal offence of bribery of foreign public officials, e.g. to ensure respect of competition rules in international business transactions. The protected legal interest is twofold in the case of this offence: transparency and fairness of the decision-making process of foreign public administrations, -this was traditionally considered a domestic affair but the globalisation has made this consideration obsolete -, and the protection of fair competition for businesses. The criminalisation of corrupt behaviour occurring outside national territories finds its justification in the common interest of States to protect these interests. The European Union was the first European organisation which succeeded in adopting an international treaty criminalising, inter alia, the corruption of foreign public officials: the Convention on the fight against corruption involving officials of the European Communities or officials of the member States of the EU (adopted on 26 May 1997). After several years, the OECD has also concluded, in November 1997 a landmark agreement on criminalising, in a co-ordinated manner, the bribery of foreign public officials, i.e. to bribe such an official in order to obtain or retain business or other improper advantage.

49. This Article goes beyond the EU Convention in that it provides for the criminalisation of bribery of foreign public officials of any foreign country. It also goes beyond the OECD provision in two respects. Firstly it deals with both the active and passive sides. Of course, the latter, for Contracting Parties to this Convention, will be already covered by Article 3. However, the inclusion of passive corruption of foreign officials in Article 5 seeks to demonstrate the solidarity of the community of States against corruption, wherever it occurs. The message is clear: corruption is a serious criminal offence that could be prosecuted by all Contracting Parties and not only by the corrupt official’s own State. Secondly Article 5 contains no restriction as to the context in which the bribery of the foreign official occurs. Again, the aim is not only to protect free

competition but the confidence of citizens in democratic institutions and the rule of law. As regards the definition of 'foreign public official', reference is made to paragraph 30 above concerning Article 1.

50. Apart from the persons who are bribed, i.e. foreign public officials, the substance of this bribery offence is identical to the one defined under Articles 2 and 3.

Article 6 – Bribery of members of foreign public assemblies

51. This Article criminalises the active and passive bribery of members of foreign public assemblies. The reasons and the protected legal interests are identical to those described under Article 4, but in a foreign context, "in any other State". It is part of the common effort undertaken by States Parties to ensure respect for democratic institutions, independently of whether they are national or foreign in character. Apart from the persons who are bribed, i.e. members of foreign public assemblies, the substance of this bribery offence is identical to the one defined under Articles 2 and 3. The notion of "member of a public assembly" is to be interpreted in the light of the domestic law of the foreign State.

Article 7 – Active bribery in the private sector

52. This Article extends criminal responsibility for bribery to the private sector. Corruption in the private sector has, over the last century, been dealt with by civil (e.g. competition), or labour laws or general criminal law provisions. Criminalising private corruption appeared as a pioneering but necessary effort to avoid gaps in a comprehensive strategy to combat corruption. The reasons for introducing criminal law sanctions for corruption in the private sphere are manifold. First of all, because corruption in the private sphere undermines values like trust, confidence or loyalty, which are necessary for the maintenance and development of social and economic relations. Even in the absence of a specific pecuniary damage to the victim, private corruption causes damage to society as a whole. In general, it can be said that there is an increasing tendency towards limiting the differences between the rules applicable to the public and private sectors. This requires redesigning the rules that protect the interests of the private sector and govern its relations with its employees and the public at large. Secondly, criminalisation of private sector corruption was necessary to ensure respect for fair competition. Thirdly, it also has to do with the privatisation process. Over the years important public functions have been privatised (education, health, transport, telecommunication etc). The transfer of such public functions to the private sector, often related to a massive privatisation process, entails transfers of substantial budgetary allocations and of regulatory powers. It is therefore logical to protect the public from the damaging effects of corruption in businesses as well, particularly since the financial or other powers concentrated in the private sector, necessary for their new functions, are of great social importance.

53. In general, the comments made on active bribery of public officials (Article 2) apply *mutatis mutandis* here as well, in particular as regards the corrupt acts performed, the mental element and the briber. There are, nevertheless, several important differences between the provisions on public and private sector bribery. First of all, Article 7 restricts the scope of private bribery to the domain of "business activity", thus deliberately excluding any non-profit oriented activities carried out by persons or organisations, e.g. by associations or other NGO's. This choice was made to focus on the most vulnerable sector, i.e. the business sector. Of course, this may leave some gaps, which Governments may wish to fill: nothing would prevent a signatory State from implementing this provision without the restriction to "in the course of business activities". "Business activity" is to be interpreted in a broad sense: it means any kind of commercial activity, in particular trading in goods and delivering services, including services to the public (transport, telecommunication etc).

54. The second important difference concerns the scope of recipient persons in Article 7. This provision prohibits bribing any persons who "direct or work for, in any capacity, private sector entities". Again, this a sweeping notion to be interpreted broadly as it covers the employer-employee relationship but also other types of relationships such as partners, lawyer and client and others in which there is no contract of employment. Within private enterprises it should cover not only employees but also the management from the top to the bottom, including members of the board, but not the shareholders. It would also include persons who do not have the status of employee or do not work permanently for the company -for example consultants, commercial agents etc.- but can engage the responsibility of the company. "Private sector entities" refer to companies, enterprises, trusts and other entities, which are entirely or to a determining extent owned by private persons. This of course covers a whole range of entities, notably those engaged "in business activities". They can be corporations but also entities with no legal personality. For the purpose of this provision, the word "entity" should be understood as meaning also, in this context, an individual. Public entities fall therefore outside the scope of this provision.

55. The third important difference relates to the behaviour of the bribed person in the private sector. If, in the case of public officials, it was immaterial whether there had been a breach of his duties, given the general expectation of transparency, impartiality and loyalty in this regard, a breach of duty is required for private sector persons. Criminalisation of bribery in the private sector seeks to protect the trust, the confidence and the loyalty that are indispensable for private relationships to exist. Rights and obligations related to those relationships are governed by private law and, to a great extent, determined by contracts. The employee, the agent, the lawyer is expected to perform his functions in accordance with his contract, which will include, expressly or implicitly, a general obligation of loyalty towards his principal, a general obligation not to act to the detriment of his interests. Such an obligation can be laid down, for example, in codes of conduct that private companies are increasingly developing. The expression, "in breach of their duties" does not aim only at ensuring respect for specific contractual obligations but rather to guarantee that there will be no breach of the general duty of loyalty in relation to the principal's affairs or business. The employee, partner, managing director who accepts a bribe to act or refrain from acting in a manner that is contrary to his principal’s interest, will be betraying the trust placed upon him, the loyalty owed to his principal. This justifies the inclusion of private sector corruption as a criminal offence. The Convention, in Article 7, retained this philosophy and requires the additional element of "breach of duty" in order to criminalise private sector corruption. The notion of "breach of duty" can also be linked to that of "secrecy", that is the acceptance of the gift to the detriment of the employer or principal and without obtaining his authorisation or approval. It is the secrecy of the benefit rather than the benefit itself that is the essence of the offence. Such a secret behaviour threatens the interests of the private sector entity and makes it dangerous.

Article 8 – Passive bribery in the private sector

56. The comments made on passive bribery of domestic public officials (Article 3) apply accordingly here as far as the corrupt acts and the mental element are concerned. So do the comments on active bribery in the private sector (Article 7), as far as the specific context, the persons involved and the extra-condition of "breach of duty" are concerned. The mirror-principle, already referred to in the context of public sector bribery, is also applicable here.

Article 9 – Bribery of officials of international organisations

57. The necessity of extending the criminalisation of acts of bribery to the international sphere was already highlighted under Article 5 (Bribery of foreign public officials). Recent initiatives in the framework of the EU, which led to the adoption on 27 September 1996 (Official Journal of the European Communities No. C 313 of 23. 10. 96) of the Protocol (on corruption) to the EU Convention on the protection of the European Communities' financial interests and that of the Convention on the fight against corruption involving officials of the European Communities or officials of the member States of the EU (26 May 1997), are evidence that criminal law protection is needed against the corruption of officials of international institutions, which must have the same consequences as the one of national public officials. The need to criminalise bribery is even greater in the case of officials of public international organisations than in the case of foreign public officials, since, as already pointed out above, passive bribery of a foreign public official is already an offence under the officials’ own domestic legislation, whereas the laws on bribery only exceptionally cover acts committed by their nationals abroad, in particular when they are permanently employed by public international organisations. The protected legal interest in general is the transparency and impartiality of the decision-making process of public international organisations which, according to their specific mandate, carry out activities on behalf or in the interest of their member States. Some of these organisations do handle large quantities of goods and services. Fair competition in their public procurement procedures is also worth protecting by criminal law.

58. Since this Article refers back to Articles 2 and 3 for the description of the bribery offences, the comments made thereon apply accordingly. The persons involved as recipients of the bribes are, however, different. It covers the corruption of "any official or other contracted employee within the meaning of the staff regulations, of any public international or supranational organisation or body of which the Party is a member, and any person, whether seconded or not, carrying out functions corresponding to those performed by such officials or agents."

59. Two main categories are therefore involved: firstly, officials and other contracted employees who, under the staff regulations, can be either permanent or temporary members of the staff, but irrespective of the duration of their employment by the organisation, have identical duties and responsibilities, governed by contract. Secondly, staff members who are seconded (put at the disposal of the organisation by a

government or any public or private body), to carry out functions equivalent to those performed by officials or contracted employees.

60. Article 9 restricts the obligation of signatories to criminalise only those cases of bribery involving the above-mentioned persons employed by international organisations of which they are members. This restriction is necessary for various practical reasons, for example to avoid problems related to immunity.

61. Article 9 mentions "public international or supranational organisations", which means that they are set up by governments and not individuals or private organisations. It also means that international non-governmental organisations (NGOs) fall outside its scope, although in some cases members of NGOs may be covered by other provisions like Articles 7 and 8. There are many regional or global public international organisations, for example the Council of Europe, whereas there's only one supranational, i.e. the European Union.

Article 10 – Bribery of members of international parliamentary assemblies

62. The comments made on the bribery of members of domestic public assemblies (Article 4) apply here as well, as far as the corrupt acts and the mental element are concerned. These assemblies perform legislative, administrative or advisory functions on the basis of the statute of the international organisation which created them. As far as the specific international context and the restriction of membership of the organisation are concerned, the comments on the bribery of officials of international organisations (Article 9) apply here as well. The persons involved on the passive side are, however, different: members of parliamentary assemblies of international (e.g. the Parliamentary Assembly of the Council of Europe) or supranational organisations (the European Parliament).

Article 11 – Bribery of judges and officials of international courts

63. The comments made on the bribery of domestic public official (Articles 2 and 3), whose definition, according to Article 1.a, includes "judges", apply here as well, as far as the corrupt acts and the mental element are concerned. Similarly, the above comments on the bribery of officials of international organisations (Article 9) should be extended to this provision as far as the specific international context and the restriction of membership of the organisation are concerned. The persons involved are, however, different: "any holders of judicial office or officials of any international court". These persons include not only "judges" in international courts (e.g. at the European Court of Human Rights) but also other officials (for example the Prosecutors of the UN Tribunal on the former Yugoslavia) or members of the clerk's office. Arbitration courts are in principle not included in the notion of "international courts" because they do not perform judicial functions in respect of States. It will be for each Contracting Party to determine whether or not it accepts the jurisdiction of the court.

Article 12 – Trading in influence

64. This offence is somewhat different from the other – bribery-based – offences defined by the Convention, though the protected legal interests are the same: transparency and impartiality in the decision-making process of public administrations. Its inclusion in the present Convention illustrates the comprehensive approach of the Programme of Action against Corruption, which views corruption, in its various forms, as a threat to the rule of law and the stability of democratic institutions. Criminalising trading in influence seeks to reach the close circle of the official or the political party to which he belongs and to tackle the corrupt behaviour of those persons who are in the neighbourhood of power and try to obtain advantages from their situation, contributing to the atmosphere of corruption. It permits Contracting Parties to tackle the so-called "background corruption", which undermines the trust placed by citizens on the fairness of public administration. The purpose of the present Convention being to improve the battery of criminal law measures against corruption it appeared essential to introduce this offence of trading in influence, which would be relatively new to some States.

65. This provision criminalises a corrupt trilateral relationship where a person having real or supposed influence on persons referred to in Articles 2, 4, 5, and 9 – 11, trades this influence in exchange for an undue advantage from someone seeking this influence. The difference, therefore, between this offence and bribery is that the influence peddler is not required to "act or refrain from acting" as would a public official. The recipient of the undue advantage assists the person providing the undue advantage by exerting or proposing to exert an improper influence over the third person who may perform (or abstain from performing) the requested act. "Improper" influence must contain a corrupt intent by the influence peddler: acknowledged forms of lobbying do not fall under this notion. Article 12 describes both forms of this corrupt relationship:

active and passive trading in influence. As has been explained (see document GMC (95) 46), "passive" trading in influence presupposes that a person, taking advantage of real or pretended influence with third persons, requests, receives or accepts the undue advantage, with a view to assisting the person who supplied the undue advantage by exerting the improper influence. "Active" trading in influence presupposes that a person promises, gives or offers an undue advantage to someone who asserts or confirms that he is able to exert an improper over third persons.

66. States might wish to break down the offence into two different parts: the active and the passive trading in influence. The offence on the active side is quite similar to active bribery, as described in Article 2, with some differences: a person gives an undue advantage to a another person (the 'influence peddler') who claims, by virtue of his professional position or social status, to be able exert an improper influence over the decision-making of domestic or foreign public officials (Articles 2 and 5), members of domestic public assemblies (Article 4), officials of international organisations, members of international parliamentary assemblies or judges and officials of international courts (Articles 9-11). The passive trading in influence side resembles to passive bribery, as described in Article 3, but, again the influence peddler is the one who receives the undue advantage, not the public official. What is important to note is the outsider position of the influence peddler: he cannot take decisions himself, but misuses his real or alleged influence on other persons. It is immaterial whether the influence peddler actually exerted his influence on the above persons or not as is whether the influence leads to the intended result.

67. The comments made on active and passive bribery apply therefore here as well, with the above additions, in particular as regards the corrupt acts and the mental element.

Article 13 – Money laundering of proceeds from corruption offences

68. This Article provides for the criminalisation of the laundering of proceeds deriving from corruption offences defined under Articles 2 – 12, i.e. all bribery offences and trading in influence. The technique used by this Article is to make a cross-reference to another Council of Europe Convention (ETS No. 141), which is the Convention on laundering, search, seizure and confiscation of the proceeds from crime (November 1990). The offence of laundering is defined in Article 6, paragraph 1 of the latter convention, whereas certain conditions of application are set out in paragraph 2. The laundering offence, whose objective is to disguise the illicit origin of proceeds, always requires a predicate offence from which the said proceeds originate. For a number of years anti-laundering efforts focused on drug-proceeds but recent international instruments, including above all the Council of Europe Convention No. 141 but also the revised 40 Recommendations of the Financial Action Task Force (FATF), recognise that virtually any offence can generate proceeds which may need to be laundered for subsequent recycling it in legitimate businesses (e.g. fraud, terrorism, trafficking in stolen goods, arms, etc). In principle, therefore, Convention No. 141 already applies to the proceeds of any kind of criminal activity, including corruption, unless a Party has entered a reservation to Article 6 whereby restricting its scope to proceeds form particular offences or categories of offences.

69. The authors of this Convention felt that given the close links that are proved to exist between corruption and money laundering, it was of primary importance that this Convention also criminalises the laundering of corruption proceeds. Another reason to include this offence was the possibly different circles of States ratifying the two instruments: some non-member States which have participated in the elaboration of this Convention could only ratify Convention No. 141 with the authorisation of the Committee of Ministers of the Council of Europe, while they can do so with the present Convention automatically by virtue of its Article 32, paragraph 1.

70. This provision lays down the principle that Contracting Parties are obliged to consider corruption offences as predicate offences for the purpose of anti-money laundering legislation. Exceptions to this principle are only allowed to the extent that the Party has made a reservation in relation to the relevant Articles of this Convention. Moreover, if a country does not consider some of these corruption offences as "serious" ones under its money laundering legislation, it will not be obliged to modify its definition of laundering.

Article 14 – Account offences

71. Account offences may have a twofold relationship to corruption offences: these offences are either preparatory acts to the latter or acts disguising the "predicate" corruption or other corruption-related offences. Article 16 covers both forms of this relationship and, in principle, all corruption-offences defined in Articles 2-12. These account offences do not apply to money laundering of corruption proceeds (Article 13),

since the main feature of laundering is precisely to disguise the origin of illicit funds. Disguising money laundering would, therefore, be redundant.

72. Given that these acts aim at committing, concealing or disguising corruption offences, either by act or by omission, they can also be qualified as preparatory-stage acts. Such acts are usually treated as administrative offences in certain domestic laws. Article 14 allows therefore the Contracting Parties to choose between criminal law or administrative law sanctions. Though the choice offered might facilitate the implementation of the Convention for certain countries it could hamper international co-operation in respect of the present offence.

73. Account offences can only be committed intentionally. Concerning the material elements of the offence, it is described in two different forms: one relates to a positive action, i.e. the creation or use of invoices or other kinds of accounting documents or records which contain false or incomplete information. This fraud-type behaviour clearly aims at deceiving a person (e.g. an auditor) as to the genuine and reliable nature of the information contained therein, with a view to concealing a corruption offence. The second indent contains an omission-act, i.e. someone fails to record a payment, coupled with a specific qualifying element, i.e. "unlawfully". The latter indicates that only where a legal duty is placed upon the relevant persons (e.g. company accountants) to record payments, the omission thereof should become a punishable act.

74. If a Party has made a reservation in respect of any of the corruption offences defined in Articles 2 -12, it is not obliged to extend the application of the account offence to such corruption offence(s). The obligation arising out of this Article to establish certain acts as offences is to be implemented in the framework of the Party’s laws and regulations regarding the maintenance of books and records, financial statement disclosures, and accounting and auditing standards. Moreover, this provision does not aim at the establishment of specific accounting offences related to corruption, since general accounting offences would be quite sufficient in this field. It should be further specified that Article 14 does not require a particular branch of the law (fiscal, administrative or criminal) to deal with this matter.

75. This provision requires Contracting Parties to establish offences "liable to criminal or other sanctions". The expression "other sanctions" means "non-criminal sanctions" imposed by the courts.

Article 15 – Participatory acts

76. The purpose of this provision is not the establishment of an additional offence but to criminalise participatory acts in the offences defined in Articles 2 to 14. It therefore provides for the liability of participants in intentional offences established in accordance with the Convention. Though it is not indicated specifically, it flows from the general principles of criminal law that any form of participation (aiding and abetting) needs to be committed intentionally.

Article 16 – Immunity

77. Article 16 provides that the Convention is without prejudice to provisions laid down in treaties, protocols or statutes governing the withdrawal of immunity. The acknowledgement of customary international law is not excluded in this field. Such provisions may, in particular, concern members of staff in public international or supranational organisations (Article 9), members of international parliamentary assemblies (Article 10) as well as judges and officials of international courts (Article 11). Withdrawal of immunity is thus a prior condition for exercising jurisdiction, according to the particular rules applying to each of the above-mentioned categories of persons. The Convention recognises the obligation of each of the institutions concerned to give effect to the provisions governing privileges and immunities.

Article 17 – Jurisdiction

78. This Article establishes a series of criteria under which Contracting Parties have to establish their jurisdiction over the criminal offences enumerated in Articles 2-14 of the Convention.

79. Paragraph 1 littera a. lays down the principle of territoriality. It does not require that a corruption offence as a whole be committed exclusively on the territory of a State to enable it establishing jurisdiction. If only parts of the offence, e.g. the acceptance or the offer of a bribe, were committed on its territory, a State may still do so: the principle of territoriality should thus be interpreted broadly. In many member States, albeit not in all, for the purpose of allowing the exercise of jurisdiction in accordance with the principle of territoriality, the place of commission is determined on the basis of what is known as the doctrine of ubiquity: it means that an offence as a whole may be considered to have been committed in the place where a part of it has

been committed. According to one form of the doctrine of ubiquity, an offence may be considered to have been also committed in the place where the consequences or effects of the offence become manifest. The doctrine of effects is accepted in several member states of the Council of Europe (Council of Europe Report on extraterritorial criminal jurisdiction, op. cit. page 8-9). It means that wherever a constituent element of an offence is committed or an effect occurs, that is usually considered as the place of perpetration. In this context, it may be noted that the intention of the offender is irrelevant and does not affect the jurisdiction based on the territorial principle. Likewise, it is immaterial which is the nationality of the briber or of the person who is bribed.

80. Paragraph 1, littera b. sets out the principle of nationality. The nationality theory is also based upon the State sovereignty: it provides that nationals of a State are obliged to comply with the domestic law even when they are outside its territory. Consequently, if a national commits an offence abroad, the Party has, in principle, to take jurisdiction, particularly if it does not extradite its nationals. The paragraph further specifies that jurisdiction has to be established not only if nationals commit one of the offences defined by the Convention but also when public officials and members of domestic assemblies of the Party commit such an offence. Naturally, in most cases the latter two categories are, at the same time, nationals as well (in some countries nationality is a pre-condition for qualifying for these positions), but exceptions do exist.

81. Paragraph 1, littera c. is also based on both the principle of protection (of national interests) and of nationality. The difference with the previous paragraph is that here jurisdiction is based on the bribed person's status: either he is a public official or a member of a domestic public assembly of the Party (therefore not necessarily a national) or he is a national who is at the same time an official of an international organisation, a member of an international parliamentary assembly or a judge or an official of an international court.

82. Paragraph 2 allows States to enter a reservation to the jurisdiction grounds laid down in paragraph 1, litterae b and c. In such cases, however, it stems from the principle of "*aut dedere aut iudicare*", "extradite or punish" laid down in paragraph 3 that there is an obligation for the contracting party to establish jurisdiction over cases where extradition of the alleged offender was refused on the basis of his nationality and the offender is present on its territory.

83. Jurisdiction is traditionally based on territoriality or nationality. In the field of corruption these principles may, however, not always suffice to exercise jurisdiction, for example over cases occurring outside the territory of a Party, not involving its nationals, but still affecting its interests (e.g. national security). Paragraph 4 of this Article allows the Parties to establish, in conformity with their national law, other types of jurisdiction as well. Among them, the universality principle would permit States to establish jurisdiction over serious offences, regardless where and by whom they are committed, because they may be seen as threatening universal values and the interest of mankind. So far, this principle has not yet gained a general international recognition, although some international documents make reference to it.

Article 18 – Corporate liability

84. Article 18 deals with the liability of legal persons. It is a fact that legal persons are often involved in corruption offences, especially in business transactions, while practice reveals serious difficulties in prosecuting natural persons acting on behalf of these legal persons. For example, in view of the largeness of corporations and the complexity of structures of the organisation, it becomes more and more difficult to identify a natural person who may be held responsible (in a criminal sense) for a bribery offence. Legal persons thus usually escape their liability due to their collective decision-making process. On the other hand, corrupt practices often continue after the arrest of individual members of management, because the company as such is not deterred by individual sanctions.

85. The international trend at present seems to support the general recognition of corporate liability, even in countries, which only a few years ago, were still applying the principle according to which corporations cannot commit criminal offences. Therefore, the present provision of the Convention is in harmony with these recent tendencies, e.g. in the area of international anti-corruption instruments, such as the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Article 2).

86. Article 18, paragraph 1 does not stipulate the type of liability it requires for legal persons. Therefore this provision does not impose an obligation to establish that legal persons will be held criminally liable for the offences mentioned therein. On the other hand it should be made clear that by virtue of this provision Contracting Parties undertake to establish some form of liability for legal persons engaging in corrupt practices, liability that could be criminal, administrative or civil in nature. Thus, criminal and non-criminal –administrative, civil- sanctions are suitable, provided that they are "effective, proportionate and dissuasive" as specified

by paragraph 2 of Article 19. Legal persons shall be held liable if three conditions are met. The first condition is that an active bribery offence, an offence of trading in influence or a money laundering offence must have been committed, as defined in Articles 2, 4, 5, 6, 7, 9, 10, 11, 12 and 13. The second condition is that the offence must have been committed for the benefit or on behalf of the legal person. The third condition, which serves to limit the scope of this form of liability, requires the involvement of "any person who has a leading position". The leading position can be assumed to exist in the three situations described –a power of representation or an authority to take decisions or to exercise control- which demonstrate that such a physical person is legally or in practice able to engage the liability of the legal person.

87. Paragraph 2 expressly mentions Parties' obligation to extend corporate liability to cases where the lack of supervision within the legal person makes it possible to commit the corruption offences. It aims at holding legal persons liable for the omission by persons in a leading position to exercise supervision over the acts committed by subordinate persons acting on behalf of the legal person. A similar provision also exists in the Second Protocol to the European Union Convention on the Protection of the financial interest of the European Communities. As paragraph 1, it does not impose an obligation to establish criminal liability in such cases but some form of liability to be decided by the Contracting Party itself.

88. Paragraph 3 clarifies that corporate liability does not exclude individual liability. In a concrete case, different spheres of liability may be established at the same time, for example the responsibility of an organ etc. separately from the liability of the legal person as a whole. Individual liability may be combined with any of these categories of liability.

Article 19 – Sanctions and measures

89. This Article is closely related to Articles 2–14, which define various corruption offences that should be made, according to this convention, punishable under criminal law. In accordance with the obligations imposed by those articles, this paragraph obliges explicitly the Contracting Parties to draw the consequence from the serious nature of these offences by providing for criminal sanctions that are "effective, proportionate and dissuasive", expression that can also be found in Article 5 of the European Union Convention of 26 May 1997 and in Article 3, paragraph 1 of the OECD Convention of 20 November 1997. This provision involves the obligation to attach to the commission of these offences by natural persons penalties of imprisonment of a certain duration ("which can give rise to extradition"). This provision does not mean that a prison sentence must be imposed every time that a person is found guilty of having committed a corruption offence established in accordance with this Convention but that the Criminal Code should provide for the possibility of imposing prison sentences of a certain level in such cases.

90. Because the offences referred to in Article 14 shall be made punishable under either criminal or administrative law, this article is only applicable to those offences in so far as these offences have been established as criminal offences.

91. Legal persons, whose liability is to be established in accordance with Article 18 shall also be subject to sanctions that are "effective, proportionate and dissuasive", which can be penal, administrative or civil in nature. Paragraph 2 compels Contracting Parties to provide for the possibility of imposing monetary sanctions of a certain level to legal persons held liable of a corruption offence.

92. It is obvious that the obligation to make corruption offences punishable under criminal law would lose much of its effect if it was not supplemented by an obligation to provide for adequately severe sanctions. While prescribing that imprisonment and pecuniary sanctions should be the sanctions that can be imposed for the relevant offences, the Article leaves open the possibility that other sanctions reflecting the seriousness of the offences are provided for. It cannot, of course, be the aim of this Convention to give detailed provisions regarding the criminal sanctions to be linked to the different offences mentioned in article 2 – 14. On this point the Parties inevitably need the discretionary power to create a system of criminal offences and sanctions that is in coherence with their existing national legal systems.

93. Paragraph 3 of this Article prescribes a general obligation for Contracting Parties to provide for adequate legal instruments to ensure that confiscation, or other forms of legal deprivation (such as civil forfeiture) of instrumentalities and proceeds of corruption, related to the value of offences mentioned in Articles 2 – 14, is possible thereof. This paragraph must be examined in view of the background of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (Strasbourg, 8 November 1990). The Convention is based on the idea that confiscation of the proceeds is one of the effective methods in combating crime. Taking into account that the undue advantage promised, given, received

or accepted in most corruption offence is of material nature, it is clear that measures resulting in the deprivation of property related to or gained by the offence should, in principle, be available in this field too.

94. Article 1 of the Laundering Convention is instrumental in the interpretation of the terms "confiscate", "instrumentalities", "proceeds" and "property", used in this Article. By the word "confiscate" reference is made to any criminal sanction or measure ordered by a court following proceedings in relation to a criminal offence resulting in the final deprivation of property. "Instrumentalities" cover the broad range of objects that are used or intended to be used, in any way, wholly or in part, to commit the relevant criminal offences established in accordance with Articles 2 – 14. The term "proceeds" means any economic advantage as well as any savings by means of reduced expenditure derived from such an offence. It may consist of any "property" in the interpretation that the term is being given below. In the wording of this paragraph, it is taken into account that the national legal systems may show differences as to what property can be confiscated in relation to an offence. Confiscation may be possible of objects that (directly) form the proceeds of the offence or of other property belonging to the offender that – although not (directly) gained by the offence – equals the value of the directly gained illegal proceeds, the so called "substitute assets". "Property" therefore has to be interpreted, in this context, as including property of any description, whether corporal or incorporeal, movable or immovable, and legal documents or instruments evidencing title to or interest in such property. It is to be noted that Contracting Parties are under no obligation to provide for the criminal confiscation of substitute assets as the words "otherwise deprive" allow for their civil forfeiture also.

Article 20 – Specialised authorities

95. This Article requires States Parties to adopt the necessary measures to ensure that persons or entities be appropriately specialised in the fight against corruption. This provision is inspired, inter alia, by the need of improving both the specialisation and independence of persons or entities in charge of the fight against corruption, which was stated in numerous Council of Europe documents. The requirement of specialisation is not meant to apply to all levels of law enforcement. It does not require in particular that in each prosecutor’s office or in each police station there is a special unit or expert for corruption offences. At the same time, this provision implies that wherever it is necessary for combating effectively corruption there are sufficiently trained law-enforcement units or personnel.

96. In this context, reference should firstly be made to the Conclusions and Recommendations of the 1st Conference for law-enforcement officers specialised in the fight against corruption, which took place in Strasbourg in April 1996. In the Recommendations, participants agreed, *inter alia*, that "corruption is a phenomenon the prevention, investigation and prosecution of which need to be approached on numerous levels, using specific knowledge and skills from a variety of fields (law, finance, economics, accounting, civil engineers, etc.). Each State should therefore have experts specialised in the fight against corruption. They should be of a sufficient number and be given appropriate material resources. Specialisation may take different forms: the specialisation of a number of police officers, judges, prosecutors and administrators or of the bodies or units specially entrusted with (several aspects of) the fight against corruption. The power available to the specialised units or individuals must be relatively broad and include right of access to all information and files which could be of values to the fight against corruption."

97. Secondly, it should be noted that the Conclusions and Recommendations of the 2nd European Conference of specialised services in the fight against corruption, which took place in Tallinn in October 1997, also recommended that «judges and prosecutors enjoy independence and impartiality in the exercise of their functions, are properly trained in combating this type of criminal behaviour and have sufficient means and resources to achieve the objective».

98. Thirdly, Resolution (97)24 on the 20 Guiding Principles for the fight against corruption, in its Principle n° 3, provides that States should "ensure that those in charge of the prevention, investigation, prosecution and adjudication of corruption offences, enjoy the independence and autonomy appropriate to their functions, are free from improper influence and have effective means for gathering evidence, protecting the persons who help the authorities in combating corruption and preserving the confidentiality of investigations".

99. It should be noted that the independence of specialised authorities for the fight against corruption, referred to in this Article, should not be an absolute one. Indeed, their activities should be, as far as possible, integrated and co-ordinated with the work carried out by the police, the administration or the public prosecutors office. The level of independence required for these specialised services is the one that is necessary to perform properly their functions.

100. Moreover, the entities referred to in Article 20 can either be special bodies created for the purposes of combating corruption, or specialised entities within existing bodies. These entities should have the adequate know-how and legal and material means at least to receive and centralise all information necessary for the prevention of corruption and for the revealing of corruption. In addition, and without prejudice to the role of other national bodies dealing with international co-operation, one of the tasks of such specialised authorities could also be to serve as counterparts for foreign entities in charge of fighting corruption.

Article 21 – Co-operation between authorities

101. The responsibility for fighting corruption does not lie exclusively with law-enforcement authorities. The 20 Guiding Principles on the fight against corruption already recognised the role that tax authorities can perform in this field (see Principle 8). The drafters of this Convention considered that co-operation with the authorities in charge of investigating and prosecuting criminal offences was an important aspect of a coherent an efficient action against those committing the corruption offences defined therein. This provision introduces a general obligation to ensure co-operation of all public authorities with those investigating and prosecuting criminal offences. Obviously the purpose of this provision can not be to guarantee that a sufficient level of co-operation will be achieved in all cases but to impose on Contracting Parties the adoption of the steps that are necessary to try and ensure an adequate level of co-operation between the national authorities. The authorities responsible for reporting corruption offences are not defined but national legislatures should adopt a broad approach. It could be tax authorities, administrative authorities, public auditors, labour inspectors... whoever in the exercise of his functions comes across information regarding potential corruption offences. Such information, necessary for the law enforcement authorities, is likely to be available, primarily, from those authorities that have a supervisory and controlling competence over the functioning of different aspects of public administration.

102. This Article provides that the general duty to co-operate with law-enforcement authorities in the investigation and prosecution of corruption offences is to be carried out "in accordance with national law". The reference to national law means that the extent of the duty to co-operate with law enforcement is to be defined by the provisions of national law applicable to the official or authority concerned (e.g. an authorisation procedure). This provision does not carry an obligation to modify those legal systems, in existence in some Contracting Parties, which do not provide for a general obligation of public officials to report crimes or have established specific procedures for so doing.

103. This is confirmed by the fact that the means of co-operation, specified in litteras a) and b) are not cumulative but alternative. As a result the obligation to co-operate with the authorities responsible for investigating and prosecuting criminal offences can be fulfilled either by informing them, on the authority’s own initiative, of the existence of reasonable grounds to believe that an offence has been committed or by providing them with the information they request. Contracting Parties will be entitled to choose between the available options.

▶ **Littera a)**

104. The first option is to allow or even compel the authority or official in question to inform law-enforcement authorities whenever it comes across a possible corruption offence. The terms "reasonable grounds" mean that the obligation to inform has to be observed as soon as the authority considers that there is a likelihood that a corruption offence has been committed. The level of likelihood should be the same as the one that is required for starting a police investigation or a prosecutorial investigation.

▶ **Littera b)**

105. This paragraph concerns the obligation to inform on request. It lays down that the fundamental principle that authorities must provide the investigating and prosecuting authorities with all necessary information, in accordance with safeguards and procedures established by national law. What is considered as "necessary information" will also be decided in accordance with national law.

106. Of course, national law might provide for some exceptions to the general principle of providing information, for instance, where the information touches upon secrets relating to the protection of national or other essential interests.

Article 22 – Protection of collaborators of justice and witnesses

107. Article 22 of the Convention requires States to take the necessary measures to provide for an effective and appropriate protection of collaborators of justice and witnesses.

108. In this context, it should be noted that already in the Conclusions and Recommendations of the 2nd European Conference of specialised services in the fight against corruption (Tallinn, October 1997), participants agreed that, in order to fight corruption effectively, "an appropriate system of protection for witnesses and other persons co-operating with the judicial authorities should be introduced, including not only an appropriate legal framework, but also the financial resources needed to achieve the result." Moreover, "provisions should be made for the granting of immunity or the adequate reduction of penalties in respect of persons charged with corruption offences who contribute to the investigation, disclosure or prevention of crime".

109. However, it is in Recommendation N° R(97)13 on the intimidation of witnesses and the rights of the defence, which has been adopted by the Committee of Ministers of the Council of Europe on 10 September 1997, that the question of the protection of collaborators of justice and witnesses has been addressed in a comprehensive way in the framework of the Council of Europe. This Recommendation establishes a set of principles which could guide national legislation when addressing the problems of witness-intimidation, either in the framework of criminal procedure law or when designing out-of-court protection measures. The Recommendation suggests to Member States a list of measures which may contribute to ensuring efficiently the protection of both the interests of witnesses and that of the criminal justice system, while maintaining appropriate opportunities for the defence to exercise its right in criminal proceedings.

110. The drafters of this Convention, inspired, inter alia, by the above-mentioned Recommendation, considered that the words "collaborators of justice" refer to persons who face criminal charges, or are convicted, of having taken part in corruption offences, as contained in Articles 2 – 14 of the Convention, but agree to co-operate with criminal justice authorities, particularly by giving information concerning those corruption offences in which they were involved, in order for the competent law-enforcement authorities to investigate and prosecute them.

111. Moreover, the word "witnesses" refers to persons who possess information relevant to criminal proceedings concerning corruption offences as contained in Articles 2 – 14 of the Convention and includes whistleblowers.

112. Intimidation of witnesses, which may be carried out either directly or indirectly, may occur in a number of ways, but its purpose is the same, i.e. to eliminate evidence against defendants with a view to their acquittal for lack of sufficient evidence, or exceptionally, to provide evidence against defendants with a view to have them convicted.

113. The terms "effective and appropriate" protection in Article 20, refer to the need to adapt the level of protection granted to the risks that exist for collaborators of justice, witnesses or whistleblowers. In some cases it could be sufficient, for instance, to maintain their name undisclosed during the proceedings, in other cases they would need bodyguards, in extreme cases more far-reaching witnesses’ protection measures such as change of identity, work, domicile, etc. might be necessary.

Article 23 – Measures to facilitate the gathering of evidence and the confiscation of proceeds

114. This provision acknowledges the difficulties that exist to obtain evidence that may lead to the prosecution and punishment of persons having committed those corruption offences defined in accordance with the present Convention. Behind almost every corruption offence lies a pact of silence between the person who pays the bribe and the person who receives it. In normal circumstances none of them will have any interest in disclosing the existence or the modalities of the corrupt agreement concluded between them. In conformity with paragraph 1, States Parties are therefore required to adopt measures, which will facilitate the gathering of evidence in cases related to the commission of one of the offences defined in Articles 2-14. In view of the already mentioned difficulties to obtain evidence, this provision includes an obligation for the Parties to permit the use of "special investigative techniques". No list of these techniques is included but the drafters of the Convention were referring in particular to the use of under-cover agents, wire-tapping, bugging, interception of telecommunications, access to computer systems and so on. Reference to these special investigative techniques can also be found in previous instruments such as the United Nations Convention of 1988, the Council of Europe Convention on the Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS No. 141, Article 4) or the Forty Recommendations adopted by the Financial Action Task Force (FATF). Most of these techniques are highly intrusive and may give rise to constitutional difficulties as regards their compatibility with fundamental rights and freedoms. Therefore, the Parties are free to decide that some of these techniques will not be admitted in their domestic legal system. Also the reference made by paragraph 1 to "national law" should enable Parties to surround the use of these special investigative techniques

with as many safeguards and guarantees as may be required by the imperative of protecting human rights and fundamental freedoms.

115. The second part of paragraph 1 of this Article is closely related to paragraph 3 of Article 19. It requires, for the implementation of the latter Article, the adoption of legal instruments allowing the Contracting Parties to take the necessary provisional steps, before measures leading to confiscation can be imposed. The effectiveness of confiscation measures depends in practice on the possibilities to carry out the necessary investigations as to the quantity of the proceeds gained or the expenses saved and the way in which profits (openly or not) are deposited. In combination with these investigations, it is necessary to ensure that the investigating authorities have the power to freeze located tangible and intangible property in order to prevent that it disappears before a decision on confiscation has been taken or executed (cf. Articles 3 and 4 in the Money Laundering Convention).

CHAPTER III – MONITORING OF IMPLEMENTATION

Article 24 – Monitoring

116. The implementation of the Convention will be monitored by the "Group of States against Corruption – GRECO". The establishment of an efficient and appropriate mechanism to monitor the implementation of international legal instruments against corruption was considered, from the outset, as an essential element for the effectiveness and credibility of the Council of Europe initiative in this field (see, inter alia, the Resolutions adopted at the 19th and 21st Conferences of the European Ministers of Justice, the terms of reference of the Multidisciplinary Group on Corruption, the Programme of Action against Corruption, the Final Declaration and Action Plan of the Second Summit of Heads of State and Government). In Resolution (98) 7 adopted at its 102nd Session (5 May 1998), the Committee of Ministers authorised the establishment of a monitoring body, the GRECO, in the form of a partial and enlarged Agreement under Statutory Resolution (93) 28 (as completed by Resolution (96) 36). Member States and non-member States having participated in the elaboration of the Agreement were invited to notify their intention to participate in GRECO, which would start functioning on the first day of the month following the date on which the 14th notification by a member State would reach the Secretary General of the Council of Europe. Consequently, on .. .... 1998, ..[member-States], joined in by [non-member-States included in the constituent Resolution] adopted Resolution (98).. establishing the GRECO and containing its Statute.

117. The GRECO will monitor the implementation of this Convention in accordance with its Statute, appended to Resolution (98)... The aim of GRECO is to improve the capacity of its members to fight corruption by following up, through a dynamic process of mutual evaluation and peer pressure, compliance with their undertakings in this field. (Article 1 of the Statute). The functions, composition, operation and procedures of GRECO are described in its Statute.

118. If a State is already a member of GRECO at the time the present Convention enters into force or, subsequently, at the time of ratifying it the consequence will be that the scope of the monitoring carried out by GRECO will be extended to cover the implementation of the present Convention. If a State is not a member of GRECO at the time of entry into force or subsequent ratification of this Convention, this provision combined with Articles 32, paragraphs 3 and 4 or with Article 33, paragraph 2 imposes a compulsory and automatic membership of GRECO. It consequently implies, in particular, an obligation to accept to be monitored in accordance with the procedures detailed in its Statute, as from the date in which the Convention enters into force in respect of that State.

CHAPTER IV – INTERNATIONAL CO-OPERATION

Article 25 – General principles and measures for international co-operation

119. The Guiding principles for the fight against corruption (Principle 20) contain an undertaking to develop to the widest extent possible international co-operation in all areas of the fight against corruption. The present Chapter IV on measures to be taken at international level was the subject of lengthy and thorough discussions within the Group, which drafted the Convention. These deliberations concentrated upon the question of whether or not the Convention should include a free-standing, substantial and rather detailed section covering several topics in the field of international co-operation in criminal matters, or, whether it should simply make a cross-reference to existing multilateral or bilateral treaties in that field. Some arguments militated in favour of this latter option, such as the risk of confusing practitioners with the multiplication of co-operation rules in conventions dealing with specific offences or a possible reduction in the willingness to accede to general conventions. The usefulness of inserting a chapter that could serve as

the legal basis for co-operating in the area of corruption was justified by the particular difficulties encountered to obtain the co-operation required for the prosecution of corruption offences – a problem widely recognised and eloquently stated, inter alia, by the «Appel de Geneve»-. Also by the fact that this Convention is an open Convention and some of the Contracting Parties to it would not be –in some cases could not be- Parties to Council of Europe treaties on international co-operation in criminal matters or would not be parties to bilateral treaties in this field with many of the other Contracting Parties. In the absence of treaty provisions, some Parties non-members of the Council of Europe would experience difficulties in co-operating with the other Parties. Thus, non-member countries, which could potentially become Parties to this Convention, underlined that co-operation would be facilitated if the present Convention was self-contained and included provisions on international co-operation that could serve as a legal basis for affording the co-operation demanded by other Contracting Parties. The drafters of the Convention finally agreed to insert this Chapter in the Convention, as a set of subsidiary rules that would be applied in the absence of multilateral or bilateral treaties containing more favourable provisions.

120. Article 25 has been conceived, therefore, as an introductory provision to the whole Chapter IV. It aims at conciliating the respect for treaties or arrangements on international co-operation in criminal matters with the need to establish a specific legal basis for co-operating under the present Convention. According to paragraph 1, the Parties undertake to grant to each other the widest possible co-operation on the basis of existing international instruments, arrangements agreed on the basis of uniform or reciprocal legislation and their national law for the purpose of investigations and proceedings related to criminal offences established in accordance with the present Convention. The reference made to instruments on international co-operation in criminal matters is formulated in a general way. It includes, of course, the Council of Europe Conventions on Extradition (ETS 24) and its additional Protocols (ETS No. 86 and 98), on Mutual Assistance in Criminal Matters (ETS No. 30) and its Protocol (ETS No. 99), on the Supervision of Conditionally Sentenced or Conditionally Released offenders (ETS No. 51), on the International Validity of Criminal Judgements (ETS 70), on the Transfer of Proceedings in Criminal Matters (ETS No. 73), on the Transfer of Sentenced Persons (ETS No. 112), on the Laundering, Search, Seizure and Confiscation of the Proceeds of Crime (ETS No. 141). It also covers multilateral agreements concluded within other supranational or international organisations as well as bilateral agreements entered upon by the Parties. The reference to international instruments on international co-operation in criminal matters is not limited to those instruments in force at the time of entry into force of the present Convention but also covers instruments that may be adopted in the future.

121. According to paragraph 1 the co-operation can also be based on "arrangements agreed on the basis of uniform or reciprocal legislation". This refers, inter alia, to the system of co-operation developed among the Nordic countries, which is also admitted by the European Convention on Extradition (ETS No. 24, Article 28, paragraph 3) and by the European Convention on Mutual Assistance in Criminal Matters (ETS No. 30, Article 26, paragraph 4). Of course, co-operation can also be granted on the basis of the Parties' own national law.

122. The second paragraph enshrines the subsidiary nature of Chapter IV by providing that Articles 26 to 31 shall apply in the absence of the international instruments or arrangements referred to in the previous paragraph. Obviously no reference is made here to national law, since the Parties can always apply their own law in the absence of international instruments. The purpose of this provision is to provide a legal basis for granting the co-operation required to those Parties which are prevented from so doing in the absence of an international treaty.

123. Paragraph 3 embodies a derogation to the subsidiary nature of Chapter IV, by providing that in spite of the existence of international instruments or arrangements in force, Articles 26 to 31 shall also apply when they are more favourable. "More favourable" refers to international co-operation. It means that these provisions must be applied if thanks to their application it will be possible to afford a form of co-operation that it would not have been possible to afford otherwise. This will be the case, for instance, with the provisions contained in Articles 26, paragraph 3, Article 27, paragraphs 1 and 3 or with Article 28. It also means that the granting of the co-operation required will be simplified, facilitated or speeded up through the application of Articles 26-31.

Article 26 – Mutual assistance

124. This provision translates into the specific area of mutual legal assistance the obligation to co-operate to the widest possible extent that is contained in Article 25, paragraph 1. Requests for mutual legal assistance need not be restricted to the gathering of evidence in corruption cases, as they could cover other aspects, such as notifications, restitution of proceeds, transmission of files. This provision incorporates an additional

requirement: that the request be processed "promptly". Experience shows that very often acts that need to be performed outside the territory of the State where the investigation is being conducted require lengthy delays, which become an obstacle to the good course of the investigation and may even jeopardise it.

125. Paragraph 2 provides for the possibility of refusing requests of mutual legal assistance made on the basis of the present Convention. Refusal of such requests may be based on grounds of prejudice to the sovereignty of the State, security, ordre public and other essential interests of the requested country. The expression "fundamental interests of the country" may be interpreted as allowing the requested state to refuse mutual legal assistance in cases where the fundamental principles of its legal system are at stake, where human rights’ consideration should prevail and, more generally, in cases where the requested State has reasonable grounds to believe that the criminal proceedings instituted in the requesting State have been distorted or misused for purposes other than combating corruption.

126. Paragraph 3 of this provision is drafted along the lines of that of Article 18, paragraph 7 of the Convention on the Laundering, Search, Seizure and Confiscation of the Proceeds of Crime (ETS 141). A similar provision is also to be found in the OECD Convention on Combating Bribery of Foreign Public Officials (Article 9, paragraph 3). Before affording the assistance required involving the lifting of bank secrecy, the requested Party may, if its domestic law so provides, require the authorisation of a judicial authority competent in relation to criminal offences.

Article 27 – Extradition

127. Drawing all the consequences from their serious nature, paragraphs 1 and 3 provide that corruption offences falling within the scope of the present Convention shall be deemed as extraditable offences. Such an obligation also stems from Article 19, paragraph 1, according to which these offences should have attached a penalty of deprivation of liberty, which can give rise to extradition. This does not mean that extradition must be granted on every occasion that a request is made but rather that the possibility must be available of granting the extradition of persons having committed one of the offences established in accordance with the present Convention. Pursuant to paragraph 1, there is an obligation to include corruption offences in the list of those that can give rise to extradition both in existing or in future extradition treaties. Pursuant to paragraph 3 the extraditable nature of these offences must be recognised among Parties which do not make extradition conditional upon the existence of a treaty.

128. In accordance with paragraph 2, the Convention can serve as a legal basis for extradition for those Parties that make extradition conditional upon the existence of a treaty. A Party that would not grant the extradition either because it has no extradition treaty with the requesting Party or because the existing treaties would not cover a request made in respect of a corruption offence established in accordance with this Convention, may use the Convention itself as basis for surrendering the person requested.

129. Paragraph 4 provides for the possibility of refusing an extradition request, because the conditions set up in applicable treaties are not fulfilled. The requested Party can also refuse on the grounds allowed by those treaties. It should be noted in particular that the Convention does not deprive Contracting Parties from the right of refusing extradition if the offence in respect of which it is requested is regarded as a political offence.

130. Paragraph 5 contains the principle of "*aut dedere aut iudicare*", extradite or punish. It is inspired by Article 6, paragraph 2 of the European Convention on Extradition (ETS No. 24). The purpose of this provision is to avoid impunity of corruption offenders. The Party that refuses extradition and institutes proceedings against the offender is under the specific obligations to institute criminal proceedings against him and to inform the requesting Party of the result of such proceedings.

Article 28 – Spontaneous information

131. It happens more and more frequently, in view of the transnational character of many corruption offences, that an authority investigating a corruption offence in their own territory comes across information showing that an offence might have been committed in the territory of another State. This provision, drafted along the lines of Article 10 of the Convention on the Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS No. 141), eliminates the need of a prior request for the transmission of information that may assist the receiving Party to investigate or institute proceedings concerning criminal offences established in accordance with this Convention. However, the spontaneous disclosure of such an information does not prevent the disclosing Party, if it has jurisdiction, from investigating or instituting proceedings in relation to the facts disclosed.

Article 29 – Central authority

132. The institution of Central authorities responsible for sending and answering requests is a common feature of modern instruments dealing with international co-operation in criminal matters. It is a means to ensure that such requests are properly and swiftly channelled. In the case of federal or confederal States, the competent authorities of the States, Cantons or entities forming the Federation are sometimes in a better position to deal more swiftly with co-operation requests emanating from other Parties. The reference to the possibility of designating "several central authorities" addresses such particular issue. The Contracting Parties are not obliged, under this provision, to designate a specific central authority for the purpose of international co-operation against offences established in accordance with this Convention. They could designate already existing authorities that are generally competent for dealing with international co-operation.

133. Each Party is called to provide the Secretary General of the Council of Europe with relevant details on the Central authority or authorities designated under paragraph 1. In accordance with Article 40, the Secretary General will put that information at the disposal of the other Contracting Parties.

Article 30 – Direct Communication

134. Central authorities designated in accordance with the previous Article shall communicate directly with one another. However, if there is urgency, requests for mutual legal assistance may be sent directly by judges and prosecutors of the Requesting State to the judges and prosecutors of the Requested State. The urgency is to be appreciated by the judge or prosecutor sending the request. The judge or prosecutor following this procedure must address a copy of the request made to his own central authority with a view to its transmission to the central authority of the Requested State. According to paragraph 3 of this Article requests may be channelled through Interpol. In accordance with paragraph 5, they may also be transmitted directly -that is, without channelling them through central authorities – even if there is no urgency, when the authority of the Requested State is able to comply with the request without making use of coercive action. The authorities of the Requested State, which receive a request falling outside their field of competence, are, according to paragraph 4, under a two-fold obligation. Firstly they must transfer the request to the competent authority of the requested State. Secondly they must inform the authorities of the Requesting State of the transfer made. Paragraph 6 of this Article enables a Party to inform the others, through the Secretary General of the Council of Europe, that, for reasons of efficiency, direct communications are to be addressed to the central authority. Indeed, in some countries direct communications between judicial authorities could be the source of longer delays and greater difficulties for providing the co-operation required.

Article 31 – Information

135. This provision embodies an obligation for the Requested Party to inform the Requesting Party of the result of actions undertaken in pursuance of the request of international co-operation. There is a further requirement that the information be addressed promptly if there are circumstances that make it impossible to carry out the request made or are likely to delay it significantly.

CHAPTER V – FINAL PROVISIONS

136. With some exceptions, the provisions contained in this Section are, for the most part, based on the "Model final clauses for conventions and agreements concluded within the Council of Europe" which were approved by the Committee of Ministers of the Council of Europe at the 315th meeting of their Deputies in February 1980. Most of these articles do not therefore call for specific comments, but the following points require some explanation.

137. Article 32, paragraph 1 has been drafted on several precedents established in other Conventions elaborated within the framework of the Council of Europe, for instance the Convention on the Transfer of Sentenced Persons (ETS No. 112) and the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS No. 141), which allow for signature, before the Convention's entry into force, not only by member States of the Council of Europe, but also by non-member States which have participated in the elaboration of the Convention. These States are Belarus, Bosnia and Herzegovina, Canada, Georgia, Holy See, Japan, Mexico and the United States of America. Once the Convention enters into force, in accordance with paragraph 3 of this Article, other non-member States not covered by this provision may be invited to accede to the Convention in conformity with Article 33, paragraph 1.

138. Article 32, paragraph 3, requires 14 ratifications for the entry into force of the Convention. This is an unusually high number of ratifications for a criminal law Convention drafted within the Council of Europe.

The reason is that criminalisation of corruption, particularly of international corruption, can only be effective if a high number of States undertake to take the necessary measures at the same time. It is widely recognised that corrupt practices bear an impact on international trade because they hinder the application of competition rules and modify the proper functioning of the market economy. Some countries considered that they would penalise their national companies if they entered into international commitments to criminalise corruption without other countries having assumed similar obligations. In order to avoid becoming a handicap for the national companies of a few Contracting Parties, the present Convention requires that a large number of States undertake to implement it at the same time.

139. The second sentence of paragraphs 3 and 4 of Article 32 as well as of Article 33, paragraph 2, combined with Article 24, entail an automatic and compulsory membership of GRECO for Contracting Parties, which were not already members of this monitoring body at the time of ratification.

140. Article 33 has also been drafted on several precedents established in other conventions elaborated within the framework of the Council of Europe. The Committee of Ministers may, on its own initiative or upon request, and after consulting the Parties, invite any non-member State to accede to the Convention. This provision refers only to non-member States not having participated in the elaboration of the Convention.

141. In conformity with the 1969 Vienna Convention on the law of treaties, Article 35 is intended to ensure the co-existence of the Convention with other treaties – multilateral or bilateral – dealing with matters which are also dealt with in the present Convention. Such matters are characterised in paragraph 1 of Article 35 as "special matters". Paragraph 2 of Article 35 expresses in a positive way that Parties may, for certain purposes, conclude bilateral or multilateral agreements relating to matters dealt with in the Convention. The drafting permits to deduct, a contrario, that Parties may not conclude agreements which derogate from the Convention. Paragraph 3 of Article 35 safeguards the continued application of agreements, treaties or relations relating to subjects which are dealt with in the present Convention, for instance in the Nordic co-operation.

142. Article 36 provides Parties with the possibility of declaring that they shall criminalise active bribery of foreign public officials, of officials of international organisations or of judges and officials of international courts only to the extent that the undue advantage offered, promised or given to the bribee induces him or is intended to induce him to act or refrain from acting in breach of his duties as an official or judge. For the drafters of the Convention the notion of "breach of duties" is to be understood in a broad sense and therefore also implies that the public official had a duty to exercise judgement or discretion impartially. In particular this notion does not require a proof of the law allegedly violated by the official.

143. Article 37 contains, in its paragraphs 1 and 2, for a large number of reservation possibilities. This stems from the fact the present Convention is an ambitious document, which provides for the criminalisation of a broad range of corruption offences, including some which are relatively new to many States. In addition, it provides for far reaching rules on grounds of jurisdiction. It seemed, therefore, appropriate to the drafters of the Convention to include reservation possibilities that may allow future Contracting Parties to bring their anti-corruption legislation progressively in line with the requirements of the Convention. Furthermore, these reservations aim at enabling the largest possible ratification of the Convention, whilst permitting Contracting Parties to preserve some of their fundamental legal concepts. Of course, it appeared necessary to strike a balance between, on the one hand, the interest of Contracting Parties to enjoy as much flexibility as possible in the process of adapting to conventional obligations with the need, on the other hand, to ensure the progressive implementation of this instrument.

144. Of course, the drafters endeavoured to restrict the possibilities of making reservations in order to secure to the largest possible extent a uniform application of the Convention by the Contracting Parties. Thus, Article 37 contains a number of restrictions to the making of reservations. It indicates, first of all, that reservations or declarations can only be made at the time of ratification in respect of the provisions mentioned in paragraphs 1 and 2, which contain, therefore, a numerus clausus. More importantly paragraph 4 of this provision limits the number of reservations that each Contracting Party may enter.

145. In addition, in accordance with Article 38, paragraph 1 reservations and declarations have a limited validity of 3 years. After this deadline, they will lapse unless they are expressly renewed. Paragraph 2 of Article 38 contains a procedure for the automatic lapsing of non-renewed reservations or declarations. Finally, pursuant to Article 38, paragraph 3, Contracting Parties will be obliged to justify before the GRECO the continuation of a reservation or reservation. The Parties will have to provide to GRECO, at its request, an explanation on the grounds justifying the continuation of a reservation or declaration made. The GRECO may require such an explanation during the initial or during the subsequent periods of validity of reservations or declarations. In cases of renewal of a reservation or declaration, there shall be no need of a prior request by

GRECO, Contracting Parties being under an automatic obligation to provide explanations before the renewal is made. In all cases GRECO will have the possibility of examining the explanations provided by the Party to justify the continuance of its reservations or declarations. The drafters of the Convention expected that the peer-pressure system followed by GRECO would have an influence on decisions by Contracting Parties to maintain or withdraw reservations or declarations.

146. The amendment procedure provided for by Article 39 is mostly thought to be for minor changes of a procedural character. Indeed, major changes to the Convention could be made in the form of additional protocols. Moreover, in accordance with paragraph 5 of Article 37, any amendment adopted would come into force only when all Parties had informed the Secretary General of their acceptance. The procedure for amending the present Convention involves the consultation of non-member States Parties to it, who are not members of the Committee of Ministers or the CDPC.

147. Article 40, paragraph 1, provides that the CDPC should be kept informed about the interpretation and application of the provisions of the Convention. Paragraph 2 of this Article imposes an obligation on the Parties to seek a peaceful settlement of any dispute concerning the interpretation or the application of the Convention. Any procedure for solving disputes should be agreed upon by the Parties concerned.

Appeal by the Committee of Ministers to States to limit as far as possible their reservations to the criminal law Convention on corruption

At this, its 103rd Ministerial Session (4 November 1998), the Committee of Ministers has adopted the Criminal Law Convention on Corruption. In the Committee's view, this is an ambitious text with a broad legal scope which will have a considerable impact on the fight against this phenomenon in Europe.

The text of the Convention provides for a certain number of possible reservations. It has transpired that this is necessary so that Parties can make a progressive adaptation to the undertakings enshrined in this instrument. The Committee of Ministers is convinced that regular examination of reservations by the "Group of States against corruption – GRECO" will make it possible to bring about a rapid reduction of reservations made upon ratification or accession to the Convention.

Nonetheless, in order to maintain the greatest possible uniformity with regard to the undertakings enshrined in the Convention, and to allow full advantage to be taken of this text from the moment it enters into force, the Committee of Ministers appeals to all States wishing to become party to the Convention to reduce as far as possible the number of reservations that they declare, when expressing their consent to be bound by this treaty, and to States which nevertheless find themselves obliged to declare reservations, to use their best endeavours to withdraw them as soon as possible.

Additional Protocol to the criminal law Convention on corruption – ETS No. 191

Strasbourg, 15.V.2003

The member States of the Council of Europe and the other States signatory hereto,

Considering that it is desirable to supplement the Criminal Law Convention on Corruption (ETS No. 173, hereafter "the Convention") in order to prevent and fight against corruption;

Considering also that the present Protocol will allow the broader implementation of the 1996 Programme of Action against Corruption,

Have agreed as follows:

CHAPTER I – USE OF TERMS

Article 1 – Use of terms

For the purpose of this Protocol:

1. The term "*arbitrator*" shall be understood by reference to the national law of the States Parties to this Protocol, but shall in any case include a person who by virtue of an arbitration agreement is called upon to render a legally binding decision in a dispute submitted to him/her by the parties to the agreement.

2. The term "*arbitration agreement*" means an agreement recognised by the national law whereby the parties agree to submit a dispute for a decision by an arbitrator.

3. The term "*juror*" shall be understood by reference to the national law of the States Parties to this Protocol but shall in any case include a lay person acting as a member of a collegial body which has the responsibility of deciding on the guilt of an accused person in the framework of a trial.

4. In the case of proceedings involving a foreign arbitrator or juror, the prosecuting State may apply the definition of arbitrator or juror only in so far as that definition is compatible with its national law.

CHAPTER II – MEASURES TO BE TAKEN AT NATIONAL LEVEL

Article 2 – Active bribery of domestic arbitrators

Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally, the promising, offering or giving by any person, directly or indirectly, of any undue advantage to an arbitrator exercising his/her functions under the national law on arbitration of the Party, for himself or herself or for anyone else, for him or for her to act or refrain from acting in the exercise of his or her functions.

Article 3 – Passive bribery of domestic arbitrators

Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally, the request or receipt by an arbitrator exercising his/her functions under the national law on arbitration of the Party, directly or indirectly, of any undue advantage for himself or herself or for anyone else, or the acceptance of an offer or promise of such an advantage, to act or refrain from acting in the exercise of his or her functions.

Article 4 – Bribery of foreign arbitrators

Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law the conduct referred to in Articles 2 and 3, when involving an arbitrator exercising his/her functions under the national law on arbitration of any other State.

Article 5 – Bribery of domestic jurors

Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law the conduct referred to in Articles 2 and 3, when involving any person acting as a juror within its judicial system.

Article 6 – Bribery of foreign jurors

Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law the conduct referred to in Articles 2 and 3, when involving any person acting as a juror within the judicial system of any other State.

CHAPTER III – MONITORING OF IMPLEMENTATION AND FINAL PROVISIONS

Article 7 – Monitoring of implementation

The Group of States against Corruption (GRECO) shall monitor the implementation of this Protocol by the Parties.

Article 8 – Relationship to the Convention

1. As between the States Parties the provisions of Articles 2 to 6 of this Protocol shall be regarded as additional articles to the Convention.

2. The provisions of the Convention shall apply to the extent that they are compatible with the provisions of this Protocol.

Article 9 – Declarations and reservations

1. If a Party has made a declaration in accordance with Article 36 of the Convention, it may make a similar declaration relating to Articles 4 and 6 of this Protocol at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession.

2. If a Party has made a reservation in accordance with Article 37, paragraph 1, of the Convention restricting the application of the passive bribery offences defined in Article 5 of the Convention, it may make a similar reservation concerning Articles 4 and 6 of this Protocol at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession. Any other reservation made by a Party, in accordance with Article 37 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.

3. No other reservation may be made.

Article 10 – Signature and entry into force

1. This Protocol shall be open for signature by States which have signed the Convention. These States may express their consent to be bound by:

   a. signature without reservation as to ratification, acceptance or approval; or

b. signature subject to ratification, acceptance or approval, followed by ratification, acceptance or approval.

2. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

3. This Protocol shall enter into force on the first day of the month following the expiry of a period of three months after the date on which five States have expressed their consent to be bound by the Protocol in accordance with the provisions of paragraphs 1 and 2, and only after the Convention itself has entered into force.

4. In respect of any signatory State which subsequently expresses its consent to be bound by it, the Protocol shall enter into force on the first day of the month following the expiry of a period of three months after the date of the expression of its consent to be bound by the Protocol in accordance with the provisions of paragraphs 1 and 2.

5. A signatory State may not ratify, accept or approve this Protocol without having, simultaneously or previously, expressed its consent to be bound by the Convention.

Article 11 – Accession to the Protocol

1. Any State or the European Community having acceded to the Convention may accede to this Protocol after it has entered into force.

2. In respect of any State or the European Community acceding to the Protocol, it shall enter into force on the first day of the month following the expiry of a period of three months after the date of the deposit of an instrument of accession with the Secretary General of the Council of Europe.

Article 12 – Territorial application

1. Any State or the European Community 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 Party 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 or territories specified in the declaration and for whose international relations it is responsible or on whose behalf it is authorised to give undertakings. In respect of such territory the Protocol shall enter into force on the first day of the month following the expiry of a period of three months after the date of receipt of such declaration by the Secretary General.

3. Any declaration made in pursuance of the two preceding paragraphs 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 become effective on the first day of the month following the expiry of a period of three months after the date of receipt of the notification by the Secretary General.

Article 13 – Denunciation

1. Any Party may, at any time, 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 expiry of a period of three months after the date of receipt of the notification by the Secretary General.

3. Denunciation of the Convention automatically entails denunciation of this Protocol.

Article 14 – Notification

The Secretary General of the Council of Europe shall notify the member States of the Council of Europe and any State, or the European Community, having acceded to this Protocol of:

a. any signature of this Protocol;

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 10, 11 and 12;

d. any declaration or reservation made under Articles 9 and 12;

e. any other act, notification or communication relating to this Protocol.

In witness whereof the undersigned, being duly authorised thereto, have signed this Protocol.

Done at Strasbourg, this 15th day of May 2003, 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 of the signatory and acceding Parties.

Additional Protocol to the criminal law
Convention on corruption – ETS No. 191

Explanatory Report

The text of this Explanatory Report does not constitute an instrument providing an authoritative interpretation of the Protocol, although it might be of such a nature as to facilitate the application of the provisions contained therein. This Protocol will be opened for signature in Strasbourg, on 15 May 2003, on the occasion of the 112th Session of the Committee of Ministers of the Council of Europe.

INTRODUCTION

1. At its 103rd Session (November 1998), the Committee of Ministers adopted the Criminal Law Convention on Corruption, decided to open it for signature on 27 January 1999 and authorised the publication of the Explanatory Report thereto. This Convention aims at harmonising national legislation regarding the criminalisation of corruption offences, promoting the adoption of complementary criminal law measures and improving international co-operation in the investigation and prosecution of these offences. According to the text of the Convention, the Contracting Parties undertake to criminalise active and passive bribery of national, foreign and international public officials, of members of national, international and supranational parliaments and assemblies, of national, foreign and international judges. It also provides for the criminalisation of active and passive corruption in the private sector, trading in influence, laundering of corruption proceeds. In addition, the Convention deals with accounting offences and other substantial or procedural issues, such as jurisdiction, sanctions and measures, liability of legal persons, setting up of specialised authorities, co-operation among national authorities, witness protection. Besides, the Convention introduced a set of rules in order to conciliate the respect for existing treaties or arrangements on international co-operation in criminal matters with the need to establish a specific legal basis for co-operating in the fight against corruption, in particular in cases where other treaties or arrangements do not apply. The Convention is a complex and ambitious document, which provides for the criminalisation of a broad range of corruption offences.

2. The Group of States against Corruption (GRECO) is responsible for monitoring the implementation of the Convention.

3. Following the adoption by the Committee of Ministers of the Criminal Law Convention on Corruption, a significant part of the objectives defined by the Council of Europe's Programme of Action against Corruption (PAC) in the criminal law field were reached. However, the Convention did not deal with all criminal law matters covered by the PAC. It should also be underlined that during the elaboration of this Convention, the GMC agreed to postpone consideration of the criminalisation at international level of some other offences related to corruption.

4. Therefore the working group on criminal law (GMCP) discussed during several meetings about the necessity of criminalising at international level other forms of corrupt behaviour or behaviour that could be assimilated to corruption, namely:

- illegal acquisitions of interest
- insider trading
- "la concussion" (extortion by a public official)
- illicit enrichment
- corruption of members of non-governmental organisations
- corruption of sport referees
- buying and selling of votes

5. The GMCP also discussed certain aspects of criminal procedure and international co-operation, which could possibly be the subject of new international standards, such as:

- confiscation of proceeds of crime, possibly entailing shifting the burden of proof;
- extension of the material scope of the offence dealt with in article 13 of the Criminal law Convention criminalising the laundering of money originating from corruption offences;
- enforcement of foreign legal decisions of confiscation of proceeds of crime;
- measures of ensuring the integrity of investigation;
- he duration of limitation periods for offences covered by the Convention.

6. While recognising the importance of most of these issues for the fight against corruption, the discussion showed that some of them were of a general nature and that some others could be covered by already existing provisions in the Convention or by national law. The GMCP felt that it would be preferable to postpone consideration of additional standards in this area, work which could be undertaken in the future in the light of the GRECO evaluations. The GMCP decided, therefore, to interrupt for the time being the work on the above listed issues.

7. On the other hand, the GMCP agreed, as a result of the debate to draft an additional Protocol to the Criminal law Convention on corruption providing for the criminalisation of corruption in the field of arbitration. For reasons spelled out later, the GMCP further decided to extend the scope of the draft Protocol to cover corruption committed by or against jurors as well.

COMMENTARY ON THE ARTICLES OF THE PROTOCOL

CHAPTER I – USE OF TERMS

Article 1 – Use of terms

8. Only three terms are defined under Article 1, as all other notions are addressed at the appropriate place in the Explanatory report or have been already used in the Criminal Law Convention on Corruption.

9. The term "arbitrator" is used in Articles 2 to 4. Paragraph 1 of Article 1 defines the concept of "arbitrator" in two ways: on the one hand it refers to the respective national laws – as does the Criminal Law Convention on Corruption concerning the term "public official" (cf. Article 1 *littera* a of the Convention: *"... shall be understood by reference to the definition ... in the national law of the State ..."*); on the other hand – and contrary to the Convention – it establishes an autonomous definition insofar as it sets a commonly binding minimum standard. In reference to the "national law" it should be noted – as has been done with respect to the Criminal Law Convention on Corruption – that it was the intention of the drafters of the Protocol, too, that Contracting Parties assume obligations under this Protocol only to the extent consistent with their Constitution and the fundamental principles of their legal system. This means in particular that no provision of this Protocol should be understood in a way that Parties to this Protocol should feel obliged to establish a system of arbitration (or lay justice) along the lines of the given definition (or any such system; notwithstanding the fact that during the negotiations better protection against corrupt behaviour by means of this Protocol has been mentioned as a supportive factor for promoting plans to introduce such a system) or even to change an already existing system by adjusting it to the Protocol's scope.

10. However, States Parties to this Protocol will be obliged to provide for criminal responsibility in the field of arbitration for offences as foreseen under Articles 2 to 4 committed – at least – by persons who by virtue of an arbitration agreement are called upon to render a legally binding decision in a dispute submitted to them by the parties to the agreement.

11. What is meant by "arbitration agreement" is defined in paragraph 2 of Article 1 (for the purpose of giving further explanation to the notion of arbitrator in paragraph 1 since the term "arbitration agreement" is not used elsewhere in the Protocol). Like the definition of arbitrator the definition of arbitration agreement also uses a very broad concept: for the purposes of this Protocol arbitration agreement means any agreement recognised by the national law whereby the parties agree to submit a dispute for a decision by an arbitrator.

12. This broad concept, in fact, could turn what might look like a "minimum standard" in the sense of a small common denominator into something like a general clause. Speaking in terms of criminalisation, this would mean that the obligation stemming from this Protocol would also be a broad one. There is, for example, no restriction to the field of legal relationships to which the definition may be applied. In particular it should be pointed out, that the scope of this Protocol is not limited to commercial arbitration. Consequently, the concept of "arbitration agreement" should be understood in a broad way in order to reflect the reality and variety of civil, commercial and other relations, and not be limited to the formal expression of commitments based on reciprocal obligations.

13. Although the drafters of this Protocol intended to keep the text as flexible as possible they considered it to be helpful to give some indications in the Explanatory report about typical aspects of arbitration and insofar focussing on commercial arbitration: in the view of the drafters commercial arbitration is an extra judiciary form of solving disputes which could arise during the implementation of a commercial agreement; the arbitrators are appointed on the basis of a common decision by the parties to a transaction and the parties being bound by the arbitration decision; an arbitration agreement (preliminary or subsequent to the dispute) should exist between the parties; the arbitrators could be chosen by the parties or be part of an arbitration tribunal; according to the agreement or applicable rules, the decision could be definitive or could be subject of appeal; the arbitrators apply the substantive applicable law to the dispute and are subject to procedural rules defined beforehand; the arbitrators should be independent while exercising their functions.

14. Some of these elements have gone into the text of the Protocol, while others have been deemed sufficiently highlighted by mentioning them in the Explanatory report. Summing up in this respect it can be pointed out that the arbitration agreement could be concluded preliminary or subsequent to the dispute, that the arbitrators can be acting individually or in the framework of an arbitration tribunal and that the fact that arbitrators are called upon to render a legally *binding* decision would not mean that there must not be any judicial remedy against it at all.

15. This potentially broad concept, however, again is subject to compatibility with national law (on arbitration), since the arbitration agreements must be "recognised by the national law". Therefore, a Party to this Protocol that, for example, knows only commercial arbitration in its national law (i.e. its national law would only recognise arbitration agreements in commercial relationships) would not be obliged to criminalise corruption in other (possible) fields of arbitration.

16. As concerns the definition of "juror", paragraph 3 of Article 1 also refers to the national law of the Parties to this Protocol. Therefore, the same principles apply as mentioned above with respect to arbitrators. Concerning the term juror, however, there is a fixed, really autonomous minimum standard (contrary to the Convention) by simply stating which kind of persons it shall include "in any case" without any further dependence on national law. This means that the criminalisation of the bribery of "lay persons acting as members of a collegial body which has the responsibility of deciding on the guilt of an accused person in the framework of a trial" is obligatory, no matter what national law says about jurors in general. Therefore, Parties to this Protocol, whose national law knows a broader concept of juror than that (by including, for example, civil law matters) would be obliged to criminalise corruption of jurors in this broader sense. On the other hand, Parties, whose national law would not include lay persons in the sense of paragraph 3 of Article 1 or would not know the concept of jurors at all, would have to adjust their criminal law accordingly in order to fulfil the obligations stemming from this Protocol. (Further adjustments of the legal system concerning the use of jurors etc. as such would, of course, not be necessary.)

17. With respect to foreign arbitrators or jurors paragraph 4 of Article 1 makes use of the same technique as the Criminal Law Convention on Corruption does with respect to foreign public officials (cf. Article 1 littera c of the Convention). It means that the definition of arbitrator or juror in the law of the other (foreign) State is not necessarily conclusive where the person concerned would not have had the status of arbitrator or juror

under the law of the prosecuting State. This follows from paragraph 4 of Article 1, according to which a State may determine that corruption offences involving a foreign arbitrator or juror refer only to such officials whose status is compatible with that of arbitrator or juror under the national law of the prosecuting State.

CHAPTER II – MEASURES TO BE TAKEN AT NATIONAL LEVEL

Article 2 – Active bribery of domestic arbitrators

18. During the final stages of the negotiations of the Convention the question was raised, how to deal with possible corruption of arbitrators. There was agreement that arbitrators should be covered – on the one hand because of the importance of their tasks, not seldom involving decisions with considerable pecuniary or other economic consequences, but not to a lesser degree also because of the similarity of their tasks with those of judges and, generally speaking, for matters of completeness. The opinion, however, about whether or not arbitrators were already covered by the Convention (and if, by which Article) was split: whereas some delegations found it compatible with their national law to treat them as judges (what would make them fall under Articles 2, 3, 5 and 11 of the Convention) and others referred to Articles 7 and 8 of the Convention (private sector corruption), there was also the opinion that they might not be covered by any of the Convention's provisions. After all it was decided to postpone the discussions on this issue until after the finalisation of the Convention; the results of those discussions are reflected in the present Protocol.

19. Article 2 defines the elements of the active bribery of domestic arbitrators following the text of Article 2 of the Criminal Law Convention on Corruption ("Active Bribery of domestic public officials"). Therefore, the corresponding explanatory remarks are applicable here, too. The offence of active bribery, in current criminal law theory and practice and in the view of the drafters of this Protocol, too, is mirrored by passive bribery, though they are considered to be separate offences for which prosecutions can be brought independently. It emerges that the two types of bribery are, in general, two sides of the same phenomenon, one perpetrator offering, promising or giving the advantage and the other perpetrator accepting the offer, promise or gift. Usually, however, the two perpetrators are not punished for complicity in the other one's offence.

20. The definition provided in Article 2 is, through a double reference, referred to in Articles 4, 5 and 6 of this Protocol. These provisions do not repeat the substantive elements but extend the criminalisation of the active bribery to further categories of persons.

21. The offence of active bribery can only be committed intentionally under Article 2 and the intent has to cover all other substantive elements of the offence. Intent must relate to a future result: the arbitrator (or juror) acting or refraining from acting as the briber intends. It is, however, immaterial whether the arbitrator (or juror) actually acted or refrained from acting as intended.

22. The briber can be anyone, whatever his capacity (businessman, public official, private individual etc). If, however, the briber acts for the account or on behalf of a company, corporate liability may also apply in respect of the company in question (cf. Article 8 of this Protocol and Article 18 of the Convention). Nevertheless, the liability of the company does not exclude in any manner criminal proceedings against the natural person (paragraph 3 of Article 18 of the Convention). The bribed person must be an arbitrator (or juror), as defined under Article 1, irrespective of whether the undue advantage is actually for himself or for someone else.

23. The material components of the offence are promising, offering or giving an undue advantage, directly or indirectly for the arbitrator (or juror) himself or for a third party. The three actions of the briber are slightly different. "Promising" may, for example, cover situations where the briber commits himself to give an undue advantage later (in most cases only once the arbitrator (or juror) has performed the act requested by the briber) or where there is an agreement between the briber and the bribe that the briber will give the undue advantage later. "Offering" may cover situations where the briber shows his readiness to give the undue advantage at any moment. Finally, "giving" may cover situations where the briber transfers the undue advantage. The undue advantage need not necessarily be given to the arbitrator (or juror) himself: it can be given also to a third party, such as a relative, an organisation to which the arbitrator (or juror) belongs, the political party of which he or she is a member. When the offer, promise or gift is addressed to a third party, the arbitrator (or juror) must at least have knowledge thereof at some point. Irrespective of whether the recipient or the beneficiary of the undue advantage is the arbitrator (or juror) himself or a third party, the transaction may be performed through intermediaries.

24. The undue advantages given are usually of an economic nature but may also be of a non-material nature. What is important is that the offender (or any other person, for instance a relative) is placed in a

better position than he was before the commission of the offence and that he is not entitled to the benefit. Such advantages may consist in, for instance, money, holidays, loans, food and drink, a case handled within a swifter time, better career prospects, etc.

25. What constitutes "undue" advantage will be of central importance in the transposition of the Protocol into national law. "Undue" for the purposes of the protocol – as well as of the Convention - should be interpreted as something that the recipient is not lawfully entitled to accept or receive. For the drafters of the Protocol, too, the adjective "undue" aims at excluding advantages permitted by the law or by administrative rules as well as minimum gifts, gifts of very low value or socially acceptable gifts.

26. Bribery provisions of certain member States of the Council of Europe make some distinctions, as to whether the act, which is solicited, is a part of the arbitrator's (or juror's) duty or whether he or she is going beyond his or her duties. Such an extra-element of 'breach of duty' was, however, not considered to be necessary for the purposes of this Protocol. The drafters of the Protocol considered that the decisive element of the offence was not whether the arbitrator (or juror) had any discretion to act as requested by the briber, but whether he or she had been offered, given or promised a bribe in order to obtain something from him or her in the exercise of his or her duties. The briber may not even have known whether the arbitrator (or juror) had discretion or not, this element being, for the purpose of this provision, irrelevant. The notion of "breach of duty" adds an element of ambiguity that makes more difficult the prosecution of this offence, by requiring to prove that the arbitrator (or juror) was expected to act against his duties or was expected to exercise his discretion for the benefit of the briber. States that require such an extra-element for bribery would therefore have to ensure that they could implement the definition of bribery under Article 2 of this Protocol (as well as the Convention) without hindering its objective.

Article 3 – Passive bribery of domestic arbitrators

27. Article 3 defines passive bribery of arbitrators, again following the text of the Criminal Law Convention on Corruption (cf. Article 3 therein, "Passive bribery of domestic public officials"). Because of that here, too, the corresponding deliberations of the Explanatory report to the Convention should apply. As the offence of passive bribery is closely linked with active bribery, some comments made thereon, e.g. in respect of the mental element and the undue advantage apply accordingly here as well. The material elements of the perpetrator's act include requesting or receiving an undue advantage or accepting the offer or the promise thereof.

28. "Requesting" may for example refer to a unilateral act whereby the arbitrator lets another person know, explicitly or implicitly, that he will have to "pay" to have some task-related act done or abstained from. It is immaterial whether the request was actually acted upon, the request itself being the core of the offence. Likewise, it does not matter whether the arbitrator requested the undue advantage for himself or for anyone else.

29. "Receiving" may, for example, mean the actual taking the benefit, whether by the arbitrator himself or by someone else (spouse, colleague, organisation, political party, etc) for himself or for someone else. The latter case supposes at least some kind of acceptance by the arbitrator. Again, intermediaries can be involved: the fact that an intermediary is involved, which would extend the scope of passive bribery to include indirect action by the arbitrator, necessarily entails identifying the criminal nature of the arbitrator's conduct, irrespective of the good or bad faith of the intermediary involved.

30. If there is a unilateral request or a corrupt pact, it is essential that the act or the omission of acting by the arbitrator takes place after the request or the pact, whereas it is immaterial in such a case at what point in time the undue advantage is actually received. Thus, it is not a criminal offence under this Protocol to receive a benefit after the act has been performed by the arbitrator, without prior offer, request or acceptance. Moreover, the word "receipt" means keeping the advantage or gift at least for some time so that the arbitrator who, having not requested it, immediately returns the gift to the sender or turns it over to the competent authorities would not be committing an offence under Article 3. This provision is not applicable either to benefits unrelated to a specific subsequent act in the exercise of the arbitrator's functions.

Article 4 – Bribery of foreign arbitrators

31. This article obliges Parties to the Protocol to criminalise active and passive bribery of foreign arbitrators. Apart from the persons who are bribed, i.e. foreign arbitrators, the substance of this bribery offence is identical to the ones defined under Articles 2 and 3. Again it can only be repeated what has been explained in the

commentary to the Convention as the motivation for expanding the scope of the core bribery offences as laid down in the Convention to acts involving foreign public officials:

32. "Corruption not only undermines good governance and destroys public trust in the fairness and impartiality of public administrations but it may also seriously distort competition and endanger economic development [....]. With the globalisation of economic and financial structures and the integration of domestic markets into the world-market, decisions taken on capital movements or investments in one country may and do exert effects in others. Multinational corporations and international investors play a determining role in nowadays economy and know of no borders. It is both in their interest and the interest of the global economy in general to keep competition rules fair and transparent."[1].

33. The decisive element for qualifying an offence as a case of bribery of a foreign arbitrator is not the nationality of the arbitrator or the parties involved, but that the arbitrator exercises his or her functions under the national law on arbitration of a State other than the prosecuting State. There is no specific definition for the term "foreign arbitrator" in this Protocol. Therefore, the general definition given in paragraphs 1 and 2 of Article 1 applies also to foreign arbitrators. In addition, paragraph 4 of Article 1 may be applied in cases where the definition of arbitrator under the law of the prosecuting State differs from the definition provided by the law under which the arbitrator exercises his or her functions.

34. After having discussed the issue of international arbitration the drafters of this Protocol have decided not to include a separate Article on the bribery of international arbitrators (that – according to some preliminary drafts of this Protocol - would have covered cases involving any person acting as arbitrator "under the competence of an international organisation to which the Party is member"). Therefore, a case of bribery in international arbitration where the arbitrator's exercising of his or her functions cannot be attributed to any national law (be it – from the point of view of the prosecuting State – domestic or foreign) would not fall under the scope of this Protocol. This would concern mainly public international arbitration. Insofar as there may be any practical relevance at all, the potential for loopholes in this field, however, has been deemed justifiable, in particular since the Criminal Law Convention on Corruption itself might be considered applicable in some cases. (If, for example, an arbitrator acts in his capacity as official of an international organisation, Article 9 of the Convention could apply.)

Article 5 – Bribery of domestic jurors

35. This article extends the scope of the active and passive bribery offences defined in Articles 2 and 3 (thereby following Articles 2 and 3 of the Criminal Law Convention on Corruption) to jurors. The definition of the term juror is given in paragraph 3 of Article 1, using the technique of referring to national law while setting up an autonomous minimum-standard at the same time. Aside from the common understanding of the term juror this minimum-standard (i.e. the inclusion of lay persons acting as members of a collegial body which has the responsibility of deciding on the guilt of an accused person in the framework of a trial) clearly indicates that jurors are fulfilling tasks in the judiciary. The question raised during the negotiations of this Protocol whether this task would not qualify jurors to be covered by the notion of judge/holder of judicial office in the sense of Article 1 littera a and b of the Criminal Law Convention on Corruption – which would mean that bribery of such persons (then being considered public officials) was already covered by Articles 2 and 3 of the Convention – has not been answered in the affirmative by all delegations. Although the Explanatory report to the Convention is of the opinion that the notion of judge in the sense of holder of judicial office should be interpreted to the widest extent possible (the decisive element being the functions performed by the person, which should be of a judicial nature, rather than his or her official title), it seemed useful in the end to address jurors explicitly in this Protocol. Given the importance of their task on the one hand and the fact that it is honorary (unpaid) on the other hand could make jurors targets for corruption which they should be prevented from to the same extent as professional judges.

36. Apart from the persons who are bribed, i.e. domestic jurors, the substance of this bribery offence is identical to the one defined under Articles 2 and 3.

Article 6 – Bribery of foreign jurors

37. This article criminalises the active and passive bribery of foreign jurors. The reasons and the protected legal interests are the same as those described under Article 5, but in a foreign context, "in any other State". It is part of the common effort undertaken by States Parties to ensure respect for judicial and democratic

1. Cf. paragraph 47 of the Explanatory Report to the Criminal Law Convention on Corruption.

institutions, independently whether they are national or foreign in character. Apart from the persons who are bribed, i.e. foreign jurors, the substance of this bribery offence is identical to the one defined under Articles 2 and 3. There is no specific definition for the term "foreign juror" in this Protocol. Therefore, the general definition given in paragraph 3 of Article 1 applies also to foreign jurors. In addition, paragraph 4 of Article 1 may be applied in cases where the definition of juror under the law of the prosecuting State differs from the definition provided by the law of the State the juror exercises his or her functions for.

CHAPTER III – MONITORING OF IMPLEMENTATION AND FINAL PROVISIONS

Article 7 – Monitoring of implementation

38. As the implementation of the Criminal Law Convention on Corruption itself (cf. Article 24 of the Convention) the implementation of this Protocol will also be monitored by the Group of States against Corruption (GRECO).

39. GRECO was established on the basis of the Council of Europe Resolutions (98) 7 and (99) 5. This monitoring mechanism aims to improve the capacity of its members to fight corruption by following up, through a dynamic process of mutual evaluation and peer pressure (including on-site visits), States' respect of the twenty Guiding Principles for the Fight against Corruption, the Criminal law Convention on Corruption, the Civil law Convention on Corruption, as well as other international instruments adopted by the Council of Europe in application of the Programme of Action against Corruption (such as the present Protocol).

Article 8 – Relationship to the Convention

40. Article 8 defines the relationship between this Protocol and the Criminal Law Convention on Corruption as follows: As between the States parties (of both the Convention and the Protocol) the substantive part of this Protocol (Articles 2 to 6) shall be regarded as additional articles to the Convention (paragraph 1). Paragraph 2 further declares explicitly that the provisions of the Convention shall apply to this Protocol (to the extent that they are compatible with the latter's provisions). Paragraph 2 should be understood as making Articles 12 to 23 of the Convention applicable to this Protocol, as well as Chapter IV and those elements of Chapter V not provided for in the Protocol. This is why it was not necessary to include provisions dealing with issues such as jurisdiction (cf. Article 17 of the Convention), corporate liability (cf. Article 18 of the Convention), sanctions and measures (cf. Article 19 of the Convention) or international co-operation (cf. Chapter IV of the Convention) in this Protocol, too.

Article 9 – Declarations and reservations

41. During the negotiations of this Protocol it has been discussed, whether – in particular with respect to the very specific and therefore rather narrow scope of this Protocol – there was room for possible declarations or reservations at all. The drafters of this Protocol came to the conclusion, that it would be desirable not to provide for additional (new) declaration or reservation possibilities, but to allow only such declarations and reservations that are a consequence of declarations or reservations already made in respect of the Convention. Consequently, paragraph 1 provides for the possibility of a declaration similar to one based on Article 36 of the Convention relating to Articles 4 and 6 of this Protocol (i.e. the bribery of foreign arbitrators and jurors) only if the respective Contracting State has already made such a declaration with respect to the Convention (i.e. a declaration that foreign or international corruption in the sense of Articles 5, 9 or 11 of the Convention would be criminalised only to the extent that the public official or judge acts or refrains from acting in breach of his or her duties). Likewise, sentence 1 of paragraph 2 allows a reservation similar to a reservation based on Article 37 paragraph 1 restricting the application of the passive bribery offences concerning foreign arbitrators (cf. Article 4 of this Protocol) or jurors (cf. Article 6 of this Protocol) only if a Party has already made such a reservation with relation to the passive bribery of foreign public officials according to Article 5 of the Convention. In such a case, and considering that both reservations are similar, the reservation made to the Protocol would not be counted under Article 37 paragraph 4 of the Convention (which limits to five the maximum number of reservations to the Convention). According to sentence 2 of paragraph 2 other reservations based on Article 37 (concerning Articles 12 [trading in influence], 17 [jurisdiction - cf. Art. 37 par. 2] and 26 [refusal of mutual assistance on the grounds of political offence - cf. Art. 37 par. 3]) of the Convention apply accordingly to this Protocol. According to paragraph 3 no other reservation may be made.

Articles 10 to 14 – (Signature and entry into force – Accession to the Protocol – Territorial application – Denunciation – Notification)

42. The final clauses have been drafted along the lines of already existing provisions, notably in the Convention itself as well as in other Council of Europe additional Protocols such as the Additional Protocols to the European Conventions on Extradition (ETS 86 and 98), on Mutual Assistance in Criminal Matters (ETS 99) and on the Transfer of Sentenced Persons (ETS 167).

43. Since the Protocol may not enter into force before the Convention has done so, and since a signatory State may not ratify this Protocol without having, simultaneously or previously ratified the Convention, it was possible to fix the number of ratifications necessary for the entry into force of this Protocol (5) considerably lower than that of the Convention itself (14) (Article 10 of this Protocol).

Convention on cybercrime – ETS No. 185

Budapest, 23.XI.2001

Preamble

The member States of the Council of Europe and the other States signatory hereto,

Considering that the aim of the Council of Europe is to achieve a greater unity between its members;

Recognising the value of fostering co-operation with the other States parties to this Convention;

Convinced of the need to pursue, as a matter of priority, a common criminal policy aimed at the protection of society against cybercrime, *inter alia,* by adopting appropriate legislation and fostering international co-operation;

Conscious of the profound changes brought about by the digitalisation, convergence and continuing globalisation of computer networks;

Concerned by the risk that computer networks and electronic information may also be used for committing criminal offences and that evidence relating to such offences may be stored and transferred by these networks;

Recognising the need for co-operation between States and private industry in combating cybercrime and the need to protect legitimate interests in the use and development of information technologies;

Believing that an effective fight against cybercrime requires increased, rapid and well-functioning international co-operation in criminal matters;

Convinced that the present Convention is necessary to deter action directed against the confidentiality, integrity and availability of computer systems, networks and computer data as well as the misuse of such systems, networks and data by providing for the criminalisation of such conduct, as described in this Convention, and the adoption of powers sufficient for effectively combating such criminal offences, by facilitating their detection, investigation and prosecution at both the domestic and international levels and by providing arrangements for fast and reliable international co-operation;

Mindful of the need to ensure a proper balance between the interests of law enforcement and respect for fundamental human rights as enshrined in the 1950 Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms, the 1966 United Nations International Covenant on Civil and Political Rights and other applicable international human rights treaties, which reaffirm the right of everyone to hold opinions without interference, as well as the right to freedom of expression, including the freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, and the rights concerning the respect for privacy;

Mindful also of the right to the protection of personal data, as conferred, for example, by the 1981 Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data;

Considering the 1989 United Nations Convention on the Rights of the Child and the 1999 International Labour Organization Worst Forms of Child Labour Convention;

Taking into account the existing Council of Europe conventions on co-operation in the penal field, as well as similar treaties which exist between Council of Europe member States and other States, and stressing that the present Convention is intended to supplement those conventions in order to make criminal investigations and proceedings concerning criminal offences related to computer systems and data more effective and to enable the collection of evidence in electronic form of a criminal offence;

Welcoming recent developments which further advance international understanding and co-operation in combating cybercrime, including action taken by the United Nations, the OECD, the European Union and the G8;

Recalling Committee of Ministers Recommendations No. R (85) 10 concerning the practical application of the European Convention on Mutual Assistance in Criminal Matters in respect of letters rogatory for the interception of telecommunications, No. R (88) 2 on piracy in the field of copyright and neighbouring rights, No**. R (87) 15 r**egulating the use of personal data in the police sector, No. R (95) 4 on the protection of personal data in the area of telecommunication services, with particular reference to telephone services, as well as No. R (89) 9 on computer-related crime providing guidelines for national legislatures concerning the definition of certain computer crimes and No. R (95) 13 concerning problems of criminal procedural law connected with information technology;

Having regard to Resolution No. 1 adopted by the European Ministers of Justice at their 21st Conference (Prague, 10 and 11 June 1997), which recommended that the Committee of Ministers support the work on cybercrime carried out by the European Committee on Crime Problems (CDPC) in order to bring domestic criminal law provisions closer to each other and enable the use of effective means of investigation into such offences, as well as to Resolution No. 3 adopted at the 23rd Conference of the European Ministers of Justice (London, 8 and 9 June 2000), which encouraged the negotiating parties to pursue their efforts with a view to finding appropriate solutions to enable the largest possible number of States to become parties to the Convention and acknowledged the need for a swift and efficient system of international co-operation, which duly takes into account the specific requirements of the fight against cybercrime;

Having also regard to the Action Plan adopted by the Heads of State and Government of the Council of Europe on the occasion of their Second Summit (Strasbourg, 10 and 11 October 1997), to seek common responses to the development of the new information technologies based on the standards and values of the Council of Europe;

Have agreed as follows:

CHAPTER I – USE OF TERMS

Article 1 – Definitions

For the purposes of this Convention:

a. "computer system" means any device or a group of interconnected or related devices, one or more of which, pursuant to a program, performs automatic processing of data;

b. "computer data" means any representation of facts, information or concepts in a form suitable for processing in a computer system, including a program suitable to cause a computer system to perform a function;

c. "service provider" means:

   i. any public or private entity that provides to users of its service the ability to communicate by means of a computer system, and

   ii. any other entity that processes or stores computer data on behalf of such communication service or users of such service;

d. "traffic data" means any computer data relating to a communication by means of a computer system, generated by a computer system that formed a part in the chain of communication, indicating the communication's origin, destination, route, time, date, size, duration, or type of underlying service.

CHAPTER II – MEASURES TO BE TAKEN AT THE NATIONAL LEVEL

Section 1 – Substantive criminal law

Title 1 – Offences against the confidentiality, integrity and availability of computer data and systems

Article 2 – Illegal access

Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally, the access to the whole or any part of a computer system without right. A Party may require that the offence be committed by infringing security measures, with the intent of obtaining computer data or other dishonest intent, or in relation to a computer system that is connected to another computer system.

Article 3 – Illegal interception

Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally, the interception without right, made by technical means, of non-public transmissions of computer data to, from or within a computer system, including electromagnetic emissions from a computer system carrying such computer data. A Party may require that the offence be committed with dishonest intent, or in relation to a computer system that is connected to another computer system.

Article 4 – Data interference

1. Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally, the damaging, deletion, deterioration, alteration or suppression of computer data without right.

2. A Party may reserve the right to require that the conduct described in paragraph 1 result in serious harm.

Article 5 – System interference

Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally, the serious hindering without right of the functioning of a computer system by inputting, transmitting, damaging, deleting, deteriorating, altering or suppressing computer data.

Article 6 – Misuse of devices

1. Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally and without right:

   a. the production, sale, procurement for use, import, distribution or otherwise making available of:

      i. a device, including a computer program, designed or adapted primarily for the purpose of committing any of the offences established in accordance with the above Articles 2 through 5;

      ii. a computer password, access code, or similar data by which the whole or any part of a computer system is capable of being accessed,

      with intent that it be used for the purpose of committing any of the offences established in Articles 2 through 5; and

   b. the possession of an item referred to in paragraphs a.i or ii above, with intent that it be used for the purpose of committing any of the offences established in Articles 2 through 5. A Party may require by law that a number of such items be possessed before criminal liability attaches.

2. This article shall not be interpreted as imposing criminal liability where the production, sale, procurement for use, import, distribution or otherwise making available or possession referred to in paragraph 1 of this article is not for the purpose of committing an offence established in accordance with Articles 2 through 5 of this Convention, such as for the authorised testing or protection of a computer system.

3. Each Party may reserve the right not to apply paragraph 1 of this article, provided that the reservation does not concern the sale, distribution or otherwise making available of the items referred to in paragraph 1 a.ii of this article.

Title 2 – Computer-related offences

Article 7 – Computer-related forgery

Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally and without right, the input, alteration, deletion, or suppression of computer data, resulting in inauthentic data with the intent that it be considered or acted upon for legal purposes as if it were authentic, regardless whether or not the data is directly readable and intelligible. A Party may require an intent to defraud, or similar dishonest intent, before criminal liability attaches.

Article 8 – Computer-related fraud

Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally and without right, the causing of a loss of property to another person by:

a. any input, alteration, deletion or suppression of computer data;

b. any interference with the functioning of a computer system,

with fraudulent or dishonest intent of procuring, without right, an economic benefit for oneself or for another person.

Title 3 – Content-related offences

Article 9 – Offences related to child pornography

1. Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally and without right, the following conduct:

a. producing child pornography for the purpose of its distribution through a computer system;

b. offering or making available child pornography through a computer system;

c. distributing or transmitting child pornography through a computer system;

d. procuring child pornography through a computer system for oneself or for another person;

e. possessing child pornography in a computer system or on a computer-data storage medium.

2. For the purpose of paragraph 1 above, the term "child pornography" shall include pornographic material that visually depicts:

a. a minor engaged in sexually explicit conduct;

b. a person appearing to be a minor engaged in sexually explicit conduct;

c. realistic images representing a minor engaged in sexually explicit conduct.

3. For the purpose of paragraph 2 above, the term "minor" shall include all persons under 18 years of age. A Party may, however, require a lower age-limit, which shall be not less than 16 years.

4. Each Party may reserve the right not to apply, in whole or in part, paragraphs 1, sub-paragraphs d. and e, and 2, sub-paragraphs b. and c.

Title 4 – Offences related to infringements of copyright and related rights

Article 10 – Offences related to infringements of copyright and related rights

1. Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law the infringement of copyright, as defined under the law of that Party, pursuant to the obligations it has undertaken under the Paris Act of 24 July 1971 revising the Bern Convention for the Protection of Literary and Artistic Works, the Agreement on Trade-Related Aspects of Intellectual Property

Rights and the WIPO Copyright Treaty, with the exception of any moral rights conferred by such conventions, where such acts are committed wilfully, on a commercial scale and by means of a computer system.

2. Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law the infringement of related rights, as defined under the law of that Party, pursuant to the obligations it has undertaken under the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (Rome Convention), the Agreement on Trade-Related Aspects of Intellectual Property Rights and the WIPO Performances and Phonograms Treaty, with the exception of any moral rights conferred by such conventions, where such acts are committed wilfully, on a commercial scale and by means of a computer system.

3. A Party may reserve the right not to impose criminal liability under paragraphs 1 and 2 of this article in limited circumstances, provided that other effective remedies are available and that such reservation does not derogate from the Party's international obligations set forth in the international instruments referred to in paragraphs 1 and 2 of this article.

Title 5 – Ancillary liability and sanctions

Article 11 – Attempt and aiding or abetting

1. Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally, aiding or abetting the commission of any of the offences established in accordance with Articles 2 through 10 of the present Convention with intent that such offence be committed.

2. Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally, an attempt to commit any of the offences established in accordance with Articles 3 through 5, 7, 8, and 9.1.a and c. of this Convention.

3. Each Party may reserve the right not to apply, in whole or in part, paragraph 2 of this article.

Article 12 – Corporate liability

1. Each Party shall adopt such legislative and other measures as may be necessary to ensure that legal persons can be held liable for a criminal offence established in accordance with this Convention, committed for their benefit by any natural person, acting either individually or as part of an organ of the legal person, who has a leading position within it, based on:

   a. a power of representation of the legal person;

   b. an authority to take decisions on behalf of the legal person;

   c. an authority to exercise control within the legal person.

2. In addition to the cases already provided for in paragraph 1 of this article, each Party shall take the measures necessary to ensure that a legal person can be held liable where the lack of supervision or control by a natural person referred to in paragraph 1 has made possible the commission of a criminal offence established in accordance with this Convention for the benefit of that legal person by a natural person acting under its authority.

3. Subject to the legal principles of the Party, the liability of a legal person may be criminal, civil or administrative.

4. Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offence.

Article 13 – Sanctions and measures

1. Each Party shall adopt such legislative and other measures as may be necessary to ensure that the criminal offences established in accordance with Articles 2 through 11 are punishable by effective, proportionate and dissuasive sanctions, which include deprivation of liberty.

2. Each Party shall ensure that legal persons held liable in accordance with Article 12 shall be subject to effective, proportionate and dissuasive criminal or non-criminal sanctions or measures, including monetary sanctions.

Section 2 – Procedural law

Title 1 – Common provisions

Article 14 – Scope of procedural provisions

1. Each Party shall adopt such legislative and other measures as may be necessary to establish the powers and procedures provided for in this section for the purpose of specific criminal investigations or proceedings.

2. Except as specifically provided otherwise in Article 21, each Party shall apply the powers and procedures referred to in paragraph 1 of this article to:

a. the criminal offences established in accordance with Articles 2 through 11 of this Convention;

b. other criminal offences committed by means of a computer system; and

c. the collection of evidence in electronic form of a criminal offence.

3. a. Each Party may reserve the right to apply the measures referred to in Article 20 only to offences or categories of offences specified in the reservation, provided that the range of such offences or categories of offences is not more restricted than the range of offences to which it applies the measures referred to in Article 21. Each Party shall consider restricting such a reservation to enable the broadest application of the measure referred to in Article 20.

b. Where a Party, due to limitations in its legislation in force at the time of the adoption of the present Convention, is not able to apply the measures referred to in Articles 20 and 21 to communications being transmitted within a computer system of a service provider, which system:

i. is being operated for the benefit of a closed group of users, and

ii. does not employ public communications networks and is not connected with another computer system, whether public or private,

that Party may reserve the right not to apply these measures to such communications. Each Party shall consider restricting such a reservation to enable the broadest application of the measures referred to in Articles 20 and 21.

Article 15 – Conditions and safeguards

1. Each Party shall ensure that the establishment, implementation and application of the powers and procedures provided for in this Section are subject to conditions and safeguards provided for under its domestic law, which shall provide for the adequate protection of human rights and liberties, including rights arising pursuant to obligations it has undertaken under the 1950 Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms, the 1966 United Nations International Covenant on Civil and Political Rights, and other applicable international human rights instruments, and which shall incorporate the principle of proportionality.

2. Such conditions and safeguards shall, as appropriate in view of the nature of the procedure or power concerned, *inter alia,* include judicial or other independent supervision, grounds justifying application, and limitation of the scope and the duration of such power or procedure.

3. To the extent that it is consistent with the public interest, in particular the sound administration of justice, each Party shall consider the impact of the powers and procedures in this section upon the rights, responsibilities and legitimate interests of third parties.

Title 2 – Expedited preservation of stored computer data

Article 16 – Expedited preservation of stored computer data

1. Each Party shall adopt such legislative and other measures as may be necessary to enable its competent authorities to order or similarly obtain the expeditious preservation of specified computer data, including traffic data, that has been stored by means of a computer system, in particular where there are grounds to believe that the computer data is particularly vulnerable to loss or modification.

2. Where a Party gives effect to paragraph 1 above by means of an order to a person to preserve specified stored computer data in the person's possession or control, the Party shall adopt such legislative and other measures as may be necessary to oblige that person to preserve and maintain the integrity of that computer

data for a period of time as long as necessary, up to a maximum of ninety days, to enable the competent authorities to seek its disclosure. A Party may provide for such an order to be subsequently renewed.

3. Each Party shall adopt such legislative and other measures as may be necessary to oblige the custodian or other person who is to preserve the computer data to keep confidential the undertaking of such procedures for the period of time provided for by its domestic law.

4. The powers and procedures referred to in this article shall be subject to Articles 14 and 15.

Article 17 – Expedited preservation and partial disclosure of traffic data

1. Each Party shall adopt, in respect of traffic data that is to be preserved under Article 16, such legislative and other measures as may be necessary to:

   a. ensure that such expeditious preservation of traffic data is available regardless of whether one or more service providers were involved in the transmission of that communication; and

   b. ensure the expeditious disclosure to the Party's competent authority, or a person designated by that authority, of a sufficient amount of traffic data to enable the Party to identify the service providers and the path through which the communication was transmitted.

2. The powers and procedures referred to in this article shall be subject to Articles 14 and 15.

Title 3 – Production order

Article 18 – Production order

1. Each Party shall adopt such legislative and other measures as may be necessary to empower its competent authorities to order:

   a. a person in its territory to submit specified computer data in that person's possession or control, which is stored in a computer system or a computer-data storage medium; and

   b. a service provider offering its services in the territory of the Party to submit subscriber information relating to such services in that service provider's possession or control.

2. The powers and procedures referred to in this article shall be subject to Articles 14 and 15.

3. For the purpose of this article, the term "subscriber information" means any information contained in the form of computer data or any other form that is held by a service provider, relating to subscribers of its services other than traffic or content data and by which can be established:

   a. the type of communication service used, the technical provisions taken thereto and the period of service;

   b. the subscriber's identity, postal or geographic address, telephone and other access number, billing and payment information, available on the basis of the service agreement or arrangement;

   c. any other information on the site of the installation of communication equipment, available on the basis of the service agreement or arrangement.

Title 4 – Search and seizure of stored computer data

Article 19 – Search and seizure of stored computer data

1. Each Party shall adopt such legislative and other measures as may be necessary to empower its competent authorities to search or similarly access:

   a. a computer system or part of it and computer data stored therein; and

   b. a computer-data storage medium in which computer data may be stored in its territory.

2. Each Party shall adopt such legislative and other measures as may be necessary to ensure that where its authorities search or similarly access a specific computer system or part of it, pursuant to paragraph 1.a, and have grounds to believe that the data sought is stored in another computer system or part of it in its territory, and such data is lawfully accessible from or available to the initial system, the authorities shall be able to expeditiously extend the search or similar accessing to the other system.

3. Each Party shall adopt such legislative and other measures as may be necessary to empower its competent authorities to seize or similarly secure computer data accessed according to paragraphs 1 or 2. These measures shall include the power to:

a. seize or similarly secure a computer system or part of it or a computer-data storage medium;

b. make and retain a copy of those computer data;

c. maintain the integrity of the relevant stored computer data;

d. render inaccessible or remove those computer data in the accessed computer system.

4. Each Party shall adopt such legislative and other measures as may be necessary to empower its competent authorities to order any person who has knowledge about the functioning of the computer system or measures applied to protect the computer data therein to provide, as is reasonable, the necessary information, to enable the undertaking of the measures referred to in paragraphs 1 and 2.

5. The powers and procedures referred to in this article shall be subject to Articles 14 and 15.

Title 5 – Real-time collection of computer data

Article 20 – Real-time collection of traffic data

1. Each Party shall adopt such legislative and other measures as may be necessary to empower its competent authorities to:

a. collect or record through the application of technical means on the territory of that Party, and

b. compel a service provider, within its existing technical capability:

i. to collect or record through the application of technical means on the territory of that Party; or

ii. to co-operate and assist the competent authorities in the collection or recording of,

traffic data, in real-time, associated with specified communications in its territory transmitted by means of a computer system.

2. Where a Party, due to the established principles of its domestic legal system, cannot adopt the measures referred to in paragraph 1.a, it may instead adopt legislative and other measures as may be necessary to ensure the real-time collection or recording of traffic data associated with specified communications transmitted in its territory, through the application of technical means on that territory.

3. Each Party shall adopt such legislative and other measures as may be necessary to oblige a service provider to keep confidential the fact of the execution of any power provided for in this article and any information relating to it.

4. The powers and procedures referred to in this article shall be subject to Articles 14 and 15.

Article 21 – Interception of content data

1. Each Party shall adopt such legislative and other measures as may be necessary, in relation to a range of serious offences to be determined by domestic law, to empower its competent authorities to:

a. collect or record through the application of technical means on the territory of that Party, and

b. compel a service provider, within its existing technical capability:

i. to collect or record through the application of technical means on the territory of that Party, or

ii. to co-operate and assist the competent authorities in the collection or recording of,

content data, in real-time, of specified communications in its territory transmitted by means of a computer system.

2. Where a Party, due to the established principles of its domestic legal system, cannot adopt the measures referred to in paragraph 1.a, it may instead adopt legislative and other measures as may be necessary to ensure the real-time collection or recording of content data on specified communications in its territory through the application of technical means on that territory.

3. Each Party shall adopt such legislative and other measures as may be necessary to oblige a service provider to keep confidential the fact of the execution of any power provided for in this article and any information relating to it.

4. The powers and procedures referred to in this article shall be subject to Articles 14 and 15.

Section 3 – Jurisdiction

Article 22 – Jurisdiction

1. Each Party shall adopt such legislative and other measures as may be necessary to establish jurisdiction over any offence established in accordance with Articles 2 through 11 of this Convention, when the offence is committed:

   a. in its territory; or

   b. on board a ship flying the flag of that Party; or

   c. on board an aircraft registered under the laws of that Party; or

   d. by one of its nationals, if the offence is punishable under criminal law where it was committed or if the offence is committed outside the territorial jurisdiction of any State.

2. Each Party may reserve the right not to apply or to apply only in specific cases or conditions the jurisdiction rules laid down in paragraphs 1.b through 1.d of this article or any part thereof.

3. Each Party shall adopt such measures as may be necessary to establish jurisdiction over the offences referred to in Article 24, paragraph 1, of this Convention, in cases where an alleged offender is present in its territory and it does not extradite him or her to another Party, solely on the basis of his or her nationality, after a request for extradition.

4. This Convention does not exclude any criminal jurisdiction exercised by a Party in accordance with its domestic law.

5. When more than one Party claims jurisdiction over an alleged offence established in accordance with this Convention, the Parties involved shall, where appropriate, consult with a view to determining the most appropriate jurisdiction for prosecution.

CHAPTER III – INTERNATIONAL CO-OPERATION

Section 1 – General principles

Title 1 – General principles relating to international co-operation

Article 23 – General principles relating to international co-operation

The Parties shall co-operate with each other, in accordance with the provisions of this chapter, and through the application of relevant international instruments on international co-operation in criminal matters, arrangements agreed on the basis of uniform or reciprocal legislation, and domestic laws, to the widest extent possible for the purposes of investigations or proceedings concerning criminal offences related to computer systems and data, or for the collection of evidence in electronic form of a criminal offence.

Title 2 – Principles relating to extradition

Article 24 – Extradition

1. a. This article applies to extradition between Parties for the criminal offences established in accordance with Articles 2 through 11 of this Convention, provided that they are punishable under the laws of both Parties concerned by deprivation of liberty for a maximum period of at least one year, or by a more severe penalty.

   b. Where a different minimum penalty is to be applied under an arrangement agreed on the basis of uniform or reciprocal legislation or an extradition treaty, including the European Convention on Extradition (ETS No. 24), applicable between two or more parties, the minimum penalty provided for under such arrangement or treaty shall apply.

2. The criminal offences described in paragraph 1 of this article shall be deemed to be included as extraditable offences in any extradition treaty existing between or among the Parties. The Parties undertake to include such offences as extraditable offences in any extradition treaty to be concluded between or among them.

3. If a Party that makes extradition conditional on the existence of a treaty receives a request for extradition from another Party with which it does not have an extradition treaty, it may consider this Convention as the legal basis for extradition with respect to any criminal offence referred to in paragraph 1 of this article.

4. Parties that do not make extradition conditional on the existence of a treaty shall recognise the criminal offences referred to in paragraph 1 of this article as extraditable offences between themselves.

5. Extradition shall be subject to the conditions provided for by the law of the requested Party or by applicable extradition treaties, including the grounds on which the requested Party may refuse extradition.

6. If extradition for a criminal offence referred to in paragraph 1 of this article is refused solely on the basis of the nationality of the person sought, or because the requested Party deems that it has jurisdiction over the offence, the requested Party shall submit the case at the request of the requesting Party to its competent authorities for the purpose of prosecution and shall report the final outcome to the requesting Party in due course. Those authorities shall take their decision and conduct their investigations and proceedings in the same manner as for any other offence of a comparable nature under the law of that Party.

7. a Each Party shall, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, communicate to the Secretary General of the Council of Europe the name and address of each authority responsible for making or receiving requests for extradition or provisional arrest in the absence of a treaty.

   b. The Secretary General of the Council of Europe shall set up and keep updated a register of authorities so designated by the Parties. Each Party shall ensure that the details held on the register are correct at all times.

Title 3 – General principles relating to mutual assistance

Article 25 – General principles relating to mutual assistance

1. The Parties shall afford one another mutual assistance to the widest extent possible for the purpose of investigations or proceedings concerning criminal offences related to computer systems and data, or for the collection of evidence in electronic form of a criminal offence.

2. Each Party shall also adopt such legislative and other measures as may be necessary to carry out the obligations set forth in Articles 27 through 35.

3. Each Party may, in urgent circumstances, make requests for mutual assistance or communications related thereto by expedited means of communication, including fax or e-mail, to the extent that such means provide appropriate levels of security and authentication (including the use of encryption, where necessary), with formal confirmation to follow, where required by the requested Party. The requested Party shall accept and respond to the request by any such expedited means of communication.

4. Except as otherwise specifically provided in articles in this chapter, mutual assistance shall be subject to the conditions provided for by the law of the requested Party or by applicable mutual assistance treaties, including the grounds on which the requested Party may refuse co-operation. The requested Party shall not exercise the right to refuse mutual assistance in relation to the offences referred to in Articles 2 through 11 solely on the ground that the request concerns an offence which it considers a fiscal offence.

5. Where, in accordance with the provisions of this chapter, the requested Party is permitted to make mutual assistance conditional upon the existence of dual criminality, that condition shall be deemed fulfilled, irrespective of whether its laws place the offence within the same category of offence or denominate the offence by the same terminology as the requesting Party, if the conduct underlying the offence for which assistance is sought is a criminal offence under its laws.

Article 26 – Spontaneous information

1. A Party may, within the limits of its domestic law and without prior request, forward to another Party information obtained within the framework of its own investigations when it considers that the disclosure of

such information might assist the receiving Party in initiating or carrying out investigations or proceedings concerning criminal offences established in accordance with this Convention or might lead to a request for co-operation by that Party under this chapter.

2. Prior to providing such information, the providing Party may request that it be kept confidential or only used subject to conditions. If the receiving Party cannot comply with such request, it shall notify the providing Party, which shall then determine whether the information should nevertheless be provided. If the receiving Party accepts the information subject to the conditions, it shall be bound by them.

Title 4 – Procedures pertaining to mutual assistance requests in the absence of applicable international agreements

Article 27 – Procedures pertaining to mutual assistance requests in the absence of applicable international agreements

1. Where there is no mutual assistance treaty or arrangement on the basis of uniform or reciprocal legislation in force between the requesting and requested Parties, the provisions of paragraphs 2 through 9 of this article shall apply. The provisions of this article shall not apply where such treaty, arrangement or legislation exists, unless the Parties concerned agree to apply any or all of the remainder of this article in lieu thereof.

2. a Each Party shall designate a central authority or authorities responsible for sending and answering requests for mutual assistance, the execution of such requests or their transmission to the authorities competent for their execution.

   b. The central authorities shall communicate directly with each other;

   c. Each Party shall, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, communicate to the Secretary General of the Council of Europe the names and addresses of the authorities designated in pursuance of this paragraph;

   d. The Secretary General of the Council of Europe shall set up and keep updated a register of central authorities designated by the Parties. Each Party shall ensure that the details held on the register are correct at all times.

3. Mutual assistance requests under this article shall be executed in accordance with the procedures specified by the requesting Party, except where incompatible with the law of the requested Party.

4. The requested Party may, in addition to the grounds for refusal established in Article 25, paragraph 4, refuse assistance if:

   a. the request concerns an offence which the requested Party considers a political offence or an offence connected with a political offence, or

   b. it considers that execution of the request is likely to prejudice its sovereignty, security, *ordre public* or other essential interests.

5. The requested Party may postpone action on a request if such action would prejudice criminal investigations or proceedings conducted by its authorities.

6. 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.

7. The requested Party shall promptly inform the requesting Party of the outcome of the execution of a request for assistance. Reasons shall be given for any refusal or postponement of the request. 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.

8. The requesting Party may request that the requested Party keep confidential the fact of any request made under this chapter as well as its subject, except to the extent necessary for its execution. If the requested Party cannot comply with the request for confidentiality, it shall promptly inform the requesting Party, which shall then determine whether the request should nevertheless be executed.

9. a. In the event of urgency, requests for mutual assistance or communications related thereto may be sent directly by judicial authorities of the requesting Party to such authorities of the requested Party.

In any such cases, a copy shall be sent at the same time to the central authority of the requested Party through the central authority of the requesting Party.

b. Any request or communication under this paragraph may be made through the International Criminal Police Organisation (Interpol).

c. Where a request is made pursuant to sub-paragraph a. of this article and the authority is not competent to deal with the request, it shall refer the request to the competent national authority and inform directly the requesting Party that it has done so.

d. Requests or communications made under this paragraph that do not involve coercive action may be directly transmitted by the competent authorities of the requesting Party to the competent authorities of the requested Party.

e. Each Party may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, inform the Secretary General of the Council of Europe that, for reasons of efficiency, requests made under this paragraph are to be addressed to its central authority.

Article 28 – Confidentiality and limitation on use

1. When there is no mutual assistance treaty or arrangement on the basis of uniform or reciprocal legislation in force between the requesting and the requested Parties, the provisions of this article shall apply. The provisions of this article shall not apply where such treaty, arrangement or legislation exists, unless the Parties concerned agree to apply any or all of the remainder of this article in lieu thereof.

2. The requested Party may make the supply of information or material in response to a request dependent on the condition that it is:

a. kept confidential where the request for mutual legal assistance could not be complied with in the absence of such condition, or

b. not used for investigations or proceedings other than those stated in the request.

3. If the requesting Party cannot comply with a condition referred to in paragraph 2, it shall promptly inform the other Party, which shall then determine whether the information should nevertheless be provided. When the requesting Party accepts the condition, it shall be bound by it.

4. Any Party that supplies information or material subject to a condition referred to in paragraph 2 may require the other Party to explain, in relation to that condition, the use made of such information or material.

Section 2 – Specific provisions

Title 1 – Mutual assistance regarding provisional measures

Article 29 – Expedited preservation of stored computer data

1. A Party may request another Party to order or otherwise obtain the expeditious preservation of data stored by means of a computer system, located within the territory of that other Party and in respect of which the requesting Party intends to submit a request for mutual assistance for the search or similar access, seizure or similar securing, or disclosure of the data.

2. A request for preservation made under paragraph 1 shall specify:

a. the authority seeking the preservation;

b. the offence that is the subject of a criminal investigation or proceedings and a brief summary of the related facts;

c. the stored computer data to be preserved and its relationship to the offence;

d. any available information identifying the custodian of the stored computer data or the location of the computer system;

e. the necessity of the preservation; and

f. that the Party intends to submit a request for mutual assistance for the search or similar access, seizure or similar securing, or disclosure of the stored computer data.

3. Upon receiving the request from another Party, the requested Party shall take all appropriate measures to preserve expeditiously the specified data in accordance with its domestic law. For the purposes of responding to a request, dual criminality shall not be required as a condition to providing such preservation.

4. A Party that requires dual criminality as a condition for responding to a request for mutual assistance for the search or similar access, seizure or similar securing, or disclosure of stored data may, in respect of offences other than those established in accordance with Articles 2 through 11 of this Convention, reserve the right to refuse the request for preservation under this article in cases where it has reasons to believe that at the time of disclosure the condition of dual criminality cannot be fulfilled.

5. In addition, a request for preservation may only be refused if:

a. the request concerns an offence which the requested Party considers a political offence or an offence connected with a political offence, or

b. the requested Party considers that execution of the request is likely to prejudice its sovereignty, security, *ordre public* or other essential interests.

6. Where the requested Party believes that preservation will not ensure the future availability of the data or will threaten the confidentiality of or otherwise prejudice the requesting Party's investigation, it shall promptly so inform the requesting Party, which shall then determine whether the request should nevertheless be executed.

7. Any preservation effected in response to the request referred to in paragraph 1 shall be for a period not less than sixty days, in order to enable the requesting Party to submit a request for the search or similar access, seizure or similar securing, or disclosure of the data. Following the receipt of such a request, the data shall continue to be preserved pending a decision on that request.

Article 30 – Expedited disclosure of preserved traffic data

1. Where, in the course of the execution of a request made pursuant to Article 29 to preserve traffic data concerning a specific communication, the requested Party discovers that a service provider in another State was involved in the transmission of the communication, the requested Party shall expeditiously disclose to the requesting Party a sufficient amount of traffic data to identify that service provider and the path through which the communication was transmitted.

2. Disclosure of traffic data under paragraph 1 may only be withheld if:

a. the request concerns an offence which the requested Party considers a political offence or an offence connected with a political offence; or

b. the requested Party considers that execution of the request is likely to prejudice its sovereignty, security, *ordre public* or other essential interests.

Title 2 – Mutual assistance regarding investigative powers

Article 31 – Mutual assistance regarding accessing of stored computer data

1. A Party may request another Party to search or similarly access, seize or similarly secure, and disclose data stored by means of a computer system located within the territory of the requested Party, including data that has been preserved pursuant to Article 29.

2. The requested Party shall respond to the request through the application of international instruments, arrangements and laws referred to in Article 23, and in accordance with other relevant provisions of this chapter.

3. The request shall be responded to on an expedited basis where:

a. there are grounds to believe that relevant data is particularly vulnerable to loss or modification; or

b. the instruments, arrangements and laws referred to in paragraph 2 otherwise provide for expedited co-operation.

Article 32 – Trans-border access to stored computer data with consent or where publicly available

A Party may, without the authorisation of another Party:

a. access publicly available (open source) stored computer data, regardless of where the data is located geographically; or

b. access or receive, through a computer system in its territory, stored computer data located in another Party, if the Party obtains the lawful and voluntary consent of the person who has the lawful authority to disclose the data to the Party through that computer system.

Article 33 – Mutual assistance in the real-time collection of traffic data

1. The Parties shall provide mutual assistance to each other in the real-time collection of traffic data associated with specified communications in their territory transmitted by means of a computer system. Subject to the provisions of paragraph 2, this assistance shall be governed by the conditions and procedures provided for under domestic law.

2. Each Party shall provide such assistance at least with respect to criminal offences for which real-time collection of traffic data would be available in a similar domestic case.

Article 34 – Mutual assistance regarding the interception of content data

The Parties shall provide mutual assistance to each other in the real-time collection or recording of content data of specified communications transmitted by means of a computer system to the extent permitted under their applicable treaties and domestic laws.

Title 3 – 24/7 Network

Article 35 – 24/7 Network

1. Each Party shall designate a point of contact available on a twenty-four hour, seven-day-a-week basis, in order to ensure the provision of immediate assistance for the purpose of investigations or proceedings concerning criminal offences related to computer systems and data, or for the collection of evidence in electronic form of a criminal offence. Such assistance shall include facilitating, or, if permitted by its domestic law and practice, directly carrying out the following measures:

a. the provision of technical advice;

b. the preservation of data pursuant to Articles 29 and 30;

c. the collection of evidence, the provision of legal information, and locating of suspects.

2. a. A Party's point of contact shall have the capacity to carry out communications with the point of contact of another Party on an expedited basis.

b. If the point of contact designated by a Party is not part of that Party's authority or authorities responsible for international mutual assistance or extradition, the point of contact shall ensure that it is able to co-ordinate with such authority or authorities on an expedited basis.

3. Each Party shall ensure that trained and equipped personnel are available, in order to facilitate the operation of the network.

CHAPTER IV – FINAL PROVISIONS

Article 36 – Signature and entry into force

1. This Convention shall be open for signature by the member States of the Council of Europe and by non-member States which have participated in its elaboration.

2. This Convention is subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

3. This Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date on which five States, including at least three member States of the Council of

Europe, have expressed their consent to be bound by the Convention in accordance with the provisions of paragraphs 1 and 2.

4. In respect of any signatory State which subsequently expresses its consent to be bound by it, the Convention 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 expression of its consent to be bound by the Convention in accordance with the provisions of paragraphs 1 and 2.

Article 37 – Accession to the Convention

1. After the entry into force of this Convention, the Committee of Ministers of the Council of Europe, after consulting with and obtaining the unanimous consent of the Contracting States to the Convention, may invite any State which is not a member of the Council and which has not participated in its elaboration to accede to this Convention. The decision shall be taken by the majority provided for in Article 20.d. of the Statute of the Council of Europe and by the unanimous vote of the representatives of the Contracting States entitled to sit on the Committee of Ministers.

2. In respect of any State acceding to the Convention under paragraph 1 above, the Convention 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 of the instrument of accession with the Secretary General of the Council of Europe.

Article 38 – 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 Convention shall apply.

2. Any State may, at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Convention to any other territory specified in the declaration. In respect of such territory the Convention 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 the 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 of the Council of Europe. 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 39 – Effects of the Convention

1. The purpose of the present Convention is to supplement applicable multilateral or bilateral treaties or arrangements as between the Parties, including the provisions of:

- the European Convention on Extradition, opened for signature in Paris, on 13 December 1957 (ETS No. 24);
- the European Convention on Mutual Assistance in Criminal Matters, opened for signature in Strasbourg, on 20 April 1959 (ETS No. 30);
- the Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, opened for signature in Strasbourg, on 17 March 1978 (ETS No. 99).

2. If two or more Parties have already concluded an agreement or treaty on the matters dealt with in this Convention or have otherwise established their relations on such matters, or should they in future do so, they shall also be entitled to apply that agreement or treaty or to regulate those relations accordingly. However, where Parties establish their relations in respect of the matters dealt with in the present Convention other than as regulated therein, they shall do so in a manner that is not inconsistent with the Convention's objectives and principles.

3. Nothing in this Convention shall affect other rights, restrictions, obligations and responsibilities of a Party.

Article 40 – Declarations

By a written notification addressed to the Secretary General of the Council of Europe, 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 possibility of requiring additional elements as provided for under Articles 2, 3, 6 paragraph 1.b, 7, 9 paragraph 3, and 27, paragraph 9.e.

Article 41 – Federal clause

1. A federal State may reserve the right to assume obligations under Chapter II of this Convention consistent with its fundamental principles governing the relationship between its central government and constituent States or other similar territorial entities provided that it is still able to co-operate under Chapter III.

2. When making a reservation under paragraph 1, a federal State may not apply the terms of such reservation to exclude or substantially diminish its obligations to provide for measures set forth in Chapter II. Overall, it shall provide for a broad and effective law enforcement capability with respect to those measures.

3. With regard to the provisions of this Convention, the application of which comes under the jurisdiction of constituent States or other similar territorial entities, that are not obliged by the constitutional system of the federation to take legislative measures, the federal government shall inform the competent authorities of such States of the said provisions with its favourable opinion, encouraging them to take appropriate action to give them effect.

Article 42 – Reservations

By a written notification addressed to the Secretary General of the Council of Europe, 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 reservation(s) provided for in Article 4, paragraph 2, Article 6, paragraph 3, Article 9, paragraph 4, Article 10, paragraph 3, Article 11, paragraph 3, Article 14, paragraph 3, Article 22, paragraph 2, Article 29, paragraph 4, and Article 41, paragraph 1. No other reservation may be made.

Article 43 – Status and withdrawal of reservations

1. A Party that has made a reservation in accordance with Article 42 may wholly or partially withdraw it by means of a notification addressed to the Secretary General of the Council of Europe. Such withdrawal shall take effect on the date of receipt of such notification by the Secretary General. If the notification states that the withdrawal of a reservation is to take effect on a date specified therein, and such date is later than the date on which the notification is received by the Secretary General, the withdrawal shall take effect on such a later date.

2. A Party that has made a reservation as referred to in Article 42 shall withdraw such reservation, in whole or in part, as soon as circumstances so permit.

3. The Secretary General of the Council of Europe may periodically enquire with Parties that have made one or more reservations as referred to in Article 42 as to the prospects for withdrawing such reservation(s).

Article 44 – Amendments

1. Amendments to this Convention may be proposed by any Party, and shall be communicated by the Secretary General of the Council of Europe to the member States of the Council of Europe, to the non-member States which have participated in the elaboration of this Convention as well as to any State which has acceded to, or has been invited to accede to, this Convention in accordance with the provisions of Article 37.

2. Any amendment proposed by a Party shall be communicated to the European Committee on Crime Problems (CDPC), which shall submit to the Committee of Ministers its opinion on that proposed amendment.

3. The Committee of Ministers shall consider the proposed amendment and the opinion submitted by the CDPC and, following consultation with the non-member States Parties to this Convention, may adopt the amendment.

4. The text of any amendment adopted by the Committee of Ministers in accordance with paragraph 3 of this article shall be forwarded to the Parties for acceptance.

5. Any amendment adopted in accordance with paragraph 3 of this article shall come into force on the thirtieth day after all Parties have informed the Secretary General of their acceptance thereof.

Article 45 – Settlement of disputes

1. The European Committee on Crime Problems (CDPC) shall be kept informed regarding the interpretation and application of this Convention.

2. In case of a dispute between Parties as to the interpretation or application of this Convention, they shall seek a settlement of the dispute through negotiation or any other peaceful means of their choice, including submission of the dispute to the CDPC, to an arbitral tribunal whose decisions shall be binding upon the Parties, or to the International Court of Justice, as agreed upon by the Parties concerned.

Article 46 – Consultations of the Parties

1. The Parties shall, as appropriate, consult periodically with a view to facilitating:

   a. the effective use and implementation of this Convention, including the identification of any problems thereof, as well as the effects of any declaration or reservation made under this Convention;

   b. the exchange of information on significant legal, policy or technological developments pertaining to cybercrime and the collection of evidence in electronic form;

   c. consideration of possible supplementation or amendment of the Convention.

2. The European Committee on Crime Problems (CDPC) shall be kept periodically informed regarding the result of consultations referred to in paragraph 1.

3. The CDPC shall, as appropriate, facilitate the consultations referred to in paragraph 1 and take the measures necessary to assist the Parties in their efforts to supplement or amend the Convention. At the latest three years after the present Convention enters into force, the European Committee on Crime Problems (CDPC) shall, in co-operation with the Parties, conduct a review of all of the Convention's provisions and, if necessary, recommend any appropriate amendments.

4. Except where assumed by the Council of Europe, expenses incurred in carrying out the provisions of paragraph 1 shall be borne by the Parties in the manner to be determined by them.

5. The Parties shall be assisted by the Secretariat of the Council of Europe in carrying out their functions pursuant to this article.

Article 47 – Denunciation

1. Any Party may, at any time, denounce this Convention 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.

Article 48 – Notification

The Secretary General of the Council of Europe shall notify the member States of the Council of Europe, the non-member States which have participated in the elaboration of this Convention as well as any State which has acceded to, or has been invited to accede to, this Convention 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 Convention in accordance with Articles 36 and 37;

   d. any declaration made under Article 40 or reservation made in accordance with Article 42;

   e. any other act, notification or communication relating to this Convention.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at Budapest, this 23rd 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, to the non-member States which have participated in the elaboration of this Convention, and to any State invited to accede to it.

Explanatory Report

I. The Convention and its Explanatory Report have been adopted by the Committee of Ministers of the Council of Europe at its 109th Session (8 November 2001) and the Convention has been opened for signature in Budapest, on 23 November 2001, on the issue of the International Conference on Cyber-crime.

II. The text of this explanatory report does not constitute an instrument providing an authoritative interpretation of the Convention, although it might be of such a nature as to facilitate the application of the provisions contained therein.

I. INTRODUCTION

1. The revolution in information technologies has changed society fundamentally and will probably continue to do so in the foreseeable future. Many tasks have become easier to handle. Where originally only some specific sectors of society had rationalised their working procedures with the help of information technology, now hardly any sector of society has remained unaffected. Information technology has in one way or the other pervaded almost every aspect of human activities.

2. A conspicuous feature of information technology is the impact it has had and will have on the evolution of telecommunications technology. Classical telephony, involving the transmission of human voice, has been overtaken by the exchange of vast amounts of data, comprising voice, text, music and static and moving pictures. This exchange no longer occurs only between human beings, but also between human beings and computers, and between computers themselves. Circuit-switched connections have been replaced by packet-switched networks. It is no longer relevant whether a direct connection can be established; it suffices that data is entered into a network with a destination address or made available for anyone who wants to access it.

3. The pervasive use of electronic mail and the accessing through the Internet of numerous web sites are examples of these developments. They have changed our society profoundly.

4. The ease of accessibility and searchability of information contained in computer systems, combined with the practically unlimited possibilities for its exchange and dissemination, regardless of geographical distances, has lead to an explosive growth in the amount of information available and the knowledge that can be drawn there from.

5. These developments have given rise to an unprecedented economic and social changes, but they also have a dark side: the emergence of new types of crime as well as the commission of traditional crimes by means of new technologies. Moreover, the consequences of criminal behaviour can be more far-reaching than before because they are not restricted by geographical limitations or national boundaries. The recent spread of detrimental computer viruses all over the world has provided proof of this reality. Technical measures to protect computer systems need to be implemented concomitantly with legal measures to prevent and deter criminal behaviour.

6. The new technologies challenge existing legal concepts. Information and communications flow more easily around the world. Borders are no longer boundaries to this flow. Criminals are increasingly located in places other than where their acts produce their effects. However, domestic laws are generally confined to a specific territory. Thus solutions to the problems posed must be addressed by international law, necessitating

the adoption of adequate international legal instruments. The present Convention aims to meet this challenge, with due respect to human rights in the new Information Society.

II. THE PREPARATORY WORK

7. By decision CDPC/103/211196, the European Committee on Crime Problems (CDPC) decided in November 1996 to set up a committee of experts to deal with cyber-crime. The CDPC based its decision on the following rationale:

8. "The fast developments in the field of information technology have a direct bearing on all sections of modern society. The integration of telecommunication and information systems, enabling the storage and transmission, regardless of distance, of all kinds of communication opens a whole range of new possibilities. These developments were boosted by the emergence of information super-highways and networks, including the Internet, through which virtually anybody will be able to have access to any electronic information service irrespective of where in the world he is located. By connecting to communication and information services users create a kind of common space, called "cyber-space", which is used for legitimate purposes but may also be the subject of misuse. These "cyber-space offences" are either committed against the integrity, availability, and confidentiality of computer systems and telecommunication networks or they consist of the use of such networks of their services to commit traditional offences. The transborder character of such offences, e.g. when committed through the Internet, is in conflict with the territoriality of national law enforcement authorities.

9. The criminal law must therefore keep abreast of these technological developments which offer highly sophisticated opportunities for misusing facilities of the cyber-space and causing damage to legitimate interests. Given the cross-border nature of information networks, a concerted international effort is needed to deal with such misuse. Whilst Recommendation No. (89) 9 resulted in the approximation of national concepts regarding certain forms of computer misuse, only a binding international instrument can ensure the necessary efficiency in the fight against these new phenomena. In the framework of such an instrument, in addition to measures of international co-operation, questions of substantive and procedural law, as well as matters that are closely connected with the use of information technology, should be addressed."

10. In addition, the CDPC took into account the Report, prepared – at its request – by Professor H.W.K. Kaspersen, which concluded that " … it should be looked to another legal instrument with more engagement than a Recommendation, such as a Convention. Such a Convention should not only deal with criminal substantive law matters, but also with criminal procedural questions as well as with international criminal law procedures and agreements."[1] A similar conclusion emerged already from the Report attached to Recommendation N° R (89) 9[2] concerning substantive law and from Recommendation N° R (95) 13[3] concerning problems of procedural law connected with information technology.

11. The new committee's specific terms of reference were as follows:

i. "Examine, in the light of Recommendations No R (89) 9 on computer-related crime and No R (95) 13 concerning problems of criminal procedural law connected with information technology, in particular the following subjects:

ii. cyber-space offences, in particular those committed through the use of telecommunication networks, e.g. the Internet, such as illegal money transactions, offering illegal services, violation of copyright, as well as those which violate human dignity and the protection of minors;

iii. other substantive criminal law issues where a common approach may be necessary for the purposes of international co-operation such as definitions, sanctions and responsibility of the actors in cyber-space, including Internet service providers;

iv. the use, including the possibility of transborder use, and the applicability of coercive powers in a technological environment, e.g. interception of telecommunications and electronic surveillance of information networks, e.g. via the Internet, search and seizure in information-processing systems (including Internet sites), rendering illegal material inaccessible and requiring service providers to comply

1. Implementation of Recommendation N° R (89) 9 on computer-related crime, Report prepared by Professor Dr. H.W.K. Kaspersen (doc. CDPC (97) 5 and PC-CY (97) 5, page 106).
2. See Computer-related crime, Report by the European Committee on Crime Problems, page 86.
3. See Problems of criminal procedural law connected with information technology, Recommendation N° R (95) 13, principle n° 17.

with special obligations, taking into account the problems caused by particular measures of information security, e.g. encryption;

v. the question of jurisdiction in relation to information technology offences, e.g. to determine the place where the offence was committed (locus delicti) and which law should accordingly apply, including the problem of ne bis idem in the case of multiple jurisdictions and the question how to solve positive jurisdiction conflicts and how to avoid negative jurisdiction conflicts;

vi. questions of international co-operation in the investigation of cyber-space offences, in close co-operation with the Committee of Experts on the Operation of European Conventions in the Penal Field (PC-OC).

The Committee should draft a binding legal instrument, as far as possible, on the items i) – v), with particular emphasis on international questions and, if appropriate, accessory recommendations regarding specific issues. The Committee may make suggestions on other issues in the light of technological developments."

12. Further to the CDPC's decision, the Committee of Ministers set up the new committee, called "the Committee of Experts on Crime in Cyber-space (PC-CY)" by decision n° CM/Del/Dec(97)583, taken at the 583rd meeting of the Ministers' Deputies (held on 4 February 1997). The Committee PC-CY started its work in April 1997 and undertook negotiations on a draft international convention on cyber-crime. Under its original terms of reference, the Committee was due to finish its work by 31 December 1999. Since by that time the Committee was not yet in a position to fully conclude its negotiations on certain issues in the draft Convention, its terms of reference were extended by decision n° CM/Del/Dec(99)679 of the Ministers' Deputies until 31 December 2000. The European Ministers of Justice expressed their support twice concerning the negotiations: by Resolution No. 1, adopted at their 21st Conference (Prague, June 1997), which recommended the Committee of Ministers to support the work carried out by the CDPC on cyber-crime in order to bring domestic criminal law provisions closer to each other and enable the use of effective means of investigation concerning such offences, as well as by Resolution N° 3, adopted at the 23rd Conference of the European Ministers of Justice (London, June 2000), which encouraged the negotiating parties to pursue their efforts with a view to finding appropriate solutions so as to enable the largest possible number of States to become parties to the Convention and acknowledged the need for a swift and efficient system of international co-operation, which duly takes into account the specific requirements of the fight against cyber-crime. The member States of the European Union expressed their support to the work of the PC-CY through a Joint Position, adopted in May 1999.

13. Between April 1997 and December 2000, the Committee PC-CY held 10 meetings in plenary and 15 meetings of its open-ended Drafting Group. Following the expiry of its extended terms of reference, the experts held, under the aegis of the CDPC, three more meetings to finalise the draft Explanatory Memorandum and review the draft Convention in the light of the opinion of the Parliamentary Assembly. The Assembly was requested by the Committee of Ministers in October 2000 to give an opinion on the draft Convention, which it adopted at the 2nd part of its plenary session in April 2001.

14. Following a decision taken by the Committee PC-CY, an early version of the draft Convention was declassified and released in April 2000, followed by subsequent drafts released after each plenary meeting, in order to enable the negotiating States to consult with all interested parties. This consultation process proved useful.

15. The revised and finalised draft Convention and its Explanatory Memorandum were submitted for approval to the CDPC at its 50th plenary session in June 2001, following which the text of the draft Convention was submitted to the Committee of Ministers for adoption and opening for signature.

III. THE CONVENTION

16. The Convention aims principally at (1) harmonising the domestic criminal substantive law elements of offences and connected provisions in the area of cyber-crime (2) providing for domestic criminal procedural law powers necessary for the investigation and prosecution of such offences as well as other offences committed by means of a computer system or evidence in relation to which is in electronic form (3) setting up a fast and effective regime of international co-operation.

17. The Convention, accordingly, contains four chapters: (I) Use of terms; (II) Measures to be taken at domestic level – substantive law and procedural law; (III) International co-operation; (IV) Final clauses.

18. Section 1 of Chapter II (substantive law issues) covers both criminalisation provisions and other connected provisions in the area of computer- or computer-related crime: it first defines 9 offences grouped in 4 different categories, then deals with ancillary liability and sanctions. The following offences are defined by the Convention: illegal access, illegal interception, data interference, system interference, misuse of devices, computer-related forgery, computer-related fraud, offences related to child pornography and offences related to copyright and neighbouring rights.

19. Section 2 of Chapter II (procedural law issues) – the scope of which goes beyond the offences defined in Section 1 in that it applies to any offence committed by means of a computer system or the evidence of which is in electronic form – determines first the common conditions and safeguards, applicable to all procedural powers in this Chapter. It then sets out the following procedural powers: expedited preservation of stored data; expedited preservation and partial disclosure of traffic data; production order; search and seizure of computer data; real-time collection of traffic data; interception of content data. Chapter II ends with the jurisdiction provisions.

20. Chapter III contains the provisions concerning traditional and computer crime-related mutual assistance as well as extradition rules. It covers traditional mutual assistance in two situations: where no legal basis (treaty, reciprocal legislation, etc.) exists between parties – in which case its provisions apply – and where such a basis exists – in which case the existing arrangements also apply to assistance under this Convention. Computer- or computer-related crime specific assistance applies to both situations and covers, subject to extra-conditions, the same range of procedural powers as defined in Chapter II. In addition, Chapter III contains a provision on a specific type of transborder access to stored computer data which does not require mutual assistance (with consent or where publicly available) and provides for the setting up of a 24/7 network for ensuring speedy assistance among the Parties.

21. Finally, Chapter IV contains the final clauses, which – with certain exceptions – repeat the standard provisions in Council of Europe treaties.

COMMENTARY ON THE ARTICLES OF THE CONVENTION

CHAPTER I – USE OF TERMS

Introduction to the definitions at Article 1

22. It was understood by the drafters that under this Convention Parties would not be obliged to copy *verbatim* into their domestic laws the four concepts defined in Article 1, provided that these laws cover such concepts in a manner consistent with the principles of the Convention and offer an equivalent framework for its implementation.

Article 1 (a) – Computer system

23. A computer system under the Convention is a device consisting of hardware and software developed for automatic processing of digital data. It may include input, output, and storage facilities. It may stand alone or be connected in a network with other similar devices "Automatic" means without direct human intervention, "processing of data" means that data in the computer system is operated by executing a computer program. A "computer program" is a set of instructions that can be executed by the computer to achieve the intended result. A computer can run different programs. A computer system usually consists of different devices, to be distinguished as the processor or central processing unit, and peripherals. A "peripheral" is a device that performs certain specific functions in interaction with the processing unit, such as a printer, video screen, CD reader/writer or other storage device.

24. A network is an interconnection between two or more computer systems. The connections may be earthbound (e.g., wire or cable), wireless (e.g., radio, infrared, or satellite), or both. A network may be geographically limited to a small area (local area networks) or may span a large area (wide area networks), and such networks may themselves be interconnected. The Internet is a global network consisting of many interconnected networks, all using the same protocols. Other types of networks exist, whether or not connected to the Internet, able to communicate computer data among computer systems. Computer systems may be connected to the network as endpoints or as a means to assist in communication on the network. What is essential is that data is exchanged over the network.

Article 1 (b) – Computer data

25. The definition of computer data builds upon the ISO-definition of data. This definition contains the terms "suitable for processing". This means that data is put in such a form that it can be directly processed by the computer system. In order to make clear that data in this Convention has to be understood as data in electronic or other directly processable form, the notion " computer data" is introduced. Computer data that is automatically processed may be the target of one of the criminal offences defined in this Convention as well as the object of the application of one of the investigative measures defined by this Convention.

Article 1 (c) – Service provider

26. The term "service provider" encompasses a broad category of persons that play a particular role with regard to communication or processing of data on computer systems (cf. also comments on Section 2). Under (i) of the definition, it is made clear that both public and private entities which provide users the ability to communicate with one another are covered. Therefore, it is irrelevant whether the users form a closed group or whether the provider offers its services to the public, whether free of charge or for a fee. The closed group can be e.g. the employees of a private enterprise to whom the service is offered by a corporate network.

27. Under (ii) of the definition, it is made clear that the term "service provider" also extends to those entities that store or otherwise process data on behalf of the persons mentioned under (i). Further, the term includes those entities that store or otherwise process data on behalf of the users of the services of those mentioned under (i). For example, under this definition, a service provider includes both services that provide hosting and caching services as well as services that provide a connection to a network. However, a mere provider of content (such as a person who contracts with a web hosting company to host his web site) is not intended to be covered by this definition if such content provider does not also offer communication or related data processing services.

Article 1 (d) – Traffic data

28. For the purposes of this Convention traffic data as defined in article 1, under subparagraph d., is a category of computer data that is subject to a specific legal regime. This data is generated by computers in the chain of communication in order to route a communication from its origin to its destination. It is therefore auxiliary to the communication itself.

29. In case of an investigation of a criminal offence committed in relation to a computer system, traffic data is needed to trace the source of a communication as a starting point for collecting further evidence or as part of the evidence of the offence. Traffic data might last only ephemerally, which makes it necessary to order its expeditious preservation. Consequently, its rapid disclosure may be necessary to discern the communication's route in order to collect further evidence before it is deleted or to identify a suspect. The ordinary procedure for the collection and disclosure of computer data might therefore be insufficient. Moreover, the collection of this data is regarded in principle to be less intrusive since as such it doesn't reveal the content of the communication which is regarded to be more sensitive.

30. The definition lists exhaustively the categories of traffic data that are treated by a specific regime in this Convention: the origin of a communication, its destination, route, time (GMT), date, size, duration and type of underlying service. Not all of these categories will always be technically available, capable of being produced by a service provider, or necessary for a particular criminal investigation. The "origin" refers to a telephone number, Internet Protocol (IP) address, or similar identification of a communications facility to which a service provider renders services. The "destination" refers to a comparable indication of a communications facility to which communications are transmitted. The term "type of underlying service" refers to the type of service that is being used within the network, e.g., file transfer, electronic mail, or instant messaging.

31. The definition leaves to national legislatures the ability to introduce differentiation in the legal protection of traffic data in accordance with its sensitivity. In this context, Article 15 obliges the Parties to provide for conditions and safeguards that are adequate for protection of human rights and liberties. This implies, *inter alia*, that the substantive criteria and the procedure to apply an investigative power may vary according to the sensitivity of the data.

CHAPTER II – MEASURES TO BE TAKEN AT THE NATIONAL LEVEL

32. Chapter II (Articles 2 – 22) contains three sections: substantive criminal law (Articles 2 – 13), procedural law (Articles 14 – 21) and jurisdiction (Article 22).

Section 1 – Substantive criminal law

33. The purpose of Section 1 of the Convention (Articles 2 – 13) is to improve the means to prevent and suppress computer- or computer – related crime by establishing a common minimum standard of relevant offences. This kind of harmonisation alleviates the fight against such crimes on the national and on the international level as well. Correspondence in domestic law may prevent abuses from being shifted to a Party with a previous lower standard. As a consequence, the exchange of useful common experiences in the practical handling of cases may be enhanced, too. International co-operation (esp. extradition and mutual legal assistance) is facilitated e.g. regarding requirements of double criminality.

34. The list of offences included represents a minimum consensus not excluding extensions in domestic law. To a great extent it is based on the guidelines developed in connection with Recommendation No. R (89) 9 of the Council of Europe on computer-related crime and on the work of other public and private international organisations (OECD, UN, AIDP), but taking into account more modern experiences with abuses of expanding telecommunication networks.

35. The section is divided into five titles. Title 1 includes the core of computer-related offences, offences against the confidentiality, integrity and availability of computer data and systems, representing the basic threats, as identified in the discussions on computer and data security to which electronic data processing and communicating systems are exposed. The heading describes the type of crimes which are covered, that is the unauthorised access to and illicit tampering with systems, programmes or data. Titles 2 – 4 include other types of 'computer-related offences', which play a greater role in practice and where computer and telecommunication systems are used as a means to attack certain legal interests which mostly are protected already by criminal law against attacks using traditional means. The Title 2 offences (computer-related fraud and forgery) have been added by following suggestions in the guidelines of the Council of Europe Recommendation No. R (89) 9. Title 3 covers the 'content-related offences of unlawful production or distribution of child pornography by use of computer systems as one of the most dangerous *modi operandi* in recent times. The committee drafting the Convention discussed the possibility of including other content-related offences, such as the distribution of racist propaganda through computer systems. However, the committee was not in a position to reach consensus on the criminalisation of such conduct. While there was significant support in favour of including this as a criminal offence, some delegations expressed strong concern about including such a provision on freedom of expression grounds. Noting the complexity of the issue, it was decided that the committee would refer to the European Committee on Crime Problems (CDPC) the issue of drawing up an additional Protocol to the present Convention.

Title 4 sets out 'offences related to infringements of copyright and related rights'. This was included in the Convention because copyright infringements are one of the most widespread forms of computer- or computer-related crime and its escalation is causing international concern. Finally, Title 5 includes additional provisions on attempt, aiding and abetting and sanctions and measures, and, in compliance with recent international instruments, on corporate liability.

36. Although the substantive law provisions relate to offences using information technology, the Convention uses technology-neutral language so that the substantive criminal law offences may be applied to both current and future technologies involved.

37. The drafters of the Convention understood that Parties may exclude petty or insignificant misconduct from implementation of the offences defined in Articles 2-10.

38. A specificity of the offences included is the express requirement that the conduct involved is done "without right". It reflects the insight that the conduct described is not always punishable per se, but may be legal or justified not only in cases where classical legal defences are applicable, like consent, self defence or necessity, but where other principles or interests lead to the exclusion of criminal liability. The expression 'without right' derives its meaning from the context in which it is used. Thus, without restricting how Parties may implement the concept in their domestic law, it may refer to conduct undertaken without authority (whether legislative, executive, administrative, judicial, contractual or consensual) or conduct that is otherwise not covered by established legal defences, excuses, justifications or relevant principles under domestic law. The Convention, therefore, leaves unaffected conduct undertaken pursuant to lawful government authority (for example, where the Party's government acts to maintain public order, protect national security or investigate criminal offences). Furthermore, legitimate and common activities inherent in the design of networks, or legitimate and common operating or commercial practices should not be criminalised. Specific examples of such exceptions from criminalisation are provided in relation to specific offences in the

corresponding text of the Explanatory Memorandum below. It is left to the Parties to determine how such exemptions are implemented within their domestic legal systems (under criminal law or otherwise).

39. All the offences contained in the Convention must be committed "intentionally" for criminal liability to apply. In certain cases an additional specific intentional element forms part of the offence. For instance, in Article 8 on computer-related fraud, the intent to procure an economic benefit is a constituent element of the offence. The drafters of the Convention agreed that the exact meaning of 'intentionally' should be left to national interpretation.

40. Certain articles in the section allow the addition of qualifying circumstances when implementing the Convention in domestic law. In other instances even the possibility of a reservation is granted (cf. Articles 40 and 42). These different ways of a more restrictive approach in criminalisation reflect different assessments of the dangerousness of the behaviour involved or of the need to use criminal law as a countermeasure. This approach provides flexibility to governments and parliaments in determining their criminal policy in this area.

41. Laws establishing these offences should be drafted with as much clarity and specificity as possible, in order to provide adequate foreseeability of the type of conduct that will result in a criminal sanction.

42. In the course of the drafting process, the drafters considered the advisability of criminalising conduct other than those defined at Articles 2 – 11, including the so-called cyber-squatting, i.e. the fact of registering a domain-name which is identical either to the name of an entity that already exists and is usually well-known or to the trade-name or trademark of a product or company. Cyber-squatters have no intent to make an active use of the domain-name and seek to obtain a financial advantage by forcing the entity concerned, even though indirectly, to pay for the transfer of the ownership over the domain-name. At present this conduct is considered as a trademark-related issue. As trademark violations are not governed by this Convention, the drafters did not consider it appropriate to deal with the issue of criminalisation of such conduct.

Title 1 – Offences against the confidentiality, integrity and availability of computer data and systems

43. The criminal offences defined under (Articles 2-6) are intended to protect the confidentiality, integrity and availability of computer systems or data and not to criminalise legitimate and common activities inherent in the design of networks, or legitimate and common operating or commercial practices.

Illegal access (Article 2)

44. "Illegal access" covers the basic offence of dangerous threats to and attacks against the security (i.e. the confidentiality, integrity and availability) of computer systems and data. The need for protection reflects the interests of organisations and individuals to manage, operate and control their systems in an undisturbed and uninhibited manner. The mere unauthorised intrusion, i.e. "hacking", "cracking" or "computer trespass" should in principle be illegal in itself. It may lead to impediments to legitimate users of systems and data and may cause alteration or destruction with high costs for reconstruction. Such intrusions may give access to confidential data (including passwords, information about the targeted system) and secrets, to the use of the system without payment or even encourage hackers to commit more dangerous forms of computer-related offences, like computer-related fraud or forgery.

45. The most effective means of preventing unauthorised access is, of course, the introduction and development of effective security measures. However, a comprehensive response has to include also the threat and use of criminal law measures. A criminal prohibition of unauthorised access is able to give additional protection to the system and the data as such and at an early stage against the dangers described above.

46. "Access" comprises the entering of the whole or any part of a computer system (hardware, components, stored data of the system installed, directories, traffic and content-related data). However, it does not include the mere sending of an e-mail message or file to that system. "Access" includes the entering of another computer system, where it is connected via public telecommunication networks, or to a computer system on the same network, such as a LAN (local area network) or Intranet within an organisation. The method of communication (e.g. from a distance, including via wireless links or at a close range) does not matter.

47. The act must also be committed 'without right'. In addition to the explanation given above on this expression, it means that there is no criminalisation of the access authorised by the owner or other right holder of the system or part of it (such as for the purpose of authorised testing or protection of the computer

system concerned). Moreover, there is no criminalisation for accessing a computer system that permits free and open access by the public, as such access is "with right."

48. The application of specific technical tools may result in an access under Article 2, such as the access of a web page, directly or through hypertext links, including deep-links or the application of 'cookies' or 'bots' to locate and retrieve information on behalf of communication. The application of such tools *per se* is not 'without right'. The maintenance of a public web site implies consent by the web site-owner that it can be accessed by any other web-user. The application of standard tools provided for in the commonly applied communication protocols and programs, is not in itself 'without right', in particular where the rightholder of the accessed system can be considered to have accepted its application, e.g. in the case of 'cookies' by not rejecting the initial instalment or not removing it.

49. Many national legislations already contain provisions on "hacking" offences, but the scope and constituent elements vary considerably. The broad approach of criminalisation in the first sentence of Article 2 is not undisputed. Opposition stems from situations where no dangers were created by the mere intrusion or where even acts of hacking have led to the detection of loopholes and weaknesses of the security of systems. This has led in a range of countries to a narrower approach requiring additional qualifying circumstances which is also the approach adopted by Recommendation N° (89) 9 and the proposal of the OECD Working Party in 1985.

50. Parties can take the wide approach and criminalise mere hacking in accordance with the first sentence of Article 2. Alternatively, Parties can attach any or all of the qualifying elements listed in the second sentence: infringing security measures, special intent to obtain computer data, other dishonest intent that justifies criminal culpability, or the requirement that the offence is committed in relation to a computer system that is connected remotely to another computer system. The last option allows Parties to exclude the situation where a person physically accesses a stand-alone computer without any use of another computer system. They may restrict the offence to illegal access to networked computer systems (including public networks provided by telecommunication services and private networks, such as Intranets or Extranets).

Illegal interception (Article 3)

51. This provision aims to protect the right of privacy of data communication. The offence represents the same violation of the privacy of communications as traditional tapping and recording of oral telephone conversations between persons. The right to privacy of correspondence is enshrined in Article 8 of the European Convention on Human Rights. The offence established under Article 3 applies this principle to all forms of electronic data transfer, whether by telephone, fax, e-mail or file transfer.

52. The text of the provision has been mainly taken from the offence of 'unauthorised interception' contained in Recommendation (89) 9. In the present Convention it has been made clear that the communications involved concern "transmissions of computer data" as well as electromagnetic radiation, under the circumstances as explained below.

53. Interception by 'technical means' relates to listening to, monitoring or surveillance of the content of communications, to the procuring of the content of data either directly, through access and use of the computer system, or indirectly, through the use of electronic eavesdropping or tapping devices. Interception may also involve recording. Technical means includes technical devices fixed to transmission lines as well as devices to collect and record wireless communications. They may include the use of software, passwords and codes. The requirement of using technical means is a restrictive qualification to avoid over-criminalisation.

54. The offence applies to 'non-public' transmissions of computer data. The term 'non-public' qualifies the nature of the transmission (communication) process and not the nature of the data transmitted. The data communicated may be publicly available information, but the parties wish to communicate confidentially. Or data may be kept secret for commercial purposes until the service is paid, as in Pay-TV. Therefore, the term 'non-public' does not *per se* exclude communications via public networks. Communications of employees, whether or not for business purposes, which constitute "non-public transmissions of computer data" are also protected against interception without right under Article 3 (see e.g. ECHR Judgement in Halford v. UK case, 25 June 1997, 20605/92).

55. The communication in the form of transmission of computer data can take place inside a single computer system (flowing from CPU to screen or printer, for example), between two computer systems belonging to the same person, two computers communicating with one another, or a computer and a person (e.g. through the keyboard). Nonetheless, Parties may require as an additional element that the communication be transmitted between computer systems remotely connected.

56. It should be noted that the fact that the notion of 'computer system' may also encompass radio connections does not mean that a Party is under an obligation to criminalise the interception of any radio transmission which, even though 'non-public', takes place in a relatively open and easily accessible manner and therefore can be intercepted, for example by radio amateurs.

57. The creation of an offence in relation to 'electromagnetic emissions' will ensure a more comprehensive scope. Electromagnetic emissions may be emitted by a computer during its operation. Such emissions are not considered as 'data' according to the definition provided in Article 1. However, data can be reconstructed from such emissions. Therefore, the interception of data from electromagnetic emissions from a computer system is included as an offence under this provision.

58. For criminal liability to attach, the illegal interception must be committed "intentionally", and "without right". The act is justified, for example, if the intercepting person has the right to do so, if he acts on the instructions or by authorisation of the participants of the transmission (including authorised testing or protection activities agreed to by the participants), or if surveillance is lawfully authorised in the interests of national security or the detection of offences by investigating authorities. It was also understood that the use of common commercial practices, such as employing 'cookies', is not intended to be criminalised as such, as not being an interception "without right". With respect to non-public communications of employees protected under Article 3 (see above paragraph 54), domestic law may provide a ground for legitimate interception of such communications. Under Article 3, interception in such circumstances would be considered as undertaken "with right".

59. In some countries, interception may be closely related to the offence of unauthorised access to a computer system. In order to ensure consistency of the prohibition and application of the law, countries that require dishonest intent, or that the offence be committed in relation to a computer system that is connected to another computer system in accordance with Article 2, may also require similar qualifying elements to attach criminal liability in this article. These elements should be interpreted and applied in conjunction with the other elements of the offence, such as "intentionally" and "without right".

Data interference (Article 4)

60. The aim of this provision is to provide computer data and computer programs with protection similar to that enjoyed by corporeal objects against intentional infliction of damage. The protected legal interest here is the integrity and the proper functioning or use of stored computer data or computer programs.

61. In paragraph 1, 'damaging' and 'deteriorating' as overlapping acts relate in particular to a negative alteration of the integrity or of information content of data and programmes. 'Deletion' of data is the equivalent of the destruction of a corporeal thing. It destroys them and makes them unrecognisable. Suppressing of computer data means any action that prevents or terminates the availability of the data to the person who has access to the computer or the data carrier on which it was stored. The term 'alteration' means the modification of existing data. The input of malicious codes, such as viruses and Trojan horses is, therefore, covered under this paragraph, as is the resulting modification of the data.

62. The above acts are only punishable if committed "without right". Common activities inherent in the design of networks or common operating or commercial practices, such as, for example, for the testing or protection of the security of a computer system authorised by the owner or operator, or the reconfiguration of a computer's operating system that takes place when the operator of a system acquires new software (e.g., software permitting access to the Internet that disables similar, previously installed programs), are with right and therefore are not criminalised by this article. The modification of traffic data for the purpose of facilitating anonymous communications (e.g., the activities of anonymous remailer systems), or the modification of data for the purpose of secure communications (e.g. encryption), should in principle be considered a legitimate protection of privacy and, therefore, be considered as being undertaken with right. However, Parties may wish to criminalise certain abuses related to anonymous communications, such as where the packet header information is altered in order to conceal the identity of the perpetrator in committing a crime.

63. In addition, the offender must have acted "intentionally".

64. Paragraph 2 allows Parties to enter a reservation concerning the offence in that they may require that the conduct result in serious harm. The interpretation of what constitutes such serious harm is left to domestic legislation, but Parties should notify the Secretary General of the Council of Europe of their interpretation if use is made of this reservation possibility.

System interference (Article 5)

65. This is referred to in Recommendation No. (89) 9 as computer sabotage. The provision aims at criminalising the intentional hindering of the lawful use of computer systems including telecommunications facilities by using or influencing computer data. The protected legal interest is the interest of operators and users of computer or telecommunication systems being able to have them function properly. The text is formulated in a neutral way so that all kinds of functions can be protected by it.

66. The term "hindering" refers to actions that interfere with the proper functioning of the computer system. Such hindering must take place by inputting, transmitting, damaging, deleting, altering or suppressing computer data.

67. The hindering must furthermore be "serious" in order to give rise to criminal sanction. Each Party shall determine for itself what criteria must be fulfilled in order for the hindering to be considered "serious." For example, a Party may require a minimum amount of damage to be caused in order for the hindering to be considered serious. The drafters considered as "serious" the sending of data to a particular system in such a form, size or frequency that it has a significant detrimental effect on the ability of the owner or operator to use the system, or to communicate with other systems (e.g., by means of programs that generate "denial of service" attacks, malicious codes such as viruses that prevent or substantially slow the operation of the system, or programs that send huge quantities of electronic mail to a recipient in order to block the communications functions of the system).

68. The hindering must be "without right". Common activities inherent in the design of networks, or common operational or commercial practices are with right. These include, for example, the testing of the security of a computer system, or its protection, authorised by its owner or operator, or the reconfiguration of a computer's operating system that takes place when the operator of a system installs new software that disables similar, previously installed programs. Therefore, such conduct is not criminalised by this article, even if it causes serious hindering.

69. The sending of unsolicited e-mail, for commercial or other purposes, may cause nuisance to its recipient, in particular when such messages are sent in large quantities or with a high frequency ("spamming"). In the opinion of the drafters, such conduct should only be criminalised where the communication is intentionally and seriously hindered. Nevertheless, Parties may have a different approach to hindrance under their law, e.g. by making particular acts of interference administrative offences or otherwise subject to sanction. The text leaves it to the Parties to determine the extent to which the functioning of the system should be hindered – partially or totally, temporarily or permanently – to reach the threshold of harm that justifies sanction, administrative or criminal, under their law.

70. The offence must be committed intentionally, that is the perpetrator must have the intent to seriously hinder.

Misuse of devices (Article 6)

71. This provision establishes as a separate and independent criminal offence the intentional commission of specific illegal acts regarding certain devices or access data to be misused for the purpose of committing the above-described offences against the confidentiality, the integrity and availability of computer systems or data. As the commission of these offences often requires the possession of means of access ("hacker tools") or other tools, there is a strong incentive to acquire them for criminal purposes which may then lead to the creation of a kind of black market in their production and distribution. To combat such dangers more effectively, the criminal law should prohibit specific potentially dangerous acts at the source, preceding the commission of offences under Articles 2 – 5. In this respect the provision builds upon recent developments inside the Council of Europe (European Convention on the legal protection of services based on, or consisting of, conditional access – ETS N° 178) and the European Union (Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access) and relevant provisions in some countries. A similar approach has already been taken in the 1929 Geneva Convention on currency counterfeiting.

72. Paragraph 1(a)1 criminalises the production, sale, procurement for use, import, distribution or otherwise making available of a device, including a computer programme, designed or adapted primarily for the purpose of committing any of the offences established in Articles 2-5 of the present Convention. 'Distribution' refers to the active act of forwarding data to others, while 'making available' refers to the placing online devices for the use of others. This term also intends to cover the creation or compilation of hyperlinks in order to facilitate access to such devices. The inclusion of a 'computer program' refers to programs that are for example designed to alter or even destroy data or interfere with the operation of systems, such as virus programs, or programs designed or adapted to gain access to computer systems.

73. The drafters debated at length whether the devices should be restricted to those which are designed exclusively or specifically for committing offences, thereby excluding dual-use devices. This was considered to be too narrow. It could lead to insurmountable difficulties of proof in criminal proceedings, rendering the provision practically inapplicable or only applicable in rare instances. The alternative to include all devices even if they are legally produced and distributed, was also rejected. Only the subjective element of the intent of committing a computer offence would then be decisive for imposing a punishment, an approach which in the area of money counterfeiting also has not been adopted. As a reasonable compromise the Convention restricts its scope to cases where the devices are objectively designed, or adapted, primarily for the purpose of committing an offence. This alone will usually exclude dual-use devices.

74. Paragraph 1(a)2 criminalises the production, sale, procurement for use, import, distribution or otherwise making available of a computer password, access code or similar data by which the whole or any part of a computer system is capable of being accessed.

75. Paragraph 1(b) creates the offence of possessing the items set out in paragraph 1(a)1 or 1(a)2. Parties are permitted, by the last phrase of paragraph 1(b), to require by law that a number of such items be possessed. The number of items possessed goes directly to proving criminal intent. It is up to each Party to decide the number of items required before criminal liability attaches.

76. The offence requires that it be committed intentionally and without right. In order to avoid the danger of overcriminalisation where devices are produced and put on the market for legitimate purposes, e.g. to counter-attacks against computer systems, further elements are added to restrict the offence. Apart from the general intent requirement, there must be the specific (i.e. direct) intent that the device is used for the purpose of committing any of the offences established in Articles 2-5 of the Convention.

77. Paragraph 2 sets out clearly that those tools created for the authorised testing or the protection of a computer system are not covered by the provision. This concept is already contained in the expression 'without right'. For example, test-devices ('cracking-devices') and network analysis devices designed by industry to control the reliability of their information technology products or to test system security are produced for legitimate purposes, and would be considered to be 'with right'.

78. Due to different assessments of the need to apply the offence of "Misuse of Devices" to all of the different kinds of computer offences in Articles 2 – 5, paragraph 3 allows, on the basis of a reservation (cf. Article 42), to restrict the offence in domestic law. Each Party is, however, obliged to criminalise at least the sale, distribution or making available of a computer password or access data as described in paragraph 1 (a) 2.

Title 2 – Computer-related offences

79. Articles 7 – 10 relate to ordinary crimes that are frequently committed through the use of a computer system. Most States already have criminalised these ordinary crimes, and their existing laws may or may not be sufficiently broad to extend to situations involving computer networks (for example, existing child pornography laws of some States may not extend to electronic images). Therefore, in the course of implementing these articles, States must examine their existing laws to determine whether they apply to situations in which computer systems or networks are involved. If existing offences already cover such conduct, there is no requirement to amend existing offences or enact new ones.

80. "Computer-related forgery" and "Computer-related fraud" deal with certain computer-related offences, i.e. computer-related forgery and computer-related fraud as two specific kinds of manipulation of computer systems or computer data. Their inclusion acknowledges the fact that in many countries certain traditional legal interests are not sufficiently protected against new forms of interference and attacks.

Computer-related forgery (Article 7)

81. The purpose of this article is to create a parallel offence to the forgery of tangible documents. It aims at filling gaps in criminal law related to traditional forgery, which requires visual readability of statements, or declarations embodied in a document and which does not apply to electronically stored data. Manipulations of such data with evidentiary value may have the same serious consequences as traditional acts of forgery if a third party is thereby misled. Computer-related forgery involves unauthorised creating or altering stored data so that they acquire a different evidentiary value in the course of legal transactions, which relies on the authenticity of information contained in the data, is subject to a deception. The protected legal interest is the security and reliability of electronic data which may have consequences for legal relations.

82. It should be noted that national concepts of forgery vary greatly. One concept is based on the authenticity as to the author of the document, and others are based on the truthfulness of the statement contained in the document. However, it was agreed that the deception as to authenticity refers at minimum to the issuer of the data, regardless of the correctness or veracity of the contents of the data. Parties may go further and include under the term "authentic" the genuineness of the data.

83. This provision covers data which is the equivalent of a public or private document, which has legal effects. The unauthorised "input" of correct or incorrect data brings about a situation that corresponds to the making of a false document. Subsequent alterations (modifications, variations, partial changes), deletions (removal of data from a data medium) and suppression (holding back, concealment of data) correspond in general to the falsification of a genuine document.

84. The term "for legal purposes" refers also to legal transactions and documents which are legally relevant.

85. The final sentence of the provision allows Parties, when implementing the offence in domestic law, to require in addition an intent to defraud, or similar dishonest intent, before criminal liability attaches.

Computer-related fraud (Article 8)

86. With the arrival of the technological revolution the opportunities for committing economic crimes such as fraud, including credit card fraud, have multiplied. Assets represented or administered in computer systems (electronic funds, deposit money) have become the target of manipulations like traditional forms of property. These crimes consist mainly of input manipulations, where incorrect data is fed into the computer, or by programme manipulations and other interferences with the course of data processing. The aim of this article is to criminalise any undue manipulation in the course of data processing with the intention to effect an illegal transfer of property.

87. To ensure that all possible relevant manipulations are covered, the constituent elements of 'input', 'alteration', 'deletion' or 'suppression' in Article 8(a) are supplemented by the general act of 'interference with the functioning of a computer programme or system' in Article 8(b). The elements of 'input, alteration, deletion or suppression' have the same meaning as in the previous articles. Article 8(b) covers acts such as hardware manipulations, acts suppressing printouts and acts affecting recording or flow of data, or the sequence in which programs are run.

88. The computer fraud manipulations are criminalised if they produce a direct economic or possessory loss of another person's property and the perpetrator acted with the intent of procuring an unlawful economic gain for himself or for another person. The term 'loss of property', being a broad notion, includes loss of money, tangibles and intangibles with an economic value.

89. The offence must be committed "without right", and the economic benefit must be obtained without right. Of course, legitimate common commercial practices, which are intended to procure an economic benefit, are not meant to be included in the offence established by this article because they are conducted with right. For example, activities carried out pursuant to a valid contract between the affected persons are with right (e.g. disabling a web site as entitled pursuant to the terms of the contract).

90. The offence has to be committed "intentionally". The general intent element refers to the computer manipulation or interference causing loss of property to another. The offence also requires a specific fraudulent or other dishonest intent to gain an economic or other benefit for oneself or another. Thus, for example, commercial practices with respect to market competition that may cause an economic detriment to a person and benefit to another, but are not carried out with fraudulent or dishonest intent, are not meant to be included in the offence established by this article. For example, the use of information gathering programs to comparison shop on the Internet ("bots"), even if not authorised by a site visited by the "bot" is not intended to be criminalised.

Title 3 – Content-related offences

Offences related to child pornography (Article 9)

91. Article 9 on child pornography seeks to strengthen protective measures for children, including their protection against sexual exploitation, by modernising criminal law provisions to more effectively circumscribe the use of computer systems in the commission of sexual offences against children.

92. This provision responds to the preoccupation of Heads of State and Government of the Council of Europe, expressed at their 2nd summit (Strasbourg, 10 – 11 October 1997) in their Action Plan (item III.4) and corresponds to an international trend that seeks to ban child pornography, as evidenced by the recent adoption of the Optional Protocol to the UN Convention on the rights of the child, on the sale of children, child prostitution and child pornography and the recent European Commission initiative on combating sexual exploitation of children and child pornography (COM2000/854).

93. This provision criminalises various aspects of the electronic production, possession and distribution of child pornography. Most States already criminalise the traditional production and physical distribution of child pornography, but with the ever-increasing use of the Internet as the primary instrument for trading such material, it was strongly felt that specific provisions in an international legal instrument were essential to combat this new form of sexual exploitation and endangerment of children. It is widely believed that such material and on-line practices, such as the exchange of ideas, fantasies and advice among paedophiles, play a role in supporting, encouraging or facilitating sexual offences against children.

94. Paragraph 1(a) criminalises the production of child pornography for the purpose of distribution through a computer system. This provision was felt necessary to combat the dangers described above at their source.

95. Paragraph 1(b) criminalises the 'offering' of child pornography through a computer system. 'Offering' is intended to cover soliciting others to obtain child pornography. It implies that the person offering the material can actually provide it. 'Making available' is intended to cover the placing of child pornography on line for the use of others e.g. by means of creating child pornography sites. This paragraph also intends to cover the creation or compilation of hyperlinks to child pornography sites in order to facilitate access to child pornography.

96. Paragraph 1(c) criminalises the distribution or transmission of child pornography through a computer system. 'Distribution' is the active dissemination of the material. Sending child pornography through a computer system to another person would be addressed by the offence of 'transmitting' child pornography.

97. The term 'procuring for oneself or for another' in paragraph 1(d) means actively obtaining child pornography, e.g. by downloading it.

98. The possession of child pornography in a computer system or on a data carrier, such as a diskette or CD-Rom, is criminalised in paragraph 1(e). The possession of child pornography stimulates demand for such material. An effective way to curtail the production of child pornography is to attach criminal consequences to the conduct of each participant in the chain from production to possession.

99. The term 'pornographic material' in paragraph 2 is governed by national standards pertaining to the classification of materials as obscene, inconsistent with public morals or similarly corrupt. Therefore, material having an artistic, medical, scientific or similar merit may be considered not to be pornographic. The visual depiction includes data stored on computer diskette or on other electronic means of storage, which are capable of conversion into a visual image.

100. A 'sexually explicit conduct' covers at least real or simulated: a) sexual intercourse, including genital-genital, oral-genital, anal-genital or oral-anal, between minors, or between an adult and a minor, of the same or opposite sex; b) bestiality; c) masturbation; d) sadistic or masochistic abuse in a sexual context; or e) lascivious exhibition of the genitals or the pubic area of a minor. It is not relevant whether the conduct depicted is real or simulated.

101. The three types of material defined in paragraph 2 for the purposes of committing the offences contained in paragraph 1 cover depictions of sexual abuse of a real child (2a), pornographic images which depict a person appearing to be a minor engaged in sexually explicit conduct (2b), and finally images, which, although 'realistic', do not in fact involve a real child engaged in sexually explicit conduct (2c). This latter scenario includes pictures which are altered, such as morphed images of natural persons, or even generated entirely by the computer.

102. In the three cases covered by paragraph 2, the protected legal interests are slightly different. Paragraph 2(a) focuses more directly on the protection against child abuse. Paragraphs 2(b) and 2(c) aim at providing protection against behaviour that, while not necessarily creating harm to the 'child' depicted in the material, as there might not be a real child, might be used to encourage or seduce children into participating in such acts, and hence form part of a subculture favouring child abuse.

103. The term 'without right' does not exclude legal defences, excuses or similar relevant principles that relieve a person of responsibility under specific circumstances. Accordingly, the term 'without right' allows a

Party to take into account fundamental rights, such as freedom of thought, expression and privacy. In addition, a Party may provide a defence in respect of conduct related to "pornographic material" having an artistic, medical, scientific or similar merit. In relation to paragraph 2(b), the reference to 'without right' could also allow, for example, that a Party may provide that a person is relieved of criminal responsibility if it is established that the person depicted is not a minor in the sense of this provision.

104. Paragraph 3 defines the term 'minor' in relation to child pornography in general as all persons under 18 years, in accordance with the definition of a 'child' in the UN Convention on the Rights of the Child (Article 1). It was considered an important policy matter to set a uniform international standard regarding age. It should be noted that the age refers to the use of (real or fictitious) children as sexual objects, and is separate from the age of consent for sexual relations. Nevertheless, recognising that certain States require a lower age-limit in national legislation regarding child pornography, the last phrase of paragraph 3 allows Parties to require a different age-limit, provided it is not less than 16 years.

105. This article lists different types of illicit acts related to child pornography which, as in articles 2 – 8, Parties are obligated to criminalise if committed "intentionally." Under this standard, a person is not liable unless he has an intent to offer, make available, distribute, transmit, produce or possess child pornography. Parties may adopt a more specific standard (see, for example, applicable European Community law in relation to service provider liability), in which case that standard would govern. For example, liability may be imposed if there is "knowledge and control" over the information which is transmitted or stored. It is not sufficient, for example, that a service provider served as a conduit for, or hosted a website or newsroom containing such material, without the required intent under domestic law in the particular case. Moreover, a service provider is not required to monitor conduct to avoid criminal liability.

106. Paragraph 4 permits Parties to make reservations regarding paragraph 1(d) and (e), and paragraph 2(b) and (c). The right not to apply these sections of the provision may be made in part or in whole. Any such reservation should be declared to the Secretary General of the Council of Europe at the time of signature or when depositing the Party's instruments of ratification, acceptance, approval or accession, in accordance with Article 42.

Title 4 – Offences related to infringements of copyright and related rights

Offences related to infringements of copyright and related rights (Article 10)

107. Infringements of intellectual property rights, in particular of copyright, are among the most commonly committed offences on the Internet, which cause concern both to copyright holders and those who work professionally with computer networks. The reproduction and dissemination on the Internet of protected works, without the approval of the copyright holder, are extremely frequent. Such protected works include literary, photographic, musical, audio-visual and other works. The ease with which unauthorised copies may be made due to digital technology and the scale of reproduction and dissemination in the context of electronic networks made it necessary to include provisions on criminal law sanctions and enhance international co-operation in this field.

108. Each Party is obliged to criminalise wilful infringements of copyright and related rights, sometimes referred to as neighbouring rights, arising from the agreements listed in the article, when such infringements have been committed by means of a computer system and on a commercial scale". Paragraph 1 provides for criminal sanctions against infringements of copyright by means of a computer system. Infringement of copyright is already an offence in almost all States. Paragraph 2 deals with the infringement of related rights by means of a computer system.

109. Infringement of both copyright and related rights is as defined under the law of each Party and pursuant to the obligations the Party has undertaken in respect of certain international instruments. While each Party is required to establish as criminal offences those infringements, the precise manner in which such infringements are defined under domestic law may vary from State to State. However, criminalisation obligations under the Convention do not cover intellectual property infringements other that those explictly addressed in Article 10 and thus exclude patent or trademark-related violations.

110. With regard to paragraph 1, the agreements referred to are the Paris Act of 24 July 1971 of the Bern Convention for the Protection of Literary and Artistic Works, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), and the World Intellectual Property Organisation (WIPO) Copyright Treaty. With regard to paragraph 2, the international instruments cited are the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (Rome Convention), the

Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the World Intellectual Property Organisation (WIPO) Performances and Phonograms Treaty. The use of the term "pursuant to the obligations it has undertaken" in both paragraphs makes it clear that a Contracting Party to the current Convention is not bound to apply agreements cited to which it is not a Party; moreover, if a Party has made a reservation or declaration permitted under one of the agreements, that reservation may limit the extent of its obligation under the present Convention.

111. The WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty had not entered into force at the time of concluding the present Convention. These treaties are nevertheless important as they significantly update the international protection for intellectual property (especially with regard to the new right of 'making available' of protected material 'on demand' over the Internet) and improve the means to fight violations of intellectual property rights worldwide. However it is understood that the infringements of rights established by these treaties need not be criminalised under the present Convention until these treaties have entered into force with respect to a Party.

112. The obligation to criminalise infringements of copyright and related rights pursuant to obligations undertaken in international instruments does not extend to any moral rights conferred by the named instruments (such as in Article 6bis of the Bern Convention and in Article 5 of the WIPO Copyright Treaty).

113. Copyright and related rights offences must be committed "wilfully" for criminal liability to apply. In contrast to all the other substantive law provisions of this Convention, the term "wilfully" is used instead of "intentionally" in both paragraphs 1 and 2, as this is the term employed in the TRIPS Agreement (Article 61), governing the obligation to criminalise copyright violations.

114. The provisions are intended to provide for criminal sanctions against infringements 'on a commercial scale' and by means of a computer system. This is in line with Article 61 of the TRIPS Agreement which requires criminal sanctions in copyright matters only in the case of "piracy on a commercial scale". However, Parties may wish to go beyond the threshold of "commercial scale" and criminalise other types of copyright infringement as well.

115. The term "without right" has been omitted from the text of this article as redundant, since the term "infringement" already denotes use of the copyrighted material without authorisation. The absence of the term "without right" does not *a contrario* exclude application of criminal law defences, justifications and principles governing the exclusion of criminal liability associated with the term "without right" elsewhere in the Convention.

116. Paragraph 3 allows Parties not to impose criminal liability under paragraphs 1 and 2 in "limited circumstances" (e.g. parallel imports, rental rights), as long as other effective remedies, including civil and/or administrative measures, are available. This provision essentially allows Parties a limited exemption from the obligation to impose criminal liability, provided that they do not derogate from obligations under Article 61 of the TRIPS Agreement, which is the minimum pre-existing criminalisation requirement.

117. This article shall in no way be interpreted to extend the protection granted to authors, film producers, performers, producers of phonograms, broadcasting organisations or other right holders to persons that do not meet the criteria for eligibility under domestic law or international agreement.

Title 5 – Ancillary liability and sanctions

Attempt and aiding or abetting (Article 11)

118. The purpose of this article is to establish additional offences related to attempt and aiding or abetting the commission of the offences defined in the Convention. As discussed further below, it is not required that a Party criminalise the attempt to commit each offence established in the Convention.

119. Paragraph 1 requires Parties to establish as criminal offences aiding or abetting the commission of any of the offences under Articles 2-10. Liability arises for aiding or abetting where the person who commits a crime established in the Convention is aided by another person who also intends that the crime be committed. For example, although the transmission of harmful content data or malicious code through the Internet requires the assistance of service providers as a conduit, a service provider that does not have the criminal intent cannot incur liability under this section. Thus, there is no duty on a service provider to actively monitor content to avoid criminal liability under this provision.

120. With respect to paragraph 2 on attempt, some offences defined in the Convention, or elements of these offences, were considered to be conceptually difficult to attempt (for example, the elements of offering

or making available of child pornography). Moreover, some legal systems limit the offences for which the attempt is punished. Accordingly, it is only required that the attempt be criminalised with respect to offences established in accordance with Articles 3, 4, 5, 7, 8, 9(1)(a) and 9(1)(c).

121. As with all the offences established in accordance with the Convention, attempt and aiding or abetting must be committed intentionally.

122. Paragraph 3 was added to address the difficulties Parties may have with paragraph 2, given the widely varying concepts in different legislations and despite the effort in paragraph 2 to exempt certain aspects from the provision on attempt. A Party may declare that it reserves the right not to apply paragraph 2 in part or in whole. This means that any Party making a reservation as to that provision will have no obligation to criminalise attempt at all, or may select the offences or parts of offences to which it will attach criminal sanctions in relation to attempt. The reservation aims at enabling the widest possible ratification of the Convention while permitting Parties to preserve some of their fundamental legal concepts.

Corporate liability (Article 12)

123. Article 12 deals with the liability of legal persons. It is consistent with the current legal trend to recognise corporate liability. It is intended to impose liability on corporations, associations and similar legal persons for the criminal actions undertaken by a person in a leading position within such legal person, where undertaken for the benefit of that legal person. Article 12 also contemplates liability where such a leading person fails to supervise or control an employee or an agent of the legal person, where such failure facilitates the commission by that employee or agent of one of the offences established in the Convention.

124. Under paragraph 1, four conditions need to be met for liability to attach. First, one of the offences described in the Convention must have been committed. Second, the offence must have been committed for the benefit of the legal person. Third, a person who has a leading position must have committed the offence (including aiding and abetting). The term "person who has a leading position" refers to a natural person who has a high position in the organisation, such as a director. Fourth, the person who has a leading position must have acted on the basis of one of these powers – a power of representation or an authority to take decisions or to exercise control – which demonstrate that such a physical person acted within the scope of his or her authority to engage the liability of the legal person. In sum, paragraph 1 obligates Parties to have the ability to impose liability on the legal person only for offences committed by such leading persons.

125. In addition, Paragraph 2 obligates Parties to have the ability to impose liability upon a legal person where the crime is committed not by the leading person described in paragraph 1, but by another person acting under the legal person's authority, i.e., one of its employees or agents acting within the scope of their authority. The conditions that must be fulfilled before liability can attach are that (1) an offence has been committed by such an employee or agent of the legal person, (2) the offence has been committed for the benefit of the legal person; and (3) the commission of the offence has been made possible by the leading person having failed to supervise the employee or agent. In this context, failure to supervise should be interpreted to include failure to take appropriate and reasonable measures to prevent employees or agents from committing criminal activities on behalf of the legal person. Such appropriate and reasonable measures could be determined by various factors, such as the type of the business, its size, the standards or the established business best practices, etc. This should not be interpreted as requiring a general surveillance regime over employee communications (see also paragraph 54). A service provider does not incur liability by virtue of the fact that a crime was committed on its system by a customer, user or other third person, because the term "acting under its authority" applies exclusively to employees and agents acting within the scope of their authority.

126. Liability under this Article may be criminal, civil or administrative. Each Party has the flexibility to choose to provide for any or all of these forms of liability, in accordance with the legal principles of each Party, as long as it meets the criteria of Article 13, paragraph 2, that the sanction or measure be "effective, proportionate and dissuasive" and includes monetary sanctions.

127. Paragraph 4 clarifies that corporate liability does not exclude individual liability.

Sanctions and measures (Article 13)

128. This article is closely related to Articles 2-11, which define various computer- or computer-related crimes that should be made punishable under criminal law. In accordance with the obligations imposed by those articles, this provision obliges the Contracting Parties to draw consequences from the serious nature

of these offences by providing for criminal sanctions that are 'effective, proportionate and dissuasive' and, in the case of natural persons, include the possibility of imposing prison sentences.

129. Legal persons whose liability is to be established in accordance with Article 12 shall also be subject to sanctions that are 'effective, proportionate and dissuasive', which can be criminal, administrative or civil in nature. Contracting Parties are compelled, under paragraph 2, to provide for the possibility of imposing monetary sanctions on legal persons.

130. The article leaves open the possibility of other sanctions or measures reflecting the seriousness of the offences, for example, measures could include injunction or forfeiture. It leaves to the Parties the discretionary power to create a system of criminal offences and sanctions that is compatible with their existing national legal systems.

Section 2 – Procedural law

131. The articles in this Section describe certain procedural measures to be taken at the national level for the purpose of criminal investigation of the offences established in Section 1, other criminal offences committed by means of a computer system and the collection of evidence in electronic form of a criminal offence. In accordance with Article 39, paragraph 3, nothing in the Convention requires or invites a Party to establish powers or procedures other than those contained in this Convention, nor precludes a Party from doing so.

132. The technological revolution, which encompasses the "electronic highway" where numerous forms of communication and services are interrelated and interconnected through the sharing of common transmission media and carriers, has altered the sphere of criminal law and criminal procedure. The ever-expanding network of communications opens new doors for criminal activity in respect of both traditional offences and new technological crimes. Not only must substantive criminal law keep abreast of these new abuses, but so must criminal procedural law and investigative techniques. Equally, safeguards should also be adapted or developed to keep abreast of the new technological environment and new procedural powers.

133. One of the major challenges in combating crime in the networked environment is the difficulty in identifying the perpetrator and assessing the extent and impact of the criminal act. A further problem is caused by the volatility of electronic data, which may be altered, moved or deleted in seconds. For example, a user who is in control of the data may use the computer system to erase the data that is the subject of a criminal investigation, thereby destroying the evidence. Speed and, sometimes, secrecy are often vital for the success of an investigation.

134. The Convention adapts traditional procedural measures, such as search and seizure, to the new technological environment. Additionally, new measures have been created, such as expedited preservation of data, in order to ensure that traditional measures of collection, such as search and seizure, remain effective in the volatile technological environment. As data in the new technological environment is not always static, but may be flowing in the process of communication, other traditional collection procedures relevant to telecommunications, such as real-time collection of traffic data and interception of content data, have also been adapted in order to permit the collection of electronic data that is in the process of communication. Some of these measures are set out in Council of Europe Recommendation No. R (95) 13 on problems of criminal procedural law connected with information technology.

135. All the provisions referred to in this Section aim at permitting the obtaining or collection of data for the purpose of specific criminal investigations or proceedings. The drafters of the present Convention discussed whether the Convention should impose an obligation for service providers to routinely collect and retain traffic data for a certain fixed period of time, but did not include any such obligation due to lack of consensus.

136. The procedures in general refer to all types of data, including three specific types of computer data (traffic data, content data and subscriber data), which may exist in two forms (stored or in the process of communication). Definitions of some of these terms are provided in Articles 1 and 18. The applicability of a procedure to a particular type or form of electronic data depends on the nature and form of the data and the nature of the procedure, as specifically described in each article.

137. In adapting traditional procedural laws to the new technological environment, the question of appropriate terminology arises in the provisions of this section. The options included maintaining traditional language ('search' and 'seize'), using new and more technologically oriented computer terms ('access' and 'copy'), as adopted in texts of other international fora on the subject (such as the G8 High Tech Crime Subgroup), or employing a compromise of mixed language ('search or similarly access', and 'seize or similarly secure'). As there is a need to reflect the evolution of concepts in the electronic environment, as well as

identify and maintain their traditional roots, the flexible approach of allowing States to use either the old notions of "search and seizure" or the new notions of "access and copying" is employed.

138. All the articles in the Section refer to "competent authorities" and the powers they shall be granted for the purposes of specific criminal investigations or proceedings. In certain countries, only judges have the power to order or authorise the collection or production of evidence, while in other countries prosecutors or other law enforcement officers are entrusted with the same or similar powers. Therefore, 'competent authority' refers to a judicial, administrative or other law enforcement authority that is empowered by domestic law to order, authorise or undertake the execution of procedural measures for the purpose of collection or production of evidence with respect to specific criminal investigations or proceedings.

Title 1 – Common provisions

139. The Section begins with two provisions of a general nature that apply to all the articles relating to procedural law.

Scope of procedural provisions (Article 14)

140. Each State Party is obligated to adopt such legislative and other measures as may be necessary, in accordance with its domestic law and legal framework, to establish the powers and procedures described in this Section for the purpose of "specific criminal investigations or proceedings."

141. Subject to two exceptions, each Party shall apply the powers and procedures established in accordance with this Section to: (i) criminal offences established in accordance with Section 1 of the Convention; (ii) other criminal offences committed by means of a computer system; and (iii) the collection of evidence in electronic form of a criminal offence. Thus, for the purpose of specific criminal investigations or proceedings, the powers and procedures referred to in this Section shall be applied to offences established in accordance with the Convention, to other criminal offences committed by means of a computer system, and to the collection of evidence in electronic form of a criminal offence. This ensures that evidence in electronic form of any criminal offence can be obtained or collected by means of the powers and procedures set out in this Section. It ensures an equivalent or parallel capability for the obtaining or collection of computer data as exists under traditional powers and procedures for non-electronic data. The Convention makes it explicit that Parties should incorporate into their laws the possibility that information contained in digital or other electronic form can be used as evidence before a court in criminal proceedings, irrespective of the nature of the criminal offence that is prosecuted.

142. There are two exceptions to this scope of application. First, Article 21 provides that the power to intercept content data shall be limited to a range of serious offences to be determined by domestic law. Many States limit the power of interception of oral communications or telecommunications to a range of serious offences, in recognition of the privacy of oral communications and telecommunications and the intrusiveness of this investigative measure. Likewise, this Convention only requires Parties to establish interception powers and procedures in relation to content data of specified computer communications in respect of a range of serious offences to be determined by domestic law.

143. Second, a Party may reserve the right to apply the measures in Article 20 (real-time collection of traffic data) only to offences or categories of offences specified in the reservation, provided that the range of such offences or categories is not more restricted than the range of offences to which it applies the interception measures referred to in Article 21. Some States consider the collection of traffic data as being equivalent to the collection of content data in terms of privacy and intrusiveness. The right of reservation would permit these States to limit the application of the measures to collect traffic data, in real-time, to the same range of offences to which it applies the powers and procedures of real-time interception of content data. Many States, however, do not consider the interception of content data and the collection of traffic data to be equivalent in terms of privacy interests and degree of intrusiveness, as the collection of traffic data alone does not collect or disclose the content of the communication. As the real-time collection of traffic data can be very important in tracing the source or destination of computer communications (thus, assisting in identifying criminals), the Convention invites Parties that exercise the right of reservation to limit their reservation so as to enable the broadest application of the powers and procedures provided to collect, in real-time, traffic data.

144. Paragraph (b) provides a reservation for countries which, due to existing limitations in their domestic law at the time of the Convention's adoption, cannot intercept communications on computer systems operated for the benefit of a closed group of users and which do not use public communications networks nor are they connected with other computer systems. The term "closed group of users" refers, for example, to a set

of users that is limited by association to the service provider, such as the employees of a company for which the company provides the ability to communicate amongst themselves using a computer network. The term "not connected with other computer systems" means that, at the time an order under Articles 20 or 21 would be issued, the system on which communications are being transmitted does not have a physical or logical connection to another computer network. The term "does not employ public communications networks" excludes systems that use public computer networks (including the Internet), public telephone networks or other public telecommunications facilities in transmitting communications, whether or not such use is apparent to the users.

Conditions and safeguards (Article 15)

145. The establishment, implementation and application of the powers and procedures provided for in this Section of the Convention shall be subject to the conditions and safeguards provided for under the domestic law of each Party. Although Parties are obligated to introduce certain procedural law provisions into their domestic law, the modalities of establishing and implementing these powers and procedures into their legal system, and the application of the powers and procedures in specific cases, are left to the domestic law and procedures of each Party. These domestic laws and procedures, as more specifically described below, shall include conditions or safeguards, which may be provided constitutionally, legislatively, judicially or otherwise. The modalities should include the addition of certain elements as conditions or safeguards that balance the requirements of law enforcement with the protection of human rights and liberties. As the Convention applies to Parties of many different legal systems and cultures, it is not possible to specify in detail the applicable conditions and safeguards for each power or procedure. Parties shall ensure that these conditions and safeguards provide for the adequate protection of human rights and liberties. There are some common standards or minimum safeguards to which Parties to the Convention must adhere. These include standards or minimum safeguards arising pursuant to obligations that a Party has undertaken under applicable international human rights instruments. These instruments include the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms and its additional Protocols No. 1, 4, 6, 7 and 12 (ETS N°s 005[4], 009, 046, 114, 117 and 177), in respect of European States that are Parties to them. It also includes other applicable human rights instruments in respect of States in other regions of the world (e.g. the 1969 American Convention on Human Rights and the 1981 African Charter on Human Rights and Peoples' Rights) which are Parties to these instruments, as well as the more universally ratified 1966 International Covenant on Civil and Political Rights. In addition, there are similar protections provided under the laws of most States.

146. Another safeguard in the convention is that the powers and procedures shall "incorporate the principle of proportionality." Proportionality shall be implemented by each Party in accordance with relevant principles of its domestic law. For European countries, this will be derived from the principles of the 1950 Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms, its applicable jurisprudence and national legislation and jurisprudence, that the power or procedure shall be proportional to the nature and circumstances of the offence. Other States will apply related principles of their law, such as limitations on overbreadth of production orders and reasonableness requirements for searches and seizures. Also, the explicit limitation in Article 21 that the obligations regarding interception measures are with respect to a range of serious offences, determined by domestic law, is an explicit example of the application of the proportionality principle.

147. Without limiting the types of conditions and safeguards that could be applicable, the Convention requires specifically that such conditions and safeguards include, as appropriate in view of the nature of the power or procedure, judicial or other independent supervision, grounds justifying the application of the power or procedure and the limitation on the scope or the duration thereof. National legislatures will have to determine, in applying binding international obligations and established domestic principles, which of the powers and procedures are sufficiently intrusive in nature to require implementation of particular conditions and safeguards. As stated in Paragraph 215, Parties should clearly apply conditions and safeguards such as these with respect to interception, given its intrusiveness. At the same time, for example, such safeguards need not apply equally to preservation. Other safeguards that should be addressed under domestic law

4. The text of the Convention had been amended according to the provisions of Protocol No. 3 (ETS No. 45), which entered into force on 21 September 1970, of Protocol No. 5 (ETS No. 55), which entered into force on 20 December 1971 and of Protocol No. 8 (ETS No. 118), which entered into force on 1 January 1990, and comprised also the text of Protocol No. 2 (ETS No. 44) which, in accordance with Article 5, paragraph 3 thereof, had been an integral part of the Convention since its entry into force on 21 September 1970. All provisions which had been amended or added by these Protocols are replaced by Protocol No. 11 (ETS No. 155), as from the date of its entry into force on 1 November 1998. As from that date, Protocol No. 9 (ETS No. 140), which entered into force on 1 October 1994, is repealed and Protocol No. 10 (ETS No. 146) has lost its purpose.

include the right against self-incrimination, and legal privileges and specificity of individuals or places which are the object of the application of the measure.

148. With respect to the matters discussed in paragraph 3, of primary importance is consideration of the "public interest", in particular the interests of "the sound administration of justice". To the extent consistent with the public interest, Parties should consider other factors, such as the impact of the power or procedure on "the rights, responsibilities and legitimate interests" of third parties, including service providers, incurred as a result of the enforcement measures, and whether appropriate means can be taken to mitigate such impact. In sum, initial consideration is given to the sound administration of justice and other public interests (e.g. public safety and public health and other interests, including the interests of victims and the respect for private life). To the extent consistent with the public interest, consideration would ordinarily also be given to such issues as minimising disruption of consumer services, protection from liability for disclosure or facilitating disclosure under this Chapter, or protection of proprietary interests.

Title 2 – Expedited preservation of stored computer data

149. The measures in Articles 16 and 17 apply to stored data that has already been collected and retained by data-holders, such as service providers. They do not apply to the real-time collection and retention of future traffic data or to real-time access to the content of communications. These issues are addressed in Title 5.

150. The measures described in the articles operate only where computer data already exists and is currently being stored. For many reasons, computer data relevant for criminal investigations may not exist or no longer be stored. For example, accurate data may not have been collected and retained, or if collected was not maintained. Data protection laws may have affirmatively required the destruction of important data before anyone realised its significance for criminal proceedings. Sometimes there may be no business reason for the collection and retention of data, such as where customers pay a flat rate for services or the services are free. Article 16 and 17 do not address these problems.

151. "Data preservation" must be distinguished from "data retention". While sharing similar meanings in common language, they have distinctive meanings in relation to computer usage. To preserve data means to keep data, which already exists in a stored form, protected from anything that would cause its current quality or condition to change or deteriorate. To retain data means to keep data, which is currently being generated, in one's possession into the future. Data retention connotes the accumulation of data in the present and the keeping or possession of it into a future time period. Data retention is the process of storing data. Data preservation, on the other hand, is the activity that keeps that stored data secure and safe.

152. Articles 16 and 17 refer only to data preservation, and not data retention. They do not mandate the collection and retention of all, or even some, data collected by a service provider or other entity in the course of its activities. The preservation measures apply to computer data that "has been stored by means of a computer system", which presupposes that the data already exists, has already been collected and is stored. Furthermore, as indicated in Article 14, all of the powers and procedures required to be established in Section 2 of the Convention are 'for the purpose of specific criminal investigations or proceedings', which limits the application of the measures to an investigation in a particular case. Additionally, where a Party gives effect to preservation measures by means of an order, this order is in relation to "specified stored computer data in the person's possession or control" (paragraph 2). The articles, therefore, provide only for the power to require preservation of existing stored data, pending subsequent disclosure of the data pursuant to other legal powers, in relation to specific criminal investigations or proceedings.

153. The obligation to ensure preservation of data is not intended to require Parties to restrict the offering or use of services that do not routinely collect and retain certain types of data, such as traffic or subscriber data, as part of their legitimate business practices. Neither does it require them to implement new technical capabilities in order to do so, e.g. to preserve ephemeral data, which may be present on the system for such a brief period that it could not be reasonably preserved in response to a request or an order.

154. Some States have laws that require that certain types of data, such as personal data, held by particular types of holders must not be retained and must be deleted if there is no longer a business purpose for the retention of the data. In the European Union, the general principle is implemented by Directive 95/46/EC and, in the particular context of the telecommunications sector, Directive 97/66/EC. These directives establish the obligation to delete data as soon as its storage is no longer necessary. However, member States may adopt legislation to provide for exemptions when necessary for the purpose of the prevention, investigation or prosecution of criminal offences. These directives do not prevent member States of the European Union from establishing powers and procedures under their domestic law to preserve specified data for specific investigations.

155. Data preservation is for most countries an entirely new legal power or procedure in domestic law. It is an important new investigative tool in addressing computer and computer-related crime, especially crimes committed through the Internet. First, because of the volatility of computer data, the data is easily subject to manipulation or change. Thus, valuable evidence of a crime can be easily lost through careless handling and storage practices, intentional manipulation or deletion designed to destroy evidence or routine deletion of data that is no longer required to be retained. One method of preserving its integrity is for competent authorities to search or similarly access and seize or similarly secure the data. However, where the custodian of the data is trustworthy, such as a reputable business, the integrity of the data can be secured more quickly by means of an order to preserve the data. For legitimate businesses, a preservation order may also be less disruptive to its normal activities and reputation than the execution of a search and seizure of its premises. Second, computer and computer-related crimes are committed to a great extent as a result of the transmission of communications through the computer system. These communications may contain illegal content, such as child pornography, computer viruses or other instructions that cause interference with data or the proper functioning of the computer system, or evidence of the commission of other crimes, such as drug trafficking or fraud. Determining the source or destination of these past communications can assist in identifying the identity of the perpetrators. In order to trace these communications so as to determine their source or destination, traffic data regarding these past communications is required (see further explanation on the importance of traffic data below under Article 17). Third, where these communications contain illegal content or evidence of criminal activity and copies of such communications are retained by service providers, such as e-mail, the preservation of these communications is important in order to ensure that critical evidence is not lost. Obtaining copies of these past communications (e.g., stored e-mail that has been sent or received) can reveal evidence of criminality.

156. The power of expedited preservation of computer data is intended to address these problems. Parties are therefore required to introduce a power to order the preservation of specified computer data as a provisional measure, whereby data will be preserved for a period of time as long as necessary, up to a maximum of 90 days. A Party may provide for subsequent renewal of the order. This does not mean that the data is disclosed to law enforcement authorities at the time of preservation. For this to happen, an additional measure of disclosure or a search has to be ordered. With respect to disclosure to law enforcement of preserved data, see paragraphs 152 and 160.

157. It is also important that preservation measures exists at the national level in order to enable Parties to assist one another at the international level with expedited preservation of stored data located in their territory. This will help to ensure that critical data is not lost during often time-consuming traditional mutual legal assistance procedures that enable the requested Party to actually obtain the data and disclose it to the requesting Party.

Expedited preservation of stored computer data (Article 16)

158. Article 16 aims at ensuring that national competent authorities are able to order or similarly obtain the expedited preservation of specified stored computer-data in connection with a specific criminal investigation or proceeding.

159. 'Preservation' requires that data, which already exists in a stored form, be protected from anything that would cause its current quality or condition to change or deteriorate. It requires that it be kept safe from modification, deterioration or deletion. Preservation does not necessarily mean that the data be 'frozen' (i.e. rendered inaccessible) and that it, or copies thereof, cannot be used by legitimate users. The person to whom the order is addressed may, depending on the exact specifications of the order, still access the data. The article does not specify how data should be preserved. It is left to each Party to determine the appropriate manner of preservation and whether, in some appropriate cases, preservation of the data should also entail its 'freezing'.

160. The reference to 'order or similarly obtain' is intended to allow the use of other legal methods of achieving preservation than merely by means of a judicial or administrative order or directive (e.g. from police or prosecutor). In some States, preservation orders do not exist in their procedural law, and data can only be preserved and obtained through search and seizure or production order. Flexibility is intended by the use of the phrase 'or otherwise obtain' to permit these States to implement this article by the use of these means. However, it is recommended that States consider the establishment of powers and procedures to actually order the recipient of the order to preserve the data, as quick action by this person can result in the more expeditious implementation of the preservation measures in particular cases.

161. The power to order or similarly obtain the expeditious preservation of specified computer data applies to any type of stored computer data. This can include any type of data that is specified in the order to be preserved. It can include, for example, business, health, personal or other records. The measures are to be established by Parties for use "in particular where there are grounds to believe that the computer data is particularly vulnerable to loss or modification." This can include situations where the data is subject to a short period of retention, such as where there is a business policy to delete the data after a certain period of time or the data is ordinarily deleted when the storage medium is used to record other data. It can also refer to the nature of the custodian of the data or the insecure manner in which the data is stored. However, if the custodian were untrustworthy, it would be more secure to effect preservation by means of search and seizure, rather than by means of an order that could be disobeyed. A specific reference to "traffic data" is made in paragraph 1 in order to signal the provisions particular applicability to this type of data, which if collected and retained by a service provider, is usually held for only a short period of time. The reference to "traffic data" also provides a link between the measures in Article 16 and 17.

162. Paragraph 2 specifies that where a Party gives effect to preservation by means of an order, the order to preserve is in relation to "specified stored computer data in the person's possession or control". Thus, the stored data may actually be in the possession of the person or it may be stored elsewhere but subject to the control of this person. The person who receives the order is obliged "to preserve and maintain the integrity of that computer data for a period of time as long as necessary, up to a maximum of 90 days, to enable the competent authorities to seek its disclosure." The domestic law of a Party should specify a maximum period of time for which data, subject to an order, must be preserved, and the order should specify the exact period of time that the specified data is to be preserved. The period of time should be as long as necessary, up to a maximum of 90 days, to permit the competent authorities to undertake other legal measures, such as search and seizure, or similar access or securing, or the issuance of a production order, to obtain the disclosure of the data. A Party may provide for subsequent renewal of the production order. In this context, reference should be made to Article 29, which concerns a mutual assistance request to obtain the expeditious preservation of data stored by means of a computer system. That article specifies that preservation effected in response to a mutual assistance request "shall be for a period not less than 60 days in order to enable the requesting Party to submit a request for the search or similar access, seizure or similar securing, or disclosure of the data."

163. Paragraph 3 imposes an obligation of confidentiality regarding the undertaking of preservation procedures on the custodian of the data to be preserved, or on the person ordered to preserve the data, for a period of time as established in domestic law. This requires Parties to introduce confidentiality measures in respect of expedited preservation of stored data, and a time limit in respect of the period of confidentiality. This measure accommodates the needs of law enforcement so that the suspect of the investigation is not made aware of the investigation, as well as the right of individuals to privacy. For law enforcement authorities, the expedited preservation of data forms part of initial investigations and, therefore, covertness may be important at this stage. Preservation is a preliminary measure pending the taking of other legal measures to obtain the data or its disclosure. Confidentiality is required in order that other persons do not attempt to tamper with or delete the data. For the person to whom the order is addressed, the data subject or other persons who may be mentioned or identified in the data, there is a clear time limit to the length of the measure. The dual obligations to keep the data safe and secure and to maintain confidentiality of the fact that the preservation measure has been undertaken helps to protect the privacy of the data subject or other persons who may be mentioned or identified in that data.

164. In addition to the limitations set out above, the powers and procedures referred to in Article 16 are also subject to the conditions and safeguards provided in Articles 14 and 15.

Expedited preservation and partial disclosure of traffic data (Article 17)

165. This article establishes specific obligations in relation to the preservation of traffic data under Article 16 and provides for expeditious disclosure of some traffic data so as to identify that other service providers were involved in the transmission of specified communications. "Traffic data" is defined in Article 1.

166. Obtaining stored traffic data that is associated with past communications may be critical in determining the source or destination of a past communication, which is crucial to identifying the persons who, for example, have distributed child pornography, distributed fraudulent misrepresentations as part of a fraudulent scheme, distributed computer viruses, attempted or successfully accessed illegally computer systems, or transmitted communications to a computer system that have interfered either with data in the system or with the proper functioning of the system. However, this data is frequently stored for only short periods of time, as laws designed to protect privacy may prohibit or market forces may discourage the long-term

storage of such data. Therefore, it is important that preservation measures be undertaken to secure the integrity of this data (see discussion related to preservation, above).

167. Often more than one service provider may be involved in the transmission of a communication. Each service provider may possess some traffic data related to the transmission of the specified communication, which either has been generated and retained by that service provider in relation to the passage of the communication through its system or has been provided from other service providers. Sometimes traffic data, or at least some types of traffic data, are shared among the service providers involved in the transmission of the communication for commercial, security, or technical purposes. In such a case, any one of the service providers may possess the crucial traffic data that is needed to determine the source or destination of the communication. Often, however, no single service provider possesses enough of the crucial traffic data to be able to determine the actual source or destination of the communication. Each possesses one part of the puzzle, and each of these parts needs to be examined in order to identify the source or destination.

168. Article 17 ensures that where one or more service providers were involved in the transmission of a communication, expeditious preservation of traffic data can be effected among all of the service providers. The article does not specify the means by which this may be achieved, leaving it to domestic law to determine a means that is consistent with its legal and economic system. One means to achieve expeditious preservation would be for competent authorities to serve expeditiously a separate preservation order on each service provider. Nevertheless, obtaining a series of separate orders can be unduly time consuming. A preferred alternative could be to obtain a single order, the scope of which however would apply to all service providers that were identified subsequently as being involved in the transmission of the specific communication. This comprehensive order could be served sequentially on each service provider identified. Other possible alternatives could involve the participation of service providers. For example, requiring a service provider that was served with an order to notify the next service provider in the chain of the existence and terms of the preservation order. This notice could, depending on domestic law, have the effect of either permitting the other service provider to preserve voluntarily the relevant traffic data, despite any obligations to delete it, or mandating the preservation of the relevant traffic data. The second service provider could similarly notify the next service provider in the chain.

169. As traffic data is not disclosed to law enforcement authorities upon service of a preservation order to a service provider (but only obtained or disclosed subsequently upon the taking of other legal measures), these authorities will not know whether the service provider possesses all of the crucial traffic data or whether there were other service providers involved in the chain of transmitting the communication. Therefore, this article requires that the service provider, which receives a preservation order or similar measure, disclose expeditiously to the competent authorities, or other designated person, a sufficient amount of traffic data to enable the competent authorities to identify any other service providers and the path through which the communication was transmitted. The competent authorities should specify clearly the type of traffic data that is required to be disclosed. Receipt of this information would enable the competent authorities to determine whether to take preservation measures with respect to the other service providers. In this way, the investigating authorities can trace the communication back to its origin, or forward to its destination, and identify the perpetrator or perpetrators of the specific crime being investigated. The measures in this article are also subject to the limitations, conditions and safeguards provided in Articles 14 and 15.

Title 3 – Production order

Production order (Article 18)

170. Paragraph 1 of this article calls for Parties to enable their competent authorities to compel a person in its territory to provide specified stored computer data, or a service provider offering its services in the territory of the Party to submit subscriber information. The data in question are stored or existing data, and do not include data that has not yet come into existence such as traffic data or content data related to future communications. Instead of requiring States to apply systematically coercive measures in relation to third parties, such as search and seizure of data, it is essential that States have within their domestic law alternative investigative powers that provide a less intrusive means of obtaining information relevant to criminal investigations.

171. A "production order" provides a flexible measure which law enforcement can apply in many cases, especially instead of measures that are more intrusive or more onerous. The implementation of such a procedural mechanism will also be beneficial to third party custodians of data, such as ISPs, who are often prepared to

assist law enforcement authorities on a voluntary basis by providing data under their control, but who prefer an appropriate legal basis for such assistance, relieving them of any contractual or non-contractual liability.

172. The production order refers to computer data or subscriber information that are in the possession or control of a person or a service provider. The measure is applicable only to the extent that the person or service provider maintains such data or information. Some service providers, for example, do not keep records regarding the subscribers to their services.

173. Under paragraph 1(a), a Party shall ensure that its competent law enforcement authorities have the power to order a person in its territory to submit specified computer data stored in a computer system, or data storage medium that is in that person's possession or control. The term "possession or control" refers to physical possession of the data concerned in the ordering Party's territory, and situations in which the data to be produced is outside of the person's physical possession but the person can nonetheless freely control production of the data from within the ordering Party's territory (for example, subject to applicable privileges, a person who is served with a production order for information stored in his or her account by means of a remote online storage service, must produce such information). At the same time, a mere technical ability to access remotely stored data (e.g. the ability of a user to access through a network link remotely stored data not within his or her legitimate control) does not necessarily constitute "control" within the meaning of this provision. In some States, the concept denominated under law as "possession" covers physical and constructive possession with sufficient breadth to meet this "possession or control" requirement.

Under paragraph 1(b), a Party shall also provide for the power to order a service provider offering services in its territory to "submit subscriber information in the service provider's possession or control". As in paragraph 1(a), the term "possession or control" refers to subscriber information in the service provider's physical possession and to remotely stored subscriber information under the service provider's control (for example at a remote data storage facility provided by another company). The term "relating to such service" means that the power is to be available for the purpose of obtaining subscriber information relating to services offered in the ordering Party's territory.

174. The conditions and safeguards referred to in paragraph 2 of the article, depending on the domestic law of each Party, may exclude privileged data or information. A Party may wish to prescribe different terms, different competent authorities and different safeguards concerning the submission of particular types of computer data or subscriber information held by particular categories of persons or service providers. For example, with respect to some types of data, such as publicly available subscriber information, a Party might permit law enforcement agents to issue such an order where in other situations a court order could be required. On the other hand, in some situations a Party might require, or be mandated by human rights safeguards to require that a production order be issued only by judicial authorities in order to be able to obtain certain types of data. Parties may wish to limit the disclosure of this data for law enforcement purposes to situations where a production order to disclose such information has been issued by judicial authorities. The proportionality principle also provides some flexibility in relation to the application of the measure, for instance in many States in order to exclude its application in minor cases.

175. A further consideration for Parties is the possible inclusion of measures concerning confidentiality. The provision does not contain a specific reference to confidentiality, in order to maintain the parallel with the non-electronic world where confidentiality is not imposed in general regarding production orders. However, in the electronic, particularly on-line, world a production order can sometimes be employed as a preliminary measure in the investigation, preceding further measures such as search and seizure or real-time interception of other data. Confidentiality could be essential for the success of the investigation.

176. With respect to the modalities of production, Parties could establish obligations that the specified computer data or subscriber information must be produced in the manner specified in the order. This could include reference to a time period within which disclosure must be made, or to form, such as that the data or information be provided in "plain text", on-line or on a paper print-out or on a diskette.

177. "Subscriber information" is defined in paragraph 3. In principle, it refers to any information held by the administration of a service provider relating to a subscriber to its services. Subscriber information may be contained in the form of computer data or any other form, such as paper records. As subscriber information includes forms of data other than just computer data, a special provision has been included in the article to address this type of information. "Subscriber" is intended to include a broad range of service provider clients, from persons holding paid subscriptions, to those paying on a per-use basis, to those receiving free services. It also includes information concerning persons entitled to use the subscriber's account.

178. In the course of a criminal investigation, subscriber information may be needed primarily in two specific situations. First, subscriber information is needed to identify which services and related technical measures have been used or are being used by a subscriber, such as the type of telephone service used (e.g., mobile), type of other associated services used (e.g., call forwarding, voice-mail, etc.), telephone number or other technical address (e.g., e-mail address). Second, when a technical address is known, subscriber information is needed in order to assist in establishing the identity of the person concerned. Other subscriber information, such as commercial information about billing and payment records of the subscriber may also be relevant to criminal investigations, especially where the crime under investigation involves computer fraud or other economic crimes.

179. Therefore, subscriber information includes various types of information about the use of a service and the user of that service. With respect to the use of the service, the term means any information, other than traffic or content data, by which can be established the type of communication service used, the technical provisions related thereto, and the period of time during which the person subscribed to the service. The term 'technical provisions' includes all measures taken to enable a subscriber to enjoy the communication service offered. Such provisions include the reservation of a technical number or address (telephone number, web site address or domain name, e-mail address, etc.), as well as the provision and registration of communication equipment used by the subscriber, such as telephone devices, call centers or LANs (local area networks).

180. Subscriber information is not limited to information directly related to the use of the communication service. It also means any information, other than traffic data or content data, by which can be established the user's identity, postal or geographic address, telephone and other access number, and billing and payment information, which is available on the basis of the service agreement or arrangement between the subscriber and the service provider. It also means any other information, other than traffic data or content data, concerning the site or location where the communication equipment is installed, which is available on the basis of the service agreement or arrangement. This latter information may only be relevant in practical terms where the equipment is not portable, but knowledge as to the portability or purported location of the equipment (on the basis of the information provided according to the service agreement or arrangement) can be instrumental to an investigation.

181. However, this article should not be understood as to impose an obligation on service providers to keep records of their subscribers, nor would it require service providers to ensure the correctness of such information. Thus, a service provider is not obliged to register identity information of users of so-called prepaid cards for mobile telephone services. Nor is it obliged to verify the identity of the subscribers or to resist the use of pseudonyms by users of its services.

182. As the powers and procedures in this Section are for the purpose of specific criminal investigations or proceedings (Article 14), production orders are to be used in individual cases concerning, usually, particular subscribers. For example, on the basis of the provision of a particular name mentioned in the production order, a particular associated telephone number or e-mail address may be requested. On the basis of a particular telephone number or e-mail address, the name and address of the subscriber concerned may be ordered. The provision does not authorise Parties to issue a legal order to disclose indiscriminate amounts of the service provider's subscriber information about groups of subscribers e.g. for the purpose of data-mining.

183. The reference to a "service agreement or arrangement" should be interpreted in a broad sense and includes any kind of relationship on the basis of which a client uses the provider's services.

Title 4 – Search and seizure of stored computer data

Search and seizure of stored computer data (Article 19)

184. This article aims at modernising and harmonising domestic laws on search and seizure of stored computer data for the purposes of obtaining evidence with respect to specific criminal investigations or proceedings. Any domestic criminal procedural law includes powers for search and seizure of tangible objects. However, in a number of jurisdictions stored computer data *per se* will not be considered as a tangible object and therefore cannot be secured on behalf of criminal investigations and proceedings in a parallel manner as tangible objects, other than by securing the data medium upon which it is stored. The aim of Article 19 of this Convention is to establish an equivalent power relating to stored data.

185. In the traditional search environment concerning documents or records, a search involves gathering evidence that has been recorded or registered in the past in tangible form, such as ink on paper. The

investigators search or inspect such recorded data, and seize or physically take away the tangible record. The gathering of data takes place during the period of the search and in respect of data that exists at that time. The precondition for obtaining legal authority to undertake a search is the existence of grounds to believe, as prescribed by domestic law and human rights safeguards, that such data exists in a particular location and will afford evidence of a specific criminal offence.

186. With respect to the search for evidence, in particular computer data, in the new technological environment, many of the characteristics of a traditional search remain. For example, the gathering of the data occurs during the period of the search and in respect of data that exists at that time. The preconditions for obtaining legal authority to undertake a search remain the same. The degree of belief required for obtaining legal authorisation to search is not any different whether the data is in tangible form or in electronic form. Likewise, the belief and the search are in respect of data that already exists and that will afford evidence of a specific offence.

187. However, with respect to the search of computer data, additional procedural provisions are necessary in order to ensure that computer data can be obtained in a manner that is equally effective as a search and seizure of a tangible data carrier. There are several reasons for this: first, the data is in intangible form, such as in an electromagnetic form. Second, while the data may be read with the use of computer equipment, it cannot be seized and taken away in the same sense as can a paper record. The physical medium on which the intangible data is stored (e.g., the computer hard-drive or a diskette) must be seized and taken away, or a copy of the data must be made in either tangible form (e.g., computer print-out) or intangible form, on a physical medium (e.g., diskette), before the tangible medium containing the copy can be seized and taken away. In the latter two situations, where such copies of the data are made, a copy of the data remains in the computer system or storage device. Domestic law should provide for a power to make such copies. Third, due to the connectivity of computer systems, data may not be stored in the particular computer that is searched, but such data may be readily accessible to that system. It could be stored in an associated data storage device that is connected directly to the computer, or connected to the computer indirectly through communication systems, such as the Internet. This may or may not require new laws to permit an extension of the search to where the data is actually stored (or the retrieval of the data from that site to the computer being searched), or the use traditional search powers in a more co-ordinated and expeditious manner at both locations.

188. Paragraph 1 requires Parties to empower law enforcement authorities to access and search computer data, which is contained either within a computer system or part of it (such as a connected data storage device), or on an independent data storage medium (such as a CD-ROM or diskette). As the definition of "computer system" in article 1 refers to "any device or a group of inter-connected or related devices", paragraph 1 concerns the search of a computer system and its related components that can be considered together as forming one distinct computer system (e.g., a PC together with a printer and related storage devices, or a local area network). Sometimes data that is physically stored in another system or storage device can be legally accessed through the searched computer system by establishing a connection with other distinct computer systems. This situation, involving linkages with other computer systems by means of telecommunication networks within the same territory (e.g., wide area network or Internet), is addressed at paragraph 2.

189. Although search and seizure of a "computer-data storage medium in which computer data may be stored" (paragraph 1 (b)) may be undertaken by use of traditional search powers, often the execution of a computer search requires both the search of the computer system and any related computer-data storage medium (e.g., diskettes) in the immediate vicinity of the computer system. Due to this relationship, a comprehensive legal authority is provided in paragraph 1 to encompass both situations.

190. Article 19 applies to stored computer data. In this respect, the question arises whether an unopened e-mail message waiting in the mailbox of an ISP until the addressee will download it to his or her computer system, has to be considered as stored computer data or as data in transfer. Under the law of some Parties, that e-mail message is part of a communication and therefore its content can only be obtained by applying the power of interception, whereas other legal systems consider such message as stored data to which article 19 applies. Therefore, Parties should review their laws with respect to this issue to determine what is appropriate within their domestic legal systems.

191. Reference is made to the term 'search or similarly access'. The use of the traditional word 'search' conveys the idea of the exercise of coercive power by the State, and indicates that the power referred to in this article is analogous to traditional search. 'Search' means to seek, read, inspect or review data. It includes the notions of searching for data and searching of (examining) data. On the other hand, the word 'access' has a neutral meaning, but it reflects more accurately computer terminology. Both terms are used in order to marry the traditional concepts with modern terminology.

192. The reference to 'in its territory' is a reminder that this provision, as all the articles in this Section, concern only measures that are required to be taken at the national level.

193. Paragraph 2 allows the investigating authorities to extend their search or similar access to another computer system or part of it if they have grounds to believe that the data required is stored in that other computer system. The other computer system or part of it must, however, also be 'in its territory'.

194. The Convention does not prescribe how an extension of a search is to be permitted or undertaken. This is left to domestic law. Some examples of possible conditions are: empowering the judicial or other authority which authorised the computer search of a specific computer system, to authorise the extension of the search or similar access to a connected system if he or she has grounds to believe (to the degree required by national law and human rights safeguards) that the connected computer system may contain the specific data that is being sought; empowering the investigative authorities to extend an authorised search or similar access of a specific computer system to a connected computer system where there are similar grounds to believe that the specific data being sought is stored in the other computer system; or exercising search or similar access powers at both locations in a co-ordinated and expeditious manner. In all cases the data to be searched must be lawfully accessible from or available to the initial computer system.

195. This article does not address 'transborder search and seizure', whereby States could search and seize data in the territory of other States without having to go through the usual channels of mutual legal assistance. This issue is discussed below at the Chapter on international co-operation.

196. Paragraph 3 addresses the issues of empowering competent authorities to seize or similarly secure computer data that has been searched or similarly accessed under paragraphs 1 or 2. This includes the power of seizure of computer hardware and computer-data storage media. In certain cases, for instance when data is stored in unique operating systems such that it cannot be copied, it is unavoidable that the data carrier as a whole has to be seized. This may also be necessary when the data carrier has to be examined in order to retrieve from it older data which was overwritten but which has, nevertheless, left traces on the data carrier.

197. In this Convention, 'seize' means to take away the physical medium upon which data or information is recorded, or to make and retain a copy of such data or information. 'Seize' includes the use or seizure of programmes needed to access the data being seized. As well as using the traditional term 'seize', the term 'similarly secure' is included to reflect other means by which intangible data is removed, rendered inaccessible or its control is otherwise taken over in the computer environment. Since the measures relate to stored intangible data, additional measures are required by competent authorities to secure the data; that is, 'maintain the integrity of the data', or maintain the 'chain of custody' of the data, meaning that the data which is copied or removed be retained in the State in which they were found at the time of the seizure and remain unchanged during the time of criminal proceedings. The term refers to taking control over or the taking away of data.

198. The rendering inaccessible of data can include encrypting the data or otherwise technologically denying anyone access to that data. This measure could usefully be applied in situations where danger or social harm is involved, such as virus programs or instructions on how to make viruses or bombs, or where the data or their content are illegal, such as child pornography. The term 'removal' is intended to express the idea that while the data is removed or rendered inaccessible, it is not destroyed, but continues to exist. The suspect is temporarily deprived of the data, but it can be returned following the outcome of the criminal investigation or proceedings.

199. Thus, seize or similarly secure data has two functions: 1) to gather evidence, such as by copying the data, or 2) to confiscate data, such as by copying the data and subsequently rendering the original version of the data inaccessible or by removing it. The seizure does not imply a final deletion of the seized data.

200. Paragraph 4 introduces a coercive measure to facilitate the search and seizure of computer data. It addresses the practical problem that it may be difficult to access and identify the data sought as evidence, given the quantity of data that can be processed and stored, the deployment of security measures, as well as the nature of computer operations. It recognises that system administrators, who have particular knowledge of the computer system, may need to be consulted concerning the technical modalities about how best the search should be conducted. This provision, therefore, allows law enforcement to compel a system administrator to assist, as is reasonable, the undertaking of the search and seizure.

201. This power is not only of benefit to the investigating authorities. Without such co-operation, investigative authorities could remain on the searched premises and prevent access to the computer system for long periods of time while undertaking the search. This could be an economic burden on legitimate businesses or customers and subscribers that are denied access to data during this time. A means to order the co-operation

of knowledgeable persons would help in making searches more effective and cost efficient, both for law enforcement and innocent individuals affected. Legally compelling a system administrator to assist may also relieve the administrator of any contractual or other obligations not to disclose the data.

202. The information that can be ordered to be provided is that which is necessary to enable the undertaking of the search and seizure, or the similarly accessing or securing. The provision of this information, however, is restricted to that which is "reasonable". In some circumstances, reasonable provision may include disclosing a password or other security measure to the investigating authorities. However, in other circumstances, this may not be reasonable; for example, where the disclosure of the password or other security measure would unreasonably threaten the privacy of other users or other data that is not authorised to be searched. In such case, the provision of the "necessary information" could be the disclosure, in a form that is intelligible and readable, of the actual data that is being sought by the competent authorities.

203. Under paragraph 5 of this article, the measures are subject to conditions and safeguards provided for under domestic law on the basis of Article 15 of this Convention. Such conditions may include provisions relating to the engagement and financial compensation of witnesses and experts.

204. The drafters discussed further in the frame of paragraph 5 if interested parties should be notified of the undertaking of a search procedure In the on-line world it may be less apparent that data has been searched and seized (copied) than that a seizure in the off-line world took place, where seized objects will be physically missing. The laws of some Parties do not provide for an obligation to notify in the case of a traditional search. For the Convention to require notification in respect of a computer search would create a discrepancy in the laws of these Parties. On the other hand, some Parties may consider notification as an essential feature of the measure, in order to maintain the distinction between computer search of stored data (which is generally not intended to be a surreptitious measure) and interception of flowing data (which is a surreptitious measure, see Articles 20 and 21). The issue of notification, therefore, is left to be determined by domestic law. If Parties consider a system of mandatory notification of persons concerned, it should be borne in mind that such notification may prejudice the investigation. If such a risk exists, postponement of the notification should be considered.

Title 5 – Real-time collection of computer data

205. Articles 20 and 21 provide for the real-time collection of traffic data and the real-time interception of content data associated with specified communications transmitted by a computer system. The provisions address the real-time collection and real-time interception of such data by competent authorities, as well as their collection or interception by service providers. Obligations of confidentiality are also addressed.

206. Interception of telecommunications usually refers to traditional telecommunications networks. These networks can include cable infrastructures, whether wire or optical cable, as well as inter-connections with wireless networks, including mobile telephone systems and microwave transmission systems. Today, mobile communications are facilitated also by a system of special satellite networks. Computer networks may also consist of an independent fixed cable infrastructure, but are more frequently operated as a virtual network by connections made through telecommunication infrastructures, thus permitting the creation of computer networks or linkages of networks that are global in nature. The distinction between telecommunications and computer communications, and the distinctiveness between their infrastructures, is blurring with the convergence of telecommunication and information technologies. Thus, the definition of 'computer system' in article 1 does not restrict the manner by which the devices or group of devices may be inter-connected. Articles 20 and 21, therefore, apply to specified communications transmitted by means of a computer system, which could include transmission of the communication through telecommunication networks before it is received by another computer system.

207. Articles 20 and 21 do not make a distinction between a publicly or a privately owned telecommunication or computer system or to the use of systems and communication services offered to the public or to closed user groups or private parties. The definition of 'service provider' in Article 1 refers to public and private entities that provide to users of their services the ability to communicate by means of a computer system.

208. This Title governs the collection of evidence contained in currently generated communications, which are collected at the time of the communication (i.e., 'real time'). The data are intangible in form (e.g., in the form of transmissions of voice or electronic impulses). The flow of the data is not significantly interfered with by the collection, and the communication reaches its intended recipient. Instead of a physical seizure of the data, a recording (i.e., a copy) is made of the data being communicated. The collection of this evidence takes place during a certain period of time. A legal authority to permit the collection is sought in respect of a future event (i.e., a future transmission of data).

209. The type of data that can be collected is of two types: traffic data and content data. 'Traffic data' is defined in Article 1 d to mean any computer data relating to a communication made by means of a computer system, which is generated by the computer system and which formed a part in the chain of communication, indicating the communication's origin, destination, route, time, date, size and duration or the type of service. 'Content data' is not defined in the Convention but refers to the communication content of the communication; i.e., the meaning or purport of the communication, or the message or information being conveyed by the communication (other than traffic data).

210. In many States, a distinction is made between the real-time interception of content data and real-time collection of traffic data in terms of both the legal prerequisites required to authorise such investigative measure and the offences in respect of which this measure can be employed. While recognising that both types of data may have associated privacy interests, many States consider that the privacy interests in respect of content data are greater due to the nature of the communication content or message. Greater limitations may be imposed with respect to the real-time collection of content data than traffic data. To assist in recognising this distinction for these States, the Convention, while operationally acknowledging that the data is collected or recorded in both situations, refers normatively in the titles of the articles to the collection of traffic data as 'real-time collection' and the collection of content data as 'real-time interception'.

211. In some States existing legislation makes no distinction between the collection of traffic data and the interception of content data, either because no distinction has been made in the law regarding differences in privacy interests or the technological collection techniques for both measures are very similar. Thus, the legal prerequisites required to authorise the undertaking of the measures, and the offences in respect of which the measures can be employed, are the same. This situation is also recognised in the Convention by the common operational use of the term 'collect or record' in the actual text of both Articles 20 and 21.

212. With respect to the real-time interception of content data, the law often prescribes that the measure is only available in relation to the investigation of serious offences or categories of serious offences. These offences are identified in domestic law as serious for this purpose often by being named in a list of applicable offences or by being included in this category by reference to a certain maximum sentence of incarceration that is applicable to the offence. Therefore, with respect to the interception of content data, Article 21 specifically provides that Parties are only required to establish the measure 'in relation to a range of serious offences to be determined by domestic law'.

213. Article 20, concerning the collection of traffic data, on the other hand, is not so limited and in principle applies to any criminal offence covered by the Convention. However, Article 14, paragraph 3, provides that a Party may reserve the right to apply the measure only to offences or categories of offences specified in the reservation, provided that the range of offences or categories of offences is not more restricted than the range of offences to which it applies the measure of interception of content data. Nevertheless, where such a reservation is taken, the Party shall consider restricting such reservation so as to enable the broadest range of application of the measure of collection of traffic data.

214. For some States, the offences established in the Convention would normally not be considered serious enough to permit interception of content data or, in some cases, even the collection of traffic data. Nevertheless, such techniques are often crucial for the investigation of some of the offences established in the Convention, such as those involving illegal access to computer systems, and distribution of viruses and child pornography. The source of the intrusion or distribution, for example, cannot be determined in some cases without real-time collection of traffic data. In some cases, the nature of the communication cannot be discovered without real-time interception of content data. These offences, by their nature or the means of transmission, involve the use of computer technologies. The use of technological means should, therefore, be permitted to investigate these offences. However, due to the sensitivities surrounding the issue of interception of content data, the Convention leaves the scope of this measure to be determined by domestic law. As some countries legally assimilate the collection of traffic data with the interception of content data, a reservation possibility is permitted to restrict the applicability of the former measure, but not to an extent greater than a Party restricts the measure of real-time interception of content data. Nevertheless, Parties should consider applying the two measures to the offences established by the Convention in Section 1 of Chapter II, in order to provide an effective means for the investigation of these computer offences and computer-related offences.

215. The conditions and safeguards regarding the powers and procedures related to real-time interception of content data and real-time collection of traffic data are subject to Articles 14 and 15. As interception of content data is a very intrusive measure on private life, stringent safeguards are required to ensure an appropriate balance between the interests of justice and the fundamental rights of the individual. In the area of interception, the present Convention itself does not set out specific safeguards other than limiting authorisation

of interception of content data to investigations into serious criminal offences as defined in domestic law. Nevertheless, the following important conditions and safeguards in this area, applied in domestic laws, are: judicial or other independent supervision; specificity as to the communications or persons to be intercepted; necessity, subsidiarity and proportionality (e.g. legal predicates justifying the taking of the measure; other less intrusive measures not effective); limitation on the duration of interception; right of redress. Many of these safeguards reflect the European Convention on Human Rights and its subsequent case-law (see judgements in Klass[5], Kruslin[6], Huvig[7], Malone[8], Halford[9], Lambert[10] cases). Some of these safeguards are applicable also to the collection of traffic data in real-time.

Real-time collection of traffic data (Article 20)

216. Often, historical traffic data may no longer be available or it may not be relevant as the intruder has changed the route of communication. Therefore, the real-time collection of traffic data is an important investigative measure. Article 20 addresses the subject of real-time collection and recording of traffic data for the purpose of specific criminal investigations or proceedings.

217. Traditionally, the collection of traffic data in respect of telecommunications (e.g., telephone conversations) has been a useful investigative tool to determine the source or destination (e.g., telephone numbers) and related data (e.g., time, date and duration) of various types of illegal communications (e.g., criminal threats and harassment, criminal conspiracy, fraudulent misrepresentations) and of communications affording evidence of past or future crimes (e.g., drug trafficking, murder, economic crimes, etc.).

218. Computer communications can constitute or afford evidence of the same types of criminality. However, given that computer technology is capable of transmitting vast quantities of data, including written text, visual images and sound, it also has greater potential for committing crimes involving distribution of illegal content (e.g., child pornography). Likewise, as computers can store vast quantities of data, often of a private nature, the potential for harm, whether economic, social or personal, can be significant if the integrity of this data is interfered with. Furthermore, as the science of computer technology is founded upon the processing of data, both as an end product and as part of its operational function (e.g., execution of computer programs), any interference with this data can have disastrous effects on the proper operation of computer systems. When an illegal distribution of child pornography, illegal access to a computer system or interference with the proper functioning of the computer system or the integrity of data, is committed, particularly from a distance such as through the Internet, it is necessary and crucial to trace the route of the communications back from the victim to the perpetrator. Therefore, the ability to collect traffic data in respect of computer communications is just as, if not more, important as it is in respect of purely traditional telecommunications. This investigative technique can correlate the time, date and source and destination of the suspect's communications with the time of the intrusions into the systems of victims, identify other victims or show links with associates.

219. Under this article, the traffic data concerned must be associated with specified communications in the territory of the Party. The specified 'communications' are in the plural, as traffic data in respect of several communications may need to be collected in order to determine the human source or destination (for example, in a household where several different persons have the use of the same telecommunications facilities, it may be necessary to correlate several communications with the individuals' opportunity to use the computer system). The communications in respect of which the traffic data may be collected or recorded, however, must be specified. Thus, the Convention does not require or authorise the general or indiscriminate surveillance and collection of large amounts of traffic data. It does not authorise the situation of 'fishing expeditions' where criminal activities are hopefully sought to be discovered, as opposed to specific instances of criminality being investigated. The judicial or other order authorising the collection must specify the communications to which the collection of traffic data relates.

220. Subject to paragraph 2, Parties are obliged, under paragraph 1(a) to ensure that their competent authorities have the capacity to collect or record traffic data by technical means. The article does not specify technologically how the collection is to be undertaken, and no obligations in technical terms are defined.

5. ECHR Judgment in the case of Klass and others v. Germany, A28, 06/09/1978.
6. ECHR Judgment in the case of Kruslin v. France, 176-A, 24/04/1990.
7. ECHR Judgment in the case of Huvig v. France, 176-B, 24/04/1990.
8. ECHR Judgment in the case of Malone v. United Kingdom, A82, 02/08/1984.
9. ECHR Judgment in the case of Halford v. United Kingdom, Reports 1997 – III, 25/06/1997.
10. ECHR Judgment in the case of Lambert v. France, Reports 1998 – V, 24/08/1998.

221. In addition, under paragraph 1(b), Parties are obliged to ensure that their competent authorities have the power to compel a service provider to collect or record traffic data or to co-operate and assist the competent authorities in the collection or recording of such data. This obligation regarding service providers is applicable only to the extent that the collection or recording, or co-operation and assistance, is within the existing technical capability of the service provider. The article does not obligate service providers to ensure that they have the technical capability to undertake collections, recordings, co-operation or assistance. It does not require them to acquire or develop new equipment, hire expert support or engage in costly re-configuration of their systems. However, if their systems and personnel have the existing technical capability to provide such collection, recording, co-operation or assistance, the article would require them to take the necessary measures to engage such capability. For example, the system may be configured in such a manner, or computer programs may already be possessed by the service provider, which would permit such measures to be taken, but they are not ordinarily executed or used in the normal course of the service provider's operation. The article would require the service provider to engage or turn-on these features, as required by law.

222. As this is a measure to be carried out at national level, the measures are applied to the collection or recording of specified communications in the territory of the Party. Thus, in practical terms, the obligations are generally applicable where the service provider has some physical infrastructure or equipment on that territory capable of undertaking the measures, although this need not be the location of its main operations or headquarters. For the purposes of this Convention, it is understood that a communication is in a Party's territory if one of the communicating parties (human beings or computers) is located in the territory or if the computer or telecommunication equipment through which the communication passes is located on the territory.

223. In general, the two possibilities for collecting traffic data in paragraph 1(a) and (b) are not alternatives. Except as provided in paragraph 2, a Party must ensure that both measures can be carried out. This is necessary because if a service provider does not have the technical ability to assume the collection or recording of traffic data (1(b)), then a Party must have the possibility for its law enforcement authorities to undertake themselves the task (1(a)). Likewise, an obligation under paragraph 1(b)(ii) to co-operate and assist the competent authorities in the collection or recording of traffic data is senseless if the competent authorities are not empowered to collect or record themselves the traffic data. Additionally, in the situation of some local area networks (LANs), where no service provider may be involved, the only way for collection or recording to be carried out would be for the investigating authorities to do it themselves. Both measures in paragraphs 1 (a) and (b) do not have to be used each time, but the availability of both methods is required by the article.

224. This dual obligation, however, posed difficulties for certain States in which the law enforcement authorities were only able to intercept data in telecommunication systems through the assistance of a service provider, or not surreptitiously without at least the knowledge of the service provider. For this reason, paragraph 2 accommodates such a situation. Where a Party, due to the 'established principles of its domestic legal system', cannot adopt the measures referred to in paragraph 1 (a), it may instead adopt a different approach, such as only compelling service providers to provide the necessary technical facilities, to ensure the real-time collection of traffic data by law enforcement authorities. In such case, all of the other limitations regarding territory, specificity of communications and use of technical means still apply.

225. Like real-time interception of content data, real-time collection of traffic data is only effective if undertaken without the knowledge of the persons being investigated. Interception is surreptitious and must be carried out in such a manner that the communicating parties will not perceive the operation. Service providers and their employees knowing about the interception must, therefore, be under an obligation of secrecy in order for the procedure to be undertaken effectively.

226. Paragraph 3 obligates Parties to adopt such legislative or other measures as may be necessary to oblige a service provider to keep confidential the fact of and any information about the execution of any of the measures provided in this article concerning the real-time collection of traffic data. This provision not only ensures the confidentiality of the investigation, but it also relieves the service provider of any contractual or other legal obligations to notify subscribers that data about them is being collected. Paragraph 3 may be effected by the creation of explicit obligations in the law. On the other hand, a Party may be able to ensure the confidentiality of the measure on the basis of other domestic legal provisions, such as the power to prosecute for obstruction of justice those persons who aid the criminals by telling them about the measure. Although a specific confidentiality requirement (with effective sanction in case of a breach) is a preferred procedure, the use of obstruction of justice offences can be an alternative means to prevent inappropriate disclosure and, therefore, also suffices to implement this paragraph. Where explicit obligations of confidentiality are created, these shall be subject to the conditions and safeguards as provided in Articles 14 and 15.

These safeguards or conditions should impose reasonable time periods for the duration of the obligation, given the surreptitious nature of the investigative measure.

227. As noted above, the privacy interest is generally considered to be less with respect to the collection of traffic data than interception of content data. Traffic data about time, duration and size of communication reveals little personal information about a person or his or her thoughts. However, a stronger privacy issue may exist in regard to data about the source or destination of a communication (e.g. the visited websites). The collection of this data may, in some situations, permit the compilation of a profile of a person's interests, associates and social context. Accordingly, Parties should bear such considerations in mind when establishing the appropriate safeguards and legal prerequisites for undertaking such measures, pursuant to Articles 14 and 15.

Interception of content data (Article 21)

228. Traditionally, the collection of content data in respect of telecommunications (e.g., telephone conversations) has been a useful investigative tool to determine that the communication is of an illegal nature (e.g., the communication constitutes a criminal threat or harassment, a criminal conspiracy or fraudulent misrepresentations) and to collect evidence of past or future crimes (e.g., drug trafficking, murder, economic crimes, etc.). Computer communications can constitute or afford evidence of the same types of criminality. However, given that computer technology is capable of transmitting vast quantities of data, including written text, visual images and sound, it has greater potential for committing crimes involving distribution of illegal content (e.g., child pornography). Many of the computer crimes involve the transmission or communication of data as part of their commission; for example, communications sent to effect an illegal access of a computer system or the distribution of computer viruses. It is not possible to determine in real-time the harmful and illegal nature of these communications without intercepting the content of the message. Without the ability to determine and prevent the occurrence of criminality in progress, law enforcement would merely be left with investigating past and completed crimes where the damage has already occurred. Therefore, the real-time interception of content data of computer communications is just as, if not more, important as is the real-time interception of telecommunications.

229. 'Content data' refers to the communication content of the communication; i.e., the meaning or purport of the communication, or the message or information being conveyed by the communication. It is everything transmitted as part of the communication that is not traffic data.

230. Most of the elements of this article are identical to those of Article 20. Therefore, the comments, above, concerning the collection or recording of traffic data, obligations to co-operate and assist, and obligations of confidentiality apply equally to the interception of content data. Due to the higher privacy interest associated with content data, the investigative measure is restricted to 'a range of serious offences to be determined by domestic law'.

231. Also, as set forth in the comments above on Article 20, the conditions and safeguards applicable to real-time interception of content data may be more stringent than those applicable to the real-time collection of traffic data, or to the search and seizure or similar accessing or securing of stored data.

Section 3 – Jurisdiction

Jurisdiction (Article 22)

232. This Article establishes a series of criteria under which Contracting Parties are obliged to establish jurisdiction over the criminal offences enumerated in Articles 2-11 of the Convention.

233. Paragraph 1 *littera a* is based upon the principle of territoriality. Each Party is required to punish the commission of crimes established in this Convention that are committed in its territory. For example, a Party would assert territorial jurisdiction if both the person attacking a computer system and the victim system are located within its territory, and where the computer system attacked is within its territory, even if the attacker is not.

234. Consideration was given to including a provision requiring each Party to establish jurisdiction over offences involving satellites registered in its name. The drafters decided that such a provision was unnecessary since unlawful communications involving satellites will invariably originate from and/or be received on earth. As such, one of the bases for a Party's jurisdiction set forth in paragraph 1(a) – (c) will be available if the transmission originates or terminates in one of the locations specified therein. Further, to the extent the offence involving a satellite communication is committed by a Party's national outside the territorial jurisdiction of any State, there will be a jurisdictional basis under paragraph 1(d). Finally, the drafters questioned whether registration was an appropriate basis for asserting criminal jurisdiction since in many cases there

would be no meaningful nexus between the offence committed and the State of registry because a satellite serves as a mere conduit for a transmission.

235. Paragraph 1, *litterae b* and *c* are based upon a variant of the principle of territoriality. These *litterae* require each Party to establish criminal jurisdiction over offences committed upon ships flying its flag or aircraft registered under its laws. This obligation is already implemented as a general matter in the laws of many States, since such ships and aircraft are frequently considered to be an extension of the territory of the State. This type of jurisdiction is most useful where the ship or aircraft is not located in its territory at the time of the commission of the crime, as a result of which Paragraph 1, *littera a* would not be available as a basis to assert jurisdiction. If the crime is committed on a ship or aircraft that is beyond the territory of the flag Party, there may be no other State that would be able to exercise jurisdiction barring this requirement. In addition, if a crime is committed aboard a ship or aircraft which is merely passing through the waters or airspace of another State, the latter State may face significant practical impediments to the exercise of its jurisdiction, and it is therefore useful for the State of registry to also have jurisdiction.

236. Paragraph 1, *littera d* is based upon the principle of nationality. The nationality theory is most frequently applied by States applying the civil law tradition. It provides that nationals of a State are obliged to comply with the domestic law even when they are outside its territory. Under *littera d*, if a national commits an offence abroad, the Party is obliged to have the ability to prosecute it if the conduct is also an offence under the law of the State in which it was committed or the conduct has taken place outside the territorial jurisdiction of any State.

237. Paragraph 2 allows Parties to enter a reservation to the jurisdiction grounds laid down in paragraph 1, *litterae b, c*, and *d*. However, no reservation is permitted with respect to the establishment of territorial jurisdiction under *littera a*, or with respect to the obligation to establish jurisdiction in cases falling under the principle of *"aut dedere aut judicare"* (extradite or prosecute) under paragraph 3, i.e. where that Party has refused to extradite the alleged offender on the basis of his nationality and the offender is present on its territory. Jurisdiction established on the basis of paragraph 3 is necessary to ensure that those Parties that refuse to extradite a national have the legal ability to undertake investigations and proceedings domestically instead, if sought by the Party that requested extradition pursuant to the requirements of "Extradition", Article 24, paragraph 6 of this Convention.

238. The bases of jurisdiction set forth in paragraph 1 are not the exclusive. Paragraph 4 of this Article permits the Parties to establish, in conformity with their domestic law, other types of criminal jurisdiction as well.

239. In the case of crimes committed by use of computer systems, there will be occasions in which more than one Party has jurisdiction over some or all of the participants in the crime. For example, many virus attacks, frauds and copyright violations committed through use of the Internet target victims located in many States. In order to avoid duplication of effort, unnecessary inconvenience for witnesses, or competition among law enforcement officials of the States concerned, or to otherwise facilitate the efficiency or fairness of the proceedings, the affected Parties are to consult in order to determine the proper venue for prosecution. In some cases, it will be most effective for the States concerned to choose a single venue for prosecution; in others, it may be best for one State to prosecute some participants, while one or more other States pursue others. Either result is permitted under this paragraph. Finally, the obligation to consult is not absolute, but is to take place "where appropriate." Thus, for example, if one of the Parties knows that consultation is not necessary (e.g., it has received confirmation that the other Party is not planning to take action), or if a Party is of the view that consultation may impair its investigation or proceeding, it may delay or decline consultation.

CHAPTER III – INTERNATIONAL CO-OPERATION

240. Chapter III contains a number of provisions relating to extradition and mutual legal assistance among the Parties.

Section 1 – General principles

Title 1 – General principles relating to international co-operation

General principles relating to international co-operation (Article 23)

241. Article 23 sets forth three general principles with respect to international co-operation under Chapter III.

242. Initially, the article makes clear that international co-operation is to be provided among Parties "to the widest extent possible." This principle requires Parties to provide extensive co-operation to each other, and to minimise impediments to the smooth and rapid flow of information and evidence internationally.

243. Second, the general scope of the obligation to co-operate is set forth in Article 23: co-operation is to be extended to all criminal offences related to computer systems and data (i.e. the offences covered by Article 14, paragraph 2, litterae a-b), as well as to the collection of evidence in electronic form of a criminal offence. This means that either where the crime is committed by use of a computer system, or where an ordinary crime not committed by use of a computer system (e.g., a murder) involves electronic evidence, the terms of Chapter III are applicable. However, it should be noted that Articles 24 (Extradition), 33 (Mutual assistance regarding the real time collection of traffic data) and 34 (Mutual assistance regarding the interception of content data) permit the Parties to provide for a different scope of application of these measures.

244. Finally, co-operation is to be carried out both "in accordance with the provisions of this Chapter" and "through application of relevant international agreements on international co-operation in criminal matters, arrangements agreed to on the basis of uniform or reciprocal legislation, and domestic laws." The latter clause establishes the general principle that the provisions of Chapter III do not supersede the provisions of international agreements on mutual legal assistance and extradition, reciprocal arrangements as between the parties thereto (described in greater detail in the discussion of Article 27 below), or relevant provisions of domestic law pertaining to international co-operation. This basic principle is explicitly reinforced in Articles 24 (Extradition), 25 (General principles relating to mutual assistance), 26 (Spontaneous information), 27 (Procedures pertaining to mutual assistance requests in the absence of applicable international agreements), 28 (Confidentiality and limitation on use), 31 (Mutual assistance regarding accessing of stored computer data), 33 (Mutual assistance regarding the real-time collection of traffic data) and 34 (Mutual assistance regarding the interception of content data).

Title 2 – Principles relating to extradition

Extradition (Article 24)

245. Paragraph 1 specifies that the obligation to extradite applies only to offences established in accordance with Articles 2-11 of the Convention that are punishable under the laws of both Parties concerned by deprivation of liberty for a maximum period of at least one year or by a more severe penalty. The drafters decided to insert a threshold penalty because, under the Convention, Parties may punish some of the offences with a relatively short maximum period of incarceration (e.g., Article 2 - illegal access – and Article 4 – data interference). Given this, the drafters did not believe it appropriate to require that each of the offences established in Articles 2-11 be considered per se extraditable. Accordingly, agreement was reached on a general requirement that an offence is to be considered extraditable if – as in Article 2 of the European Convention on Extradition (ETS N° 24) – the maximum punishment that could be imposed for the offence for which extradition was sought was at least one year's imprisonment. The determination of whether an offence is extraditable does not hinge on the actual penalty imposed in the particular case at hand, but instead on the maximum period that may legally be imposed for a violation of the offence for which extradition is sought.

246. At the same time, in accordance with the general principle that international co-operation under Chapter III should be carried out pursuant to instruments in force between the Parties, Paragraph 1 also provides that where a treaty on extradition or an arrangement on the basis of uniform or reciprocal legislation is in force between two or more Parties (see description of this term in discussion of Article 27 below) which provides for a different threshold for extradition, the threshold provided for in such treaty or arrangement shall apply. For example, many extradition treaties between European countries and non-European countries provide that an offence is extraditable only if the maximum punishment is greater than one year's imprisonment or there is a more severe penalty. In such cases, international extradition practitioners will continue to apply the normal threshold under their treaty practice in order to determine whether an offence is extraditable. Even under the European Convention on Extradition (ETS N° 24), reservations may specify a different minimum penalty for extradition. Among Parties to that Convention, when extradition is sought from a Party that has entered such a reservation, the penalty provided for in the reservation shall be applied in determining whether the offence is extraditable.

247. Paragraph 2 provides that the offences described in paragraph 1 are to be deemed extraditable offences in any extradition treaty between or among the Parties, and are to be included in future treaties they may negotiate among themselves. This does not mean that extradition must be granted on every occasion on which a request is made but rather that the possibility of granting extradition of persons for such offences must be available. Under paragraph 5, Parties are able to provide for other requirements for extradition.

248. Under paragraph 3, a Party that would not grant extradition, either because it has no extradition treaty with the requesting Party or because the existing treaties would not cover a request made in respect of the

offences established in accordance with this Convention, may use the Convention itself as a basis for surrendering the person requested, although it is not obligated to do so.

249. Where a Party, instead of relying on extradition treaties, utilises a general statutory scheme to carry out extradition, paragraph 4 requires it to include the offences described in Paragraph 1 among those for which extradition is available.

250. Paragraph 5 provides that the requested Party need not extradite if it is not satisfied that all of the terms and conditions provided for by the applicable treaty or law have been fulfilled. It is thus another example of the principle that co-operation shall be carried out pursuant to the terms of applicable international instruments in force between the Parties, reciprocal arrangements, or domestic law. For example, conditions and restrictions set forth in the European Convention on Extradition (ETS N° 24) and its Additional Protocols (ETS N°s 86 and 98) will apply to Parties to those agreements, and extradition may be refused on such bases (e.g., Article 3 of the European Convention on Extradition provides that extradition shall be refused if the offence is considered political in nature, or if the request is considered to have been made for the purpose of prosecuting or punishing a person on account of, *inter alia*, race, religion, nationality or political opinion).

251. Paragraph 6 applies the principle "*aut dedere aut judicare*" (extradite or prosecute). Since many States refuse extradition of their nationals, offenders who are found in the Party of which they are a national may avoid responsibility for a crime committed in another Party unless local authorities are obliged to take action. Under paragraph 6, if another Party has sought extradition of the offender, and extradition has been refused on the grounds that the offender is a national of the requested Party, the requested Party must, upon request of the requesting Party, submit the case to its authorities for the purpose of prosecution. If the Party whose extradition request has been refused does not request submission of the case for local investigation and prosecution, there is no obligation on the requested Party to take action. Moreover, if no extradition request has been made, or if extradition has been denied on grounds other than nationality, this paragraph establishes no obligation on the requested Party to submit the case for domestic prosecution. In addition, paragraph 6 requires the local investigation and prosecution to be carried out with diligence; it must be treated as seriously "as in the case of any other offence of a comparable nature" in the Party submitting the case. That Party shall report the outcome of its investigation and proceedings to the Party that had made the request.

252. In order that each Party know to whom its requests for provisional arrest or extradition should be directed, paragraph 7 requires Parties to communicate to the Secretary General of the Council of Europe the name and address of its authorities responsible for making or receiving requests for extradition or provisional arrest in the absence of a treaty. This provision has been limited to situations in which there is no extradition treaty in force between the Parties concerned because if a bilateral or multilateral extradition treaty is in force between the Parties (such as ETS N° 24), the Parties will know to whom extradition and provisional arrest requests are to be directed without the necessity of a registration requirement. The communication to the Secretary General must be made at the time of signature or when depositing the Party's instrument of ratification, acceptance, approval or accession. It should be noted that designation of an authority does not exclude the possibility of using the diplomatic channel.

Title 3 – General principles relating to mutual assistance

General principles relating to mutual assistance (Article 25)

253. The general principles governing the obligation to provide mutual assistance are set forth in paragraph 1. Co-operation is to be provided "to the widest extent possible." Thus, as in Article 23 ("General principals relating to international co-operation"), mutual assistance is in principle to be extensive, and impediments thereto strictly limited. Second, as in Article 23, the obligation to co-operate applies in principle to both criminal offences related to computer systems and data (i.e. the offences covered by Article 14, paragraph 2, litterae a-b), and to the collection of evidence in electronic form of a criminal offence. It was agreed to impose an obligation to co-operate as to this broad class of crimes because there is the same need for streamlined mechanisms of international co-operation as to both of these categories. However, Articles 34 and 35 permit the Parties to provide for a different scope of application of these measures.

254. Other provisions of this Chapter will clarify that the obligation to provide mutual assistance is generally to be carried out pursuant to the terms of applicable mutual legal assistance treaties, laws and arrangements. Under paragraph 2, each Party is required to have a legal basis to carry out the specific forms of co-operation described in the remainder of the Chapter, if its treaties, laws and arrangements do not already contain such

provisions. The availability of such mechanisms, particularly those in Articles 29 through 35 (Specific provisions – Titles 1, 2, 3), is vital for effective co-operation in computer related criminal matters.

255. Some Parties will not require any implementing legislation in order to apply the provisions referred to in paragraph 2, since provisions of international treaties that establish detailed mutual assistance regimes are considered to be self-executing in nature. It is expected that Parties will either be able to treat these provisions as self executing, already have sufficient flexibility under existing mutual assistance legislation to carry out the mutual assistance measures established under this Chapter, or will be able to rapidly enact any legislation required to do so.

256. Computer data is highly volatile. By a few keystrokes or by operation of automatic programs, it may be deleted, rendering it impossible to trace a crime to its perpetrator or destroying critical proof of guilt. Some forms of computer data are stored for only short periods of time before being deleted. In other cases, significant harm to persons or property may take place if evidence is not gathered rapidly. In such urgent cases, not only the request, but the response as well should be made in an expedited manner. The objective of Paragraph 3 is therefore to facilitate acceleration of the process of obtaining mutual assistance so that critical information or evidence is not lost because it has been deleted before a request for assistance could be prepared, transmitted and responded to. Paragraph 3 does so by (1) empowering the Parties to make urgent requests for co-operation through expedited means of communications, rather than through traditional, much slower transmission of written, sealed documents through diplomatic pouches or mail delivery systems; and (2) requiring the requested Party to use expedited means to respond to requests in such circumstances. Each Party is required to have the ability to apply this measure if its mutual assistance treaties, laws or arrangement do not already so provide. The listing of fax and e-mail is indicative in nature; any other expedited means of communication may be used as would be appropriate in the particular circumstances at hand. As technology advances, further expedited means of communicating will be developed that may be used to request mutual assistance. With respect to the authenticity and security requirement contained in the paragraph, the Parties may decide among themselves how to ensure the authenticity of the communications and whether there is a need for special security protections (including encryption) that may be necessary in a particularly sensitive case. Finally, the paragraph also permits the requested Party to require a formal confirmation sent through traditional channels to follow the expedited transmission, if it so chooses.

257. Paragraph 4 sets forth the principle that mutual assistance is subject to the terms of applicable mutual assistance treaties (MLATs) and domestic laws. These regimes provide safeguards for the rights of persons located in the requested Party that may become the subject of a request for mutual assistance. For example, an intrusive measure, such as search and seizure, is not executed on behalf of a requesting Party, unless the requested Party's fundamental requirements for such measure applicable in a domestic case have been satisfied. Parties also may ensure protection of rights of persons in relation to the items seized and provided through mutual legal assistance.

258. However, paragraph 4 does not apply if "otherwise specifically provided in this Chapter." This clause is designed to signal that the Convention contains several significant exceptions to the general principle. The first such exception has been seen in paragraph 2 of this Article, which obliges each Party to provide for the forms of co-operation set forth in the remaining articles of the Chapter (such as preservation, real time collection of data, search and seizure, and maintenance of a 24/7 network), regardless of whether or not its MLATs, equivalent arrangements or mutual assistance laws currently provide for such measures. Another exception is found in Article 27 which is always to be applied to the execution of requests in lieu of the requested Party's domestic law governing international co-operation in the absence of an MLAT or equivalent arrangement between the requesting and requested Parties. Article 27 provides a system of conditions and grounds for refusal. Another exception, specifically provided for in this paragraph, is that co-operation may not be denied, at least as far as the offences established in Articles 2 – 11 of the Convention are concerned, on the grounds that the requested Party considers the request to involve a "fiscal" offence. Finally, Article 29 is an exception in that it provides that preservation may not be denied on dual criminality grounds, although the possibility of a reservation is provided for in this respect.

259. Paragraph 5 is essentially a definition of dual criminality for purposes of mutual assistance under this Chapter. Where the requested Party is permitted to require dual criminality as a condition to the providing of assistance (for example, where a requested Party has reserved its right to require dual criminality with respect to the preservation of data under Article 29, paragraph 4 "Expedited preservation of stored computer data"), dual criminality shall be deemed present if the conduct underlying the offence for which assistance is sought is also a criminal offence under the requested Party's laws, even if its laws place the offence within a different category of offence or use different terminology in denominating the offence. This provision was

believed necessary in order to ensure that requested Parties do not adopt too rigid a test when applying dual criminality. Given differences in national legal systems, variations in terminology and categorisation of criminal conduct are bound to arise. If the conduct constitutes a criminal violation under both systems, such technical differences should not impede assistance. Rather, in matters in which the dual criminality standard is applicable, it should be applied in a flexible manner that will facilitate the granting of assistance.

Spontaneous information (Article 26)

260. This article is derived from provisions in earlier Council of Europe instruments, such as Article 10 of the Convention on the Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS N° 141) and Article 28 of the Criminal Law Convention on Corruption (ETS N° 173). More and more frequently, a Party possesses valuable information that it believes may assist another Party in a criminal investigation or proceeding, and which the Party conducting the investigation or proceeding is not aware exists. In such cases, no request for mutual assistance will be forthcoming. Paragraph 1 empowers the State in possession of the information to forward it to the other State without a prior request. The provision was thought useful because, under the laws of some States, such a positive grant of legal authority is needed in order to provide assistance in the absence of a request. A Party is not obligated to spontaneously forward information to another Party; it may exercise its discretion in light of the circumstances of the case at hand. Moreover, the spontaneous disclosure of information does not preclude the disclosing Party, if it has jurisdiction, from investigating or instituting proceedings in relation to the facts disclosed.

261. Paragraph 2 addresses the fact that in some circumstances, a Party will only forward information spontaneously if sensitive information will be kept confidential or other conditions can be imposed on the use of information. In particular, confidentiality will be an important consideration in cases in which important interests of the providing State may be endangered should the information be made public, e.g., where there is a need to protect the identity of a means of collecting the information or the fact that a criminal group is being investigated. If advance inquiry reveals that the receiving Party cannot comply with a condition sought by the providing Party (for example, where it cannot comply with a condition of confidentiality because the information is needed as evidence at a public trial), the receiving Party shall advise the providing Party, which then has the option of not providing the information. If the receiving Party agrees to the condition, however, it must honour it. It is foreseen that conditions imposed under this article would be consistent with those that could be imposed by the providing Party pursuant to a request for mutual assistance from the receiving Party.

Title 4 – Procedures pertaining to mutual assistance requests in the absence of applicable international agreements

Procedures pertaining to mutual assistance requests in the absence of applicable international agreements (Article 27)

262. Article 27 obliges the Parties to apply certain mutual assistance procedures and conditions where there is no mutual assistance treaty or arrangement on the basis of uniform or reciprocal legislation in force between the requesting and requested Parties. The Article thus reinforces the general principle that mutual assistance should be carried out through application of relevant treaties and similar arrangements for mutual assistance. The drafters rejected the creation of a separate general regime of mutual assistance in this Convention that would be applied in lieu of other applicable instruments and arrangements, agreeing instead that it would be more practical to rely on existing MLAT regimes as a general matter, thereby permitting mutual assistance practitioners to use the instruments and arrangements they are the most familiar with and avoiding confusion that may result from the establishment of competing regimes. As previously stated, only with respect to mechanisms particularly necessary for rapid effective co-operation in computer related criminal matters, such as those in Articles 29-35 (Specific provisions – Title 1, 2, 3), is each Party required to establish a legal basis to enable the carrying out of such forms of co-operation if its current mutual assistance treaties, arrangements or laws do not already do so.

263. Accordingly, most forms of mutual assistance under this Chapter will continue to be carried out pursuant to the European Convention on Mutual Assistance in Criminal Matters (ETS N° 30) and its Protocol (ETS N° 99) among the Parties to those instruments. Alternatively, Parties to this Convention that have bilateral MLATs in force between them, or other multilateral agreements governing mutual assistance in criminal cases (such as between member States of the European Union), shall continue to apply their terms, supplemented by the computer- or computer-related crime-specific mechanisms described in the remainder of Chapter III, unless they agree to apply any or all of the provisions of this Article in lieu thereof. Mutual assistance may also be based on arrangements agreed on the basis of uniform or reciprocal legislation, such as the system of

co-operation developed among the Nordic countries, which is also admitted by the European Convention on Mutual Assistance in Criminal Matters (Article 25, paragraph 4), and among members of the Commonwealth. Finally, the reference to mutual assistance treaties or arrangements on the basis of uniform or reciprocal legislation is not limited to those instruments in force at the time of entry into force of the present Convention, but also covers instruments that may be adopted in the future.

264. Article 27 (Procedures pertaining to mutual assistance requests in the absence of applicable international agreements), paragraphs 2-10, provide a number of rules for providing mutual assistance in the absence of an MLAT or arrangement on the basis of uniform or reciprocal legislation, including establishment of central authorities, imposing of conditions, grounds for and procedures in cases of postponement or refusal, confidentiality of requests, and direct communications. With respect to such expressly covered issues, in the absence of a mutual assistance agreement or arrangement on the basis of uniform or reciprocal legislation, the provisions of this Article are to be applied in lieu of otherwise applicable domestic laws governing mutual assistance. At the same time, Article 27 does not provide rules for other issues typically dealt with in domestic legislation governing international mutual assistance. For example, there are no provisions dealing with the form and contents of requests, taking of witness testimony in the requested or requesting Parties, the providing of official or business records, transfer of witnesses in custody, or assistance in confiscation matters. With respect to such issues, Article 25, paragraph 4 provides that absent a specific provision in this Chapter, the law of the requested Party shall govern specific modalities of providing that type of assistance.

265. Paragraph 2 requires the establishment of a central authority or authorities responsible for sending and answering requests for assistance. The institution of central authorities is a common feature of modern instruments dealing with mutual assistance in criminal matters, and it is particularly helpful in ensuring the kind of rapid reaction that is so useful in combating computer- or computer-related crime. Initially, direct transmission between such authorities is speedier and more efficient than transmission through diplomatic channels. In addition, the establishment of an active central authority serves an important function in ensuring that both incoming and outgoing requests are diligently pursued, that advice is provided to foreign law enforcement partners on how best to satisfy legal requirements in the requested Party, and that particularly urgent or sensitive requests are dealt with properly.

266. Parties are encouraged as a matter of efficiency to designate a single central authority for the purpose of mutual assistance; it would generally be most efficient for the authority designated for such purpose under a Party's MLATs, or domestic law to also serve as the central authority when this article is applicable. However, a Party has the flexibility to designate more than one central authority where this is appropriate under its system of mutual assistance. Where more than one central authority is established, the Party that has done so should ensure that each authority interprets the provisions of the Convention in the same way, and that both incoming and outgoing requests are treated rapidly and efficiently. Each Party is to advise the Secretary General of the Council of Europe of the names and addresses (including e-mail and fax numbers) of the authority or authorities designated to receive and respond to mutual assistance requests under this Article, and Parties are obliged to ensure that the designation is kept up-to-date.

267. A major objective of a State requesting mutual assistance often is to ensure that its domestic laws governing the admissibility of evidence are fulfilled, and it can use the evidence before its courts as a result. To ensure that such evidentiary requirements can be met, paragraph 3 obliges the requested Party to execute requests in accordance with the procedures specified by the requesting Party, unless to do so would be incompatible with its law. It is emphasised that this paragraph relates only to the obligation to respect technical procedural requirements, not to fundamental procedural protections. Thus, for example, a requesting Party cannot require the requested Party to execute a search and seizure that would not meet the requested Party's fundamental legal requirements for this measure. In light of the limited nature of the obligation, it was agreed that the mere fact that the requested Party's legal system knows no such procedure is not a sufficient ground to refuse to apply the procedure requested by the requesting Party; instead, the procedure must be incompatible with the requested Party's legal principles. For example, under the law of the requesting Party, it may be a procedural requirement that a statement of a witness be given under oath. Even if the requested Party does not domestically have the requirement that statements be given under oath, it should honour the requesting Party's request.

268. Paragraph 4 provides for the possibility of refusing requests for mutual assistance requests brought under this Article. Assistance may be refused on the grounds provided for in Article 25, paragraph 4 (i.e. grounds provided for in the law of the requested Party), including prejudice to the sovereignty of the State, security, ordre public or other essential interests, and where the offence is considered by the requested Party to be a political offence or an offence connected with a political offence. In order to promote the overriding principle of providing the widest measure of co-operation (see Articles 23, 25), grounds for refusal established

by a requested Party should be narrow and exercised with restraint. They may not be so expansive as to create the potential for assistance to be categorically denied, or subjected to onerous conditions, with respect to broad categories of evidence or information.

269. In line with this approach, it was understood that apart from those grounds set out in Article 28, refusal of assistance on data protection grounds may be invoked only in exceptional cases. Such a situation could arise if, upon balancing the important interests involved in the particular case (on the one hand, public interests, including the sound administration of justice and, on the other hand, privacy interests), furnishing the specific data sought by the requesting Party would raise difficulties so fundamental as to be considered by the requested Party to fall within the essential interests ground of refusal. A broad, categorical, or systematic application of data protection principles to refuse cooperation is therefore precluded. Thus, the fact the Parties concerned have different systems of protecting the privacy of data (such as that the requesting Party does not have the equivalent of a specialised data protection authority) or have different means of protecting personal data (such as that the requesting Party uses means other than the process of deletion to protect the privacy or the accuracy of the personal data received by law enforcement authorities), do not as such constitute grounds for refusal. Before invoking "essential interests" as a basis for refusing co-operation, the requested Party should instead attempt to place conditions which would allow the transfer of the data. (see Article 27, paragraph 6 and paragraph 271 of this report).

270. Paragraphs 5 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.

271. Paragraph 6 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.

272. Paragraph 7 obliges the requested Party to keep the requesting Party informed of the outcome of the request, and requires reasons to be given in the case of refusal or postponement of assistance. The providing of reasons can, *inter alia*, assist the requesting Party to understand 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.

273. There are times when a Party makes a request in a particularly sensitive case, or in a case in which there could be disastrous consequences if the facts underlying the request were to be made public prematurely. Paragraph 8 accordingly permits the requesting Party to request that the fact and content of the request be kept confidential. Confidentiality may not be sought, however, to the extent that it would undermine the requested Party's ability to obtain the evidence or information sought, e.g., where the information will need to be disclosed in order to obtain a court order needed to effect assistance, or where private persons possessing evidence will need to be made aware of the request in order for it to be successfully executed. If the requested Party cannot comply with the request for confidentiality, it shall notify the requesting Party, which then has the option of withdrawing or modifying the request.

274. Central authorities designated in accordance with paragraph 2 shall communicate directly with one another. However, in case of urgency, requests for mutual legal assistance may be sent directly by judges and prosecutors of the requesting Party to the judges and prosecutors of the requested Party. The judge or prosecutor following this procedure must also address a copy of the request made to his own central authority with a view to its transmission to the central authority of the requested Party. Under *littera b*, requests may be channelled through Interpol. Authorities of the requested Party that receive a request falling outside their field of competence, are, pursuant to *littera c*, under a two-fold obligation. First, they must transfer the request to the competent authority of the requested Party. Second, they must inform the authorities of the requesting Party of the transfer made. Under *littera d*, requests may also be transmitted directly without the intervention of central authorities even if there is no urgency, as long as the authority of the requested Party is able to comply with the request without making use of coercive action. Finally, *littera e* enables a Party to inform the others, through the Secretary General of the Council of Europe, that, for reasons of efficiency, direct communications are to be addressed to the central authority.

Confidentiality and limitation on use (Article 28)

275. This provision specifically provides for limitations on use of information or material, in order to enable the requested Party, in cases in which such information or material is particularly sensitive, to ensure that its use is limited to that for which assistance is granted, or to ensure that it is not disseminated beyond law enforcement officials of the requesting Party. These restrictions provide safeguards that are available for, *inter alia*, data protection purposes.

276. As in the case of Article 27, Article 28 only applies where there is no mutual assistance treaty, or arrangement on the basis of uniform or reciprocal legislation in force between the requesting and requested Parties. Where such treaty or arrangement is in force, its provisions on confidentiality and use limitations shall apply in lieu of the provisions of this Article, unless the Parties thereto agree otherwise. This avoids overlap with existing bilateral and multilateral mutual legal assistance treaties (MLATs) and similar arrangements, thereby enabling practitioners to continue to operate under the normal well-understood regime rather than seeking to apply two competing, possibly contradictory, instruments.

277. Paragraph 2 allows the requested Party, when responding to a request for mutual assistance, to impose two types of conditions. First, it may request that the information or material furnished be kept confidential where the request could not be complied with in the absence of such condition, such as where the identity of a confidential informant is involved. It is not appropriate to require absolute confidentiality in cases in which the requested Party is obligated to provide the requested assistance, as this would, in many cases, thwart the ability of the requesting Party to successfully investigate or prosecute crime, e.g. by using the evidence in a public trial (including compulsory disclosure).

278. Second, the requested Party may make furnishing of the information or material dependent on the condition that it not be used for investigations or proceedings other than those stated in the request. In order for this condition to apply, it must be expressly invoked by the requested Party, otherwise, there is no such limitation on use by the requesting Party. In cases in which it is invoked, this condition will ensure that the information and material may only be used for the purposes foreseen in the request, thereby ruling out use of the material for other purposes without the consent of the requested Party. Two exceptions to the ability to limit use were recognised by the negotiators and are implicit in the terms of the paragraph. First, under fundamental legal principles of many States, if material furnished is evidence exculpatory to an accused person, it must be disclosed to the defence or a judicial authority. In addition, most material furnished under mutual assistance regimes is intended for use at trial, normally a public proceeding (including compulsory disclosure). Once such disclosure takes place, the material has essentially passed into the public domain. In these situations, it is not possible to ensure confidentiality to the investigation or proceeding for which mutual assistance was sought.

279. Paragraph 3 provides that if the Party to which the information is forwarded cannot comply with the condition imposed, it shall notify the providing Party, which then has the option of not providing the information. If the receiving Party agrees to the condition, however, it must honour it.

280. Paragraph 4 provides that the requesting Party may be required to explain the use made of the information or material it has received under conditions described in paragraph 2, in order that the requested Party may ascertain whether such condition has been complied with. It was agreed that the requested Party may not call for an overly burdensome accounting e.g., of each time the material or information furnished was accessed.

Section 2 – Specific provisions

281. The aim of the present Section is to provide for specific mechanisms in order to take effective and concerted international action in cases involving computer-related offences and evidence in electronic form.

Title 1 – Mutual assistance regarding provisional measures

Expedited preservation of stored computer data (Article 29)

282. This article provides for a mechanism at the international level equivalent to that provided for in Article 16 for use at the domestic level. Paragraph 1 of this article authorises a Party to make a request for, and paragraph 3 requires each Party to have the legal ability to obtain, the expeditious preservation of data stored in the territory of the requested Party by means of a computer system, in order that the data not be altered, removed or deleted during the period of time required to prepare, transmit and execute a request for mutual assistance to obtain the data. Preservation is a limited, provisional measure intended to take place

much more rapidly than the execution of a traditional mutual assistance. As has been previously discussed, computer data is highly volatile. With a few keystrokes, or by operation of automatic programs, it may be deleted, altered or moved, rendering it impossible to trace a crime to its perpetrator or destroying critical proof of guilt. Some forms of computer data are stored for only short periods of time before being deleted. Thus, it was agreed that a mechanism was required in order to ensure the availability of such data pending the lengthier and more involved process of executing a formal mutual assistance request, which may take weeks or months.

283. While much more rapid than ordinary mutual assistance practice, this measure is at the same time less intrusive. The mutual assistance officials of the requested Party are not required to obtain possession of the data from its custodian. The preferred procedure is for the requested Party to ensure that the custodian (frequently a service provider or other third party) preserve (i.e., not delete) the data pending the issuance of process requiring it to be turned over to law enforcement officials at a later stage. This procedure has the advantage of being both rapid and protective of the privacy of the person whom the data concerns, as it will not be disclosed to or examined by any government official until the criteria for full disclosure pursuant to normal mutual assistance regimes have been fulfilled. At the same time, a requested Party is permitted to use other procedures for ensuring the rapid preservation of data, including the expedited issuance and execution of a production order or search warrant for the data. The key requirement is to have an extremely rapid process in place to prevent the data from being irretrievably lost.

284. Paragraph 2 sets forth the contents of a request for preservation pursuant to this Article. Bearing in mind that this is a provisional measure and that a request will need to be prepared and transmitted rapidly, the information provided will be summary and include only the minimum information required to enable preservation of the data. In addition to specifying the authority that is seeking preservation and the offence for which the measure is sought, the request must provide a summary of the facts, information sufficient to identify the data to be preserved and its location, and a showing that the data is relevant to the investigation or prosecution of the offence concerned and that preservation is necessary. Finally, the requesting Party must undertake to subsequently submit a request for mutual assistance so that it may obtain production of the data.

285. Paragraph 3 sets forth the principle that dual criminality shall not be required as a condition to providing preservation. In general, application of the principle of dual criminality is counterproductive in the context of preservation. First, as a matter of modern mutual assistance practice, there is a trend to eliminate the dual criminality requirement for all but the most intrusive procedural measures, such as search and seizure or interception. Preservation as foreseen by the drafters, however, is not particularly intrusive, since the custodian merely maintains possession of data lawfully in its possession, and the data is not disclosed to or examined by officials of the requested Party until after execution of a formal mutual assistance request seeking disclosure of the data. Second, as a practical matter, it often takes so long to provide the clarifications necessary to conclusively establish the existence of dual criminality that the data would be deleted, removed or altered in the meantime. For example, at the early stages of an investigation, the requesting Party may be aware that there has been an intrusion into a computer in its territory, but may not until later have a good understanding of the nature and extent of damage. If the requested Party were to delay preserving traffic data that would trace the source of the intrusion pending conclusive establishment of dual criminality, the critical data would often be routinely deleted by service providers holding it for only hours or days after the transmission has been made. Even if thereafter the requesting Party were able to establish dual criminality, the crucial traffic data could not be recovered and the perpetrator of the crime would never be identified.

286. Accordingly, the general rule is that Parties must dispense with any dual criminality requirement for the purpose of preservation. However, a limited reservation is available under paragraph 4. If a Party requires dual criminality as a condition for responding to a request for mutual assistance for production of the data, and if it has reason to believe that, at the time of disclosure, dual criminality will not be satisfied, it may reserve the right to require dual criminality as a precondition to preservation. With respect to offences established in accordance with Articles 2 through 11, it is assumed that the condition of dual criminality is automatically met between the Parties, subject to any reservations they may have entered to these offences where permitted by the Convention. Therefore, Parties may impose this requirement only in relation to offences other than those defined in the Convention.

287. Otherwise, under paragraph 5, the requested Party may only refuse a request for preservation where its execution will prejudice its sovereignty, security, *ordre public* or other essential interests, or where it considers the offence to be a political offence or an offence connected with a political offence. Due to the centrality of

this measure to the effective investigation and prosecution of computer- or computer-related crime, it was agreed that the assertion of any other basis for refusing a request for preservation is precluded.

288. At times, the requested Party will realise that the custodian of the data is likely to take action that will threaten the confidentiality of, or otherwise prejudice, the requesting Party's investigation (for example, where the data to be preserved is held by a service provider controlled by a criminal group, or by the target of the investigation himself). In such situations, under paragraph 6, the requesting Party must be notified promptly, so that it may assess whether to take the risk posed by carrying through with the request for preservation, or to seek a more intrusive but safer form of mutual assistance, such as production or search and seizure.

289. Finally, paragraph 7 obliges each Party to ensure that data preserved pursuant to this Article will be held for at least 60 days pending receipt of a formal mutual assistance request seeking the disclosure of the data, and continue to be held following receipt of the request.

Expedited disclosure of preserved traffic data (Article 30)

290. This article provides the international equivalent of the power established for domestic use in Article 17. Frequently, at the request of a Party in which a crime was committed, a requested Party will preserve traffic data regarding a transmission that has travelled through its computers, in order to trace the transmission to its source and identify the perpetrator of the crime, or locate critical evidence. In doing so, the requested Party may discover that the traffic data found in its territory reveals that the transmission had been routed from a service provider in a third State, or from a provider in the requesting State itself. In such cases, the requested Party must expeditiously provide to the requesting Party a sufficient amount of the traffic data to enable identification of the service provider in, and path of the communication from, the other State. If the transmission came from a third State, this information will enable the requesting Party to make a request for preservation and expedited mutual assistance to that other State in order to trace the transmission to its ultimate source. If the transmission had looped back to the requesting Party, it will be able to obtain preservation and disclosure of further traffic data through domestic processes.

291. Under Paragraph 2, the requested Party may only refuse to disclose the traffic data, where disclosure is likely to prejudice its sovereignty, security, *ordre public* or other essential interests, or where it considers the offence to be a political offence or an offence connected with a political offence. As in Article 29 (Expedited preservation of stored computer data), because this type of information is so crucial to identification of those who have committed crimes within the scope of this Convention or locating of critical evidence, grounds for refusal are to be strictly limited, and it was agreed that the assertion of any other basis for refusing assistance is precluded.

Title 2 – Mutual assistance regarding investigative powers

Mutual assistance regarding accessing of stored computer data (Article 31)

292. Each Party must have the ability to, for the benefit of another Party, search or similarly access, seize or similarly secure, and disclose data stored by means of a computer system located within its territory – just as under Article 19 (Search and seizure of stored computer data) it must have the ability to do so for domestic purposes. Paragraph 1 authorises a Party to request this type of mutual assistance, and paragraph 2 requires the requested Party to be able to provide it. Paragraph 2 also follows the principle that the terms and conditions for providing such co-operation should be those set forth in applicable treaties, arrangements and domestic laws governing mutual legal assistance in criminal matters. Under paragraph 3, such a request must be responded to on an expedited basis where (1) there are grounds to believe that relevant data is particularly vulnerable to loss or modification, or (2) otherwise where such treaties, arrangements or laws so provide.

Transborder access to stored computer data with consent or where publicly available (Article 32)

293. The issue of when a Party is permitted to unilaterally access computer data stored in another Party without seeking mutual assistance was a question that the drafters of the Convention discussed at length. There was detailed consideration of instances in which it may be acceptable for States to act unilaterally and those in which it may not. The drafters ultimately determined that it was not yet possible to prepare a comprehensive, legally binding regime regulating this area. In part, this was due to a lack of concrete experience with such situations to date; and, in part, this was due to an understanding that the proper solution often turned

on the precise circumstances of the individual case, thereby making it difficult to formulate general rules. Ultimately, the drafters decided to only set forth in Article 32 of the Convention situations in which all agreed that unilateral action is permissible. They agreed not to regulate other situations until such time as further experience has been gathered and further discussions may be held in light thereof. In this regard, Article 39, paragraph 3 provides that other situations are neither authorised, nor precluded.

294. Article 32 (Trans-border access to stored computer data with consent or where publicly available) addresses two situations: first, where the data being accessed is publicly available, and second, where the Party has accessed or received data located outside of its territory through a computer system in its territory, and it has obtained the lawful and voluntary consent of the person who has lawful authority to disclose the data to the Party through that system. Who is a person that is "lawfully authorised" to disclose data may vary depending on the circumstances, the nature of the person and the applicable law concerned. For example, a person's e-mail may be stored in another country by a service provider, or a person may intentionally store data in another country. These persons may retrieve the data and, provided that they have the lawful authority, they may voluntarily disclose the data to law enforcement officials or permit such officials to access the data, as provided in the Article.

Mutual assistance regarding the real-time collection of traffic data (Article 33)

295. In many cases, investigators cannot ensure that they are able to trace a communication to its source by following the trail through records of prior transmissions, as key traffic data may have been automatically deleted by a service provider in the chain of transmission before it could be preserved. It is therefore critical for investigators in each Party to have the ability to obtain traffic data in real time regarding communications passing through a computer system in other Parties. Accordingly, under Article 33 (Mutual assistance regarding the real-time collection of traffic data), each Party is under the obligation to collect traffic data in real time for another Party. While this Article requires the Parties to co-operate on these matters, here, as elsewhere, deference is given to existing modalities of mutual assistance. Thus, the terms and conditions by which such co-operation is to be provided are generally those set forth in applicable treaties, arrangements and laws governing mutual legal assistance in criminal matters.

296. In many countries, mutual assistance is provided broadly with respect to the real time collection of traffic data, because such collection is viewed as being less intrusive than either interception of content data, or search and seizure. However, a number of States take a narrower approach. Accordingly, in the same way as the Parties may enter a reservation under Article 14 (Scope of procedural provisions), paragraph 3, with respect to the scope of the equivalent domestic measure, paragraph 2 permits Parties to limit the scope of application of this measure to a more narrow range of offences than provided for in Article 23 (General principles relating to international co-operation). One caveat is provided: in no event may the range of offences be more narrow than the range of offences for which such measure is available in an equivalent domestic case. Indeed, because real time collection of traffic data is at times the only way of ascertaining the identity of the perpetrator of a crime, and because of the lesser intrusiveness of the measure, the use of the term "at least" in paragraph 2 is designed to encourage Parties to permit as broad assistance as possible, i.e., even in the absence of dual criminality.

Mutual assistance regarding the interception of content data (Article 34)

297. Because of the high degree of intrusiveness of interception, the obligation to provide mutual assistance for interception of content data is restricted. The assistance is to be provided to the extent permitted by the Parties' applicable treaties and laws. As the provision of co-operation for interception of content is an emerging area of mutual assistance practice, it was decided to defer to existing mutual assistance regimes and domestic laws regarding the scope and limitation on the obligation to assist. In this regard, reference is made to the comments on Articles 14, 15 and 21 as well as to N° R (85) 10 concerning the practical application of the European Convention on Mutual Assistance in Criminal Matters in respect of letters rogatory for the interception of telecommunications.

Title 3 – 24/7 Network

24/7 Network (Article 35)

298. As has been previously discussed, effective combating of crimes committed by use of computer systems and effective collection of evidence in electronic form requires very rapid response. Moreover, with a few keystrokes, action may be taken in one part of the world that instantly has consequences many thousands

of kilometres and many time zones away. For this reason, existing police co-operation and mutual assistance modalities require supplemental channels to address the challenges of the computer age effectively. The channel established in this Article is based upon the experience gained from an already functioning network created under the auspices of the G8 group of nations. Under this Article, each Party has the obligation to designate a point of contact available 24 hours per day, 7 days per week in order to ensure immediate assistance in investigations and proceedings within the scope of this Chapter, in particular as defined under Article 35, paragraph 1, *litterae a) – c)*. It was agreed that establishment of this network is among the most important means provided by this Convention of ensuring that Parties can respond effectively to the law enforcement challenges posed by computer- or computer-related crime.

299. Each Party's 24/7 point of contact is to either facilitate or directly carry out, *inter alia*, the providing of technical advice, preservation of data, collection of evidence, giving of legal information, and locating of suspects. The term "legal information" in Paragraph 1 means advice to another Party that is seeking co-operation of any legal prerequisites required for providing informal or formal co-operation.

300. Each Party is at liberty to determine where to locate the point of contact within its law enforcement structure. Some Parties may wish to house the 24/7 contact within its central authority for mutual assistance, some may believe that the best location is with a police unit specialised in fighting computer- or computer-related crime, yet other choices may be appropriate for a particular Party, given its governmental structure and legal system. Since the 24/7 contact is to provide both technical advice for stopping or tracing an attack, as well as such international co-operation duties as locating of suspects, there is no one correct answer, and it is anticipated that the structure of the network will evolve over time. In designating the national point of contact, due consideration should be given to the need to communicate with points of contacts using other languages.

301. Paragraph 2 provides that among the critical tasks to be carried out by the 24/7 contact is the ability to facilitate the rapid execution of those functions it does not carry out directly itself. For example, if a Party's 24/7 contact is part of a police unit, it must have the ability to co-ordinate expeditiously with other relevant components within its government, such as the central authority for international extradition or mutual assistance, in order that appropriate action may be taken at any hour of the day or night. Moreover, paragraph 2 requires each Party's 24/7 contact to have the capacity to carry out communications with other members of the network on an expedited basis.

302. Paragraph 3 requires each point of contact in the network to have proper equipment. Up-to-date telephone, fax and computer equipment will be essential to the smooth operation of the network, and other forms of communication and analytical equipment will need to be part of the system as technology advances. Paragraph 3 also requires that personnel participating as part of a Party's team for the network be properly trained regarding computer- or computer-related crime and how to respond to it effectively.

CHAPTER IV – FINAL PROVISIONS

303. With some exceptions, the provisions contained in this Chapter are, for the most part, based on the 'Model final clauses for conventions and agreements concluded within the Council of Europe' which were approved by the Committee of Ministers at the 315th meeting of the Deputies in February 1980. As most of the articles 36 through 48 either use the standard language of the model clauses or are based on long-standing treaty-making practice at the Council of Europe, they do not call for specific comments. However, certain modifications of the standard model clauses or some new provisions require some explanation. It is noted in this context that the model clauses have been adopted as a non-binding set of provisions. As the Introduction to the Model Clauses pointed out "these model final clauses are only intended to facilitate the task of committees of experts and avoid textual divergences which would not have any real justification. The model is in no way binding and different clauses may be adapted to fit particular cases."

Signature and entry into force (Article 36)

304. Article 36, paragraph 1, has been drafted following several precedents established in other conventions elaborated within the framework of the Council of Europe, for instance, the Convention on the Transfer of Sentenced Persons (ETS No. 112) and the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS No. 141), which allow for signature, before their entry into force, not only by the member States of the Council of Europe, but also by non-member States which have participated in their elaboration. The provision is intended to enable the maximum number of interested States, not just members of the Council of Europe, to become Parties as soon as possible. Here, the provision is intended to apply

to four non-member States, Canada, Japan, South Africa and the United States of America, which actively participated in the elaboration of the Convention. Once the Convention enters into force, in accordance with paragraph 3, other non-member States not covered by this provision may be invited to accede to the Convention in conformity with Article 37, paragraph 1.

305. Article 36, paragraph 3 sets the number of ratifications, acceptances or approvals required for the Convention's entry into force at 5. This figure is higher than the usual threshold (3) in Council of Europe treaties and reflects the belief that a slightly larger group of States is needed to successfully begin addressing the challenge of international computer- or computer-related crime. The number is not so high, however, so as not to delay unnecessarily the Convention's entry into force. Among the five initial States, at least three must be Council of Europe members, but the two others could come from the four non-member States that participated in the Convention's elaboration. This provision would of course also allow for the Convention to enter into force based on expressions of consent to be bound by five Council of Europe member States.

Accession to the Convention (Article 37)

306. Article 37 has also been drafted on precedents established in other Council of Europe conventions, but with an additional express element. Under long-standing practice, the Committee of Ministers decides, on its own initiative or upon request, to invite a non-member State, which has not participated in the elaboration of a convention, to accede to the convention after having consulted all contracting Parties, whether member States or not. This implies that if any contracting Party objects to the non-member State's accession, the Committee of Ministers would usually not invite it to join the convention. However, under the usual formulation, the Committee of Ministers could – in theory – invite such a non-member State to accede to a convention even if a non-member State Party objected to its accession. This means that – in theory – no right of veto is usually granted to non-member States Parties in the process of extending Council of Europe treaties to other non-member States. However, an express requirement that the Committee of Ministers consult with and obtain the unanimous consent of all Contracting States – not just members of the Council of Europe – before inviting a non-member State to accede to the Convention has been inserted. As indicated above, such a requirement is consistent with practice and recognises that all Contracting States to the Convention should be able to determine with which non-member States they are to enter into treaty relations. Nevertheless, the formal decision to invite a non-member State to accede will be taken, in accordance with usual practice, by the representatives of the contracting Parties entitled to sit on the Committee of Ministers. This decision requires the two-thirds majority provided for in Article 20.d of the Statute of the Council of Europe and the unanimous vote of the representatives of the contracting Parties entitled to sit on the Committee.

307. Federal States seeking to accede to the Convention, which intend to make a declaration under Article 41, are required to submit in advance a draft of the statement referred to in Article 41, paragraph 3, so that the Parties will be in a position to evaluate how the application of the federal clause would affect the prospective Party's implementation of the Convention.(see paragraph 320).

Effects of the Convention (Article 39)

308. Article 39, paragraphs 1 and 2 address the Convention's relationship to other international agreements or arrangements. The subject of how conventions of the Council of Europe should relate to one another or to other treaties, bilateral or multilateral, concluded outside the Council of Europe is not dealt with by the Model Clauses referred to above. The usual approach utilised in Council of Europe conventions in the criminal law area (e.g., Agreement on Illicit Traffic by Sea (ETS N° 156)) is to provide that: (1) new conventions do not affect the rights and undertakings derived from existing international multilateral conventions concerning special matters; (2) Parties to a new convention may conclude bilateral or multilateral agreements with one another on the matters dealt with by the convention for the purposes of supplementing or strengthening its provisions or facilitating the application of the principles embodied in it; and (3) if two or more Parties to the new convention have already concluded an agreement or treaty in respect of a subject which is dealt with in the convention or otherwise have established their relations in respect of that subject, they shall be entitled to apply that agreement or treaty or to regulate those relations accordingly, in lieu of the new convention, provided this facilitates international co-operation.

309. Inasmuch as the Convention generally is intended to supplement and not supplant multilateral and bilateral agreements and arrangements between Parties, the drafters did not believe that a possibly limiting reference to "special matters" was particularly instructive and were concerned that it could lead to

unnecessary confusion. Instead, paragraph 1 of Article 39 simply indicates that the present Convention supplements other applicable treaties or arrangements as between Parties and it mentions in particular three Council of Europe treaties as non-exhaustive examples: the 1957 European Convention on Extradition (ETS N° 24), the 1959 European Convention on Criminal Matters (ETS N° 30) and its 1978 Additional Protocol (ETS N° 99). Therefore, regarding general matters, such agreements or arrangements should in principle be applied by the Parties to the Convention on cybercrime. Regarding specific matters only dealt with by this Convention, the rule of interpretation *lex specialis derogat legi generali* provides that the Parties should give precedence to the rules contained in the Convention. An example is Article 30, which provides for the expedited disclosure of preserved traffic data when necessary to identify the path of a specified communication. In this specific area, the Convention, as *lex specialis*, should provide a rule of first resort over provisions in more general mutual assistance agreements.

310. Similarly, the drafters considered language making the application of existing or future agreements contingent on whether they "strengthen" or "facilitate" co-operation as possibly problematic, because, under the approach established in the international co-operation Chapter, the presumption is that Parties will apply relevant international agreements and arrangements.

311. Where there is an existing mutual assistance treaty or arrangement as a basis for co-operation, the present Convention would only supplement, where necessary, the existing rules. For example, this Convention would provide for the transmission of mutual assistance requests by expedited means of communications (see Article 25, paragraph 3) if such a possibility does not exist under the original treaty or arrangement.

312. Consistent with the Convention's supplementary nature and, in particular, its approach to international co-operation, paragraph 2 provides that Parties are also free to apply agreements that already are or that may in the future come into force. Precedent for such an articulation is found in the Transfer of Sentenced Persons Convention (ETS N° 112). Certainly, in the context of international co-operation, it is expected that application of other international agreements (many of which offer proven, longstanding formulas for international assistance) will in fact promote co-operation. Consistent with the terms of the present Convention, Parties may also agree to apply its international co-operation provisions in lieu of such other agreements (see Article 27(1)). In such instances the relevant co-operation provisions set forth in Article 27 would supersede the relevant rules in such other agreements. As the present Convention generally provides for minimum obligations, Article 39, paragraph 2 recognises that Parties are free to assume obligations that are more specific in addition to those already set out in the Convention, when establishing their relations concerning matters dealt with therein. However, this is not an absolute right: Parties must respect the objectives and principles of the Convention when so doing and therefore cannot accept obligations that would defeat its purpose.

313. Further, in determining the Convention's relationship to other international agreements, the drafters also concurred that Parties may look for additional guidance to relevant provisions in the Vienna Convention on the Law of Treaties.

314. While the Convention provides a much-needed level of harmonisation, it does not purport to address all outstanding issues relating to computer- or computer-related crime. Therefore, paragraph 3 was inserted to make plain that the Convention only affects what it addresses. Left unaffected are other rights, restrictions, obligations and responsibilities that may exist but that are not dealt with by the Convention. Precedent for such a "savings clause" may be found in other international agreements (e.g., UN Terrorist Financing Convention).

Declarations (Article 40)

315. Article 40 refers to certain articles, mostly in respect of the offences established by the Convention in the substantive law section, where Parties are permitted to include certain specified additional elements which modify the scope of the provisions. Such additional elements aim at accommodating certain conceptual or legal differences, which in a treaty of global ambition are more justified than they perhaps might be in a purely Council of Europe context. Declarations are considered acceptable interpretations of Convention provisions and should be distinguished from reservations, which permit a Party to exclude or to modify the legal effect of certain obligations set forth in the Convention. Since it is important for Parties to the Convention to know which, if any, additional elements have been attached by other Parties, there is an obligation to declare them to the Secretary General of the Council of Europe at the time of signature or when depositing an instrument of ratification, acceptance, approval or accession. Such notification is particularly important concerning the definition of offences, as the condition of dual criminality will have

to be met by the Parties when applying certain procedural powers. No numerical limit was felt necessary in respect of declarations.

Federal clause (Article 41)

316. Consistent with the goal of enabling the largest possible number of States to become Parties, Article 41 allows for a reservation which is intended to accommodate the difficulties federal States may face as a result of their characteristic distribution of power between central and regional authorities. Precedents exist outside the criminal law area for federal declarations or reservations to other international agreements[11]. Here, Article 41 recognises that minor variations in coverage may occur as a result of well-established domestic law and practice of a Party which is a federal State. Such variations must be based on its Constitution or other fundamental principles concerning the division of powers in criminal justice matters between the central government and the constituent States or territorial entities of a federal State. There was agreement among the drafters of the Convention that the operation of the federal clause would only lead to minor variations in the application of the Convention.

317. For example, in the United States, under its Constitution and fundamental principles of federalism, federal criminal legislation generally regulates conduct based on its effects on interstate or foreign commerce, while matters of minimal or purely local concern are traditionally regulated by the constituent States. This approach to federalism still provides for broad coverage of illegal conduct encompassed by this Convention under US federal criminal law, but recognises that the constituent States would continue to regulate conduct that has only minor impact or is purely local in character. In some instances, within that narrow category of conduct regulated by State but not federal law, a constituent State may not provide for a measure that would otherwise fall within the scope of this Convention. For example, an attack on a stand-alone personal computer, or network of computers linked together in a single building, may only be criminal if provided for under the law of the State in which the attack took place; however the attack would be a federal offence if access to the computer took place through the Internet, since the use of the Internet provides the effect on interstate or foreign commerce necessary to invoke federal law. The implementation of this Convention through United States federal law, or through the law of another federal State under similar circumstances, would be in conformity with the requirements of Article 41.

318. The scope of application of the federal clause has been restricted to the provisions of Chapter II (substantive criminal law, procedural law and jurisdiction). Federal States making use of this provision would still be under the obligation to co-operate with the other Parties under Chapter III, even where the constituent State or other similar territorial entity in which a fugitive or evidence is located does not criminalise conduct or does not have procedures required under the Convention.

319. In addition, paragraph 2 of Article 41 provides that a federal State, when making a reservation under paragraph 1 of this Article, may not apply the terms of such reservation to exclude or substantially diminish its obligations to provide for measures set forth in Chapter II. Overall, it shall provide for a broad and effective law enforcement capability with respect to those measures. In respect of provisions the implementation of which come within the legislative jurisdiction of the constituent States or other similar territorial entities, the federal government shall refer the provisions to the authorities of these entities with a favourable endorsement, encouraging them to take appropriate action to give them effect. .

Reservations (Article 42)

320. Article 42 provides for a number of reservation possibilities. This approach stems from the fact that the Convention covers an area of criminal law and criminal procedural law which is relatively new to many States. In addition, the global nature of the Convention, which will be open to member and non-member States of the Council of Europe, makes having such reservation possibilities necessary. These reservation possibilities aim at enabling the largest number of States to become Parties to the Convention, while permitting such States to maintain certain approaches and concepts consistent with their domestic law. At the same time, the drafters endeavoured to restrict the possibilities for making reservations in order to secure to the largest possible extent the uniform application of the Convention by the Parties. Thus, no other reservations may be made than those enumerated. In addition, reservations may only be made

11. E.g. Convention Relating to the Status of Refugees of 28 July 1951, Art. 34; Convention Relating to the Status of Stateless Persons of 28 September 1954, Art. 37; Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958, Art. 11; Convention for the Protection of World Cultural and Natural Heritage of 16 November 1972, Art. 34.

by a Party at the time of signature or upon deposit of its instrument of ratification, acceptance, approval or accession.

321. Recognising that for some Parties certain reservations were essential to avoid conflict with their constitutional or fundamental legal principles, Article 43 imposes no specific time limit for the withdrawal of reservations. Instead, they should be withdrawn as soon as circumstances so permit.

322. In order to maintain some pressure on the Parties and to make them at least consider withdrawing their reservations, the Convention authorises the Secretary General of the Council of Europe to periodically enquire about the prospects for withdrawal. This possibility of enquiry is current practice under several Council of Europe instruments. The Parties are thus given an opportunity to indicate whether they still need to maintain their reservations in respect of certain provisions and to withdraw, subsequently, those which no longer prove necessary. It is hoped that over time Parties will be able to remove as many of their reservations as possible so as promote the Convention's uniform implementation.

Amendments (Article 44)

323. Article 44 takes its precedent from the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS N° 141), where it was introduced as an innovation in respect of criminal law conventions elaborated within the framework of the Council of Europe. The amendment procedure is mostly thought to be for relatively minor changes of a procedural and technical character. The drafters considered that major changes to the Convention could be made in the form of additional protocols.

324. The Parties themselves can examine the need for amendments or protocols under the consultation procedure provided for in Article 46. The European Committee on Crime Problems (CDPC) will in this regard be kept periodically informed and required to take the necessary measures to assist the Parties in their efforts to amend or supplement the Convention.

325. In accordance with paragraph 5, any amendment adopted would come into force only when all Parties have informed the Secretary General of their acceptance. This requirement seeks to ensure that the Convention will evolve in a uniform manner.

Settlement of disputes (Article 45)

326. Article 45, paragraph 1, provides that the European Committee on Crime Problems (CDPC) should be kept informed about the interpretation and application of the provisions of the Convention. Paragraph 2 imposes an obligation on the Parties to seek a peaceful settlement of any dispute concerning the interpretation or the application of the Convention. Any procedure for solving disputes should be agreed upon by the Parties concerned. Three possible mechanisms for dispute-resolution are suggested by this provision: the European Committee on Crime Problems (CDPC) itself, an arbitral tribunal or the International Court of Justice.

Consultations of the Parties (Article 46)

327. Article 46 creates a framework for the Parties to consult regarding implementation of the Convention, the effect of significant legal, policy or technological developments pertaining to the subject of computer- or computer-related crime and the collection of evidence in electronic form, and the possibility of supplementing or amending the Convention. The consultations shall in particular examine issues that have arisen in the use and implementation of the Convention, including the effects of declarations and reservations made under Articles 40 and 42.

328. The procedure is flexible and it is left to the Parties to decide how and when to convene if they so wish. Such a procedure was believed necessary by the drafters of the Convention to ensure that all Parties to the Convention, including non-member States of the Council of Europe, could be involved – on an equal footing basis – in any follow-up mechanism, while preserving the competences of the European Committee on Crime Problems (CDPC). The latter shall not only be kept regularly informed of the consultations taking place among the Parties, but also facilitate those and take the necessary measures to assist the Parties in their efforts to supplement or amend the Convention. Given the needs of effective prevention and prosecution of cyber-crime and the associated privacy issues, the potential impact on business activities, and other relevant factors, the views of interested parties, including law enforcement, non-governmental and private sector organisations, may be useful to these consultations (see also paragraph 14).

329. Paragraph 3 provides for a review of the Convention's operation after 3 years of its entry into force, at which time appropriate amendments may be recommended. The CDPC shall conduct such review with the assistance of the Parties.

330. Paragraph 4 indicates that except where assumed by the Council of Europe it will be for the Parties themselves to finance any consultations carried out in accordance with paragraph 1 of Article 46. However, apart from the European Committee on Crime Problems (CDPC), the Council of Europe Secretariat shall assist the Parties in their efforts under the Convention.

Additional Protocol to the Convention on cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems – ETS No. 189

Strasbourg, 28.I.2003

The member States of the Council of Europe and the other States Parties to the Convention on Cybercrime, opened for signature in Budapest on 23 November 2001, signatory hereto;

Considering that the aim of the Council of Europe is to achieve a greater unity between its members;

Recalling that all human beings are born free and equal in dignity and rights;

Stressing the need to secure a full and effective implementation of all human rights without any discrimination or distinction, as enshrined in European and other international instruments;

Convinced that acts of a racist and xenophobic nature constitute a violation of human rights and a threat to the rule of law and democratic stability;

Considering that national and international law need to provide adequate legal responses to propaganda of a racist and xenophobic nature committed through computer systems;

Aware of the fact that propaganda to such acts is often subject to criminalisation in national legislation;

Having regard to the Convention on Cybercrime, which provides for modern and flexible means of international co-operation and convinced of the need to harmonise substantive law provisions concerning the fight against racist and xenophobic propaganda;

Aware that computer systems offer an unprecedented means of facilitating freedom of expression and communication around the globe;

Recognising that freedom of expression constitutes one of the essential foundations of a democratic society, and is one of the basic conditions for its progress and for the development of every human being;

Concerned, however, by the risk of misuse or abuse of such computer systems to disseminate racist and xenophobic propaganda;

Mindful of the need to ensure a proper balance between freedom of expression and an effective fight against acts of a racist and xenophobic nature;

Recognising that this Protocol is not intended to affect established principles relating to freedom of expression in national legal systems;

Taking into account the relevant international legal instruments in this field, and in particular the Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocol No. 12 concerning the general prohibition of discrimination, the existing Council of Europe conventions on co-operation in the penal field, in particular the Convention on Cybercrime, the United Nations International Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965, the European Union Joint Action of 15 July 1996 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, concerning action to combat racism and xenophobia;

Welcoming the recent developments which further advance international understanding and co-operation in combating cybercrime and racism and xenophobia;

Having regard to the Action Plan adopted by the Heads of State and Government of the Council of Europe on the occasion of their Second Summit (Strasbourg, 10-11 October 1997) to seek common responses to the developments of the new technologies based on the standards and values of the Council of Europe;

Have agreed as follows:

CHAPTER I – COMMON PROVISIONS

Article 1 – Purpose

The purpose of this Protocol is to supplement, as between the Parties to the Protocol, the provisions of the Convention on Cybercrime, opened for signature in Budapest on 23 November 2001 (hereinafter referred to as "the Convention"), as regards the criminalisation of acts of a racist and xenophobic nature committed through computer systems.

Article 2 – Definition

1. For the purposes of this Protocol:

"*racist and xenophobic material*" means any written material, any image or any other representation of ideas or theories, which advocates, promotes or incites hatred, discrimination or violence, against any individual or group of individuals, based on race, colour, descent or national or ethnic origin, as well as religion if used as a pretext for any of these factors.

2. The terms and expressions used in this Protocol shall be interpreted in the same manner as they are interpreted under the Convention.

CHAPTER II – MEASURES TO BE TAKEN AT NATIONAL LEVEL

Article 3 – Dissemination of racist and xenophobic material through computer systems

1. Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally and without right, the following conduct:

distributing, or otherwise making available, racist and xenophobic material to the public through a computer system.

A Party may reserve the right not to attach criminal liability to conduct as defined by paragraph 1 of this article, where the material, as defined in Article 2, paragraph 1, advocates, promotes or incites discrimination that is not associated with hatred or violence, provided that other effective remedies are available.

2. Notwithstanding paragraph 2 of this article, a Party may reserve the right not to apply paragraph 1 to those cases of discrimination for which, due to established principles in its national legal system concerning freedom of expression, it cannot provide for effective remedies as referred to in the said paragraph 2.

Article 4 – Racist and xenophobic motivated threat

Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally and without right, the following conduct:

threatening, through a computer system, with the commission of a serious criminal offence as defined under its domestic law, (i) persons for the reason that they belong to a group, distinguished by race, colour, descent

or national or ethnic origin, as well as religion, if used as a pretext for any of these factors, or (ii) a group of persons which is distinguished by any of these characteristics.

Article 5 – Racist and xenophobic motivated insult

1. Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally and without right, the following conduct:

insulting publicly, through a computer system, (i) persons for the reason that they belong to a group distinguished by race, colour, descent or national or ethnic origin, as well as religion, if used as a pretext for any of these factors; or (ii) a group of persons which is distinguished by any of these characteristics.

A Party may either:

a. require that the offence referred to in paragraph 1 of this article has the effect that the person or group of persons referred to in paragraph 1 is exposed to hatred, contempt or ridicule; or

b. reserve the right not to apply, in whole or in part, paragraph 1 of this article.

Article 6 – Denial, gross minimisation, approval or justification of genocide or crimes against humanity

1. Each Party shall adopt such legislative measures as may be necessary to establish the following conduct as criminal offences under its domestic law, when committed intentionally and without right:

distributing or otherwise making available, through a computer system to the public, material which denies, grossly minimises, approves or justifies acts constituting genocide or crimes against humanity, as defined by international law and recognised as such by final and binding decisions of the International Military Tribunal, established by the London Agreement of 8 August 1945, or of any other international court established by relevant international instruments and whose jurisdiction is recognised by that Party.

A Party may either

a. require that the denial or the gross minimisation referred to in paragraph 1 of this article is committed with the intent to incite hatred, discrimination or violence against any individual or group of individuals, based on race, colour, descent or national or ethnic origin, as well as religion if used as a pretext for any of these factors, or otherwise

b. reserve the right not to apply, in whole or in part, paragraph 1 of this article.

Article 7 – Aiding and abetting

Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally and without right, aiding or abetting the commission of any of the offences established in accordance with this Protocol, with intent that such offence be committed.

CHAPTER III — RELATIONS BETWEEN THE CONVENTION AND THIS PROTOCOL

Article 8 – Relations between the Convention and this Protocol

1. Articles 1, 12, 13, 22, 41, 44, 45 and 46 of the Convention shall apply, *mutatis mutandis*, to this Protocol.

2. The Parties shall extend the scope of application of the measures defined in Articles 14 to 21 and Articles 23 to 35 of the Convention, to Articles 2 to 7 of this Protocol.

CHAPTER IV – FINAL PROVISIONS

Article 9 – Expression of consent to be bound

1. This Protocol shall be open for signature by the States which have signed the Convention, which may express their consent to be bound by either:

a. signature without reservation as to ratification, acceptance or approval; or

b. signature subject to ratification, acceptance or approval, followed by ratification, acceptance or approval.

2. A State may not sign this Protocol without reservation as to ratification, acceptance or approval, or deposit an instrument of ratification, acceptance or approval, unless it has already deposited or simultaneously deposits an instrument of ratification, acceptance or approval of the Convention.

3. The instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

Article 10 – Entry into force

1. This Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date on which five States have expressed their consent to be bound by the Protocol, in accordance with the provisions of Article 9.

2. In respect of any State which subsequently expresses its consent to be bound by it, 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 its signature without reservation as to ratification, acceptance or approval or deposit of its instrument of ratification, acceptance or approval.

Article 11 – Accession

1. After the entry into force of this Protocol, any State which has acceded to the Convention may also accede to the Protocol.

2. Accession shall be effected by the deposit with the Secretary General of the Council of Europe of an instrument of accession which shall take effect on the first day of the month following the expiration of a period of three months after the date of its deposit.

Article 12 – Reservations and declarations

1. Reservations and declarations made by a Party to a provision of the Convention shall be applicable also to this Protocol, unless that Party declares otherwise at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession.

2. By a written notification addressed to the Secretary General of the Council of Europe, any Party may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, declare that it avails itself of the reservation(s) provided for in Articles 3, 5 and 6 of this Protocol. At the same time, a Party may avail itself, with respect to the provisions of this Protocol, of the reservation(s) provided for in Article 22, paragraph 2, and Article 41, paragraph 1, of the Convention, irrespective of the implementation made by that Party under the Convention. No other reservations may be made.

3. By a written notification addressed to the Secretary General of the Council of Europe, 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 possibility of requiring additional elements as provided for in Article 5, paragraph 2.a, and Article 6, paragraph 2.a, of this Protocol.

Article 13 – Status and withdrawal of reservations

1. A Party that has made a reservation in accordance with Article 12 above shall withdraw such reservation, in whole or in part, as soon as circumstances so permit. Such withdrawal shall take effect on the date of receipt of a notification addressed to the Secretary General of the Council of Europe. If the notification states that the withdrawal of a reservation is to take effect on a date specified therein, and such date is later than the date on which the notification is received by the Secretary General, the withdrawal shall take effect on such a later date.

2. The Secretary General of the Council of Europe may periodically enquire with Parties that have made one or more reservations in accordance with Article 12 as to the prospects for withdrawing such reservation(s).

Article 14 – Territorial application

1. Any Party 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 Party may, at any later date, by a 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 the 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 of the Council of Europe. 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 15 – Denunciation

1. Any Party may, at any time, 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.

Article 16 – Notification

The Secretary General of the Council of Europe shall notify the member States of the Council of Europe, the non-member States which have participated in the elaboration of this Protocol as well as any State which has acceded to, or has been invited to accede 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 its Articles 9, 10 and 11;

d. any other act, notification or communication relating to this Protocol.

In witness whereof the undersigned, being duly authorised thereto, have signed this Protocol.

Done at Strasbourg, this 28 January 2003, 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, to the non-member States which have participated in the elaboration of this Protocol, and to any State invited to accede to it.

Additional Protocol to the Convention on cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems – ETS No. 189

Explanatory Report

The text of this Explanatory Report does not constitute an instrument providing an authoritative interpretation of the Protocol, although it might be of such a nature as to facilitate the application of the provisions contained therein. This Protocol will be opened for signature in Strasbourg, on 28 January 2003, on the occasion of the First Part or the 2003 Session of the Parliamentary Assembly.

INTRODUCTION

1. Since the adoption in 1948 of the Universal Declaration of Human Rights, the international community has made important progress in the fight against racism, racial discrimination, xenophobia and related intolerance. National and international laws have been enacted and a number of international human rights instruments have been adopted, in particular, the International Convention of New York of 1966 on the Elimination of All Forms of Racial Discrimination, concluded in the framework of the United Nations needs to be mentioned (CERD). Although progress has been made, yet, the desire for a world free of racial hatred and bias remains only partly fulfilled.

2. As technological, commercial and economic developments bring the peoples of the world closer together, racial discrimination, xenophobia and other forms of intolerance continue to exist in our societies. Globalisation carries risks that can lead to exclusion and increased inequality, very often along racial and ethnic lines.

3. In particular, the emergence of international communication networks like the Internet provide certain persons with modern and powerful means to support racism and xenophobia and enables them to disseminate easily and widely expressions containing such ideas. In order to investigate and prosecute such persons, international co-operation is vital. The Convention on Cybercrime (ETS 185) hereinafter referred to as "the Convention", was drafted to enable mutual assistance concerning computer related crimes in the broadest sense in a flexible and modern way. The purpose of this Protocol is twofold: firstly, harmonising substantive criminal law in the fight against racism and xenophobia on the Internet and, secondly, improving international co-operation in this area. This kind of harmonisation alleviates the fight against such crimes on the national and on the international level. Corresponding offences in domestic laws may prevent misuse of computer systems for a racist purpose by Parties whose laws in this area are less well defined. As a consequence, the exchange of useful common experiences in the practical handling of cases may be enhanced too. International co-operation (especially extradition and mutual legal assistance) is facilitated, e.g. regarding requirements of double criminality.

4. The committee drafting the Convention discussed the possibility of including other content-related offences, such as the distribution of racist propaganda through computer systems. However, the committee was not in a position to reach consensus on the criminalisation of such conduct. While there was significant support in favour of including this as a criminal offence, some delegations expressed strong concern about including such a provision on freedom of expression grounds. Noting the complexity of the issue, it was decided that the committee would refer to the European Committee on Crime Problems (CDPC) the issue of drawing up an additional Protocol to the Convention.

5. The Parliamentary Assembly, in its Opinion 226(2001) concerning the Convention, recommended immediately drawing up a protocol to the Convention under the title "Broadening the scope of the convention to include new forms of offence", with the purpose of defining and criminalising, inter alia, the dissemination of racist propaganda.

6. The Committee of Ministers therefore entrusted the European Committee on Crime Problems (CDPC) and, in particular, its Committee of Experts on the Criminalisation of Acts of a Racist and xenophobic Nature committed through Computer Systems (PC-RX), with the task of preparing a draft additional Protocol, a binding legal instrument open to the signature and ratification of Contracting Parties to the Convention, dealing in particular with the following:

i. the definition and scope of elements for the criminalisation of acts of a racist and xenophobic nature committed through computer networks, including the production, offering, dissemination or other forms of distribution of materials or messages with such content through computer networks;

ii. the extent of the application of substantive, procedural and international co-operation provisions in the Convention on Cybercrime to the investigation and prosecution of the offences to be defined under the additional Protocol.

7. This Protocol entails an extension of the Convention's scope, including its substantive, procedural and international cooperation provisions, so as to cover also offences of racist and xenophobic propaganda. Thus, apart from harmonising the substantive law elements of such behaviour, the Protocol aims at improving the ability of the Parties to make use of the means and avenues of international cooperation set out in the Convention in this area.

COMMENTARY ON THE ARTICLES OF THE PROTOCOL

CHAPTER I – COMMON PROVISIONS

Article 1 – Purpose

8. The purpose of this Protocol is to supplement, as between the Parties to the Protocol, the provisions of the Convention as regards the criminalisation of acts of a racist and xenophobic nature committed through computer systems.

9. The provisions of the Protocol are of a mandatory character. To satisfy these obligations, States Parties have not only to enact appropriate legislation but also to ensure that it is effectively enforced.

Article 2 – Definition

▶ Paragraph 1 – "Racist and xenophobic material"

10. Several legal instruments have been elaborated at an international and national level to combat racism or xenophobia. The drafters of this Protocol took account in particular of (i) the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), (ii) Protocol No. 12 (ETS 177) to the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), (iii) the Joint Action of 15 July 1996 of the European Union adopted by the Council on the basis of Article K.3 of the Treaty on the European Union, concerning action to combat racism and xenophobia, (iv) the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (Durban, 31 August-8 September 2001), (v) the conclusions of the European Conference against racism (Strasbourg, 13 October 2000) (vi) the comprehensive study published by the Council of Europe Commission against Racism and Xenophobia (ECRI) published in August 2000 (CRI(2000)27) and (vii) the November 2001 Proposal by the European Commission for a Council Framework Decision on combating racism and xenophobia (in the framework of the European Union).

11. Article 10 of the ECHR recognises the right to freedom of expression, which includes the freedom to hold opinions and to receive and impart information and ideas. "Article 10 of the ECHR is applicable not only to information and ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population[1]. However, the European Court of Human Rights held that the State's actions to restrict the right to freedom of expression were properly justified under the restrictions of paragraph 2 of Article 10 of the ECHR, in particular when such ideas or expressions violated the rights of others. This Protocol, on the basis of national and international

1. See in this context, for instance, the Handyside judgment of 7 December 1976, Series A, no. 24, p. 23, para. 49.

instruments, establishes the extent to which the dissemination of racist and xenophobic expressions and ideas violates the rights of others.

12. The definition contained in Article 2 refers to written material (e.g. texts, books, magazines, statements, messages, etc.), images (e.g. pictures, photos, drawings, etc.) or any other representation of thoughts or theories, of a racist and xenophobic nature, in such a format that it can be stored, processed and transmitted by means of a computer system.

13. The definition contained in Article 2 of this Protocol refers to certain conduct to which the content of the material may lead, rather than to the expression of feelings/belief/aversion as contained in the material concerned. The definition builds upon existing national and international (UN, EU) definitions and documents as far as possible.

14. The definition requires that such material advocates, promotes, incites hatred, discrimination or violence. "Advocates" refers to a plea in favour of hatred, discrimination or violence, "promotes" refers to an encouragement to or advancing hatred, discrimination or violence and "incites" refers to urging others to hatred, discrimination or violence.

15. The term "violence" refers to the unlawful use of force, while the term "hatred" refers to intense dislike or enmity.

16. When interpreting the term "discrimination", account should be taken of the ECHR (Article 14 and Protocol 12), and of the relevant case-law, as well as of Article 1 of the CERD. The prohibition of discrimination contained in the ECHR guarantees to everyone within the jurisdiction of a State Party equality in the enjoyment of the rights and freedoms protected by the ECHR itself. Article 14 of the ECHR provides for a general obligation for States, accessory to the rights and freedoms provided for by the ECHR. In this context, the term "discrimination" used in the Protocol refers to a different unjustified treatment given to persons or to a group of persons on the basis of certain characteristics. In the several judgments (such as the Belgian Linguistic case, the Abdulaziz, Cabales and Balkandali judgment[2]**)** the European Court of Human Rights stated that "a difference of treatment is discriminatory if it 'has no objective and reasonable justification', that is, if it does not pursue a 'legitimate aim' or if there is not a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised'". Whether the treatment is discriminatory or not has to be considered in the light of the specific circumstances of the case. Guidance for interpreting the term "discrimination" can also be found in Article 1 of the CERD, where the term "racial discrimination" means "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life".

17. Hatred, discrimination or violence, have to be directed against any individual or group of individuals, for the reason that they belong to a group distinguished by "race, colour, descent or national or ethnic origin, as well as religion, if used as a pretext for any of these factors".

18. It should be noted that these grounds are not exactly the same as the grounds contained, for instance, in Article 1 of Protocol No. 12 to the ECHR, as some of those contained in the latter are alien to the concept of racism or xenophobia. The grounds contained in Article 2 of this Protocol are also not identical to those contained in the CERD, as the latter deals with "racial discrimination" in general and not "racism" as such. In general, these grounds are to be interpreted within their meaning in established national and international law and practice. However, some of them require further explanation as to their specific meaning in the context of this Protocol.

19. "Descent" refers mainly to persons or groups of persons who descend from persons who could be identified by certain characteristics (such as race or colour), but not necessarily all of these characteristics still exist. In spite of that, because of their descent, such persons or groups of persons may be subject to hatred, discrimination or violence. "Descent" does not refer to social origin.

20. The notion of "national origin" is to be understood in a broad factual sense. It may refer to individuals' histories, not only with regard to the nationality or origin of their ancestors but also to their own national belonging, irrespective of whether from a legal point of view they still possess it. When persons possess more than one nationality or are stateless, the broad interpretation of this notion intends to protect them if they are discriminated on any of these grounds. Moreover, the notion of "national origin" may not only refer to the

2. Abulaziz, Cabales and Balkandali, judgment of 28 May 1985, Series A no. 94, p. 32, para. 62; Belgian Linguistic case, judgment of 23 July 1968, Series A no. 6, p. 34, para. 10.

belonging to one of the countries that is internationally recognised as such, but also to minorities or other groups of persons, with similar characteristics.

21. The notion of "religion" often occurs in international instruments and national legislation. The term refers to conviction and beliefs. The inclusion of this term as such in the definition would carry the risk of going beyond the ambit of this Protocol. However, religion may be used as a pretext, an alibi or a substitute for other factors, enumerated in the definition. "Religion" should therefore be interpreted in this restricted sense.

▶ **Paragraph 2**

22. By providing that the terms and expressions used in the Protocol shall be interpreted in the same manner as they are interpreted under the Convention, this Article ensures uniform interpretation of both. This means that the terms and expressions used in this Explanatory Report are to be interpreted in the same manner as such terms and expressions are interpreted in the Explanatory Report to the Convention.

CHAPTER II – MEASURES TO BE TAKEN AT NATIONAL LEVEL

GENERAL CONSIDERATIONS

23. The offences, as established in this Protocol, contain a number of common elements which were taken from the Convention. For the sake of clarity, the relating paragraphs of the Explanatory Report to the Convention are included hereafter.

24. A specificity of the offences included is the express requirement that the conduct involved is done "without right". It reflects the insight that the conduct described is not always punishable *per se*, but may be legal or justified not only in cases where classical legal defences are applicable, like consent, self defence or necessity, but where other principles or interests lead to the exclusion of criminal liability (e.g. for law enforcement purposes, for academic or research purposes). The expression 'without right' derives its meaning from the context in which it is used. Thus, without restricting how Parties may implement the concept in their domestic law, it may refer to conduct undertaken without authority (whether legislative, executive, administrative, judicial, contractual or consensual) or conduct that is otherwise not covered by established legal defences, excuses, justifications or relevant principles under domestic law. The Protocol, therefore, leaves unaffected conduct undertaken pursuant to lawful government authority (for example, where the Party's government acts to maintain public order, protect national security or investigate criminal offences). Furthermore, legitimate and common activities inherent in the design of networks, or legitimate and common operating or commercial practices should not be criminalized. It is left to the Parties to determine how such exemptions are implemented within their domestic legal systems (under criminal law or otherwise).

25. All the offences contained in the Protocol must be committed "intentionally" for criminal liability to apply. In certain cases an additional specific intentional element forms part of the offence. The drafters of the Protocol, as those of the Convention, agreed that the exact meaning of 'intentionally' should be left to national interpretation. Persons cannot be held criminally liable for any of the offences in this Protocol, if they have not the required intent. It is not sufficient, for example, for a service provider to be held criminally liable under this provision, that such a service provider served as a conduit for, or hosted a website or newsroom containing such material, without the required intent under domestic law in the particular case. Moreover, a service provider is not required to monitor conduct to avoid criminal liability.

26. As regards the notion of "computer system", this is the same as contained in the Convention and explained in paragraphs 23 and 24 of its Explanatory Report. This constitutes an application of Article 2 of this Protocol (see also the explanation of Article 2 above).

Article 3 – Dissemination of racist and xenophobic material in a computer system

27. This article requires States Parties to criminalize distributing or otherwise making available racist and xenophobic material to the public through a computer system. The act of distributing or making available is only criminal if the intent is also directed to the racist and xenophobic character of the material.

28. "Distribution" refers to the active dissemination of racist and xenophobic material, as defined in Article 2 of the Protocol, to others, while "making available" refers to the placing on line of racist and xenophobic material for the use of others. This term also intends to cover the creation or compilation of hyperlinks in order to facilitate access to such material.

29. The term "to the public" used in Article 3 makes it clear that private communications or expressions communicated or transmitted through a computer system fall outside the scope of this provision. Indeed, such communications or expressions, like traditional forms of correspondence, are protected by Article 8 of the ECHR.

30. Whether a communication of racist and xenophobic material is considered as a private communication or as a dissemination to the public, has to be determined on the basis of the circumstances of the case. Primarily, what counts is the intent of the sender that the message concerned will only be received by the pre-determined receiver. The presence of this subjective intent can be established on the basis of a number of objective factors, such as the content of the message, the technology used, applied security measures, and the context in which the message is sent. Where such messages are sent at the same time to more than one recipient, the number of the receivers and the nature of the relationship between the sender and the receiver/s is a factor to determine whether such a communication may be considered as private.

31. Exchanging racist and xenophobic material in chat rooms, posting similar messages in newsgroups or discussion fora, are examples of making such material available to the public. In these cases the material is accessible to any person. Even when access to the material would require authorisation by means of a password, the material is accessible to the public where such authorisation would be given to anyone or to any person who meets certain criteria. In order to determine whether the making available or distributing was to the public or not, the nature of the relationship between the persons concerned should be taken into account.

32. Paragraphs 2 and 3 are included to provide for a reservation possibility in very limited circumstances. They should be read in conjunction and in sequence. Therefore, a Party, firstly, has the possibility not to attach criminal liability to the conduct contained in this Article where the material advocates, promotes or incites discrimination that is not associated with hatred or violence, provided that other effective remedies are available. For instance, those remedies may be civil or administrative. Where a Party cannot, due to established principles of its legal system concerning freedom of expression, provide for such remedies, it may reserve the right not to implement the obligation under paragraph 1 of this Article, provided that it concerns only the advocating, promoting or inciting to discrimination, which is not associated to hatred or violence. A Party may further restrict the scope of the reservation by requiring that the discrimination is, for instance, insulting, degrading, or threatening a group of persons.

Article 4 – Racist and xenophobic motivated threat

33. Most legislation provide for the criminalisation of threat in general. The drafters agreed to stress in the Protocol that, beyond any doubt, threats for racist and xenophobic motives are to be criminalized.

34. The notion of "threat" may refer to a menace which creates fear in the persons to whom the menace is directed, that they will suffer the commission of a serious criminal offence (e.g. affecting the life, personal security or integrity, serious damage to properties, etc., of the victim or their relatives). It is left to the States Parties to determine what is a serious criminal offence.

35. According to this article, the threat has to be addressed either to (i) a person for the reason that he or she belongs to a group, distinguished by race, colour, descent or national or ethnic origin, as well as religion, if used as a pretext for any of these factors, or to (ii) a group of persons which is distinguished by any of these characteristics. There is a no restriction that the threat should be public. This article also covers threats by private communications.

Article 5 – Racist and xenophobic motivated insult

36. Article 5 deals with the question of insulting publicly a person or a group of persons because they belong or are thought to belong to a group distinguished by specific characteristics. The notion of "insult" refers to any offensive, contemptuous or invective expression which prejudices the honour or the dignity of a person. It should be clear from the expression itself that the insult is directly connected with the insulted person's belonging to the group. Unlike in the case of threat, an insult expressed in private communications is not covered by this provision.

37. Paragraph 2(i) allows Parties to require that the conduct must also have the effect that the person or group of persons, not only potentially, but are also actually exposed to hatred, contempt or ridicule.

38. Paragraph 2(ii) allows Parties to enter reservations which go further, even to the effect that paragraph 1 does not apply to them.

Article 6 – Denial, gross minimisation, approval or justification of genocide or crimes against humanity

39. In recent years, various cases have been dealt with by national courts where persons (in public, in the media, etc.) have expressed ideas or theories which aim at denying, grossly minimising, approving or justifying the serious crimes which occurred in particular during the second World War (in particular the Holocaust). The motivation for such behaviours is often presented with the pretext of scientific research, while they really aim at supporting and promoting the political motivation which gave rise to the Holocaust. Moreover, these behaviours have also inspired or, even, stimulated and encouraged, racist and xenophobic groups in their action, including through computer systems. The expression of such ideas insults (the memory of) those persons who have been victims of such evil, as well as their relatives. Finally, it threatens the dignity of the human community.

40. Article 6, which has a similar structure as Article 3, addresses this problem. The drafters agreed that it was important to criminalize expressions which deny, grossly minimise, approve or justify acts constituting genocide or crimes against humanity, as defined by international law and recognised as such by final and binding decisions of the International Military Tribunal, established by the London Agreement of 8 April 1945. This owing to the fact that the most important and established conducts, which had given rise to genocide and crimes against humanity, occurred during the period 1940-1945. However, the drafters recognised that, since then, other cases of genocide and crimes against humanity occurred, which were strongly motivated by theories and ideas of a racist and xenophobic nature. Therefore, the drafters considered it necessary not to limit the scope of this provision only to the crimes committed by the Nazi regime during the 2nd World War and established as such by the Nuremberg Tribunal, but also to genocides and crimes against humanity established by other international courts set up since 1945 by relevant international legal instruments (such as UN Security Council Resolutions, multilateral treaties, etc.). Such courts may be, for instance, the International Criminal Tribunals for the former Yugoslavia, for Rwanda, the Permanent International Criminal Court. This Article allows to refer to final and binding decisions of future international courts, to the extent that the jurisdiction of such a court is recognised by the Party signatory to this Protocol.

41. The provision is intended to make it clear that facts of which the historical correctness has been established may not be denied, grossly minimised, approved or justified in order to support these detestable theories and ideas.

42. The European Court of Human Rights has made it clear that the denial or revision of "clearly established historical facts – such as the Holocaust – […] would be removed from the protection of Article 10 by Article 17" of the ECHR (see in this context the Lehideux and Isorni judgment of 23 September 1998)[3].

43. Paragraph 2 of Article 6 allows a Party either (i) to require, through a declaration, that the denial or the gross minimisation referred to in paragraph 1 of Article 6, is committed with the intent to incite hatred, discrimination or violence against any individual or group of individuals, based on race, colour, descent or national or ethnic origin, as well as religion if used as a pretext for any of these factors. or (ii) to make use of a reservation, by allowing a Party not to apply – in whole or in part – this provision.

Article 7 – Aiding and abetting

44. The purpose of this article is to establish as criminal offences aiding or abetting the commission of any of the offences under Articles 3-6. Contrary to the Convention, the Protocol does not contain the criminalisation of the attempt to commit the offences contained in it, as many of the criminalized conducts have a preparatory nature.

45. Liability arises for aiding or abetting where the person who commits a crime established in the Protocol is aided by another person who also intends that the crime be committed. For example, although the transmission of racist and xenophobic material through the Internet requires the assistance of service providers as a conduit, a service provider that does not have the criminal intent cannot incur liability under this section. Thus, there is no duty on a service provider to actively monitor content to avoid criminal liability under this provision.

46. As with all the offences established in accordance with the Protocol, aiding or abetting must be committed intentionally.

3. Lehideux and Isorni judgment of 23 September 1998, Reports 1998-VII, para. 47.

CHAPTER III – RELATIONS BETWEEN THE CONVENTION AND THIS PROTOCOL

Article 8 – Relations between the Convention and this Protocol

47. Article 8 deals with the relationship between the Convention and this Protocol. This provision avoids the inclusion of a number of provisions of the Convention in this Protocol. It indicates that some of the provisions of the Convention apply, *mutatis mutandis*, to this Protocol (e.g. concerning ancillary liability and sanctions, jurisdictions and a part of the final provisions). Paragraph 2 reminds the Parties that the meaning as defined in the Convention should apply to the offences of the Protocol. For the sake of clarity, the relating articles are specified.

CHAPTER IV – FINAL PROVISIONS

48. The provisions contained in this Chapter are, for the most part, based on the 'Model final clauses for conventions and agreements concluded within the Council of Europe' which were approved by the Committee of Ministers at the 315th meeting of the Deputies in February 1980. As most of the Articles 9 through 16 either use the standard language of the model clauses or are based on long-standing treaty-making practice at the Council of Europe, they do not call for specific comments. However, certain modifications of the standard model clauses or some new provisions require further explanation. It is noted in this context that the model clauses have been adopted as a non-binding set of provisions. As the introduction to the model clauses pointed out "these model final clauses are only intended to facilitate the task of committees of experts and avoid textual divergences which would not have any real justification. The model is in no way binding and different clauses may be adopted to fit particular cases" (see also in this context paragraphs 304-330 of the Explanatory Report to the Convention).

49. Paragraph 2 of Article 12 specifies that the Parties may make use of the reservation as defined in Articles 3, 5 and 6 of this Protocol. No other reservation may be made.

50. This Protocol is opened to signature only to the signatories to the Convention. The Protocol will enter into force three month after five Parties to the Convention have expressed their consent to be bound by it (Articles 9-10).

51. The Convention allows reservations concerning certain provisions which, through the connecting clause of Article 8 of the Protocol, may have an effect on the obligations of a Party under the Protocol as well. Nevertheless, a Party may notify the Secretary General that it will not apply this reservation in respect of the content of the Protocol. This is expressed in paragraph 2 of Article 12 of the Protocol.

52. However, where a Party did not make use of such reservation possibility under the Convention, it may have a need to restrict its obligations in relation with the offences of the Protocol. Paragraph 2 of Article 12 enables Parties to do so in relation to Article 22, paragraph 2, and Article 41, paragraph 1, of the Convention.

European Convention on the supervision of conditionally sentenced or conditionally released offenders – ETS No. 51

Strasbourg, 30.XI.1964

Preamble

The member States of the Council of Europe, signatory hereto,

Considering that the aim of the Council of Europe is to achieve greater unity among its members;

Being resolved to take concerted action to combat crime;

Considering that, to this end, they are in duty bound to ensure, in the territory of the other Contracting Parties, either the social rehabilitation of offenders given suspended sentences or released conditionally by their own courts, or the enforcement of the sentence when the prescribed conditions are not fulfilled,

Have agreed as follows:

PART I – BASIC PRINCIPLES

Article 1

1. The Contracting Parties undertake to grant each other in the circumstances set out below the mutual assistance necessary for the social rehabilitation of the offenders referred to in Article 2. This assistance shall take the form of supervision designed to facilitate the good conduct and readaptation to social life of such offenders and to keep a watch on their behaviour with a view, should it become necessary, either to pronouncing sentence on them or to enforcing a sentence already pronounced.

2. The Contracting Parties shall, in the circumstances set out below and in accordance with the following provisions, enforce such detention order or other penalty involving deprivation of liberty as may have been passed on the offender, application of which has been suspended.

Article 2

1. For the purposes of this Convention, the term "offender" shall be taken to mean any person, who, in the territory of one of the Contracting Parties, has:

   a. been found guilty by a court and placed on probation without sentence having been pronounced;

b. been given a suspended sentence involving deprivation of liberty, or a sentence of which the enforcement has been conditionally suspended, in whole or in part, either at the time of the sentence or subsequently.

2. In subsequent articles, the term "sentence" shall be deemed to include all judicial decisions taken in accordance with sub-paragraphs a and b of paragraph 1 above.

Article 3

The decisions referred to in Article 2 must be final and must have executive force.

Article 4

The offence on which any request under Article 5 is based shall be one punishable under the legislation of both the requesting and the requested State.

Article 5

1. The State which pronounced the sentence may request the State in whose territory the offender establishes his ordinary residence:

a. to carry out supervision only, in accordance with Part II;

b. to carry out supervision and if necessary to enforce the sentence, in accordance with Parts II and III;

c. to assume entire responsibility for applying the sentence, in accordance with the provisions of Part IV.

2. The requested State shall act upon such a request, under the conditions laid down in this Convention.

3. If the requesting State has made one of the requests mentioned in paragraph 1 above, and the requested State deems it preferable, in any particular case, to adopt one of the other courses provided for in that paragraph, the requested State may refuse to accede to such a request, at the same time declaring its willingness to follow another course, which it shall indicate.

Article 6

Supervision, enforcement or complete application of the sentence, as defined in the preceding article, shall be carried out, at the request of the State in which sentence was pronounced, by the State in whose territory the offender establishes his ordinary residence.

Article 7

1. Supervision, enforcement or complete application shall be refused:

a. if the request is regarded by the requested State as likely to prejudice its sovereignty, security, the fundamentals of its legal system, or other essential interests;

b. if the request relates to a sentence for an offence which has been judged in final instance in the requested State;

c. if the act for which sentence has been passed is considered by the requested State as either a political offence or an offence related to a political offence, or as a purely military offence;

d. if the penalty imposed can no longer be exacted, because of the lapse of time, under the legislation of either the requesting or the requested State;

e. if the offender has benefited under an amnesty or a pardon in either the requesting or the requested State.

2. Supervision, enforcement or complete application may be refused:

a. if the competent authorities in the requested State have decided not to take proceedings, or to drop proceedings already begun, in respect of the same act;

b. if the act for which sentence has been pronounced is also the subject of proceedings in the requested State;

c. if the sentence to which the request relates was pronounced *in absentia*;

d. to the extent that the requested State deems the sentence incompatible with the principles governing the application of its own penal law, in particular, if on account of his age the offender could not have been sentenced in the requested State.

3. In the case of fiscal offences, supervision or enforcement shall be carried out, in accordance with the provisions of this Convention, only if the Contracting Parties have so decided in respect of each such offence or category of offences.

Article 8

The requesting and requested State shall keep each other informed in so far as it is necessary of all circumstances likely to affect measures of supervision or enforcement in the territory of the requested State.

Article 9

The requested State shall inform the requesting State without delay what action is being taken on its request

In the case of total or partial refusal to comply, it shall communicate its reasons for such refusal.

PART II – SUPERVISION

Article 10

The requesting State shall inform the requested State of the conditions imposed on the offender and of any supervisory measures with which he must comply during his period of probation.

Article 11

1. In complying with a request for supervision, the requested State shall, if necessary, adapt the prescribed supervisory measures in accordance with its own laws.

2. In no case may the supervisory measures applied by the requested State, as regards either their nature or their duration, be more severe than those prescribed by the requesting State.

Article 12

When the requested State agrees to undertake supervision, it shall proceed as follows:

1. It shall inform the requesting State without delay of the answer given to its request;

2. It shall contact the authorities or bodies responsible in its own territory for supervising and assisting offenders;

3. It shall inform the requesting State of all measures taken and their implementation.

Article 13

Should the offender become liable to revocation of the conditional suspension of his sentence referred to in Article 2 either because he has been prosecuted or sentenced for a new offence, or because he has failed to observe the prescribed conditions, the necessary information shall be supplied to the requesting State automatically and without delay by the requested State.

Article 14

When the period of supervision expires, the requested State shall, on application by the requesting State, transmit all necessary information to the latter.

Article 15

The requesting State shall alone be competent to judge, on the basis of the information and comments supplied by the requested State, whether or not the offender has satisfied the conditions imposed upon him, and, on the basis of such appraisal, to take any further steps provided for by its own legislation.

It shall inform the requested State of its decision.

PART III – ENFORCEMENT OF SENTENCES

Article 16

After revocation of the conditional suspension of the sentence by the requesting State, and on application by that State, the requested State shall be competent to enforce the said sentence.

Article 17

Enforcement in the requested State shall take place in accordance with the law of that State, after verification of the authenticity of the request for enforcement and its compatibility with the terms of this Convention.

Article 18

The requested State shall in due course transmit to the requesting State a document certifying that the sentence has been enforced.

Article 19

The requested State shall, if need be, substitute for the penalty imposed in the requesting State, the penalty or measure provided for by its own legislation for a similar offence. The nature of such penalty or measure shall correspond as closely as possible to that in the sentence to be enforced. It may not exceed the maximum penalty provided for by the legislation of the requested State, nor may it be longer or more rigorous than that imposed by the requesting State.

Article 20

The requesting State may no longer itself take any of the measures of enforcement requested, unless the requested State indicates that it is unwilling or unable to do so.

Article 21

The requested State shall be competent to grant the offender conditional release. The right of pardon may be exercised by either the requesting or the requested State.

PART IV – RELINQUISHMENT TO THE REQUESTED STATE

Article 22

The requesting State shall communicate to the requested State the sentence of which it requests complete application.

Article 23

1. The requested State shall adapt to its own penal legislation the penalty or measure prescribed as if the sentence had been pronounced for the same offence committed in its own territory.

2. The penalty imposed by the requested State may not be more severe than that pronounced in the requesting State.

Article 24

The requested State shall ensure complete application of the sentence thus adapted as if it were a sentence pronounced by its own courts.

Article 25

The acceptance by the requested State of a request in accordance with the present Part IV shall extinguish the right of the requesting State to enforce the sentence.

PART V – COMMON PROVISIONS

Article 26

1. All requests in accordance with Article 5 shall be transmitted in writing. They shall indicate:

   a. the issuing authority;

   b. their purpose;

   c. the identity of the offender and his place of residence in the requested State.

2. Requests for supervision shall be accompanied by the original or a certified transcript of the Court findings containing the reasons which justify the supervision and specifying the measures imposed on the offender. They should also certify the enforceable nature of the sentence and of the supervisory measures to be applied. So far as possible, they shall state the circumstances of the offence giving rise to the sentence of supervision, its time and place and legal destination and, where necessary, the length of the sentence to be enforced. They shall give full details of the nature and duration of the measures of supervision requested, and include a reference to the legal provisions applicable together with necessary information on the character of the offender and his behaviour in the requesting State before and after pronouncement of the supervisory order.

3. Requests for enforcement shall be accompanied by the original, or a certified transcript, of the decision to revoke conditional suspension of the pronouncement or enforcement of sentence and also of the decision imposing the sentence now to be enforced. The enforceable nature of both decisions shall be certified in the manner prescribed by the law of the State in which they were pronounced.

If the judgment to be enforced has replaced an earlier one and does not contain a recital of the facts of the case, a certified copy of the judgment containing such recital shall also be attached.

Requests for complete application of the sentence shall be accompanied by the documents mentioned in paragraph 2 above.

Article 27

1. Requests shall be sent by the Ministry of Justice of the requesting State to the Ministry of Justice of the requested State and the reply shall be sent through the same channels.

2. Any communications necessary under the terms of this Convention shall be exchanged either through the channels referred to in paragraph 1 of this article, or directly between the authorities of the Contracting Parties.

3. In case of emergency, the communications referred to in paragraph 2 of this article may be made through the International Criminal Police Organisation (Interpol).

4. Any Contracting Party may, by declaration addressed to the Secretary General of the Council of Europe, give notice of its intention to adopt new rules in regard to the communications referred to in paragraphs 1 and 2 of this article.

Article 28

If the requested State considers that the information supplied by the requesting State is inadequate to enable it to apply this Convention, it shall ask for the additional information required. It may fix a time-limit for receipt of such information.

Article 29

1. Subject to the provisions of paragraph 2 of this article, no translation of requests, or of the supporting documents, or of any other documents relating to the application of this Convention, shall be required.

2. Any Contracting Party may, when signing this Convention or depositing its instrument of ratification, acceptance or accession, by a declaration addressed to the Secretary General of the Council of Europe, reserve the right to require that requests and supporting documents should be accompanied by a translation into its own language, or into one of the official languages of the Council of Europe, or into such one of those languages as it shall indicate. The other Contracting Parties may claim reciprocity.

3. This article shall be without prejudice to any provision regarding translation of requests and supporting documents that may be contained in agreements or arrangements now in force or that may be concluded between two or more of the Contracting Parties.

Article 30

Documents transmitted in application of this Convention shall not require authentication.

Article 31

The requested State shall have powers to collect, at the request of the requesting State, the cost of prosecution and trial incurred in that State.

Should it collect such costs, it shall be obliged to refund to the requesting State experts' fees only.

Article 32

Supervision and enforcement costs incurred in the requested State shall not be refunded.

PART VI – FINAL PROVISIONS

Article 33

This Convention shall be without prejudice to police regulations relating to foreigners.

Article 34

1. This Convention shall be open to signature by the member States of the Council of Europe. It shall be subject to ratification or acceptance. Instruments of ratification or acceptance shall be deposited with the Secretary General of the Council of Europe.

2. This Convention shall enter into force three months after the date of the deposit of the third instrument of ratification or acceptance.

3. In respect of a signatory State ratifying or accepting subsequently, the Convention shall come into force three months after the date of the deposit of its instrument of ratification or acceptance.

Article 35

1. After the entry into force of this Convention, the Committee of Ministers of the Council of Europe may invite any non-member State to accede thereto.

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 three months after the date of its deposit.

Article 36

1. Any Contracting Party may, at the time of signature or when depositing its instrument of ratification, acceptance or accession, specify the territory or territories to which this Convention shall apply.

2. Any Contracting Party may, when depositing its instrument of ratification, acceptance or accession or at any later date, by declaration addressed to the Secretary General of the Council of Europe, extend this Convention 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 according to the procedure laid down in Article 39 of this Convention.

Article 37

1. This Convention shall not affect the undertakings given in any other existing or future international Convention, whether bilateral or multilateral, between two or more of the Contracting Parties, on extradition or any other form of mutual assistance in criminal matters.

2. The Contracting Parties may not conclude bilateral or multilateral agreements with one another on the matters dealt with in this Convention, except in order to supplement its provisions or facilitate application of the principles embodied in it.

3. Should two or more Contracting Parties, however, have already established their relations in this matter on the basis of uniform legislation, or instituted a special system of their own, or should they in future do so, they shall be entitled to regulate those relations accordingly, notwithstanding the terms of this Convention.

Contracting Parties ceasing to apply the terms of this Convention to their mutual relations in this matter shall notify the Secretary General of the Council of Europe to that effect.

Article 38

1. Any Contracting Party may, at the time of signature or when depositing its instrument of ratification, acceptance or accession, declare that it avails itself of one or more of the reservations provided for in the annex to this Convention.

2. Any Contracting Party may wholly or partly withdraw a reservation 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.

3. A Contracting Party which has made a reservation in respect of any provision of this Convention may not claim the application of that provision by any other 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.

4. Any Contracting Party may, on signing the present Convention, or on depositing its instrument of ratification, acceptance or accession, notify the Secretary General of the Council of Europe that it considers ratification, acceptance or accession as entailing an obligation, in international law, to introduce into municipal law measures to implement the said Convention.

Article 39

1. This Convention shall remain in force indefinitely.

2. Any Contracting Party may, in so far as it is concerned, denounce this Convention by means of a notification addressed to the Secretary General of the Council of Europe.

3. Such denunciation shall take effect six months after the date of receipt by the Secretary General of such notification.

Article 40

The Secretary General of the Council of Europe shall notify the member States of the Council, and any State that has acceded to this Convention of:

a. any signature;

b. any deposit of an instrument of ratification, acceptance or accession;

c. any date of entry into force of this Convention in accordance with Article 34;

d. any notification or declaration received in pursuance of the provisions of paragraph 4 of Article 27, of paragraph 2 of Article 29, of paragraph 3 of Article 37 and of paragraph 4 of Article 38;

e. any declaration received in pursuance of the provisions of paragraphs 2 and 3 of Article 36;

f. any reservation made in pursuance of the provisions of paragraph 1 of Article 38;

g. the withdrawal of any reservation carried out in pursuance of the provisions of paragraph 2 of Article 38;

h. any notification received in pursuance of the provisions of Article 39, and the date on which denunciation takes effect.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at Strasbourg this 30th day of November 1964, 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 each of the signatory and acceding States.

ANNEX

Any Contracting Party may declare that it reserves the right to make known:

1. that it does not accept the provisions of the Convention as related to the enforcement of sentences or their complete application;

2. that it accepts only part of these provisions;

3. that it does not accept the provisions of paragraph 2 of Article 37.

European Convention on the supervision of conditionally sentenced or conditionally released offenders – ETS No. 51

Explanatory Report

I. The European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders, drawn up within the Council of Europe by a committee of governmental experts, was opened to signature by member States of the Council of Europe on 30 November 1964.

II. The text of the explanatory report prepared by the committee of experts and submitted to the Committee of Ministers of the Council of Europe, as amended and completed by the CCJ, does not constitute an instrument providing an authoritative interpretation of the Convention, although it might be of such a nature as to facilitate the application of the provisions contained therein.

INTRODUCTION

In 1957 the Committee of Ministers decided to set up a committee of experts with the task of " preparing and putting into effect a Council of Europe programme of action in the field of the prevention of crime and treatment of offenders ". This committee was subsequently given the name European Committee on Crime Problems " (ECCP).

At its first meeting, held from 30 June to 3 July 1958, the ECCP drew up a first Council of Europe programme of action comprising the question of possible European co-operation in mutual assistance in after-care.

This programme was approved by the Committee of Ministers in September 1958.

Following this decision, the ECCP considered it expedient to draw up a draft European Convention on the supervision of conditionally sentenced or conditionally released offenders.

A sub-committee was directed to prepare a preliminary draft Convention. This sub-committee met on several occasions, first under the chairmanship of Mr. Peterson (United Kingdom) and subsequently under that of Mr. Dupréel (Belgium).

At its meeting on 8 and 9 May 1963, it finished drawing up the text of a preliminary draft convention for submission to the Plenary Committee.

The Plenary Committee examined this text at its 10th and 11th meetings, held at Strasbourg from 28 to 30 May 1963 and from 2 to 7 December 1963 respectively.

At its 11th meeting, it adopted the draft Convention.

In January 1964, in accordance with the conclusions of the 15th meeting of the Committee of Ministers, the Secretariat sent to the governments of all Council of Europe member countries, the draft Convention. Governments were asked to communicate any observations before 15 March 1964.

The observations formulated by the governments have been examined by the Plenary Committee of the ECCP at its 12th meeting, held from 8-12 June 1964 under the Chairmanship of Mr. Cornil (Belgium).

On the basis of these observations, the ECCP adopted unanimously the text of the European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders.

Pursuant to a decision taken by the Committee of Ministers sitting at Deputy level during its 134th meeting (October 1964) the Convention was opened to signature by the member States of the Council of Europe on 30 November 1964.

COMMENTARY ON THE CONVENTION

The European Convention was drawn up by the European Committee on Crime Problems with the object of establishing a system of international co-operation where by conditional measures (suspended sentence, probation, early release etc.) taking effect concurrently with or subsequent to a sentence pronounced by one Contracting Party, may be carried out on the territory of another.

Nowadays conditional measures are a recognised part of the penal system, and are used to provide better protection against crime while at the same time lightening the financial burden of prison costs and aid to prisoners' families.

Except in very few cases, however, these measures for treatment without confinement are applied only on a national scale. Where foreigners or persons residing abroad are concerned, courts are reluctant to pass a sentence which is not certain to be put into effect in another country. In consequence, offenders who would normally have qualified for suspended sentence or probation are either given a term of confinement, kept in prison until their sentence expires, or released only in order to be expelled from the country, making it likely that they will relapse into crime in the country to which they are deported.

In the past this state of affairs aroused little attention, since very few cases were involved; but today there is so much coming and going between different countries of Europe that a more equitable system has become essential. The Convention is designed to provide such a system. The mutual aid which it organises on an international scale will facilitate the prevention of relapse into crime by making available across frontiers those methods of individual amendment and social rehabilitation which have proved successful on a national scale. Its aim will be not only to supervise released offenders, but also to give such assistance as may be necessary to ensure their rehabilitation in their country of residence.

The Convention is intended to apply only to offenders, of any age, on whom a penal judgment has been pronounced. It does not therefore concern minors dealt with by measures not arising from penal proceedings.

The Convention consists of forty articles grouped in six parts.

Part I (Articles 1 to 9) states the basic principles dealt with above, and specifies that the responsible authorities of the State in which the offender was conditionally sentenced or conditionally released (requesting State) will have three possible courses of action, set out under Parts II, III and IV respectively.

The penal judgments referred to in the Convention are defined in Article 2. They must be final and must have executive force (Article 3). The offence on which the request is based must be punishable under the legislation of both States concerned, in application of the principle of double incrimination (Article 4).

Cases in which the requested State shall or may refuse the action requested are set out in Article 7.

Under Part II (Articles 10 to 15), entitled " Supervision ", the requesting State may ask the State in which the released offender is resident to undertake supervision in order to ascertain whether the offender is complying with the conditions imposed on him. In that case the final decision as to whether the offender has amended his conduct satisfactorily or, if not, whether the suspended sentence should be enforced, shall rest with the requesting State.

Article 10 specifies in particular that the requesting State shall inform the State of residence of "any" supervisory measures with which the offender must comply. This wording was introduced deliberately, to cover hypothetical cases of suspended sentence in which no supervisory measures are ordered.

In accordance with Article 15, the requesting State alone shall remain competent to judge whether or not the offender has satisfied the conditions imposed upon him, and on the basis of such appraisal to take any further steps provided for by its own legislation.

Part III (Articles 16 to 21) deals with enforcement of sentences. It authorises a requesting State which has revoked conditional suspension of sentence to apply to the State of residence to enforce that sentence on its own territory.

Provision is made for enforcement of sentence to take place in accordance with the law of the requested State (Article 17). That State has a certain liberty to make necessary adjustments in the measures it is asked to apply (Article 19).

In order to avoid any risk of the duplication of proceedings, it is laid down that the requesting State may no longer itself enforce the sentence, unless its request has not been met (Article 20).

Part IV (Articles 22 to 25) deals with relinquishment to the requested State and institutes a simplified procedure under which the State in which sentence was imposed may transmit the case to the State of residence, which then enforces the sentence as if it has been pronounced on its own territory.

This procedure will probably be followed where there are grounds for anticipating that the offender will go to the requested State with no intention of returning to the requesting State.

Part V (Articles 26 to 32) consists of provisions common to the three types of procedure described above. It deals with the form of requests, the procedure to be adopted in transmining them, the language to be used and the method of paying the costs incurred.

Part VI (Articles 33 to 40) comprises the final provisions covering the conditions of ratification or acceptance of the Convention and of accession thereto, and the form to be given to any declaration or reservations formulated by the Contracting Parties at the time of signature or ratification.

The Convention gives Contracting Parties the right to make reservations (Article 38, paragraph 1 and Appendix to the Convention) concerning:

a. enforcement of sentences and relinquishment to the requested State, which are dealt with in Parts III and IV. The possibility of making reservations concerning these Parts will permit countries, if their municipal legislation requires it, to establish objective criteria governing cases of transfer of competence from the judge in one State to the judge in another;

b. provisions of paragraph 2 of Article 37.

No reservation can be made in respect of supervision by one State at the request of another. Part II of the Convention does not challenge the established concepts of national sovereignty and can thus be readily accepted by all States.

The Convention as a whole is flexible enough to allow the States concerned considerable liberty both in their choice of procedure and in adapting measures to the requirements of their national laws and penal systems.

European Convention on the punishment of road traffic offences – ETS No. 52

Strasbourg, 30.XI.1964

Preamble

The member States of the Council of Europe, signatory hereto,

Considering the increase in road traffic between European States and the dangers consequent upon the violation of rules designed to protect road users;

Considering that the aim of the Council of Europe is the achievement of greater unity between its members;

Convinced of the necessity of their mutual co-operation in ensuring more effective punishment of road traffic offences committed in their territories,

Have agreed as follows:

SECTION I – FUNDAMENTAL PRINCIPLES

Article 1

1. When a person ordinarily resident in the territory of one Contracting Party has committed a road traffic offence in the territory of another Contracting Party, the State of the offence may, or if its municipal law requires, must, request the State of residence to take proceedings if it has not instituted them itself, or if, having done so, it deems it impossible to carry them through to a final decision or to enforce the penalty in full.

2. When a judgment or administrative decision has become enforceable in the State of the offence after the offender has been given an opportunity to present his defence, that State may request the State of residence to enforce such judgment or decision.

3. The State of residence shall take action on the request for proceedings or enforcement as hereinafter provided. However, enforcement of judgments rendered by default shall not be compulsory.

Article 2

1. The road traffic offence in respect of which proceedings or enforcement are requested in accordance with Article 1 must be punishable under the laws of both the State of the offence and the State of residence.

2. For the purposes of prosecution or enforcement of sentence the law of the State of residence shall be applicable, it being understood that the only traffic rules to be referred to shall be those in force at the place of the offence.

SECTION II – PROCEEDINGS IN THE STATE OF RESIDENCE

Article 3

The authorities of the State of residence shall be competent to prosecute, at the request of the State of the offence, for a road traffic offence committed in the territory of that State.

Article 4

The competent authorities of the State of residence shall examine any request for proceedings addressed to them under Articles 1 and 2 and shall decide, in accordance with their own laws, what action to take thereon.

Article 5

1. When the State of the offence has addressed a request for proceedings under Article 1, it may no longer proceed or enforce a decision against the offender.

2. It may resume proceedings or enforcement:

   a. whenever the State of residence has notified the State of the offence that it has not taken action on the request;

   b. whenever, on grounds which have arisen subsequently, it has notified the State of residence of the withdrawal of its request before the opening of the hearing in a court of first instance or before the delivery of an administrative decision in the State of residence.

Article 6

1. The request for proceedings shall mention the date on which the competent authority made application.

In the State of the offence, the limitation of the time for prosecution shall be suspended as from that date. Such time limitation shall begin to run again to its full extent from the date of the notification in accordance with paragraphs 2.a and b of Article 5 that no action has been taken or that the request has been withdrawn and, in any case, within six months of the request for proceedings.

2. In the State of residence, the time limitation for prosecution shall only begin to run from the date of receipt of the request for proceedings.

When, in that State, a complaint from the victim is required for the institution of proceedings, the time-limit within which such complaint shall be lodged will begin to run from the date of receipt of the request for proceedings.

Article 7

Documents drawn up by the judicial and administrative authorities of the State of the offence shall have the same legal force in the State of residence as if they had been drawn up by the authorities of that State, and *vice versa*.

SECTION III – ENFORCEMENT IN THE STATE OF RESIDENCE

Article 8

The authorities of the State of residence shall be competent, when requested by the State of the offence, to enforce the decisions referred to in Article 1.2 of this Convention. Decisions shall be enforced in accordance with the law of the State of residence subject to confirmation of the authenticity of the request and of its conformity with this Convention. The State of residence shall be competent to grant the offender conditional release. The right of pardon may be exercised by either the State of residence or the State of the offence.

Article 9

1. Enforcement in the State of residence shall not take place:

   a. if the offender has been the subject of a final decision in that State in respect of the same offence;

   b. if the time-limit for the penalty has expired according to the law of either the State of the offence or the State of residence;

   c. if the offender has benefited under an amnesty or a pardon in either the State of residence or the State of the offence.

2. The State of residence may refuse enforcement:

   a. if the competent authorities in that State have decided not to take proceedings, or to drop proceedings already begun, in respect of the same act;

   b. if the act for which sentence has been pronounced is also the subject of proceedings in that State;

   c. to the extent that that State deems it likely that enforcement would do violence to the fundamentals of its legal system or would be incompatible with the principles governing the application of its own penal law, in particular if, on account of his age, the offender could not have been sentenced in that State.

Article 10

When a request is made under Article 1.2 for the enforcement of some penalty other than a fine, the State of residence shall, if necessary, substitute for the penalty imposed in the State of the offence the penalty prescribed by the law of the State of residence for a like offence.

Such penalty shall, as far as possible, correspond in nature to that imposed by the decision of which enforcement is requested. It may not exceed the maximum penalty provided for by the legislation of the State of residence nor may it be longer or more severe than that imposed by the State of the offence. In determining the penalty, the competent authorities of the State of residence may also take into consideration the methods whereby the penalty is customarily enforced in that State.

Article 11

When a request is made for the enforcement of a fine, the State of residence shall collect payment in accordance with the conditions prescribed by its law up to the maximum sum fixed by such law in respect of a like offence or, failing such a maximum, up to the amount of the fine customarily imposed in the State of residence in respect of a like offence.

Article 12

In case of non-payment of the fine, the State of residence shall, if requested by the State of the offence, apply such compulsory or substitute measures as are prescribed by its own laws.

The State of residence shall not apply a compulsory or substitute measure involving imprisonment prescribed by a sentence in the State of the offence unless expressly requested to do so by that State.

Article 13

The State of the offence may no longer enforce any decision against the offender unless a refusal or an inability to enforce has been notified to it by the State of residence.

SECTION IV – GENERAL PROVISIONS

Article 14

1. Requests under Article 1 of this Convention shall be made in writing.

2. A request for proceedings shall be accompanied by the original or authentic copy of all statements, diagrams, photographs and other documents relating to the offence and by a copy of the legal provisions applicable to the case in the State of the offence. Copies of the offender's record of convictions, statutory

provisions relating to the time limitation, writs suspending the time limitation, together with supporting facts, shall also be appended.

3. A request for enforcement shall be accompanied by the original or an authentic copy of the decision, which shall be certified enforceable in the manner prescribed by the law of the State of the offence. When the decision of which enforcement is requested supersedes another decision without reproducing the statement of the facts, an authentic copy of the decision containing such statement shall be appended.

Article 15

1. Requests shall be sent by the Ministry of Justice of the State of the offence to the Ministry of Justice of the State of residence and the reply shall be sent through the same channels.

2. Any communications necessary under the terms of this Convention shall be exchanged either through the channels referred to in paragraph 1 of this article, or directly between the authorities of the Contracting Parties.

3. In case of emergency, the communications referred to in paragraph 2 of this article may be made through the International Criminal Police Organisation (Interpol).

4. Any Contracting Party may, by declaration addressed to the Secretary General of the Council of Europe, give notice of its intention to adopt new rules in regard to the communications referred to in paragraphs 1 and 2 of this article.

Article 16

If the State of residence considers that the information supplied by the State of the offence is inadequate to enable it to apply this Convention, it shall ask for the additional information required. It may fix a time-limit for the receipt of such information.

Article 17

The Contracting Parties shall extend the legal assistance they afford one another in criminal matters to measures necessary for the execution of this Convention, including the transmission of writs drawn up by the administrative authorities and service of orders to pay, the latter measure not being deemed an enforcement measure.

Article 18

The State of residence shall inform the State of the offence without delay of the action taken on a request for proceedings or enforcement and shall, in either case, send to the latter State a document certifying that the penalty has been enforced and also, in the case of proceedings, an authentic copy of the final decision.

Article 19

1. Subject to the provisions of paragraph 2 of this article, no translation of requests, or of the supporting documents, or of any other documents relating to the application of this Convention, shall be required.

2. Any Contracting Party may, when signing or depositing its instrument of ratification, acceptance or accession, by a declaration addressed to the Secretary General of the Council of Europe, reserve the right to require that requests and supporting documents should be accompanied by a translation into its own language or into one of the official languages of the Council of Europe or into such one of those languages as it shall indicate. The other Contracting Parties may claim reciprocity.

3. This article shall be without prejudice to any provision concerning translation of requests and supporting documents that may be contained in agreements or arrangements now in force or that may be concluded between two or more Contracting Parties.

Article 20

Evidence and documents transmitted in application of this Convention need not be authenticated.

Article 21

The proceeds of fines levied as a result of requests for proceedings or enforcement shall become the property of the State of residence which may use them as it deems fit.

Article 22

The State of residence shall have power to collect, at the request of the State of the offence, the costs of prosecution and trial incurred in that State.

Should it collect such costs, it shall be obliged to refund to the State of the offence experts' fees only.

Article 23

The costs of proceedings and enforcement incurred in the State of residence shall not be refunded.

SECTION V – FINAL PROVISIONS

Article 24

In this Convention:

a. "Road traffic offence" means any offence listed in the "Common Schedule of Road Traffic Offences" annexed to this Convention;

b. "State of the offence" means the State, Party to the present Convention, in whose territory a road traffic offence has been committed;

c. "State of residence" means the State, Party to the present Convention, in which the person who has committed a road traffic offence is ordinarily resident;

d. "Road traffic rules" means any rules covering items 4 to 7 of Annex I to this Convention, entitled "Common Schedule of Road Traffic Offences";

e. "Judgment" refers to decisions rendered by a judicial authority, including *ordonnances pénales* and *amendes de composition*;

f. "Administrative decision" refers to decisions rendered in some States by administrative authorities empowered to impose the penalties prescribed by law for certain classes of road traffic offences.

Article 25

1. Annex I to this Convention, entitled "Common Schedule of Road Traffic Offences", shall be an integral part thereof.

2. Any Contracting Party may, at any time, by written declaration to the Secretary General of the Council of Europe, indicate road traffic offences not listed in Annex I to which it wishes to apply this Convention, or those listed in Annex I which it wishes to exclude from such application, in its relations with the other Contracting Parties.

3. When a Contracting Party has added an offence or offences to the list contained in Annex I to this Convention, the other Contracting Parties shall, if appropriate, notify the Secretary General of the Council of Europe of their agreement. Such additions may be invoked *vis-à-vis* them, three months after such notification.

4. When a Contracting Party has removed an offence or offences from the list contained in Annex I to this Convention, the declaration referred to in paragraph 2 of this article shall take effect, if it is made at the time of the signature of the Convention or of the deposit of the instrument of ratification, acceptance or accession, at the time of entry into force of the Convention; if it is made later, three months after its receipt by the Secretary General of the Council of Europe. Any Contracting Party may claim reciprocity.

5. Any Contracting Party may state that under its domestic law the declaration provided for in paragraphs 2 and 3 must be submitted for approval to its legislative organs. In this event any addition to the list in Annex I shall not come into effect with regard to the said Party until the latter has informed the Secretary General of the Council of Europe that such approval has been obtained.

Article 26

The present Convention does not limit the competence given to the State of residence by its municipal law in regard to prosecutions and/or enforcement.

Article 27

1. If two or more Contracting Parties establish their relations on the basis of uniform legislation or on special arrangements for reciprocity, they shall have the option of regulating their mutual relations in the matter solely on the basis of such systems, notwithstanding the provisions of the present Convention.

2. Contracting Parties who, in accordance with the provisions of the present article, exclude from their mutual relations the application of the present Convention, shall send a notification to the Secretary General of the Council of Europe to this effect.

Article 28

The European Committee on Crime Problems of the Council of Europe shall be kept informed regarding the application of this Convention and shall do whatever is needful to facilitate a friendly settlement of any difficulty which may arise out of its execution.

Article 29

1. This Convention shall be open to signature by the member States of the Council of Europe. It shall be subject to ratification or acceptance. Instruments of ratification or acceptance shall be deposited with the Secretary General of the Council of Europe.

2. The Convention shall enter into force three months after the date of the deposit of the third instrument of ratification or acceptance.

3. In respect of a signatory State ratifying or accepting subsequently, the Convention shall come into force three months after the date of the deposit of its instrument of ratification or acceptance.

Article 30

1. After the entry into force of this Convention, the Committee of Ministers of the Council of Europe may invite any non-member State to accede thereto.

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 three months after the date of its deposit.

Article 31

1. Any Contracting Party may, at the time of signature or when depositing its instrument of ratification, acceptance or accession, specify the territory or territories to which this Convention shall apply.

2. Any Contracting Party may, when depositing its instrument of ratification, acceptance or accession or at any later date, by declaration addressed to the Secretary General of the Council of Europe, extend this Convention 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 according to the procedure laid down in Article 33 of this Convention.

Article 32

1. Any Contracting Party may, at the time of signature or when depositing its instrument of ratification, acceptance or accession, declare that it avails itself of one or more of the reservations provided for in Annex II to this Convention.

2. Any Contracting Party may wholly or partly withdraw a reservation 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.

3. A Contracting Party which has made a reservation in respect of any provision of this Convention may not claim the application of that provision by any other 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.

4. Any Contracting Party may, on signing the present Convention or on depositing its instrument of ratification, acceptance or accession, notify the Secretary General of the Council of Europe that it considers ratification, acceptance or accession as entailing an obligation, in international law, to introduce into municipal law measures to implement the said Convention.

Article 33

1. This Convention shall remain in force indefinitely.

2. Any Contracting Party may, in so far it is concerned, denounce this Convention by means of a notification addressed to the Secretary General of the Council of Europe.

3. Such denunciation shall take effect six months after the date of receipt by the Secretary General of such notification.

Article 34

The Secretary General of the Council of Europe shall notify the member States of the Council and any State which has acceded to this Convention, of:

a. any signature;

b. any deposit of an instrument of ratification, acceptance or accession;

c. any date of entry into force of this Convention in accordance with Article 29 thereof;

d. any notification or declaration received in pursuance of the provisions of paragraph 4 of Article 15, of paragraph 2 of Article 19, of paragraphs 2, 3, 4 and 5 of Article 25, of paragraph 2 of Article 27 and of paragraph 4 of Article 32;

e. any declaration received in pursuance of the provisions of paragraphs 2 and 3 of Article 31;

f. any reservation made in pursuance of the provisions of paragraph 1 of Article 32;

g. the withdrawal of any reservation carried out in pursuance of the provisions of paragraph 2 of Article 32;

h. any modification received in pursuance of the provisions of Article 33, and the date on which denunciation takes effect.

Article 35

This Convention and the notifications and declarations authorised thereunder shall apply only to road traffic offences committed after the Convention comes into effect for the Contracting Parties involved.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at Strasbourg this 30th day of November 1964, 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 each of the signatory and acceding States.

ANNEX I

Common schedule of road traffic offences

1. Manslaughter or accidental injury on the roads.

2. "Hit and run" driving, i.e., the wilful failure to carry out the obligations placed on drivers of vehicles after being involved in a road accident.

3. Driving a vehicle while:

a. intoxicated or under the influence of alcohol;

b. under the influence of drugs or other products having similar effects;

c. unfit because of excessive fatigue.

4. Driving a motor-vehicle not covered by third-party insurance against damage caused by the use of the vehicle.

5. Failure to comply with a direction given by a policeman in relation to road traffic.

6. Non-compliance with the rules relating to:

a. speed of vehicles;

b. position and direction of vehicles in motion, meeting of oncoming traffic, overtaking, changes of direction and proceeding over level crossings;

c. right of way;

d. traffic priority of certain vehicles such as fire-engines, ambulances and police vehicles;

e. signs, signals and road markings, in particular "stop" signs;

f. parking and halting of vehicles;

g. access of vehicles or classes of vehicles to certain roads (for example, on account of their weight or dimensions);

h. safety devices for vehicles and loads;

i. marking descriptive (*signalisation*) of vehicles and loads;

j. lighting of vehicles and use of lamps;

k. load and capacity of vehicles;

l. registration of vehicles, registration plates and nationality plates.

7. Driving without a valid licence.

ANNEX II

1. Any Contracting Party may declare that it reserves the right:

a. not to accept Section III or to accept it only in respect of certain classes of penalties or enforcement measures;

b. not to accept Article 6 or to accept only certain provisions of this article.

2. Any Contracting Party may declare that for reasons arising out of its constitutional law, it can accept requests for proceedings only in cases specified in its municipal law.

European Convention on the punishment of road traffic offences – ETS No. 52

Explanatory Report

I. The European Convention on the Punishment of Road Traffic Offences, drawn up within the Council of Europe by a committee of governmental experts, was opened to signature by the member states of the Council of Europe on 30 November 1964.

II. The text of the explanatory report prepared by the committee of experts and submitted to the Committee of Ministers of the Council of Europe, as amended and completed by the CCJ, does not constitute an instrument providing an authoritative interpretation of the Convention, although it might be of such a nature as to facilitate the application of the provisions contained therein.

INTRODUCTION

In 1957 a committee of government experts was set up at the Council of Europe and received instructions from the Committee of Ministers: "to draw up and implement a plan of action for the Council of Europe in the field of crime prevention and the treatment of offenders".

The attention of this committee was inevitably drawn to the grave danger in all European countries of breaches of road traffic regulations. Such offences are increasing in number in proportion to the general increase in motor traffic, and the toll of the road has everywhere become a veritable scourge.

The object of the committee was to set up machinery for European co-operation to assist in curbing and checking this new form of delinquency. To this end the committee appointed a working party to prepare a preliminary draft of a multilateral convention between member countries of the Council of Europe, under which road traffic offences committed in one might be punished in another, thereby creating a close bond of solidarity between States in this matter.

The preliminary draft of the Convention was largely the work of Mr. A. D. Belinfante, Professor at Amsterdam University and Chairman of the sub-committee. It was amended at many meetings in the light of the views expressed by the experts of the participating countries, before being submitted to the Committee of Ministers in 1961. Its principles were favourably considered by the Conference of European Ministers of Justice in Paris on 6 June 1961.

Following a detailed examination the Committee of Ministers, sitting at Deputy level, decided to "refer the project to the ECCP along with governments' comments".

In pursuance of this decision, a committee of experts specialising in the subject of road traffic offences met to re-examine the preliminary draft Convention in the light of these comments and of the comments made by experts at the sitting.

This committee's conclusions were re-examined at a joint meeting of the experts of the specialised committee and of the regular committee held on 6 December 1963.

The European Convention on the Punishment of Road Traffic Offences was, by a decision taken by the Committee of Ministers sitting at Deputy level during its 134th meeting (October 1964) opened for signature by the member States of the Council of Europe on 30 November 1964.

I. BASIC PRINCIPLES

The law at present does not entirely ensure that penalties will be enforced against drivers from some other country who are guilty of offences against traffic regulations.

Extradition is hedged about with conditions, laid down by municipal law or by treaty, that can rarely be satisfied. Further, the principle of territorial jurisdiction which governs most national criminal law prevents the State of residence of the driver from proceeding against him for traffic offences committed in another country or enforcing sentences pronounced by foreign courts. Thus when proceedings are taken in the State where the offence is committed the offender cannot be punished after he has returned to his country of residence. The proceedings remain in abeyance or are concluded by a sentence which is not likely to be enforced. Moreover, the authorities in one country are naturally apprehensive that a person who causes a road accident may return to his own country to escape the consequences, and they will take measures to detain him in their own territory, which may cause him unnecessary inconvenience and are justified only because there is no enforceable international law.

The present Convention aims at removing these difficulties by departing in two ways from the principle of territoriality which by tradition settles the question of the competent court and the applicable criminal law.

First, it empowers the State where the person responsible is ordinarily resident (State of residence) to take proceedings for an offence committed on the territory of another European State (State of offence) whatever be the nationality of the offender. Secondly, it enables the State of residence under certain conditions to enforce sentences pronounced in the State of the offence. The Convention extends the competence of the State of residence and makes it possible for the State of offence either itself to institute proceedings against an offender in the usual way and eventually to request the State of residence to enforce the sentence, or to request the State of residence to institute proceedings, whatever the nationality of the offender or of the victim. The State of residence on its part is obliged to act on the request for proceedings or enforcement made by the State of the offence, all possible precautions being taken to avoid dual proceedings or dual enforcement. The categories of offence to which the Convention is applicable are listed restrictively in a "Common Schedule of Road Traffic Offences" which forms an integral part of the Convention. Only offences punishable both in the State of residence and in the State of the offence are included.

In order that the text may cover situations peculiar to each State, provision has been made for signatory States, subject to reciprocity, to declare their intention of limiting or extending the content of this Annex and to make reservations on certain articles of the Convention, particularly those concerned with enforcement. It should be noted that the Convention is limited to the punishment of acts which are infringements of criminal law. It does not deal with compensation for damage resulting from such offences. Nor does it deal with the problems of the influence of criminal proceedings on the settlement of civil claims. Claims for damages remain subject to the normal rules of private international law regarding legislative and judicial competence.

The common desire of European States to combat road traffic offences thus finds expression in the addition of a European jurisdiction to national jurisdiction. The State of the offence, as being chiefly interested, retains its normal legislative and judicial competence; but if circumstances prevent it from enforcing a penalty, the State of residence undertakes to help the State of the offence by placing at its disposal the machinery of its juridical system. It is not too much to think that, in arranging for effective co-operation in such matters between European States, the Convention, although limited to road traffic, marks an important stage in the development of international criminal law and foreshadows further developments.

The text that is presented consists of 35 Articles divided into 5 Sections. Section 1 sets forth the basic principles common to the proceedings in respect of road traffic offences and the enforcement of sentences. Sections II and III establish the conditions under which the State of residence may institute proceedings and enforce penalties at the request of the State of the offence. Section IV deals with the form of requests for proceedings or execution, their means of transmission, the purposes for which the proceeds of fines collected in the State of residence are to be used, and the settlement of costs of proceedings, judgment and enforcement. Section V in particular defines the meaning of some of the expressions used in the Convention. It explains the scope of the appended "Common Schedule of Road Traffic Offences" and provides reservations on certain clauses.

II. COMMENTARY ON THE ARTICLES

Preamble

The preamble requires no comment.

Section 1 – Fundamental principles

Article 1

▶ **Paragraph 1**

When a road traffic offence has been committed in its territory, the State of the offence may itself institute proceedings and carry them through to a final decision in accordance with ordinary law. Alternatively, it may under paragraph 1 report the offence to the State of residence as long as it has not itself fully enforced the penalty that it has imposed. The experts thought it desirable not to deprive the State of the offence of the opportunity of requesting the State of residence to institute proceedings after itself instituting them but before the penalty had been completely enforced in its territory. They felt that the State of the offence should he enabled, when several persons were involved in the same case, at any time to pass differing sentences on each according to the circumstances. Such, for instance, would be the case of a motor accident involving drivers of different nationalities. It may be to the advantage of the State of the offence to initiate proceedings against all individuals concerned but to try only its own nationals and to report aliens to the authorities of their States of residence.

It also appeared desirable to make it possible for the State of the offence to ask the State of residence to take over proceedings if the offender had gone back to that State after proceedings had been started in the State of the of fence.

The additional provision which stipulates that the State of the offence must request the State of residence to take proceedings, if its municipal law requires, was inserted because of the difficulties that would be created for the legal system of some States, particularly Italy (and Greece), by a purely optional right - of their legal authorities - to abandon proceeding's by means of a request for the institution of proceedings made to the State of residence. In those States it will therefore be necessary to determine by domestic legislation according to what objective criteria a request for proceedings must be addressed to the State of residence. Such rules may, of course, be laid down either in the law to be adopted to authorise the ratification of the Convention or in a subsequent law.

The experts also considered the case where a request for enforcement originated by the State of the offence under Article 1, (2), would be a dead letter in the State of residence because the latter had not, as is provided by Article 32, (1), subscribed to the provisions of the Convention regarding the enforcement in its own territory of penalties imposed in the State of the offence. In this case, too, it was agreed that the State of the offence could ask the State of residence to take over the proceedings irrespective of the stage then reached.

Admittedly there are disadvantages in the State of the offence requesting the State of residence to take proceedings after itself initiating them. First of all, this might give rise to dual proceedings; and secondly, it would enable the State of the offence to hold the offender in its territory so that it might start proceedings against him which would not necessarily be terminated. Therefore, in order to reconcile the interests of the State of the offence and those of the offender, the text stresses the exceptional nature of a request for proceedings made after proceedings had already started in the State of the offence. Under Article 1, paragraph 1, the State of the offence may report the facts to the State of residence after having started proceedings on them, only if "it is unable to carry them through to a final decision or to enforce the penalty in full".

One of the experts proposed the deletion of the phrase "or to enforce the penalty in full" in order that the State of the offence should not be able to report the facts to the State of residence after pronouncing a final decision. This would avoid any risk of dual judgment on the same facts in the State of offence and in the State of residence.

The committee did not approve this proposal. It considered that the provisions of paragraph 1 complied with the rule *ne bis in idem* as applied in most European countries. This rule is generally considered as intended to prevent dual sentence rather than dual enforcement. The same expert also wished to add the following provision to paragraph 1:

"The State of the offence shall without delay take all necessary steps to preserve evidence".

Most of the experts considered that the inclusion of this clause was not necessary, and they assured their colleague that the State of the offence would in any case have the right to take such measures.

▶ **Paragraph 2**

Paragraph 2 makes it possible for the State of the offence to request the State of residence to enforce a judgment or administrative decision that it has rendered.

The meaning of the expressions "judgment" and "administrative decision" is explained in Article 24 (e) and (j). The judicial or administrative penalties thus ordered must be enforceable in the State where they were rendered (Article 14, paragraph 3).

The expression "become enforceable... after the offender has been given an opportunity to present his defence" relates to administrative decisions and possibly to judicial decisions rendered by default in so far as they are final (in particular *ordonnances pénales* and *amendes de composition*).

This provision guarantees that these decisions may be enforced only if the offender has had an opportunity to avail himself of the means of defence either before the pronouncement of the decisions or after they were pronounced but before they became enforceable.

▶ **Paragraph 3**

This paragraph contains the provision requiring the State of residence to "take action" on the request for proceedings of enforcement presented to it by the State of the offence. The "action" referred to does not mean in the case of a request for proceedings the actual initiation of proceedings but merely the consideration of their advisability. In fact, the principle that the State of residence alone should assess the advisability of proceedings is contained in Article 4 ("the competent authorities of the State of residence shall examine any request... and shall decide in accordance with their own laws what action to take thereon") On the other hand, when a request for enforcement is presented to it the State of residence must comply with it under Article 8, on the conditions laid down by the Convention ("decisions *shall be* enforced").

This obligation does not include the enforcement of decisions rendered by default. Whether or not its law recognises decisions of this kind, the State of residence has full discretion in such cases, There is, however, nothing to hinder the State of the offence from resenting a request for to the State of residence if the latter has refused enforcement.

The committee were in agreement in considering that for decisions rendered by default the discretion as to enforcement for which provision is made in the text is left to the State of residence in each specific case. It is therefore not necessary for that State to state its position once and for all at the time of signing the Convention or depositing the instrument of ratification or accession.

The experts further specified that the option left open to the State of residence referred only to decisions by default which had become enforceable, Article 14 (3) in fact stipulates that they must be enforceable. Hence a judgment by default which was not enforceable, could never be enforced by the State of residence.

Finally, the committee expressed the opinion that, in cases where a State declined to enforce a decision rendered by default, absence of reciprocity could always be invoked by the State whose request had been declined in an analogous case.

Article 2

▶ **Paragraph 1**

This paragraph provides that in order to be covered by the Convention, the offence which gives rise to the request for proceedings or enforcement and which, under Articles 24 (a) and 25, must of course appear in the "Common Schedule of Road Traffic Offences", must be punishable under the law of both the State of the offence and the State of residence. This condition is considered to be satisfied even if the legal definition of the offence under consideration is not, as is often the case, identical in the two States. It is enough for the offence to be amenable to criminal law in these States.

▶ **Paragraph 2**

When at the request of the State of the offence, the authorities of the State of residence take proceedings or enforce a penalty, they apply in principle their own law. When, however, they are considering whether the material factors of the offence have been established they must base themselves on those provisions that regulate road traffic in the State of the offence. Thus, for example, the authorities of a State of residence whose regulations stipulate that traffic must keep to the right will deem such action punishable if the regulations of the State of the offence stipulate that traffic must keep to the left. Further examples could be given: in cases of exceeding the speed limit or exceeding a time-limit for parking, it is always the road traffic rules in force at the place of the offence which must be taken into consideration by the authorities of the State of residence when they are judging the conduct of a driver in the State of the offence.

But for the other factors involved in the offence, such as those subjective factors that determine or modify the offender's responsibility (for example, factors that diminish or aggravate responsibility), it is their own law that must be applied by the authorities of the State of residence.

Article 24 (d) indicates that within the meaning of the Convention, and in particular of Article 2 (2), "road traffic rules" means any regulation relating to road traffic which, when broken, is punished by a penal provision included in one of the categories of offences listed in items 4 et seq. of the "Common Schedule of Road Traffic Offences", and not merely rules regarding road traffic in the strict sense of the term. Thus, the Convention considers as "road traffic rules" regulations regarding insurance obligations, failure to report an accident, driving licences, refusal to obey police orders.

Paragraph 2 solves one legal problem which is particularly complex but vital: that of the application in the State of residence of certain laws and regulations in force in the State of the offence.

This problem is complicated by difficulties of a constitutional nature peculiar to those States where the Convention does not, in itself, constitute a fount of municipal law.

In an attempt to reconcile the difficulties, without, however, having recourse to the legal fiction of assimilating offences committed abroad to those committed within national territory, Article 2 (2) confines itself to stating the general principle that authorities of the State of residence should apply their own law to offences committed abroad. They would have to refer to the traffic rules in force in the State of the offence, in other words they would have to apply their own criminal law which, in principle, punishes any violation of national traffic rules - to violation of foreign traffic rules valid at the place where the offence was committed.

An expert proposed that paragraph 2 should be placed in Article 3, dealing with competence to prosecute. He said that although the rules of:paragraph 1 referred both to proceedings and to enforcement, these of paragraph 2 only dealt with the assessment of the offence with a view to proceedings, and not with enforcement. This proposal was not accepted. The majority of the committee thought that the principle that the State of residence should apply its own law was fundamental and should therefore govern the whole Convention.

Section II – Proceedings in the State of residence

Article 3

This article grants the State of residence the necessary competence enabling it to take proceedings in respect of a road traffic offence committed outside its territory, when, as is generally the case, it does not possess such competence under its own laws. Such provision seems necessary for those States which will apply the Convention directly, without the need to pass any special legislation on the subject. The personal competence possessed by some States in respect of those who commit road traffic offences abroad remains unaffected by application of Article 26.

Article 4

This article describes the action the authorities of the State of residence may take when they have received a request for proceedings. It will be noted that those authorities are only obliged to "examine" the request and to decide what action to take on it. It is left to their discretion whether they should institute proceedings for the offence committed abroad.

The reference to the law of the State of residence made in the Article is explained by the desire not to prejudice the principle of the desirability of the proceedings when this principle is legally recognised, as is the case in most member States of the Council of Europe.

Article 5

Paragraph 1 deals with the effect of the request for proceedings in the State of the offence. It is aimed at preventing the institution of separate proceedings for the same offence in the State of the offence and in the State of residence. The text provides that in principle the sending by the State of the offence of a request for proceedings rules out or terminates any proceedings in that State. It further forbids any measures of enforcement.

Proceedings maybe resumed or enforcement measures may be taken by the State of the offence only in the cases laid down in paragraph 2. The State of residence must be informed of any resumption, but its consent is not necessary.

The "action" referred to in sub-paragraph (a) of paragraph 2 is the taking of a final internal decision by the State of residence. It would become impossible to take such action if, for example, the offender returned to the State of the offence, or for any other reason of law or of fact.

In pursuance of sub-paragraph (b) of the same paragraph, the resumption of proceedings or enforcement in the State of the offence is only possible if some new fact has come to the knowledge of that State after the request for proceedings was sent and if that resumption comes before a judicial hearing in the State of residence or before the delivery of an administrative decision in that State.

Article 6

The effects of the request for proceedings on the limitation of the time for prosecution in the State of the offence and in the State of residence are dealt with in paragraphs, 1 and 2 respectively.

Paragraph 1 provides that the sending of the request for proceedings by the State of the offence shall suspend the limitation of the time for prosecution in a State. The time limitation shall begin to run again to its full extent in the State of the offence, if that State resumes proceedings in accordance with paragraphs 2 (a) and (b) of Article 5 and in any case at the expiry of a period of six months from the date on which the request for proceedings was sent. The reason behind this clause is the desire not to leave the institution of proceedings in the State of the offence in abeyance for an indefinite period of time.

Paragraph 2 (1) provides that in the State of residence the time limitation for prosecution shall begin to run only from the time that the request for proceedings is received.

Paragraph 2 (2) relates to cases where the victim must lodge a complaint before proceedings can be instituted. The period within which the complaint must he lodged begins to run from the date on which the application for the institution of proceedings is received.

Article 7

This article provides that documents drawn up by the judicial and administrative authorities of the State of the offence, following a road traffic offence, in particular police reports establishing the facts, shall have the same force in the State of residence as similar documents drawn up in that State by its national authorities. Thus, under the Convention, a French police report concerning a road offence committed in Prance would have in Sweden, the State where the offender resided and where the proceedings would be instituted, the same legal force as a report made out under similar circumstances by the Swedish police in respect of a like offence committed in Sweden.

Reciprocity is provided for in cases where the State of the offence has resumed proceedings in pursuance of Article 5 (2). The documents drawn up in the State of residence following the, now necessary, request for proceedings or enforcement, would have, in the State of the offence about to resume the proceedings, the same value as similar documents drawn up by its own authorities.

Section III – Enforcement in the State of residence

Article 8

The first sentence of this Article empowers the State of residence to enforce a penalty imposed in the State of the offence in respect of an offence committed in that State. This provision goes hand-in-hand with that of Article 3 which empowers the State of residence to prosecute. It makes the authorities of the State of residence competent to enforce an order issued by an authority of the State of the offence, although, according to the generally accepted principles and in conformity with the executory formula attached to the decision, the police force of a State executes only the orders of its national authorities.

The second sentence of Article 8 lays down the obligation for the State of residence to enforce the foreign sentence after it has satisfied itself that the requirements as to, form and substance laid down under the Convention have been met. It is up to that State to determine how compliance with these requirements is to be checked.

The third sentence gives the State of residence alone power to take decisions regarding conditional release.

The fourth sentence empowers both the State of residence and the State of the offence to take decisions regarding free pardon. Consultation is not necessary but arrangements in the matter may be made in each individual case.

Article 9

This article deals with reasons for a refusal to enforce on the part of the State of residence.

▶ **Paragraph 1**

Obvious obstacles to enforcement are: that a final decision in the same case has been rendered in the State of residence; that a time-limit has been reached, or an amnesty granted, in the State of the offence and in the State of residence,

▶ **Paragraph 2**

This paragraph is modelled on Article 7 (2) of the European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders. It entitles the State of residence to refuse enforcement if the authorities in that State have decided not to take proceedings, or to drop proceedings already begun, in respect of the same act, if proceedings are pending in the territory of that State in respect of the same act and, finally, if that State considers enforcement to be incompatible with the fundamental principles of its judicial system or with the principles governing the application of its own penal law. The committee decided to mention as an example the irrebuttable presumption in some legal systems that persons below a certain age are not responsible for offences.

Article 10

The conditions governing enforcement in the State of residence of penalties other than fines, such as imprisonment, are stipulated in this Article. Its provisions are of particular importance since they offer a solution to the problem rightly considered to be of great complexity.

As such penalties vary from State to State, it is necessary to adapt the sentence pronounced in the State of the offence to the penal system of the State of residence. The text adopted by the committee leaves it to the State of residence to do so. In practice, it was felt that such adaptation was not likely to give rise to any major complication.

In actual fact, the different sentences of imprisonment provided for under European legislation are similar enough for it to be possible to replace the penalty imposed by the State of the offence, without altering its main features, by the penalty provided for in the law of the State of residence in. respect of a like offence.

The manner of enforcing sentence, for instance the condition of imprisonment, will be in accordance with the practice of the State where the sentence is served. However, the maximum term of imprisonment provided for in such cases in the law of the State of residence may not be exceeded. Furthermore, the penalty imposed by the State of residence may not be longer or more severe than that imposed by the State of the offence.

This article is not limited in scope to penalties of imprisonment. Its broad wording makes it applicable to penalties depriving the offender of certain rights, such as the suspension or prohibition of the right to drive a motor vehicle, imposed by a court or administrative decision on traffic offenders in all countries. There seems no reason why the measures of adaptation mentioned in the Convention should not be taken with regard to penalties of this kind provided the latter meet the criteria laid down by the Convention.

The experts agreed that this article should be interpreted as meaning that the requested party may reduce the term of a penalty involving deprivation of liberty, having regard not only to the maximum penalty of its legislation, but also to its court practice in regard to determination of the penalty, and also having regard to the same consideration, that the requested party may commute a penalty involving deprivation of liberty into that of a fine.

An expert proposed the addition of the following provision for Article 10:

"The time limitation for the penalty shall be determined by the law of the State of residence. It shall begin to run on the day when the State of residence receives the request for enforcement."

This proposal was not supported by the majority of the experts. They made clear, however, that the time limitation for the penalty would be determined according to the law of the State of residence and that the commencement of that time limitation would as a general rule be the date of the final sentence.

Article 11

The State of residence will enforce fines on the same principle as for other penalties. For the reason already given, the fines collected by the State of residence, the proceeds of which are its property under Article 21,

may not exceed the maximum provided for in the law of that State in respect of a like offence. In Denmark, Norway and Sweden, where there is no legal maximum, the amount of the fines shall not exceed that normally imposed by the competent authorities of the State of residence for a like offence.

Article 12

This article deals with compulsive measures to be applied by the State of residence to any person who does not pay the fine imposed on him by the State of the offence.

The first paragraph deals with procedures for compelling payment of the fine which do not involve imprisonment of the offender. Enforcement by a bailiff comes within this category.

The second paragraph deals with measures bringing pressure to bear on the offender in order to compel him to pay the fine (for instance, imprisonment for debt in France) or substituting imprisonment for the fine (subsidiary or substitute imprisonment) .

Article 13

This article aims at avoiding dual enforcement in the same case in the State of offence and the State of residence. It corresponds, as regards enforcement, to Article 5 (1) as regards proceedings.

Section IV – General provisions

Article 14

This article covers the form in which requests for proceedings or enforcement shall be made and the nature of supporting documents.

Article 15

Flexible rules governing the transmission of requests for proceedings or enforcement as well as supporting documents were designed to fit the variety of administrative bodies existing in the States concerned.

In principle, the request will be sent by the Ministry of Justice of the State where the offence was committed to the Ministry of Justice of the State of residence. The reply will be transmitted by the same method (paragraph 1). The communications necessary to the application of the Convention will be exchanged either as indicated in paragraph 1 or direct between the authorities of the Contracting Parties (paragraph 2).

However, paragraph 4 gives each Contracting Party the right to derogate from these rules for the transmission of documents.

Paragraph 3 of this article suggests the use of the rapid means of transmission available to the International Criminal Police Organisation (Interpol), already provided for in the European Conventions on Extradition and on Mutual Assistance in Criminal Matters. There is every reason to think that use of this channel will greatly facilitate the inter-State exchange of information required by the Convention.

Article 15

This article empowers the State of residence to ask the State of the offence for such additional information as is needed to establish – in cases where the request is insufficiently documented – whether the conditions laid down by the Convention have been met. It would be particularly desirable in such cases to have recourse to the International Criminal Police Organisation (Interpol), as provided for in Article 15 (3). Clearly, the information in question is not that required by the State of residence in connection with the prosecution itself. Such information can be secured by invoking the European Convention on Mutual Assistance in Criminal Matters.

Article 17

This governs the relationship between the present Convention and the European Convention on Mutual Assistance in Criminal Matters. The mutual assistance provided for in a general way by the latter Convention is that lent between judicial authorities with a view to the punishment of all kinds of offences.

As certain road traffic offences are punished in some States by authorities which other States do not consider judicial authorities, it seems necessary to provide that for the purposes of the Convention, assistance will be granted under any circumstances whatever the authorities concerned.

Furthermore, according to its Article 1 (2), the European Convention on Mutual Assistance does not apply to the enforcement of sentences. It follows that the despatch to the State of residence by the State of the offence of a payment order in respect of a person sentenced to a fine might give rise to difficulties in cases where 'such an act would be regarded by the State of residence as a measure preparatory to enforcement.

It is in order to avoid such contingencies that Article 17 provides that the payment order shall not be deemed an enforcement measure.

Article 18

This article lays down the obligation for the State of residence to inform the State of the offence of the action taken on its request for proceedings or enforcement.

Article 19

This settles the question of translations in the same way as Article 16 of the European Convention on Mutual Assistance in Criminal Matters.

It provides that, as a general rule, requests for proceeding's or enforcement together with appended evidence shall be sent without translation. Exceptions may, however, be made, subject to reciprocity.

Article 20

This is similar to Article 17 of the European Convention on Mutual Assistance in Criminal Matters and does not call for any comment.

Article 21

To avoid complications arising from the refund by the State of residence of the proceeds of fines levied as a result of requests for proceedings or enforcement, it was agreed that such monies should become the property of that State.

Articles 22 and 23

These articles concern the cost of proceedings incurred in the State of the offence and collected in the State of residence after prosecution or enforcement in the latter State (Article 22) and the costs incurred in the State of residence following a request for proceedings or enforcement by the State of the offence (Article 23). For the sake of simplicity, it has been agreed that in principle costs will not be refunded by the State to which they have been paid. The State of residence may secure from the convicted person the costs of the proceedings instituted in the State of the offence only if it is expressly requested to do so by that State. In that case, only experts' fees incurred in the State of the offence will be refunded to that State.

Section V – Final provisions

These provisions are modelled on the final clauses adopted by the Ministers' Deputies at their 113th meeting.

Article 24

This article defines the meaning under the Convention of the terms "road traffic offence", "State of the offence", "State of residence", "judgment administrative decision" and "road traffic rules".

Paragraph (a) is comparable with Article 2 which lays down the principle that to be covered by the Convention a road traffic offence must be punishable both in the State of the offence and in the State of residence, the material factors, however, being assessed exclusively according to the road traffic regulations in force in the State of the offence.

The committee considered that the offence must fall under the Convention even if it is committed by a pedestrian and whatever vehicle is used as long as it moves on a thoroughfare. The Convention therefore applies to bicycle traffic as well as to motor vehicles or vehicles drawn by animals.

Paragraph (c) specifies that the State of residence is the State where the offender is ordinarily resident. Residence is therefore characterised by a certain degree of permanence, which in practice must be assessed by those who apply the Convention,

The purpose of paragraph (d) has been explained in connection with Article 2.

Paragraph (e) states that the term "judgment" refers to all decisions rendered by a judicial authority, including criminal sentences *(Stralbefehlen* and *Strafverfügungen)* provided for under German penal law and orders to pay compensation as provided for in Articles 524-528 of the French code of penal proceedings.

Paragraph (f) provides that "administrative decisions" should. be understood to mean decisions which in certain countries are rendered by administrative authorities empowered to pronounce sentences provided under the laws governing the punishment of road traffic offences. They include decisions rendered in Germany to punish offences known as *Ordnungswidrigkeiten,* i.e. appealable decisions rendered by administrative authorities to punish certain traffic and other violations. Naturally, such decisions should meet the conditions laid down in Article 1 (2) (Cf. commentary of Article 1 (2)).

Article 25

Paragraphs 1 to 4 of this Article determine the scope of the: Convention with regard to the offences covered. A list of road traffic offences to be covered by the Convention has been prepared, it being understood that the Convention will apply to them only if the actual offence committed happens to be punishable both in the State of the offence and the State of residence (Article 2 (1)). The name given to this list, i.e. "Common Schedule of Road Traffic Offences", reflects the identity of views held by the Contracting Parties in this matter. However, this list should not be considered as definitive either at the time of the signature of the Convention or the deposit of the instrument of ratification or accession.

After the coming into force of the Convention, a number of States may, in the light of growing road traffic, consider it necessary to add to the list of offences, just as other countries may have reason to withdraw a number of offences from the original list.

The notification system mentioned in paragraphs 2, 3 and 4 of Article 25 has been established in order to enable any Contracting Party to add to or restrict at any time the list of offences contained in the Annex to the Convention.

It follows that if the Contracting States avail themselves of this possibility a certain discrimination will result as between the different offences appearing on the list. Some offences will be recognised by all the Contracting Parties and will be truly "common" to them, while others will be recognised only as between some of the Parties.

Despite this drawback, it seems desirable that the list should remain a flexible one.

In view of the changes that may be made, this list should form an annex which, as stated in paragraph 1, is considered an integral part of the Convention. In this way, it will be easier to keep up to date than would he the case if it were incorporated in the Convention itself.

It should be pointed out that the notification of withdrawal mentioned in paragraphs 2 and 4 is not identical with the reservations which the Parties may formulate under Article 32,

Paragraph 5 provides for the case when a signatory State has to pass legislation in order to make the Convention applicable in its territory.

Article 26

This article is intended to express clearly that the Convention does not affect the rules of municipal law regarding the competence of the State of residence (and its exercise) in regard to prosecutions or enforcement.

Article 27

This article recognises the right of certain signatory States to conclude bilateral or multilateral agreements on a regional basis and to arrange their mutual relations in this matter on the exclusive basis of these agreements. This clause has, in view particularly the conventions between the Scandinavian States and between the Benelux States. It is analogous to that in Article 26 (4) of the European Convention on Mutual Assistance in Criminal Matters.

Article 28

This article entrusts the European Committee on Crime Problems of the Council of Europe with the task of watching over the implementation of the Convention by the Contracting Parties and, as far as possible, of

aiding in the amicable settlement of any difficulties that may arise. This committee appeared to be in the best position to provide any necessary explanations regarding the application of the Convention in accordance with the intentions of its authors.

Article 29

This article deals with the conditions of ratification and acceptance of the Convention.

Article 30

This article deals with the conditions for accession to the Convention.

Article 31

This article deals with the territorial application of the Convention.

Article 32

Paragraph 1 enables Contracting Parties, by means of a declaration addressed to the Secretary General of the Council of Europe at the time of signature or when depositing their instrument of ratification, acceptance or accession, to avail themselves of the reservations provided for in Annex 2 to the Convention.

Paragraph 2, on the other hand, provides that any signatory may at any time totally or partially withdraw its reservations. The procedure for the withdrawal of reservations is similar to that for their notification.

Paragraph 4 concerns countries in which ratification of the Convention is not considered as entailing solely by the fact of its ratification obligations within the framework of their municipal law.

Article 33

This article concerns the duration of the Convention and the conditions for its denunciation.

Articles 34 and 35

These articles contain the usual final clauses.

Article 35 conforms with the opinion of the majority of the experts that the Convention should apply only to offences committed subsequent to its entry into force.

ANNEX I TO THE CONVENTION

Common Schedule of Road Traffic Offences

Item 4

The French expert raised the question of the application of this Convention to the 50% increase in fines decreed under French law in the case of offences in regard to insurance obligation. The committee agreed in considering that this increase which was not penal (*de caractère répressif*) should remain outside the scope of this Convention.

Another expert pointed out that the question should be considered whether it was appropriate to regard "failure to comply with the obligation to be covered by third party insurance" as a road traffic offence, particularly in view of its civil law implications.

The experts studied the question and considered that there were no grounds for omitting "failure to comply with the obligation to be covered by third party insurance" from the field of application of the Convention, when this offence, according to the general principles of the Convention, was punishable by law both in the State of the offence and in the State of residence. It had always been specified in this connection that the civil consequences of accidents were not governed by the Convention which deals only with criminal proceedings. Civil consequences were governed by the normal rules of international private law.

Item 5

This item covers not only wilful refusal to halt when signalled to do so by a policeman, but also all those cases where a person on a public road does not conform to the orders and signals given by a policeman in relation to road traf fic.

Item 6

The text of this item takes into account the classification contained in the Protocol to the International Convention on Road Traffic concluded at Geneva on 19 September 1949.

ANNEX II TO THE CONVENTION

This annex defines the cases in which Contracting Parties may make reservations.

The Italian delegate pointed out that in conformity with the Italian constitution, every person had the right to know a priori who would judge his case on the basis of objective criteria fixed by the law. The discretionary exercise of the power to make requests for proceedings granted to the State of the offence by Article 1, paragraph 1 of the Convention, in so far as it would determine the competence of the Italian judge, did not appear to the Italian delegate to be compatible with the above-mentioned constitutional principle since that: power would leave those concerned uncertain as to the authority competent to take proceedings against them. The possibility of making a reservation of the kind mentioned above was provided for in order to overcome difficulties, of this nature and to ensure that countries in which they would arise are not precluded from ratifying the Convention.

These States could limit the acceptance of the requests addressed to them to certain categories of requests determined by their municipal law. Thus a Contracting Party could declare that in accordance with its municipal law it only accepted requests for proceedings from States of the offence if the transfer of proceedings by that State to the State of residence is compulsory on the basis of objective criteria prescribed in the law of the State of the offence.

Several delegations, whilst recognising that the reservation makes it possible to establish criteria of this kind for the acceptance of requests, pointed out that this would have the effect of depriving States which wanted to maintain complete freedom of choice between proceedings in the State of the offence and proceedings in the State of residence, of the possibility of addressing requests for the taking of proceedings to a State which had established such criteria.

States wishing to make use of this reservation will be required to inform the Secretariat General of the Council of Europe of the categories of requests they would accept.

European Convention on the international validity of criminal judgments – ETS No. 70

The Hague, 28.V.1970

Preamble

The member States of the Council of Europe, signatory hereto,

Considering that the fight against crime, which is becoming increasingly an international problem, calls for the use of modern and effective methods on an international scale;

Convinced of the need to pursue a common criminal policy aimed at the protection of society;

Conscious of the need to respect human dignity and to promote the rehabilitation of offenders;

Considering that the aim of the Council of Europe is to achieve greater unity between its Members,

Have agreed as follows:

PART I – DEFINITIONS

Article 1

For the purpose of this Convention:

a. "European criminal judgment" means any final decision delivered by a criminal court of a Contracting State as a result of criminal proceedings;

b. "Offence" comprises, apart from acts dealt with under the criminal law, those dealt with under the legal provisions listed in Appendix II to the present Convention on condition that where these provisions give competence to an administrative authority there must be opportunity for the person concerned to have the case tried by a court;

c. "Sentence" means the imposition of a sanction;

d. "Sanction" means any punishment or other measure expressly imposed on a person, in respect of an offence, in a European criminal judgment, or in an *ordonnance pénale*;

e. "Disqualification" means any loss or suspension of a right or any prohibition or loss of legal capacity;

f. "Judgment rendered *in absentia*" means any decision considered as such under Article 21, paragraph 2;

g. "*ordonnance pénale*" means any of the decisions delivered in another Contracting State and listed in Appendix III to this Convention.

PART II – ENFORCEMENT OF EUROPEAN CRIMINAL JUDGMENTS

Section 1 – General provisions

a – General conditions of enforcement

Article 2

This part is applicable to:

a. sanctions involving deprivation of liberty;

b. fines or confiscation;

c. disqualifications.

Article 3

1. A Contracting State shall be competent in the cases and under the conditions provided for in this Convention to enforce a sanction imposed in another Contracting State which is enforceable in the latter State.

2. This competence can only be exercised following a request by the other Contracting State.

Article 4

1. The sanction shall not be enforced by another Contracting State unless under its law the act for which the sanction was imposed would be an offence if committed on its territory and the person on whom the sanction was imposed liable to punishment if he had committed the act there.

2. If the sentence relates to two or more offences, not all of which fulfil the requirements of paragraph 1, the sentencing State shall specify which part of the sanction applies to the offences that satisfy those requirements.

Article 5

The sentencing State may request another Contracting State to enforce the sanction only if one or more of the following conditions are fulfilled:

a. if the person sentenced is ordinarily resident in the other State;

b. if the enforcement of the sanction in the other State is likely to improve the prospects for the social rehabilitation of the person sentenced;

c. if, in the case of a sanction involving deprivation of liberty, the sanction could be enforced following the enforcement of another sanction involving deprivation of liberty which the person sentenced is undergoing or is to undergo in the other State;

d. if the other State is the State of origin of the person sentenced and has declared itself willing to accept responsibility for the enforcement of that sanction;

e. if it considers that it cannot itself enforce the sanction, even by having recourse to extradition, and that the other State can.

Article 6

Enforcement requested in accordance with the foregoing provisions may not be refused, in whole or in part, save:

a. where enforcement would run counter to the fundamental principles of the legal system of the requested State;

b. where the requested State considers the offence for which the sentence was passed to be of a political nature or a purely military one;

c. where the requested State considers that there are substantial grounds for believing that the sentence was brought about or aggravated by considerations of race, religion, nationality or political opinion;

d. where enforcement would be contrary to the international undertakings of the requested State;

e. where the act is already the subject of proceedings in the requested State or where the requested State decides to institute proceedings in respect of the act;

f. where the competent authorities in the requested State have decided not to take proceedings or to drop proceedings already begun, in respect of the same act;

g. where the act was committed outside the territory of the requesting State;

h. where the requested State is unable to enforce the sanction;

i. where the request is grounded on Article 5.e and none of the other conditions mentioned in that article is fulfilled;

j. where the requested State considers that the requesting State is itself able to enforce the sanction;

k. where the age of the person sentenced at the time of the offence was such that he could not have been prosecuted in the requested State;

l. where under the law of the requested State the sanction imposed can no longer be enforced because of the lapse of time;

m. where and to the extent that the sentence imposes a disqualification.

Article 7

A request for enforcement shall not be complied with if enforcement would run counter to the principles recognised in the provisions of Section 1 of Part III of this Convention.

b – Effects of the transfer of enforcement

Article 8

For the purposes of Article 6, paragraph 1 and the reservation mentioned under c of Appendix I of the present Convention any act which interrupts or suspends a time limitation validly performed by the authorities of the sentencing State shall be considered as having the same effect for the purpose of reckoning time limitation in the requested State in accordance with the law of that State.

Article 9

1. A sentenced person detained in the requesting State who has been surrendered to the requested State for the purpose of enforcement shall not be proceeded against, sentenced or detained with a view to the carrying out of a sentence or detention order for any offence committed prior to his surrender other than that for which the sentence to be enforced was imposed, nor shall he for any other reason be restricted in his personal freedom, except in the following cases:

a. when the State which surrendered him consents. A request for consent shall be submitted, accompanied by all relevant documents and a legal record of any statement made by the convicted person in respect of the offence concerned. Consent shall be given when the offence for which it is requested would itself be subject to extradition under the law of the State requesting enforcement or when extradition would be excluded only by reason of the amount of the punishment;

b. when the sentenced person, having had an opportunity to leave the territory of the State to which he has been surrendered, has not done so within 45 days of his final discharge, or if he has returned to that territory after leaving it.

2. The State requested to enforce the sentence may, however, take any measure necessary to remove the person from its territory, or any measures necessary under its law, including proceedings by default, to prevent any legal effects of lapse of time.

Article 10

1. The enforcement shall be governed by the law of the requested State and that State alone shall be competent to take all appropriate decisions, such as those concerning conditional release.

2. The requesting State alone shall have the right to decide on any application for review of sentence.

3. Either State may exercise the right of amnesty or pardon.

Article 11

1. When the sentencing State has requested enforcement it may no longer itself begin the enforcement of a sanction which is the subject of that request. The sentencing State may, however, begin enforcement of a sanction involving deprivation of liberty when the sentenced person is already detained on the territory of that State at the moment of the presentation of the request.

2. The right of enforcement shall revert to the requesting State:

   a. if it withdraws its request before the requested State has informed it of an intention to take action on the request;

   b. if the requested State notifies a refusal to take action on the request;

   c. if the requested State expressly relinquishes its right of enforcement. Such relinquishment shall only be possible if both the States concerned agree or if enforcement is no longer possible in the requested State. In the latter case, a relinquishment demanded by the requesting State shall be compulsory.

Article 12

1. The competent authorities of the requested State shall discontinue enforcement as soon as they have knowledge of any pardon, amnesty or application for review of sentence or any other decision by reason of which the sanction ceases to be enforceable. The same shall apply to the enforcement of a fine when the person sentenced has paid it to the competent authority in the requesting State.

2. The requesting State shall without delay inform the requested State of any decision or procedural measure taken on its territory that causes the right of enforcement to lapse in accordance with the preceding paragraph.

c – Miscellaneous provisions

Article 13

1. The transit through the territory of a Contracting State of a detained person, who is to be transferred to a third Contracting State in application of this Convention, shall be granted at the request of the State in which the person is detained. The State of transit may require to be supplied with any appropriate document before taking a decision on the request. The person being transferred shall remain in custody in the territory of the State of transit, unless the State from which he is being transferred requests his release.

2. Except in cases where the transfer is requested under Article 34 any Contracting State may refuse transit:

   a. on one of the grounds mentioned in Article 6.b and c;

   b. on the ground that the person concerned is one of its own nationals.

3. If air transport is used, the following provisions shall apply:

   a. when it is not intended to land, the State from which the person is to be transferred may notify the State over whose territory the flight is to be made that the person concerned is being transferred in application of this Convention. In the case of an unscheduled landing such notification shall have the effect of a request for provisional arrest as provided for in Article 32, paragraph 2, and a formal request for transit shall be made;

   b. where it is intended to land, a formal request for transit shall be made.

Article 14

Contracting States shall not claim from each other the refund of any expenses resulting from the application of this Convention.

Section 2 – Requests for enforcement

Article 15

1. All requests specified in this Convention shall be made in writing. They, and all communications necessary for the application of this Convention, shall be sent either by the Ministry of Justice of the requesting State

to the Ministry of Justice of the requested State or, if the Contracting States so agree, direct by the authorities of the requesting State to those of the requested State; they shall be returned by the same channel.

2. In urgent cases, requests and communications may be sent through the International Criminal Police Organisation (Interpol).

3. Any Contracting State may, by declaration addressed to the Secretary General of the Council of Europe, give notice of its intention to adopt other rules in regard to the communications referred to in paragraph 1 of this article.

Article 16

The request for enforcement shall be accompanied by the original, or a certified copy, of the decision whose enforcement is requested and all other necessary documents. The original, or a certified copy, of all or part of the criminal file shall be sent to the requested State, if it so requires. The competent authority of the requesting State shall certify the sanction enforceable.

Article 17

If the requested State considers that the information supplied by the requesting State is not adequate to enable it to apply this Convention, it shall ask for the necessary additional information. It may prescribe a date for the receipt of such information.

Article 18

1. The authorities of the requested State shall promptly inform those of the requesting State of the action taken on the request for enforcement.

2. The authorities of the requested State shall, where appropriate, transmit to those of the requesting State a document certifying that the sanction has been enforced.

Article 19

1. Subject to paragraph 2 of this article, no translation of requests or of supporting documents shall be required.

2. Any Contracting State may, at the time of signature or when depositing its instrument of ratification, acceptance or accession, by declaration addressed to the Secretary General of the Council of Europe, reserve the right to require that requests and supporting documents be accompanied by a translation into its own language or into one of the official languages of the Council of Europe or into such one of those languages as it shall indicate. The other Contracting States may claim reciprocity.

3. This article shall be without prejudice to any provisions concerning translation of requests and supporting documents that may be contained in agreements or arrangements now in force or that may be concluded between two or more Contracting States.

Article 20

Evidence and documents transmitted in application of this Convention need not be authenticated.

Section 3 – Judgments rendered *in absentia* and *ordonnances pénales*

Article 21

1. Unless otherwise provided in this Convention, enforcement of judgments rendered *in absentia* and of *ordonnances pénales* shall be subject to the same rules as enforcement of other judgments.

2. Except as provided in paragraph 3, a judgment *in absentia* for the purposes of this Convention means any judgment rendered by a court in a Contracting State after criminal proceedings at the hearing of which the sentenced person was not personally present.

3. Without prejudice to Articles 25, paragraph 2, 26, paragraph 2, and 29, the following shall be considered as judgments rendered after a hearing of the accused:

a. any judgment *in absentia* and any *ordonnance pénale* which have been confirmed or pronounced in the sentencing State after opposition by the person sentenced;

b. any judgment rendered *in absentia* on appeal, provided that the appeal from the judgment of the court of first instance was lodged by the person sentenced.

Article 22

Any judgment rendered *in absentia* and any *ordonnances pénales* which have not yet been the subject of appeal or opposition may, as soon as they have been rendered, be transmitted to the requested State for the purpose of notification and with a view to enforcement.

Article 23

1. If the requested State sees fit to take action on the request to enforce a judgment rendered *in absentia* or an *ordonnance pénale*, it shall cause the person sentenced to be personally notified of the decision rendered in the requesting State.

2. In the notification to the person sentenced information shall also be given:

a. that a request for enforcement has been presented in accordance with this Convention;

b. that the only remedy available is an opposition as provided for in Article 24 of this Convention;

c. that the opposition must be lodged with such authority as may be specified; that for the purposes of its admissibility the opposition is subject to the provisions of Article 24 of this Convention and that the person sentenced may ask to be heard by the authorities of the sentencing State;

d. that, if no opposition is lodged within the prescribed period, the judgment will, for the entire purposes of this Convention, be considered as having been rendered after a hearing of the accused.

3. A copy of the notification shall be sent promptly to the authority which requested enforcement.

Article 24

1. After notice of the decision has been served in accordance with Article 23, the only remedy available to the person sentenced shall be an opposition. Such opposition shall be examined, as the person sentenced chooses, either by the competent court in the requesting State or by that in the requested State. If the person sentenced expresses no choice, the opposition shall be examined by the competent court in the requested State.

2. In the cases specified in the preceding paragraph, the opposition shall be admissible if it is lodged with the competent authority of the requested State within a period of 30 days from the date on which the notice was served. This period shall be reckoned in accordance with the relevant rules of the law of the requested State. The competent authority of that State shall promptly notify the authority which made the request for enforcement.

Article 25

1. If the opposition is examined in the requesting State, the person sentenced shall be summoned to appear in that State at the new hearing of the case. Notice to appear shall be personally served not less than 21 days before the new hearing. This period may be reduced with the consent of the person sentenced. The new hearing shall be held before the court which is competent in the requesting State and in accordance with the procedure of that State.

2. If the person sentenced fails to appear personally or is not represented in accordance with the law of the requesting State, the court shall declare the opposition null and void and its decision shall be communicated to the competent authority of the requested State. The same procedure shall be followed if the court declares the opposition inadmissible. In both cases, the judgment rendered *in absentia* or the *ordonnance pénale* shall, for the entire purposes of this Convention, be considered as having been rendered after a hearing of the accused.

3. If the person sentenced appears personally or is represented in accordance with the law of the requesting State and if the opposition is declared admissible, the request for enforcement shall be considered as null and void.

Article 26

1. If the opposition is examined in the requested State the person sentenced shall be summoned to appear in that State at the new hearing of the case. Notice to appear shall be personally served not less than 21 days before the new hearing. This period may be reduced with the consent of the person sentenced. The new hearing shall be held before the court which is competent in the requested State and in accordance with the procedure of that State.

2. If the person sentenced fails to appear personally or is not represented in accordance with the law of the requested State, the court shall declare the opposition null and void. In that event, and if the court declares the opposition inadmissible, the judgment rendered *in absentia* or the *ordonnance pénale* shall, for the entire purposes of this Convention, be considered as having been rendered after a hearing of the accused.

3. If the person sentenced appears personally or is represented in accordance with the law of the requested State, and if the opposition is admissible, the act shall be tried as if it had been committed in that State. Preclusion of proceedings by reason of lapse of time shall, however, in no circumstances be examined. The judgment rendered in the requesting State shall be considered null and void.

4. Any step with a view to proceedings or a preliminary enquiry, taken in the sentencing State in accordance with its law and regulations, shall have the same validity in the requested State as if it had been taken by the authorities of that State, provided that assimilation does not give such steps a greater evidential weight than they have in the requesting State.

Article 27

For the purpose of lodging an opposition and for the purpose of the subsequent proceedings, the person sentenced *in absentia* or by an *ordonnance pénale* shall be entitled to legal assistance in the cases and on the conditions prescribed by the law of the requested State and, where appropriate, of the requesting State.

Article 28

Any judicial decisions given in pursuance of Article 26, paragraph 3, and enforcement thereof, shall be governed solely by the law of the requested State.

Article 29

If the person sentenced *in absentia* or by an *ordonnance pénale* lodges no opposition, the decision shall, for the entire purposes of this Convention, be considered as having been rendered after the hearing of the accused.

Article 30

National legislations shall be applicable in the matter of reinstatement if the sentenced person, for reasons beyond his control, failed to observe the time-limits laid down in Articles 24, 25 and 26 or to appear personally at the hearing fixed for the new examination of the case.

Section 4 – Provisional measures

Article 31

If the sentenced person is present in the requesting State after notification of the acceptance of its request for enforcement of a sentence involving deprivation of liberty is received, that State may, if it deems it necessary in order to ensure enforcement, arrest him with a view to his transfer under the provisions of Article 43.

Article 32

1. When the requesting State has requested enforcement, the requested State may arrest the person sentenced:

   a. if, under the law of the requested State, the offence is one which justifies remand in custody, and

   b. if there is a danger of abscondence or, in case of a judgment rendered *in absentia*, a danger of secretion of evidence.

2. When the requesting State announces its intention to request enforcement, the requested State may, on application by the requesting State arrest the person sentenced, provided that requirements under a and b of the preceding paragraph are satisfied. The said application shall state the offence which led to the judgment and the time and place of its perpetration, and contain as accurate a description as possible of the person sentenced. It shall also contain a brief statement of the facts on which the judgment is based.

Article 33

1. The person sentenced shall be held in custody in accordance with the law of the requested State; the law of that State shall also determine the conditions on which he may be released.

2. The person in custody shall in any event be released:

   a. after a period equal to the period of deprivation of liberty imposed in the judgment;

   b. if he was arrested in pursuance of Article 32, paragraph 2, and the requested State did not receive, within 18 days from the date of the arrest, the request together with the documents specified in Article 16.

Article 34

1. A person held in custody in the requested State in pursuance of Article 32 who is summoned to appear before the competent court in the requesting State in accordance with Article 25 as a result of the opposition he has lodged, shall be transferred for that purpose to the territory of the requesting State.

2. After transfer, the said person shall not be kept in custody by the requesting State if the condition set out in Article 33, paragraph 2.a, is met or if the requesting State does not request enforcement of a further sentence. The person shall be promptly returned to the requested State unless he has been released.

Article 35

1. A person summoned before the competent court of the requesting State as a result of the opposition he has lodged shall not be proceeded against, sentenced or detained with a view to the carrying out of a sentence or detention order nor shall he for any other reason be restricted in his personal freedom for any act or offence which took place prior to his departure from the territory of the requested State and which is not specified in the summons unless he expressly consents in writing. In the case referred to in Article 34, paragraph 1, a copy of the statement of consent shall be sent to the State from which he has been transferred.

2. The effects provided for in the preceding paragraph shall cease when the person summoned, having had the opportunity to do so, has not left the territory of the requesting State during 15 days after the date of the decision following the hearing for which he was summoned to appear or if he returns to that territory after leaving it without being summoned anew.

Article 36

1. If the requesting State has requested enforcement of a confiscation of property, the requested State may provisionally seize the property in question, on condition that its own law provides for seizure in respect of similar facts.

2. Seizure shall be carried out in accordance with the law of the requested State which shall also determine the conditions on which the seizure may be lifted.

Section 5 – Enforcement of sanctions

a – General clauses

Article 37

A sanction imposed in the requesting State shall not be enforced in the requested State except by a decision of the court of the requested State. Each Contracting State may, however, empower other authorities to take such decisions if the sanction to be enforced is only a fine or a confiscation and if these decisions are susceptible of appeal to a court.

Article 38

The case shall be brought before the court or the authority empowered under Article 37 if the requested State sees fit to take action on the request for enforcement.

Article 39

1. Before a court takes a decision upon a request for enforcement the sentenced person shall be given the opportunity to state his views. Upon application he shall be heard by the court either by letters rogatory or in person. A hearing in person must be granted following his express request to that effect.

2. The court may, however, decide on the acceptance of the request for enforcement in the absence of a sentenced person requesting a personal hearing if he is in custody in the requesting State. In these circumstances any decision as to the substitution of the sanction under Article 44 shall be adjourned until, following his transfer to the requested State, the sentenced person has been given the opportunity to appear before the court.

Article 40

1. The court, or in the cases referred to in Article 37, the authority empowered under the same article, which is dealing with the case shall satisfy itself:

   a. that the sanction whose enforcement is requested was imposed in a European criminal judgment;

   b. that the requirements of Article 4 are met;

   c. that the condition laid down in Article 6.a is not fulfilled or should not preclude enforcement;

   d. that enforcement is not precluded by Article 7;

   e. that, in case of a judgment rendered *in absentia* or an *ordonnance pénale* the requirements of Section 3 of this part are met.

2. Each Contracting State may entrust to the court or the authority empowered under Article 37 the examination of other conditions of enforcement provided for in this Convention.

Article 41

The judicial decisions taken in pursuance of the present section with respect to the requested enforcement and those taken on appeal from decisions by the administrative authority referred to in Article 37 shall be appealable.

Article 42

The requested State shall be bound by the findings as to the facts in so far as they are stated in the decision or in so far as it is impliedly based on them.

b – Clauses relating specifically to enforcement of sanctions involving deprivation of liberty

Article 43

When the sentenced person is detained in the requesting State he shall, unless the law of that State otherwise provides, be transferred to the requested State as soon as the requesting State has been notified of the acceptance of the request for enforcement.

Article 44

1. If the request for enforcement is accepted, the court shall substitute for the sanction involving deprivation of liberty imposed in the requesting State a sanction prescribed by its own law for the same offence. This sanction may, subject to the limitations laid down in paragraph 2, be of a nature or duration other than that imposed in the requesting State. If this latter sanction is less than the minimum which may be pronounced under the law of the requested State, the court shall not be bound by that minimum and shall impose a sanction corresponding to the sanction imposed in the requesting State.

2. In determining the sanction, the court shall not aggravate the penal situation of the person sentenced as it results from the decision delivered in the requesting State.

3. Any part of the sanction imposed in the requesting State and any term of provisional custody, served by the person sentenced subsequent to the sentence, shall be deducted in full. The same shall apply in respect of any period during which the person sentenced was remanded in custody in the requesting State before being sentenced in so far as the law of that State so requires.

4. Any Contracting State may, at any time, deposit with the Secretary General of the Council of Europe a declaration which confers on it in pursuance of the present Convention the right to enforce a sanction involving deprivation of liberty of the same nature as that imposed in the requesting State even if the duration of that sanction exceeds the maximum provided for by its national law for a sanction of the same nature. Nevertheless, this rule shall only be applied in cases where the national law of this State allows, in respect of the same offence, for the imposition of a sanction of at least the same duration as that imposed in the requesting State but which is of a more severe nature. The sanction imposed under this paragraph may, if its duration and purpose so require, be enforced in a penal establishment intended for the enforcement of sanctions of another nature.

c – Clauses relating specifically to enforcement of fines and confiscations

Article 45

1. If the request for enforcement of a fine or confiscation of a sum of money is accepted, the court or the authority empowered under Article 37 shall convert the amount thereof into the currency of the requested State at the rate of exchange ruling at the time when the decision is taken. It shall thus fix the amount of the fine, or the sum to be confiscated, which shall nevertheless not exceed the maximum sum fixed by its own law for the same offence, or failing such a maximum, shall not exceed the maximum amount customarily imposed in the requested State in respect of a like offence.

2. However, the court or the authority empowered under Article 37 may maintain up to the amount imposed in the requesting State the sentence of a fine or of a confiscation when such a sanction is not provided for by the law of the requested State for the same offence, but this law allows for the imposition of more severe sanctions. The same shall apply if the sanction imposed in the requesting State exceeds the maximum laid down in the law of the requested State for the same offence, but this law allows for the imposition of more severe sanctions.

3. Any facility as to time of payment or payment by instalments, granted in the requesting State, shall be respected in the requested State.

Article 46

1. When the request for enforcement concerns the confiscation of a specific object, the court or the authority empowered under Article 37 may order the confiscation of that object only in so far as such confiscation is authorised by the law of the requested State for the same offence.

2. However, the court or the authority empowered under Article 37 may maintain the confiscation ordered in the requesting State when this sanction is not provided for in the law of the requested State for the same offence but this law allows for the imposition of more severe sanctions.

Article 47

1. The proceeds of fines and confiscations shall be paid into the public funds of the requested State without prejudice to any rights of third parties.

2. Property confiscated which is of special interest may be remitted to the requesting State if it so requires.

Article 48

If a fine cannot be exacted, a court of the requested State may impose an alternative sanction involving deprivation of liberty in so far as the laws of both States so provide in such cases unless the requesting State expressly limited its request to exacting of the fine alone. If the court decides to impose an alternative sanction involving deprivation of liberty, the following rules shall apply:

a. If conversion of a fine into a sanction involving deprivation of liberty is already prescribed either in the sentence pronounced in the requesting State or directly in the law of that State, the court of the requested State shall determine the nature and length of such sanction in accordance with the rules

laid down by its own law. If the sanction involving deprivation of liberty already prescribed in the requesting State is less than the minimum which may be imposed under the law of the requested State, the court shall not be bound by that minimum and impose a sanction corresponding to the sanction prescribed in the requesting State. In determining the sanction the court shall not aggravate the penal situation of the person sentenced as it results from the decision delivered in the requesting State.

b. In all other cases the court of the requested State shall convert the fine in accordance with its own law, observing the limits prescribed by the law of the requesting State.

d – Clauses relating specifically to enforcement of disqualification

Article 49

1. Where a request for enforcement of a disqualification is made such disqualification imposed in the requesting State may be given effect in the requested State only if the law of the latter State allows for disqualification for the offence in question.

2. The court dealing with the case shall appraise the expediency of enforcing the disqualification in the territory of its own State.

Article 50

1. If the court orders enforcement of the disqualification it shall determine the duration thereof within the limits prescribed by its own law, but may not exceed the limits laid down in the sentence imposed in the requesting State.

2. The court may order the disqualification to be enforced in respect of some only of the rights whose loss or suspension has been pronounced.

Article 51

Article 11 shall not apply to disqualifications.

Article 52

The requested State shall have the right to restore to the person sentenced the rights of which he has been deprived in accordance with a decision taken in application of this section.

PART III – INTERNATIONAL EFFECTS OF EUROPEAN CRIMINAL JUDGMENTS

Section 1 – *Ne bis in idem*

Article 53

1. A person in respect of whom a European criminal judgment has been rendered may for the same act neither be prosecuted nor sentenced nor subjected to enforcement of a sanction in another Contracting State:

a. if he was acquitted;

b. if the sanction imposed:

i. has been completely enforced or is being enforced, or

ii. has been wholly, or with respect to the part not enforced, the subject of a pardon or an amnesty, or

iii. can no longer be enforced because of lapse of time;

c. if the court convicted the offender without imposing a sanction.

2. Nevertheless, a Contracting State shall not, unless it has itself requested the proceedings, be obliged to recognise the effect of *ne bis in idem* if the act which gave rise to the judgment was directed against either a person or an institution or any thing having public status in that State, of if the subject of the judgment had himself a public status in that State.

3. Furthermore, any Contracting State where the act was committed or considered as such according to the law of that State shall not be obliged to recognise the effect of *ne bis in idem* unless that State has itself requested the proceedings.

Article 54

If new proceedings are instituted against a person who in another Contracting State has been sentenced for the same act, then any period of deprivation of liberty arising from the sentence enforced shall be deducted from the sanction which may be imposed.

Article 55

This section shall not prevent the application of wider domestic provisions relating to the effect of *ne bis in idem* attached to foreign criminal judgments.

Section 2 – Taking into consideration

Article 56

Each Contracting State shall legislate as it deems appropriate to enable its courts when rendering a judgment to take into consideration any previous European criminal judgment rendered for another offence after a hearing of the accused with a view to attaching to this judgment all or some of the effects which its law attaches to judgments rendered in its territory. It shall determine the conditions in which this judgment is taken into consideration.

Article 57

Each Contracting State shall legislate as it deems appropriate to allow the taking into consideration of any European criminal judgment rendered after a hearing of the accused so as to enable application of all or part of a disqualification attached by its law to judgments rendered in its territory. It shall determine the conditions in which this judgment is taken into consideration.

PART IV – FINAL PROVISIONS

Article 58

1. This Convention shall be open to signature by the member States represented on the Committee of Ministers of the Council of Europe. It shall be subject to ratification or acceptance. Instruments of ratification or acceptance shall be deposited with the Secretary General of the Council of Europe.

2. The Convention shall enter into force three months after the date of the deposit of the third instrument of ratification or acceptance.

3. In respect of a signatory State ratifying or accepting subsequently, the Convention shall come into force three months after the date of the deposit of its instrument of ratification or acceptance.

Article 59

1. After the entry into force of this Convention, the Committee of Ministers of the Council of Europe may invite any non-member State to accede thereto, provided that the resolution containing such invitation receives the unanimous agreement of the members of the Council who have ratified the Convention.

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 three months after the date of its deposit.

Article 60

1. Any Contracting State may, at the time of signature or when depositing its instrument of ratification, acceptance or accession, specify the territory or territories to which this Convention shall apply.

2. Any Contracting State may, when depositing its instrument of ratification, acceptance or accession or at any later date, by declaration addressed to the Secretary General of the Council of Europe, extend this

Convention 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 according to the procedure laid down in Article 66 of this Convention.

Article 61

1. Any Contracting State may, at the time of signature or when depositing its instrument of ratification, acceptance or accession, declare that it avails itself of one or more of the reservations provided for in Appendix I to this Convention.

2. Any Contracting State may wholly or partly withdraw a reservation 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.

3. A Contracting State which has made a reservation in respect of any provision of this Convention may not claim the application of that provision by any other State; 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 62

1. Any Contracting State may at any time, by declaration addressed to the Secretary General of the Council of Europe, set out the legal provisions to be included in Appendices II or III to this Convention.

2. Any change of the national provisions listed in Appendices II or III shall be notified to the Secretary General of the Council of Europe if such a change renders the information in these appendices incorrect.

3. Any changes made in Appendices II or III in application of the preceding paragraphs shall take effect in each Contracting State one month after the date of their notification by the Secretary General of the Council of Europe.

Article 63

1. Each Contracting State shall, at the time of depositing its instrument of ratification, acceptance or accession, supply the Secretary General of the Council of Europe with relevant information on the sanctions applicable in that State and their enforcement, for the purposes of the application of this Convention.

2. Any subsequent change which renders the information supplied in accordance with the previous paragraph incorrect, shall also be notified to the Secretary General of the Council of Europe.

Article 64

1. This Convention affects neither the rights and the undertakings derived from extradition treaties and international multilateral conventions concerning special matters, nor provisions concerning matters which are dealt with in the present Convention and which are contained in other existing conventions between Contracting States.

2. The Contracting States may not conclude bilateral or multilateral agreements with one another on the matters dealt with in this Convention, except in order to supplement its provisions or facilitate application of the principles embodied in it.

3. Should two or more Contracting States, however, have already established their relations in this matter on the basis of uniform legislation, or instituted a special system of their own, or should they in future do so, they shall be entitled to regulate those relations accordingly, notwithstanding the terms of this Convention.

4. Contracting States ceasing to apply the terms of this Convention to their mutual relations in this matter shall notify the Secretary General of the Council of Europe to that effect.

Article 65

The European Committee on Crime Problems of the Council of Europe shall be kept informed regarding the application of this Convention and shall do whatever is needful to facilitate a friendly settlement of any difficulty which may arise out of its execution.

Article 66

1. This Convention shall remain in force indefinitely.

2. Any Contracting State may, in so far as it is concerned, denounce this Convention by means of a notification addressed to the Secretary General of the Council of Europe.

3. Such denunciation shall take effect six months after the date of receipt by the Secretary General of such notification.

Article 67

The Secretary General of the Council of Europe shall notify the member States represented on the Committee of Ministers of the Council, and any State that has acceded to this Convention, of:

a. any signature;

b. any deposit of an instrument of ratification, acceptance or accession;

c. any date of entry into force of this Convention in accordance with Article 58 thereof;

d. any declaration received in pursuance of Article 19, paragraph 2:

e. any declaration received in pursuance of Article 44, paragraph 4:

f. any declaration received in pursuance of Article 60:

g. any reservation made in pursuance of the provisions of Article 61, paragraph 1, and the withdrawal of such reservation;

h. any declaration received in pursuance of Article 62, paragraph 1, and any subsequent notification received in pursuance of that article, paragraph 2;

i. any information received in pursuance of Article 63, paragraph 1, and any subsequent notification received in pursuance of that article, paragraph 2;

j. any notification concerning the bilateral or multilateral agreements concluded in pursuance of Article 64, paragraph 2, or concerning uniform legislation introduced in pursuance of Article 64, paragraph 3;

k. any notification received in pursuance of Article 66, and the date on which denunciation takes effect.

Article 68

This Convention and the declarations and notifications authorised thereunder shall apply only to the enforcement of decisions rendered after the entry into force of the Convention between the Contracting States concerned.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at The Hague, this 28th day of May 1970, 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 each of the signatory and acceding States.

APPENDIX I

Each Contracting State may declare that it reserves the right:

a. to refuse enforcement, if it considers that the sentence relates to a fiscal or religious offence;

b. to refuse enforcement of a sanction for an act which according to the law of the requested State could have been dealt with only by an administrative authority;

c. to refuse enforcement of a European criminal judgment which the authorities of the requesting State rendered on a date when, under its own law, the criminal proceedings in respect of the offence punished by the judgment would have been precluded by the lapse of time;

d. to refuse the enforcement of sanctions rendered *in absentia* and *ordonnances pénales* or of one of these categories of decisions only;

e. to refuse the application of the provisions of Article 8 where this State has an original competence and to recognise in these cases only the equivalence of acts interrupting or suspending time limitation which have been accomplished in the requesting State;

f. to accept the application of Part III in respect of one of its two sections only.

APPENDIX II

The following offences shall be assimilated to offences under criminal law:

- in France: Any unlawful behaviour sanctioned by a "contravention de grande voirie".
- in the Federal Republic of Germany: Any unlawful behaviour dealt with according to the procedure laid down in Act on violations of Regulations *(Gesetz Uber Ordnungswidrigkeiten)* of 24 May 1968 (BGBL 1968, I 481).
- in Italy: Any unlawful behaviour to which is applicable Act No. 317 of 3 March 1967.
- in the Netherlands: any unlawful behaviour to which the Traffic Regulations (Administrative Enforcement) Act *(Wet administratiefrechtelijke handhaving verkeersvoorschriften)* of 3 July 1989 (Bulletin of Act, Orders and Decrees, 300) is applicable.

APPENDIX III

AUSTRIA

Strafverfugung (Articles 460-62 of the Code of Criminal Procedure).

DENMARK

Bodeforelaeg or Udenretlig bodevedtagelse (Article 931 of the Administration of Justice Act).

FRANCE

1. *Amende de Composition* (Articles 524-528 of the Code of Criminal Procedure supplemented by Articles R 42 - R 50).
2. *Ordonnance pénale* applied only in the departments of the *Bas-Rhin*, the *Haut-Rhin* and the Mossele.

FEDERAL REPUBLIC OF GERMANY

1. *Strafbefehl* (Articles 407-412 of the Code of Criminal Procedure).
2. *Strafverfugung* (Articles 413 of the Code of Criminal Procedure).
3. *Bussgeldbescheid* (Articles 65-66 of Act of 24 May 1968 -BGBL 1968 I, 481).

ICELAND

"Ordonnances Pénales" according to Icelandic legislation are: *"Lögreglustjórasektir"* (Article 115 of the Act on Law of Criminal Procedure).

ITALY

1. *Decreto penale* (Articles 506-10 of the Code of Criminal Procedure).
2. *Decreto penale* in fiscal matters (Act of 7 January 1929, No.4).
3. *Decreto penale* in navigational matters (Articles 1242-43 of the Code of Navigation).
4. Decision rendered in pursuance of Act No.317 of 3 March 1967.

LUXEMBOURG

1. *Ordonnance pénale* (Act of 31 July 1924 on the organisation of "ordonnances penaleso").
2. *Ordonnance pénale* (Article 16 of Act of 14 February 1955 on the Traffic on Public Highways).

NORWAY

1. *Forelegg* (Articles 287-290 of the Act on Judicial Procedure in Penal Cases).
2. *Forenklet forelegg* (Article 31B of Traffic Code of 18 June 1965).

SWEDEN

1. *Strafforelaggande* (Chapter 48 of the Code of Procedure).
2. *Forelaggande av ordningsbot* (Chapter 48 of the Code of Procedure).

SWITZERLAND

1. *Strafbefehl* (Aargau, Bale-Country, Bale-Town, Schaffhausen, Schwyz, Uri, Zug, Zurich). Ordonnance pénale (Fribourg, Valais).
2. *Strafantrag* (Lower Unterwalden).
3. *Strafbescheid* (St. Gallen).
4. *Strafmandat* (Bern, Graubunden, Solothurn, Upper Unterwalden).
5. *Strafverfugung* (Appenzell Outer Rhoden, Glarus, Schaffhausen, Thurgau).
6. *Abwandlungserkenntnis* (Lucerne).
7. *Bussenentscheid* (Appenzell Inner Rhoden).
8. *Ordonnance de condamnation* (Vaud).
9. *Mandat de répression* (Neuchatel).
10. *Avis de contravention* (Geneva, Vaud).
11. *Prononcé préfectoral* (Vaud).
12. *Prononcé de contravention* (Valais).
13. *Decreto di accusa* (Ticino).

TURKEY

Ceza Kararnamesi (Articles 386-91 of the Code of Criminal Procedure) and all other decisions by which administrative authorities impose sanctions.

European Convention on the international validity of criminal judgments – ETS No. 70

Explanatory Report

I. The European Convention on the International Validity of Criminal judgments, drawn up within the Council of Europe by a committee of governmental experts, was opened for signature on 28 May 1970 on the occasion of the VIth Conference of European Ministers of Justice.

II. The report adopted by the Committee of experts responsible for drawing up the draft Convention and addressed to the Committee of Ministers of the Council of Europe has been taken, as the basis for the present publication and does not constitute an instrument providing an authoritative interpretation of the text of the Convention although it may facilitate the application of the Convention's provisions.

HISTORY

(a) Setting up of sub-committee and mandate

During its VIIth plenary session which was held on 15-16 November 1961, the European Committee on Crime Problems recommended the setting up of a sub-committee which should examine "the international validity of criminal judgments in relation to recidivism Later this mandate was extended in order to allow the sub-committee to examine other aspects of the validity of foreign judgments. Dr. H. Grützner (Federal Republic of Germany) was appointed Chairman of the subcommittee and Secretariat duties were carried out by the Division of Crime Problems in the Directorate of Legal Affairs of the Council of Europe.

(b) Identification of key problems

During the early meetings the members of the sub-committee undertook a preliminary general examination of a variety of problems concerning the recognition of foreign judgments[1]. The purpose of this was to crystallise the opinion of the members of the sub-committee on the various questions raised and provided an introduction to a more thorough examination and to the drafting of the Convention. This survey led to a detailed exchange of views and made it possible for the subcommittee to arrive at the conclusions on which its draft Convention was based. The problems thus identified and the conclusions of the sub-committee, which served as a basis for the further examination of the draft carried out by a committee of experts to the meetings of which all member States of the Council of Europe were invited to send a representative, are set out briefly below.

1. The sub-committee first discussed the recognition of foreign judgments. The sub-committee agreed that considerations of national sovereignty upon which the territoriality of legislative and judicial authority in penal matters is traditionally based should no longer be an obstacle to the recognition of the legal effects of foreign judgments; it thus took account of the mutual confidence between member States of the Council of Europe, the development of criminality in modern society and the necessity of combating it by collaboration across frontiers. It was of the opinion that each State is free to concede, by an international convention, to another Contracting Party the exercise of the rights derived from its sovereignty.

1. See article by Dr. Grützner in " Aspects of the International Validity of Criminal judgments ", Council of Europe, 1968.

After an exchange of views on whether it would suffice that the facts on which a conviction was based should be punishable by the legislation of both States concerned (dual liability *in abstracto*) or whether it was also necessary that the convicted person could in a particular case be prosecuted and sanctions imposed in the State of enforcement if he had committed the act in the country (dual liability *in concreto),* the sub-committee decided in favour of the latter solution.

In the matter of time limitation for sanction, the subcommittee considered. that in order to he recognised a sanction should not be precluded by reason of lapse of time either under the law of the requesting State (State of conviction) or under that of the requested State (enforcing State). The solution thus adopted corresponds to that adopted in other European Conventions on crime problems of the Council of Europe. The majority of the sub-committee was of the opinion that the question of time limitation for prosecution at the time of conviction should not be taken into consideration by the requested State.

After a long discussion on the subject of amnesty the experts concluded that an amnesty granted in the enforcing State should preclude recognition of the judgment insofar as the offence would be annulled if it had been committed in the territory of that State. An amnesty in the State of conviction would preclude recognition of the judgment in the enforcing State.

The sub-committee also discussed whether recognition could be granted to a judgment which had been given in violation of the conditions laid down in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The sub-committee decided that recognition could not be granted on the ground that the non-observance of that article by the requesting State would render the enforcement of the judgment contrary to the *ordre public* of the requested State.

2. Discussion of the question of recognition of judgments rendered in *absentia* raised the related question as to the validity of *ordonnances pénales* In order to obtain more detailed information on the provisions on judgments rendered *in absentia* in national legislations, the sub-committee sent out a questionnaire, the replies to which greatly facilitated discussion. From these replies the sub-committee arrived at the opinion that all judgments rendered *in absentia* should be assimilated to judgments pronounced in the presence of the parties, provided that the accused had had the opportunity to defend himself, to ask for a hearing in his presence, and to appeal against the judgment rendered *in absentia*. It was also decided that *ordonnances pénales* might be enforced in the same way as decisions pronounced in the presence of the parties.

3. The sub-committee discussed the enforcement of subsidiary sanctions and made a distinction between subsidiary sanctions of a pecuniary nature and subsidiary sanctions of a different kind. It decided that all subsidiary sanctions of a pecuniary nature should be enforced by the requested State on condition that they were of a penal character.

During the discussion the sub-committee examined in detail the problems raised by forfeiture of civil rights, prohibition to exercise a profession and withdrawal of driving licence. It was of the opinion that these subsidiary sanctions, whose extra-territorial validity has never been recognised, could no longer be limited to one single territory even if the judge could only impose these sanctions by giving them a purely internal validity. It seemed particularly inequitable that a person to whom a certain profession had been prohibited could exercise it freely in a neighbouring country. A regulation extending abroad such effects of criminal judgment appeared thus to be necessary, but the members hesitated nevertheless to make it an obligation for the Contracting States.

4. The sub-committee examined the problems raised by the taking into consideration of foreign criminal judgments. In particular, it studied these from the point of view of ascertaining recidivism, the imposition of security measures, the revocation of conditionally suspended national sanctions and the fixing of sanctions during subsequent proceedings. The sub-committee was of the opinion that it would be preferable to include a provision in the Convention whereby States would be free to take into consideration a sentence pronounced abroad without making it an obligatory rule.

5. An important question was raised before the sub-committee concerning the negative effects of *res judicata (ne bis in idem).* The members held the basic principle to be that any foreign judgment should have res *judicata* force regardless of the nationality of the person involved or of the place of the commission of the act. That principle should apply to acquittals as well as convictions followed by a sanction. Its application should, however, be excluded when the convicted person had not served his sanction or only a part of it except under specifically defined conditions.

6. During the general examination of problems relating to the international validity of criminal judgments, the members of the sub-committee became aware of the wide diversity of sanctions provided for in the legislations of the member States and of the necessity to establish comparative tables of penal sanctions

which would facilitate the task of national judges when the sanction pronounced by the State of conviction was adapted to the penal system of the State of enforcement. A questionnaire was sent to member governments and from the replies received the Chairman of the sub-committee drew up the tables intended to facilitate the comparison of sanctions.

(c) Exclusion of certain problems from the scope of the Convention

During their discussion the members of the sub-committee examined certain problems which, though closely linked to the recognition of foreign criminal judgments, in their view should not be solved by a Convention on the International Validity of Criminal judgments. The sub-committee decided to exclude the following questions:

- the enforcement of that part of a criminal judgment which decided on requests for damages, as this fell within the jurisdiction of authorities competent in civil matters and it was for them to decide as to the desirability of enforcing that part of the judgment;
- the enforcement of that part of a criminal judgment which decided on the question of costs, as the imposition of costs might be an obstacle to the rehabilitation of the convicted person and this problem could be better regulated by bilateral agreements;
- the restitution of stolen objects to the victim
- the harmonisation of national provisions on time limitation because of divergent theories as to their nature, in particular as to whether they were part of material law or procedural law;
- the enforcement of subsidiary sanctions imposed by an administrative authority, such a decision not being "a criminal judgment";
- the right for a private person to launch *exequatur* proceedings in order to render enforceable a decision containing a disqualification of the rights of another person, as this right, though known in Italian law, was not recognised by most of the legal systems in member States and as the person interested in the enforcement of the disqualification could make a request to the competent authorities to the effect that they launch the *exequatur* proceedings;
- the enforcement of moral sanctions, as their diversity rendered uniform rules difficult.

(d) Working methods of the sub-committee

Having thus during their first meetings examined the key problems raised, the members of the sub-committee agreed, on a proposal made by the Chairman, to submit reports on the most important aspects of the subject under study. During the meetings which took place in 1964 and 1965 the sub-committee studied in detail the following documents[2].

- Report on the question of *ne bis in idem* (by Mr. Brydensholt);
- Report on *exequatur* proceedings (by Mr. Altavista)
- Report dealing with sentences passed in the absence of the accused in arranging for the enforcement of foreign criminal sentences (by Mr. Hulsman);
- Report on the problem of limitation of time viewed from the standpoint of the international validity of criminal judgments (by Mr. Markees);
- Reports on disqualifications and other consequences of foreign criminal judgments excluding indirect contingent consequences, and on the European validity of criminal judgments in respect of contingent effects (by Mr. Kunter).

Subsequently, the members submitted draft articles of the Convention, together with a commentary relating to them, taking account of the ideas contained in their reports and the discussion to which these gave rise in the sub-committee.

From these individual proposals, the Chairman made the first draft of the Convention which was discussed during two meetings in 1965, and approved with certain amendments during a meeting in June 1966.

2. Certain of these documents were published in 1968 under the title " Aspects of the International Validity of Criminal judgments ".

(e) Examination by the Conferences of European Ministers of Justice

During their second Conference held in Rome in 1962, the European Ministers of justice heard a report submitted by Dr Grützner on the work already completed and on the plans of the sub-committee for the recognition of foreign criminal judgments. As the result of the debate on the questions raised in this report, the Ministers adopted the following resolution:

> "The Ministers taking part in the second Conference of European Ministers of justice,
>
> Having regard to Resolution No. V of the first Conference of European Ministers of justice, held in Paris from 5 to 7 June 1961;
>
> Observing that the effects of crime are becoming more and more apparent beyond the frontiers of a given country;
>
> Considering that this trend calls for the recognition of greater validity of penal sentences outside the territory of the State in which they have been pronounced;
>
> Welcoming the study undertaken on this subject by the European Committee on Crime Problems of the Council of Europe,
>
> Hold that it is necessary to resolve the problem of recognition of the validity of foreign penal sentences;
>
> Express the wish that this study may be pursued until a European Convention on this subject has been drawn up."

During the fourth Conference held in May 1966, Mr. Grützner submitted a detailed report on the work accomplished by the sub-committee to the European Ministers of justice; the Ministers took note of this report by adopting the following resolution:

> "The Ministers taking part in the fourth Conference of European Ministers of justice,
>
> Having regard to Resolution No. V of the second Conference of European Ministers of Justice held in Rome from 5 to 7 October 1962;
>
> Having been informed of the action being taken by ECCP to deal on a multilateral basis with the problems pertaining to the international validity of criminal judgments and to delimitation of the national jurisdiction of member States on criminal matters;
>
> Considering that early resolution of these important issues is highly desirable,
>
> Recommend the Committee of Ministers of the Council of Europe to give the European Committee on Crime Problems all necessary facilities to enable it to complete its work in this sphere at the earliest possible date."

(f) Examination by the European Committee on Crime Problems

During its plenary session in May 1967, the European Committee on Crime Problems briefly examined the draft Convention adopted by the sub-committee. It endorsed its previous decision that the draft should be submitted to a Committee of experts representative of all member States *of* the Council *of* Europe interested in this matter. It recommended the appointment of Dr. H. Grützner as Chairman also of this committee of experts.

(g) Examination of basic principles by the Committee of Experts on the International Validity of Criminal Judgments

Meeting in December 1967, experts from fourteen member States of the Council of Europe undertook a preliminary examination of the conclusions arrived at. by the sub-committee.

Basing itself on the solutions proposed under *(b)* above, the Committee agreed that:

- foreign criminal judgments should, generally speaking, be recognised;
- dual liability should be considered *in concreto*
- the sanction should not be precluded by lapse of time under the laws of the two States concerned;
- time limitation for prosecution in the requesting State should not be taken into consideration by the requested State;
- amnesty should under certain conditions preclude recognition of a foreign judgment;
- the proceedings in the requesting State should comply with the provisions of the Convention on Human Rights.

The experts also agreed to the general principles adopted in respect of judgments rendered *in absentia,* subsidiary sanctions, taking into consideration of foreign criminal judgments and *ne bis in idem*.

The experts also agreed to exclude from the scope of the draft Convention, the problems listed under letter (c) above.

(h) Working methods of the committee of experts

The experts then proceeded to a detailed examination of each article contained in the sub-committee's preliminary draft Convention. When a unanimous decision or one by a majority vote had been reached on the content, the text was referred to a drafting committee composed of experts having a special familiarity with the official languages of the Council of Europe in which the Convention was drafted.

The sub-committee's preliminary draft was substantially amended. The final text of the draft Convention was adopted during the meeting in December 1968.

The meetings in 1969 were devoted to the examination of the appendices to the Convention, of the comparatives tables of sanctions and of the explanatory report.

(i) Examination by the European Committee on Crime Problems

The text of the draft Convention was submitted to the XVIIIth plenary session of the ECCP. The text was adopted in principle, but the committee of experts was requested to re-examine Appendix 1 dealing with reservations. Any amendment brought to that appendix should be approved by the Bureau of the ECCP.

(j) Transmission to the Committee of Ministers

During its meeting on 18 September 1969, the Bureau of the ECCP formally approved the texts of the draft Convention and the draft explanatory report and decided to transmit them to the Committee of Ministers.

(k) Approval by the Committee of Ministers

The Committee of Ministers of the Council of Europe approved the text of the draft Convention at its meeting in March 1970 (187th meeting of the Ministers' Deputies).

(l) Opening for signature

The European Convention on the International Validity of Criminal judgments was opened for signature on 28 May 1970 during the VIth Conference of the European Ministers of justice at The Hague.

GENERAL OBSERVATIONS

I. Background

The criminal law of the member States of the Council of Europe is governed, with some few exceptions, by the classical concept of national sovereignty. Each State takes indeed as its basis the principle of territoriality and the effect of its judicial decisions does not in general extend beyond its frontiers.

This situation does not fully meet present-day requirements. If society is to be effectively protected, account must be taken of trends in crime. The problems are, like many others, becoming international, largely owing to the considerable development of economic resources, improved means of transport and communication and to the ensuing mobility of populations.

Moreover, penal policy has come to lay greater emphasis upon treatment of the offender. It would seem that resocialisation is often considerably facilitated when the sanctions imposed upon the offender are carried out in his State of residence rather than in the State of the offence and judgment. This policy is also rooted in humane considerations, in particular the understanding of the detrimental influences upon a prisoner of difficulties in communication by reason of language barriers, alienation from local culture and habits and the absence of contact with relatives and friends.

For these reasons determined efforts have been made to regulate the question of extending the validity of foreign judgments. In recent years regional arrangements between sovereign States have broken down barriers created by long and established traditions and by legal concepts now considered inadequate. Thus, the five Nordic countries have enacted parallel legislation providing for the enforcement in one country of

criminal judgments emanating from any of the other four countries, and the three Benelux countries have drawn up a draft treaty with the same aim. Both of these arrangements have been a source of inspiration to the members of the committee when drafting the present Convention.

International collaboration in criminal matters can take several forms:

i. extradition, the traditional example of international co-operation by which a person is transferred from one State to another in order to stand trial or for enforcement of sanctions in the latter;

ii. mutual legal assistance, by which is understood the communication of relevant information and evidence from one State to another;

iii. enforcement in one State of a criminal judgment rendered in another;

iv. transfer of proceedings and delimitation of competences by which it is attempted to organise proceedings actually begun or planned in a more efficient way so that the State which is best placed prosecutes and enforces the sanction to be imposed.

In 1957 and in 1959 the Council of Europe regulated the first two methods of legal co-operation by opening for signature the European Convention on Extradition and the European Convention on Mutual Assistance in Criminal Matters respectively. The present Convention is a further step towards the ultimate goal of ensuring full international co-operation in criminal matters between member States of the Council of Europe. It extends the principles of the European Convention for the Punishment of Road Traffic Offences and of the European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders (principles which, *inter alia*, enable the State of residence under certain conditions to enforce judgments pronounced in the State of the offence and to take the measures necessary for the social rehabilitation of persons convicted in another State) so as to make them more widely applicable.

It should be added that a sub-committee of the European Committee on Crime Problems has recently[3] adopted a draft Convention concerning the fourth method of legal co-operation, namely the transfer of proceedings and plurality of proceedings in criminal matters.

Having examined the desirability of joining this draft Convention and the present Convention, the committee of experts decided to deal with the two methods of legal co-operation in two different instruments. It was indeed of the opinion that a single Convention would be an impractical solution rendering the presentation of these two methods less clear and ratification by the member States of the Council of Europe more difficult.

II. Basic principles

The fundamental concept behind the Convention is the assimilation of a foreign judgment to a judgment emanating from the courts of another Contracting State. This concept is applied in three different respects, namely to

- the enforcement of the sentence
- the *ne bis in idem* effect
- the taking into consideration of foreign judgments.

The Convention is divided into two main parts:

1. Enforcement of European criminal judgments (Part II, Articles 2-52);

2. International effects of European criminal judgments (Part III, Articles 53-57), this part being divided into two sections, one dealing with *ne bis in idem* and the other with taking into consideration.

1. Enforcement of European criminal judgments

A detailed examination in the Plenary Committee of the European Committee on Crime Problems, in the sub-committee and in the committee of experts as to which foreign decisions might be enforced has led to the adoption of the following conditions for enforcement:

- the decision must have been rendered in full observation of the fundamental principles of the Convention on Human Rights, notably Article 6, which lays down certain minimum requirements for court proceedings. Though it is not expressly stated in the text there was complete agreement that

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it was unthinkable to acknowledge the outcome of a trial as a valid judgment if it fell short of basic democratic requirements;

- the act for which a person is convicted in the State of judgment must also be punishable under the law of the requested State (see Article 4, (1));
- the decision must, with the exception of the judgment *in absentia* and the *ordonnance pénale* be final and enforceable in the State of judgment (see definition in Article 1 of the term "European criminal judgment" and Article 3);
- a request must be validly made by the State of judgment (see Articles 3 and *5);*
- the requested State may refuse enforcement only on one of the grounds limitatively listed in the Convention (Article 6); and
- the effect *ne bis in idem,* as defined in the present Convention, is an obstacle to enforcement (see Article 7).

These principles are contained in sub-section *(a)* of Section I of the Convention, entitled . General conditions of enforcement.

Sub-section (b) deals with the various rights and competences of the requesting and requested States as a result of the former making a request for enforcement and the latter accepting this request.

judgments rendered *in absentia* present a special problem which is dealt with in Section 3. A survey made by the subcommittee showed wide differences in national legislations. It is incontestable that these decisions do not offer the same guarantees to the accused person as decisions pronounced after hearing the accused in court. The objections are twofold. First, the gathering, verification and interpretation of evidence is rendered difficult by the absence of the accused person during the investigation and the court proceedings. Secondly, the absence of the offender prevents the sentencing judge from taking account of his special needs and from individualising the penalty.

Consequently, the sub-committee concluded - and the Committee of experts subsequently concurred in this opinion - that when laying down general rules for the enforcement of foreign judgments it was not possible to deal with those rendered *in absentia* in the same way as other judgments. On the other hand it thought it necessary to take into account the fact that judgments rendered *in absentia* represented a large proportion of judgments whose enforcement was not possible in the sentencing State and which therefore desirably should be enforced in another State. The practical value of rules on the enforcement of foreign judgments would be greatly diminished if they did not apply to judgments rendered in *absentia.* The only solution was to make the general rules applicable to judgments rendered *in absentia* and at the same time to establish a special system common to all Contracting States granting to the person sentenced *in absentia* the right to be heard before the enforcement of the sanction. This solution, which was used in the Benelux Treaty on the enforcement of criminal judgments, has also been adopted in the present Convention.

Except as provided for in Section 3, judgments rendered *in absentia* are therefore subject to the same rules as judgments rendered after a hearing of the parties. There are, however, important differences. With judgments rendered after a hearing enforcement may be requested only insofar as the judgment is final and enforceable. Enforcement of judgments rendered *in absentia* may, however, be requested as soon as they have been pronounced.

The Convention provides in respect of judgments rendered *in absentia,* a special common remedy; opposition (that is, an application to re-open the judgment) lodged in the requested State and decided upon either in the requested State or in the requesting State in lieu of all ordinary domestic remedies. Thus, it is not necessary to wait until domestic remedies have been exhausted and the judgment has become enforceable.

If the requested State accepts a request for enforcement, notice of the judgment is personally served on the person sentenced in that State. Thereafter, the person sentenced has 30 days in which to lodge an opposition. This remedy is based directly on the provisions of the Convention. It is the only remedy available to the person sentenced at this stage of the proceedings.

It follows that there are three possibilities which must be considered separately: (a) the person sentenced makes no opposition; (b) he submits his opposition to the court of the requesting State; (c) he submits his opposition to the court of the requested State.

(a) The person sentenced makes no opposition.

In these circumstances, the judgment may be enforced as if it had been passed after a hearing.

(b) The person sentenced submits his opposition to the court of the requesting State.

In these circumstances, he is summoned to the hearing. If he appears, or is represented, and the opposition is declared admissible, the case is re-opened. Following the new trial, the decision is rendered after a hearing of the parties.

If the person sentenced does not appear or the opposition is declared inadmissible, the judgment *in absentia is* regarded as a judgment pronounced after a hearing.

(c) The person sentenced submits his opposition to the court of the requested State.

In these circumstances he is summoned to the hearing. If he does not appear, or is not represented, the opposition is declared null and void and the judgment in *absentia* treated as a sentence passed after a hearing. The same applies if the opposition is declared inadmissible.

If he does appear, or is represented, and the opposition is declared admissible, the case is reconsidered as if the act had been committed in the requested State.

In all these cases the judgment is enforced in accordance with the provisions of Section 5.

The introduction of this system of opposition guarantees to the person sentenced that a judgment *in absentia* will not be enforced without his being afforded an opportunity to obtain a retrial.

Difficulties arose in respect of certain decisions imposing minor penalties after a simplified, often administrative, procedure *(ordonnance pénale)*. It was, however, decided to apply a similar system of opposition to them.

The committee of experts agreed that a foreign judgment should be examined in the State of enforcement with a view to giving it effect in that State. These proceedings are divided into two phases: action at international level between the requesting and the requested States. and action at national level *(exequatur* proceedings) before the competent authorities of the requested State. The rules applicable to the administrative arrangements between the States concerned are contained in Section 2 of Part II; the rules applicable to the proceedings before the national authorities are contained in Section 5 of Part II.

Exequatur proceedings are instituted in order to give the convicted person the assurance that enforcement of the sanction imposed upon him and adaptation of the foreign sanction will be carried out in accordance with the provisions of the Convention. For this reason the examination of the request for enforcement and the final decision on the matter has been entrusted to the courts of the requested State. Examination and decision by a court would seem the most appropriate way to inspire confidence in the observance of basic judicial principles and better than proceedings before an administrative authority for securing a satisfactory legal interpretation of the conditions for enforcement laid down in the Convention. In the interest of speedy and efficient enforcement an exception has been allowed for fines and confiscation, on condition that appeal to a judicial authority is possible.

Adapting the foreign sanction to the legislation of the State of enforcement raises difficult problems. The legal systems of the member States of the Council of Europe differ widely. The committee of experts therefore found it necessary to oblige the Contracting States to supply information on their system of sanctions (Article 63).

Section 5 lays down the general rules for enforcement of all sanctions; it also sets out special rules dealing with sanctions involving deprivation of liberty, fines and confiscations and forfeiture of rights.

2. The international effects of European criminal judgments

It is widely recognised in national law that a person cannot be brought to trial twice for the same offence. It is no less desirable that the same principle should prevail in applying criminal law at the international level, though it has not yet, there, found similar recognition. justice requires that a foreign judgment should, if possible, be given the same negative effect as a national judgment. A necessary prerequisite for the recognition of such effect is the mutual confidence in legal systems prevailing in the member States of the Council of Europe. The committee found that the close co-operation manifest within the European Committee on Crime Problems was tangible evidence of such confidence. It was therefore the unanimous opinion of the committee that this matter should be regulated in the Convention.

In establishing these rules the committee took account of the views of the European Commission of Human Rights which, in 1964, drew the attention of the Committee of Ministers to the fact that the principle of *ne bis in idem* was not adequately internationally safeguarded in Europe.

The international application of the principle of *ne bis in idem* requires detailed regulation; this has been done in Section 1 of Part III of the Convention.

The taking into consideration of a foreign judgment in order to attach to it certain effects is dealt with in Section *2* of Part III of the Convention. Indirect effects are to be understood as the effects which result from a decision taken subsequently by a competent authority, judicial or other.

An important principle - which the committee preferred not to make mandatory - is that judgments rendered by foreign courts may be taken into consideration in cases where, under national law, an identical decision would have such effects.

3. Final clauses

Part IV of the Convention comprises the final provisions covering the conditions of ratification, or acceptance of, or accession to, the Convention, the form to be given to any declaration or reservation formulated by the Contracting Parties at the time of signature or ratification and the conditions in which special rules be applied rather than those laid down in the Convention.

III. Conclusion

The common desire of European States to make a joint effort to fight crime at an international legal level has found tangible expression in this Convention. It is hoped that its entry into force will mark an important stage in the development of international criminal law in general and European criminal law in particular, put at the disposal of governments new and more efficacious means for the protection of society and enable national authorities to develop a criminal policy laying emphasis on the resocialisation of the offender with greater success.

COMMENTARY ON THE CONVENTION

Title of the Convention

The title of the Convention was discussed, in particular whether the adjective "international" should have been replaced by "European" because the Convention would not be applicable to extra-European decisions and the idea of European integration did not admit of emphasis being laid on a distinction between national and international. In order not to repeat the word "European", however, the use of the adjective 11 extra-territorial" was also discussed. It was, however, decided to retain the present title for practical reasons because the term "international validity" was more widely used and better known. Moreover, the term "international" does not imply any world-wide application, but only application between two or more nations.

PART I – DEFINITIONS

Article 1

This article defines for the purposes of the Convention, the terms which recur frequently, and thus simplifies the drafting of all subsequent articles.

Sub-paragraph *(a)* defines "European criminal judgments", making it clear that the Convention attributes international validity only to decisions rendered by a court of another Contracting State. *Ordonnances pénales* (see subparagraph (g)) are not covered by this definition. They are, however, for the purpose of this Convention, assimilated to European criminal judgments in accordance with Article 21. The committee deliberately departed from the system adopted by the European Convention on the Punishment of Road Traffic Offences, which puts judgments and administrative decisions on the same footing (Article 1), because the fields of application of these two Conventions cannot be compared, that on the International Validity of Criminal judgments being almost unlimited in scope. The rules of the European Convention on the Punishment of Road Traffic Offences are not affected by a different regulation in the present Convention.

Article 1 lays down three conditions:

1. It must first of all originate from a criminal court this excludes the decisions of civil courts which are therefore not within the scope of the present Convention.

2. The decision must be rendered as a result of criminal proceedings. This condition excludes any decisions rendered by a criminal court as the result of a civil action for damages.

The Convention deals primarily with what might be called "principal" criminal proceedings liable to result in punishment of the accused or in the imposition of a preventive measure. But the decision need not necessarily be a conviction: a judgment of acquittal may also have international validity under the Convention.

3. The decision must be final. A decision is final if, according to the traditional expression, it has acquired the force of *res judicata*. This is the case when it is irrevocable, that is to say when no further ordinary remedies are available or when the parties have exhausted such remedies or have permitted the time-limit to expire without availing themselves of them. An exception to this rule is provided for in Section 3 of Part II dealing with judgments rendered *in absentia*.

The definition included judgments emanating from courts which in some member States of the Council of Europe have been specially set up to deal with juveniles.

Sub-paragraph *(b)* defines the term "offence". This means, of course, any act which is punishable under criminal law, but the term is extended to cover, for instance, illicit behaviour, known in Germany as an *Ordnungswidrigkeit* (violation of 11 rules of order"), i.e. a behaviour which is dealt with during a simplified procedure by an administrative authority, whose decision is subject to appeal to a judicial authority. Similar systems are known in other member States and the relevant provisions in national law are listed in Appendix II to this Convention.

Article 62 provides for a Contracting State to have further provisions included in Appendix II but it follows from Article 1, sub-paragraph *(b)* as a necessary condition that where the provision gives competence to an administrative authority there must be opportunity for the person concerned to have the case tried by a court. This means the right to a full and ordinary procedure before a court.

It may be useful in this context to explain briefly the notion of violation of "rules of order" and the system employed to deal with them as it has been explained to the committee of experts by the German delegation.

Since 1952, legislation in the Federal Republic of Germany distinguishes between offences *(Straftaten)* and violations of "rules of order", the former being punishable by sanctions (including prison sentences) and the latter attracting only pecuniary sanctions *(Celdbussen)* which put no moral stigma on the person concerned and do not label him as an offender.

However, offences and violations of "rules of order" have in common that a particular kind of unlawful behaviour is punished by the State in the interests of protection of the law.

Both kinds of violation form part of criminal law in the traditional sense: the only acts considered as violations of "rules of order" since 1952 are those that formerly were or would have been punishable as petty or correctional offences.

Offences and violations of "rules of order" are treated as separate categories because it seems unreasonable to make a particular conduct which is not morally reprehensible but must, in the public interest, be combated (e.g. a parking offence) punishable in the same way as an offence, such as murder, theft and false pretences. In distinguishing between offences and violations of "rules of order", offences are applied only to morally blameworthy conduct, thus strengthening the effect of criminal judgments. This distinction also has the advantage that because of the lesser sanctions applicable, violations of 11 rules of order" can be punished by an administrative authority in the course of simplified and accelerated proceedings. The judicial authorities are thereby relieved of a great number of insignificant cases.

The person found guilty of a violation of "rules of order" may not accept the decision given by the administrative authority, and the case may be brought before the judicial authorities (the ordinary courts).

Sub-paragraph (c) stipulates that the term "sentence" shall mean any pronouncement of a sanction. In the light of subparagraph *(d)* it is clear that the usual meaning of the term 10 sentence has been enlarged to comprise not only sentences as such, viz. those imposing the traditional sanctions, but also the judgments providing for the application to a person of preventive measures on account of an offence committed by that person as well as *ordonnances pénales*.

Sub-paragraph *(d)* makes it clear that the term "sanction" comprises punishments as well as measures such as preventive measures, and measures confiscating objects.

The committee was aware that some sanctions which in one country are officially known as "punishments" *(peines)* may in another be called "measures". For this reason it wished to avoid the use of these ambiguous terms.

The sanctions in question must be applied to an individual in respect of an offence. Thus purely precautionary measures sometimes also known as "preventive measures", are excluded.

The sanctions must moreover be expressly ordered in the criminal judgment.

Sub-paragraph *(e)* stipulates that the term "disqualification" shall mean any loss or suspension of a right or any prohibition or any loss of legal capacity, e.g. that of driving a motor vehicle, of exercising a profession, of voting, of administering property, of exercising parental authority. It was felt that these should for the sake of convenience be grouped under a single designation of "disqualification". The provisions relating specifically to enforcement of sanctions involving disqualifications are laid down in Section 5 (d) of Part II.

Sub-paragraph *(f)* which concerns the term "judgment rendered *in absentia"* refers to Article 21 (2) which defines for the purposes of this Convention a judgment *in absentia,* as being any judgment rendered by a court in a Contracting State after criminal proceedings at the hearing of which the sentenced person was not personally present.

The committee of experts considered such a definition to be necessary as judgments rendered *in absentia* were not covered by the definition of "European criminal judgments".

Sub-paragraph (g) defines the term *ordonnance pénale*. According to this sub-paragraph the term *ordonnance pénale* shall mean any of the decisions listed in Appendix III to the Convention. Such a definition was necessary, as in fact, the European Convention on the Punishment of Road Traffic Offences specifies that the term "judgment" refers also to *ordonnances pénales* and *amendes de composition*. The absence of any specific provision in this Convention might be interpreted to mean their being excluded from its field of application.

PART II – ENFORCEMENT OF EUROPEAN CRIMINAL JUDGMENTS

SECTION 1 – General provisions

(a) General conditions of enforcement

Part II of the Convention deals with the enforcement of European criminal judgments. In the main, it lays down rules governing the making of a request, the effects of the request for both States involved (Section 1) the special system applicable to judgments rendered *in absentia* (Section 3), provisional measures of arrest (Section 4) and the enforcement of sanctions (Section 5). It deals exclusively with such judgments as are susceptible of enforcement abroad.

Sub-section *(a) of* Section 1 sets out the general conditions for enforcement. Articles 3 - 5 lay down the conditions under which a State may request another State Party to the Convention to enforce a decision emanating from one of its courts,

Articles 6 and 7 list the grounds on which the requested State may or shall refuse such enforcement.

Article 2

This article sets out the scope of the Convention. the system of enforcement established by the Convention is limited by the nature of the sanction. The system only operates in respect of:

a. sanctions involving deprivation of liberty

b. fines or confiscation

c. disqualification.

It differs therefore from the system adopted in the European Convention on Extradition, the scope of which is limited both by the nature and the duration of the sanction provided for in respect of the act giving rise to extradition (Article 2). The seriousness of the offence is not relevant for the application of the present Convention and it is possible to enforce the judgment in a State other than that in which it was pronounced, even for a minor offence, providing the sanction is one of those laid down in the Convention.

The various categories of sanctions are explicitly stated, and this should rule out any difficulty of interpretation. The enumeration in Article 2 comprises only sanctions laid down in the criminal law of all European member States. It was necessary, in order to avoid difficulties, to include only those aspects which were common to all the legal systems in question.

One effect of distinguishing between the various categories of sanction is to clarify the structure of the Convention for the purposes of Section 5, which contains special clauses on *exequatur* procedure for each category of sanction.

Article 3

This article gives competence to the State of judgment to request the enforcement of a sanction which has been imposed upon an offender. It also gives competence to the requested State to undertake this enforcement.

The word " enforce" is not to be understood in a limited sense. For the purposes of this Convention it must be given a wider meaning so as to comprise the possibilities of adapting the sanction, its duration and nature.

The article contains two basic conditions.

One condition is that the sanction must be enforceable (paragraph 1). According to Article 1, sub-paragraph (a), the judgment must be final. Although in most cases a decision is enforceable if it is final, yet recourse to an extraordinary remedy may preclude enforcement. On the other hand, an enforceable decision is not necessarily final since appeal may not always result in a stay of execution. Thus enforceability cannot be completely identified with finality and for this reason it was held essential to stipulate the enforceable character of the criminal judgment as a separate condition. This condition cannot present any problem in practice for there is express provision in Article 16 for the competent authority of the requesting State to certify that the sanction is enforceable. Such an attestation means that the sanction has been found to be enforceable according to the rules laid down in the legislation of the requesting State, and also that the court in the requested State need not make any enquiry into this question.

The requirement that the sanction shall be enforceable applies only to Part 11. For the purpose of Part III *(ne bis in idem* and " taking into consideration) this condition is not relevant.

Another basic condition implied is that the request for enforcement must be made by the competent authorities of the sentencing State. It follows from the provision that the competence of the requested State may be exercised only if it is seized by a request under the Convention from the State which imposed the sanction (paragraph 2).

It is indeed the request and its acceptance which create the special legal relation between the requesting and the requested States on which the Convention relies for its system for enforcement. This relation deliberately departs from the traditional notion that criminal judgments are not, and cannot

become enforceable outside the State in which they are pronounced. In the absence of a request this special relation does not come into existence, for enforcement of any sanction imposed is transferred from one State to another only if the State on whose territory the judgment was pronounced waives enforcement.

Article 4

▸ Paragraph 1

Article 4 specifies another condition for the enforcement of a foreign criminal judgment, namely compliance with the principle of dual criminal liability.

The present article deals only with one aspect of dual liability. The punishability of the act in question in the requesting State is not to be examined, for the existence of a valid criminal judgment confirms liability in that State. Only punishability in the requested State is open to examination. In accordance with Article 10 (2) it is the requesting State alone which has the right to decide on any review of the sentence.

Dual liability may be defined either *in abstracto* or *in concreto.* For the present Convention, after careful deliberation, the principle of dual liability *in concreto* was adopted.

The condition is fulfilled if the act which gave rise to the judgment in a particular State would have been punishable if committed in the State requested to enforce the judgment and if the person who performed the act could have had a sanction imposed on him under the law of the requested State. Paragraph 1 covers this notion, since it refers expressly to the punishability of the particular act, viewed as a complex of objective and subjective elements, as well as to the punishability of the perpetrator.

The rule does not imply that the *nomen juris* must necessarily be the same, for one cannot expect the legal systems of two or more States to agree to such an extent that they invariably consider a particular factual situation to constitute the same offence.

Moreover, the general nature of the wording of the clause on the punishability of acts shows clearly that identical categorisation is not in fact required and that differences in the legal classification of an act are therefore of no importance.

In order to clarify the notion of dual liability *in concreto,* account must be taken of relations between the offender and

the injured party (when such relations make an act unpunishable), grounds justifying an act or serving as an excuse for it (self-defence, *force majeure* etc.) and objective considerations making an act punishable. Such circumstances are in fact among the factors which constitute an offence; relations between the offender and the injured party and grounds justifying an act or serving as an excuse for it, may take away from the act its criminal character and may exempt the perpetrator from his liability to punishment. Thus, if the justification and extenuating circumstances mentioned above are recognised by the law of the requested State, but not by the law of the requesting State, there is no dual liability *in concreto,* since in the requested State the offender would not have been punishable for the same act.

The conditions for instituting criminal proceedings are not to be considered for these purposes, for they are in no way concerned with liability for the act or with the punishability of the offender. At the time of the request for enforcement, institution of criminal proceedings has already taken place within the jurisdiction of the requesting State and in accordance with its law. The conditions for criminal action play therefore no part in determining dual liability *in concreto*.

When the draft text was in preparation, inclusion was urged of a clause providing expressly for rejection of a request for enforcement in the absence of a complaint in those cases where the law of the requested State required a complaint to have been made.

It was decided that such a clause would be superfluous, the requirement of dual liability being sufficient. Indeed, where the legislation of the requested State provides that an act shall only be punishable if a complaint has been lodged, there can be no dual liability *in concreto* if there is no complaint. However, this is not so when the law makes the instituting of a criminal action dependent on a complaint. The act is already punishable as such but actual punishment depends on a complaint launching the proceedings.

Another question arising in connection with dual liability is the possible effect of grounds for extinction of the criminal proceedings and the sanction. But the Convention contains explicit clauses on such grounds (time-limitation, pardon, age etc.) since it was thought desirable to distinguish them, for the purposes of dual liability, from the other factors which have to be considered.

It is for the authorities of the requested State to establish whether there is dual liability *in concreto*. Where there is doubt, about the facts stated in the judgment, those authorities may ask the authorities of the requesting State for clarification and information (Article 17).

▶ **Paragraph 2**

The request for enforcement and the rejection of a request, may be total or partial if the conviction covers several offences at once, or if it imposes several sanctions.

It may in fact happen that some of the offences do not meet the requirement of dual liability, that the various sanctions imposed are not all listed in Article 2 or that the judgment complies only in part with the conditions laid down in Article 6.

A partial request for enforcement presents no difficulty since it is the requesting State which has to specify the sanction to be enforced and thus the offences for which it was imposed; on the other hand, partial rejection which restores to the requesting State the power to enforce the rejected part of the judgment, presupposes that the authorities of the requested State are in possession of all the information necessary to avoid the danger of either double enforcement or aggravation of the penalty.

The information required is clearly apparent where the court in the requesting State has imposed a separate sanction for each offence, but this is not so where several offences have been considered together and have given rise to a single sanction. It has not been possible to make a rule to govern each case and, since partial refusal has been accepted in order not to restrict the scope of enforcement of judgments given abroad, particular solutions will have to be found for each case as it arises, within the context of, and in conformity with, the principles underlying the Convention.

If the sanction cannot be divided, the requested State is entitled entirely to refuse the request for enforcement. This follows from the words of Article 6 which require that the enforcement is "requested in accordance with the foregoing provisions".

The term "sanction" comprises also a plurality of sanctions.

Article 5

This article lists five further conditions for the making of a request for enforcement which have been regarded as essential. They preclude, for instance, a request for enforcement founded solely on a requesting State's desire to avoid enforcing a judgment passed by its own authorities.

The limitations on the right to make a request are counterpart to the limitations on the right of the requested State to reject the request.

The rules adopted are not intended to delimit jurisdiction between the authorities of the States in question; their sole purpose is to ensure a preliminary examination which, in the case of the requesting State, is concerned only with the conditions which have been judged essential to presentation of a request.

That the presentation of a request is subject to a number of conditions does not in itself confer any fight on the convicted person. Nor is he thereby deprived of protection, as any objection which he may have may be made during the *exequatur* procedure. In addition, laws and regulations in the requesting State may require that the convicted person is heard before the request for enforcement is made. The first examination of the request which is preliminary to that procedure is only concerned with establishing the special enforcement relations between States.

The limits laid down for presentation of a request for enforcement, however varied they may be, have a common denominator in the inability of the State in which conviction took place itself to enforce the judgment; such inability is not to be understood in a purely objective sense, for it also implies an assessment of what is desirable.

The nationality of the convicted person has not the same paramount importance as in extradition matters, as, for the purposes of the present Convention, the basic consideration is that, whatever his nationality, the judgment shall not only be enforced in that State in which this can in fact be done, but also where it can most advantageously be done.

Indirectly, nationality may, however, decide in practice the question of the place of the enforcement. If, for example, the convicted person cannot be extradited because he is a national of the requested State, enforcement in that State of the judgment passed abroad is at times the only way by which justice can be done.

If a judgment given in the requesting State imposes two or more different sanctions for the same offence, or several offences, that State is entitled to request enforcement of only one of these sanctions. The right to enforce the remaining sanction or sanctions rests with the requesting State (see also the commentary of Article 11).

The conditions mentioned in sub-paragraphs (a) – (e) are not cumulative.

Article 5 acknowledges that the State in which judgment has been pronounced may decide after appraisal that the judgment is more usefully enforceable in another State for various reasons. Thus, this State may be the State of the Ordinary residence of the person sentenced (sub-paragraph (a)), the State in which enforcement will make his social rehabilitation easier (sub-paragraph (b)), the State in which he is already serving, or is due to serve, another sanction involving deprivation of liberty (sub-paragraph (e)) and his State of origin, provided that State is prepared to accept responsibility for enforcement (sub-paragraph (d)). Finally, as a general clause, the State of judgment, unable itself to ensure enforcement even by recourse to extradition, may ask the State which is able to do so, to undertake enforcement (sub-paragraph (e)).

The order in which the cases mentioned in sub-paragraph (a) and the succeeding three sub-paragraphs are listed does not indicate any gradation: all the cases are of the same importance in relation to the objectives, i.e. to prevent the convicted person from evading enforcement of the judgment and to facilitate his rehabilitation. It would seem that, on the whole, enforcement of a judgment in a milieu and in surroundings which are familiar to the offender is more likely to facilitate his social rehabilitation. All contemporary European systems of law stress the re-integration into society as an important aim of corrections, and a Council of Europe Convention naturally seeks to give expression to modern thinking in this matter.

The various conditions have been considered in relation to the rehabilitative aim. For instance, that aim may well be more successful where the convicted person is resident since this enables him to live in his own environment and maintain his necessary social contacts more easily (sub-paragraphs (a) and (b)).

The other conditions also, to some extent, relate to this point. If the convicted person is already serving a sentence in one State, his transfer to another State for another enforcement may be harmful to the continuity of the treatment given him with a view to rehabilitation (sub-paragraph (c)); similarly, enforcement in his State of origin may accord better with his needs and produce better results (sub-paragraph (d)).

In this context "State of origin" does not necessarily mean the State of which the convicted person is a national; it can denote, for example, that State in which the convicted person has passed the greater part of his life and in consequence with whose way of life and general conditions he is most familiar.

No request for enforcement can be made to the State of origin unless it has declared its readiness to accept responsibility for enforcement, except where such request is made in pursuance of another sub-paragraph of this article. This provision has two objectives: firstly it reflects the secondary position of the State of origin in the system of the Convention, secondly it makes it clear that other States, unlike the State of origin, must proceed to enforcement once the conditions laid down are fulfilled.

The rule in sub-paragraph *(e)* gives the State in which judgment was passed full discretion to declare whether or not it is able to enforce the sanction. The reason for this is that at the time of the request for enforcement normally only the State which passed judgment has all the information necessary to take this decision. It must be noted that, in accordance with Article 6 (i) the requested State is entitled to refuse the request.

Article 6

Articles 6 and 7 lay down when the requested State may or must, wholly or in part, reject a request for enforcement. Article 6 deals with optional refusal, Article 7 with obligatory refusal. The grounds for optional refusal are several and varied, for it has to be borne in mind that the requested State has to solve all the problems raised by the enforcement of the foreign judgment, having regard to its own constitutional and penal system.

It is, of course, essential in matters of international cooperation to allow for the protection of the fundamental principles of the domestic legal systems of States; it is impossible to conceive of an obligation to enforce a foreign judgment which in one way or another contravenes the constitutional and other fundamental laws of the State which has to proceed to enforcement (sub-paragraph (a)).

Application and observance of the underlying principles of national legislation are, for every State, absolute requirements which it cannot avoid. It is for the authorities of the State in question to assess for themselves whether this condition is fulfilled in practice. The general expression "the fundamental principles of the legal system" was carefully chosen to make it possible to establish this broad ground of incompatibility and still respect the particular distinctive characteristics of each system of law.

In any case the legal principles enunciated in Article 6, which lists conditions of refusal, have to be interpreted in the light of the law of the State to which the request for enforcement is made.

However, there is provision for the rejection of a request for enforcement for the following reasons: the protection of the State's domestic legal system, the character of the offences, the nature of the sanction, the safeguard of the State's prerogatives in the matter of criminal proceedings, the observance of international undertakings, ascertainment of a defect in the evaluation of the grounds and conditions underlying the request for enforcement and application of the provisions of national law with regard to lapse of time and the convicted person's age. This list does not exclude a refusal based on a failure to observe the conditions laid down elsewhere in the Convention, notably in Articles 3 - 5.

The nature of the offence (see sub-paragraph (b)) only comes into play in the case of political and military offences. As there is a clear trend against giving international effect to the punishment of these offences the requested State has the right to refuse enforcement. Such offences are often committed under the influence of strong emotion and in circumstances difficult for other States to judge; their objective existence as offences may depend on situations and aims which may even be in opposition to the policies of other States. This is the reason for the systematic refusal of extradition for such offences, and the same considerations are valid in respect of enforcement under the present Convention.

This article does not exclude offences of a fiscal or religious nature; it was thought preferable, in view of the different aims and values which apply in this sphere, to allow each State to make reservations (Appendix I).

Sub-paragraph (c) corresponds to Article 3, paragraph (2) of the European Convention on Extradition. It arises from the general human rights philosophy that considerations of race, religion, nationality or political opinion should not be the sole or major factor influencing the treatment of private persons by the State. If suspicion arises that such influence brought about or aggravated the judgment to be enforced, the requested State shall be under no obligation to participate in conduct which might contravene the European Convention on Human Rights or any other international or national legal instrument safeguarding human rights and fundamental freedoms.

Observance of international undertakings is an absolute requirement in relations between States, and the purpose of the explicit reference to such observance in the Convention is to underline its conformity with these general principles of international co-operation (sub-paragraph (d)).

No State may be coerced or limited in the exercise of its jurisdiction, which is one of the attributes of its sovereignty, except by its own express decision. For this reason the Convention provides that enforcement may be refused in cases in which the requested State itself has already opened proceedings in respect of the act which is the subject of the foreign judgment or where it proposes to take such proceedings after it has received the request for enforcement (sub-paragraph (e)).

Sub-paragraph (f) extends this principle to the requested State's decision not to take proceedings or to discontinue proceedings. It corresponds to Article 9 of the European Convention on Extradition and to Article 9 (2) (a) of the European Convention on the Punishment of Road Traffic Offences.

The authorities which are competent to institute proceedings against a perpetrator of the offence in question are competent for the purposes of this provision.

Sub-paragraph (g) states that if the judgment, enforcement of which has been requested, is based on a jurisdictional principle other than that of territoriality, the requested State has the right to refuse enforcement. This means that it is not obliged to enforce decisions based on the active or the passive personality principle or on the universality principle.

Sub-paragraphs (h) and (i) supplement each other in the following way:

The requested State can decline to accept the assessment of the requesting State as to its inability to enforce the sanction. A clause of this kind is necessary in order to place the two States on an equal footing and encourage them to co-operate effectively in ascertaining directly where it would be easier to enforce the sanction (sub-paragraph (j)).

This clause, which confirms that the requested State may judge for itself what action to take on the request, avoids resort to explicit rules which would necessarily have been too restrictive. It seeks to ensure that solutions appropriate to each individual case are found and applied.

The requested State is indeed entitled to review on its own behalf the original assessment of the situation made by the requesting State. The situation leading originally to the request may prove to have changed or the circumstances may appear in a different light due to the information obtained subsequently. This is particularly important when it affects the prospects of rehabilitation. The requested State may therefore re-examine all relevant aspects of the case and relate its own judgment to that of the requesting State.

In addition to sub-paragraph (i) which presupposes a subjective assessment by the requested State, there is the objective rule with regard to that State's inability to enforce the sanction, which arises principally when the convicted person is not on its territory (sub-paragraph (h)).

Sub-paragraph (i) also deals with inability to enforce the sanction. It gives the requested State the right to refuse enforcement if the request is based solely on the appreciation of the requesting State that it is not able to enforce the sanction. Obviously, this right lapses, however, if the request also invokes one of the grounds laid down in sub-paragraphs (a) (d) of Article 5.

The convicted person's age may be a ground for refusal if, because of his age at the time of the offence, he cannot be prosecuted in the requested State (sub-paragraph (k)). The age at which a sanction can be imposed on a minor varies greatly from State to State. In certain member States of the Council of Europe minors can be brought to trial if charged with the commission of a criminal offence. In other States the same minor would be considered too young to have incurred responsibility under criminal law. The latter States will in certain cases consider the imposition of a sanction on such a minor to he against the fundamental principles of their legal systems. To avoid any ambiguity, it seems preferable to provide a specific and explicit ground for refusal when the person convicted would be considered a minor under the criminal law of the requested State.

The clause on lapse of time (sub-paragraph (1)) as ground for rejecting a request for enforcement relates to a complex matter: it is therefore explained in detail.

Lapse of time may affect either the prosecution or the sanction.

Time limitation for prosecution implies that no definitive judgment has been rendered within the period laid down to this effect by law, but the operation of time limitation on sanction only begins to run after final judgment has been pronounced. This distinction occurs in the legal systems of the various States, but the periods of limitation, as well as their causes of interruption or suspension of its operation, differ widely. In view, therefore, of the effect of time limitation on the enforcement of sanctions imposed abroad, it was necessary to find a solution that would overcome the difficulties inherent in the differences without unduly restricting the scope of the Convention.

For the case of time limitation for sanction only, the formula which appeared best to achieve this was to render applicable the law of the State to which the request for enforcement is made. This solution differs from that adopted in the European Convention on Extradition, Article 10 of which provides that extradition shall not be granted when the person claimed has, according to the law of either of the States in question, become immune by reason of lapse of time for prosecution or sanction.

This difference is justified especially by the different position of a State which is asked to enforce a sanction from that of a State which is asked to extradite.

It is because of this that the European Convention on the Punishment of Road Traffic Offences provided, in connection with the enforcement of foreign judgments in the State where the convicted person is resident, that the law of that State only should apply in respect of time limitation for sanction.

This provision is clearly parallel with that referred to in the present Convention, for both relate to the enforcement phase, with necessary assumption that criminal proceedings have already been validly undertaken.

A request for enforcement implies that the procedural stage, consisting of pronouncement of judgment, has been completed. Since prosecution is not precluded as long as that stage has not been arrived at, the question of time limitation for prosecution concerns only the jurisdiction of the State which has to pass the judgment. This is also in line with the principle that procedural acts are governed by the law of the State in which they are performed.

At the time of the request the only stage of procedure to be considered is that of enforcement. Moreover, the requested State is a party to the enforcement stage only and therefore

its law can only apply to that stage. If it were accepted that that State could, notwithstanding the fact that the stage of cognisance had been closed in the requesting State, invoke lapse of time for prosecution as a ground for extinguishing the offence under its own law, this would be equivalent to saying that the request for enforcement re-opened that stage. The entire system of the Convention is based on the opposite concept.

However, as the solution adopted may conflict with other considerations in the legal systems of certain States, for example, time limitation for prosecution may be considered as a ground for exempting the perpetrator from his liability to punishment, therefore as a ground to be considered when the dual liability *in concreto* is being examined. It is why it was agreed that reservations might be made in respect of this clause (see Appendix 1, sub-paragraph (c)).

When a Contracting State avails itself of the reservation provided on the subject of lapse of time, it is obliged, when considering whether action may have become precluded under its own law, to take account of acts with interruptive or suspensive effect validly performed by the authorities of the State in which the foreign judgment was given (see Article 8).

In consequence of the forgoing, only time limitation for sanction is relevant from the point of view of enforcement of a judgment rendered abroad. It is clear that the requested State will not take action on a request for enforcement if under its own law the sanction is already precluded.

The period of limitation begins to run from the day on which the judgment became final; a request for enforcement and the *exequatur* procedure will be considered as grounds for suspension or interruption, according to the rules in force in the requested State.

No mention is made of the law of the requesting State on time limitation for sanction. This is because presentation of the request for enforcement presupposes that under that State's law the sanction was not precluded at the time the request was made, for otherwise it could not have made the request according to its own law.

It therefore was unnecessary to provide for the requested State to make any subsequent inquiry into the question.

The sanctions mentioned in Article 2 include disqualifications (sub-paragraph (c)); thus in principle these may be the subject of a request for enforcement. However, it was accepted that their enforcement could be refused since, in most cases, such sanctions are restrictions on activities within the territory of the State where judgment was passed. Moreover, they differ from one country to another either in their conception, or on the conditions (compulsory or otherwise) of their application as corollaries to other sentences passed, or as to the authority competent to apply them. It must be noted that it is only to the extent that the sentence imposes a disqualification that the request can be refused in accordance with this provision. If the sentence also contains Other sanctions, refusal of their enforcement cannot be grounded on sub-paragraph *(m)*.

Article 7

This article stipulates another condition for admissibility of the request for enforcement, one which is a general condition of a binding nature. It concerns observance of the principles laid down in Section 1 of Part III which is devoted specifically to the effect *ne bis in idem* (see Articles 53-55).

The word "principle" should be understood in the widest sense. Although Article 53 does not expressly state that enforcement shall not be accepted when a sanction has been imposed in the requesting State but its enforcement not yet begun, it is clear that the provisions of that article shall be applicable.

(b) Effects of the transfer of enforcement

Sub-section *(b)* of Section 1 deals with the effects of the transfer of enforcement of the sanction in both States concerned. It gives, *inter alia*, rules on speciality, on pardon and amnesty and on the right to enforcement, its lapse and restoration.

Article 8

This article provides that any act which interrupts or suspends time limitation for sanction which is validly performed by the authorities in the requesting State must be given the same effect in the requested State.

This clause refers to time limitation of both the criminal proceedings and the sanction, for this article refers not only to Article 6 (1) on time limitation of the sanction, but also to the reserve mentioned in sub-paragraph (c) of Appendix I regarding time limitation of the criminal proceedings.

The Convention is based on the principle of the equivalence of the acts of procedure validly carried out in the States concerned. It adopts at the same time the equivalence of the effects of those acts, since an interrupting or suspending act in one State shall be considered to have the same effect in another State, even if the latter's legislation does not attribute that effect to the act. Paragraph *(e)* of Appendix 1 provides a reservation for those States preferring to adopt only the equivalence of acts and, consequently, to apply only its own provisions as regards the suspending or interrupting effect of the time limitation when such States have an original competence.

Article 9

The Convention is based on the principle that enforcement in the requested State does not presuppose the offender's prior consent. It is therefore necessary to give a rule of speciality. Such a rule is laid down in Article 9, which draws on Article 17 of the European Convention on Extradition.

Paragraph 1 of this article establishes the principle that a person surrendered with a view to enforcement of a sanction may not be proceeded against or sentenced or detained for an offence other than that relating to the requested enforcement. Nor shall he for any other reason be restricted in his personal freedom. Sub-paragraphs (a) and (b) of this paragraph set out the following exceptions to this principle:

Sub-paragraph (a): if the sentencing State consents, enforcement may be allowed for other sanctions. To obtain such consent, the enforcing State must submit a request accompanied by the relevant documents and by an official record of the statements of the convicted person, drawn up by a judicial authority.

In some countries statements concerning a new offence are part of legal proceedings and might as such be considered to violate the principle of speciality. It is essential, however, that the convicted person should be

given the opportunity of making a statement concerning a new charge before any decision is taken on the extension of the enforcement of the sanction imposed upon him to cover proceedings taken in respect of any new offence. Since sub-paragraph (a) expressly requires that an official record should be made of the statements of the convicted person, there can be no objection to such statements being taken.

The third sentence of this sub-paragraph lays down that the sentencing State is obliged to agree to the extension if it follows from the request made and documents produced by the enforcing State that the offence, for which extension is requested, would allow for extradition. The same applies in cases where extradition is not possible on the sole ground that it is too insignificant under Article 2 of the European Convention on Extradition to warrant such action.

Sub-paragraph (b) lays down that the rule of speciality shall not apply if the convicted person has not left, having had the opportunity to do so, the territory of the Party to which he was delivered, within 45 days after his final discharge or if he has returned to that territory after leaving it.

The provision contains two conditions: that the person has been finally discharged and that he has had the opportunity to leave the territory.

The words "had the opportunity" make it clear that the person must not only have been free to leave the territory, but must also have had the opportunity to do so. He must not have been impeded from availing himself of that liberty by causes beyond his control (e.g. illness). Nor could it be said that he had had an opportunity to leave if he lacked means or money to do so.

Paragraph 2 authorises the enforcing State to take the measures necessary, in particular, to interrupt any legal effects of the lapse of time.

Article 10

Once the authorities of a State have accepted a request for enforcement, everything relating to the enforcement must be done in accordance with that State's law and through its authorities.

This fundamental rule is stated in paragraph 1 of Article 10.

It follows that by its acceptance the requested State deprives the requesting State of its competence to take the various decisions normally connected with enforcement. The Convention explicitly mentions conditional release as one example of this rule which is extended also to other decisions relevant to enforcement.

Paragraph 2 provides that the requesting State alone has the right to take decisions on applications for review of a final sentence. The acknowledgement of this right should not in fact be considered as an exception to paragraph 1 since review proceedings are not logically speaking part of enforcement. The object of such application is to obtain the re-examination of the final sentence in the light of new elements of fact. As the requesting State alone is competent to re-examine the materiality of facts, it follows necessarily that only that State has jurisdiction to examine such an application, especially since it is better placed to obtain new evidence on the point at issue. It should be noted that the term "review" used in Article 10 also covers the extraordinary proceedings which in some States may result in a new examination of the legal aspects of the case.

Paragraph 3 of the article lays down two exceptions to the rule stated in paragraph 1 in that it recognises the legal validity of a pardon or amnesty granted by the requesting State. The justification for these exceptions is that enforcement is of primary concern to the State which imposed the sanction. Thus, if that State thinks a pardon or amnesty may be granted in respect of the sanction, the enforcing State has no reason to reject this assessment of the situation, especially since enforcement does not preclude the requested State's power itself to grant a pardon. The paragraph does indeed safeguard the rights of *both* States concerned in the matter.

By using the words "may exercise" the Convention has implied the recognition of a competence.

Article 11

This article further limits the competence of the requesting State. From the moment it has made the decision to request enforcement in another State and given effect to this decision, as a general rule it forfeits its right to begin enforcement of the sanction. The rule is made in application of the general principle that a sanction can be enforced only once; it corresponds to the rule laid down in Article 5 of the European Convention on the Punishment of Road Traffic Offences.

As mentioned in the observations on Article 5, the requesting State is entitled, where a sentence imposes two or more different sanctions, to request enforcement of only one of them. In accordance with Article 11

(1) the requesting State may no longer begin the enforcement of a sanction which is the subject of a request but it is still entitled to enforce the remaining sanctions.

The second sentence of the paragraph provides an exception to the rule mentioned in the first sentence. The requesting State is authorised to begin the enforcement if the sentenced person is already detained in the territory of that State at the moment of the presentation of the request. It would indeed not be reasonable to require the release of a person who -irrespective of the decision of the requested State on the request for enforcement - would have to be incarcerated again in either of the two States concerned and who might therefore attempt to escape while at liberty.

Another exception is contained in Article 31 which permits arrest of the sentenced person by the requesting State if such action is necessary for the purpose of ensuring enforcement.

Paragraph 2 specifies the situations in which the requesting State regains its right to enforce the sanction. It might be due either to that State's early reconsideration of its decision by a withdrawal of the request made (sub-paragraph (a)), or to a deliberate decision on the part of the requested State not to pursue the matter (sub-paragraphs (b) and (c)).

The requesting State has the right to withdraw its request until the requested State has informed it of its intention to take positive action on the request. The consent of the requested State to such a withdrawal is not required. The notification of the withdrawal annuls the request and the special legal relation between the two States concerned becomes non-existent.

Having received the request for enforcement the requested State submits it to an examination under Articles 6 and 7 with a view to deciding whether the request shall be referred to a court, or an administrative authority as the case may be, for the purpose of *exequatur* proceedings. This may be decided negatively or positively. If it decides to take no action on the request it shall so inform the requesting State, which then regains the right it lost in accordance with paragraph 1.

Although the requested State has provisionally accepted in principle the request for enforcement, it is not obliged to carry out such enforcement in practice. It is free at any stage of the *exequatur* proceedings to decide not to enforce by invoking one or more of the grounds laid down in Articles 6 and 7 if the existence of these grounds is ascertained or confirmed during the course of proceedings in the requested State. In these circumstances, it shall also notify the requesting State of its decision and the requesting State again becomes entitled to enforce the sanction.

This right shall likewise be restored to the requesting State if the requested State expressly relinquishes its right of enforcement. Relinquishment is not completely discretionary; it is possible only:

1. if both the requesting and the requested State agree; or
2. 2. if the requested State can no longer enforce the sanction.

It becomes compulsory if in the second case the requesting State demands the restoration of its right to enforce. These rules have been adopted with a view to ensuring enforcement; a refusal to relinquish on the part of the requested State incapable itself of enforcing the sanction would result in impunity for the offender even if he re appeared in the sentencing State.

A temporary suspension of the possibility to enforce the sanction should not be construed as being an impossibility to do so.

Article 12

This article restricts the competence of the requested State to enforce a foreign sanction. It is based on the idea that that State acts as a representative of the State which imposed the sanction. It follows that if, for one of the reasons indicated in paragraph 1, the sanction ceases to be enforceable in the requesting State, the requested State shall discontinue enforcement. A continuation could indeed result in an aggravation of the penal situation of the convicted person who, had the sanction been enforced in the State of judgment, would have benefited from measures of pardon, amnesty etc. The basic principle is that any development in the requesting State favourable to the convicted person should have effect also in the requested State. However, it will be noted that the time limitation for sanction in accordance with the law of the requesting State is not mentioned in Article 12; references to this question are made in the observations on Article 6, subparagraph (1).

Paragraph 2 lays down an obligation for the requesting State to inform the requested State of any decision or measure taken which affects the enforceability of the sanction. Even if such information has not - or not yet - 'been given, the requested State is obliged to make enquiries into the possible cessation of enforcement when it obtains knowledge of such decision or measure by other means, for instance, by information received directly from the person concerned.

The information under paragraph 2 must be addressed to the authorities of the requested State and not only to the individual concerned. This does not exclude informing both the authorities of the requested State and the individual concerned.

The requested State is not obliged to keep itself informed of any development. Ignorance cannot in any way be construed as a neglect of duties on the part of its authorities.

The word "decision" in paragraph 2 refers to acts of pardon and amnesty, the words "procedural measures" to any step taken with a view to, or during, retrial proceedings and having a suspensive effect on enforcement.

(c) Miscellaneous provisions

Article 13

This article lays down the rules governing the transit of persons passing from the requesting State to the requested State through the territory of another Contracting State.

Article 13 corresponds to Article 21 of the European Convention on Extradition.

Under the terms of paragraph 1 the Contracting State which has been asked to grant transit must do so. If this were not so, that State could render the application of the Convention, if not impossible, at least considerably more difficult by withholding its consent.

The State of transit is entitled to have its own authorities examine whether the conditions provided for under this Convention are fulfilled. It is thus not obliged to consent without question to a request for transit. This results from the right of that State to be supplied on its request with any document throwing light on the facts and the legal basis of the case. Such documents may, for instance, be a copy of the judgment and the written consent to enforcement by the requested State.

On granting transit, the authorities are under obligation to maintain the person under transfer in custody, the purpose, of course, of the transit being to facilitate enforcement; this presupposes control of his whereabouts on his passage from the authorities of the State imposing the sanction to the authorities of the State called upon to enforce that sanction.

Article 13 applies only to Contracting States. Transit through a State which has not become a party to the Convention, though a Member of the Council of Europe, cannot be claimed as a right by the States concerned by the enforcement procedure. It is, however, hoped that those member States of the Council of Europe which are unable to accept the Convention, will nevertheless give all possible assistance to the States which are able to do so. It is indeed in the interest of the European community as a whole that crime be counteracted as efficiently as possible by the unimpeded function, *inter alia*, of the several European Conventions to that effect.

Paragraph 1 does not exclude the transit of a national of the State of transit. Paragraph 2, however, entitles a State to refuse the transit of its nationals. It may also refuse if the offence for which the sanction was imposed was of a political or purely military character or if it was brought about by considerations, alien to a proper respect for human rights. An exception to this rule is provided for under Article 34 where the convicted person has himself taken the initiative to have his opposition against a judgment rendered *in absentia* heard in the State in which he is not present. His presence at the hearing of the opposition is vital to the functioning of the special system established in respect of such judgments and if the State of transit had the right to oppose transit it could render this system inoperative to the detriment of the convicted person in particular and to the administration of justice in general.

Paragraph 3 deals with transit by air. A prior request for transit is required only if the aircraft intends to land in the State of transit. Otherwise a simple notification suffices. If for some unexpected reason the aircraft lands in the State of transit, a formal request for transit shall immediately be made; meanwhile that State may proceed to the arrest Of the person transferred, the notification already received being considered to imply a request for such arrest. In such cases the State of transit is also entitled to refuse transit on the grounds laid down in paragraph 2.

When a similar text was examined in the committee of experts drafting the Convention on Extradition, a full discussion took place on whether the transport of a person on board a ship or aircraft of the nationality of a State other than the requesting or requested State was to be considered as transit through the territory of that State. Several experts thought that it should be so considered. Others observed that the strict application of such a rule would raise difficulties, in particular when the ship called in at the ports of third States or merely went through their territorial waters. Would it in such cases be necessary to request such third States to allow transit? The reply to this question would vary according to whether the ship in question belonged to a private person, a private company or a State. In view of these difficulties, the committee decided not to deal with this question in the Convention on Extradition, but to leave it to be settled in practice. The question was not further elucidated in the committee drafting the present Convention which decided to limit itself to a reference to the European Convention on Extradition.

In this Convention, unlike the European Convention on Extradition, the requesting State will often be the State in which the person concerned is present. It is for that State alone to make the necessary arrangements for transit and to settle all questions connected with it in agreement with the authorities of the State of transit. It shall inform the requested State as soon as the transit can be effected. It has fulfilled its obligations by the delivery of the person transferred either at the frontier or at the port of disembarkation of the ship or at the place of landing or the aircraft used to transport the person if, however, charge of the person is taken over by one requested State on the territory of the requesting State, with the intention of transporting him by air through a third country, the requested State alone is responsible for securing transit. The requesting State cannot therefore demand guarantees concerning the arrangements for the transit even if an aircraft of the requesting State is used.

The rule of speciality laid down in Article 9 applies to persons in transit, whether this transit takes place with their consent or not.

Article 14

This article, which governs the question of costs, provides that States shall not claim the refund of any expenses which may result from application of the Convention. The purpose is to eliminate a possible obstacle to the smooth functioning of the Convention by avoiding the procedural difficulties involved.

SECTION 2 – Requests for enforcement

Section 2 lays down the formal rules applicable to the proceedings at inter-State level. Most of these rules are common to all the Conventions drawn up by the Council of Europe in the field of crime problems.

Article 15

The requirement that requests shall be made in writing is generally recognised in other Conventions[4].

Article 15 lays down that communications shall be exchanged as a general rule between the Ministries of Justice of the States concerned, but allows for communications to be exchanged, by agreement, direct between the competent authorities.

" Communications" means both the decisions to take further action on the request and the decisions to enforce the judgment.

Article 16

This article lays down what documents shall accompany the request[5].

Whereas other Conventions contain a detailed enumeration of the documents required, it has been preferred to draft the present article in wider terms by using the words "all other necessary documents". Indeed, it was not considered possible to state in precise terms what documents might be needed for the determination of

4. See Article 14 (1) of the European Convention on the Punishment of Road Traffic Offences and Article 1 (1) of the European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders; in respect of paragraph 2 see Article 15 (3) of the European Convention on the Punishment of Road Traffic Offences and to Article 27 (3) of the European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders.
5. See Article 14 (2) and (3) of the European Convention on the Punishment of Road Traffic Offences and Article 26 (2) and (3) of the European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders.

the sanction to he imposed by the requested State. On the other hand, it will normally not be difficult for the requesting State to foresee what documents should be sent in each particular case.

If the requested State wishes further information in the form of the whole or part of the criminal file, such a request shall be complied with. Article 16 must be read in connection with Article 17, according to which a request may be made for such additional information as is considered necessary. In the last resort it is for the requested State to judge what information must be considered necessary in each particular case.

It may be taken for granted that a judgment will always contain a description of the fact which is regarded as established. It should be recognised, however, that such description of fact is made on the basis of the legal criteria decisive in the sentencing State, and that it is quite possible that the requested State may apply other legal criteria. It may therefore be of decisive importance to the requested State, partly for the decision as to whether the offence is punishable at all under the law of that State (see Article 4), partly for the determination of the sanction (see Article 42), that in addition to those facts appearing from the description in the judgment, other elements of facts be brought to its attention.

The competent authority of the requesting State shall certify the sanction enforceable so as to ensure that this condition laid down in Article 3 (1) is fulfilled. No special form is necessary for this purpose.

Article 17

Some comments on this article[6] have been included under those for the preceding article.

Reference should also be made to the observations on Article 42.

Article 18

This article[7] requires the authorities of the requested State to keep the requesting State informed of the action it takes on the request for enforcement and of the termination of the enforcement.

No particular form has been prescribed for the notification to be made under this article.

Article 19

This article[8] contains the rules concerning the use of languages for the purposes of applying this Convention.

It should be stressed that the choice of one of the official languages of the Council of Europe under paragraph 2 will rest with the requested State.

Article 20

This article[9] lays down that documents require no formal legalisation (authentication); it is sufficient for the competent authority of the sending State to ensure that the document has been certified in accordance with the general rules in force in that State.

SECTION 3 –Judgments rendered *in absentia* and "*ordonnances pénales*"

The term "judgments rendered *in absentia" is* used in the Convention, in a non-technical sense, covering all judgments passed in the absence of the accused, that is to say without his having been heard. Such judgments form a special category of criminal judgments. There is no doubt that they do not afford the same safeguards as judgments pronounced after hearing the accused.

For this reason national systems of law have certain procedures designed to avoid the rendering of judgments *in absentia,* or at least to limit as far as possible the hardships they cause.

In examining the possibility of including judgments rendered *in absentia* in the general rules on the enforcement of foreign judgments, it must be borne in mind that it must be a general condition of any system for the

6. See Article 16 of the European Convention on the Punishment of Road Traffic Offences and of Article 28 of the European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders.
7. See Article 18 of the European Convention on the Punishment of Road Traffic Offences.
8. See Article 19 of the European Convention on the Punishment of Road Traffic Offences and Article 29 of the European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders.
9. See Article 20 of the European Convention on the Punishment of Road Traffic Offences, Article 30 of the European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders and Article 17 of the European Convention on Mutual Assistance in Criminal Matters.

enforcement of such judgments that enforcement brings about neither a diminution of the accused rights of defence nor a lowering of the quality of prosecution. justice must not be sacrificed to considerations of expediency or efficiency; furthermore it can be maintained - with good reason - that prosecution is only effective if in accordance with exacting standards of justice.

From the foregoing it is apparent that a system for the enforcement of foreign judgments must not lead to the rendering of judgments *in absentia* and the enforcement of such judgments in cases where they are not generally considered adequate by national standards; in particular, the accused must not be deprived of the practical possibility of avoiding a judgment *in absentia* or of having such a judgment converted at a later stage into a judgment passed following a hearing of his case.

In order to ascertain whether these. conditions are fulfilled it is necessary to examine:

- whether national procedures for the avoidance of judgments *in absentia* or for the limitation, as far as possible, of the hardships caused by them are equally effective in the case of accused persons resident abroad
- whether such procedures will still be effective once the possibility of enforcing foreign judgments in general is accepted.

From consideration of these questions it appears that some national procedures - although they apply formally to persons resident abroad -do not give them the same practical safeguards as are enjoyed by persons living in the territory of the State in question. This situation would be further aggravated if it became generally possible to enforce foreign judgments. A large number of safeguards provided in the extradition system would thereby lose their value. A national of a State would be obliged to go to the State of judgment in order to avoid the effect of a judgment rendered *in absentia* which was enforceable there; this would be tantamount to an obligation to extradite himself. Moreover, a person without ample financial means would be deprived of any practical possibility of defending himself in criminal proceedings conducted at a great distance from his own State of residence.

An additional difficulty lies in the fact that there are profound differences between the legal systems of the member States of the Council of Europe with regard to judgments *in absentia*. There are wide variations both in the extent to which such judgments are permitted and in the remedies available against them.

The conclusion must therefore be that it is not possible to place judgments passed *in absentia* on the same footing as other judgments in any general rules on the enforcement of foreign judgments. On the other hand, it must be remembered that many of the judgments which cannot be enforced in the countries where they were passed - in which case enforcement elsewhere is indicated - are judgments rendered *in absentia*. Any rules for the enforcement of foreign judgments which did not cover judgments rendered *in absentia* would lose most of their practical value. The only way out of this dilemma is to include such judgments in the general rules and at the same time to set up a special system among the Contracting Parties granting persons sentenced *in absentia* the right to be heard before the judgment is enforced.

Article 21

Where the Convention makes no special provision for judgments *in absentia* within the meaning of this article, their enforcement is subject to the same rules as those governing the enforcement of judgments rendered after a hearing of the accused. These rules differ according to the nature of the sanction imposed in the judgment (imprisonment, fine and confiscation, disqualification).

It appears from paragraph 1 that a distinction is made between judgments rendered in *absentia* and *ordonnances pénales*. Generally speaking, the *ordonnance pénale is* a decision rendered by application of a simplified procedure without a hearing and solely on the basis of the file, the accused person having had the possibility to defend himself by making a statement to the police. They are often issued by a judicial authority but not necessarily so. For example, in Denmark, the Federal Republic of Germany (in respect of *Bussgeldbescheid),* Italy (in respect of decisions rendered in accordance with Act No. 317 of 3 March 1967), Norway, Sweden, Turkey and certain Swiss cantons, the competence is vested in authorities which would not normally be described as "judicial", although appeal or referral to a judicial authority is possible. Appendix III to the Convention gives the list of *ordonnances pénales* in the various member States of the Council of Europe.

The judgments rendered *in absentia* are judgments rendered after a hearing in the absence of the accused person. The definition thus made in paragraph 2 is wider than the sense given to this term in many national legal systems. Many codes of criminal procedure permit indeed the accused, under certain conditions, to be represented by counsel. Moreover, it is sometimes open to courts to exempt an accused person from his duty

to appear at the hearing if he so requests invoking illness or the distance between his residence and the seat of the court; the court will then refer to the statement given by him prior to the trial before a judge at the place of his residence. But even in the cases where the accused person was able to defend himself through counsel at the hearing or made a statement before a judge prior to the trial and when he was in the latter case at his request exempted from his duty to appear, the judgment pronounced as a result of the trial cannot be considered as having been rendered after a hearing of the accused. The definition emphasises the need for a personal appearance by the accused person at the hearing of his case.

Paragraph 3 of this article states two exceptions to the general rule. It should be made clear that letter *(a)* deals with the application to re-open a judgment on the national level. If it is established that the accused has at national level made an opposition or lodged an appeal against the decision of the court of first instance and he has therefore had the possibility to bring about a hearing in his presence but that he did not appear, there is no need to provide any special remedy. In such cases, therefore, a judgment rendered *in absentia* may be treated as one given after a hearing of the accused. Under Article 29 this also applies to judgments in *absentia* or an *ordonnance pénale* against which the convicted person has not lodged an opposition as provided for in the Convention. Hence the reference to that article. The transformation of a judgment rendered *in absentia* to a decision rendered after a hearing is admitted only once.

The expression "sentencing State" in letter *(a)* of paragraph 3 will normally refer to the requesting State, but in respect of Article 26 it refers to the requested State which has replaced the judgment rendered *in absentia* by its own decision.

Article 22

Under Article 3, a criminal judgment can as a rule only be enforced in another State if it is enforceable in the State in which it was pronounced. In the case of judgments rendered *in absentia,* proceedings with a view to enforcement in another State open with personal notification of the judgment in the requested State. Thus it is not necessary to require the judgment to have become enforceable in the requesting State, for that would go so far as to make enforcement impossible in numerous cases. This article therefore provides that a request for notification and possible enforcement of a judgment rendered *in absentia* may be made and accepted as soon as judgment is rendered.

Ordonnances pénales shall be dealt with in the same way.

If the accused has already made an opposition or appeal the request for enforcement is no longer possible. The expression used in this article "appeal or opposition" refers to action taken in the requesting State in accordance with the legislation of that State.

Article 23

When a State receives a request under the provisions of the preceding article it considers first whether in principle it should accept the request. The real proceedings for enforcement of a judgment rendered *in absentia* will not begin in that State until it has answered the question in the affirmative. The acceptance, which it is recalled implies examination of the conditions laid down in Articles 4-6, may be decided by an administrative authority. The requested State then opens the proceedings by notifying the convicted person himself of the judgment. This notification must be given by personal service even if he has already in another way received notice of the judgment.

The notification required under this article is also necessary in order to determine the moment in time from which the person sentenced has recourse to the remedy against judgment *in absentia* allowed to him under the Convention.

In this context the second paragraph provides that at the time of notification the person sentenced shall be informed of the request for enforcement and of the remedy open to him. The requested State must explain to the sentenced person the consequences of his lodging an opposition or of his failure to do so, and inform him that he will in any event be heard by the court on the question of the transformation of the sanction. It shall in general give him all useful information on his legal position during the *exequatur* proceedings. It is also appropriate to give the sentenced person the essential elements of the judgment which is to be enforced in his own language.

Paragraph (3) provides that the authorities of the requesting State shall be informed of the notification.

Article 24

The notification dealt with in Article 23 has the effect of substituting the system laid down in the Convention for the remedies available against the judgment according to national rules. The convicted person may avail himself of the opposition, as provided in the Convention, only at the sacrifice of the remedies that might be open to him under national law. An opposition is admissible if the conditions laid down in the Convention are complied with.

The fact that national remedies are ruled out when enforcement of a judgment rendered in *absentia* is requested does not prevent exercise of national remedies against the judgment rendered following an opposition. It is evident that the article does not apply to the judgments covered by Article 21 (3) which shall be treated as judgments rendered after a hearing of the accused. Any national remedies available against them remain open, and enforcement of such judgments cannot be requested before they have in fact become enforceable.

The opposition need not necessarily contain reasons but should mention the decision against which it was directed.

A convicted person may, at his own discretion, have his opposition dealt with by the courts of either the requesting or the requested State. In each case, the opposition must be lodged with the competent authority in the requested State. If the matter is settled in that State, the competent authority must notify the fact without delay to the authority of the State which requested enforcement.

The competent authority of the requested State which has received the opposition transmits it after a preliminary examination to the court which, by the choice - or lack of choice - of the convicted person, is competent to deal with the case. This court decides on the admissibility of the opposition.

The object of stipulating 30 days as the time limit for making the opposition was to give the person concerned the opportunity to obtain legal opinion both in his State of residence and in the requesting State. The period is calculated in accordance with the law of the requested State. If the person sentenced fails to observe this time limit, the national legislation of re-instatement of the requested State shall be applicable (see Article 30).

Article 25

A convicted person who wishes his opposition to be dealt with in the requesting State must be summoned at least 21 days beforehand to appear at the hearing arranged for reconsideration of the case. The summons must be served personally.

As a reduction of the period of 21 days may be to the convicted person's benefit, for instance if he has been remanded in custody. the article makes provision for such reduction subject to his consent.

Judgment on the opposition in the requesting State must be given according to its own rules of procedure: its legislation on reinstatement shall apply in case of failure to appear at the hearing (Article 30).

It is recalled that the opposition procedure is a new procedure instituted by this Convention. National law might not therefore provide any special rules on this matter and competence will in that case be given to the authority which would normally be competent to deal with the case.

If the convicted person does not appear after making the opposition (or is not represented, in cases where the law of the requesting State so allows), or if the court in the requesting State declares the opposition inadmissible (as not introduced in complete observation of rules and regulations), the competent authority in the requested State must be informed, and the judgment rendered *in absentia* may be enforced as though it had been passed after a hearing of the accused. One of the procedures mentioned in Section 5 will then be followed, according to the nature of the sanction. The requesting State may merely inform the requested State that it maintains its original request.

If the opposition is admitted, a new judgment must be given, and the one covered by the original request for enforcement is thereupon annulled. It follows that the request is also annulled. In that case, the requesting State must consider whether it is desirable to request that the new judgment is enforced. Enforcement is of course, if requested, subject to the procedure for judgments passed after a hearing of the accused.

Article 26

If a decision is to be given in the requested State on an opposition, the convicted person is summoned to appear at a hearing. The form for the summons shall be as laid down in that State's law. The time limit corresponds to that provided for under Article 25.

If the convicted person does not appear (or is not represented, in cases in which the law of the requested State so allows), or if the opposition is declared inadmissible, enforcement is subject to the procedure for judgments rendered after a hearing of the accused.

If the person sentenced appears or is represented, and the opposition is declared admissible, the case is reheard in the requested State. It is not necessary to take an express decision on admissibility: the rendering of a decision on the opposition is implicit acceptance of admissibility. It is expressly stated that the court of the requested State shall not be entitled to examine the question of a possible preclusion of the proceedings by reason of lapse of time according to the law of the requested State. This question has been definitively settled during the proceedings in the requesting State prior to the making of the request for enforcement.

The act on which the judgment *in absentia is* based is heard *in toto* in the requested State, according to the rules applicable to a similar act committed in that State and on the basis of all the circumstances that give rise to the initial trial. The court may apply only its own law.

The preceding provisions may not be interpreted as prohibiting *reformatio in pejus* provided that this possibility is allowed under the law of the requested State.

It should be, however, noted that the principle of double incrimination (Article 4) is valid also in the cases dealt with under Article 26 (3) where the opposition procedure takes place in the requested State. If it appears, for instance, that the act committed is not punishable under the law of the requesting State, the person concerned must be acquitted, even if the act would have been an offence under the law of the requested State.

Paragraph 4 provides that any step with a view to prosecution or a preliminary enquiry taken in the course of the proceedings in the requesting State shall have the same validity in the requested State as if it had been taken by the authorities of that State. However the text of the article adds that this assimilation cannot have the effect of giving such steps a greater evidential weight in the requested State than they had in the requesting State.

Article 27

The national provisions on legal assistance are also to be applied in the cases referred to in this article. The assistance is granted by the competent authorities of the requested State when opposition proceedings are being brought in this State. It must also be granted if national law so permits for the purpose of judging the desirability of lodging an opposition, even if the person sentenced envisages having the opposition examined in the requesting State.

If the convicted person chooses in pursuance of Article 24, paragraph 1, second sentence, to have the opposition heard in that State, the legal assistance during the opposition proceedings must be granted by its competent authorities in accordance with its law.

This article does not exclude partial payment of fees.

Article 28

The proceedings carried out in the requested State on the basis of an opposition by the convicted person are in every respect national proceedings and solely subject to the national law. The judgment *in absentia or* the *ordonnance pénale* pronounced in the requesting State is rendered null and void as a result of the enforceable decision pronounced by the judge in the requested State. The enforcement of the judgment rendered in the requested State belongs exclusively to that State. The requesting State has no possibility of influencing the enforcement procedure. In particular, it is precluded from exercising any right of pardon or from examining any request for a reconsideration of the trial which originally took place before its courts.

Article 29

Where there has been no appeal against a judgment passed *in absentia* or an *ordonnance pénale,* they must be enforced, once the time limit for submitting an opposition has expired, as if they had been passed after

a hearing of the accused. This article refers to the opposition at national level and to that instituted by this Convention.

Article 30

This article renders national legislation on reinstatement applicable in cases where a person, for reasons beyond his control, has failed to observe the time limits laid down in Section 3 or to appear at the hearing of his opposition.

SECTION 4 – Provisional measures

All codes of criminal procedure include provisional measures designed to prevent the accused or convicted person from evading the consequences of the judgment. Similar provisions also exist in extradition law. A request for provisional arrest may precede the request for extradition. An accused person whose extradition has been requested may be detained until a decision has been taken on the request. It was essential to include a similar provision in this Convention.

In addition to measures to detain convicted persons it is necessary to provide for the detention of goods liable to confiscation. Seizure of goods is a counterpart to provisional detention with a view to enforcement of a prison sentence.

Article 31

This article allows for the arrest of the sentenced person if that step is necessary to ensure enforcement in the requested State. In other words the arrest is permitted as it is considered in this situation as a preliminary to a transfer only and not as part of the enforcement.

This article does not therefore derogate from the general principle contained in Article 11 which provides that after requesting enforcement, the sentencing State may not itself begin the enforcement of the sanction.

It is understood that the requesting State can under the present article arrest the person concerned only if objective reasons so require.

After examination of the content of Article 3 of the fourth Protocol to the Convention on Human Rights, it was concluded that the transfer of a person from his State of nationality to another State for the purpose of enforcement did not constitute expulsion as understood in that Article.

Article 32

This article deals with the situations in which a foreign judgment may entail remand in custody. There are two such situations:

The first occurs when a request for enforcement, accompanied by the related documents, is already in the possession of the requested State. Paragraph 1 deals with this.

The second arises when the State in which judgment was delivered has decided to request enforcement but has not yet completed all the necessary formalities. This is dealt with in paragraph 2.

Article 32 must be seen in connection with Article 3. Whereas Article 3 provides a competence in the requested State to enforce a foreign judgment, Article 32 creates a competence in the requested State to arrest the person concerned.

If the request for enforcement has already reached its destination, the requested State may on its own initiative arrest the person sentenced. The situation is somewhat different where all the formalities necessary to the request for enforcement have not yet been fulfilled. The requested State can then arrest only at the express request of the requesting State, without, however, being obliged to act on such a request; it has entire discretion to judge whether such action is desirable.

Paragraph 2 is inspired by Article 16 (2) of the European Convention on Extradition. It states in detail the information which should be contained in the request for provisional arrest.

Article 33

Provisional detention under Article 32 is governed solely by the law of the requested State, which may terminate it at any time. This freedom is restricted in the two cases mentioned in paragraph 2. The requested State is obliged to terminate detention:

- where the sentenced person has spent a period under remand in custody equal to the length of sanction imposed in the requesting State and to be enforced in the requested State, and
- when the requesting State has not sent the request for enforcement within 18 days from the date of the arrest.

The first rule is based on the consideration that any prolongation of the provisional arrest is unnecessary and even unjustified as the sanction has in fact already been enforced. The second rule underlines the provisional nature of the arrest where the requesting State has made only its request for arrest and not yet its request for enforcement. It obliges that State to clarify its intentions with regard to enforcement as soon as possible. If the request for enforcement arrives before the eighteenth day of the arrest, the legal basis for the detention changes and is no longer the second paragraph of Article 32, but the first paragraph of that article. The requested State is therefore entitled to prolong detention if authorised under its own law.

Moreover, release shall not prejudice re-arrest, so soon as the necessary conditions are fulfilled.

Article 34

If the person sentenced *in absentia* wishes to reopen the proceedings before the courts of the requesting State (see Article 25) and he is deprived of his liberty in the requested State, he shall be transferred to the territory of the requesting State for the purpose of the hearing in these proceedings. The sole aim of this transfer is to ensure the presence of that person at the hearing.

If the proceedings no longer necessitate his presence the sentenced person must be released or returned to the requested State. The transfer does not confer any right to enforce a sentence of imprisonment, not even of the sanction which may have been imposed as a result of the rehearing of the case. Enforcement in the requesting State can only take place if the requested State agrees (Article 11 (2) (c)).

The rules concerning transit through a third State are laid down in Article 13.

Article 35

This article corresponds to Article 12 (2) and (3) of the European Convention on Mutual Assistance in Criminal

Matters. It renders applicable a rule of speciality to persons summoned to appear before a court in the requesting State (see Article 9).

Article 36

When enforcement of a confiscation is requested, the possibility must be provided of taking immediate steps to detain the goods, so that the sanction can in fact be enforced. The most suitable measure is seizure. This article enables the requested State to effect such seizure if it considers this desirable and if its legislation provides for seizure in case of similar offences. Such seizure is governed solely by the law of the requested State.

SECTION 5 – Enforcement of sanctions

The Convention is based on the notion that it is for each Contracting State to establish an *exequatur* procedure for European criminal judgments similar to that applicable to civil judgments. It therefore confines itself to laying down three principles considered necessary to secure the degree of uniformity which is essential for its application and to determining the material conditions to be fulfilled for the grant of *exequatur*. The procedural principles in question are: intervention by a court of the requested State, or an administrative authority if the sanction to be enforced is only a fine or a confiscation; application of the convicted person's right to be heard in *exequatur* proceedings; and the provision of a remedy against decisions taken in the course of such proceedings. The other provisions in this Section confer on the court the right to adapt the sanction laid down in the foreign judgment to its own legal system and stipulate limits and conditions for such adaptation.

(a) General clauses

Article 37

Article 37 requires, as a main rule, a decision by a court in the requested State for any enforcement of a sanction pronounced in another Contracting State. This principle is justified by the nature of the material conditions for the grant of *exequatur* and by the important fact that it is a matter of applying measures which affect individual liberty.

The second sentence contains an exception to this rule by allowing the Contracting State to use a more expedient administrative system in respect of fines and confiscations only. It is a condition that any decision by such administrative authority may be reviewed by a court. If a judgment provides for a fine or confiscation *and* deprivation of liberty, it must consequently be examined by a court and not by an administrative authority.

Article 38

This article lays down that the requested State is required to bring a case before a court or before an administrative authority, as the case may be, without specifying the authority responsible for deciding in this matter. This question has been left for national law to decide. The competent authorities, which under national law have been granted the necessary competence, have the right to examine if the conditions required for the enforcement of a foreign decision are complied with. If they find that these conditions have not been fulfilled, for instance, because the act on which the decision is based is considered to be of a political nature (see Article 6 sub-paragraph (b)), they can reject it without having recourse to a judge. These authorities may also avail themselves of Article 17 and ask for additional information, if the information given is considered inadequate. If, having examined the file, the authorities of the requested State are of the opinion that the request should be complied with, they are obliged to transmit the request to a judge or, in the case of a fine or a confiscation, to the appropriate authority, for decision. This transmission of the request to a judge or administrative authority does not imply a recognition of the decision, nor an obligation on the part of the competent authorities to enforce the decision. Their decision that the request should be complied with relates solely to the opening of *exequatur* proceedings by the transmission of the decision and the file to the judge or administrative authority. The further examination of the case is exclusively a matter for the judge or administrative authority.

Article 39

Paragraph 1 of this article gives the sentenced person the right to be heard during the *exequatur* proceedings if these take place before a court. No reference is made to the authorities empowered under Article 37 to take decisions on the enforcement of fines or confiscations in the article.

The sentenced person may be heard in person or by letters rogatory. He may decide himself that he wishes to be personally present at the hearing and the court is bound to accede to such a wish. If no such wish is expressed the court may choose the method to be adopted.

This absolute rule applies only to decisions on the actual enforcement of the sanction. It does not apply to decisions concerning the acceptance of the request where such decisions are taken on a request made directly to the court by the competent authority in the requesting State in application of an agreement under Article 15 (1) of this Convention. These latter decisions may be taken in the absence of the sentenced person if he is detained in the requesting State.

The question of the substitution of the sanction may, however. not be decided in his absence but shall be adjourned until he has been transferred to the requested State.

Article 40

This article lays down the legal conditions on which the court or authority must satisfy itself before it can order enforcement of the judgment.

Sub-paragraph (a) must be interpreted in the light of the definition given in Article 1 (a). Only sanctions imposed in a judgment passed in the course of criminal proceedings by a court in another Contracting State, and enforceable under the law of that State, can be enforced. An *ordonnance pénale* must be considered equivalent in certain circumstances to a judgment passed after a hearing of the accused. Insofar as such *ordonnances pénales* and assimilated decisions (see Appendix III) are deemed to have been given after a

hearing of the accused in accordance with Section 3, the sanctions imposed under them therefore comply with the conditions stated in subparagraph (a).

Sub-paragraph (b) covers the conditions of dual criminal liability *in concreto* and the punishability of the offender, (see commentary on Article 4).

Sub-paragraph (c) is concerned with the compatibility of enforcement of the judgment in question with the fundamental principles of the legal system of the requested State including statutory limitation. (See commentary on Article 6 (a)). The use of the word "should" refers to the objective evaluation by the court in the requested State of the conditions for enforcement.

As a result of the reference in Article 7 to Section 1 of Part 111 of the Convention, the condition in sub-paragraph *(d)* means that there should be no other European criminal judgment with the effect of *res judicata* as recognised in Articles 53-55 of the Convention.

Sub-paragraph *(e)* applies only if the judgment, the enforcement of which is requested, was originally rendered *in absentia* or by *ordonnance pénale*. The judgment must then be deemed to have been passed after a hearing of the accused, in accordance with Articles 21 (2), 25 (2), 26 (2) or 29 of the Convention.

Finally, other conditions may be verified by the court if the law of the requested State so provides.

Article 41

This article provides that the *exequatur* decision taken by the court or by the administrative authority must allow for appeal. The details relating to this legal remedy are a matter for national law. If the enforcement of a fine or a confiscation has been decided first by an administrative authority, there is in accordance with Article 37, second sentence, a right of appeal to a court; the decision by the court is, in its turn, also appealable under the provisions of Article 41.

Article 42

This article lays down that the court or the administrative authority of the requested State is bound by the facts.

The court has therefore no freedom to evaluate differently the "factual" aspect on which the judgment of the requesting State is based. The findings in this judgment may be explicit or implicit. They may relate to "objective" or 11 subjective" facts. "Objective" facts relate to the commission of the act and its results. "Subjective" facts relate to design, premeditation, the "voluntary" nature of an act and the convicted person's mental state etc.

There is no problem with regard to the facts explicitly found in the judgment. The court or authority in the requested State knows where it stands. More difficult is the case of facts found by implication in the judgment, for instance the absence of justifying or exonerating facts. Such findings bind the court or authority in the requested State insofar as it can deduce them from the judgment.

If there is a difference between the legal systems to the effect that a certain fact constitutes a legitimate defence in the requested but not in the requesting State, the requested State must refuse enforcement if it finds that such a fact was present.

Thus it may be necessary for the court or authority in the requested State to conduct a supplementary investigation into he facts, not determined by the judgment of the requesting State. However, the court of the requested State is not allowed to proceed to the hearing of new evidence in respect of facts contained in the judgment of the requesting State. This need will arrive if under the law of the requested State certain facts must be examined which it was not necessary to take into account under the law of the requested State. It follows from the above that the court of the requested State cannot make any independent assessment of evidence bearing upon the guilt of the person convicted and contained in the judgment of the requesting State. However, in accordance with generally recognised principles of law, the request may be dismissed if the offence cannot with certainty be regarded as punishable under the law of the requested State.

When a court or administrative authority in the requested State examines a request for enforcement of a criminal judgment it must take account of its various aspects: one of these is the condition of dual criminal liability *in concreto* (Article 4 *(M)*.

The criminal liability of the act according to the law of the requesting State must be considered beyond dispute as the examination relates to an enforce-able decision by a court of that State. The examination of the question of dual criminal liability by the requested State concerns only the verification that the convicted

person could have been convicted also by the courts of the requested State on the facts underlying the decision of the requesting State if a similar act had been committed in the territory of that requested State.

Dual liability implies therefore a dual legal qualification of the act; first, by the court of the requesting State, then, by the court of the requested State. Each court qualifies the act legally according to its own law. Although bound by the findings of the facts, the court or administrative authority of the requested State is free to qualify these legally. There are differences between the qualifications used in the various States. What is theft in one country may be breach of trust in a second, while in a third it may not be punishable.

As already stated in respect of Article 4, the penal codes of member States differ on the grounds justifying the act (such as legitimate defence and consent by the victim) grounds for exemption from responsibility (such as mental deficiency) and grounds for non-infliction of punishment (i.e. relationship to the injured party in certain offences). The judge or authority in the requested State must therefore examine in each case whether the law of the requesting State recognises the same grounds justifying the act and the same grounds for exemption from responsibility and for non-infliction of punishment as the law of the requested State. It is consequently according to its own legal system that the court judges all the facts underlying the foreign judgment in respect of the unlawfulness of the act and the punishability of the offender as well as of the determination of the penalty. It is bound on only two points: firstly, it must accept that the act is contrary to criminal law of the requesting State, and the offender punishable under that law and, secondly, it cannot, when fixing the sanction, make the penal situation of the sentenced person harsher than that laid down in the judgment whose enforcement is requested (Article 44 (2)).

(b) Clauses relating specifically to enforcement on sanctions involving deprivation of liberty

Article 43

This article provides for the transfer of the person whose sentence is to be enforced from the requesting State to the requested State. If transit through a third State is necessary, Article 13 applies. The phrase "unless the law of that State otherwise provides" refers, for instance, to the situation where the sentenced person is discovered, after the request for enforcement has been made, to be a national of the requesting State and where the Constitution of that State does not permit the extradition of nationals. It also refers to the situation where the person in question has, according to the law of the requesting State, the right to request an examination in that State of the conditions for the enforcement.

Article 44

▶ **Paragraphs 1 and 2**

This article which is of capital importance for the smooth and efficient functioning of the Convention gives the requested State the right to adapt the sanction imposed in the requesting State to its own legal system. It should be read in conjunction with Article 42. Whereas the requested State is bound as to the facts on which the European criminal judgment is based, it is as a main rule free to replace the sanction imposed in the foreign judgment by a sanction known in its own law.

It is an attempt to solve the extremely difficult and delicate problems raised by the considerable diversity of penal systems between the States of the Council of Europe. The law in some of those States is based on a threefold division of penalties entailing deprivation of freedom (penal servitude, imprisonment and detention). Other States have only a twofold division; still other States have only one. While enforcement of a particular judgment in a State which has the same division of sanctions as the sentencing State usually raises no difficulties of adaptation, this is not so where the two States concerned have different systems.

Moreover, the legal framework in which a sanction may be imposed for a particular offence varies appreciably from one State to another; this is also true of the legal minimum and maximum length for a particular kind of sanction. It follows that a sanction imposed in the requesting State may, for example:

a. exceed the maximum laid down for the same offence or even for the same kind of sanction in the law of the requested State;

b. be below the minimum laid down in that law;

c. not apply to the offence in question under that law or by reason of the nature of the sanction;

d. even be non-existent (as a type of sanction) in the system of the requested State.

Lastly, some laws attach to certain judgments automatic effects which are unknown or merely optional in the legal systems of other States.

When one of these cases occurs, the question of adaptation arises first as a matter of admissibility in principle and subsequently, if this is accepted, in connection with the extent of such adaptation and the criterion applicable to it.

Adaptation was considered admissible. This applies to the nature of the sanction as well as to its duration. Adaptations may take many forms; the Convention only refers to the principle embodied in an express stipulation (paragraph 2) that the penal situation of the person sentenced should not be aggravated. This prohibition does not refer solely to prolongation of the restrictions placed on his freedom or to application of a harsher kind of sanction than that ordered in the judgment to be enforced. Such aggravation would also occur if enforcement of part of a composite sanction were to be deferred because there was no dual liability in respect of part of the facts underlying the judgment whose enforcement was requested, thus making enforcement by the requested State impossible. On the other hand, it would not be contrary to this principle for an administrative authority to attach a disqualification or forfeiture to the sanction, whether or not they were inflicted in the judgment to be enforced.

Another rule is that the court in the requested State must abide within the limits of its own law as far as enforcement is concerned, This means that the court cannot enforce a sanction which exceeds the maximum laid down in its own law for the offence in question (see (a) above). On the other hand it is allowed to reduce the sanction in the light of any circumstances which authorise it to do so under its own law. It is also expressly allowed not to respect a minimum laid down in its own law if the sanction imposed abroad is less than that minimum (see *(b)* above). The court is also allowed to suspend the sanction. In lieu of a sanction imposed in the foreign judgment, some other measure provided by the law of the requested State may be enforced (see (c) and *(d)* above).

The legal situation in respect of changes of the nature and of the duration of the sanction was examined in detail and in the light of these principles.

1. As to the nature of the sanction the following questions were discussed:

    a. Would it be possible to substitute a sanction of "reclusion" (a severe form of imprisonment) for a sanction of prison?

    b. Would it be possible to substitute a sanction of prison for a sanction of "reclusion"?

    c. Would it be possible to substitute a sanction involving deprivation of liberty for a fine?

    d. Would it be possible to substitute a fine for a sentence involving deprivation of liberty?

On the first and the third questions ((a) and (c) above) it was agreed that normally paragraph 2 would prevent such substitution, but account should be taken of the particular circumstances of each case. The court of the requested State should appreciate whether the rule in paragraph 2 would be complied with. It should not be bound by any objective criteria but should be given the liberty necessary to appreciate the practical and legal consequences of the adaptation of the sanction.

On the second question ((b) above) an affirmative answer was given. The requested State's right to impose a milder sanction than that imposed in the requesting State corresponds to developments in modem criminal law. It is undoubtedly important to support in the present Convention trends to individualise sanctions and take account not only of the convicted person's personality and situation, but also of the practice prevailing and the criminal policy followed in the requested State. The use of probation for example, in that State should thus not be excluded on the sole ground that the requesting State does not use probation.

The same or similar considerations led to a positive reply to the fourth question ((d) above).

2. On the duration of the sanction, the following questions were discussed:

    a. Would it be possible to impose a sanction of a shorter duration than the minimum duration for sanction laid down in the legislation of the requested State?

    b. Could a more severe penalty be imposed than the maximum provided for in that legislation?

An affirmative answer was given to the first question ((a) above) and the third sentence of the first paragraph reflects this opinion.

On the second question it was agreed that the court in the requested State should be bound by the maximum laid down in the law of that State (see, however, paragraph 4).

It was agreed that the court was allowed to take into consideration extenuating circumstances admitted under its own system, though unknown in the requesting State. Thus, the duration of the sanction could be accordingly diminished. In addition, the court had the right to diminish the duration in accordance with court practice in the requested State.

It should be made clear that an adaptation of sanction does not affect the validity of the original judgment. The requesting State does not have the right to enforce the original sanction (for example a "reclusion") even respecting the sanction substituted (an imprisonment) and enforced in the requested State. The substitution by a sanction of a different nature or duration does not imply any modification of the judgment but should be considered as part of the ordinary and normal enforcement of the sanction. It does not differ from the frequent changes made during the national enforcement with a view to improved rehabilitation of the convicted person.

▶ **Paragraph 3**

Paragraph 3 creates an obligation for any part of the sanction served subsequent to the judgment in the same case to be deducted from the sanction imposed in the requested State, whether it is the part of the sanction served in the requesting State or provisional detention in accordance with Section 4. Moreover, deduction must be made of the period of remand in custody served by the convicted person prior to conviction in the requesting State if this period has been deducted by the judgment or any other decision by a court in the requesting State or should have been deducted according to the law of that State. It is clear that the deduction must also be made if the law of the requested State so requires.

▶ **Paragraph 4**

This paragraph opens the possibility for Contracting States, by means of a declaration deposited with the Secretary General of the Council of Europe, to enforce a sanction of the duration longer than the maximum laid down in their national legislation. This possibility is, however, conditional on the existence of provisions permitting the imposition of sanctions of a more severe nature. To give an example, a State, which provides a sanction of "reclusion" of up to ten years for a certain offence, is permitted to enforce a foreign sanction of four years' imprisonment, even if according to its law the maximum imprisonment is two years.

The sanction imposed may be served in a penal establishment intended for the enforcement of sanctions of another nature.

(c) Clauses relating specifically to enforcement of fines and confiscations

Article 45

This article is the counterpart to Article 44 but adapted to cover the enforcement of fines and confiscations. Many of the questions arising in respect of Article 45 have already been dealt with under Article 44.

Article 45 authorises the requested State to adapt pecuniary sanctions. Normally this will be done by a conversion of the amount from the currency of the requesting State to that of the requested State at the exchange rate prevailing at the moment the decision is taken. When adapting it the requested

State shall be bound by the maximum laid down in its own law for the same offence. As it was realised that several member States do not provide a maximum sum for pecuniary sanctions in their legislations, it was recognised that, in this situation, the maximum limit should be that fixed by practice.

In accordance with paragraph 2, such a maximum need not be respected if the law of the requested State for the same offence provides other sanctions of a more severe nature. In that case the requested State may even enforce a fine, though it is not provided for at all in its own law.

The present article applies to fines and confiscations of sums of money (for other confiscations, see Article 46) whether imposed by a European criminal judgment or an *ordonnance pénale*.

A "more severe" sanction under paragraph 2 would normally mean a sanction involving deprivation of liberty. It might also mean, for instance, the withdrawal of a driving licence for a professional driver or the loss of a right to exercise a profession.

In accordance with paragraph 3, the sentenced person shall be entitled to benefit in the requested State from any payment facilities granted in the requesting State. This is a natural consequence of the principle laid down in Article 44 (2) that his penal situation shall not be aggravated.

Article 46

This article renders the main principles of Article 45 applicable to confiscations of specific objects.

Article 47

The first paragraph of this article governs the requested State's right, subject to the rights of third parties, to the proceeds of enforcement of the sanction mentioned in Subsection (c). This is the counterpart of Article 14 and follows logically from the desire to avoid, in the interests of economy in relations between the Contracting States, all book-keeping transactions.

Paragraph 2 provides that certain property confiscated may be remitted to the requesting State if it so requires. This relates to property which may be of historical, criminological or other special interest.

Article 48

This article deals with the conversion of fines which cannot be exacted. The words "may impose" make it clear that this conversion is optional. It is in any event conditional upon the legislation of both States concerned providing such possibility and on the requesting State not excluding the conversion in its request for enforcement.

The detailed rules are given in sub-paragraphs *(a) and (b)*. They are derived from the provisions of Article 44 concerning the adaptation of sanction. The court of the requested State shall be bound by its own law in converting the fine. Nevertheless it may disregard the minimum limit for the sanctions in question if the sanction imposed in the requesting State is lower than that limit. The penal situation of the person sentenced shall not be aggravated by the conversion.

(d) Clauses relating specifically to enforcement of disqualification

Article 49

This article states the principle that a disqualification, if it is to be enforced in another Contracting State, must be known to the law of that State, a principle which might be described as "double recognition".

It is recalled that the disqualifications dealt with in this sub-section are imposed by the judgment itself. Disqualifications derived from the judgment by other means are the subject of Articles 56-57. Sub-section (d) is applicable only when a request for enforcement has been made.

Paragraph 1 requires the double recognition to be in *concreto,* that is to say the disqualification must be prescribed for the same offence by the law of the State of enforcement.

The second paragraph makes clear that a disqualification shall not be enforced in another Contracting State unless the court in that State, having regard to all the circumstances of the case, in particular the interest of the community and of the sentenced person, considers it expedient.

If the foreign judgment provides for a sanction involving deprivation of liberty and for a disqualification, the requested State may accept enforcement of the sanction but refuse enforcement of the disqualification. It follows from Article 7, sub-paragraph (m).

If the judge is not willing to execute the foreign disqualifications, Part III of the present Convention may be applied.

This article is not intended to interfere with national systems providing for the automatic and obligatory enforcement of foreign disqualifications.

Article 50

This article deals with any adaptation, which may be necessary, of disqualifications to the legislation of the State of enforcement. It requires that the adaptation shall always be made by a judge.

The adaptation may be seen from two points of view: duration and rights forfeited. As to duration, the Convention adopted a system according to which the disqualification shall be enforced for a period falling within the limits prescribed by the law of the State of enforcement. The judge who, in accordance with Article 44 (2) may not aggravate the sanction, cannot extend the duration beyond the limits laid down in the European

criminal judgment. As to rights forfeited, adaptation may consist in restricting forfeiture to a part of the rights in respect of which it was imposed.

Article 51

This article makes disqualification an exception to the rule that acceptance of a request for enforcement by the requested State shall debar the requesting State from exercising its right of enforcement (Article 11).

Enforcement of a disqualification differs from enforcement of a prison sentence or a fine. Whereas these latter sanctions are enforced once and for all by a positive act, disqualifications call for no positive act and are enforced separately for the whole of their duration. Hence enforcement of a disqualification in another Contracting State should not prevent its enforcement in the State where the sentence was passed.

Article 52

This article relates to reinstatement. Obviously the State in which sentence was passed retains the competence to grant reinstatement. Since disqualifications must be enforced, according to the law of the State of enforcement, it is however logical also for that State to be able to grant reinstatement in application of its own law.

It results from the words "in accordance with a decision taken in application of this Section" that the reinstatement granted by the State of enforcement shall not be effective in the State where the sentence was passed.

PART III – INTERNATIONAL EFFECTS OF EUROPEAN CRIMINAL JUDGMENTS

SECTION 1 – *Ne bis in idem*

General remarks

The term *ne bis in idem,* which is generally used in legal literature and is used also in other European Conventions, means that a person who has once been the subject of a final judgment in a criminal case cannot be prosecuted again on the basis of the same fact.

Insofar as this principle is concerned, a distinction has to he made between its application at the national level and its application at the international level.

At the national level the principle is generally recognised in the laws of member States, for a final judgment delivered in a particular State has the effect of debarring the authorities of that State from taking once more proceedings against the same person on the basis of the same body of facts.

At the international level, on the other hand, the principle of *ne bis in idem is* not generally recognised. By way of example, no State in which a punishable act has been committed is debarred from prosecuting the offence only because the same offence has already been prosecuted in another State.

It is not difficult to understand the considerations underlying this legal position. Traditionally, the right to prosecute offences has been considered part of sovereignty. To this must be added, however, that the State of the offence more often than not will be the State in which the commission of the act by the accused can best be proved; it would therefore seem unjustified for that State normally to be bound by decisions delivered in other States, where the absence of certain elements of evidence may have led to acquittal or the imposition of less severe penalties.

Against this view may be that which considers that the offender will be subjected to a manifestly inequitable treatment if he is again prosecuted and may even be subjected to the enforcement of several judgments for the same offence.

It might be argued that the need for a reasonable protection of the offender might be dealt with through a protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms. It was deemed preferable, however, to include the provisions in a convention regulating the co-operation between the States in penal matters.

Two reasons justify this solution.

The recognition of a foreign judgment presupposes a certain degree of confidence in foreign justice. Such confidence exists among the member States of the Council of Europe but is, at the present time, hardly equally apparent in wider international relations between States. For this reason it is urged that it is possible to give more substance to the principle of *ne bis in idem* at the European level than at the wider international level. But the insertion of this principle in the European Convention for the Protection of Human Rights and Fundamental Freedoms would have an effect *erga omnes,* and would thereby be liable to be deprived of most of its content and hence its usefulness.

It is also claimed that such an insertion in the Human Rights Convention would result in a more advanced degree of unification than an insertion in the Convention on the International Validity of Criminal judgments. But at the present moment such a degree of unification appears to be difficult to obtain in view of the pronounced differences between the technical rules of criminal procedure.

Accordingly, it was decided to insert a number of provisions regulating the question in Articles 53 to 55 of the Convention dealt with here.

It will be necessary to view these provisions as a whole.

First, it should be pointed out that the provisions are in the nature of minimum rules, each State being free to maintain or adopt rules which to a wider extent give the effect of *ne bis in idem* to foreign judgments. This is apparent from the provisions of Article 55.

Article 53 indicates the extent to which foreign criminal judgments shall be given an actual effect of *ne bis in idem*.

The system adopted in the Convention is that, where a State has itself requested another State to take proceedings, the requesting State shall always recognise the judgment delivered as a result of these proceedings. A part from this, European criminal judgments never have the effect of *ne bis in idem* in relation to the State in which the offence was committed (paragraph (3)), or – in the case of specified offences directed against the particular interests of a State – in relation to that State (paragraph (2)).

Where none of these special situations exists - that is, notably, in cases where judgment was delivered in the State where the offence was committed - the judgment has the effect of *ne bis in idem* in relation to other States in the event of an acquittal or a conviction where the sanction imposed is enforced in the normal manner or of the court having convicted the offender without imposing a sanction (paragraph (1)).

For those cases where the principle of *ne bis in idem does* not apply in accordance with this Convention a supplementary rule has been laid down. According to this rule any period of deprivation of liberty already served in one Contracting State as part of the enforcement of a sanction shall be deducted from the sanction which may be imposed in another Contracting State (Article 54).

Mention should be made that there is according to Appendix I, sub-paragraph (f) a possibility to make a reservation of this Section.

Article 53

▶ Paragraph 1

"European criminal judgment" is defined in Article 1 (a) as "any final decision delivered by a criminal court of a Contracting State as a result of criminal proceedings ".

The requirement that the decision shall be final has been made with a particular view to Part II of the Convention (Enforcement of European criminal judgments). It is evident that it will normally be contrary to the factual considerations underlying the provision of paragraph (1) if another State should commence prosecution in the period of time between the pronouncement of the first judgment and the expiration of the time allowed for appeal. Under certain legal systems, however, there may be cases where a decision will never be final. In such cases it is inconceivable that a non-final sentence should prevent any subsequent prosecution being instituted by another State.

Sub-paragraph *(a)* relates to acquittals.

The question has arisen whether an acquittal, which is not due to the absence of evidence showing that the prosecuted act was committed by the accused, but to the fact that the particular act is not punishable under the penal legislation of the State of judgment, should also debar other States in which the act would be punishable, from prosecuting. In view of the fact that the rule of *ne bis in idem* will normally be relevant only if the judgment is delivered in the State in which the offence was committed, it will accord best with

the general principle of dual criminal liability (see the comment to Article 4, paragraph (1)) that an acquittal based on the fact that the act is not punishable in that State should also be covered by the provision of paragraph (1).

Sub-paragraph *(b)* relates to judgments imposing a sanction.

For the meaning of the term "sanction", reference is made to Article 1 (d).

The general application of the principle of *ne bis in idem* would in respect of these judgments lead to the unacceptable result that the mere fact that a State happened to take criminal proceedings first would debar other States from prosecuting the offence. The interest of the States in the effective reduction of crime has to be weighed against the general consideration requiring that a person should not be prosecuted several times for the same act.

In the member States whose legislation contains special provisions on the subject, such weighing of conflicting considerations has normally led to the result that a foreign conviction is given the effect of *res judicata* only if the sanction has been served or has been remitted or is time-barred under the law of the State of judgment.

That solution reasonably meets the legitimate interest of the convicted person not to be prosecuted several times for the same act, since -normally, in any case - new proceedings will be taken only where he has rendered himself liable thereto by evading the enforcement of the sanction in the State of the first judgment. On the other hand, as long as the enforcement of a judgment follows a normal course, new proceedings ought not to be instituted.

Sub-paragraph *(b)* has been drafted accordingly. *Res judicata* effect is given to a sanction which (i) has been completely enforced or is being enforced, (ii) has been wholly, or with respect to the part not enforced, the subject of a pardon or an amnesty, or (iii) can no longer be enforced because of lapse of time.

The term "sanction" also covers special conditions which may be imposed in a suspended sentence. Thus the principle *ne bis in idem* applies as long as the sentenced person *complies* with the conditions imposed in the suspended sentence.

Having regard to the drafting of the provision, the fact that only a minor part of a sanction, or possibly a measure imposed under the judgment, has not been served in the normal way will imply that another State will be free to open new proceedings. It has not been considered possible to distinguish whether the convicted person has evaded a larger or smaller part of the sanction; it must be stressed, however, that in accordance with the view underlying this provision, States should hesitate to open new proceedings where only a small part of the sanction has not been served. This applies irrespective of the question whether the other State would, in its determination of sanction, have to take account of the sanction already served; the mere fact that the person already sentenced might be subject to a new prosecution may imply an inequitable aggravation of his situation.

Sub-paragraph (c) relates to judgments where the court convicted the offender without imposing a sanction. By that provision and the provision of sub-paragraph (b) (i), any form of suspension or exclusion of sanctions is covered.

▶ **Paragraph 2**

This provision relates to certain special cases where a particular State has a quite special interest in being able to prosecute the offence, since it cannot be supposed that other States will adopt the same strict view of the offence.

The cases concerned are those where the offence is directed against either a person or an institution or any thing having public status in that State, or where the offender had himself a public status in that State.

Consideration was given to whether a more general term could be applied in that provision, such as "acts directed against the interests of a State", but the term was thought too comprehensive and vague. Such a term would, for example, include offences against a large number of the trade regulations provided for in special national legislation.

As examples of offences that will be covered by the provision of paragraph (2), mention may be made of assaults on public servants ("a person... having public status"), espionage ("an institution.. having public status"), counterfeiting ("any thing having public status") and the taking of bribes ("had himself a public status").

▶ **Paragraph 3**

This provision arises out of the notion that in most cases the State of offence has a special interest in judging the offender by its own courts, which can more easily collect all the evidence. Such criminal procedure may also be of value in respect of civil proceedings for the purpose of compensating an injured party.

In view of the differences between the laws of member States on the criteria determining the place of the offence, it has been considered advisable to provide that the question whether an offence was committed on this territory of a particular State shall be decided in accordance with the domestic law of that State.

Article 54

Reference is made to the general remarks at the beginning of this Part.

Consideration has been given to whether it would be possible to provide a wider protection of offenders so that not only enforced sanctions involving deprivation of liberty but all enforced sanctions, e.g. also fines, should have the effect of reducing the new sanction. It is evident, however, that the need for a rule of protection is particularly urgent in regard to sanctions involving deprivation of liberty. Besides, providing for a possible reduction where the sanctions to be compared are of different types presents special difficulties. Since the cases where a State wishes to prosecute an offence for the second time which has already been decided and enforced in another State are likely to be the more serious ones where the new judgment will generally imply a sanction involving deprivation of liberty, a provision to the effect that foreign sanctions of fine should also cause a reduction would typically lead to difficult comparisons in practice between sanctions of different types. Furthermore, taking into consideration that the provisions concerned are minimum rules so that each State is free to provide a wider protection, it was considered that, at the present time, no steps should be taken to insert a wider rule in the Convention. For the same reason also deduction of any period during which the sentenced person was detained pending trial was left to national legislation.

Article 55

Reference is made to the general remarks at the beginning of this Part.

SECTION 2 – Taking into consideration of European criminal judgments

General remarks

Section 2 of Part III deals with the taking into consideration of a European criminal judgment. This is to be distinguished from its enforcement. It does not mean enforcing the sanctions ordered in the European criminal judgment (for instance, disqualification as a sanction falls under Articles 49) but attaching to it, through a subsequent decision by the authorities in another State, certain indirect effects which are provided for in the law of this State in respect of its national judgments.

Individualisation of the sanction requires knowledge of the offender's personality and this in its turn requires knowledge of his previous convictions no matter in which State they were passed. The criminal record is relevant to the offender's history and should not be influenced by the national or foreign origin of his convictions.

On these grounds it was decided to insert in the Convention provisions dealing with the taking into consideration of European criminal judgments for the purpose of attaching to them the indirect effects as is done in respect of national judgments.

The Convention obliges the Contracting Parties to provide the legislative basis for this taking into consideration but leaves them free to decide on the nature of the indirect effects which could or should be attached to European criminal judgments.

Taking into consideration does not require that there should be a new offence (Article 57) although this may often be the case (Article 56).

Mention should be made that there is according to Appendix I, sub-paragraph (f) a possibility to make a reservation in respect of this section.

Article 56

The previous judgment is considered by the judge examining the new offence for the purpose of determining the sanction to be imposed in respect of that new offence. In this context it is indeed important to have all information necessary to enable the court to decide whether it should establish *re*cidivism, qualify a person as a habitual offender, or an offender by profession or inclination, grant a suspended sentence or probation etc.

Although the importance of considering the elements necessary for attaching effects to a European criminal judgment was never in dispute, it was however decided not to render such attachment obligatory. This arose through the insufficient harmonisation of criminal policy of member States of the Council of Europe and because an obligation would run counter to the national evolution of criminal law and deprive the judge of his discretionary powers to decide whether to attach such effects. In view of the general desirability of creating links between the various national systems it was nevertheless decided that the words "all or some of the effects" should be interpreted to mean that a complete refusal by a State to agree to the principle of taking into consideration was excluded; on the other hand, to provide a possibility in internal legislation for the courts to attach only one effect, for instance, recidivism to a previous European criminal judgment would suffice.

The conditions in which such effect is given to a European criminal judgment are determined by the national legislation.

The text specified that the first judgment must have been rendered after a hearing of the accused. The taking into consideration of judgments rendered *in absentia* is therefore outside the scope of this Convention.

Article 57

Other indirect effects of a European criminal judgment imposed without the occurrence of a new offence are dealt with in this article. They are called additional effects because they are attached as a supplement to the original judgment. The obligation in this article to take legislative measures does not concern all the supplementary effects but only those which are termed disqualification, loss and suspension of rights (see Article *1 (e)* and comments thereto).

For the same reasons as those given above (Article 56), a judge or an administrative authority is not obliged under Article 57 to attach effects to a European criminal judgment in a particular case unless national legislation itself confers on them a compulsory character with respect to a European criminal judgment.

PART IV – FINAL PROVISIONS

Articles 58 – 68 are, for the most part, based on the model final clauses of Agreements and Conventions which were approved by the Committee of Ministers of the Council of Europe, sitting at Deputy level during its 113th meeting. Most of these articles do not call for specific comments; Articles 62, 63 and 65 have been inserted by express decision.

Article 62 relates to Appendices II and III which set out, respectively, the list of offences other than offences under criminal law (for instance in the Federal Republic of Germany *Ordnungswidrigkeiten)* and the list of *ordonnances pénales*. It was considered necessary that these Appendices should, at any given time, reflect the actual legislative situation in those member States which have become Contracting Parties to the Convention. This article gives the States a right to insert in the Appendices any provision of their legal systems relating to the imposition of sanctions for "depenalised" offences or to *ordonnances pénales* (for comments see above Article 1, sub-paragraphs (b) and (g) respectively; see also Article 21).

If they have availed themselves of this possibility they are obliged to keep the Secretary General of the Council of Europe informed of any amendments or additions made to these provisions whenever modifications of the latter render the information contained in the Appendices inexact. It follows that changes which affect aspects of these systems but which have not been communicated originally to the Secretary General, need not be notified. It is stipulated that the changes shall have effect one month after communication to the other Contracting States by the Secretary General in accordance with Article 67, sub-paragraph (h).

In accordance with *Article* 63 (1), each Contracting State shall supply information to the Secretary General on the system of sanctions applicable in that State and their enforcement. This information should be given

in respect of each sanction applicable in the requesting State. It was decided to recommend that this information be obtained following a definite scheme[10]. This scheme may be reviewed by the ECCP in collaboration with the Secretariat in the light of experience in accordance with Article 65. The Secretary General shall, under Article 67 sub-paragraph (i), notify other member States of the information thus received. The purpose of this information is to assist the courts in the requested State in adapting the foreign judgment to their own legal system and to avoid an aggravation of the penal situation of the accused person (see Article 44 (2)).

Any subsequent change of this information shall be notified to the Secretary General. It is clear that this provision is applicable to Contracting States only.

Article 65 provides that the European Committee on Crime Problems shall assist the Contracting States, if necessary, in the application of this Convention.

COMMENTS ON APPENDIX I

This Appendix contains the six reservations of which Contracting States may avail themselves when depositing their instruments of ratification, acceptance or accession, in accordance with Article 61 (1).

The reason for these reservations is stated above; see

as to reservation (a): comments relating to Article 6 sub-paragraph (b)

as to reservation (b): comments relating to Articles 1 (b) and 4

as to reservation (c): comments relating to Articles 6, sub-paragraph (1) and 8

as to reservation (d): comments relating to Articles 21-30

as to reservation (d) . comments relating to Articles 21-30

as to reservation *(e):* comments relating to Article 8

as to reservation (f): comments relating to Part III, Sections 1 and 2.

COMMENTS ON APPENDIX II

This Appendix sets out the list of offences other than offences dealt with under criminal law. See comments under Articles 1 (b) and 62.

COMMENTS ON APPENDIX III

This Appendix sets out the lists of *ordonnances pénales* in the member States of the Council of Europe. For comments see Articles 1, sub-paragraph (g), 21 - 30 and 62.

10. (a) Name in official language (s) of the State; (b) Legal basis (reference to codes and acts); (c) Maximum and minimum sanction; (d) Supplementary effects of the sanction, nature (disqualification etc.) and duration; (e) Method of enforcement (for pecuniary sanctions: possibility of transformation into sanctions involving deprivation of liberty; for sanctions involving deprivation of liberty: nature and regime of the establishment in which enforcement may take place, conditional release).

European Convention on the compensation of victims of violent crimes – ETS No. 116

Strasbourg, 24.XI.1983

The member States of the Council of Europe, signatory hereto,

Considering that the aim of the Council of Europe is to achieve a greater unity between its members;

Considering that for reasons of equity and social solidarity it is necessary to deal with the situation of victims of intentional crimes of violence who have suffered bodily injury or impairment of health and of dependants of persons who have died as a result of such crimes;

Considering that it is necessary to introduce or develop schemes for the compensation of these victims by the State in whose territory such crimes were committed, in particular when the offender has not been identified or is without resources;

Considering that it is necessary to establish minimum provisions in this field;

Having regard to Resolution (77) 27 of the Committee of Ministers of the Council of Europe on the compensation of victims of crime,

Have agreed as follows:

PART I – BASIC PRINCIPLES

Article 1

The Parties undertake to take the necessary steps to give effect to the principles set out in Part I of this Convention.

Article 2

1. When compensation is not fully available from other sources the State shall contribute to compensate:
   a. those who have sustained serious bodily injury or impairment of health directly attributable to an intentional crime of violence;
   b. the dependants of persons who have died as a result of such crime.

2. Compensation shall be awarded in the above cases even if the offender cannot be prosecuted or punished.

Article 3

Compensation shall be paid by the State on whose territory the crime was committed:

a. to nationals of the States party to this Convention;

b. to nationals of all member States of the Council of Europe who are permanent residents in the State on whose territory the crime was committed.

Article 4

Compensation shall cover, according to the case under consideration, at least the following items: loss of earnings, medical and hospitalisation expenses and funeral expenses, and, as regards dependants, loss of maintenance.

Article 5

The compensation scheme may, if necessary, set for any or all elements of compensation an upper limit above which and a minimum threshold below which such compensation shall not be granted.

Article 6

The compensation scheme may specify a period within which any application for compensation must be made.

Article 7

Compensation may be reduced or refused on account of the applicant's financial situation.

Article 8

1. Compensation may be reduced or refused on account of the victim's or the applicant's conduct before, during or after the crime, or in relation to the injury or death.

2. Compensation may also be reduced or refused on account of the victim's or the applicant's involvement in organised crime or his membership of an organisation which engages in crimes of violence.

3. Compensation may also be reduced or refused if an award or a full award would be contrary to a sense of justice or to public policy (*ordre public*).

Article 9

With a view to avoiding double compensation, the State or the competent authority may deduct from the compensation awarded or reclaim from the person compensated any amount of money received, in consequence of the injury or death, from the offender, social security or insurance, or coming from any other source.

Article 10

The State or the competent authority may be subrogated to the rights of the person compensated for the amount of the compensation paid.

Article 11

Each Party shall take appropriate steps to ensure that information about the scheme is available to potential applicants.

PART II – INTERNATIONAL CO-OPERATION

Article 12

Subject to the application of bilateral or multilateral agreements on mutual assistance concluded between Contracting States, the competent authorities of each Party shall, at the request of the appropriate authorities of any other Party, give the maximum possible assistance in connection with the matters covered by this Convention. To this end, each Contracting State shall designate a central authority to receive, and to

take action on, requests for such assistance, and shall inform thereof the Secretary General of the Council of Europe when depositing its instrument of ratification, acceptance, approval or accession.

Article 13

1. The European Committee on Crime Problems (CDPC) of the Council of Europe shall be kept informed regarding the application of the Convention.

2. To this end, each Party shall transmit to the Secretary General of the Council of Europe any relevant information about its legislative or regulatory provisions concerning the matters covered by the Convention.

PART III – FINAL CLAUSES

Article 14

This Convention shall be open for signature by the member States of the Council of Europe. It is subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

Article 15

1. This Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date on which three member States of the Council of Europe have expressed their consent to be bound by the Convention in accordance with the provisions of Article 14.

2. In respect of any member State which subsequently expresses its consent to be bound by it, the Convention 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 ratification, acceptance or approval.

Article 16

1. After the entry into force of this Convention, the Committee of Ministers of the Council of Europe may invite any State not a member of the Council of Europe to accede to this Convention by a decision taken by the majority provided for in Article 20.d of the Statute of the Council of Europe and by the unanimous vote of the representatives of the Contracting States entitled to sit on the Committee.

2. In respect of any acceding State, the Convention 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 of the instrument of accession with the Secretary General of the Council of Europe.

Article 17

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 Convention shall apply.

2. Any State may at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Convention to any other territory specified in the declaration. In respect of such territory the Convention 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 six months after the date of receipt of such notification by the Secretary General.

Article 18

1. 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 one or more reservations.

2. Any Contracting State which has made a reservation under the preceding paragraph may wholly or partly withdraw it by means of a notification addressed to the Secretary General of the Council of Europe. The withdrawal shall take effect on the date of receipt of such notification by the Secretary General.

3. A Party which has made a reservation in respect of a provision of this Convention may not claim the application of that provision by any other 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 19

1. Any Party may at any time denounce this Convention by means of a notification addressed to the Secretary General of the Council of Europe.

2. Such a denunciation shall become effective on the first day of the month following the expiration of a period of six months after the date of receipt of the notification by the Secretary General.

Article 20

The Secretary General of the Council of Europe shall notify the member States of the Council and any State which has acceded to this Convention, 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 Convention in accordance with Articles 15, 16 and 17;

d. any other act, notification or communication relating to this Convention.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at Strasbourg, this 24th day of November 1983, in English and 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 any State invited to accede to this Convention.

European Convention on the compensation of victims of violent crimes – ETS No. 116

Explanatory Report

I. The European Convention on the Compensation of Victims of Violent Crimes, drawn up within the Council of Europe by a Committee of Governmental Experts under the authority of the European Committee on Crime Problems (CDPC), was opened for signature by the member states of the Council of Europe on 24 November 1983.

II. The text of the explanatory report prepared by the committee of experts and submitted the Committee of Ministers of the Council of Europe, as amended and completed by the CCJ, does not constitute an instrument providing an authoritative interpretation of the Convention although it might be of such a nature to facilitate the application of the provisions contained therein.

I. INTRODUCTION

1. In recent decades, policy makers and criminologists have been particularly concerned with the victim's position in crime and with protecting the victim's interests. They have emphasised that assisting victims must be a constant concern of crime policy, on a par with the penal treatment of offenders. Such assistance includes measures designed to alleviate psychological distress as well as to make reparation for the victim's physical injuries.

One of these concerns is to provide compensation for the victim or his dependants. In principle, the offender should pay the compensation, by order of the civil or - in some countries - criminal courts or by a judicial or extrajudicial arrangement between him and the victim. However, though the victim can obtain satisfaction by this means in theory, full reparation is seldom made in practice, in particular because of the offender's non-apprehension, disappearance or lack of means.

2. In the 1960s, therefore, various Council of Europe member states started setting up schemes to compensate victims from public funds when compensation was otherwise unavailable. In view of this development, the CEPC (now the CDPC) decided in 1970 to add the compensation of victims of crime to its work programme. This decision was approved by the Committee of Ministers of the Council of Europe at their Deputies' 192nd meeting, but no action was taken on it pending the outcome of relevant work by the International Association of Penal Law (11th International Congress on Penal Law, Budapest, 1974).

Having discussed the compensation of victims of crime, the 9th Conference of European Ministers of Justice (Vienna, 1974) recommended that the Committee of Ministers of the Council of Europe instruct the CEPC to hold an exchange of views and information on the subject.

This was duly held by the CEPC in January 1975.

Finally, a CEPC sub-committee was asked to draw up common principles governing the compensation of victims of crime, with particular reference to compensation from public funds. The subcommittee produced a draft resolution and a report on the subject, which were submitted to the CEPC and approved in 1977.

In September 1977, the Committee of Ministers of the Council of Europe adopted Resolution (77) 27 on the compensation of victims of crime. This recommended that the member States provide for state compensation of victims, or dependants of victims, of intentional violence where compensation could not be ensured by any other means, and set out guidelines.

The CEPC report on the compensation of victims of crime was published in 1978.

3. In the five years following the adoption of Resolution (77) 27, various Council of Europe member States, guided, *inter alia,* by the said resolution, either introduced state schemes for compensating victims of crime or drafted legislation on the subject.

Various member states soon found, however, that if foreigners moving between member States - notably migrant workers - were to be socially protected, the principles laid down in Resolution (77) 27 (and more particularly in Article 13) needed to be reconsidered and an instrument drawn up which would have binding force.

These considerations are mentioned in the report submitted by Mr Luster on behalf of the European Parliament's Legal Affairs Committee (Doc. 1-464/80). During the European Parliament debate on 12 March 1981, it was stated that the EEC should draw up a directive in this sphere, unless the Council of Europe embarked on producing a convention on the basis of Resolution (77) 27. The Resolution on Compensation for Victims of Acts of Violence, adopted by the European Parliament on 13 March 1981, reflects this view.

4. At its 30th plenary Session (1981) the CDPC heeded this concern by instructing the Select Committee on the Victim and Criminal and Social Policy to begin its work by drawing up a European convention on compensation of victims of crime on the basis of Resolution (77) 27 on the same subject.

5. The Select Committee met twice in 1982 (24-26 February and 29 September-1 October) under the chairmanship of Mr J. G. Schätzler (Federal Republic of Germany). Its meetings were attended by experts from France, Iceland, Italy., Luxembourg, the Netherlands, Portugal, Switzerland, Turkey and the United Kingdom, as well as by Mr H.J. Schneider (Federal Republic of Germany) and Ms J. Shapland (United Kingdom), consultants, and observers from Canada and the IAPL.

An enlarged meeting of the committee took place from 17 to 21 January 1983 under the chairmanship of Mr J. G. Schätzler. The meeting was attended by all the Council of Europe's member States, except Belgium, Ireland, Liechtenstein and Malta.

The Select Committee's draft European Convention on the Compensation of Victims of Violent Crimes, as approved after amendment by the enlarged committee, and the draft explanatory report were approved by the CDPC at its 32nd plenary Session (April 1983). At the 361st meeting of the Deputies (June 1983), the Committee of Ministers adopted the Convention and decided to open it for signature on 24 November 1983.

II. GENERAL CONSIDERATIONS

A. Framework of the Convention

6. The Council of Europe's aim of promoting closer unity between its member States is pursued in particular through the harmonisation of their legislation and agreement among them on common policy.

In this context, the European Committee on Crime Problems has sought, since its inception, to promote joint policy on crime prevention and the treatment of offenders.

Such a policy demands that balanced consideration be given to all the components of the criminal act. Victim studies carried out in various countries in the last few decades have revealed the interaction which may exist between criminal and victim during the commission of a crime. At the same time, they have thrown light on victims' psychological and physical distress after a crime and on the difficulties they often encounter in asserting their rights. These considerations lead one to conclude that as much importance must be attached to the victims, and in particular to the protection of their interests, as to the treatment and social rehabilitation of offenders.

7. This points to the need to compensate the victim, not only to alleviate as far as possible the injury and distress suffered by him, but also to quell the social conflict caused by the offence and make it easier to apply rational, effective crime policy.

8. Various provisions in force in member States are designed to induce the offender to compensate the victim (for example, suspended sentence or probation may depend on payment of compensation, payment of compensation may constitute the main penalty, etc.). In very few cases is compensation for injury actually paid, however. A State contribution to compensation is accordingly thought necessary.

9. Various arguments for State involvement in compensation have been put forward:

   a. One theory is that the State is bound to compensate the victim because:

   – it has failed to prevent the crime by means of effective criminal policy,

   – it introduced criminal policy measures which have failed,

– having prohibited personal vengeance, it is bound to appease the victim, or his dependants (principle of State responsibility for crime);

b. Another theory is that State intervention is justified on grounds of social solidarity and equity: since some citizens are more vulnerable, or unluckier, than others, they must be compensated by the whole community for any injury sustained:

c. Lastly, it has been suggested that by removing the victim's sense of injustice, State compensation makes it easier to apply a less punitive criminal policy, but one which is more effective.

10. Resolution (77) 27 accepted equity and social solidarity as the basic principles of compensation.

These same principles underlie the European Convention on the Compensation of Victims of Violent Crimes (second preambular paragraph).

The majority view in the committee was, however, that these principles did not mean that the State should intervene only in cases of absolute necessity (that is hardship). Compensation awards may nevertheless take the victim's or victim's dependants' financial position Into account (Article 7).

B. Aims of the Convention

11. The European Convention on the Compensation of Victims of Violent Crimes, based on Resolution (77) 27, pursues the following aims:

a. To harmonise at European level the guidelines (minimum provisions) on the compensation of victims of violent crimes and to give them binding force.

States ratifying the Convention will have to comply with the principles laid down, either by amending existing legislation and administrative arrangements or by introducing these principles to any new legislation or arrangements.

b. To ensure co-operation between the Parties in the compensation of victims of violent crimes, and more particularly to promote:

– the compensation of foreign victims by the State on whose territory the offence was committed;

– mutual assistance between Parties in all matters concerning compensation.

The presence of numerous foreigners on the Parties' territories (migrant workers, tourists, students, etc.) makes such co-operation necessary.

III. COMMENTARY ON THE ARTICLES OF THE CONVENTION

PART I – BASIC PRINCIPLES

Article 1

12. By the terms of Article 1, the Parties undertake to ensure that their present and future legislation and administrative arrangements on the compensation of victims of crimes of violence comply with the Convention. It follows that this Convention is not directly enforceable.

It is for the Contracting States to establish the legal basis, the administrative framework and the methods of operation of the compensation schemes having due regard to these principles.

13. Since several member States have for some years effectively operated schemes for paying compensation from public funds, the committee decided to draw up minimum provisions rather than a model act, whose rigidity might have prevented several member States from ratifying the Convention.

Article 2

14. This article sets out the basic conditions governing State compensation of victims of violent crimes. Since the rules given are minima, more generous compensation arrangements by Parties are not precluded.

The succeeding articles foresee, for specific cases, limitations to the obligations laid down by Article 2.

15. The State pays compensation only where compensation is not fully available from other sources (the offender, social security, etc.).

As is clear from Articles 9 and 10, however, this provision must not be taken to preclude an interim State contribution to compensation of the victim pending decision of an action, judicial or extrajudicial (arbitration), to recover damages. A victim urgently needing help sometimes cannot await the outcome of often complicated proceedings (cf. paragraph 8 of Resolution (77) 27). In such cases, the Parties can provide that the State or the competent authority may subrogate in the rights of the person compensated for the amount of the compensation paid (Article 10) or, if later the person compensated obtains reparation from any other source, may reclaim totally or partially the amount of money awarded (Article g).

16. For compensation to be payable to the victim from public funds, offences must be:

- intentional,
- violent,
- the direct cause of serious bodily injury or damage to health.

17. The Convention applies only to intentional offences, because they are particularly serious and give rise to compensation less often than non-intentional offences, which include the huge range of road traffic offences and are in principle covered by other schemes (private insurance, social security, etc.).

18. The violence inflicted by the offender need not be physical. Compensation may also be payable in cases of psychological violence (for example serious threats) causing serious injury or death.

19. The Convention aims at protecting victims of offences against life, physical integrity and health.

The term health may include, according to the domestic law of each State, mental as well as physical health.

Injury must be serious and directly attributable to the crime, a relationship of cause and effect being proven.

Having regard both to the underlying principle of solidarity, which requires the alleviation of major distress and injury, and to financial constraints, the Convention does not cover:

- slight injury or injury not directly caused by the offence;
- injury to other interests, notably property.

Poisoning, rape and arson are to be treated as intentional violence.

20. The persons eligible for compensation are:

a. The victim

In the event of serious bodily injury or damage to health, compensation is payable to the victim direct. The victim's dependants thus benefit indirectly.

Victims of violent crimes may include anyone injured or killed in trying to prevent an offence, or in helping the police to prevent the offence, apprehend the culprit or help the victim.

b. The dependants of persons who have died as a result of a violent crime

It is for the Parties to define the term according to the requirements of their domestic law (children, spouse, etc.).

21. Compensation from public funds is payable to the victim irrespective of the offender's prosecution or conviction.

Particular categories of offender specified in national legislation (for example, minors, the mentally ill) may not be subject to prosecution, being regarded as not responsible for their actions.

Offenders prosecuted may escape conviction for other reasons (act arising from necessity, for example).

The State may nonetheless make reparation, even in respect of these acts, if compensation is not fully available from other sources.

Article 3

22. This article regulates international aspects of the compensation of victims of violent crimes.

23. Like Resolution (77) 27 before it, the Convention recognises the principle of "territoriality": compensation is payable by the State in whose territory the offence is committed.

Where different parts of a crime are committed in different States, compensation shall be paid by the State in which the victim or his dependants are permanently resident, provided part of the offence is committed in the territory of this State.

The Convention does not provide for compensation of nationals who fall victim to violent crimes while abroad, but there is nothing to prevent the Parties from recognising the nationality principle in certain cases.

24. Compensation of foreign victims of violent crimes on the same basis as nationals - already provided for in some of the Council of Europe's member States - seems necessary for the following main reasons:

- solidarity and equity demand that, on certain conditions, the State contribute to the compensation of other victims in its territory and not just its own nationals;
- foreigners often contribute to a country's economic and social development (for example, as migrant workers); consequently, they are entitled to the same advantages as nationals.

25. The Convention specifies categories of foreigners to be entitled to compensation:

a. Nationals of Parties to the Convention.

This provision complies with the principle of reciprocity.

b. Nationals of any Council of Europe member State who are permanently resident in the State in whose territory the offence is committed.

The main purpose of this provision, a departure from the principle of reciprocity, Is to protect migrant workers, a lower-income group which nonetheless contributes to the receiving country's economy and ought not to be penalised where the State of origin is still unable to ratify the Convention.

Compensation of all foreign victims of crime without a reciprocity requirement was also recommended by the 11th International Congress on Penal Law (Budapest, 1974, Conclusions, item A. 7).

26. The concept of permanent residence must be construed in the light of Committee of Ministers Resolution (72) 1 on the standardisation of the legal concepts of "domicile" and of "residence".

27. Though the Convention lays down minimum provisions, this need not prevent Contracting States from compensating:

- nationals of any State (and not just nationals of Council of Europe member States) who are permanently resident in their territory;
- all foreigners (which would enable tourists to be compensated).

Article 4

28. This article specifies as minimum requirements items for which reasonable compensation shall be paid, when the loss is verified in a particular case. These are the following:

- loss of earnings (for example, as a result of immobilisation through injury);
- medical expenses (which may include prescription charges and the cost of dental treatment);
- hospital fees;
- funeral expenses;
- in the case of dependants (children, spouse, etc.), loss of maintenance.

Other possible items, subject to the provisions of national legislation, are, in particular:

- pain and suffering (*pretium doloris*);
- loss of expectation of life;
- additional expenses arising from disablement caused by an offence.

Compensation of these items is to be calculated by the State paying the compensation according to the scales normally applied for social security or private insurance or according to normal practice under civil law.

Article 5

29. This allows the setting of:

- An upper limit to compensation.

As the public funds earmarked for the compensation of victims of violent crimes are not unlimited, a ceiling on such compensation may be necessary in certain circumstances.

– A minimum threshold below which compensation is not payable.

In line with the principle of *de minimis non curat praetor*, this provision narrows the scope of the Convention to exclude minor damage the victim can readily make good.

30. The Convention obviously cannot set rigidly quantified limits, since resources and living standards vary from State to State. These differences will mean that the sum awarded in compensation by different States will vary, and this will be particularly noticeable where foreign victims are compensated. In such cases, it is desirable that due regard should be had to the standard of living in the country where the victim habitually resides. Limits are to be set with particular reference to:

– administrative constraints (for example individual States' resources),

– financial factors (for example, wages, medical or hospital fees, etc.).

These limits may apply either to the total amount of compensation in a particular case or to the Individual elements of compensation, for example for loss of earnings or pain and suffering.

Article 6

31. Applications for compensation of a victim or, if he has died, of his dependants, should be made within a period of time to be laid down by each State according to its own customary practice.

An application must be made as soon as possible after the crime has been committed, so that:

– the victim may be assisted if in physical and psychological distress;

– the damage may be ascertained and assessed without untoward difficulty.

Article 7

32. Since compensation of the victim from public funds is an act of social solidarity, it may be unnecessary where the victim or his dependants are plainly comfortably off. In such a case, the State may reduce or even withhold its contribution to compensation of the victim without being regarded as discriminating unfairly against a section of the population. However, this provision must not be construed as precluding State compensation where no hardship exists.

Nor need it prevent States from paying compensation regardless of the victim's or his dependants' financial position (on the same basis as war disablement pensions, for example).

Article 8

33. Whereas Article 7 contains an objective criterion for reducing or withholding compensation, Article 8 allows compensation to be reduced or withheld where the victim is at fault.

34. a. *Improper behaviour of the victim in relation to the crime or to the damage suffered*

There is frequent evidence of a degree of interaction between the victim's behaviour and the offender's. The first paragraph of Article 8 refers to cases where the victim triggers the crime, for example by behaving exceptionally provocatively or aggressively, or causes worse violence through criminal retaliation, as well as to cases where the victim by his behaviour contributes to the causation or aggravation of the damage (for example by unreasonably refusing medical treatment).

Refusal to report the offence to the police or to co-operate with the administration of justice may also give grounds for reducing or withholding compensation.

35. b. *Membership of criminal gangs or of organisations which commit acts of violence*

Where the victim belongs to the world of organised crime (for example drug trafficking) or of organisations which commit acts of violence (for example terrorist organisations), he may be regarded as forfeiting the sympathy or solidarity of society as a whole. As a consequence, the victim may be refused compensation or be paid reduced compensation, even if the crime which caused the damage was not directly related to the foregoing activities.

36. c. *Compensation repugnant to the sense of justice or contrary to public policy* (ordre public)

States which introduce compensation schemes usually want to retain some discretion in awarding compensation and to be able to refuse it in certain cases where it is clear that a gesture of solidarity would be contrary to public feeling or interests or would be contrary to the basic principles of the legislation of the State concerned. This being so, a known criminal who was the victim of a crime of violence could be refused compensation even if the crime in question was unrelated to his criminal activities.

37. The principles justifying the withholding or reduction of compensation are valid not only in respect of a victim in person but also in relation to dependants of a victim who has died as a result of a violent crime.

Article 9

38. To avoid double compensation, compensation already received from the offender or other sources maybe deducted from the amount of compensation payable from public funds.

It is for the Parties to specify which sums are so deductible. In some of the member States, for instance, sums paid to the victim under private insurance schemes are not generally deductible from compensation.

39. A State may require any compensation the victim receives from the offender or other sources after being compensated from public funds to be repaid in full or in part (depending on the sum received) to the State or the authority paying compensation from public funds.

This eventuality is liable to arise, for example, where:

- a victim suffering hardship receives State compensation pending decision of an action brought against an offender or agency;
- the offender, unknown at the time of compensation from public funds, is subsequently traced and convicted, and has fully or partly made reparation to the victim.

40. Informing the compensating authority of subsequent compensation awards poses obvious problems. In some States, the courts inform the compensating authority of awards made to the victim, thus facilitating restitution of the sums allowed by the compensating authority.

Article 10

41. Where the victim or his dependants receive compensation from public funds, their rights against the offender or other sources of compensation (social security, etc.) may, if the domestic law so provides, pass to the State or the compensating authority, which may then take action to obtain reimbursement on that basis.

Article 11

42. In States with schemes for paying compensation from public funds, it has often been found that they are rarely used. This is mainly due to public ignorance of the existence of compensation schemes and brings home the need to publicise them better.

The main responsibility for informing the victim of his compensation rights should lie with the authorities and agencies dealing with him immediately after the offence (the police, hospitals, the examining judge, the public prosecutor's office, etc.). Information, specially published by the competent authorities, should be available to such agencies who should distribute this, whenever practicable, to the persons concerned.

The mass media (press, radio, television) could also help publicise such arrangements.

PART II – INTERNATIONAL CO-OPERATION

Article 12

43. Various matters relating to the implementation of the Convention may necessitate co-operation between the Parties, particularly:

- information about compensation available to a foreign victim in his country of origin;
- facilities whereby a State which compensates a victim can seek reimbursement from the offender resident abroad (or from a foreign agency, such as a social security authority);
- information from medical authorities or employers.

44. International co-operation here may be helped by Council of Europe conventions, particularly the European Convention on Mutual Assistance in Criminal Matters and its Protocol and the European Convention on the Obtaining Abroad of Information and Evidence in Administrative Matters, and by bilateral and multilateral agreements concluded by the Contracting Parties.

45. As well as recommending that the Contracting Parties assist one another in all matters covered by the Convention, Article 12 also requires that, when depositing its instrument of ratification, acceptance, approval or accession, each State designate a central authority to receive and take action on requests for assistance. This will not prevent a State, with more than one compensation scheme, from designating more than one such authority.

Article 13

46. This article indicates that the European Committee on Crime Problems must be kept informed of the application of the Convention.

47. To this end, the Parties accept the obligation to transmit periodically to the Secretary General of the Council of Europe information about new legislation or regulations on compensation schemes; by this is meant provisions introducing methods of operation for these schemes which are of some interest and not merely internal administrative regulations.

48. This information will:

a. help the CDPC to collect sufficient documentation for making available to member States who request it (member States who envisage introducing a compensation scheme, for example); and

b. enable the CDPC to identify any difficulties arising from the application of the Convention and see whether it is necessary to hold meetings to solve such problems or whether protocols to the Convention need to be drawn up.

PART III – FINAL CLAUSES

Articles 14-20

49. These articles are inspired by the final clauses usual in European conventions.

European Convention on offences relating to cultural property – ETS No. 119

Delphi, 23.VI.1985

The member States of the Council of Europe, signatory hereto,

Considering that the aim of the Council of Europe is to achieve a greater unity between its members;

Believing that such unity is founded to a considerable extent in the existence of a European cultural heritage;

Conscious of the social and economic value of that common heritage;

Desirous of putting an end to the offences that too often affect that heritage and urgently adopting international standards to this end;

Recognising their common responsibility and solidarity in the protection of the European cultural heritage;

Having regard to the European Conventions in the criminal and cultural fields,

Have agreed as follows:

PART I – DEFINITIONS

Article 1

For the purposes of this Convention:

a. "offence" comprises acts dealt with under the criminal law and those dealt with under the legal provisions listed in Appendix I to this Convention on condition that where an administrative authority is competent to deal with the offence it must be possible for the person concerned to have the case tried by a court;

b. "proceedings" means any procedure instituted in respect of an offence;

c. "judgment" means any final decision delivered by a criminal court or by an administrative body as a result of a procedure instituted in pursuance of one of the legal provisions listed in Appendix I;

d. "sanction" means any punishment or measure incurred or pronounced in respect of an offence.

PART II – SCOPE

Article 2

1. This Convention shall apply to the cultural property listed in Appendix II, paragraph 1.

2. Any Contracting State may, at any time, declare that for the purposes of this Convention it also considers any one or more of the categories of property listed in Appendix II, paragraph 2, as cultural property.

3. Any Contracting State may, at any time, declare that for the purposes of this Convention it also considers as cultural property any category of movable or immovable property, presenting an artistic, historical, archaeological, scientific or other cultural interest, that is not included in Appendix II.

Article 3

1. For the purposes of this Convention, the acts and omissions listed in Appendix III, paragraph 1, are offences relating to cultural property.

2. Any Contracting State may, at any time, declare that, for the purposes of this Convention, it also deems to be offences relating to cultural property the acts and omissions listed in any one or more sub-paragraphs of Appendix III, paragraph 2.

3. Any Contracting State may, at any time, declare that, for the purposes of this Convention, it also deems to be offences relating to cultural property any one or more acts and omissions that affect cultural property and are not listed in Appendix III.

PART III – PROTECTION OF CULTURAL PROPERTY

Article 4

Each Party shall take appropriate measures to enhance public awareness of the need to protect cultural property.

Article 5

The Parties shall take appropriate measures with a view to co-operating in the prevention of offences relating to cultural property and the discovery of cultural property removed subsequent to such offences.

PART IV – RESTITUTION OF CULTURAL PROPERTY

Article 6

The Parties undertake to co-operate with a view to the restitution of cultural property found on their territory, which has been removed from the territory of another Party subsequent to an offence relating to cultural property committed in the territory of a Party, notably in conformity with the provisions that follow.

Article 7

1. Any Party that is competent under Article 13 shall, if it thinks fit, notify as soon as possible the Party or Parties to whose territory cultural property has been removed, or is believed to have been removed, subsequent to an offence relating to cultural property.

2. Any Party from whose territory cultural property has been removed, or is believed to have been removed, subsequent to an offence relating to cultural property, shall notify as soon as possible the Party that is competent in accordance with Article 13, paragraph 1, sub-paragraph e.

3. If such cultural property is found on the territory of a Party which has been duly notified, that Party shall immediately inform the Party or Parties concerned.

4. If cultural property is found on the territory of a Party and if that Party has reasonable grounds to believe that the property in question has been removed from the territory of another Party subsequent to an offence relating to cultural property, it shall immediately inform the other Party or Parties presumed to be concerned.

5. The communications referred to in the preceding paragraphs shall contain all information concerning the identification of the property in question, the offence subsequent to which it was removed and the circumstances concerning the discovery.

6. The Parties shall ensure the fullest possible distribution of the notifications which they receive pursuant to the provisions of paragraph 1.

Article 8

1. Each Party shall execute in the manner provided for by its law any letters rogatory relating to proceedings addressed to it by the competent authorities of a Party that is competent in accordance with Article 13 for the purpose of procuring evidence or transmitting articles to be produced in evidence, records or documents.

2. Each Party shall execute in the manner provided for by its law any letters rogatory relating to proceedings addressed to it by the competent authorities of a Party that is competent in accordance with Article 13 for the purpose of seizure and restitution of cultural property which has been removed to the territory of the requested Party subsequent to an offence relating to cultural property. Restitution of the property in question is however subject to the conditions laid down in the law of the requested Party.

3. Each Party shall likewise execute any letters rogatory relating to the enforcement of judgments delivered by the competent authorities of the requesting Party in respect of an offence relating to cultural property for the purpose of seizure and restitution of cultural property found on the territory of the requested Party to the person designated by the judgment or that person's successors in title. To this end the Parties shall take such legislative measures as they may consider necessary and shall determine the conditions under which such letters rogatory are executed.

4. Where there is a request for extradition, the return of the cultural property mentioned in paragraphs 2 and 3 shall take place even if extradition, having been agreed to, cannot be carried out owing to the death or escape of the person claimed or to other reasons of fact.

5. The requested Party may not refuse to return the cultural property on the grounds that it has seized, confiscated or otherwise acquired rights to the property in question as the result of a fiscal or customs offence committed in respect of that property.

Article 9

1. Unless the Parties otherwise agree, letters rogatory shall be in the language of the requested Party, or in the official language of the Council of Europe that is indicated by the requested Party in a declaration addressed to the Secretary General of the Council of Europe, or where no such declaration has been made in either of the official languages of the Council of Europe.

2. They shall indicate:

   a. the authority making the request,

   b. the object of and the reason for the request,

   c. the identity of the person concerned,

   d. the detailed identification of the cultural property in question,

   e. a summary of the facts as well as the offence they constitute and shall be accompanied by an authenticated or certified copy of the judgment whose enforcement is requested, in the cases covered by Article 8, paragraph 3.

Article 10

Evidence or documents transmitted pursuant to this Convention shall not require any form of authentication.

Article 11

Execution of requests under this Convention shall not entail refunding of expenses except those incurred by the attendance of experts and the return of cultural property.

PART V – PROCEEDINGS

Section I – Sanctioning

Article 12

The Parties acknowledge the gravity of any act or omission that affects cultural property; they shall accordingly take the necessary measures for adequate sanctioning.

Section II – Jurisdiction

Article 13

1. Each Party shall take the necessary measures in order to establish its competence to prosecute any offence relating to cultural property:

   a. committed on its territory, including its internal and territorial waters, or in its airspace;

   b. committed on board a ship or an aircraft registered in it;

   c. committed outside its territory by one of its nationals;

   d. committed outside its territory by a person having his/her habitual residence on its territory;

   e. committed outside its territory when the cultural property against which that offence was directed belongs to the said Party or one of its nationals;

   f. committed outside its territory when it was directed against cultural property originally found within its territory.

2. In the cases referred to in paragraph 1, sub-paragraphs d and f, a Party shall not be competent to institute proceedings in respect of an offence relating to cultural property committed outside its territory unless the suspected person is on its territory.

Section III – Plurality of proceedings

Article 14

1. Any Party which, before the institution or in the course of proceedings for an offence relating to cultural property, is aware of proceedings pending in another Party against the same person in respect of the same offence shall consider whether it can either waive or suspend its own proceedings.

2. If such Party considers it opportune in the circumstances not to waive or suspend its own proceedings it shall so notify the other Party in good time and in any event before judgment is given on the substance of the case.

Article 15

1. In the eventuality referred to in Article 14, paragraph 2, the Parties concerned shall through consultation endeavour as far as possible to determine, after evaluation of the circumstances of each case notably with a view to facilitating the restitution of the cultural property, which of them alone shall continue to conduct proceedings. During this consultation the Parties concerned shall stay judgment on the substance without however being obliged to extend that stay beyond a period of 30 days as from the despatch of the notification provided for in Article 14, paragraph 2.

2. The provisions of paragraph 1 shall not be binding:

   a. on a Party which despatches the notification provided for in Article 14, paragraph 2, if the main trial has been declared open there in the presence of the accused before despatch of the notification;

   b. on a Party to which the notification is addressed, if the main trial has been declared open there in the presence of the accused before receipt of the notification.

Article 16

In the interests of arriving at the truth, the restitution of the cultural property and the application of an adequate sanction, the Parties concerned shall examine whether it is expedient that one of them alone shall conduct proceedings and, if so, endeavour to determine which one, when:

   a. several offences relating to cultural property which are materially distinct are ascribed either to a single person or to several persons having acted in unison;

   b. a single offence relating to cultural property is ascribed to several persons having acted in unison.

Section IV – *Ne bis in idem*

Article 17

1. A person in respect of whom a final and enforceable judgment has been rendered may for the same act neither be prosecuted nor sentenced nor subjected to enforcement of a sanction in another Party:

a. if he was acquitted;

b. if the sanction imposed:

i. has been completely enforced or is being enforced, or

ii. has been wholly, or with respect to the part not enforced, the subject of a pardon or an amnesty, or

iii. can no longer be enforced owing to the expiry of a limitation period;

c. if the court found the offender guilty without imposing a sanction.

2. Nevertheless, a Party shall not, unless it has itself requested the proceedings, be obliged to recognise the *ne bis in idem* rule if the act which gave rise to judgment as directed against either a person or an institution or any thing having public status in that Party, or if the subject of the judgment had itself a public status in that Party.

3. Furthermore, a Party in whose territory the act was committed or considered to have been committed under the law of that Party shall not be obliged to recognise the *ne bis in idem* rule unless that Party has itself requested the proceedings.

Article 18

If new proceedings are instituted against a person who has been sentenced in another Party for the same act, then any period of deprivation of liberty imposed in the execution of that sentence shall be deducted from any sanction which may be imposed.

Article 19

This section shall not prevent the application of wider domestic provisions relating to the *ne bis in idem* rule attached to judicial decisions.

PART VI – FINAL CLAUSES

Article 20

This Convention shall be open for signature by the member States of the Council of Europe. It is subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

Article 21

1. This Convention shall enter into force on the first day of the month following the expiration of a period of one month after the date on which three member States of the Council of Europe have expressed their consent to be bound by the Convention in accordance with the provisions of Article 20.

2. In respect of any member State which subsequently expresses its consent to be bound by it the Convention shall enter into force on the first day of the month following the expiration of a period of one month after the date of deposit of the instrument of ratification, acceptance or approval.

Article 22

1. After the entry into force of this Convention, the Committee of Ministers of the Council of Europe may invite any State not a member of the Council to accede to this Convention, by a decision taken by the majority provided for in Article 20.d of the Statute of the Council of Europe and by the unanimous vote of the representatives of the Contracting States entitled to sit on the Committee.

2. In respect of any acceding State, the Convention shall enter into force on the first day of the month following the expiration of a period of one month after the date of deposit of the instrument of accession with the Secretary General of the Council of Europe.

Article 23

No Party is bound to apply this Convention to the offences relating to cultural property committed before the date of entry into force of the Convention in respect of that Party.

Article 24

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 Convention shall apply.

2. Any State may at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Convention to any other territory specified in the declaration. In respect of such territory the Convention shall enter into force on the first day of the month following the expiration of a period of one month 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 six months after the date of receipt of such notification by the Secretary General.

Article 25

The following provisions shall apply to those States Parties to this Convention which have a federal or non-unitary constitutional system:

a. with regard to the provisions of this Convention, the implementation of which comes under the legal jurisdiction of the federal or central legislative power, the obligations of the federal or central government shall be the same as for those States Parties which are not federal or non-unitary States;

b. with regard to the provisions of this Convention, the implementation of which comes under the legal jurisdiction of individual constituent States, countries, provinces or cantons that are not obliged by the constitutional system of the federation to take legislative measures, the federal government shall inform the competent authorities of such States, countries, provinces or cantons of the said provisions with its favourable opinion.

Article 26

In no case may a Party claim application of this Convention by another Party save in so far as it would itself apply this Convention in similar cases.

Article 27

Any Party may decide not to apply the provisions of Articles 7 and 8 either where the request is in respect of offences that it regards as political or where it considers that the application is likely to prejudice its sovereignty, security or "*ordre public*".

Article 28

1. 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 apply any one or more provisions of Articles 8, paragraph 3, 10, 13 and 18. No other reservation may be made.

2. Any State 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.

Article 29

1. Any Contracting State may, at any time, by declaration addressed to the Secretary General of the Council of Europe, set out the legal provisions to be included in Appendix I to this Convention.

2. Any change of the national provisions listed in Appendix I shall be notified to the Secretary General of the Council of Europe if such a change renders the information in this appendix incorrect.

3. Any changes made in Appendix I in application of the preceding paragraphs shall take effect in each Party on the first day of the month following the expiration of a period of one month after the date of their notification by the Secretary General of the Council of Europe.

Article 30

The declarations provided for in Articles 2 and 3 shall be addressed to the Secretary General of the Council of Europe. They shall become effective in respect of each Party on the first day of the month following the expiration of a period of one month after the date of their notification by the Secretary General of the Council of Europe.

Article 31

The European Committee on Crime Problems of the Council of Europe shall follow the application of this Convention and shall do whatever is needed to facilitate a friendly settlement of any difficulty which may arise out of its execution.

Article 32

1. The European Committee on Crime Problems may formulate and submit to the Committee of Ministers of the Council of Europe proposals designed to alter the contents of Appendices II and III or their paragraphs.

2. Any proposal submitted in accordance with the provisions of the preceding paragraph shall be examined by the Committee of Ministers which, by a decision taken by the majority provided for in Article 20.d of the Statute of the Council of Europe and by the unanimous vote of the representatives of the Contracting States entitled to sit on the Committee, may approve it and instruct the Secretary General of the Council of Europe to notify the Contracting States thereof.

3. Any alteration approved in accordance with the provisions of the preceding paragraph shall enter into force on the first day of the month following the expiration of a period of six months after the date of despatch of the notification provided for in that paragraph unless a Contracting State notifies an objection to the entry into force. In the event of such an objection being made, the alteration will only enter force if the objection is subsequently lifted.

Article 33

1. The notifications and information provided for in Article 7 shall be exchanged between the competent authorities of the Parties. However, they may be sent through the International Criminal Police Organisation – Interpol.

2. The requests provided for in this Convention and any communication made under the provisions of Part V, Section III, shall be addressed by the competent authority of a Party to the competent authority of another Party.

3. Any Contracting State may, by a declaration addressed to the Secretary General of the Council of Europe, designate which authorities will be its competent authorities within the meaning of this article. Where such declaration is not made the Ministry of Justice of the State in question will be deemed to be its competent authority.

Article 34

1. Nothing in this Convention shall prejudice the application of the provisions of any other international treaties or conventions in force between two or more Parties on the matters dealt with in this Convention provided that the said provisions are more compelling with respect to the duty to restitute cultural property affected by an offence.

2. The Parties may not conclude bilateral or multilateral agreements with one another on the matters dealt with in this Convention, except in order to supplement its provisions or facilitate the application of the principles embodied in it.

3. However, if two or more Parties have already established their relations in this matter on the basis of uniform legislation, or instituted a special system of their own, or should they in the future do so, they shall be entitled to regulate those relations accordingly, notwithstanding the terms of this Convention.

4. Parties ceasing to apply the terms of this Convention to their mutual relations in accordance with the provisions of the preceding paragraph shall notify the Secretary General of the Council of Europe to that effect.

Article 35

1. Any Party may at any time denounce this Convention 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 six months after the date of receipt of the notification by the Secretary General.

Article 36

The Secretary General of the Council of Europe shall notify the member States of the Council and any State which has acceded to this Convention 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 Convention in accordance with Articles 21 and 22;

d. any other act, notification or communication relating to this Convention.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at Delphi, this 23rd day of June 1985, in English and 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.

APPENDIX I

List of legal provisions that provide for offences other than offences dealt with under criminal law

No declaration has been received pursuant to Article 29.

APPENDIX II

1. a products of archaeological exploration and excavations (including regular and clandestine) conducted on land and underwater;

b. elements of artistic or historical monuments or archaeological sites which have been dismembered;

c. pictures, paintings and drawings produced entirely by hand on any support and in any material which are of great importance from an artistic, historical, archaeological, scientific or otherwise cultural point of view;

d. original works of statuary art and sculpture in any material which are of great importance from an artistic, historical, archaeological, scientific or otherwise cultural point of view and items resulting from the dismemberment of such works;

e. original engravings, prints, lithographs and photographs which are of great importance from an artistic, historical, archaeological, scientific or otherwise cultural point of view;

f. tools, pottery, inscriptions, coins, seals, jewellery, weapons and funerary remains, including mummies, more than one hundred years old;

g. articles of furniture, tapestries, carpets and dress more than one hundred years old;

h. musical instruments more than one hundred years old;

i. rare manuscripts and incunabula, singly or in collections.

2. a original artistic assemblages and montages in any material which are of great importance from an artistic, historical, archaeological, scientific or otherwise cultural point of view;

b. works of applied art in such materials as glass, ceramics, metal, wood, etc. which are of great importance from an artistic, historical, archaeological, scientific or otherwise cultural point of view;

c. old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections;

d. archives, including textual records, maps and other cartographic materials, photographs, cinematographic films, sound recordings and machine-readable records which are of great importance from an artistic, historical, archaeological, scientific or otherwise cultural point of view;

e. property relating to history, including the history of science and technology and military and social history;

f. property relating to life of national leaders, thinkers, scientists and artists;

g. property relating to events of national importance;

h. rare collections and specimens of fauna;

i. rare collections and specimens of flora;

j. rare collections and specimens of minerals;

k. rare collections and specimens of anatomy;

l. property of paleontological interest;

m. material of anthropological interest;

n. property of ethnological interest;

o. property of philatelic interest;

p. rare property of numismatic interest (medals and coins);

q. all remains and objects, or any other traces of human existence, which bear witness to epochs and civilisations for which excavations or discoveries are the main source or one of the main sources of scientific information;

r. monuments of architecture, art or history;

s. archaeological and historic or scientific sites of importance, structures or other features of important historic, scientific, artistic or architectural value, whether religious or secular, including groups of traditional structures, historic quarters in urban or rural built-up areas and the ethnological structures of previous cultures still existent in valid form.

APPENDIX III

1. a Thefts of cultural property.

b. Appropriating cultural property with violence or menace.

c. Receiving of cultural property where the original offence is listed in this paragraph and regardless of the place where the latter was committed.

2. a Acts which consist of illegally appropriating the cultural property of another person, whether such acts be classed by national law as misappropriation, fraud, breach of trust or otherwise.

b. Handling cultural property obtained as the result of an offence against property other than theft.

c. The acquisition in a grossly negligent manner of cultural property obtained as the result of theft or of an offence against property other than theft.

d. Destruction or damaging of cultural property of another person.

e. Any understanding followed by overt acts, between two or more persons, with a view to committing any of the offences referred to in paragraph 1 of this appendix.

f. i. alienation of cultural property which is inalienable according to the law of a Party;

ii. acquisition of such property as referred to under i, if the person who acquires it acts knowing that the property is inalienable;

iii. alienation of cultural property in violation of the legal provisions of a Party which make alienation of such property conditional on prior authorisation by the competent authorities;

iv. acquisition of such property as referred to under iii, if the person who acquires it acts knowing that the property is alienated in violation of the legal provisions referred to under iii;

v. violation of the legal provisions of a Party according to which the person who alienates or acquires cultural property is held to notify the competent authorities of such alienation or acquisition.

g. i. violation of the legal provisions of a Party according to which the person who fortuitously discovers archaeological property is held to declare such property to the competent authorities;

ii. concealment or alienation of such property as referred to under i;

iii. acquisition of such property as referred to under i, if the person who acquires it acts knowing that the property was obtained in violation of the legal provisions referred to under i;

iv. violation of the legal provisions of a Party according to which archaeological excavations may only be carried out with the authorisation of the competent authorities;

v. concealment or alienation of archaeological property discovered as a result of excavations carried out in violation of the legal provisions referred to under iv;

vi. acquisition of archaeological property discovered as a result of excavations carried out in violation of the legal provisions referred to under iv, if the person who acquires it acts knowing that the property was obtained as a result of such excavations;

vii. violation of the legal provisions of a Party, or of an excavation licence issued by the competent authorities, according to which the person who discovers archaeological property as a result of duly authorised excavations is held to declare such property to the competent authorities;

viii. concealment or alienation of such property as referred to under vii;

ix. acquisition of such property as referred to under vii, if the person who acquires it acts knowing that the property was obtained in violation of the legal provisions referred to under vii;

x. violation of the legal provisions of a Party according to which the use of metal detectors in archaeological contexts is either prohibited or subject to conditions.

h. i. actual or attempted exportation of cultural property the exportation of which is prohibited by the law of a Party;

ii. exportation or attempted exportation, without authorisation of the competent authorities, of cultural property the exportation of which is made conditional on such an authorisation by the law of a Party.

i. Violation of the legal provisions of a Party:

i. which make modifications to a protected monument of architecture, a protected movable monument, a protected monumental ensemble or a protected site, conditional on prior authorisation by the competent authorities, or

ii. according to which the owner or the possessor of a protected monument of architecture, a protected movable monument, a protected monumental ensemble or a protected site, is held to preserve it in adequate condition or to give notice of defects which endanger its preservation.

j. Receiving of cultural property where the original offence is listed in this paragraph and regardless of the place where the latter was committed.

European Convention on offences relating to cultural property – ETS No. 119

Explanatory Report

I. The European Convention on Offences relating to Cultural Property drawn up within the Council of Europe by a committee of governmental experts under the authority of the European Committee on Crime Problems, was opened for signature by the member states of the Council of Europe on 23 June 1985.

II. The text of the explanatory report prepared by the committee of experts and transmitted to the Committee of Ministers of the Council of Europe does not constitute an instrument providing an authoritative interpretation of the text of the Convention although it may facilitate the understanding of the Convention's provisions.

INTRODUCTION

1. Background

Cultural property in museums, in churches, in private collections, on archaeological sites, has become, these last few years, the victim of unprecedented pillage, theft and destruction. An organised underground brings the loot to market, usually in a country other than the one from where it comes. This situation is serious for all member states of the Council of Europe since it puts at risk the common cultural heritage of Europe.

Action in this field is the realisation of the programme established in the European Cultural Convention (ETS 18), Article 5 of which is worded as follows: «Each Contracting Party shall regard the objects of European cultural value placed under its control as integral parts of the common cultural heritage of Europe, shall take appropriate measures to safeguard them and shall ensure reasonable access thereto». There is in this article a statement of principle and two undertakings which were subscribed to by each and every member state of the Council of Europe (plus Finland and the Holy See) in ratifying this Convention. The principle is that there exists a common cultural heritage of Europe. The undertakings are:

a. to regard the objects of European cultural value placed under the control of each state as integral parts of that common cultural heritage of Europe, and

b. to take appropriate measures to safeguard them.

In view of this situation but conscious that action had already been taken by other international organisations, the European Committee on Crime Problems (CDPC) charged Professor B. de Schutter (Belgium) to prepare a report on lacunae in international co-operation with a view to the punishment of the theft of works of art and similar attacks on the cultural heritage.

2. Terms of reference of the Select Committee

At its 26th plenary session in 1977 the CDPC, following the conclusions of Professor de Schutter's report, decided to set up a Select Committee of Experts on International Co-operation in the Field of Offences relating to Works of Art (PC-R-OA) and gave it the following terms of reference:

«Consideration should be given to the establishment of legal standards for the international protection of works of art, namely:

– definition of the different offences against the artistic heritage;

- prevention of such offences;

- establishment of provisions governing competence (that is, supplementary application of the universality principle, whereby the court of the place where the offender is found is competent to hear the case, irrespective of the place of commission and of the nationality of the offender or his victim); and their implementation;

- application in this field of the four European conventions concerning criminal law - the European Convention on Extradition (CETS 24), the European Convention on Mutual Assistance in Criminal Matters (CETS 30), the European Convention on the International Validity of Criminal Judgments (CETS 70) and the European Convention on the Transfer of Proceedings in Criminal Matters (CETS 73);

- settlement of problems inherent in the concept of *'bona fide* owner', transnational restitution and prescription.»

Professor J. Chatelain (France) was appointed Chairman of the Select Committee and secretariat duties were carried out by the Division of Crime Problems of the Directorate of Legal Affairs of the Council of Europe.

3. Working methods of the Select Committee

The Committee prepared questionnaires on national legislation and practice and statistics pertaining to the matter under consideration. On the basis of the replies thereto received from national administrations of member states, Mr S. Dockx (Belgium) prepared extensive reports which were examined by the Committee. The Committee also gave careful examination to the European Conventions on Extradition, Mutual Assistance in Criminal Matters, International Validity of Criminal Judgments, and the Transfer of Proceedings in Criminal Matters as well as to the different Unesco instruments with a bearing on this topic. On the basis of such studies and of the discussions in its midst, the Committee finally prepared the draft Convention.

4. Adoption of the draft Convention

Once examined and approved by the CDPC at its 33rd plenary session, the draft Convention was submitted to the Committee of Ministers which in its turn adopted it at the 379th meeting of the Ministers' Deputies.

The Convention was opened for signature by member states on 23 June 1985 in Delphi.

GENERAL OBSERVATIONS

5. The paramount aim of this Convention is to afford protection to cultural property against a major danger that presently threatens it: crime. The underlying assumption is that cultural property, whether placed under the control of one or another member state of the Council of Europe, is an integral part of the common cultural heritage of Europe and therefore its protection should be jointly assumed by all. Because cultural property, both in quality and quantity, is unevenly distributed geographically, solidarity is the corner-stone to this approach.

6. The Parties undertake to take measures to enhance public awareness of the need to protect cultural property, to co-operate with a view to the prevention of offences against cultural property, to acknowledge the gravity of any act that affects cultural property, to penalise such acts adequately, to establish their competence to prosecute offences relating to cultural property in terms larger than usual. However, the central part of the Convention provides legal rules for international co-operation with a view to the discovery of cultural property removed as the result of an offence and its restitution to its lawful possessor in the state from where it was removed.

7. The implementation of such rules is therefore dependent on the previous commission of an offence with international implications. Their implementation, therefore, may be called for alongside rules provided in other Conventions, namely the four above-mentioned European Conventions on penal matters. Indeed, the provisions of the present Convention were designed in such a way as not to supersede or contradict the provisions of the other four Conventions, but rather to supplement them. Moreover, the layout of this Convention and the language of its articles follow closely the other four Conventions.

COMMENTARIES ON THE ARTICLES OF THE CONVENTION

PART I – DEFINITIONS

Part I contains one article giving definitions of four terms frequently used in the Convention, namely «offence», «proceedings», «judgment» and «sanction».

Article 1

a. The definition of «offence» is drawn from the definition contained in Article 1 of the European Convention on the International Validity of Criminal Judgments (1970) (CETS 70) and the European Convention on the Transfer of Proceedings in Criminal Matters (1972) (CETS 73). The definition is commented as follows in the Explanatory report on the latter Convention:

«any act which is punishable under criminal law. The term is, however, extended to cover also behaviour which is not primarily within the competence of the judicial authorities, but dealt with by simplified procedure by an administrative authority whose decision is subject to appeal to a judicial authority. Such a system is used in some member states and the relevant provisions in national law are listed in Appendix I to the Convention.

The words 'tried by a court' include appeals involving a full rehearing of the case by a court as to the facts and as to the law. The word 'court' refers to administrative tribunals at all levels on condition that these institutions are independent and that they give the offender the possibility to defend himself.»

It goes without saying that the word «court» also refers to criminal courts.

b. In line with the above definition of «offence», the term «proceedings» refers to both criminal and administrative procedures. It excludes civil procedures.

c. «Judgment» is defined as a criminal judgment or a final decision, delivered by an administrative body as a result of a procedure in accordance with any of the legal provisions listed in Appendix I.

d. The definition of «sanction» is drafted as the model of the definition contained in Article 1 of the European Convention on the Transfer of Proceedings in Criminal Matters. it makes it clear that the term comprises any punishment, any repressive measures which are not legally speaking of a penal nature, as well as detention orders.

PART II – SCOPE

Articles 2 and 3

Part II (Articles 2 and 3) contains provisions that define the field of application of the Convention by way of reference to the cultural property which it aims at protecting (Article 2) and the offences relating to that property which it purprots to combat (Article 3).

The specification of the categories of cultural property and the offences which fall within the scope of the Convention is achieved by way of enumerations. In fact, Appendices II and III to the Convention each contains a list. These lists are subdivided into two sections, the first of which is a shortlist defining the core of the Convention: that is to say that the first section of both Appendices II and III enumerates the categories of property and of offences in respect of which the implementation of the Convention is mandatory. This core of the Convention was intentionally reduced to a minimum in order to ensure that a large number of states could accept it.

However, the scope of application of the Convention may be unilaterally enlarged so as to include one or more of the categories of property and/or offences listed in section 2 of Appendices II and III provided that the contracting state makes a declaration under Article 2, paragraph 2, and/or Article 3, paragraph 2. It may, furthermore, be enlarged to include categories of property and/or offences not listed in the appendices by way of a declaration under Article 2, paragraph 3 and/ or Article 3, paragraph 3. The rule of reciprocity is applicable in both these instances (see comments on Article 26).

Procedural rules concerning the declarations provided for in this part are laid down in Article 30.

The items listed in Appendix II concern private as well as public and movable as well as immovable property. The drafting is largely inspired by Article 1 of the Unesco Convention on the means of prohibiting and preventing the illicit import, export and transfer of ownership of cultural property (Paris, 14 November 1970) and

Article 1.a of the Unesco Recommendation for the protection of movable cultural property (Paris, 28 November 1978).

The appreciation of the nature and cultural interest of the categories of property in respect of which a declaration may be made under paragraph 3 is left to each Party.

PART III – PROTECTION OF CULTURAL PROPERTY

Article 4

The draftsmen judged that the best protection that can be afforded to cultural property should come from the community. Indeed public co-operation is indispensable to protect public cultural property while public opinion should be involved in scrutinising the effectiveness of the means used to protect such property. Moreover, private owners should be made aware of their responsibility in protecting the cultural property that they keep.

Article 5

Under this article, the Parties give an open-ended undertaking to co-operate with each other with a view to

a. preventing offences relating to cultural property and

b. discovering cultural property removed subsequent to such offences.

Such co-operation should take the form and be carried out in the way that is most appropriate depending on the precise circumstances of each case. It may consist of police co-operation (particularly through ICPO-Interpol), customs co-operation, border controls, measures with a view to the protection of cultural property during international transport, etc.

PART IV – RESTITUTION OF CULTURAL PROPERTY

Part IV comprises Articles 6 to 11. Under Article 6, Parties give a general undertaking to take all necessary measures with a view to the restitution of cultural property. The provisions in Articles 7 to 11 define the circumstances under which the Parties shall take specific measures with a view to restitution and lay down procedural rules to that effect.

By «restitution» is meant the return of cultural property from the territory of one to that of another Party with a view to it being handed over to its lawful owners. It presupposes: a. that cultural property was found on the territory of a Party (State A); b. that that cultural property had been removed from the territory of another Party (State B); and c. that this removal was the result of an offence against cultural property committed in the territory of a Party (State C), it being understood that State C can be a third state or the same as either State A or State B.

The term «territory» used in Part IV means the territory of the Party in question or, if that Party has made a declaration under Article 24, the territory or territories specified in that declaration.

Article 6

This article calls for no comments further to those made above.

Article 7

This article provides for different notifications concerning cultural property which was removed or found in order to facilitate either its discovery or the institution of proceedings with a view to its restitution. Procedural rules concerning these notifications are contained in Article 33.

The notification provided for in paragraph 1 aims at bringing to the attention of a Party that cultural property has been conveyed, or is believed to have been conveyed, to its territory as the result of an offence against cultural property. The Party thus notified becomes bound by the provisions of Articles 4 and 5. Furthermore, if the property in question is discovered on its territory, it is bound under paragraph 3 to notify the Parties deemed to have competence to prosecute the offender. A Party will not deem it necessary to notify under paragraph 1 when, for example, it cannot identify properly the property in question.

Paragraph 2 imposes an obligation upon State B to notify as soon as possible the Party concerned: this may be the state to which the cultural property removed belongs, or the state of which its owner is a national.

That notification aims at bringing the facts and circumstances to the attention of a Party presumed to be interested in the sense that it may use its competence to prosecute the offender and subsequently obtain restitution.

It follows that there is no obligation under this paragraph to notify a Party which availed itself of the right not to apply Article 13, paragraph 1, sub-paragraph e (see Article 28).

Paragraph 4 imposes upon State A the obligation to notify immediately the other Parties that are supposed to have competence to prosecute the offender. A major purpose of this notification is to identify the owner of the cultural property found.

It is underlined that the purpose of the provision in paragraph 6 is twofold: to facilitate the discovery of the property and, especially, to alert the public against getting involved in transactions concerning such property. ICPO-Interpol on its own initiative already affords good publicity to thefts of cultural property. The Parties concerned should facilitate the circulation of the Interpol notices.

Any Party may, under the conditions laid down in Article 27 decide not to apply this article.

Article 8

This article concerns the execution of letters rogatory. By «letters rogatory», in this article, is meant a mandate given by an authority of the requesting Party to an authority of the requested Party to perform in its place one or more actions which are specified in the mandate. The authority of the requesting Party is either an authority that has instituted proceedings, or an authority that has delivered a judgment, or an authority that has the power to enforce a judgment that was given. It should be understood that both «proceedings» and «judgment» are being used in the sense given to these words in Article 1 of the Convention.

The rule of double incrimination applies here to the extent that the scope of this Convention is limited in Article 3 to those offences that are listed in Appendix III and are considered as offences relating to cultural property by both the requesting and the requested Parties. (see Article 26).

The conditions for implementing this article are the following:

a. that proceedings have been instituted in the requesting Party in respect of an offence relating to cultural property, and

b. that the letter rogatory be addressed by an authority of the requesting Party to an authority of the requested Party, both authorities being the competent authorities within the meaning given in Article 33, paragraph 3, and

c. that the requested Party does not avail itself of the rights conferred by Article 27.

Paragraph 1 is worded along the lines of Article 3 of the European Convention on Mutual Assistance in Criminal Matters (1959) (CETS 30). It has a general scope.

The expression «in the manner provided for by its law» has a procedural meaning and is therefore not intended to set out a condition for implementation.

Paragraphs 2 to 4 only apply when cultural property has been removed, or is believed to have been removed, to the territory of the requested Party subsequent to an offence relating to cultural property.

Paragraph 2 concerns the seizure and restitution to the requesting Party of cultural property that was the object of an offence in respect of which proceedings were instituted by this Party. Its inclusion in the Convention stems from the fact that the Convention on Mutual Assistance (CETS 30), namely Articles 3 and 6 thereof, provides no legal basis for restitution of unlawfully removed property. Indeed these provisions are limited to the seizure and transmission of articles to be produced in evidence. They do not regard property obtained as the result of an offence as a separate category. The phrase «articles to be produced in evidence» is usually taken to include not merely objects used for committing an offence, but also objects which appear to be the product of it, such as property obtained as the direct result of a theft. But the fact that the latter kind of property is not treated separately means that its transmission remains subject to the general conditions laid down in Articles 3 and 6, namely that the property is requested for evidence and that it must be returned to the requested state.

However, it is to be noted that the Committee of Ministers of the Council of Europe adopted, on 2 December 1977, Resolution (77) 36 recommending to the governments of member states, Contracting Parties to the European Convention on Mutual Assistance in Criminal Matters «that, when applying Articles 3 and 6 of that

Convention, the requested party waive the return by the requesting party of property handed over whenever this would facilitate the rapid restitution of the property to its presumed owner .....».

Paragraph 3 concerns the restitution of cultural property by way of letters rogatory concerning foreign judgments ordering the return of that property.

It is to be noted that the Convention on the Validity (CETS 70), namely its Articles 46 and 47, does not provide a legal basis for the restitution of unlawfully removed property. It refers to confiscation as a sanction whereas the seizure of property with a view to restitution, ordered in a judgment, is not a sanction within the meaning of Articles 1 and 2 of that Convention.

Paragraph 4 contemplates the cases where the request for the return of cultural property is formulated within the framework of an extradition procedure. It is worded on the model of Article 20, paragraph 2, of the European Convention on Extradition (1957) (CETS 24). Its scope, however, is modified to include not only cases of death or escape of the person claimed but also any other reasons of fact, such as serious illness, not allowing the transportation of the person.

Paragraph 5 seeks to prevent the provisions in the preceding paragraphs which, although under different conditions, impose on the requested Party an obligation to restitute cultural property removed to its territory subsequent to an offence, from being circumvented by that Party's applying certain measures pertaining to its *jus imperium*. Such measures are in particular the seizure or confiscation of property as the result of a fiscal or customs offence committed in respect of that property, such as where the property was seized as a security for the payment of evaded import duties due for the importation of that property.

Articles 9 to 11

These articles set out the rules of procedure applicable to the letters rogatory mentioned in Article 8.

As for the language in which letters rogatory will be written, Article 9, paragraph 1, allows for the Parties to agree on the language which they wish to use in their bilateral relations. In the absence of such an agreement, it gives the requesting Party the choice of either using the language of the requested Party or the official language of the Council of Europe (English or French) that the requested Party indicated by way of a declaration addressed to the Secretary General of the Council of Europe. Where such a declaration has not been made, the requesting Party may use either the English or the French language.

Articles 10 and 11 correspond, in substance, to Articles 19 and 20 of the above-mentioned Convention CETS 73.

With a view to meeting particularly strict requirements concerning the formalities involved in producing evidence and documents in some member states, the provisions in Article 10 are open to reservations.

The provisions in Article 10 concern the authentication by an administrative authority of evidence and documents. Therefore they do not conflict with the requirement in Article 9.2 to support a request with an immediately enforceable document.

PART V – PROCEEDINGS

Part V is subdivided into four sections which concern respectively:

I. the punishment of acts against cultural property;

II. rules of international competence to prosecute and try offences relating to cultural property;

III. conflicts of competence; and IV. the principle of ne bis in idem.

Article 12

This article emphasises the gravity of any act that affects cultural property even if it is not, or not yet. an offence relating to cultural property. Moreover, it makes provisions for an obligation incumbent on the Parties to enact legislation or to amend existing legislation in order that such acts should receive a punishment commensurate with their gravity.

Article 13

Paragraph 1 of this article imposes on Parties an obligation to take all necessary measures in order to establish their criminal jurisdiction in respect of offences against cultural property committed under the conditions

laid down in sub-paragraphs a to f. However, Parties may make reservations in respect of any of the provisions of this article (see Article 28).

It should be understood that for the purposes of this article, the term «territory» means the territory of the Party in question or, if that Party has made a declaration under Article 24, the territory or territories specified in that declaration.

Sub-paragraph f refers to cultural property reported or believed to be in the territory of the state in question at the time when attention was first given to it in modern times.

Article 14 to 16

These articles provide for solutions to positive conflicts of jurisdiction which may arise in particular from the implementation of Article 13. They are inspired by the provisions of Articles 30 to 32 of the Convention CETS 73. In accordance with the Convention's general aim, Article 16 adds the criterion of restitution to the other criteria contained in Article 32 of the Convention CETS 73.

Articles 17 to 19

These articles are drafted on the model of Articles 35 to 37 of the Convention CETS 73. Articles 17 and 18 refer to proceedings or judgments concerning offences relating to cultural property. As to Article 19, it refers to domestic provisions, the implementation of which has a wider effect of ne bis in idem than that which would result from the implementation of Section IV.

PART VI – FINAL CLAUSES

Articles 20 to 36 are, for the most part, based on the «Model Final Clauses for Conventions and Agreements concluded with the Council of Europe» - which were approved by the Committee of Ministers of the Council of Europe at the 315th meeting of the Ministers' Deputies in February 1980. For the most part they do not call for comments.

Article 25

This article contains a federal clause drafted along the lines of Article 34 of the Unesco Convention for the protection of the world cultural and natural heritage (1972). It was deemed necessary to insert such a clause as in some member States of the Council of Europe (for example the Federal Republic of Germany and Switzerland) the federated States (Länder Cantons) have wide, sometimes exclusive competence for the matters dealt with in the Convention. The same may apply to non-member States which might wish to accede to the Convention.

Article 26

By way of a declaration under Articles 2 or 3 any Party may unilaterally extend the Convention's scope of application to certain categories of property or to certain offences. It follows from the rule of reciprocity contained in this article, that such declarations do not bind any other Party which has not itself made a declaration with respect to the same categories of property or the same offences.

Article 27

This article corresponds, in substance, with Article 2 of the Convention CETS 30. However, the phrase «other essential interests» appearing in that article was not retained by the draftsmen because they considered that the interest of affording protection to cultural property is an essential interest common to all member states of the Council of Europe that cannot be weighed against other interests.

The scope of application of this article is limited to the provisions of Articles 7 and 8.

Convention on the protection of the environment through criminal law – ETS No. 172

Strasbourg, 4.XI.1998

Preamble

The member States of the Council of Europe and the other States signatory hereto,

Considering that the aim of the Council of Europe is to achieve a greater unity between its members;

Convinced of the need to pursue a common criminal policy aimed at the protection of the environment;

Considering that unregulated industrial development may give rise to a degree of pollution which poses risks to the environment;

Considering that the life and health of human beings, the environmental media and fauna and flora must be protected by all possible means;

Considering that the uncontrolled use of technology and the excessive exploitation of natural resources entail serious environmental hazards which must be overcome by appropriate and concerted measures;

Recognising that, whilst the prevention of the impairment of the environment must be achieved primarily through other measures, criminal law has an important part to play in protecting the environment;

Recalling that environmental violations having serious consequences must be established as criminal offences subject to appropriate sanctions;

Wishing to take effective measures to ensure that the perpetrators of such acts do not escape prosecution and punishment and desirous of fostering international co-operation to this end;

Convinced that imposing criminal or administrative sanctions on legal persons can play an effective role in the prevention of environmental violations and noting the growing international trend in this regard;

Mindful of the existing international conventions which already contain provisions aiming at the protection of the environment through criminal law;

Having regard to the conclusions of the 7th and 17th Conferences of European Ministers of Justice held in Basle in 1972 and in Istanbul in 1990, and to Recommendation 1192 (1992) of the Parliamentary Assembly,

Have agreed as follows:

Section I – Use of terms

Article 1 – Definitions

For the purposes of this Convention:

a. "unlawful" means infringing a law, an administrative regulation or a decision taken by a competent authority, aiming at the protection of the environment;

b. "water" means all kinds of groundwater and surface water including the water of lakes, rivers, oceans and seas.

Section II – Measures to be taken at national level

Article 2 – Intentional offences

1. Each Party shall adopt such appropriate measures as may be necessary to establish as criminal offences under its domestic law:

a. the discharge, emission or introduction of a quantity of substances or ionising radiation into air, soil or water which:

i. causes death or serious injury to any person, or

ii. creates a significant risk of causing death or serious injury to any person;

b. the unlawful discharge, emission or introduction of a quantity of substances or ionising radiation into air, soil or water which causes or is likely to cause their lasting deterioration or death or serious injury to any person or substantial damage to protected monuments, other protected objects, property, animals or plants;

c. the unlawful disposal, treatment, storage, transport, export or import of hazardous waste which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, soil, water, animals or plants;

d. the unlawful operation of a plant in which a dangerous activity is carried out and which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, soil, water, animals or plants;

e. the unlawful manufacture, treatment, storage, use, transport, export or import of nuclear materials or other hazardous radioactive substances which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, soil, water, animals or plants,

when committed intentionally.

2. Each Party shall adopt such appropriate measures as may be necessary to establish as criminal offences under its domestic law aiding or abetting the commission of any of the offences established in accordance with paragraph 1 of this article.

Article 3 – Negligent offences

1. Each Party shall adopt such appropriate measures as may be necessary to establish as criminal offences under its domestic law, when committed with negligence, the offences enumerated in Article 2, paragraph 1 a to e.

2. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, by a declaration addressed to the Secretary General of the Council of Europe, declare that paragraph 1 of this article, in part or in whole, shall only apply to offences which were committed with gross negligence.

3. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, by a declaration addressed to the Secretary General of the Council of Europe, declare that paragraph 1 of this article, in part or in whole, shall not apply to:

– subparagraph 1 a ii of Article 2,

– subparagraph 1 b of Article 2, insofar as the offence relates to protect monuments, to other protected objects or to property.

Article 4 – Other criminal offences or administrative offences

Insofar as these are not covered by the provisions of Articles 2 and 3, each Party shall adopt such appropriate measures as may be necessary to establish as criminal offences or administrative offences, liable to sanctions or other measures under its domestic law, when committed intentionally or with negligence:

a. the unlawful discharge, emission or introduction of a quantity of substances or ionising radiation into air, soil or water;

b. the unlawful causing of noise;

c. the unlawful disposal, treatment, storage, transport, export or import of waste;

d. the unlawful operation of a plant;

e. the unlawful manufacture, treatment, use, transport, export or import of nuclear materials, other radioactive substances or hazardous chemicals;

f. the unlawful causing of changes detrimental to natural components of a national park, nature reserve, water conservation area or other protected areas;

g. the unlawful possession, taking, damaging, killing or trading of or in protected wild flora and fauna species.

Article 5 – Jurisdiction

1. Each Party shall adopt such appropriate measures as may be necessary to establish jurisdiction over a criminal offence established in accordance with this Convention when the offence is committed:

a. in its territory; or

b. on board a ship or an aircraft registered in it or flying its flag; or

c. by one of its nationals if the offence is punishable under criminal law where it was committed or if the place where it was committed does not fall under any territorial jurisdiction.

2. Each Party shall adopt such appropriate measures as may be necessary to establish jurisdiction over a criminal offence established in accordance with this Convention, in cases where an alleged offender is present in its territory and it does not extradite him to another Party after a request for extradition.

3. This Convention does not exclude any criminal jurisdiction exercised by a Party in accordance with its domestic law.

4. Each Party may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, by a declaration addressed to the Secretary General of the Council of Europe, declare that paragraphs 1 c and 2 of this article, in part or in whole, shall not apply.

Article 6 – Sanctions for environmental offences

Each Party shall adopt, in accordance with the relevant international instruments, such appropriate measures as may be necessary to enable it to make the offences established in accordance with Articles 2 and 3 punishable by criminal sanctions which take into account the serious nature of these offences. The sanctions available shall include imprisonment and pecuniary sanctions and may include reinstatement of the environment.

Article 7 – Confiscation measures

1. Each Party shall adopt such appropriate measures as may be necessary to enable it to confiscate instrumentalities and proceeds, or property the value of which corresponds to such proceeds, in respect of offences enumerated in Articles 2 and 3.

2. Each Party may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, by a declaration addressed to the Secretary General of the Council of Europe, declare that it will not apply paragraph 1 of this Article either in respect of offences specified in such declaration or in

respect of certain categories of instrumentalities or of proceeds, or property the value of which corresponds to such proceeds.

Article 8 – Reinstatement of the environment

Each Party may, at any time, in a declaration addressed to the Secretary General of the Council of Europe, declare that it will provide for reinstatement of the environment according to the following provisions of this article:

a. the competent authority may order the reinstatement of the environment in relation to an offence established in accordance with this Convention. Such an order may be made subject to certain conditions;

b. where an order for the reinstatement of the environment has not been complied with, the competent authority may, in accordance with domestic law, make it executable at the expense of the person subject to the order or that person may be liable to other criminal sanctions instead of or in addition to it.

Article 9 – Corporate liability

1. Each Party shall adopt such appropriate measures as may be necessary to enable it to impose criminal or administrative sanctions or measures on legal persons on whose behalf an offence referred to in Articles 2 or 3 has been committed by their organs or by members thereof or by another representative.

2. Corporate liability under paragraph 1 of this article shall not exclude criminal proceedings against a natural person.

3. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, by a declaration addressed to the Secretary General of the Council of Europe, declare that it reserves the right not to apply paragraph 1 of this article or any part thereof or that it applies only to offences specified in such declaration.

Article 10 – Co-operation between authorities

1. Each Party shall adopt such appropriate measures as may be necessary to ensure that the authorities responsible for environmental protection co-operate with the authorities responsible for investigating and prosecuting criminal offences:

a. by informing the latter authorities, on their own initiative, where there are reasonable grounds to believe that an offence under Article 2 has been committed;

b. by providing, upon request, all necessary information to the latter authorities, in accordance with domestic law.

2. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, by a declaration addressed to the Secretary General of the Council of Europe, declare that it reserves the right not to apply paragraph 1 a of this article or that it applies only to offences specified in such declaration.

Article 11 – Rights for groups to participate in proceedings

Each Party may, at any time, in a declaration addressed to the Secretary General of the Council of Europe, declare that it will, in accordance with domestic law, grant any group, foundation or association which, according to its statutes, aims at the protection of the environment, the right to participate in criminal proceedings concerning offences established in accordance with this Convention.

Section III – Measures to be taken at international level

Article 12 – International co-operation

1. The Parties shall afford each other, in accordance with the provisions of relevant international instruments on international co-operation in criminal matters and with their domestic law, the widest measure of co-operation in investigations and judicial proceedings relating to criminal offences established in accordance with this Convention.

2. The Parties may afford each other assistance in investigations and proceedings relating to those acts defined in Article 4 of this Convention which are not covered by paragraph 1 of this article.

Section IV – Final clauses

Article 13 – Signature and entry into force

1. This Convention shall be open for signature by the member States of the Council of Europe and non-member States which have participated in its elaboration. Such States may express their consent to be bound by:

   a. signature without reservation as to ratification, acceptance or approval; or

   b. signature subject to ratification, acceptance or approval, followed by ratification, acceptance or approval.

2. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

3. This Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date on which three States have expressed their consent to be bound by the Convention in accordance with the provisions of paragraph 1.

4. In respect of any signatory State which subsequently expresses its consent to be bound by it, the Convention 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 expression of its consent to be bound by the Convention in accordance with the provisions of paragraph 1.

Article 14 – Accession to the Convention

1. After the entry into force of this Convention, the Committee of Ministers of the Council of Europe, after consulting the Contracting States to the Convention, may invite any State not a member of the Council of Europe to accede to this Convention, by a decision taken by the majority provided for in Article 20.d of the Statute of the Council of Europe and by the unanimous vote of the representatives of the Contracting States entitled to sit on the Committee.

2. In respect of any acceding State, the Convention 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 of the instrument of accession with the Secretary General of the Council of Europe.

Article 15 – 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 Convention shall apply.

2. Any State may, at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Convention to any other territory specified in the declaration. In respect of such territory the Convention 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 16 – Relationship with other conventions and agreements

1. This Convention does not affect the rights and undertakings derived from international multilateral conventions concerning special matters.

2. The Parties to the Convention may conclude bilateral or multilateral agreements with one another on the matters dealt with in this Convention, for purposes of supplementing or strengthening its provisions or facilitating the application of the principles embodied in it.

3. If two or more Parties have already concluded an agreement or treaty in respect of a subject which is dealt with in this Convention or otherwise have established their relations in respect of that subject, they shall be entitled to apply that agreement or treaty or to regulate those relations accordingly, in lieu of the present Convention, if it facilitates international co-operation.

Article 17 – Reservations

1. 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 one or more of the reservations provided for in Article 3, paragraphs 2 and 3, Article 5, paragraph 4, Article 7, paragraph 2, Article 9, paragraph 3 and Article 10, paragraph 2. No other reservation may be made.

2. Any State which has made a reservation under the preceding paragraph may wholly or partly withdraw it by means of a notification addressed to the Secretary General of the Council of Europe. The withdrawal shall take effect on the date of receipt of such notification by the Secretary General.

3. A Party which has made a reservation in respect of a provision of this Convention may not claim the application of that provision by any other 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 18 – Amendments

1. Amendments to this Convention may be proposed by any Party, and shall be communicated by the Secretary General of the Council of Europe to the member States of the Council of Europe and to every non-member State which has acceded to or has been invited to accede to this Convention in accordance with the provisions of Article 14.

2. Any amendment proposed by a Party shall be communicated to the European Committee on Crime Problems which shall submit to the Committee of Ministers its opinion on that proposed amendment.

3. The Committee of Ministers shall consider the proposed amendment and the opinion submitted by the European Committee on Crime Problems and may adopt the amendment.

4. The text of any amendment adopted by the Committee of Ministers in accordance with paragraph 3 of this article shall be forwarded to the Parties for acceptance.

5. Any amendment adopted in accordance with paragraph 3 of this article shall come into force on the thirtieth day after all Parties have informed the Secretary General of their acceptance thereof.

Article 19 – Settlement of disputes

1. The European Committee on Crime Problems of the Council of Europe shall be kept informed regarding the interpretation and application of this Convention.

2. In case of a dispute between Parties as to the interpretation or application of this Convention, they shall seek a settlement of the dispute through negotiation or any other peaceful means of their choice, including submission of the dispute to the European Committee on Crime Problems, to an arbitral tribunal whose decisions shall be binding upon the Parties, or to the International Court of Justice, as agreed upon by the Parties concerned.

Article 20 – Denunciation

1. Any Party may, at any time, denounce this Convention 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.

Article 21 – 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 Convention 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 Convention in accordance with Articles 13 and 14;

d. any reservation made under Article 17, paragraph 1;

e. any proposal for amendment made under Article 18, paragraph 1;

f. any other act, notification or communication relating to this Convention.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at Strasbourg, the 4th day of November 1998, 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 any State invited to accede to it.

Convention on the protection of the environment through criminal law – ETS No. 172

Explanatory Report

1. The Convention on the Protection of the Environment through Criminal Law, drawn up within the Council of Europe by a committee of governmental experts under the authority of the European Committee of Crime Problems (CDPC), was opened for signature on 4 November 1998.

2. After declassifying the text of the Convention in 1995 with a view to a wider consultation, and on the basis of that committee's discussions, the Committee of Ministers adopted the Convention while taking into account the observations made by the Parliamentary Assembly, which was consulted in 1996.

3. The explanatory report's purpose is to facilitate the understanding of the Convention's provisions.

I. HISTORICAL BACKGROUND

The work of the expert committee

Following the adoption of Resolution No 1. by the 17th Conference of European Ministers of Justice (1990, Istanbul) the Committee of Ministers of the Council of Europe set up a new selected committee of experts in 1991 under the name of "Group of Specialists on the protection of the environment through criminal law" (PC-S-EN). The Committee was later transformed into a traditional committee of experts (PC-EN). It started its work in October 1991 and completed it in December 1995. It held seven plenary and ten working group meetings.

The Committee's terms of reference were as follows:

> *"The project group is invited to examine the conclusions of the 17th Conference of European Ministers of Justice (Istanbul, 5-7 June 1990), recommending the development of common guidelines for the purpose of combating environmental impairment, and more particularly, to examine the following questions taking into account the work of the PC-S-EN:*
>
> *a. drawing up of a list of offences the purpose of which would be to provide for adequate criminal law protection for water, soil, the air, the flora and the fauna and other components of the environment meriting protection, and also for man in his environment;*
>
> *b. applicability of the concept of endangerment offences (concrete, abstract or potential), irrespective of the damage actually done;*
>
> *c. defining the relationship between criminal law and administrative law in the environmental sphere;*
>
> *d. allowing the offender's actions to avert danger or damage arising from his offence to be taken into account in decisions on prosecutions or punishment;*
>
> *e. the applicability of the European Criminal Law Conventions to environmental crime, international co-operation, jurisdiction, conflicts of competence, the place of the commission of the offence and other relevant questions concerning international criminal law relating to the environment.*
>
> *The project group should make a Recommendation containing guidelines or a Convention, if appropriate."*

At its first meeting (October 1991), the Committee decided to draft a binding international treaty. The Committee adopted the draft Convention and the draft explanatory report relating thereto at its last meeting (December 1995), which were then transmitted to the CDPC for its approval. The draft Convention and the

explanatory report were approved by the CDPC in June 1996 and adopted by the Committee of Ministers in September 1998.

The Committee based its work on reports submitted by the experts and scientific consultants. The Committee's main objective was to establish a set of provisions which should be implemented by the criminal law of contracting states. They address first conduct which, in the opinion of the Committee, represents the greatest danger to the environment, including human beings, and should therefore be criminalised; the Convention then deals with questions related to jurisdiction, sanctions and other measures, corporate liability and certain procedural issues; finally it sets out principles of international co-operation, taking into account other relevant instruments (cf. commentary on Article 12).

The Convention aims at a better protection of the environment by using the solution of last resort, the criminal law, for deterring and preventing conduct which is most harmful to it. To this end, the Convention seeks to harmonise national legislation in the particular field of environmental offences. It creates obligations for contracting States to introduce, if necessary, new elements or to modify existing criminal law provisions, on the understanding that the harmonisation of legislation in this area also enhances international co-operation. The extent to which States will enact new legislations or amendments to existing laws will however depend on both the use they will make of reservation possibilities, offered by the Convention in respect of certain provisions, and the compatibility of their existing criminal law provisions with the Convention.

II. INTRODUCTION

Autonomous offences and unlawful conduct

National legislatures worldwide have addressed environmental exploitation through a more or less comprehensive network of administrative laws. These laws have made fundamental determinations as to the extent of permissible pollution and acceptable risks in most environmental areas, frequently leaving to the administrative agencies the task of establishing the allowable level of pollution in individual cases. Therefore, a close relationship exists between administrative laws and criminal law, no matter which type of legal system is involved. This is especially the case in countries, where penal and administrative law are traditionally interconnected.

In the area of environmental protection, where criminal law and administrative law are generally linked, administrative laws may clarify the allowed use of the environment. This can be done either by statutory provisions, provisions in subsidiary legislation, such as ordinances or regulations or by administrative decisions aimed at protecting the environment. As a rule, polluting conduct for which a person or a corporate body may be held responsible under criminal law presupposes infringements of such provisions and is therefore "unlawful" in this respect. However, it is open to member States to restrict the application of administrative law, for example in cases where an administrative decision was taken in violation of substantive administrative law ("abuse of law").

However, compliance with environmental administrative law cannot always preclude criminal liability. A permit may legalise certain acts, but does not grant absolute rights to the polluter.

Administrative consent must not be available, or if granted, irrelevant in those cases where environmental use causes death or serious injury to any person or which creates a significant risk thereof. There is a consensus among member States that the concrete endangerment of life and of physical integrity of natural persons should, at least in certain areas, constitute a criminal offence. An "autonomous" offence should accordingly be established, i.e. where the behaviour causes, or creates a significant risk of, death or serious injury to any person, when committed intentionally or with negligence.

III. COMMENTARY

SECTION I – USE OF TERMS

Article 1 – Definitions

Only two terms are defined under Article 1, as all other notions shall be addressed at the appropriate place in the Explanatory Report.

The term "unlawful" is used in Article 2, paragraphs 1/b-1/e and Article 4, paragraphs a-g. It has a broad scope of application. It relates to behaviour prohibited by laws and statutes and also to external subsidiary legislation introduced by governmental bodies with a view to implementing laws and statutes and by decisions

taken by relevant authorities, in the area of the protection of the environment, particularly of the environmental media (air, soil, water) as well as of the fauna and flora. Internal administrative rules inside organisations are not included in this definition.

The term "water" is used in Article 2, paragraphs 1/b-1/e and Article 4, paragraph a. The definition given in Article 1 corresponds to the definition used by most international treaties regarding the protection of the environment and includes natural water bodies, such as groundwater and surface water, lakes, rivers including coastal waters, seas and oceans, but excluding water e.g. in swimming pools, tap water or water in sewage systems.

SECTION II – MEASURES TO BE TAKEN AT NATIONAL LEVEL

Article 2 – Intentional offences

Article 2 covers the most serious environmental offences which, whether by an act or an omission, are committed "intentionally". This mental element bears upon all elements of the offences specified under 1/a – 1/e. If the same conduct is the consequence of negligence, Articles 3 and 4 apply, the latter being also applicable to other, in general, less serious offences as well.

▶ Paragraph 1

The Contracting States are obliged to establish the "hard core" of offences dealt with in Articles 2 and 3 as "criminal offences". They should usually carry at least as an alternative sanction the sanction of imprisonment (cf. Article 6, 2nd sentence).

Article 2 contains specific environmental offences with an emphasis on the protection of environmental media, i.e. of the air, the soil and water, but also including the protection of human beings, protected monuments, other protected objects, property, animals and plants from environmental dangers. The first two offences are pollution offences, the latter ones primarily cover pre-stages where the illegal handling of dangerous installations and of specific dangerous substances (radio-active substances, hazardous waste) is likely to cause death or serious injury to persons or damage to the environment.

▶ Paragraph 1/a

The first offence deals with the most serious violations of the environment, namely the intentional pollution of environmental media, creating intentionally at least a significant danger of death or serious injury to persons. It is formed as a so-called autonomous offence (cf. Introduction).

The polluting conduct is described as "the discharge, emission or introduction of a quantity of substances or ionising radiation" into one of the three environmental media (cf. also the definition of "pollution" by reference to the introduction of substances in Article 1 (4) of the UN Convention on the Law of the Sea – UNCLOS - and the definition of "discharge" in Article 2 (3) (a) of the International Convention for the Prevention of Pollution from Ships, 1973). It also includes cases of dumping. The enumeration of different alternatives, even if they may overlap, shall guarantee that all sorts of polluting activities are included. They are different in form, depending on the state of substances (solid, liquid or gaseous) and on the media they enter. "Ionising radiation" is added, because not in all cases substances which are discharged etc. are its source.

All media are put on the same footing, although in the past water pollution offences were dominant. In many member States, however, a stronger protection of the air and recently of the soil, has been introduced. By "air" is meant the air outdoors or outside (i.e. outside buildings and installations) as being one of the objects of environmental protection. The preservation of clean air inside buildings belongs to the area e.g. of working place and health protection laws and regulations. The "soil" embraces the upper crust of the earth, as far as it serves ecological purposes.

The polluting conduct must be intended intentionally to cause "death or serious injury to persons" (cf. Article 7 (1) (a) of the Convention on the Physical Protection of Nuclear Materials) or "a significant risk of" causing it, requiring a causal link between these two elements of the offence. National offences may link such "result" to (negative) changes of the quality or the properties of environmental media as the usual consequence of the conduct described above. Even without actually injuring or killing a person, the offender is liable if he intentionally created, taking all circumstances of the case into consideration, a concrete danger, i.e. an immediate and substantial risk for a person. Such so-called endangerment offences are known in the criminal law of many member States and also in international conventions (cf. Article 1 (e) of the European Convention on the Suppression of Terrorism).

▶ **Paragraph 1/b**

The second offence is the main pollution offence as the first one has a very limited scope. It differs from the latter in two aspects.

It is not restricted to pollution endangering persons, but is applicable to pollution causing "substantial damage to protected monuments, other protected objects, property, animals or plants". It goes beyond the scope of the general damage provision in criminal law in so far as the objects mentioned do not necessarily belong to another person. On the same footing with the alternative of "damaging", the causation of a "lasting deterioration" of these objects is also included here. Moreover, as regards persons, it is sufficient that the polluting conduct is "likely to cause death or serious injury to any person" which is wider than "creating a significant risk of causing" in paragraph a). A lower and more general degree of risk is sufficient.

The reference to a likelihood of damage or harm or even only of danger is known in international conventions (cf. Article 1 I (4) UNCLOS (see also Article 218 II); Article 7 (1) a of the Convention on the Physical Protection of Nuclear Materials; Article 2 I (b) of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Person, including Diplomatic Agents).

The second difference is the additional requirement of an infringement of legal provisions ("unlawfulness"), i.e. either of statutory provisions, provisions in sub-laws, such as ordinances or regulations ("Verordnungen" in Germany) or in administrative decisions; the latter may be part of an administrative act taken by an administrative authority and which contains binding specific orders or prohibitions related to a specific situation. Only those provisions are referred to here which serve the purpose of the protection of the environment but do not exclude the possibility of serving other purposes as well.

The term "property" in this paragraph refers to all kinds of tangible objects, goods, which are not covered by "protected monuments, other protected objects, animals or plants".

▶ **Paragraph 1/c**

Paragraph 1/c contains the offence of intentional illegal handling of hazardous waste in a dangerous manner.

"Wastes" are substances or objects which are disposed of or are intended to be disposed of or are required to be disposed of by the provisions of national law (Article 2, paragraph 1 of the Basel Convention on the Control of Transboundary Movements of Hazardous Waste and their disposal; cf. also Article 1 a) of Council Directive 75/442/EEC on waste). Orientation concerning the notion of "hazardous" waste is given in Article 1, paragraph 1 (together with the appendix) of the Basel Convention and Article 1, paragraph 4 of the Council Directive 91/689/EEC (together with the appendix). Highly radioactive waste is also included.

The offence includes all important phases of illegal handling of such waste. Examples of disposals, such as deposit, surface impoundment, release into a water body, incineration or treatment (biological, physico-chemical) and storage (permanent or not) are given in Appendix IV of the Basel Convention (cf. also Appendix IIA of the Council Directive 75/442/EEC). The terms import and export include all transboundary movements (cf. Article 1, paragraph 3, Article 9 of the Basel Convention, Council Regulation (EEC) No. 259/93) and the term "transport" in addition of course shipments of waste within a Contracting State.

As an obligation for criminalisation should only be introduced for rather serious offences, the unlawful conduct as described is only a criminal offence if death or serious injury to any person or to the environment is likely to occur. However, this does not prevent Member States from going further and from punishing already the unlawful conduct as such, if committed in a blameworthy manner (cf. Article 4, paragraph 1 c).

▶ **Paragraph 1/d**

Paragraph 1/d deals with the intentional illegal operation of a plant in which dangerous activity is carried out and is likely to cause serious damage to persons or the environment. The notion of "a plant in which a dangerous activity is carried out" is determined by national law. It might include nuclear plants or chemical plants where hazardous substances are processed. As in paragraph 1c, the offence requires a violation of administrative law and a likelihood of damage. Its scope of application does not include effects occurring solely inside the plant.

▶ **Paragraph 1/e**

Paragraph 1/e extends the offence in Article 7 (paragraph 1/a) of the Vienna Convention of Physical Protection of Nuclear Materials in two ways: it is applicable not only to nuclear material but also to other hazardous radioactive substances such as Caesium and Strontium. Additionally, it includes the case where the conduct

is likely to cause serious damage to animals or plants. The remaining part of the subparagraph is similar to paragraph 1/c.

▶ **Paragraph 2**

This paragraph provides for the criminal liability of participants in intentional offences as described in paragraph 1 of Article 2.

Article 3 – Negligent offences

▶ **Paragraph 1**

This paragraph of Article 3 extends the scope of Article 2 to those cases where the offence is committed "with negligence". If, in relation to one, several or even all substantial (objective) elements of the offences in Article 2, the mental element of intention is missing, but negligence can be established, Article 3 shall apply. The standard of such a duty aiming at avoiding the damage or the risks by acts as described in Article 2 is influenced by the required ordinary diligence often laid down in legal, administrative or technical rules, or rules generally acknowledged in the specific professions concerned. This is also the case in relation to the offence in Article 2, paragraph 1/a, as these rules, whether they are legal or non-legal, would not allow the creation of such high risks (cf. the commentary on Art. 2).

▶ **Paragraph 2**

This paragraph allows States to restrict the application of Article 3 to offences committed with gross negligence. The concept of "gross negligence" requires a serious violation of duties of care. The legislation of several countries provides for this form of negligence in the field of environmental criminal law.

▶ **Paragraph 3**

In order to meet the concern of certain member States whose legislation includes endangerment (Article 2, paragraph 1 a.ii), only as an intentional offence, a possibility of reservation has been included in this Article. Reservation is also allowed concerning the pollution offence in Article 2, paragraph 1 b, when committed with negligence, but only when it relates to damage to protected monuments, other protected objects or property. This possibility therefore does not apply when the offence relates to damage caused or likely to be caused to environmental media, animals or plants.

Article 4 – Other criminal offences or administrative offences

This article extends the scope of the Convention to a wide range of environment-related illegal behaviours. The "unlawfulness" is always determined by reference to "infringement of the law, an administrative regulation or a decision taken by a competent authority" (cf. comments on Article 2, paragraph 1b).

The Contracting States have the choice to impose criminal sanctions and/or measures, as it is foreseen by Articles 5 to 7 for the offences in Articles 2 or 3, or administrative sanctions and/or measures. The latter may include administrative fines, but also confiscation and reinstatement of the environment (Articles 7 and 8). Other measures of a punitive nature could be e.g. the withdrawal of a permit, the prohibition to continue environmentally dangerous processes or an order to reduce the discharge of pollutants, professional disqualification or even – in minor cases – a simple warning the violation of which could then lead to a fine. What sanctions or measures are used will to a great extent depend on the seriousness of the wrongdoing and of the degree of culpability.

There are member States which consider the level of qualifying elements in Articles 2 and 3 as being too high and too severe and therefore go further in their criminal law. This is especially the case of water pollution, illegal export and import of hazardous waste (on the basis of the Basel Convention) and its illegal disposal.

Often other criteria are used in national law to distinguish between offences as this is done in this Convention between Articles 2 and 3 as well as Article 4. Distinctions depend on the structure of the national law, e.g. whether petty offences still belong to the area of criminal offences (as the lowest category) or to the area of administrative offences (such as the German "Ordnungswidrigkeiten" with non-penal administrative fines as sanctions).

The different categories of offences in Article 4 belong to the so-called abstract endangerment offences where the protected legal interests include the preservation of a certain standard of the quality and of ecological functions of the environmental media and the control interests of the administrative authorities.

▶ Paragraph a

Paragraph a covers the intentional or negligent pollution of the environmental media. As in Article 2 (paragraphs 1/a and 1/b), the substances or the radiation must "enter" these media as a result of illegal conduct. National legislations may decide whether to establish already the discharge etc. as a criminal offence or only as an administrative offence ("Ordnungswidrigkeit", etc.). The criminalisation of such conduct may be made dependent on a pollution with a lesser likelihood of damages or a lower deleterious effect than in Article 2.

▶ Paragraph b

Paragraph b deals with the illegal causation of noise. As such, it is mostly considered as a minor offence. If qualified by additional elements like those in Article 2 (paragraph 1/a), it might be classified as a criminal offence. The obligation imposed by paragraph b may also be met in national law by the establishment of an offence which is not defined by express relation to violation of administrative law.

▶ Paragraph c

Paragraph c is also related to Article 2 (paragraph 1/c), as is paragraph a to Article 2 (paragraph 1/b). It is a general waste offence which also covers very minor cases. It extends the scope of Article 2 (paragraph 1/c) to non-hazardous waste, infringements of law and regulations in general and the violation of conditions imposed by an administrative decision. Mere negligence is sufficient.

▶ Paragraph d

Paragraph d extends the scope of protection afforded by Article 2 (paragraph 1/d) to cases where a plant is operated unlawfully, without regard in general whether there is any dangerous activity carried out by the plant. On the other hand, the likelihood of causing damage is not required under this provision and even cases involving mere negligence are covered by it.

▶ Paragraph e

Paragraph e supplements Article 2 (paragraph 1/e), as do paragraphs c and d. Chemicals which are hazardous (as determined by national, international or supranational law, including EC legislation) are added.

▶ Paragraph f

Paragraph f has no reference to Article 2. It includes in the Convention illegal behaviour related to specific areas in nature which deserve special protection. Examples are on the one hand national parks and nature reserves, as well as water conservation areas such as water protection zones, including drinking water reservoirs. "Other protected areas" are those which need protection due to their environmental quality, i.e. particular beautiful landscapes or biotopes or due to certain dangers like smog-zones or the preservation of certain high standards as in spa resorts.

▶ Paragraph g

Paragraph g deals with the violation of wild flora and fauna species laws and regulations. An important international basis in this respect is the (Washington) Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES), implemented in the European Union by EC legislation and generally by national law. Article VIII of this Convention imposes the obligation "to penalise trade in, or possession of, such specimens, or both; and to provide for the confiscation or return to the State of export of such specimens". According to Article 1 (c) of the CITES Convention "trade" means export, re-export, as defined in Article 1 (d), import and introduction from the sea, as defined in Article 1 (e).

This paragraph has, however, in relation to the Convention CITES, a wider scope of application. It applies not only to international trade but also to trade within a Contracting State. In addition, it includes the illegal catching, damaging and killing covered also by national hunting law. Conducts described in this paragraph are in virtually all member States an offence sanctioned at least by fines but often by criminal measures, though in this case they may require additional qualifying elements (e.g. that the protected animal is threatened by extinction or that the perpetrator acted in a professional manner with the aim to make illegal profits).

Article 5 – Jurisdiction

▶ Paragraph 1/a

The Convention obliges Contracting Parties to establish their jurisdiction over the criminal offences enumerated in the Convention. Paragraph 1 lays down the principle of territoriality. Transboundary pollution may, however, raise a problem with regard to territorial jurisdiction. In some cases, it is difficult to define exactly

the place where the offence was actually committed, since the constitutive elements of the offence were completed in several countries at the same time.

"In many member states, albeit not in all, for the purpose of allowing the exercise of jurisdiction in accordance with the principle of territoriality, the place of commission is determined on the basis of what is known as the doctrine of ubiquity: it means that an offence as a whole may be considered to have been committed in the place where a part of it has been committed. According to one form of the doctrine of ubiquity, an offence may be considered to have been committed in the place where the consequences or effects of the offence become manifest. The doctrine of effects is accepted in several member states of the Council of Europe" (Council of Europe Report on extraterritorial criminal jurisdiction, op. cit. page 8-9).

It means that wherever a constituent element of an offence is committed or an effect occurs, that is usually considered as the place of perpetration. In this context, it may be noted that the intention of the offender is irrelevant and does not affect the jurisdiction based on the territorial principle.

▶ Paragraph 1/b

Paragraph 1/b introduces the traditional principle of flag which, from the point of view of environmental protection, is very important. Although the high seas and the airspace above the high seas cannot be subject to claims of any state, the pollution occurring on board may seriously affect both the State which owns or operates them and other states whose environmental interest may be affected. Article 5 refers to "ships" instead of "vessels" because the former term is used by most of the relevant international instruments, including the UN Convention on the Law of the Sea (UNCLOS, 10 December 1982) and the London ("Marpol") Convention for the prevention of pollution by ships (2 November 1973).

▶ Paragraph 1/c

The nationality theory is also based upon the state sovereignty: it provides that nationals of a state are obliged to comply with the domestic law even when they are outside its territory. However, there are several interpretations as to the scope of this principle. It may suggest that all offences perpetrated abroad are punishable, but it may also be interpreted in a restricted way: only those offences are punishable which are also punishable by the law of the place where they have been committed. The requirement of double criminality has been included in this Article to deal with offences under Article 4 and those offences under Articles 2 and 3 which are committed on the territory of a non-Contracting State. Where the Contracting States to this Convention have criminalised the intentional and negligent offences under Articles 2 and 3 of this Convention, the requirement of double criminality, if the offence is committed on the territory of a Contracting State, should be satisfied.

The high seas are not subject to the sovereign claims of any State. Similarly, the airspace above the high seas does not belong to any State. There are also some specific environments, such the Arctic, the Antarctic and the outerspace, which cannot be submitted to the exclusive control of any State. In this respect the Convention dos not require double criminality in those cases where the offender is punishable under the principle of nationality. It is worth mentioning that these problems can generally be solved by applying the principle of the flag as well.

▶ Paragraph 2

This paragraph is based on the principle of "extradite or punish". It creates an obligation for the Contracting Parties to establish jurisdiction over cases where extradition of the alleged offender was refused. The typical example of this case is the refusal of the extradition of the own nationals.

▶ Paragraph 3

Jurisdiction is traditionally based on territoriality or nationality, while the principle of flag allows States to exercise "quasi-territorial" jurisdiction over offences committed by ships (or aircrafts) flying their flag or registered in their territory. In the field of environmental protection, these principles may, however, not always suffice to exercise jurisdiction, for example over pollution cases occurring on the high seas. Paragraph 3 of this Article therefore allows the Parties to establish, in conformity with their national law, other types of jurisdiction as well. Among them, the universality principle would permit states to establish jurisdiction over serious environmental offences, regardless where and by whom they are committed, because they may be seen as threatening universal values and the interest of mankind. So far, this principle has not yet gained a general international recognition, although some international documents make reference to it.

Current international law and, in particular, the recent UN Convention on the Law of the Sea ("UNCLOS", see e.g. Articles 216 – 218) indicate some possible new ways of enforcing international environmental norms.

The port-State, under certain conditions, would be able to exercise jurisdiction over offences committed by non-nationals beyond the limits of traditional territorial jurisdiction. Thus, when a ship flying the flag of State X is voluntarily within a port or at an off-shore terminal of State Y, the latter State may institute proceedings in respect of a discharge seaward of State Y's Exclusive Economic Zone, in violation of applicable international rules.

Likewise, the shipment of waste principle would allow any State to establish jurisdiction over cases of marine pollution by dumping when the acts of loading of wastes or other matter occurred within its territory or at its off-shore terminals. The requirements for claiming jurisdiction under this principle are similar to those of port-State principle: the acts must have occurred within the Exclusive Economic Zone of coastal State and must have violated applicable international rules.

▶ **Paragraph 4**

Because of the problems mentioned under paragraphs 1 and 2, the Contracting Parties are entitled to make a reservation with regard to paragraphs 1/c and 2.

Article 6 – Sanctions for environmental offences

This article is closely related to Articles 2 and 3 defining the serious environmental offences which, according to this convention, should be made punishable under criminal law. In accordance with the obligations imposed by those articles, it obliges explicitly the Contracting Parties to provide for criminal sanctions in their criminal laws that are adequate to the seriousness of the offences (1st sentence). According to the 2nd sentence this obligation implies that imprisonment and pecuniary sanctions shall at least be available as a possible sanction. Reinstatement of the environment is indicated as possibility for which the Parties at their discretion may provide.

Because the offences referred to in Article 4 shall be made punishable under either criminal or administrative law, this article is not directly applicable to those offences. In so far as these offences are made criminal, this article may be applied accordingly. Sanctions applicable to legal persons will be dealt with under Article 9.

It is obvious that the obligation to make serious environmental offences punishable under criminal law would lose much of its content if it were not supplemented by an obligation to provide for adequately severe sanctions. While prescribing that imprisonment and pecuniary sanctions should be the sanctions that can be imposed for the relevant offences, the Article leaves open the possibility that other sanctions reflecting the seriousness of the offences are provided for. It can of course not be the aim of this Convention to give detailed provisions regarding the criminal sanctions to be linked to the different offences mentioned in article 2 and 3. On this point the Parties inevitably need the discretionary power to create a system of criminal offences and sanctions that is in coherence with the existing national legal systems.

The obligation this Article imposes is restricted by referring to the necessary accordance with relevant international instruments. This reference was made especially with a view to Article 230 of the United Nations Convention on the Law of the Sea by which Article the imposition of other than monetary penalties is excluded (with an exception specified in the 2nd paragraph of that Article). Where applicable, this Article should also be taken into account when imposing sanctions.

Apart from imprisonment and pecuniary sanctions other sanctions and measures may correspond to the seriousness of the offence. As an example, reinstatement of the environment is mentioned in the second sentence of this Article. Pecuniary sanctions refer of course to the fine as a traditional criminal law sanction. In addition to fines, other financial sanctions may also be conceivable. Taking into account that the relevant offences should be criminalised on an adequate level, the height of the financial sanction foreseen should be sufficiently deterring. The level of the financial sanction may be adjusted to the seriousness of the offence which may be determined by mental elements. In another approach, it can be related to the profitable character of the offence and thereby have a necessary preventive effect. In combination with an obligation to reinstate the environment or to take measures preventing future offences, a system in which the fine is not (completely) fixed in advance, such as e.g. the daily fine, may be considered an effective instrument. A more detailed examination of the subject can be found in the Report of the European Committee on Crime Problems on the contribution of criminal law to the protection of the environment (1978). Confiscation as a criminal sanction or measure forms the subject matter of Article 7 of this convention.

In so far as provision is made for the availability of imprisonment as a possible sanction the Article further leaves open the option to provide for alternative sanctions. In that case only those alternative sanctions shall be taken into account which have an equivalent preventive and deterrent effect. The special character that

environmental offences may have calls for a careful consideration of alternatives to imprisonment. Taking into account that these offences may – of course depending on their specific content – in quite a number of cases be perceived as technical defaults almost inevitably occurring in a complicated industrial process, there may be good reasons not only to confront the offender with the traditional criminal response but to frame the sanctions in accordance with the nature of the offence and the offender.

Community service may be an interesting example of an alternative sanction. When taken as an obligation imposed on the offender to work for the benefit of the community its form may be chosen in such a manner that the work to be performed contributes to the protection of the environment. Consideration can also be given to further possibilities provided by some legal systems such as the limitation of the right of the offender to continue activities in a certain profession or position, the withdrawal of a license or permit, the limitation or denial of financial or other facilities (related to the conduct of business in which the offence was committed) provided by public authorities, etcetera.

Reinstatement of the environment (cf. also Article 8) is explicitly indicated as a possibly suitable measure to be imposed as a consequence of an environmental offence. There are legal systems in which the liability for environmental (or comparable) offences is a sufficient condition for a judicial or administrative decision to order the offender to take the necessary steps to repair the damage caused to environmental interests or to create a situation which approaches the environmental conditions prior to the offence. It is clear that measures aiming at this effect are valuable from different points of view and therefore deserve serious consideration. On the one hand this kind of reaction to an offence has a positive value because it is not merely a retributive reflection of disapproval of the offence. On the other hand its positive value consists of the improvement of the environmental conditions that were damaged by the forbidden act.

The idea that steps taken by the offender leading to reduction of the danger or damage to the environment resulting from the offence should be taken in account in decisions in the criminal proceedings was already laid down in Resolution 1 of the 17th Conference of European Ministers of Justice held in 1990. The Committee has considered taking up a provision on this subject in this Convention. Taking in view however that this topic is one of application of criminal law rather than one of legislation, it was decided not to deal with the subject in this article. The present article leaves the Contracting Parties to ensure that the courts are able to determine the appropriate sanctions, taking in account possible measures of reinstatement of the environment carried out by the offender. It does not affect the power of courts to decide whether or not to start or continue a criminal prosecution according to the reinstatement of the environment by the offender. The possibilities in this respect are determined by the national legal systems.

Article 6 presupposes that the national legal systems leave the court some discretionary power in determining the appropriate sanction in the relevant cases. It cannot be determined, by this Convention, the degree to which reinstatement should influence the decision about the concrete sanction nor the forms to be chosen to express that reinstatement has been taken in account. Taking into account however the obligation mentioned in the first sentence of this Article, the effects connected with the reinstatement should be limited in so far as the resulting sanctions even in these cases must adequately reflect the seriousness of the offence.

The reasons to leave court the stipulated discretionary power are obvious. In the tradition of criminal law, spontaneous efforts of the offender to reduce the negative effects of his offence are viewed as indicating a positively valued feeling of social responsibility – provided of course that the efforts are of some significance. In view of the interest of protection of the environment, it is clear that the imposition of criminal sanctions should, where appropriate, prevent counterproductive effects and rather provide stimuli for measures leading to reinstatement of the environment.

Article 7 – Confiscation measures

Paragraph 1 of this article prescribes a general obligation for Contracting Parties to provide for adequate legal instruments to ensure that confiscation of instrumentalities, proceeds, related to the value of offences mentioned in Articles 2 and 3, is possible thereof. The second paragraph allows the Contracting Parties to make a partial reservation in respect of this obligation.

This article must be examined in view of the background of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (Strasbourg, 8 November 1990). The Convention is based on the idea that confiscation of the proceeds is one of the effective methods in combating crime. Taking into account that quite a number of environmental offences are committed either directly to gain illegal profits, e.g. illegal transportation and dumping of waste, or indirectly to save expenses, it is clear that measures resulting in the deprivation of property related to or gained by the offence should, in principle, be

available in this field too. Apart from the expected preventive effect, the contribution of these measures to the restoration of fair economic competition may also be a reason in favour of adopting them in this Convention. The possibilities for international co-operation provided by the Convention make the implementation of the first paragraph of this article all the more important.

This article refers to Articles 2 and 3. In so far however as the offences mentioned in Article 4 are made criminal Contracting Parties may consider to provide for confiscation possibilities in relation to those offences too.

▶ **Paragraph 1**

It is important to note that – although an explicit provision in this respect is not taken up in the Convention – the implementation of this paragraph presupposes the existence of legal instruments allowing the Contracting Parties to take the necessary provisional steps before measures leading to confiscation can be imposed. The effectiveness of confiscation measures depends in practice on possibilities to carry out the necessary investigations as to the quantity of the proceeds gained or the expenses saved and the way in which profits (openly or not) are deposited. In combination with these investigations, it is necessary to ensure that the investigating authorities have the power to freeze located tangible and intangible property in order to prevent that it disappears before a decision on confiscation has been taken or executed (cf.. Articles 3 and 4 in the Money Laundering Convention).

It is clear that the use of confiscation measures may be more effective if the financial and economic expertise needed for the relevant investigations and provisional measures is available to the police, the prosecution and the judiciary. In this respect, the problem of assessing the size of the expenses saved by committing environmental offences instead of complying with environmental regulations must be given attention. Although it is quite well conceivable that proceeds from a number of environmental offences can be calculated with acceptable precision, for other cases reasonable estimations, possibly based on expert opinions, will be inevitable. In so far as solutions to this problem can be laid down in legislation at all, it will be on a national level.

As was mentioned before, this article is related to the Money Laundering Convention. Article 1 of this Convention therefore is instrumental in the interpretation of the terms confiscate, instrumentalities, proceeds and property, used in this article. By the word "confiscate" reference is made to any criminal sanction or measure ordered by a court following proceedings in relation to a criminal offence resulting in the final deprivation of property. "Instrumentalities" cover the broad range of objects that are used or intended to be used, in any way, wholly or in part, to commit the relevant criminal offences established in accordance with Articles 2 and 3. The term "proceeds" means any economic advantage as well as any savings by means of reduced expenditure derived from such an offence. It may consist of any "property" in the interpretation that the term is being given below.

In the wording of this paragraph, it is taken into account that the national legal systems may show differences as to what property can be confiscated in relation to an offence. Confiscation may be possible of objects that (directly) form the proceeds of the offence or of other property belonging to the offender that – although not (directly) gained by the offence – equals the value of the directly gained illegal proceeds. "Property" therefore has to be interpreted, in this context, as including property of any description, whether corporal or incorporeal, movable or immovable, and legal documents or instruments evidencing title to or interest in such property.

▶ **Paragraph 2**

This paragraph offers the possibility to the Parties to make a reservation concerning the applicability of paragraph 1. The declaration by which the reservation is made may bear upon the offences for which confiscation measures are applicable, or upon (the categories of) objects relevant in this respect. In both situations – or in a combination thereof – the declaration must contain the necessary specifications.

The possibility of making a reservation is included in this Convention since the national law of the member States shows considerable differences in the way confiscation measures are regulated. These differences for instance bear upon the provisions in legal systems that aim at the deprivation of illegally gained profits. This aim may be reached by determining the amount of the fine according to the amount of the profit or by imposing separately a measure obliging the offender to pay an amount equal to the profit gained. Differences also exist in respect of the possibilities for confiscation especially with a view to claims for compensation by the injured party and to the criteria – such as the culpability of the offender or the nature of the offence or the severity of the sanction – that determine the cases in which confiscation measures are applicable. Furthermore, the member States may find reasons to have special regulations for confiscation related to environmental offences taking in account the special characteristics some of these offences have. It is to

be noted that this reservation clause is consistent with Article 2 of the Money Laundering Convention that provides for possible reservations too.

Taking into account that confiscation measures (of some kind) related to a conviction for a criminal offence are generally foreseen by the criminal legislation, there seems to be no need for reservations resulting in case of the complete exclusion of the application of paragraph 1. Due to considerations of consistency in the legislation and other elements of legislative policy or considerations with regard to practical problems in implementing certain forms of confiscation, member States may feel the necessity to exclude in a more general way the confiscation of the categories of objects mentioned in paragraph 1.

Article 8 – Reinstatement of the environment

This article is formulated as an optional (opting in) provision. Such a flexible approach seemed necessary as legislations of only a limited number of member States provide for the possibility of the reinstatement of the environment within the frame of the criminal proceedings, especially before the stage of the trial. It is inspired by the underlying philosophy of some existing legislations which recognise the advisability of solving litigations either by making use of different means of reparation, including the reinstatement of the environment, or the compensation of victims, before the prosecution of the offence or during the trial.

▶ Paragraph a

Paragraph a provides for a general possibility of the reinstatement of the environment, in particular in cases where it is advisable to manage the situations of conflict rather than to impose traditional criminal sanctions. "Measures of reinstatement" means any reasonable measures aiming at to reinstate or restore damaged or destroyed components of the environment, or to introduce, where reasonable, the equivalent of those components into the environment.

In view of the differences regarding the application of this measure in member States, this paragraph does not determine the different stages of the criminal proceedings where the reinstatement of the environment can be ordered. It can take place prior to prosecution, e.g. when the offender had no intention to commit an offence and the damage caused to the environment is relatively insignificant. It can also take place at the trial stage. Both alternatives are left to the discretion of the competent national authorities, which should duly take into account the consent of the offender, if appropriate. The "competent authority" may include, in accordance with national law, judicial and administrative authorities, as well as prosecutors.

The implementation of a measure of reinstatement of the environment may be made subject to specific conditions such as the absence of criminal records on the charge of the prosecuted person, consultation of the victims, associations, services or bodies entitled to lodge a claim before the criminal justice. If the reinstatement of the environment is ordered prior to criminal prosecution, the necessary period of time must be left for the offender to comply with such an order. If it is executed properly, criminal prosecution shall not take place. At the trial stage, the reinstatement of the environment can be imposed by decision of the competent judicial authority as the only sanction, or may be combined with a complementary sanction usually pronounced by criminal courts (fines, withdrawal of a permit, etc.).

▶ Paragraph b

In order to ensure the effective implementation of the measure of the reinstatement of the environment by the offender, the competent judicial authority has to provide for a procedure of control. This may take the form of a procedure of adjournment of the trial permitting to control the actual execution of the reinstatement of the environment, but can also consist in a decision of conviction, adapted to the situation and in conformity with judicial traditions of member States. Paragraph b provides for a possibility and not an obligation for the judicial authorities to ensure by additional sanctions the effective implementation of the order of reinstatement of the environment, if it has not been carried out properly or the conditions thereof have not been respected (the offender appeared to be of bad faith). For example, the competent judicial authority shall have the possibility to decide that the measure should be implemented by the offender at his own expenses or impose additional sanctions.

Article 9 – Corporate liability

Article 9 deals with the liability of legal persons. It is a fact that a major part of environmental crimes is committed within the framework of legal persons, while practice reveals serious difficulties in prosecuting natural persons acting on behalf of these legal persons. For example, in view of the largeness of corporations and the complexity of structures of the organisation, it becomes more and more difficult to identify a natural person

who may be hold responsible (in a criminal law sense) for the offence. Furthermore, if an agent of management is sentenced, the sanction can easily be compensated by the legal person.

The international trend at present seems to support the general recognition of corporate liability in criminal law, even in countries which only a few years ago formally adopted the principle according to which corporations cannot commit criminal offences. Therefore, the present provision of the Convention is in harmony with these recent tendencies, e.g. the recommendations of international institutions (see 1994 AIDP Recommendations – Portland/Rio de Janeiro) and Recommendation No. R (88) 18 of the Committee of Ministers of the Council of Europe. The provision leaves, however, open to the States to impose "criminal or administrative sanctions or measures on legal persons" corresponding to their legal traditions.

Article 9, paragraph 1 refers to corporate liability of legal persons. This type of liability necessitates clarification regarding its three conditions. The first condition is that an environmental criminal offence must have been committed, as specified in Article 2 (intentionally) or Article 3 (by negligence). The second condition is that the offence must have been committed "on behalf of" the legal person. The third condition, which serves to limit this liability, requires the involvement of "an organ, a member of its organs or other representatives" in the criminal offence, assuming that those physical persons referred to are legally or by fact in such position which may engage the liability of the legal person. Violations of the supervisorial duties are in this respect sufficient.

Article 9, paragraph 2 clarifies that corporate liability does not exclude individual liability. In a concrete case, different spheres of liability may be established at the same time, for example the responsibility of an organ etc. separately from the liability of the legal person as a whole. Individual liability may be combined with any of these categories of liability.

Article 9, paragraph 3 states that each Party "may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, by a declaration addressed to the Secretary General of the Council of Europe, declare that it reserves the right not to apply paragraph 1 of this Article or any part thereof or that it applies only to offences specified in such declaration". The reason of providing such a possibility is that irrespective of the mentioned international tendencies regarding corporate liability in criminal law, some member States still address these problems (or part of them) in administrative law or in civil law, therefore they cannot entirely apply these principles.

Article 10 – Cooperation between authorities

▶ Paragraph 1

A comprehensive system of administrative regulations and case-law for environmental protection apply in most countries. The system contains a great variety of obligations and responsibilities, concerning prohibitions against pollution, permissions to start and carry on different kinds of activities, reports to the authorities responsible for environmental protection and acceptance of control, levels of pollutants and so on. The criminal legislation for environmental protection is to a great extent linked to administrative rules and other norms. Nevertheless, the most serious environmental violations are in some countries independent from administrative law, which means that they are punishable even if the dangerous activity does not contravene any administrative rule. But even in these cases, the administrative system has an important role to play in relation to the perpetrator. As regards environmental offences, criminal law interventions may depend on the facts established by the administrative authority.

The above structure of penal law in the environmental field is reflected in this draft convention (cf. the "autonomous" offence in Article 2 1/a and the dependent ones in Article 2 1/b-e).

There was an agreement in the Committee which drafted the Convention that, due to important divergences between domestic administrative legislations, the co-operation between the authorities responsible for environmental protection and the investigating and prosecuting authorities should be decided and regulated, as a whole, at a national level. However, it was also agreed that one important aspect of this type of co-operation, the issue of providing information to the law enforcement authorities by authorities responsible for environmental protection, should be included in the Convention. Such information is obviously necessary for the law enforcement authorities and it is available primarily from the authorities responsible for environmental protection.

▶ Paragraph 1/a

Taking into account the above circumstances, Article 10 paragraph 1/a lays down that the authorities responsible for environmental protection shall have an obligation to inform the investigating and prosecuting

authorities in cases where there are reasonable grounds to believe that an offence enumerated in Article 2 has been committed. The information shall be given on the initiative of the authority responsible for environmental protection.

The authorities responsible for environmental protection mentioned are not defined in the Article. It is a question left to the national legislature. The Committee had in view those authorities that have a supervisory and controlling competence in the field of environmental protection.

The terms "reasonable grounds" mean that the obligation to inform has to be observed as soon as the supervisory authority considers that there is a likelihood that an environmental offence has been committed. The Committee was of the opinion that the level of likelihood should be the same as the one that is required for starting a police investigation or a prosecutorial investigation.

The obligation to inform without request is proposed to encompass only serious offences. Reference is therefore made only to Article 2.

▶ **Paragraph 1/b**

This paragraph concerns the obligation to inform on request. The paragraph lays down that the authorities responsible for environmental protection shall provide the investigating and prosecuting authorities with all necessary information, in accordance with safeguards and procedures established by national law. What is considered as "necessary information" should be decided by the requesting authority.

The Committee recognised that in some countries there could be secrecy problems connected with a transfer of information from authorities responsible for environmental protection to law enforcement authorities. It considered, however, that a provision on information provided by the environmental authorities in accordance with a legally established obligation, as is the case here, could not constitute a breach of any restriction on disclosure of information or involve the authority in liability of any kind. Special considerations could be taken into account at a national level as to secrecy for the purposes of protecting national or other essential interests.

▶ **Paragraph 2**

The Committee also recognised that an obligation to provide information without request could raise problems in some countries. A possibility of reservation is therefore laid down in paragraph 2. As to the information given on request, no possibility of reservation was considered to be needed, because the obligation is subject to national law.

Article 11 – Rights for groups to participate in proceedings

In some countries, legislative measures have been taken to enable groups, foundations and associations (non-governmental organisations, hereafter "NGOs") aiming at environmental protection to participate in proceedings concerning environmental offences. The content of this right, however, varies a great deal from one State to another. In other countries, this right is not known or currently envisaged to be established. It seemed to the Committee that the recognition of this right for NGOs had an increasing importance. It should be mentioned that in this context, Resolution (77) 28 of the Council of Europe on the contribution of criminal law to the protection of the environment already referred to the subject.

The main reason for allowing NGOs access to environmental proceedings is that criminal law in the environmental field protects interests of a highly collective nature, in view of the fact that the various forms of pollution potentially affect the interest not only of single individuals, but also of groups of persons.

The question of giving NGOs access to criminal proceedings remains controversial. Only a few countries have recognised such right. Therefore, as mandatory provisions were found inappropriate, the Committee drafted the Article in a facultative form.

According to Article 11, each Party may grant the NGOs the right to participate in criminal proceedings concerning serious environmental offences as defined in Articles 2 and 3 of the Convention. The voluntary character of the Article is defined by the use of the words "may grant". Which NGOs will have a right to participate in proceedings and what will be the exact content of its rights is a question left for the national legislature. The proposed wording of the paragraph indicates that the NGOs mentioned should be to a certain extent established organisations with statutes and a clearly expressed aim to protect the environment.

As a consequence of the facultative form of this Article, any Contracting Party will be entitled to stipulate any condition limiting the number of NGOs which will have the access to proceedings or the right to participate in them.

SECTION III – MEASURES TO BE TAKEN AT INTERNATIONAL LEVEL

Article 12 – International co-operation

This Section on measures to be taken at international level has been subject to lengthy and thorough discussions within the Committee. These deliberations concentrated upon the question whether or not it was advisable to provide for a substantial and rather detailed section covering several topics in the field of international co-operation in criminal matters. While discussing the possible content of such a section the Committee reached the conclusion that it was not probable that the envisaged section would offer more possibilities for international co-operation than are already taken up in the existing relevant conventions of the Council of Europe. Taking this into account, the majority of the Committee shared the opinion that there are insufficient reasons to expect that Parties will be prepared to accept specific obligations concerning international co-operation in criminal matters in relation to environmental offences.

In relation to this expectation it was also noted that the development of international instruments on specific fields might reduce the willingness to accede to general conventions. With a view to the application in practice, a limitation of relevant international instruments was considered to be desirable too. Due to these considerations this Section is limited to the present Article.

The first paragraph of this Article bears upon the international co-operation in criminal matters. It imposes a general obligation on the Contracting Parties to afford each other all possible co-operation within the limits of the (bi- and multilateral) agreements to which they have acceded and their national law. The reference made to instruments on international co-operation is formulated in a general way. It includes of course the Council of Europe Conventions on extradition (ETS 24), mutual assistance in criminal matters (ETS 30), the supervision of conditionally sentenced or conditionally released offenders (ETS 51), the international validity of criminal judgements (ETS 70), the transfer of proceedings in criminal matters (ETS 73), the transfer of sentenced persons (ETS 112), the laundering, search, seizure and confiscation of the proceeds of crime (ETS 141). Other international treaties, including maritime conventions such as the UN Convention on the Law of the Sea, but also the Vienna Convention on the Physical Protection of Nuclear Materials may be relevant in respect of international co-operation.

The second paragraph of the Article is meant to stimulate the Parties to render each other assistance in investigations and proceedings relating to acts that are made liable to administrative sanctions and measures according to Article 4 of this Convention. This form of international co-operation should be considered in the case where the relevant offence is not a criminal one in both Parties concerned as well as in the case where the relevant offence is made criminal by one Party but not by the other.

Taking into account that the instruments on international co-operation in this field have not yet reached the degree of development that exists in the field of criminal offences, it is not feasible to extend the scope of this Convention to obligations concerning administrative offences. With a view to already developed instruments like the EC-regulation 1468/81 (L 144), the Schengen-Treaty (art. 50) and the Council of Europe Convention on the obtaining abroad of information and evidence in administrative matters (ETS 100) a tendency to further progress in international co-operation is demonstrable. It will be clear that the aim of this Convention calls for the joined effort of the Parties to assist each other in enforcing environmental legislation.

SECTION IV – FINAL CLAUSES

Articles 13 to 21

With some exceptions, the provisions contained in this Section are, for the most part, based on the "Model final clauses for conventions and agreements concluded within the Council of Europe" which were approved by the Committee of Ministers of the Council of Europe at the 315th meeting of their Deputies in February 1980. Most of these articles do not therefore call for specific comments, but the following points require some explanation.

Article 13 – Signature and entry into force

Article 13 has been drafted on several precedents established in other Conventions elaborated within the framework of the Council of Europe, for instance the Convention on the Transfer of Sentenced Persons (ETS No. 112) and the Convention on laundering, search, seizure and confiscation of the proceeds from crime (ETS No. 141), which allow for signature, before the Convention's entry into force, not only by the member States of the Council of Europe, but also by non-member States which have participated in the elaboration of the Convention. These provisions are intended to enable the maximum number of interested States, not necessarily members of the Council of Europe, to become Parties as soon as possible. The provision in Article 13 is intended to apply to one non-member State, i.e. Canada, which was represented on the Committee of Experts by an observer and was actively associated with the elaboration of the Convention. Other non-member States that do not fall under the scope of Article 13 may be invited to accede to the Convention in conformity with Article 14.

Article 14 – Accession to the Convention

The Committee of Ministers may, on its own initiative or upon request, and after consulting the Parties, invite any non-member State to accede to the Convention.

Article 15 – Territorial application

Since this provision is mainly aimed at territories overseas, it was agreed that it would be clearly against the philosophy of the Convention for any Party to exclude from the application of this instrument parts of its main territory and that there would be no need to lay this down explicitly in the Convention.

Article 16 – Relationship to other conventions and agreements

In conformity with the 1969 Vienna Convention on the law of treaties, this Article is intended to ensure the co-existence of the Convention with other treaties – multilateral or bilateral – dealing with matters which are also dealt with in the present Convention. Paragraph 2 expresses in a positive way that Parties may, for certain purposes, conclude bilateral or multilateral agreements (cf. the conventions referred to in the commentary under Article 12) relating to matters dealt with in the Convention. The drafting permits the a contrario deduction that Parties may not conclude agreements which derogate from the Convention. Paragraph 3 safeguards the continued application of agreements, treaties or relations relating to subjects which are dealt with in the present Convention, for instance in the Nordic co-operation.

As regards the range of possible sanctions for environmental offences, the accordance with other international instruments is provided for in Article 6.

Article 17 – Reservations

This article lays down on a restrictive basis the reservations which can be made to the Convention.

Council of Europe Convention on Action against Trafficking in Human Beings – CETS No. 197

Warsaw, 16.V.2005

Preamble

The member States of the Council of Europe and the other Signatories hereto,

Considering that the aim of the Council of Europe is to achieve a greater unity between its members;

Considering that trafficking in human beings constitutes a violation of human rights and an offence to the dignity and the integrity of the human being;

Considering that trafficking in human beings may result in slavery for victims;

Considering that respect for victims' rights, protection of victims and action to combat trafficking in human beings must be the paramount objectives;

Considering that all actions or initiatives against trafficking in human beings must be non-discriminatory, take gender equality into account as well as a child-rights approach;

Recalling the declarations by the Ministers for Foreign Affairs of the Member States at the 112th (14-15 May 2003) and the 114th (12-13 May 2004) Sessions of the Committee of Ministers calling for reinforced action by the Council of Europe on trafficking in human beings;

Bearing in mind the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) and its protocols;

Bearing in mind the following recommendations of the Committee of Ministers to member states of the Council of Europe: Recommendation No. R (91) 11 on sexual exploitation, pornography and prostitution of, and trafficking in, children and young adults; Recommendation No. R (97) 13 concerning intimidation of witnesses and the rights of the defence; Recommendation No. R (2000) 11 on action against trafficking in human beings for the purpose of sexual exploitation and Recommendation Rec (2001) 16 on the protection of children against sexual exploitation; Recommendation Rec (2002) 5 on the protection of women against violence;

Bearing in mind the following recommendations of the Parliamentary Assembly of the Council of Europe: Recommendation 1325 (1997) on traffic in women and forced prostitution in Council of Europe member states; Recommendation 1450 (2000) on violence against women in Europe; Recommendation 1545 (2002) on a campaign against trafficking in women; Recommendation 1610 (2003) on migration connected with

trafficking in women and prostitution; Recommendation 1611 (2003) on trafficking in organs in Europe; Recommendation 1663 (2004) Domestic slavery: servitude, au pairs and mail-order brides;

Bearing in mind the European Union Council Framework Decision of 19 July 2002 on combating trafficking in human beings, the European Union Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings and the European Union Council Directive of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities;

Taking due account of the United Nations Convention against Transnational Organized Crime and the Protocol thereto to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children with a view to improving the protection which they afford and developing the standards established by them;

Taking due account of the other international legal instruments relevant in the field of action against trafficking in human beings;

Taking into account the need to prepare a comprehensive international legal instrument focusing on the human rights of victims of trafficking and setting up a specific monitoring mechanism,

Have agreed as follows:

CHAPTER I – PURPOSES, SCOPE, NON-DISCRIMINATION PRINCIPLE AND DEFINITIONS

Article 1 – Purposes of the Convention

1. The purposes of this Convention are:

   a. to prevent and combat trafficking in human beings, while guaranteeing gender equality;

   b. to protect the human rights of the victims of trafficking, design a comprehensive framework for the protection and assistance of victims and witnesses, while guaranteeing gender equality, as well as to ensure effective investigation and prosecution;

   c. to promote international cooperation on action against trafficking in human beings.

2. In order to ensure effective implementation of its provisions by the Parties, this Convention sets up a specific monitoring mechanism.

Article 2 – Scope

This Convention shall apply to all forms of trafficking in human beings, whether national or transnational, whether or not connected with organised crime.

Article 3 – Non-discrimination principle

The implementation of the provisions of this Convention by Parties, in particular the enjoyment of measures to protect and promote the rights of victims, shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Article 4 – Definitions

For the purposes of this Convention:

   a. "Trafficking in human beings" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;

   b. The consent of a victim of "trafficking in human beings" to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;

c. The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered "trafficking in human beings" even if this does not involve any of the means set forth in subparagraph (a) of this article;

d. "Child" shall mean any person under eighteen years of age;

e. "Victim" shall mean any natural person who is subject to trafficking in human beings as defined in this article.

CHAPTER II – PREVENTION, CO-OPERATION AND OTHER MEASURES

Article 5 – Prevention of trafficking in human beings

1. Each Party shall take measures to establish or strengthen national co-ordination between the various bodies responsible for preventing and combating trafficking in human beings.

2. Each Party shall establish and/or strengthen effective policies and programmes to prevent trafficking in human beings, by such means as: research, information, awareness raising and education campaigns, social and economic initiatives and training programmes, in particular for persons vulnerable to trafficking and for professionals concerned with trafficking in human beings.

3. Each Party shall promote a Human Rights-based approach and shall use gender mainstreaming and a child-sensitive approach in the development, implementation and assessment of all the policies and programmes referred to in paragraph 2.

4. Each Party shall take appropriate measures, as may be necessary, to enable migration to take place legally, in particular through dissemination of accurate information by relevant offices, on the conditions enabling the legal entry in and stay on its territory.

5. Each Party shall take specific measures to reduce children's vulnerability to trafficking, notably by creating a protective environment for them.

6. Measures established in accordance with this article shall involve, where appropriate, non-governmental organisations, other relevant organisations and other elements of civil society committed to the prevention of trafficking in human beings and victim protection or assistance.

Article 6 – Measures to discourage the demand

To discourage the demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking, each Party shall adopt or strengthen legislative, administrative, educational, social, cultural or other measures including:

a. research on best practices, methods and strategies;

b. raising awareness of the responsibility and important role of media and civil society in identifying the demand as one of the root causes of trafficking in human beings;

c. target information campaigns involving, as appropriate, inter alia, public authorities and policy makers;

d. preventive measures, including educational programmes for boys and girls during their schooling, which stress the unacceptable nature of discrimination based on sex, and its disastrous consequences, the importance of gender equality and the dignity and integrity of every human being.

Article 7 – Border measures

1. Without prejudice to international commitments in relation to the free movement of persons, Parties shall strengthen, to the extent possible, such border controls as may be necessary to prevent and detect trafficking in human beings.

2. Each Party shall adopt legislative or other appropriate measures to prevent, to the extent possible, means of transport operated by commercial carriers from being used in the commission of offences established in accordance with this Convention.

3. Where appropriate, and without prejudice to applicable international conventions, such measures shall include establishing the obligation of commercial carriers, including any transportation company or the owner or operator of any means of transport, to ascertain that all passengers are in possession of the travel documents required for entry into the receiving State.

4. Each Party shall take the necessary measures, in accordance with its internal law, to provide for sanctions in cases of violation of the obligation set forth in paragraph 3 of this article.

5. Each Party shall adopt such legislative or other measures as may be necessary to permit, in accordance with its internal law, the denial of entry or revocation of visas of persons implicated in the commission of offences established in accordance with this Convention.

6. Parties shall strengthen co-operation among border control agencies by, *inter alia*, establishing and maintaining direct channels of communication.

Article 8 – Security and control of documents

Each Party shall adopt such measures as may be necessary:

a. To ensure that travel or identity documents issued by it are of such quality that they cannot easily be misused and cannot readily be falsified or unlawfully altered, replicated or issued; and

b. To ensure the integrity and security of travel or identity documents issued by or on behalf of the Party and to prevent their unlawful creation and issuance.

Article 9 – Legitimacy and validity of documents

At the request of another Party, a Party shall, in accordance with its internal law, verify within a reasonable time the legitimacy and validity of travel or identity documents issued or purported to have been issued in its name and suspected of being used for trafficking in human beings.

CHAPTER III – MEASURES TO PROTECT AND PROMOTE THE RIGHTS OF VICTIMS, GUARANTEEING GENDER EQUALITY

Article 10 - Identification of the victims

1. Each Party shall provide its competent authorities with persons who are trained and qualified in preventing and combating trafficking in human beings, in identifying and helping victims, including children, and shall ensure that the different authorities collaborate with each other as well as with relevant support organisations, so that victims can be identified in a procedure duly taking into account the special situation of women and child victims and, in appropriate cases, issued with residence permits under the conditions provided for in Article 14 of the present Convention.

2. Each Party shall adopt such legislative or other measures as may be necessary to identify victims as appropriate in collaboration with other Parties and relevant support organisations. Each Party shall ensure that, if the competent authorities have reasonable grounds to believe that a person has been victim of trafficking in human beings, that person shall not be removed from its territory until the identification process as victim of an offence provided for in Article 18 of this Convention has been completed by the competent authorities and shall likewise ensure that that person receives the assistance provided for in Article 12, paragraphs 1 and 2.

3. When the age of the victim is uncertain and there are reasons to believe that the victim is a child, he or she shall be presumed to be a child and shall be accorded special protection measures pending verification of his/her age.

4. As soon as an unaccompanied child is identified as a victim, each Party shall:

a. provide for representation of the child by a legal guardian, organisation or authority which shall act in the best interests of that child;

b. take the necessary steps to establish his/her identity and nationality;

c. make every effort to locate his/her family when this is in the best interests of the child.

Article 11 – Protection of private life

1. Each Party shall protect the private life and identity of victims. Personal data regarding them shall be stored and used in conformity with the conditions provided for by the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108).

2. Each Party shall adopt measures to ensure, in particular, that the identity, or details allowing the identification, of a child victim of trafficking are not made publicly known, through the media or by any other means, except, in exceptional circumstances, in order to facilitate the tracing of family members or otherwise secure the well-being and protection of the child.

3. Each Party shall consider adopting, in accordance with Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms as interpreted by the European Court of Human Rights, measures aimed at encouraging the media to protect the private life and identity of victims through self-regulation or through regulatory or co-regulatory measures.

Article 12 – Assistance to victims

1. Each Party shall adopt such legislative or other measures as may be necessary to assist victims in their physical, psychological and social recovery. Such assistance shall include at least:

   a. standards of living capable of ensuring their subsistence, through such measures as: appropriate and secure accommodation, psychological and material assistance;

   b. access to emergency medical treatment;

   c. translation and interpretation services, when appropriate;

   d. counselling and information, in particular as regards their legal rights and the services available to them, in a language that they can understand;

   e. assistance to enable their rights and interests to be presented and considered at appropriate stages of criminal proceedings against offenders;

   f. access to education for children.

2. Each Party shall take due account of the victim's safety and protection needs.

3. In addition, each Party shall provide necessary medical or other assistance to victims lawfully resident within its territory who do not have adequate resources and need such help.

4. Each Party shall adopt the rules under which victims lawfully resident within its territory shall be authorised to have access to the labour market, to vocational training and education.

5. Each Party shall take measures, where appropriate and under the conditions provided for by its internal law, to co-operate with non-governmental organisations, other relevant organisations or other elements of civil society engaged in assistance to victims.

6. Each Party shall adopt such legislative or other measures as may be necessary to ensure that assistance to a victim is not made conditional on his or her willingness to act as a witness.

7. For the implementation of the provisions set out in this article, each Party shall ensure that services are provided on a consensual and informed basis, taking due account of the special needs of persons in a vulnerable position and the rights of children in terms of accommodation, education and appropriate health care.

Article 13 – Recovery and reflection period

1. Each Party shall provide in its internal law a recovery and reflection period of at least 30 days, when there are reasonable grounds to believe that the person concerned is a victim. Such a period shall be sufficient for the person concerned to recover and escape the influence of traffickers and/or to take an informed decision on cooperating with the competent authorities. During this period it shall not be possible to enforce any expulsion order against him or her. This provision is without prejudice to the activities carried out by the competent authorities in all phases of the relevant national proceedings, and in particular when investigating and prosecuting the offences concerned. During this period, the Parties shall authorise the persons concerned to stay in their territory.

2. During this period, the persons referred to in paragraph 1 of this Article shall be entitled to the measures contained in Article 12, paragraphs 1 and 2.

3. The Parties are not bound to observe this period if grounds of public order prevent it or if it is found that victim status is being claimed improperly.

Article 14 – Residence permit

1. Each Party shall issue a renewable residence permit to victims, in one or other of the two following situations or in both:

   a. the competent authority considers that their stay is necessary owing to their personal situation;

   b. the competent authority considers that their stay is necessary for the purpose of their co-operation with the competent authorities in investigation or criminal proceedings.

2. The residence permit for child victims, when legally necessary, shall be issued in accordance with the best interests of the child and, where appropriate, renewed under the same conditions.

3. The non-renewal or withdrawal of a residence permit is subject to the conditions provided for by the internal law of the Party.

4. If a victim submits an application for another kind of residence permit, the Party concerned shall take into account that he or she holds, or has held, a residence permit in conformity with paragraph 1.

5. Having regard to the obligations of Parties to which Article 40 of this Convention refers, each Party shall ensure that granting of a permit according to this provision shall be without prejudice to the right to seek and enjoy asylum.

Article 15 – Compensation and legal redress

1. Each Party shall ensure that victims have access, as from their first contact with the competent authorities, to information on relevant judicial and administrative proceedings in a language which they can understand.

2. Each Party shall provide, in its internal law, for the right to legal assistance and to free legal aid for victims under the conditions provided by its internal law.

3. Each Party shall provide, in its internal law, for the right of victims to compensation from the perpetrators.

4. Each Party shall adopt such legislative or other measures as may be necessary to guarantee compensation for victims in accordance with the conditions under its internal law, for instance through the establishment of a fund for victim compensation or measures or programmes aimed at social assistance and social integration of victims, which could be funded by the assets resulting from the application of measures provided in Article 23.

Article 16 – Repatriation and return of victims

1. The Party of which a victim is a national or in which that person had the right of permanent residence at the time of entry into the territory of the receiving Party shall, with due regard for his or her rights, safety and dignity, facilitate and accept, his or her return without undue or unreasonable delay.

2. When a Party returns a victim to another State, such return shall be with due regard for the rights, safety and dignity of that person and for the status of any legal proceedings related to the fact that the person is a victim, and shall preferably be voluntary.

3. At the request of a receiving Party, a requested Party shall verify whether a person is its national or had the right of permanent residence in its territory at the time of entry into the territory of the receiving Party.

4. In order to facilitate the return of a victim who is without proper documentation, the Party of which that person is a national or in which he or she had the right of permanent residence at the time of entry into the territory of the receiving Party shall agree to issue, at the request of the receiving Party, such travel documents or other authorisation as may be necessary to enable the person to travel to and re-enter its territory.

5. Each Party shall adopt such legislative or other measures as may be necessary to establish repatriation programmes, involving relevant national or international institutions and non governmental organisations. These programmes aim at avoiding re-victimisation. Each Party should make its best effort to favour the reintegration of victims into the society of the State of return, including reintegration into the education system and the labour market, in particular through the acquisition and improvement of their professional skills. With regard to children, these programmes should include enjoyment of the right to education and measures to secure adequate care or receipt by the family or appropriate care structures.

6. Each Party shall adopt such legislative or other measures as may be necessary to make available to victims, where appropriate in co-operation with any other Party concerned, contact information of structures that can assist them in the country where they are returned or repatriated, such as law enforcement offices, non-governmental organisations, legal professions able to provide counselling and social welfare agencies.

7. Child victims shall not be returned to a State, if there is indication, following a risk and security assessment, that such return would not be in the best interests of the child.

Article 17 – Gender equality

Each Party shall, in applying measures referred to in this chapter, aim to promote gender equality and use gender mainstreaming in the development, implementation and assessment of the measures.

CHAPTER IV – SUBSTANTIVE CRIMINAL LAW

Article 18 – Criminalisation of trafficking in human beings

Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct contained in article 4 of this Convention, when committed intentionally.

Article 19 – Criminalisation of the use of services of a victim

Each Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences under its internal law, the use of services which are the object of exploitation as referred to in Article 4 paragraph a of this Convention, with the knowledge that the person is a victim of trafficking in human beings.

Article 20 - Criminalisation of acts relating to travel or identity documents

Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the following conducts, when committed intentionally and for the purpose of enabling the trafficking in human beings:

a. forging a travel or identity document;

b. procuring or providing such a document;

c. retaining, removing, concealing, damaging or destroying a travel or identity document of another person.

Article 21 – Attempt and aiding or abetting

1. Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences when committed intentionally, aiding or abetting the commission of any of the offences established in accordance with Articles 18 and 20 of the present Convention.

2. Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences when committed intentionally, an attempt to commit the offences established in accordance with Articles 18 and 20, paragraph a, of this Convention.

Article 22 – Corporate liability

1. Each Party shall adopt such legislative and other measures as may be necessary to ensure that a legal person can be held liable for a criminal offence established in accordance with this Convention, committed for its benefit by any natural person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on:

a. a power of representation of the legal person;

b. an authority to take decisions on behalf of the legal person;

c. an authority to exercise control within the legal person.

2. Apart from the cases already provided for in paragraph 1, each Party shall take the measures necessary to ensure that a legal person can be held liable where the lack of supervision or control by a natural person

referred to in paragraph 1 has made possible the commission of a criminal offence established in accordance with this Convention for the benefit of that legal person by a natural person acting under its authority.

3. Subject to the legal principles of the Party, the liability of a legal person may be criminal, civil or administrative.

4. Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offence.

Article 23 – Sanctions and measures

1. Each Party shall adopt such legislative and other measures as may be necessary to ensure that the criminal offences established in accordance with Articles 18 to 21 are punishable by effective, proportionate and dissuasive sanctions. These sanctions shall include, for criminal offences established in accordance with Article 18 when committed by natural persons, penalties involving deprivation of liberty which can give rise to extradition.

2. Each Party shall ensure that legal persons held liable in accordance with Article 22 shall be subject to effective, proportionate and dissuasive criminal or non-criminal sanctions or measures, including monetary sanctions.

3. Each Party shall adopt such legislative and other measures as may be necessary to enable it to confiscate or otherwise deprive the instrumentalities and proceeds of criminal offences established in accordance with Articles 18 and 20, paragraph a, of this Convention, or property the value of which corresponds to such proceeds.

4. Each Party shall adopt such legislative or other measures as may be necessary to enable the temporary or permanent closure of any establishment which was used to carry out trafficking in human beings, without prejudice to the rights of bona fide third parties or to deny the perpetrator, temporary or permanently, the exercise of the activity in the course of which this offence was committed.

Article 24 – Aggravating circumstances

Each Party shall ensure that the following circumstances are regarded as aggravating circumstances in the determination of the penalty for offences established in accordance with Article 18 of this Convention:

a. the offence deliberately or by gross negligence endangered the life of the victim;

b. the offence was committed against a child;

c. the offence was committed by a public official in the performance of her/his duties;

d. the offence was committed within the framework of a criminal organisation.

Article 25 - Previous convictions

Each Party shall adopt such legislative and other measures providing for the possibility to take into account final sentences passed by another Party in relation to offences established in accordance with this Convention when determining the penalty.

Article 26 – Non-punishment provision

Each Party shall, in accordance with the basic principles of its legal system, provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so.

CHAPTER V – INVESTIGATION, PROSECUTION AND PROCEDURAL LAW

Article 27 - *Ex parte* and *ex officio* applications

1. Each Party shall ensure that investigations into or prosecution of offences established in accordance with this Convention shall not be dependent upon the report or accusation made by a victim, at least when the offence was committed in whole or in part on its territory.

2. Each Party shall ensure that victims of an offence in the territory of a Party other than the one where they reside may make a complaint before the competent authorities of their State of residence. The competent

authority to which the complaint is made, insofar as it does not itself have competence in this respect, shall transmit it without delay to the competent authority of the Party in the territory in which the offence was committed. The complaint shall be dealt with in accordance with the internal law of the Party in which the offence was committed.

3. Each Party shall ensure, by means of legislative or other measures, in accordance with the conditions provided for by its internal law, to any group, foundation, association or non-governmental organisations which aims at fighting trafficking in human beings or protection of human rights, the possibility to assist and/or support the victim with his or her consent during criminal proceedings concerning the offence established in accordance with Article 18 of this Convention.

Article 28 – Protection of victims, witnesses and collaborators with the judicial authorities

1. Each Party shall adopt such legislative or other measures as may be necessary to provide effective and appropriate protection from potential retaliation or intimidation in particular during and after investigation and prosecution of perpetrators, for:

   a. Victims;

   b. As appropriate, those who report the criminal offences established in accordance with Article 18 of this Convention or otherwise co-operate with the investigating or prosecuting authorities;

   c. witnesses who give testimony concerning criminal offences established in accordance with Article 18 of this Convention;

   d. when necessary, members of the family of persons referred to in subparagraphs a and c.

2. Each Party shall adopt such legislative or other measures as may be necessary to ensure and to offer various kinds of protection. This may include physical protection, relocation, identity change and assistance in obtaining jobs.

3. A child victim shall be afforded special protection measures taking into account the best interests of the child.

4. Each Party shall adopt such legislative or other measures as may be necessary to provide, when necessary, appropriate protection from potential retaliation or intimidation in particular during and after investigation and prosecution of perpetrators, for members of groups, foundations, associations or non-governmental organisations which carry out the activities set out in Article 27, paragraph 3.

5. Each Party shall consider entering into agreements or arrangements with other States for the implementation of this article.

Article 29 – Specialised authorities and co-ordinating bodies

1. Each Party shall adopt such measures as may be necessary to ensure that persons or entities are specialised in the fight against trafficking and the protection of victims. Such persons or entities shall have the necessary independence in accordance with the fundamental principles of the legal system of the Party, in order for them to be able to carry out their functions effectively and free from any undue pressure. Such persons or the staffs of such entities shall have adequate training and financial resources for their tasks.

2. Each Party shall adopt such measures as may be necessary to ensure co-ordination of the policies and actions of their governments' departments and other public agencies against trafficking in human beings, where appropriate, through setting up co-ordinating bodies.

3. Each Party shall provide or strengthen training for relevant officials in the prevention of and fight against trafficking in human beings, including Human Rights training. The training may be agency-specific and shall, as appropriate, focus on: methods used in preventing such trafficking, prosecuting the traffickers and protecting the rights of the victims, including protecting the victims from the traffickers.

4. Each Party shall consider appointing National Rapporteurs or other mechanisms for monitoring the anti-trafficking activities of State institutions and the implementation of national legislation requirements.

Article 30 – Court proceedings

In accordance with the Convention for the Protection of Human Rights and Fundamental Freedoms, in particular Article 6, each Party shall adopt such legislative or other measures as may be necessary to ensure in the course of judicial proceedings:

a. the protection of victims' private life and, where appropriate, identity;

b. victims' safety and protection from intimidation,

in accordance with the conditions under its internal law and, in the case of child victims, by taking special care of children's needs and ensuring their right to special protection measures.

Article 31 – Jurisdiction

1. Each Party shall adopt such legislative and other measures as may be necessary to establish jurisdiction over any offence established in accordance with this Convention, when the offence is committed:

a. in its territory; or

b. on board a ship flying the flag of that Party; or

c. on board an aircraft registered under the laws of that Party; or

d. by one of its nationals or by a stateless person who has his or her habitual residence in its territory, if the offence is punishable under criminal law where it was committed or if the offence is committed outside the territorial jurisdiction of any State;

e. against one of its nationals.

2. Each Party may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, by a declaration addressed to the Secretary General of the Council of Europe, declare that it reserves the right not to apply or to apply only in specific cases or conditions the jurisdiction rules laid down in paragraphs 1 (d) and (e) of this article or any part thereof.

3. Each Party shall adopt such measures as may be necessary to establish jurisdiction over the offences referred to in this Convention, in cases where an alleged offender is present in its territory and it does not extradite him/her to another Party, solely on the basis of his/her nationality, after a request for extradition.

4. When more than one Party claims jurisdiction over an alleged offence established in accordance with this Convention, the Parties involved shall, where appropriate, consult with a view to determining the most appropriate jurisdiction for prosecution.

5. Without prejudice to the general norms of international law, this Convention does not exclude any criminal jurisdiction exercised by a Party in accordance with internal law.

CHAPTER VI – INTERNATIONAL CO-OPERATION AND CO-OPERATION WITH CIVIL SOCIETY

Article 32 – General principles and measures for international co-operation

The Parties shall co-operate with each other, in accordance with the provisions of this Convention, and through application of relevant applicable international and regional instruments, arrangements agreed on the basis of uniform or reciprocal legislation and internal laws, to the widest extent possible, for the purpose of:

- preventing and combating trafficking in human beings;
- protecting and providing assistance to victims;
- investigations or proceedings concerning criminal offences established in accordance with this Convention.

Article 33 - Measures relating to endangered or missing persons

1. When a Party, on the basis of the information at its disposal has reasonable grounds to believe that the life, the freedom or the physical integrity of a person referred to in Article 28, paragraph 1, is in immediate danger on the territory of another Party, the Party that has the information shall, in such a case of emergency, transmit it without delay to the latter so as to take the appropriate protection measures.

2. The Parties to this Convention may consider reinforcing their co-operation in the search for missing people, in particular for missing children, if the information available leads them to believe that she/he is a victim of trafficking in human beings. To this end, the Parties may conclude bilateral or multilateral treaties with each other.

Article 34 – Information

1. The requested Party shall promptly inform the requesting Party of the final result of the action taken under this chapter. The requested Party shall also promptly inform the requesting Party of any circumstances which render impossible the carrying out of the action sought or are likely to delay it significantly.

2. A Party may, within the limits of its internal law, without prior request, forward to another Party information obtained within the framework of its own investigations when it considers that the disclosure of such information might assist the receiving Party in initiating or carrying out investigations or proceedings concerning criminal offences established in accordance with this Convention or might lead to a request for co-operation by that Party under this chapter.

3. Prior to providing such information, the providing Party may request that it be kept confidential or used subject to conditions. If the receiving Party cannot comply with such request, it shall notify the providing Party, which shall then determine whether the information should nevertheless be provided. If the receiving Party accepts the information subject to the conditions, it shall be bound by them.

4. All information requested concerning Articles 13, 14 and 16, necessary to provide the rights conferred by these Articles, shall be transmitted at the request of the Party concerned without delay with due respect to Article 11 of the present Convention.

Article 35 – Co-operation with civil society

Each Party shall encourage state authorities and public officials, to co-operate with non-governmental organisations, other relevant organisations and members of civil society, in establishing strategic partnerships with the aim of achieving the purpose of this Convention.

CHAPTER VII – MONITORING MECHANISM

Article 36 – Group of experts on action against trafficking in human beings

1. The Group of experts on action against trafficking in human beings (hereinafter referred to as "GRETA"), shall monitor the implementation of this Convention by the Parties.

2. GRETA shall be composed of a minimum of 10 members and a maximum of 15 members, taking into account a gender and geographical balance, as well as a multidisciplinary expertise. They shall be elected by the Committee of the Parties for a term of office of 4 years, renewable once, chosen from amongst nationals of the States Parties to this Convention.

3. The election of the members of GRETA shall be based on the following principles:

   a. they shall be chosen from among persons of high moral character, known for their recognised competence in the fields of Human Rights, assistance and protection of victims and of action against trafficking in human beings or having professional experience in the areas covered by this Convention;

   b. they shall sit in their individual capacity and shall be independent and impartial in the exercise of their functions and shall be available to carry out their duties in an effective manner;

   c. no two members of GRETA may be nationals of the same State;

   d. they should represent the main legal systems.

4. The election procedure of the members of GRETA shall be determined by the Committee of Ministers, after consulting with and obtaining the unanimous consent of the Parties to the Convention, within a period of one year following the entry into force of this Convention. GRETA shall adopt its own rules of procedure.

Article 37 – Committee of the Parties

1. The Committee of the Parties shall be composed of the representatives on the Committee of Ministers of the Council of Europe of the member States Parties to the Convention and representatives of the Parties to the Convention, which are not members of the Council of Europe.

2. The Committee of the Parties shall be convened by the Secretary General of the Council of Europe. Its first meeting shall be held within a period of one year following the entry into force of this Convention in order to elect the members of GRETA. It shall subsequently meet whenever one-third of the Parties, the President of GRETA or the Secretary General so requests.

3. The Committee of the Parties shall adopt its own rules of procedure.

Article 38 – Procedure

1. The evaluation procedure shall concern the Parties to the Convention and be divided in rounds, the length of which is determined by GRETA. At the beginning of each round GRETA shall select the specific provisions on which the evaluation procedure shall be based.

2. GRETA shall define the most appropriate means to carry out this evaluation. GRETA may in particular adopt a questionnaire for each evaluation round, which may serve as a basis for the evaluation of the implementation by the Parties of the present Convention. Such a questionnaire shall be addressed to all Parties. Parties shall respond to this questionnaire, as well as to any other request of information from GRETA.

3. GRETA may request information from civil society.

4. GRETA may subsidiarily organise, in co-operation with the national authorities and the "contact person" appointed by the latter, and, if necessary, with the assistance of independent national experts, country visits. During these visits, GRETA may be assisted by specialists in specific fields.

5. GRETA shall prepare a draft report containing its analysis concerning the implementation of the provisions on which the evaluation is based, as well as its suggestions and proposals concerning the way in which the Party concerned may deal with the problems which have been identified. The draft report shall be transmitted for comments to the Party which undergoes the evaluation. Its comments are taken into account by GRETA when establishing its report.

6. On this basis, GRETA shall adopt its report and conclusions concerning the measures taken by the Party concerned to implement the provisions of the present Convention. This report and conclusions shall be sent to the Party concerned and to the Committee of the Parties. The report and conclusions of GRETA shall be made public as from their adoption, together with eventual comments by the Party concerned.

7. Without prejudice to the procedure of paragraphs 1 to 6 of this article, the Committee of the Parties may adopt, on the basis of the report and conclusions of GRETA, recommendations addressed to this Party (a) concerning the measures to be taken to implement the conclusions of GRETA, if necessary setting a date for submitting information on their implementation, and (b) aiming at promoting co-operation with that Party for the proper implementation of the present Convention.

CHAPTER VIII – RELATIONSHIP WITH OTHER INTERNATIONAL INSTRUMENTS

Article 39 – Relationship with the Protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the United Nations Convention against transnational organised crime

This Convention shall not affect the rights and obligations derived from the provisions of the Protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the United Nations Convention against transnational organised crime, and is intended to enhance the protection afforded by it and develop the standards contained therein.

Article 40 – Relationship with other international instruments

1. This Convention shall not affect the rights and obligations derived from other international instruments to which Parties to the present Convention are Parties or shall become Parties and which contain provisions on matters governed by this Convention and which ensure greater protection and assistance for victims of trafficking.

2. The Parties to the Convention may conclude bilateral or multilateral agreements with one another on the matters dealt with in this Convention, for purposes of supplementing or strengthening its provisions or facilitating the application of the principles embodied in it.

3. Parties which are members of the European Union shall, in their mutual relations, apply Community and European Union rules in so far as there are Community or European Union rules governing the particular subject concerned and applicable to the specific case, without prejudice to the object and purpose of the present Convention and without prejudice to its full application with other Parties.

4. Nothing in this Convention shall affect the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of *non-refoulement* as contained therein.

CHAPTER IX – AMENDMENTS TO THE CONVENTION

Article 41 – Amendments

1. Any proposal for an amendment to this Convention presented by a Party shall be communicated to the Secretary General of the Council of Europe and forwarded by him or her to the member States of the Council of Europe, any signatory, any State Party, the European Community, to any State invited to sign this Convention in accordance with the provisions of Article 42 and to any State invited to accede to this Convention in accordance with the provisions of Article 43.

2. Any amendment proposed by a Party shall be communicated to GRETA, which shall submit to the Committee of Ministers its opinion on that proposed amendment.

3. The Committee of Ministers shall consider the proposed amendment and the opinion submitted by GRETA and, following consultation of the Parties to this Convention and after obtaining their unanimous consent, may adopt the amendment.

4. The text of any amendment adopted by the Committee of Ministers in accordance with paragraph 3 of this article shall be forwarded to the Parties for acceptance.

5. Any amendment adopted in accordance with paragraph 3 of this article shall enter into force on the first day of the month following the expiration of a period of one month after the date on which all Parties have informed the Secretary General that they have accepted it.

CHAPTER X – FINAL CLAUSES

Article 42 – Signature and entry into force

1. This Convention shall be open for signature by the member States of the Council of Europe, the non member States which have participated in its elaboration and the European Community.

2. This Convention is subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

3. This Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date on which 10 Signatories, including at least 8 member States of the Council of Europe, have expressed their consent to be bound by the Convention in accordance with the provisions of the preceding paragraph.

4. In respect of any State mentioned in paragraph 1 or the European Community, which subsequently expresses its consent to be bound by it, the Convention 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 its instrument of ratification, acceptance or approval.

Article 43 – Accession to the Convention

1. After the entry into force of this Convention, the Committee of Ministers of the Council of Europe may, after consultation of the Parties to this Convention and obtaining their unanimous consent, invite any non-member State of the Council of Europe, which has not participated in the elaboration of the Convention, to accede to this Convention by a decision taken by the majority provided for in Article 20 *d*. of the Statute of the Council of Europe, and by unanimous vote of the representatives of the Contracting States entitled to sit on the Committee of Ministers.

2. In respect of any acceding State, the Convention 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 of the instrument of accession with the Secretary General of the Council of Europe.

Article 44 – Territorial application

1. Any State or the European Community 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 Convention shall apply.

2. Any Party may, at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Convention to any other territory specified in the declaration and for whose international relations it is responsible or on whose behalf it is authorised to give undertakings. In respect of such territory, the Convention 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 of the Council of Europe. 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 45 – Reservations

No reservation may be made in respect of any provision of this Convention, with the exception of the reservation of Article 31, paragraph 2.

Article 46 – Denunciation

1. Any Party may, at any time, denounce this Convention 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.

Article 47 – Notification

The Secretary General of the Council of Europe shall notify the member States of the Council of Europe, any State signatory, any State Party, the European Community, to any State invited to sign this Convention in accordance with the provisions of Article 42 and to any State invited to accede to this Convention in accordance with the provisions of Article 43 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 Convention in accordance with Articles 42 and 43;

d. any amendment adopted in accordance with Article 41 and the date on which such an amendment enters into force;

e. any denunciation made in pursuance of the provisions of Article 46;

f. any other act, notification or communication relating to this Convention

g. any reservation made under Article 45.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at Warsaw, this 16th day of May 2005, 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, to the non-member States which have participated in the elaboration of this Convention, to the European Community and to any State invited to accede to this Convention.

Council of Europe Convention on Action against Trafficking in Human Beings – CETS No. 197

Explanatory Report

I. INTRODUCTION

A. TRAFFICKING IN HUMAN BEINGS: THE PHENOMENON AND ITS CONTEXT

1. Trafficking in human beings is a major problem in Europe today. Annually, thousands of people, largely women and children, fall victim to trafficking for sexual exploitation or other purposes, whether in their own countries or abroad. All indicators point to an increase in victim numbers. Action to combat trafficking in human beings is receiving worldwide attention because trafficking threatens the human rights and the fundamental values of democratic societies.

2. Action to combat this persistent assault on humanity is one of a number of fronts on which the Council of Europe is battling on behalf of human rights and human dignity.

3. Trafficking in human beings, with the entrapment of its victims, is the modern form of the old worldwide slave trade. It treats human beings as a commodity to be bought and sold, and to be put to forced labour, usually in the sex industry but also, for example, in the agricultural sector, declared or undeclared sweatshops, for a pittance or nothing at all. Most identified victims of trafficking are women but men also are sometimes victims of trafficking in human beings. Furthermore, many of the victims are young, sometimes children. All are desperate to make a meagre living, only to have their lives ruined by exploitation and rapacity.

4. To be effective, a strategy for combating trafficking in human beings must adopt a multidisciplinary approach incorporating prevention, protection of human rights of victims and prosecution of traffickers, while at the same time seeking to harmonise relevant national laws and ensure that these laws are applied uniformly and effectively.

5. A worldwide phenomenon, trafficking in human beings can be national or transnational. Often linked to organised crime, for which it now represents one of the most lucrative activities, trafficking has to be fought in Europe just as vigorously as drug and money laundering. Indeed, according to certain estimations, trafficking in human beings is the third largest illicit money-making venture in the world after trafficking of weapons and drugs.

6. In this context the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime* (hereafter "the Palermo Protocol") laid the foundations for international action on trafficking. The Council of Europe Convention, while taking the Palermo Protocol as a starting point and taking into account other international legal instruments, whether universal or regional, relevant to combating trafficking in human beings, seeks to strengthen the protection afforded by those instruments and to raise the standards which they lay down.

7. The Palermo Protocol contains the first agreed, internationally binding definition (taken over into the Council of Europe convention) of the term "trafficking in persons" (see, below, the comments on Article 4 of the Convention). It is important to stress at this point that trafficking in human beings is to be distinguished

from smuggling of migrants. The latter is the subject of a separate protocol to the *United Nations Convention against Transnational Organized Crime* (*Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Crime*). While the aim of smuggling of migrants is the unlawful cross-border transport in order to obtain, directly or indirectly, a financial or other material benefit, the purpose of trafficking in human beings is exploitation. Furthermore, trafficking in human beings does not necessarily involve a transnational element; it can exist at national level.

8. There are other international instruments that have a contribution to make in combating trafficking in human beings and protecting its victims. Among United Nations instruments the following can be mentioned:

- the International Labour Organization (ILO) Convention concerning Forced or Compulsory Labour (No. 29) of 28 June 1930;
- the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others of 2 December 1949;
- the Convention relating to the Status of Refugees of 28 July 1951 and its Protocol relating to the Status of Refugees;
- the Convention on the Elimination of All Forms of Discrimination against Women of 18 December 1979;
- the Convention on the Rights of the Child of 20 November 1989;
- the ILO Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour of 17 June 1999;
- the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography of 25 May 2000.

9. Experience has shown that putting legal instruments in place at regional level valuably reinforces action at world level. In the European context, the European Union (EU) *Council Framework Decision of 19 July 2002 on combating trafficking in human beings* and the EU *Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities* regulate some of the questions concerning trafficking in human beings. The EU *Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings* would also be relevant in the field of trafficking in human beings.

B. ACTION OF THE COUNCIL OF EUROPE

10. Given that one of the primary concerns of the Council of Europe is the safeguarding and protection of human rights and human dignity, and that trafficking in human beings directly undermines the values on which the Council of Europe is based, it is logical that finding solutions to this problem is a top priority for the Organisation. It is all the more relevant as the Council of Europe has, among its 46 member States, countries of origin, transit and destination of trafficking victims.

11. Since the late 1980s, the Council of Europe has therefore been a natural focus for work on combating trafficking in human beings[1]. Trafficking impinges on a number of questions with which the Council of Europe is concerned, such as sexual exploitation of women and children, protection of women against violence, organised crime and migration. The Council of Europe has taken various initiatives in this field and in related fields: among other things it has produced legal instruments, devised strategies, conducted research, engaged in legal and technical cooperation and carried out monitoring.

The Committee of Ministers of the Council of Europe

12. In 1991 the Council of Europe Committee of Ministers adopted *Recommendation No. R(91)11 on sexual exploitation, pornography and prostitution of, and trafficking in, children and young adults*, which was the first international instrument dealing comprehensively with these matters. In 1999 a committee of experts on protecting children against sexual exploitation (PC-SE) was set up, in particular to revise Recommendation No. R(91)11.

1. 1991 Strasbourg seminar organised by the Steering Committee for Equality between Women and Men (CDEG) on *Action against traffic in women, considered as a violation of human rights and human dignity*.

13. Through the Group of Experts on traffic in women (1992-93), which reported to the Steering Committee for Equality between Women and Men (CDEG), the Council identified the most urgent areas for action from which a consultant drew up a general action plan on trafficking in women[2]. The plan suggested areas for reflection and investigation in order to draw up recommendations to the member States on legislative, judicial and punishment aspects of trafficking, on aiding, supporting and rehabilitating its victims and on programmes of prevention and training.

14. Trafficking aroused the collective concern of Council of Europe Heads of State and Government at the October 1997 Strasbourg Summit: the final declaration explicitly treats all forms of exploitation of women as a threat to citizens' security and democracy in Europe.

15. There have been various activities since the Summit. The first type of activity was concerned both with raising awareness and action. Seminars to heighten the awareness of governments and civil society to this new form of slavery[3] were organised in order to alert the different players (police, judges, social workers, embassy staff, teachers, etc.) to their role vis-à-vis trafficking victims and the dangers facing certain individuals.

16. In addition, member States were encouraged to draw up national action plans against trafficking. To that end, the Council prepared the above-mentioned model action plan against trafficking in women in 1996 and since then has encouraged the preparation of both national and regional action plans, in particular in South-East Europe[4] and the South Caucasus[5].

17. Studies and research have also been carried out to apprehend the problem of trafficking from its many different angles. In particular the Steering Committee for equality between women and men (CDEG) prepared a study on *the impact of the use of new information technologies on trafficking in human beings for the purpose of sexual exploitation*.[6]

18. Furthermore, targeted seminars and meetings of experts have taken place in several member States, both providing them with the necessary technical assistance for drawing up or revising legislation in this area and helping them to take other requisite measures for combating this scourge.

19. One more recent initiative was the LARA Project supporting the reform of criminal legislation in South-East Europe as a means of preventing and combating trafficking in human beings, launched in July 2002 and completed in November 2003. This Council of Europe Project, implemented within the framework of the Stability Pact Task Force on Trafficking in Human Beings, enabled the countries concerned to adapt and review their domestic legislation in this field. As a result of this Project, nearly all those countries adopted national global action plans against trafficking in human beings, covering prevention, prosecution of traffickers and protection of the victims.

20. The awareness-raising activities led to setting up a legal framework for combating the trafficking in human beings. Two Council of Europe legal instruments were produced which specifically dealt with trafficking in human beings for sexual exploitation, most of whose victims are women and children:

- *Recommendation No. R(2000)11 of the Committee of Ministers to member States on action against trafficking in human beings for the purpose of sexual exploitation;*
- *Recommendation No. R(2001)16 of the Committee of Ministers to member States on the protection of children against sexual exploitation.*

21. These put forward a pan-European strategy taking in definitions, general measures, a methodological and action framework, prevention, victim assistance and protection, criminal measures, judicial cooperation and arrangements for international co-operation and co-ordination.

22. Finally, it should be underlined that during the 5th European Ministerial Conference on Equality between Women and Men (Skopje, 22-23 January 2003) devoted to the theme: "Democratisation, conflict

2. Plan of action against traffic in women (doc. EG (96) 2) by Ms Michèle HIRSCH (Belgium).
3. For example, an International seminar on action against trafficking in human beings for the purpose of sexual exploitation: the role of NGOs (Strasbourg, June 1998) and a Workshop on good and bad practices with regard to media portrayal of women, with reference to trafficking in human beings for sexual exploitation (Strasbourg, September 1998).
4. Within the framework of the Stability Pact for South-Eastern Europe, the Council of Europe organised an International seminar on "Co-ordinated action against trafficking in human beings in South-Eastern Europe: towards a regional action plan". At the invitation of the Greek authorities, the seminar took place in Athens from 29 June to 1 July 2000. It was organised in partnership with the United Nations High Commissioner for Human Rights, OSCE/ODIHR and the International Organisation for Migration (IOM), and with the support of Japan.
5. A seminar on "Co-ordinated action against trafficking in human beings in the South Caucasus: towards a regional action plan" was held in Tbilisi on 6 and 7 November 2002.
6. EG-S-NT (2002) 9 Fin.

prevention and peace building: the perspectives and the roles of women", the European Equality Ministers agreed that the activities undertaken by the Council of Europe to protect and promote the human rights of women should be focused, among other things, on the objective to prevent and combat violence against women and trafficking in human beings.

23. Trafficking in human beings may be engaged in by organised criminal groups – which frequently use corruption to circumvent the law, and money laundering to conceal their profits – but it can occur in other contexts. Consequently, other Council of Europe legal instruments are also relevant to trafficking, in particular those concerned with protecting human rights, children's rights, social rights, victims' rights and personal data, those designed to combat corruption, money laundering and cybercrime, and the treaties on international cooperation in criminal matters. Thus, the following Council of Europe conventions could play a part in combating trafficking in human beings and protecting the victims of it:

- the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (ETS No. 5);
- the European Convention on Extradition of 13 December 1957 (ETS No. 24) and the protocols thereto;
- the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959 (ETS No. 30) and the protocols thereto;
- the European Social Charter of 18 October 1961 (ETS No. 35) and the European Social Charter (revised) of 3 May 1996 (ETS No. 163);
- the European Convention on the Compensation of Victims of Violent Crimes of 24 November 1983 (ETS No. 116);
- the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime of 8 November 1990 (ETS No. 141);
- the European Convention on the Exercise of Children's Rights of 25 January 1996 (ETS No. 160);
- the Criminal Law Convention on Corruption of 27 January 1999 (ETS No. 173) and the Civil Law Convention on Corruption of 4 November 1999 (ETS No. 174);
- the Convention on Cybercrime of 23 November 2001 (ETS No. 185).

The Parliamentary Assembly of the Council of Europe

24. In *Recommendation 1545 (2002) on a campaign against trafficking in women* the Council of Europe Parliamentary Assembly recommended that the Committee of Ministers, among other things, draw up a European convention on trafficking in women that would be open to non-member States and based on the definition of trafficking set out in Committee of Ministers *Recommendation No. R(2000)11 on action against trafficking in human beings for the purpose of sexual exploitation*.

25. The Assembly returned to the question in 2003, with *Recommendation 1610 (2003) on migration connected with trafficking in women and prostitution*. This recommended that the Committee of Ministers:

i. "begin as soon as possible the drafting of the Council of Europe convention on trafficking in human beings, which will bring added value to other international instruments with its clear human rights and victim protection focus and the inclusion of a gender perspective;

ii. ensure that the Council of Europe convention on trafficking in human beings includes provisions aiming at:

   a. introducing the offence of trafficking in the criminal law of Council of Europe member States;

   b. harmonising the penalties applicable to trafficking;

   c. ensuring the effective establishment of jurisdiction over traffickers or alleged traffickers, particularly by facilitating extradition and the application of the principle *aut dedere aut judicare* in all cases concerning trafficking."

26. In *Recommendation 1611 (2003) on trafficking in organs in Europe*, the Parliamentary Assembly suggested developing, in cooperation with relevant organisations, a European strategy for combating organ trafficking and also suggested that drafting the future Council of Europe Convention on action against trafficking in human beings include a protocol to it on trafficking in organs and tissues of human origin.

27. Parliamentary Assembly Recommendation 1663 (2004) on domestic slavery: servitude, au pairs and mail-order brides recommended adopting the necessary measures to combat domestic slavery in all its forms. Furthermore, the Parliamentary Assembly considered that the Council of Europe must have zero tolerance for slavery, and that the Council of Europe as an international organisation defending human rights must fight against all forms of slavery and trafficking in human beings. The Assembly underlined that the Council of Europe and its member States must promote and protect the human rights of the victim and ensure that the perpetrators of such crimes are brought to justice so that slavery can finally be eliminated from Europe. Finally, the Parliamentary Assembly expressed its support for the drafting of the *Council of Europe Convention on action against trafficking in human beings.*

C. THE COUNCIL OF EUROPE CONVENTION ON ACTION AGAINST TRAFFICKING IN HUMAN BEINGS

28. At the same time as these different activities, and to follow up Committee of Ministers Recommendation No. R(2000)11, the Steering Committee for Equality between Women and Men (CDEG) took the initiative to give new impetus to the Council of Europe's work in this area and prepared a study on the feasibility of drawing up a Convention on action against trafficking in human beings.

29. The Council of Europe considered that it was necessary to draft a legally binding instrument which goes beyond recommendations or specific actions. The European public perception of the phenomenon of trafficking and the measures which need to be adopted to combat it efficiently have evolved, thus rendering necessary the elaboration of a legally binding instrument, geared towards the protection of victims' rights and the respect for human rights, and aiming at a proper balance between matters concerning human rights and prosecution.

30. Even though there are already other international instruments in this field, the Convention benefits from the more limited and uniform context of the Council of Europe, contains more precise provisions and may go beyond minimum standards agreed upon in other international instruments. The evolution of international law proves that regional instruments are very often necessary to complement global efforts. European instruments in the field of the protection of children's rights[7], money laundering or trafficking in drugs[8] have proved to have a very positive impact on the implementation of global initiatives. The drafting of a Council of Europe Convention does not aim at competing with other instruments adopted at a global or regional level but at improving the protection afforded by them and developing the standards contained therein, in particular in relation to the protection of the human rights of the victims of trafficking.

31. At a tripartite meeting in Geneva, on 14 February 2003, high-level representatives of the Council of Europe, the Organisation for Security and Cooperation in Europe (OSCE) and the United Nations stated their support for a Council of Europe convention on trafficking in human beings to improve the protection of victims and to develop pan-European action on what was an extremely serious form of criminal activity, they also backed the idea of promoting national legislation to combat trafficking.

32. The need for the Council of Europe to reinforce its action was underlined by the Foreign Affairs Ministers at the 112th (4-5 May 2003), 113th (5-6 November 2003) and 114th (12-13 May 2004) Sessions of the Committee of Ministers. Therefore, the Council of Europe launched the drafting of a Convention on action against trafficking in human beings. The convention would be geared towards the protection of victims' rights and the respect for human rights, and aim at a proper balance between matters concerning human rights and prosecution.

33. The proposal to prepare a Council of Europe Convention on action against trafficking in human beings was approved by the Committee of Ministers, at the 838th meeting of the Ministers' Deputies on 30 April 2003, when adopting the specific terms of reference setting up the Ad Hoc Committee on Action against Trafficking in Human Beings (CAHTEH). This multidisciplinary committee had the task of preparing a convention focusing on the protection of the human rights of the victims of trafficking and, balanced with this concern, the prosecution of traffickers.

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7. European Convention on the exercise of children's rights of 25 January 1996 (ETS No. 160) (in relation to the 1989 UN Convention on the rights of the child).
8. Convention on Laundering, Search, Seizure and Confiscation of Proceeds of Crime of 1990 (ETS No.141) (in relation to the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic substances of 1988); Council of Europe Agreement of 1995 on illicit traffic by sea, implementing Article 17 of the United Nations Convention against illicit traffic in narcotic drugs and psychotropic substances of 1995 (ETS No. 156).

34. In September 2003, the Council of Europe started negotiations on the Convention on action against trafficking in human beings. The CAHTEH held eight meetings, in September and December 2003; February, May, June/July, September/October and December 2004 and February 2005 to finalise the text.

35. The text of the draft Convention was approved by the CAHTEH during its meeting in December 2004 and transmitted to the Committee of Ministers for submission to the Parliamentary Assembly for opinion. In January 2005 the Parliamentary Assembly gave its opinion on the draft convention (Opinion No. 253 (2005), 26 January 2005) and the CAHTEH considered that opinion at its 8th and final meeting in February 2005.

36. The added value provided by the Council of Europe Convention lies firstly in the affirmation that trafficking in human beings is a violation of human rights and violates human dignity and integrity, and that greater protection is therefore needed for all of its victims. Secondly, the Convention's scope takes in all forms of trafficking (national, transnational, linked or not to organised crime, and for purposes of exploitation) in particular with a view to victim protection measures and international cooperation. Thirdly, the Convention sets up monitoring machinery to ensure that Parties implement its provisions effectively. Lastly, the Convention mainstreams gender equality in its provisions.

37. The Convention contains a preamble and ten chapters. Chapter I deals with its purposes and scope, the principle of non-discrimination and definitions; Chapter II deals with prevention, cooperation and other measures; Chapter III deals with measures to protect and promote the rights of victims, guaranteeing gender equality; Chapter IV deals with substantive criminal law; Chapter V deals with investigation, prosecution and procedural law; Chapter VI deals with international cooperation and cooperation with the civil society; Chapter VII sets out the monitoring mechanism; and, lastly, Chapters VIII, IX and X deal with the relationship between the Convention and other international instruments, amendments to the Convention and final clauses.

II. COMMENTARY ON THE PROVISIONS OF THE CONVENTION

Title

38. The title contains the new official name of all new Council of Europe treaties. Following a decision by the Secretary General, the official name of any new treaty would be "Council of Europe Convention [or agreement] on…". Therefore, this new title is adopted for the Convention.

39. Furthermore, the Convention includes in its title the term "action" in order to underline that the Convention provides not only legislative measures but also other initiatives to be taken to combat trafficking in human beings. Action against trafficking in human beings should be understood to include prevention and assistance to victims as well as criminal law measures designed to combat trafficking.

Preamble

40. The Preamble reaffirms the commitment of the signatories to human rights and fundamental freedoms. Furthermore, it underlines that the accession to the Convention is open to other signatories than the member States of the Council of Europe.

41. The Convention is based on recognition, already stated in the Preamble in paragraph 5 of *Recommendation No. R(2000)11 of the Committee of Ministers to member States on action against trafficking in human beings for the purpose of sexual exploitation*, that trafficking in human beings constitutes a violation of human rights and an offence to the dignity and integrity of the human being. The recognition of trafficking as a violation of human rights would have consequences for some legal systems which have introduced special protection measures in cases of infringement of fundamental rights.

42. The recognition of trafficking in human beings as a violation of human rights appears directly or indirectly in an important number of international legal instruments and international declarations. *Recommendation Rec(2002)5 of the Committee of Ministers to member States on the protection of women against violence*, defines violence against women as including trafficking and states that violence against women both violates and impairs or nullifies the enjoyment of their human rights and fundamental freedoms. The *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women* affirms, in the Preamble, that violence against women constitutes a violation of their human rights and fundamental freedoms. The definition of violence against women in Article 2 of this Convention includes trafficking as a form of violence against women. The European Union, in its *Council Framework Decision on Combating Trafficking in Human Beings* of 19 July 2002 states that "trafficking in human beings comprises serious violations of fundamental human rights and human dignity…"(paragraph 3). Treaty monitoring bodies of the United Nations, including

the Human Rights Committee and the Committee on the Elimination of Discrimination against Women, have also identified trafficking in human beings as a violation of human rights.[9]

43. Furthermore, the Rome Statute of the International Criminal Court in its Article 7 states that: "For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: […] (c) Enslavement; […] which "means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children".

44. The horizontal application of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter ECHR) has been the subject of debate over many years. However, the case law of the European Court of Human Rights contains clear indications in favour of the applicability of the ECHR to relations between private individuals in the sense that the Court has recognised the liability of contracting States for acts committed by individuals or group of individuals when these States failed to take appropriate measures of protection. The first judgment in this sense was case X and Y v. The Netherlands[10], where the Court held that there was an obligation on the State to adopt criminal-law provisions to secure the effective protection of individuals. Culpable State failure to act on this could therefore give rise to violation of the ECHR. In the case *Young, James and Webster v. The United Kingdom*[11], the Court stated that "Under Article 1 (art. 1) of the Convention, each Contracting State "shall secure to everyone within [its] jurisdiction the rights and freedoms defined in ... [the] Convention"; hence, if a violation of one of those rights and freedoms is the result of non-observance of that obligation in the enactment of domestic legislation, the responsibility of the State for that violation is engaged. Although the proximate cause of the events giving rise to this case was the 1975 agreement between British Rail and the railway unions, it was the domestic law in force at the relevant time that made lawful the treatment of which the applicants complained. The responsibility of the respondent State for any resultant breach of the Convention is thus engaged on this basis […]" Since then[12] the liability of Contracting States for acts committed by individuals or a group of individuals in violation of the ECHR has been recognised.

45. Trafficking in human beings has become one of the Europe's major scourges. This phenomenon affecting men, women and children has reached such an unprecedented level that we can refer to it as a new form of slavery. The ECHR prohibits slavery and forced labour in its Article 4: "1. No one shall be held in slavery or servitude; 2. No one shall be required to perform forced or compulsory labour […]". The definition of "trafficking in human beings" contained in Article 4 of the present Convention refers specifically to "slavery" (see comments on Article 4 below).

46. The main added value of the present Convention in relation to other international instruments is its Human Rights perspective and its focus on victim protection. Therefore, paragraph 5 of the Preamble states that the respect for the rights and protection of victims and the fight against trafficking in human beings must be the paramount objectives.

47. In relation to the non-discrimination principle, it should be recalled that Recommendation 1545 (2002) of the Parliamentary Assembly of the Council of Europe on a *campaign against trafficking in women*, calls for the inclusion of a non-discrimination clause in the future Convention based on the one contained in Parliamentary Assembly Opinion 216 (2000) on Draft Protocol No. 12 to the ECHR. (See comments on Article 3 below).

48. The Preamble of the Convention also refers to the declarations of the Foreign Affairs Ministers of the member States of the Council of Europe at the 112th, 113th and 114th Sessions of the Committee of Ministers, as mentioned above.

49. The Preamble contains an enumeration of the most important international legal instruments which directly deal with trafficking in human beings in the framework of the Council of Europe, the European Union and the United Nations. In particular, it should be underlined that, as mentioned above, the Council of Europe

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9. See, *inter alia*, UN Docs: CCPR/CO/79/LVA, dated 06/11/2003 and A/53/38/rev.1, respectively. See also, The Permanent Council of the OSCE's *Decision No 557: Action Plan to Combat Trafficking in Human Beings*, 24 July 2003 Budapest, *Declaration on Public Health and Trafficking in Human Beings* of 19-21 March 2003. See also, the second paragraph of the Preamble to the *SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution.*
10. *Eur. Court HR, X and Y v. The Netherlands judgement of 26 March 1985*, Series A no. 91, paragraph 23.
11. *Eur. Court HR, Young James and Websters v. The United Kingdom judgement of 13 August 1981*, Series A, no. 44, paragraph 49.
12. See, *inter alia*, the following judgments: *Eur. Court HR, A v. The United Kingdom judgement of 23 September 1998*, Reports of Judgments and Decisions 1998-VI, paragraph 22; *Eur. Court HR, Z and others v. The United Kingdom judgement of 10 May 2001*, Reports of Judgments and Decisions 2001-V, paragraph 73; *Eur. Court HR, M.C. v. Bulgaria judgement of 4 December 2003*; application no. 39272/98.

through its Committee of Ministers, and its Parliamentary Assembly prepared an important number of instruments to examine and combat trafficking in human beings from different perspectives. The important place that this Convention attributes to the *Protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the United Nations Convention against transnational organized crime* is reflected in the adoption of the definition on « trafficking in human beings » agreed upon in this Protocol. As a complement to and development of this United Nations Protocol, which emphasises the crime prevention aspect of trafficking, the Council of Europe Convention clearly defines trafficking as being first and foremost an issue of violation of human rights and emphasises the victims' protection aspect of trafficking. The aim is to improve the protection afforded by it and to develop the standards contained therein.

50. During the negotiation process of this Convention, other international legal instruments relevant in this field have also been taken into account as mentioned above.

51. In conclusion it could be said that the added value of this new Council of Europe instrument in relation to the other existing international legal instruments is:

- recognition of trafficking in human beings as a violation of human rights;
- a special focus on assistance to victims and on protection of their human rights;
- a comprehensive scope of application:
  - all forms of trafficking: national/transnational linked/non-linked with organised crime;
  - all trafficked persons: the Convention applies to all persons who are victims of trafficking whether they are women, children or men;
- setting up a comprehensive legal framework for the protection of victims and witnesses with specific and binding measures to be adopted;
- setting up an efficient and independent monitoring mechanism: experience has proved that, in areas where such independent monitoring systems exist (e.g. torture and minorities), they have high credibility with the States Parties, and the cooperative nature of such mechanisms is fully understood and recognised;
- a Council of Europe Convention benefits from the more limited and uniform context of the Council of Europe, contains more precise provisions and goes beyond the minimum standards agreed upon in other international instruments.

CHAPTER I – PURPOSES, SCOPE, NON-DISCRIMINATION PRINCIPLE AND DEFINITIONS

Article 1 – Purposes of the Convention

52. Article 1 deals with the purposes of the Convention. Paragraph 1 states these to be:

a. to prevent and combat trafficking in human beings, guaranteeing gender equality;

b. to protect the human rights of the victims of trafficking, design a comprehensive framework for the protection and assistance of victims and witnesses, guaranteeing gender equality, and ensure effective investigation and prosecution;

c. to promote international cooperation on action against trafficking in human beings.

53. Paragraph 1(a) states the need for measures both to prevent and combat trafficking in human beings. At the same time it is important to bear in mind the specific needs of the victims, whether women, children or men. While applying to women, children and men, the Convention recognises that specific measures to prevent and combat trafficking in human beings also require guaranteeing gender equality and a child-rights approach to children.

54. Gender equality means an equal visibility, empowerment and participation of both sexes in all spheres of public and private life. Gender equality is the opposite of gender inequality, not of gender difference. It means accepting and valuing equally the complementarity of women and men and the diverse roles they play in society. Equality between women and men means not only non-discrimination on grounds of gender but also positive measures to achieve equality between women and men. Equality must be promoted by supporting specific policies for women, who are more likely to be exposed to practices which qualify as torture or inhuman or degrading treatment (physical violence, rape, genital and sexual mutilation, trafficking for the purpose of sexual exploitation). These violations of women's human rights are still common and have

dramatically increased in some areas of Europe. It should be noted that *Recommendation Rec(2002)5 of the Committee of Ministers to member States on the protection of women against violence* considers trafficking in human beings as a form of violence against women. The Declaration of the Committee of Ministers on Equality of Women and Men (16 November 1988) was a landmark. It affirms that the principle of equality of the sexes is an integral part of human rights, and that sex-related discrimination is an impediment to the exercise of fundamental freedoms.

55. Here it should be noted that gender equality is not reducible to the non-discrimination principle (as laid down in Article 3) and that the CAHTEH's terms of reference asked it to take gender equality into account. A further point is that gender equality is integral to human rights and that discrimination on sex grounds is an interference with the exercise of fundamental freedoms.

56. Paragraph 1(b) reflects the multidisciplinarity necessary to combat trafficking in human beings effectively. Not only is multidisciplinarity basic to the Convention, it must also be basic to any national action on trafficking in human beings.

57. Two of the main aims of this Convention, as set out in Article 1, are the protection of the rights of trafficked persons and the prosecution of those responsible for trafficking. The drafters recognised that the two are related to each other.

58. Paragraph 1(c) deals with international cooperation: only by joining forces will countries overcome trafficking; on their own, they stand very little chance of success. International cooperation as referred to by the Convention is not confined to criminal matters (a field in which the Council of Europe has already adopted a number of authoritative documents – see the comments on Chapter VI) but also takes in preventing trafficking and assisting and protecting victims, and is intended to make these things central concerns of the countries which victims are trafficked from, through and into.

59. Article 1, paragraph 2, states that, in order to ensure effective implementation of its provisions by the Parties, the Convention sets up a special monitoring mechanism, the "Group of Experts on Action against Trafficking in Human Beings" (GRETA). This is a crucial element of the Convention's added value: the GRETA is a means of ensuring Parties' compliance with the Convention and is a guarantee of the Convention's long-term effectiveness (see comments on Chapter VII).

Article 2 – Scope

60. This sets the Convention's scope. Firstly, it lays down that the Convention applies to all forms of trafficking in human beings. The Convention thus applies whoever the victim of the trafficking, man, woman or child. ,

61. Secondly the drafters wanted the Convention to make clear that it applied to both national and transnational trafficking, whether or not related to organised crime. That is, the Convention is wider in scope than the Palermo Protocol and, as stated in Article 39, is intended to enhance the protection which the Palermo Protocol affords. Article 1, paragraph 2, of the Palermo Protocol states that the provisions of the *United Nations Convention against Transnational Organized Crime* apply *mutatis mutandis* to the protocol unless the protocol otherwise provides, and Article 3, paragraph 1, of the United Nations convention states that it applies to certain offences of a transnational nature[13] and involves an organised criminal group[14]. Under Article 2 of the Convention, therefore, Chapters II to VI apply even if trafficking is at the purely national level and does not involve any organised criminal group.

62. Lastly, in the case of transnational trafficking, the Convention applies both to victims who legally entered or are legally present in the territory of the receiving Party and those who entered or are present illegally. In some cases, trafficking victims are taken illegally into the country, but in other cases they enter a country legally as tourists, future spouses, artists, domestic staff, au pair girls or asylum seekers, depending on the law of the particular country. The Convention applies to both types of situations. Nevertheless, certain specific provisions (Articles 13 and 14) apply only to victims illegally present.

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13. Article 3(2) of the United Nations Convention against Transnational Organized Crime states that "an offence is transnational if:
a) It is committed in more than one State;
b) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State;
c) It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or
d) It is committed in one State but has substantial effects in another State."

14. Article 2(a) of the United Nations Convention against Transnational Organized Crime states: "'Organized criminal group' shall mean a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit".

Article 3 – Non-discrimination principle

63. This prohibits discrimination in Parties' implementation of the Convention and in particular in enjoyment of measures to protect and promote victims' rights, which are set out in Chapter III. The meaning of discrimination in Article 3 is identical to that given to it under Article 14 of the *Convention for the Protection of Human Rights and Fundamental Freedoms* (hereafter the ECHR).

64. The concept of discrimination has been interpreted consistently by the European Court of Human Rights in its case-law concerning Article 14 of the ECHR. In particular this case-law has made clear that not every distinction or difference of treatment amounts to discrimination. As the Court has stated, for example in the *Abdulaziz, Cabales and Balkandali v. the United Kingdom* judgment, "a difference of treatment is discriminatory if it 'has no objective and reasonable justification', that is, if it does not pursue a 'legitimate aim' or if there is not a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised'" (judgment of 28 May 1985, Series A, No.94, paragraph 72).

65. Since not every distinction or difference of treatment amounts to discrimination and because of the general character of the non-discrimination principle, it was not considered necessary or appropriate to include a restriction clause in the present convention. For example, the law of most if not all Council of Europe member States provides for certain distinctions based on nationality concerning certain rights or entitlements to benefits. The situations where such distinctions are perfectly acceptable are sufficiently safeguarded by the very meaning of the term "discrimination" as described in the above paragraph, since distinctions for which an objective and reasonable justification exists do not constitute discrimination. In addition, under the case-law of the European Court of Human Rights national authorities are allowed some discretion in assessing whether and to what extent differences in otherwise similar situations justify different treatment in law. The scope of the discretion will vary according to the circumstances, the subject-matter and its background (see, for example, the judgment of 28 November 1984 in *Rasmussen v. Denmark*, Series A, No. 87, paragraph 40).

66. The list of non-discrimination grounds in Article 3 is identical to that in Article 14 of the ECHR and the list contained in Protocol No.12 to the ECHR. This solution was considered preferable to others, such as expressly including certain additional non-discrimination grounds (e.g. state of health, physical or mental disability, sexual orientation and age). The reason for this was not unawareness that such grounds may be of particular importance in trafficking victims' predicament, but that such an inclusion is legally unnecessary because the list of non-discrimination grounds is not exhaustive and inclusion of any specific additional ground might give rise to unwarranted *a contrario* interpretations as regards discrimination based on grounds not so included. It is worth pointing out that the European Court of Human Rights has applied Article 14 to discrimination grounds not explicitly mentioned in that provision (see, for example, as concerns the ground of sexual orientation, the judgment of 21 December 1999 in *Salgueiro da Silva Mouta v. Portugal*).

67. Article 3 refers to "implementation of the provision of this Convention by Parties". These words seek to specify the extent of the prohibition on discrimination. In particular, Article 3 prohibits a victim's being discriminated against in the enjoyment of measures – as provided for in Chapter III of the Convention – to protect and promote their rights.

68. It should be noted that the Convention mainly places positive obligations on Parties. For example, Article 12 requires Parties to provide certain assistance to victims of trafficking, such as standards of living capable of ensuring their subsistence, through such measures as appropriate and secure housing, psychological and material assistance and access to emergency medical treatment. Similarly, Article 14 provides the issuing of a renewable residence permit to victims. Under Article 3 such measures must be applied without discrimination – that is without any making of unjustified distinctions.

69. Thus Article 3 of the Convention might be contravened, even if there were no contravention of other provisions of the Convention, if the measures provided for in those articles were implemented differently in respect of particular categories of person (for example, depending on sex, age or nationality) and the difference in treatment could not be reasonably justified.

Article 4 – Definitions

Introduction concerning the Article 4 definitions

70. It was understood by the drafters that, under the Convention, Parties would not be obliged to copy *verbatim* into their domestic law the concepts in Article 4, provided that domestic law covered the concepts in a manner consistent with the principles of the Convention and offered an equivalent framework for implementing it.

Definition of trafficking in human beings

71. The Article 4 definition of trafficking in human beings is not the first international legal definition of the phenomenon. For instance, *Recommendation No. R(2000)11 of the Committee of Ministers to member States on action against trafficking in human beings for the purpose of sexual exploitation* gives a definition of trafficking, but one whose scope, unlike the definition in the present Convention, is restricted to trafficking in human beings for the purpose of sexual exploitation.

72. To combat trafficking more effectively and help its victims, it is of fundamental importance to use a definition of trafficking in human beings on which there is international consensus. The definition of trafficking in human beings in Article 4(a) of the Convention is identical to the one in Article 3(a) of the Palermo Protocol. Article 4(b) to (d) of the Convention is identical to Article 3(b) to (d) of the Palermo Protocol. Article 3 of that protocol forms a whole which needed to be incorporated as it stood into the present convention.

73. The definition of trafficking in human beings is essential in that it crucially affects implementation of the provisions in Chapters II to VI.

74. In the definition, trafficking in human beings consists in a combination of three basic components, each to be found in a list given in the definition:

- the action of: "recruitment, transportation, transfer, harbouring or receipt of persons";
- by means of: "the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person";
- for the purpose of exploitation, which includes "at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs".

75. Trafficking in human beings is a combination of these constituents and not the constituents taken in isolation. For instance, "harbouring" of persons (action) involving the "threat or use of force" (means) for "forced labour" (purpose) is conduct that is to be treated as trafficking in human beings. Similarly, recruitment of persons (action) by deceit (means) for exploitation of prostitution (purpose).

76. For there to be trafficking in human beings ingredients from each of the three categories (action, means, purpose) must be present together. There is, however, an exception regarding children: under Article 4(c) recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation is to be regarded as trafficking in human beings even if it does not involve any of the means listed in Article 4(a). Under Article 4(d) the word "child" means any person under 18 years of age.

77. Thus trafficking means much more than mere organised movement of persons for profit. The critical additional factors that distinguish trafficking from migrant smuggling are use of one of the means listed (force, deception, abuse of a situation of vulnerability and so on) throughout or at some stage in the process, and use of that means for the purpose of exploitation.

78. The actions the Convention is concerned with are "recruitment, transportation, transfer, harbouring or receipt of persons". The definition endeavours to encompass the whole sequence of actions that leads to exploitation of the victim.

79. The drafters looked at use of new information technologies in trafficking in human beings. They decided that the Convention's definition of trafficking in human beings covered trafficking involving use of new information technologies. For instance, the definition's reference to recruitment covers recruitment by whatever means (oral, through the press or via the Internet). It was therefore felt to be unnecessary to include a further provision making the international-cooperation arrangements in the *Convention on Cybercrime* (ETS No.185) applicable to trafficking in human beings.

80. As regards "transportation", it should be noted that, under the Convention, transport need not be across a border to be a constituent of trafficking in human beings. Similarly Article 2, on the Convention's scope, states that the Convention applies equally to transnational and national trafficking. Nor does the Convention require, in cases of transnational trafficking, that the victim has entered illegally or be illegally present on national territory. Trafficking in human beings can be involved even where a border is crossed legally and presence on national territory is lawful.

81. The means are the threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power or of a position of vulnerability, and giving or receiving payments or benefits to achieve the consent of a person having control over another person.

82. Fraud and deception are frequently used by traffickers, as when victims are led to believe that an attractive job awaits them rather than the intended exploitation.

83. By abuse of a position of vulnerability is meant abuse of any situation in which the person involved has no real and acceptable alternative to submitting to the abuse. The vulnerability may be of any kind, whether physical, psychological, emotional, family-related, social or economic. The situation might, for example, involve insecurity or illegality of the victim's administrative status, economic dependence or fragile health. In short, the situation can be any state of hardship in which a human being is impelled to accept being exploited. Persons abusing such a situation flagrantly infringe human rights and violate human dignity and integrity, which no one can validly renounce.

84. A wide range of means, therefore has to be contemplated: abduction of women for sexual exploitation, enticement of children for use in paedophile or prostitution rings, violence by pimps to keep prostitutes under their thumb, taking advantage of an adolescent's or adult's vulnerability, whether or not resulting from sexual assault, or abusing the economic insecurity or poverty of an adult hoping to better their own and their family's lot. However, these various cases reflect differences of degree rather than any difference in the nature of the phenomenon, which in each case can be classed as trafficking and is based on use of such methods.

85. The purpose must be exploitation of the individual. The Convention provides: "Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs". National legislation may therefore target other forms of exploitation but must at least cover the types of exploitation mentioned as constituents of trafficking in human beings.

86. The forms of exploitation specified in the definition cover sexual exploitation, labour exploitation and removal of organs, for criminal activity is increasingly diversifying in order to supply people for exploitation in any sector where demand emerges.

87. Under the definition, it is not necessary that someone has been exploited for there to be trafficking in human beings. It is enough that they have been subjected to one of the actions referred to in the definition and by one of the means specified "for the purpose of" exploitation. Trafficking in human beings is consequently present before the victim's actual exploitation.

88. As regards "the exploitation of the prostitution of others or other forms of sexual exploitation", it should be noted that the Convention deals with these only in the context of trafficking in human beings. The terms "exploitation of the prostitution of others" and "other forms of sexual exploitation" are not defined in the Convention, which is therefore without prejudice to how States Parties deal with prostitution in domestic law.

89. Nor does the Convention define "forced labour". Nonetheless, there are several relevant international instruments, such as the *Universal Declaration of Human Rights* (Article 4), the *International Covenant on Civil and Political Rights* (Article 8), the 1930 ILO *Convention concerning Forced or Compulsory Labour* (Convention No. 29), and the 1957 ILO *Convention concerning the Abolition of Forced Labour* (Convention No. 105).

90. Article 4 of the ECHR prohibits forced labour without defining it. The authors of the ECHR took as their model the ILO Convention concerning Forced or Compulsory Labour (No.29) of 29 June 1930, which describes as forced or compulsory "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily". In the case *Van der Müssele v. Belgium* (judgment of 23 November 1983, Series A, No.70, paragraph 37) the Court held that "relative weight" was to be attached to the prior-consent criterion and it opted for an approach which took into account all the circumstances of the case. In particular it observed that, in certain circumstances, a service "could not be treated as having been voluntarily accepted beforehand". It therefore held that consent of the person concerned was not sufficient to rule out forced labour. Thus, the validity of consent has to be evaluated in the light of all the circumstances of the case.

91. Article 4(b) of the present Convention follows ECHR case-law in that it states that a human-trafficking victim's consent to a form of exploitation listed in Article 4(a) is irrelevant if any of the means referred to in sub-paragraph a. has been used.

92. With regard to the concept of "forced services", the Court likewise found, in *Van der Müssele v. Belgium*, that the words "forced labour", as used in Article 4 ECHR, were to be given a broad meaning and encompassed

the concept of forced services (judgment of 23 November 1983, Series A, No.70, paragraph 33). From the standpoint of the ECHR, therefore, there is no distinction to be made between the two concepts.

93. Slavery is not defined in the Convention but many international instruments and the domestic law of many countries define or deal with slavery and practices similar to slavery (for example, the *Geneva Convention on Slavery* of 25 September 1926, as amended by the New York Protocol of 7 December 1953; the *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices similar to Slavery* of 7 September 1956; the ILO *Worst Forms of Child Labour Convention* (Convention No.182)).

94. The definition of trafficking in human beings does not refer to illegal adoption as such. Nevertheless, where an illegal adoption amounts to a practice similar to slavery as defined in Article 1(d) of the *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices similar to Slavery*, it will also fall within the Convention's scope.

95. The ECHR bodies have defined "servitude". The European Commission of Human Rights regarded it as having to live and work on another person's property and perform certain services for them, whether paid or unpaid, together with being unable to alter one's condition (Application No.7906/77, D.R.17, p. 59; see also the Commission's report in the *Van Droogenbroeck* case of 9 July 1980, Series B, Vol. 44, p. 30, paragraphs 78 to 80). Servitude is thus to be regarded as a particular form of slavery, differing from it less in character than in degree. Although it constitutes a state or condition, and is a "particularly serious form of denial of freedom" (*Van Droogenbroeck* case, judgment of 24 June 1982, Series A, No.50, p.32, paragraph 58), it does not have the ownership features characteristic of slavery.

96. Exploitation also includes "removal of organs". The principle that it is not permissible for the human body or its parts as such to give rise to financial gain is established Council of Europe legal *acquis*. It was laid down in Committee of Ministers Resolution (78) 29 and was confirmed, in particular, by the final declaration of the 3rd Conference of European Health Ministers (Paris, 1987) before being definitively established in Article 21 of the *Convention on Human Rights and Biomedicine* (ETS No. 164). The principle was then reaffirmed in the additional protocol to that convention *concerning transplantation of organs and tissues of human origin* (ETS No. 186), which was opened for signature in January 2002. Article 22 of the protocol explicitly prohibits traffic in organs and tissues. It should also be recalled that the Parliamentary Assembly of the Council of Europe adopted a report on "Trafficking in organs in Europe" (Doc. 9822, 3 June 2003, Social, Health and Family Affairs Committee, Rapporteur: Mrs Ruth-Gaby Vermot-Mangold, Switzerland, SOC) and *Recommendation 1611 (2003) on trafficking in organs in Europe*.

97. Article 4(b) states: "The consent of a victim of 'trafficking in human beings' to the intended exploitation set forth in sub-paragraph (a) of this article shall be irrelevant where any of the means set forth in sub-paragraph (a) have been used". The question of consent is not simple and it is not easy to determine where free will ends and constraint begins. In trafficking, some people do not know what is in store for them while others are perfectly aware that, for example, they will be engaging in prostitution. However, while someone may wish employment, and possibly be willing to engage in prostitution, that does not mean that they consent to be subjected to abuse of all kinds. For that reason Article 4(b) provides that there is trafficking in human beings whether or not the victim consents to be exploited.

98. Under sub-paragraphs b. and c. of Article 4 taken together, recruitment, transportation, transfer, harbouring and receipt of a child for the purpose of exploitation are regarded as trafficking in human beings. It is immaterial whether the means referred to in sub-paragraph a. have been used. It is also immaterial whether or not the child consents to be exploited.

Definition of "victim"

99. There are many references in the Convention to the victim, and the drafters felt it was essential to define the concept. In particular the measures provided for in Chapter III are intended to apply to persons who are victims within the meaning of the Convention.

100. The Convention defines "victim" as "any natural person who is subjected to trafficking in human beings as defined in this Article". As explained above, a victim is anyone subjected to a combination of elements (action, means, purpose) specified in Article 4(a) of the Convention. Under Article 4(c), however, when that person is a child, he or she is to be regarded as a victim even if none of the means specified in Article 4(a) has been used.

CHAPTER II – PREVENTION, COOPERATION AND OTHER MEASURES

101. Chapter II contains various provisions that come under the heading of prevention in the wide sense of the term. Some provisions are particularly concerned with prevention measures in the strict sense (Articles 5 and 6) while others deal with specific measures relating to controls, security and cooperation (Articles 7, 8 and 9) for preventing and combating trafficking in human beings.

Article 5 – Prevention of trafficking in human beings

102. Trafficking in human beings takes many forms, cuts across various fields and has implications for various branches of society. To be effective, and given the nature of the phenomenon, preventive action against trafficking must be co-ordinated. The first paragraph of Article 5 is therefore concerned to promote a multidisciplinary co-ordination approach by requiring that Parties take measures to establish or strengthen co-ordination nationally between the various bodies responsible for preventing and combating trafficking in human beings. The paragraph makes it a requirement to co-ordinate all the sectors whose action is essential in preventing and combating trafficking, such as the agencies with social, police, migration, customs, judicial or administrative responsibilities, non-governmental organisations, other organisations with relevant responsibilities and other elements of civil society.

103. Article 5, paragraph 2, gives a specimen list of prevention policies and programmes which Parties must establish or support, in particular for persons vulnerable to trafficking and for relevant professionals. The drafters felt that it was important that the beneficiaries of such policies and programmes include "*professionals concerned*", namely anyone coming into contact with victims of trafficking in the course of their work (police, social workers, doctors, etc.). Such measures vary in character and may have short-, medium-, or long-term effects. For example, *research* on combating trafficking is essential for devising effective prevention methods. *Information, awareness-raising and education campaigns* are important short-term prevention measures, particularly in the countries of origin. *Social and economic initiatives* tackle the underlying and structural causes of trafficking and require long-term investment. It is widely recognised that improvement of economic and social conditions in countries of origin and measures to deal with extreme poverty would be the most effective way of preventing trafficking. Among social and economic initiatives, improved training and more employment opportunities for people liable to be traffickers' prime targets would undoubtedly help prevent trafficking in human beings.

104. Under Article 5, paragraph 3, Parties are to promote a human-rights-based approach. Here, the drafters took the view that it was essential that the policies and programmes referred to in paragraph 2 be based on gender mainstreaming and a child-rights approach to children. One of the main strategies for bringing about proper equality between women and men is gender mainstreaming, as described in Committee of Ministers *Recommendation No. R(98)14 to member States on gender mainstreaming*. Gender mainstreaming is a concept which features prominently in international documents, particularly those of the United Nations World Conferences on Women, and in European documents since its 1996 adoption by the European Commission (Commission Communication of 21 February 1996, "Incorporating equal opportunities for women and men into all Community policies and activities", COM (96) 67 final). The concept was then consolidated in the Community Framework Strategy on Gender Equality (2001-2005). The Council of Europe group of specialists on the subject defined the approach as "*the (re)organisation, improvement, development and evaluation of policy processes, so that a gender equality perspective is incorporated in all policies at all levels and at all stages, by the actors normally involved in policy making*". Each Party is required to apply these approaches at all stages of its prevention policies and programmes – that is, in developing, implementing and evaluating them.

105. Paragraph 4 places an obligation on Parties to take appropriate measures as necessary to enable people to emigrate and immigrate lawfully. It is essential that would-be immigrants have accurate information about legal opportunities for migration, employment conditions and their rights and duties. The provision is aimed at counteracting traffickers' misinformation so that people recognise traffickers' offers for what they are and know better than to take them up. It is for each Party to decide, according to its internal functioning, which the "relevant offices" are. The drafters mainly but not exclusively had in mind visa and immigration services.

106. Paragraph 5 requires that Parties take specific preventive measures with regard to children. The provision refers in particular to creating a "*protective environment*" for children so as to make them less vulnerable to trafficking and enable them to grow up without harm and to lead decent lives. The concept of a *protective environment*, as promoted by UNICEF, has eight key components:

- protecting children's rights from adverse attitudes, traditions, customs, behaviour and practices;
- government commitment to and protection and realisation of children's rights;

- open discussion of, and engagement with, child protection issues;
- drawing up and enforcing protective legislation;
- he capacity of those dealing and in contact with children, families and communities to protect children;
- children's life skills, knowledge and participation;
- putting in place a system for monitoring and reporting abuse cases;
- programmes and services to enable child victims of trafficking to recover and reintegrate.

107. Lastly, paragraph 6 recognises the important role of non-governmental organisations, other relevant organisations and other elements of civil society in preventing trafficking in human beings and protecting and assisting victims. For that reason Parties, while responsible for meeting the obligations laid down in Article 5, must, as appropriate, involve such bodies in the implementation of preventive measures.

Article 6 – Measures to discourage the demand

108. This article places a positive obligation on Parties to adopt and reinforce measures for discouraging demand whether as regards sexual exploitation or in respect of forced labour or services, slavery and practices similar to slavery, servitude and organ removal. By devoting a separate, free-standing article to this, the drafters sought to underline the importance of tackling demand in order to prevent and combat the trafficking itself.

109. The aim of measures is to achieve effective dissuasion. The measures involved may be legislative, administrative, educational, social, cultural or of other kinds.

110. The article includes a list of such minimum measures. An essential one is research on best practices, methods and strategies for discouraging client demand effectively. The media and civil society have been key agencies in identifying demand as one of the main causes of trafficking, and the measures accordingly seek to create maximum awareness and recognition of their role and responsibility in that field. Information campaigns targeting relevant groups could also be conducted, with involvement, where appropriate, of political decision-makers and public authorities. Lastly, educational measures play an important part in discouraging demand. For example, educational programmes for school children could not only advantageously tell them about the trafficking phenomenon but also alert them to gender issues, questions of dignity and integrity of human beings, and the consequences of gender-based discrimination.

Article 7 – Border measures

111. Article 7, modelled on Article 11 of the Palermo Protocol, covers a range of measures for prevention and border detection of transnational trafficking in human beings. The drafters agreed that better management of controls and cooperation at borders would make action to combat trafficking in human beings more effective.

112. Under the first paragraph, Parties have to strengthen border controls as far as possible to ensure that people are authorised to enter or leave a Party's territory. Such measures must be without prejudice to international commitments in relation to people's freedom of movement, this requirement being particularly relevant within the European Community, where member States have developed a set of rules on control and surveillance of external borders (EC law on police and customs cooperation).

113. Under paragraph 2, Parties must adopt legislative or other appropriate measures to prevent means of transport operated by commercial carriers from being used to commit offences established in Chapter IV.

114. The type of measure is left to Parties' discretion. For example, paragraph 3 requires commercial carriers to check that passengers are in possession of the travel documents necessary for entering the receiving State. When passengers are not, there also have to be appropriate penalties (paragraph 4). It should be noted, however, that the obligation on commercial carriers, including any transport company or owner or operator of any means of transport, consists in checking solely for possession of documents and not on documents' validity or authenticity. The nature of the penalties to be applied in cases of contravening the paragraph 3 obligation is not specified, leaving it to Parties to decide appropriate measures according to their domestic law.

115. Paragraph 5 is concerned with punishing persons implicated in Chapter IV offences. Each Party is required to adopt the legislative or other measures necessary so that such persons can be refused entry to their territory or their visas can be revoked.

116. Lastly, in paragraph 6, the drafters sought to promote cooperation between border control services. Introducing new types of operational action (such as cross-border observation and pursuit, and introducing official machinery for direct exchange of information between services) has a definite place in cross-border cooperation on devising preventive law-and-order and security measures or strategies. New modes of action and intervention methods give cross-border services an important role in combating trafficking. Paragraph 6 accordingly requires Parties to consider strengthening cooperation between border-control services by, among other things, establishing and maintaining direct channels of communication.

Article 8 – Security and control of documents

117. Under Article 8, modelled on Article 12 of the Palermo Protocol, every Party must adopt the necessary measures to ensure quality of travel and identity documents and protect the integrity and security of such documents. By "travel or identity documents" the drafters mean any type of document required to enter or leave a country's territory in accordance with domestic law or any document commonly used to establish a person's identity in a country under that country's law.

118. It should be noted that the drafters had in mind not only cases where documents have been unlawfully falsified, altered, reproduced or issued but also those where lawfully created or issued documents have been tampered with, altered or misappropriated.

119. Such measures may include, for example, introducing minimum standards to improve security of passports and other travel documents, including stricter technical specifications and additional security requirements such as more sophisticated preventive features that make counterfeiting, falsification, forgery and fraud more difficult. They also include administrative and control measures to prevent illegal issue and possession, guard against improper use and facilitate detection where such documents have been falsified or illegally altered, reproduced, issued or used.

Article 9 – Legitimacy and validity of documents

120. Travel and identity documents are essential tools in trafficking, particularly transnational trafficking. Cooperation between Parties in checking the legitimacy and validity of travel and identity documents is thus an important preventive measure.

121. Under Article 9, modelled on Article 13 of the Palermo Protocol, Parties are required to check the legitimacy and validity of travel or identity documents which have been issued, or supposedly have been issued, by their authorities when they are requested to do so by another Party and when it is suspected that the documents are being used for trafficking in human beings. The checking is carried out according to the rules of domestic law of the Party requested.

122. The requested Party must verify the "legitimacy and validity" of travel or identity documents issued or purporting to have been issued in its name. By this is meant that the requested Party must check both the formal and material legality of the documents. Documents used for trafficking in human beings may be outright forgeries, and therefore not issued by the requested Party. They may also have been issued by the requested Party but later altered to produce a counterfeit. In such cases the documents are formally illegal. However, documents which neither are counterfeits nor have been altered may likewise be used for trafficking in human beings. For example, documents may have been drawn up on the basis of inaccurate or false information, or they may be perfectly valid but being used by persons other than their rightful holders. In such cases the documents are materially illegal. Article 9 places a duty on Parties to cooperate in detecting all such situations.

123. It should be noted in particular that Parties have a duty to proceed expeditiously and that the Party requested must provide a reply to the requesting Party within a reasonable time, which will of course vary according to the complexity of the checks which the request involves. Nevertheless, it is essential that the reply be received in time for the requesting Party to take any measures necessary.

CHAPTER III – MEASURES TO PROTECT AND PROMOTE THE RIGHTS OF VICTIMS, GUARANTEEING GENDER EQUALITY

124. Chapter III contains provisions to protect and assist victims of trafficking in human beings. Some of the provisions in this chapter apply to all victims (Articles 10, 11, 12, 15 and 16). Others apply specifically to victims unlawfully present in the receiving Party's territory (Articles 13 and 14) or victims in a legal situation but with a short-term residence permit. In addition, some provisions also apply to persons not yet formally

identified as victims but whom there are reasonable grounds for believing to be victims (Article 10, paragraph 2, Article 12, paragraphs 1 and 2, and Article 13).

125. This chapter is an essential part of the Convention. It is centred on protecting the rights of trafficking victims, taking the same stance as set out in the United Nations *Recommended Principles and Guidelines on Human Rights and Trafficking in Human Beings:* "The human rights of trafficked persons shall be at the centre of all efforts to prevent and combat trafficking and to protect, assist and provide redress to victims"[15].

126. Chapter III has eight articles. Article 10 deals with identification of victims of trafficking as being essential if they are to be given the benefit of the rights laid down in the Convention. Article 11 deals with protection of their private life. Article 12 specifies the assistance measures to which trafficking victims are entitled. Articles 13 and 14 lay down a recovery and reflection period to which victims illegally present in a Party's territory are entitled and provide for issue of a residence permit. Article 15 deals with compensation of trafficking victims for harm suffered and Article 16 with repatriation or return. Article 17 deals with gender equality.

Article 10 – Identification of the victims

127. To protect and assist trafficking victims it is of paramount importance to identify them correctly. Article 10 seeks to allow such identification so that victims can be given the benefit of the measures provided for in Chapter III. Identification of victims is crucial, is often tricky and necessitates detailed enquiries. Failure to identify a trafficking victim correctly will probably mean that victim's continuing to be denied his or her fundamental rights and the prosecution to be denied the necessary witness in criminal proceedings to gain a conviction of the perpetrator for trafficking in human beings. Through the identification process, competent authorities seek and evaluate different circumstances, according to which they can consider a person to be a victim of trafficking.

128. Paragraph 1 places obligations on Parties so as to make it possible to identify victims and, in appropriate cases, issue residence permits in the manner laid down in Article 14 of the Convention. Paragraph 1 addresses the fact that national authorities are often insufficiently aware of the problem of trafficking in human beings. Victims frequently have their passports or identity documents taken away from them or destroyed by the traffickers. In such cases they risk being treated primarily as illegal immigrants, prostitutes or illegal workers and being punished or returned to their countries without being given any help. To avoid that, Article 10, paragraph 1, requires that Parties provide their competent authorities with persons who are trained and qualified in preventing and combating trafficking in human beings and in identifying and helping victims, including children, and that they ensure that those authorities cooperate with one other as well as with relevant support organisations.

129. By "competent authority" is meant the public authorities which may have contact with trafficking victims, such as the police, the labour inspectorate, customs, the immigration authorities and embassies or consulates. It is essential that these have people capable of identifying victims and channelling them towards the organisations and services who can assist them.

130. The Convention does not require that the competent authorities have specialists in human-trafficking matters but it does require that they have trained, qualified people so that victims can be identified. The Convention likewise requires that the authorities collaborate with one another and with organisations that have a support-providing role. The support organisations could be non-governmental organisations (NGOs) tasked with providing aid and support to victims.

131. Even though the identification process is not completed, as soon as competent authorities consider that there are reasonable grounds to believe that the person is a victim, they will not remove the person from the territory of the receiving State. Identifying a trafficking victim is a process which takes time. It may require an exchange of information with other countries or Parties or with victim-support organisations, and this may well lengthen the identification process. Many victims, however, are illegally present in the country where they are being exploited. Paragraph 2 seeks to avoid their being immediately removed from the country before they can be identified as victims. Chapter III of the Convention secures various rights to people who are victims of trafficking in human beings. Those rights would be purely theoretical and illusory if such people were removed from the country before identification as victims was possible.

132. The Convention does not require absolute certainty – by definition impossible before the identification process has been completed – for not removing the person concerned from the Party's territory. Under the Convention, if there are "reasonable" grounds for believing someone to be a victim, then that is sufficient

15. Principles, paragraph 1.

reason not to remove them until completion of the identification process establishes conclusively whether or not they are victims of trafficking.

133. The words "removed from its territory" refer both to removal to the country of origin and removal to a third country.

134. The identification process provided for in Article 10 is independent of any criminal proceedings against those responsible for the trafficking. A criminal conviction is therefore unnecessary for either starting or completing the identification process.

135. Even though the identification process may be speedier than criminal proceedings (if any), victims will still need assistance even before they have been identified as such. For that reason the Convention provides that if the authorities "have reasonable grounds to believe" that someone has been a victim of trafficking, then they should have the benefit, during the identification process, of the assistance measures provided for in Article 10, paragraphs 1 and 2.

136. The point of paragraph 3 is that, while children need special protection measures, it is sometimes difficult to determine whether someone is over or under 18. Paragraph 3 consequently requires Parties to presume that a victim is a child if there are reasons for believing that to be so and if there is uncertainty about their age. Until their age is verified, they must be given special protection measures, in accordance with their rights as defined, in particular, in the *United Nations Convention on the Rights of the Child*.

137. Paragraph 4 provides for measures which must be taken by the Parties when they deal with cases of child victims of trafficking who are unaccompanied children. Hence, Parties must provide for the representation of the child by a legal guardian, organisation or authority which is responsible to act in the best interests of that child (a); take the necessary steps to establish his/her identity and nationality (b); and make every effort to locate his/her family when this is in the best interests of the child (c). The family of the child should be found only when this is in the best interests of the child given that sometimes that is his/her family who is at the source of his/her trafficking.

Article 11 – Protection of private life

138. Article 11 protects trafficking victims' private life. Protection is essential for victims' physical safety, given the danger from their traffickers, but also (on account of the feelings of shame and the stigmatisation risk that attach to the trafficking, both for the victim and the family) to preserve their chances of social reintegration in the country of origin or the receiving country.

139. The first sentence of paragraph 1 states the objective of the article as a whole: to protect victims' private life and identity. The remainder of Article 11 lays down specific measures for achieving that objective. It should be noted that this question is also dealt with in Article 30 of the Convention, which is concerned with protection of victims' private life and identity in the specific context of judicial proceedings.

140. Paragraph 1 also refers to the question of personal data regarding victims of trafficking. Because of the possible dangers to a victim if data concerning them were to circulate without any safeguards or checks, the Convention requires that such data be processed and stored in the manner prescribed in the *Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data* (ETS No.108).

141. Convention No.108 provides, in particular, that personal data are to be stored only for specified lawful purposes and are not to be used in any way incompatible with those purposes. It also provides that such data are not to be stored in any form allowing identification of the data subject or for any longer than is necessary for the purposes for which the data are recorded and stored. Convention No.108 likewise makes it compulsory to take appropriate security measures preventing unauthorised access to and alteration or disclosure of data. It should be noted that under Article 11, paragraph 1, Parties must comply, as regards personal data of trafficking victims, with the requirements laid down in Convention No.108 regardless of whether they have ratified it.

142. Paragraph 2 provides for special protection measures regarding children as it would be particularly harmful for their identity to be disclosed in the media or by other means. This provision likewise applies to "details enabling […] identification" in that, without actually mentioning a child victim's name, the media may sometimes reveal details – such as where they are staying or, possibly, working – that might allow them to be identified.

143. The Parties are free to decide what measures to take to prevent the identity, or details allowing identification, of child trafficking victims from being made publicly known. For that purpose the law of some

countries lays down criminal penalties for making publicly known any information that might reveal the identity of victims of some offences.

144. Paragraph 2 nonetheless allows information to be released about child victims' identity where exceptional circumstances justify doing so in order to trace relatives or otherwise secure the well-being and protection of the child.

145. Finally, paragraph 3 exhorts Parties to adopt measures encouraging the media to protect victims' private life and identity. To avoid undue interference with media freedom of expression, it states that such measures must accord with Article 10 ECHR and must be for the specific purpose of protecting victims' private life and identity. "Self-regulation" is regulation by the private sector, "co-regulation" is regulation in the context of a partnership between the private sector and public authorities, and "regulation" applies to standards laid down by the public authorities independently.

Article 12 – Assistance to victims

146. Victims who break free of their traffickers' control generally find themselves in a position of great insecurity and vulnerability. Article 12, paragraph 1, sets out the assistance measures which Parties must provide for trafficking victims. It must be pointed out that Article 12 applies to all victims, whether victims of national or transnational trafficking. It applies to victims that have not been granted residence permit, under the conditions established in Articles 10, paragraph 2, and 13, paragraph 2.

147. The persons who must receive assistance measures are all those who have been identified as victims after completion of the Article 10 identification process. Such persons are entitled to all the assistance measures set out in Article 12. During the actual identification process, in the case of someone whom the authorities have "reasonable grounds to believe" to be a victim, that person is entitled solely to the measures in Article 12, paragraphs 1 and 2, and not to all the Article 12 measures. During the recovery and reflection period (Article 13) such a person is likewise entitled to the measures in Article 12, paragraphs 1 and 2.

148. Paragraph 1 provides that the measures concerned have to be taken by "each Party". This does not mean that all Parties to the Convention must provide assistance measures to each and every victim but that the Party in whose territory the victim is located must ensure that the assistance measures specified in sub-paragraphs a. to f. are provided to him or her. When the victim leaves that Party's territory the measures referred to in Article 12 no longer apply as Parties are responsible only for persons within their jurisdiction.

149. Under paragraph 5 the assistance can be provided in cooperation with non-governmental organisations, other relevant organisations or other elements of civil society engaged in victim assistance. It is nevertheless the Parties that remain responsible for meeting the obligations in the Convention. Consequently, it is they who have to take the steps necessary to ensure that victims receive the assistance they are entitled to, in particular by making sure that reception, protection and assistance services are funded adequately and in time.

150. The aim of the assistance provided for in sub-paragraphs a. to f. is to "assist victims in their physical, psychological and social recovery". The authorities must therefore make arrangements for those assistance measures while bearing in mind the specific nature of that aim.

151. Although there was no legal necessity to do so, as it is always open to Parties to adopt measures more favourable than those provided for in any part of the Convention, the drafters wished to make it clear that the assistance measures referred to are minimum ones. Parties are thus free to grant additional assistance measures.

152. Under paragraph a. victims are to be secured "standards of living capable of ensuring their subsistence, through such measures as: appropriate and secure accommodation, psychological and material assistance". The obligation on Parties is to provide victims with standards of living capable of ensuring their subsistence, but the drafters considered it necessary to refer, as an example, to appropriate and secure accommodation and to psychological and material assistance as being particularly relevant to assisting victims of trafficking.

153. It should be noted that even though Article 31 of the *revised European Social Charter* (ETS No. 163) recognises everyone's right to housing, the special features of the situation in which victims find themselves often calls for particular measures to assist them in their psychological and social recovery. Paragraph a. accordingly specifies that accommodation must be "appropriate and secure" as victims need adapted and protected accommodation in which they can feel safe from the traffickers.

154. The type of appropriate accommodation depends on the victim's personal circumstances (for instance, they may be living in the streets or already have accommodation, and in the latter case it will be necessary

to make sure that the accommodation is appropriate and does not present any security problems). Where trafficking in human beings is concerned, special protected shelters are especially suitable and have already been introduced in various countries. Such refuges, staffed by people qualified to deal with questions of assistance to trafficking victims, provide round-the-clock victim reception services and are able to respond to emergencies. The purpose of such shelters is to provide victims with surroundings in which they feel secure and to provide them with help and stability. As a guarantee of victims' security it is very important to take precautions such as keeping their address secret and having strict rules on visits from outsiders, since, to begin with, there is the danger that traffickers will try to regain control of the victim. The protection and help which the refuges provide is aimed at enabling victims to take charge of their own lives again.

155. In the case of children, the accommodation has to be appropriate in terms of their specific needs. Child victims of trafficking are sometimes placed in detention institutions. In some cases this happens because of a shortage of places in specialist child-welfare institutions. Placement of a child in a detention institution should never be regarded as appropriate accommodation.

156. Psychological assistance is needed to help the victim overcome the trauma they have been through and get back to reintegration into society. The Convention provides for material assistance because many victims, once out of the traffickers' hands, are totally without material resources. The material assistance provided for in sub-paragraph a. is intended to give them the means of subsistence. Material assistance is distinguished from financial aid in that it may take the form of aid in kind (for example, food and clothing) and is not necessarily in the form of money.

157. Sub-paragraph b. provides for emergency medical treatment to be available to victims. Article 13 of the *revised European Social Charter* (ETS No.163) also recognises the right of any person who is without adequate resources to social and medical assistance. Medical assistance is often necessary for victims of trafficking who have been exploited or have suffered violence. The assistance may also allow evidence to be kept of the violence so that, if they wish, the victims can take legal action. Full medical assistance is only for victims lawfully resident in the Party's territory under Article 12, paragraph 3.

158. Under sub-paragraph c. language aid is to be provided to victims when appropriate, for many victims do not speak, or barely speak, the language of the country they have been brought to for exploitation. Ignorance of the language adds to their isolation and is one of the factors preventing them from claiming their rights. In such cases language aid is needed to help them with formalities. This is an essential measure for guaranteeing access to rights, which is a prerequisite for access to justice. The provision is not limited to the right to an interpreter in judicial proceedings.

159. Sub-paragraphs d. and e. deal more specifically with assistance to victims in the form of supply of information: two common features of victims' situation are helplessness and submissiveness to the traffickers due to fear and lack of information about how to escape their situation.

160. Sub-paragraph d. provides that victims are to be given counselling and information, in particular as regards their legal rights and the services available to them, in a language that they understand. The information deals with matters such as availability of protection and assistance arrangements, the various options open to the victim, the risks they run, the requirements for legalising their presence in the Party's territory, the various possible forms of legal redress, how the criminal-law system operates (including the consequences of an investigation or trial, the length of a trial, witnesses' duties, the possibilities of obtaining compensation from persons found guilty of offences or from other persons or entities, and the chances of a judgment being properly enforced). The information and counselling should enable victims to evaluate their situation and make an informed choice from the various possibilities open to them.

161. Such advice and information, even though it has to do "in particular [with] their legal rights", is to be distinguished from free legal aid by an appointed lawyer in compensation proceedings, which is dealt with specifically in Article 15, paragraph 2.

162. Sub-paragraph e. deals with general assistance to victims to ensure that their interests are taken into account in criminal proceedings. Article 15, paragraph 2, deals more specifically with the right to a defence counsel.

163. Sub-paragraph f. recognises the right to access to education for children.

164. Under Article 12, paragraph 2, each Party must take due account of victims' safety and protection needs. Victims' needs can vary widely depending on their personal circumstances. They may arise from matters such as age or gender, or from circumstances such as the type of exploitation the victim has undergone, the country of origin, the types and degree of violence suffered, isolation from his or her family and culture,

knowledge of the local language, and his or her material and financial resources. It is therefore essential to provide measures that take victims' safety fully into account. For example, the address of any accommodation needs to be kept secret and the accommodation must be protected from any attempts by traffickers to recapture the victims.

165. Under paragraph 3 each Party is required to provide the necessary medical or other assistance to victims lawfully resident in its territory who do not have adequate resources and need the assistance. Lawfully resident victims are, in particular, nationals and persons with the residence permit referred to in Article 14. In addition Article 13 of the *revised European Social Charter* (ETS No.163) – under which any person who is without resources and who is unable to secure such resources either by his or her own efforts or from other sources is to be granted adequate assistance, and, in case of sickness, the care necessitated by his or her condition – applies to nationals and to persons lawfully present on national territory. This medical assistance is not just a question of availability of emergency medical care, as provided for in paragraph 1(b). For example, the medical assistance might be assistance to a victim during pregnancy or with HIV/AIDS.

166. Paragraph 4 provides that each Party is to adopt the rules under which victims lawfully resident in the Party's territory are allowed access to the labour market, to vocational training and to education. In the drafters' view these measures are desirable for helping victims reintegrate socially and more particularly take greater charge of their lives. However, the Convention does not establish an actual right of access to the labour market, vocational training and education. It is for the Parties to decide the conditions governing access. As in paragraph 3, the words "lawfully resident" refer, for instance, to victims who have a residence permit referred to in Article 14 or who have the Party's nationality. The authorisation referred to need not involve issuing an administrative document to the person concerned that allows them to work.

167. As already stated, NGOs often have a crucial role in victim assistance. For that reason paragraph 5 specifies that each Party is to take measures, where appropriate and under the conditions provided for by national law, to cooperate with non-governmental organisations, other relevant organisations or other elements of civil society engaged in victim assistance.

168. The drafters wish to make it clear that under Article 12, paragraph 6, of the Convention, assistance is not conditional upon a victim's agreement to cooperate with competent authorities in investigations and criminal proceedings.

169. Some Parties may decide – as allowed by Article 14 – to grant residence permits only to victims who cooperate with the authorities. Nevertheless, paragraph 6 of Article 12 provides that each Party shall adopt such legislative or other measures as may be necessary to ensure that assistance to a victim is not made conditional on his or her willingness to act as a witness.

170. It should also be noted that, in the law of many countries, it is compulsory to give evidence if requested to do so. Paragraph 6 is without prejudice to the activities carried out by the competent authorities in all phases of the relevant national proceedings, and in particular when investigating and prosecuting the offences concerned. Thus no one may rely on paragraph 6 in refusing to act as a witness when they are legally required to do so.

171. Paragraph 7 indicates that the services provided to victims should be carried out on an informed and consensual basis. It is indeed essential that victims agree to the services provided to them. Thus, for instance, victims must be able to agree to the detection of illness such as HIV/AIDS for them to be licit. In addition, the services provided must take into account the specific needs of persons in a vulnerable position and the rights of children concerning accommodation, education and health.

Article 13 – Recovery and reflection period

172. Article 13 is intended to apply to victims of trafficking in human beings who are illegally present in a Party's territory or who are legally resident with a short-term residence permit. Such victims, when identified, are, as other victims of trafficking, extremely vulnerable after all the trauma they have experienced. In addition, they are likely to be removed from the territory.

173. Article 13, paragraph 1, accordingly introduces a recovery and reflection period for illegally present victims during which they are not to be removed from the Party's territory. The Convention contains a provision requiring Parties to provide in their internal law for this period to last at least 30 days. This minimum period constitutes an important guarantee for victims and serves a number of purposes. One of the purposes of this period is to allow victims to recover and escape the influence of traffickers. Victims recovery implies, for example, healing of the wounds and recovery from the physical assault which they have suffered. That also

implies that they have recovered a minimum of psychological stability. Paragraph 3 of Article 13 allows Parties not to observe this period if grounds of public order prevent it or if it is found that victim status is being claimed improperly. This provision aims to guarantee that victims' status will not be illegitimately used.

174. The other purpose of this period is to allow victims to come to a decision "on co-operating with the competent authorities". By this is meant that victims must decide whether they will cooperate with the law-enforcement authorities in a prosecution of the traffickers. From that standpoint, the period is likely to make the victim a better witness: statements from victims wishing to give evidence to the authorities may well be unreliable if they are still in a state of shock from their ordeal. "Informed decision" means that the victim must be in a reasonably calm frame of mind and know about the protection and assistance measures available and the possible judicial proceedings against the traffickers. Such a decision requires that the victim no longer be under the traffickers' influence.

175. The reflection and recovery period provided for in Article 13, paragraph 1, should not be confused with the issue of the residence permit under Article 14, paragraph 1. Its purpose being to enable victims to recover and escape the influence of traffickers and/or to take an informed decision on co-operating with the competent authorities, the period, in itself, is not conditional on their co-operating with the investigative or prosecution authorities.

176. The decision to cooperate or to not cooperate with the competent authorities does not exclude the obligation to testify when it is required by a judge. Someone who is legally required to do so therefore cannot use Article 13, paragraph 1, as a basis for refusing to testify. For that reason, Article 13, paragraph 1, specifies that it is "without prejudice to the activities carried out by the competent authorities in all phases of the relevant national proceedings, and in particular when investigating and prosecuting the offences concerned".

177. The Convention specifies that the length of the recovery and reflection period must be at least 30 days. The length of this recovery and reflection period has to be of at least 30 days and has to be compatible with the purpose of Article 13. At present countries which have a period of that kind in their domestic law have lengths of one month, 45 days, two months, three months or unspecified. A three-month period was referred to in the declaration of the 3rd Regional Ministerial Forum of the Stability Pact for South-Eastern Europe (Tirana, 11 December 2002). The Group of Experts on trafficking in human beings which the European Commission set up by decision of 25 March 2003 recommended, in an opinion of 16 April 2004, a period of at least 3 months.

178. The words "it shall not be possible to enforce any expulsion order against him or her" mean that the victim must not be removed from the Party's territory during the recovery and reflection period. Although free to choose what method to employ, Parties are required to create a legal framework allowing the victim to remain on their territory for the duration of the period. To meet this end, in accordance with national legislation, each Party shall provide victims, without delay, with the relevant documents authorising them to remain on its territory during the recovery and reflection period.

179. To help victims to recover and stay free of the traffickers for that period, it is essential to provide appropriate assistance and protection. Article 13, paragraph 2, consequently provides that victims are entitled to the measures contained in Article 12, paragraphs 1 and 2.

Article 14 – Residence permit

180. Article 14, paragraph 1, provides that victims of trafficking in human beings shall be issued with renewable residence permits. Provision for a residence permit meets both victims' needs and the requirements of combating the traffic.

181. Immediate return of the victims to their countries is unsatisfactory both for the victims and for the law-enforcement authorities endeavouring to combat the traffic. For the victims this means having to start again from scratch – a failure that, in most cases, they will keep quiet about, with the result that nothing will be done to prevent other victims from falling into the same trap. A further factor is fear of reprisals by the traffickers, either against the victims themselves or against family or friends in the country of origin. For the law-enforcement authorities, if the victims continue to live clandestinely in the country or are removed immediately they cannot give information for effectively combating the traffic. The greater victims' confidence that their rights and interests are protected, the better the information they will give. Availability of residence permits is a measure calculated to encourage them to cooperate.

182. The two requirements laid down in Article 14, paragraph 1, for issue of a residence permit are that either the victim's stay be "necessary owing to their personal situation" or that it be necessary "for the purpose of

their cooperation with the competent authorities in investigation or criminal proceedings". The aim of these requirements is to allow Parties to choose between granting a residence permit in exchange for cooperation with the law-enforcement authorities and granting a residence permit on account of the victim's needs, or indeed to adopt both simultaneously.

183. Thus, for the victim to be granted a residence permit, and depending on the approach the Party adopts, either the victim's personal circumstances must be such that it would be unreasonable to compel them to leave the national territory, or there has to be an investigation or prosecution with the victim co-operating with the authorities. Parties likewise have the possibility of issuing residence permits in both situations.

184. The personal situation requirement takes in a range of situations, depending on whether it is the victim's safety, state of health, family situation or some other factor which has to be taken into account.

185. The requirement of the cooperation with the competent authorities has been introduced in order to take into account that victims are deterred from contacting the national authorities by fear of being immediately sent back to their country of origin as illegal entrants to the country of exploitation.

186. In the case of children, the child's best interests take precedence over the above two requirements: the Convention provides that residence permits for child victims are to be "issued in accordance with the best interests of the child and, where appropriate, renewed under the same conditions" (Article 14, paragraph 2). The words "when legally necessary" have been introduced in order to take into account the fact that certain States do not require for children a residence permit.

187. The Convention leaves the length of the residence permit to the Parties' discretion, though the Parties must set a length compatible with the provision's purpose. By way of example, the EU *Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities* sets a minimum period of 6 months.

188. Even though the Convention does not specify any length of residence permit it does provide that the permit has to be renewable. Paragraph 3 provides that the non-renewal or the withdrawal of a residence permit are subject to the conditions provided for in the internal law of the Party.

189. The object of Article 14, paragraph 4, is to ensure that a Party granting, under paragraph 1, a residence permit takes that into account when the victim requests another kind of residence permit. Where a victim applies for another kind of residence permit, paragraph 2 encourages Parties to have regard to the applicant's having been a victim of trafficking in human beings. However, it does not place any obligation on the Parties to grant another kind of residence permit to persons who have received a residence permit under paragraph 1.

190. Paragraph 5 is a particular application of the principle provided for in Article 4,0 paragraph 4, of the Convention.

Article 15 – Compensation and legal redress

191. The purpose of this article is to ensure that victims of trafficking in human beings are compensated for damage suffered. It comprises four paragraphs. The first is concerned with information to victims. The second deals with victims' right to legal assistance. The third establishes victims' right to compensation and the fourth is concerned with guarantees of compensation.

192. People cannot claim their rights if they do not know about them. Paragraph 1 therefore requires Parties to ensure that, as from their first contact with the competent authorities, victims have access to information on relevant court and administrative proceedings in a language which they can understand. It is of paramount importance that they be told about any procedures they can use to obtain compensation for damage suffered. It is also essential that victims who are illegally present in the country be informed of their rights as regards the possibility of obtaining a residence permit under Article 14 of the Convention, as it would be very difficult for them to obtain compensation if they were unable to remain in the country where the proceedings take place.

193. Reference is made to "court and administrative proceedings" so as to take into account the diversity of national systems. For example, compensation of victims can be a matter for the courts (whether civil or criminal) or sometimes for administrative authorities with special responsibility for compensating victims of offences. In the case of illegally present victims eligible for a residence permit under Article 14, information about the procedure for obtaining the permit is likewise essential. Traditionally, granting residence permits

is an administrative matter but there may also be judicial review by means of an appeal to the courts. It is important that victims be informed of all relevant procedures.

194. Victims must be informed of relevant procedure as from their first contact with the competent authorities. By "competent authorities" is meant the wide range of public authorities with which victims may have their first contact with officialdom, such as the police, the prosecutor's office, the labour inspectorate, or the customs or immigration services. It does not have to be these services which supply the relevant information to victims. However, as soon as a victim is in touch with such services, he or she needs to be directed to persons, services or organisations able to supply the necessary information.

195. Under paragraph 2 each Party shall provide, in its internal law, for the right to legal assistance and to free legal aid for victims under the conditions provided by its internal law. As court and administrative procedure is often very complex, legal assistance is necessary for victims to be able to claim their rights.

196. This provision does not give the victim an automatic right to free legal aid. It is for each Party to decide the requirements for obtaining such aid. Parties must have regard not only to Article 15, paragraph 2, but also to Article 6 of the ECHR. Even though Article 6, paragraph 3.c, of the ECHR provides for free assistance from an officially appointed lawyer only in criminal proceedings, European Court of Human Rights case-law (*Airey v. Ireland* judgment of 9 October 1979) also recognises, in certain circumstances, the right to free legal assistance in a civil matter on the basis of Article 6, paragraph 1, of the ECHR, interpreted as establishing the right to a court for determination of civil rights and obligations (see *Golder v. the United Kingdom*, judgment of 21 February 1975). The Court's view is that effective access to a court may necessitate free legal assistance. Its position is that it must be ascertained whether appearance before a court without the assistance of a lawyer would be effective in the sense that the person concerned would be able to present his or her case properly and satisfactorily. Here the Court has taken into account the complexity of procedures and the emotional character of a situation – which might be scarcely compatible with the degree of objectivity required by advocacy in court – in deciding whether someone was in a position to present his or her own case effectively. If not, he or she must be given free legal assistance. Thus, even in the absence of legislation granting free legal assistance in civil matters, it is for the courts to assess whether, in the interest of justice, an applicant who is without financial means should be granted legal assistance if unable to afford a lawyer.

197. Paragraph 3 establishes a right of victims to compensation. The compensation is pecuniary and covers both material injury (such as the cost of medical treatment) and non-material damage (the suffering experienced). For the purposes of this paragraph, victims' right to compensation consists in a claim against the perpetrators of the trafficking – it is the traffickers who bear the burden of compensating the victims. If, in proceedings against traffickers, the criminal courts are not empowered to determine civil liability towards the victims, it must be possible for the victims to submit their claims to civil courts with jurisdiction in the matter and powers to award damages with interest.

198. However, even though it is the trafficker who is liable to compensate the victim, by order of a civil court or – in some countries – a criminal court, or under a judicial or extrajudicial transaction between the victim and the trafficker, in practice there is rarely full compensation whether because the trafficker has not been found, has disappeared or has declared himself bankrupt. Paragraph 4 therefore requires that Parties take steps to guarantee compensation of victims. The means of guaranteeing compensation are left to the Parties, which are responsible for establishing the legal basis of compensation, the administrative framework and the operational arrangements for compensation schemes. In this connection, paragraph 4 suggests setting up a compensation fund or introducing measures or programmes for social assistance to and social integration of victims that could be funded by assets of criminal origin.

199. In deciding the compensation arrangements, Parties may use as a model the principles contained in the *European Convention on the Compensation of Victims of Violent Crimes* (ETS No.116), which is concerned with European-level harmonisation of the guiding principles on compensating victims of violent crime and with giving them binding force. European Union member States must also have regard to the *Council Directive of 29 April 2004 on compensation of crime victims*.

Article 16 – Repatriation and return of victims

200. Article 16 is partly inspired by Article 8 of the Palermo Protocol. It regards at the same time voluntary return as well as non-voluntary return of victims of trafficking in human beings, though the drafters have specified that this return shall preferably be voluntary.

201. Paragraph 1 of Article 16 places an obligation on the Party which a victim is a national of or in which the person had the right of permanent residence to facilitate and accept the return of the victim without undue

or unreasonable delay. In this context it should be recalled Article 13, paragraph 2, of the *Universal declaration of human rights* which provides for the right to return in its country, as well as article 3, paragraph 2, of Protocol No. 4 to the *Convention for the Protection of Human Rights and Fundamental Freedoms* which provides that "no one shall be deprived of the right to enter the territory of the State of which he is a national". Article 12, paragraph 4, of the *International Covenant on Civil and Political Rights* also provides that "no one shall be arbitrarily deprived of the right to enter his own country", which includes the right to return for persons who, without being nationals of that country, had established their residence.

202. The return of a victim of trafficking is not always without any risk. Therefore, the drafters wished to precise in the text of the convention that the return of a victim "shall be with due regard for the rights, safety and dignity of that person". This applies to the Party which facilitates and accepts the return of the victim as well as, according to paragraph 2, to the Party which returns a victim to another State. Such rights include, in particular, the right not to be subjected to inhuman or degrading treatment, the right to the protection of private and family life and the protection of his/her identity. The return of a victim shall also take into account the status of any legal proceedings related to the fact that the person is a victim, in order not to affect the rights that the victim could exercise in the course of the proceedings as well as the proceedings themselves.

203. The drafters considered that in this respect it was important to have in mind the jurisprudence of the European Court of Human Rights regarding article 3. Hence, in the case *Soering v United Kingdom* (7 July 1989, Series A No. 161), in the context of extradition, the Court found that "such a decision may give rise to an issue under Article 3 and hence engage the responsibility of that State under the convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment". In the case *Cruz Varaz and Others v. Sweden* (20 March 1991, Series A, No. 201) the Court has decided that this principles apply also to deportation. In the case *D.v United Kingdom* (2 May 1997, Reports of Judgments and Decisions, 1997-III), it stated that the responsibility of States Parties is also engaged when the alleged ill treatments did not follow directly or indirectly from public authorities of the destination country.

204. Paragraphs 3 and 4 of this article deal with specific measures of international cooperation among the receiving Party and the Party of which the person is a national or had the right of permanent residence in its territory at the time of entry into the territory of the receiving Party. Hence, upon the request of the latter, the requested Party has an obligation of diligence to facilitate the return of the victim, by conducting checks in order to identify if the victim is one of its nationals or if the victim had the right of permanent residence on its territory, as well as, if these checks are positive, and if the victim no longer has the necessary documents, to deliver the travel documents or other authorisation as may be necessary to enable the victim to travel to and re-enter its territory.

205. Paragraph 5 obliges each Party to establish repatriation programmes by the adoption of legislative or other measures, aiming at avoiding re-victimisation. This provision is addressed to each Party, which is responsible for putting in place the measures provided for. At the same time, each Party should make its best efforts to favour the social reintegration of the victims. Regarding children, these programmes have to take into account their right to education and to establish measures in order to secure adequate care or receipt by the family or appropriate care structure.

206. Paragraph 6 provides that each Party shall adopt such legislative or other measures as may be necessary in order to make available to victims information on the services and organisations which could assist them upon their return. The list of these services is formulated in an exemplifying manner as they may vary according to each Party.

207. Paragraph 7 of Article 16 includes in the context of repatriation and return the principle embodied in Article 3 of the United Nations *Convention on the Rights of the Child*. When the authorities take a decision regarding the repatriation of a child victim, the best interests of the child must be the primary consideration. According to this provision, the authorities must undertake an assessment of the risks which could be generated by the return of the child to a State as well as on its security, before implementing any repatriation measure.

Article 17 – Gender equality

208. Trafficking in human beings, when it is carried out for the purposes of sexual exploitation, mainly concerns women, although women can be trafficked for other purposes. In this respect it should be recalled that to put an end to what was commonly known as "white slaving", two international conferences were held in Paris in 1902 and 1910. This work culminated in the signing of the *International Convention for the Suppression*

of the White Slave Traffic (Paris, 4 May 1910), later supplemented by the *International Convention for the Suppression of the Traffic in Women and Children* (30 September 1921) and the *International Convention for the Suppression of the Traffic in Women of Full Age* (Geneva, 11 October 1933). *The Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others* (New York, 2 December 1949) cancelled and replaced, in parts, the provisions of the earlier international instruments.

209. The development of communications and the economic imbalances in the world have made trafficking in women, mainly for sexual exploitation purposes, more international than ever. There was first the "white slave traffic[16]", then trafficking from South to North and now there is trafficking in human beings from the more disadvantaged regions to the more prosperous regions, whatever their geographical location (but in particular to western Europe).

210. The aim of Article 17 is not to avoid any discrimination on the grounds of sex in the enjoyment of measures to protect and promote the rights of victims, which is already contained in Article 3 of the Convention. The main aim of Article 17 is to draw the attention to the fact that women, according to existing data, are the main target group of trafficking in human beings and to the fact that women, who are susceptible to being victims, are often marginalised even before becoming victims of trafficking and find themselves victims of poverty and unemployment more often than men. Therefore, measures to protect and promote the rights of women victims of trafficking must take into account this double marginalisation, as women and as victims. In short, these measures must take into account the social reality to which they apply, mainly that society is composed of women and men and that their needs are not always the same.

211. As mentioned above in relation to Article 1, equality between women and men means not only non-discrimination on grounds of sex but also positive measures to achieve equality between women and men. Equality must be promoted by supporting specific policies for women, who are more likely to be exposed to practices which qualify as torture or inhuman or degrading treatment (physical violence, rape, genital and sexual mutilation, trafficking for the purpose of sexual exploitation). As the Vienna Programme of Action, adopted by the World Conference on Human Rights (Vienna, 14-25 June 1993), and the Declaration on the Elimination of Violence against Women adopted by the General Assembly (December 1993) stated "member States were alarmed that opportunities for women to achieve legal, social, political and economic equality in society are limited, *inter alia*, by continuing and endemic violence against women (...)".

212. For a long time gender equality in Europe was defined as giving women and men *de jure* equal rights. Nowadays, it is recognised that equality *de jure* does not automatically lead to equality *de facto*. It is true that the legal status of women has improved over the last 30 years in Europe, but effective equality is still far from being reality. Imbalances between women and men continue to influence all walks of life and it is becoming increasingly clear that new approaches, new strategies and new methods are needed to achieve gender equality. Gender mainstreaming is one of these strategies.

213. The Council of Europe *Steering Committee for Equality between Women and Men (CDEG)*, in its 1998 report on "Gender mainstreaming: Conceptual framework, methodology, and presentation of good practices" agreed on the following definition:

> *Gender mainstreaming is the (re)organisation, improvement, development and evaluation of policy processes, so that a gender equality perspective is incorporated in all policies at all levels and at all stages, by the actors normally involved in policy-making.*

214. Following the adoption of this report by the CDEG, the Committee of Ministers adopted *Recommendation No. R (98) 14 to member States on gender mainstreaming* inviting them to draw inspiration from the CDEG's report and implement the strategy at national level. The Committee of Ministers also adopted a "Message to Steering Committees of the Council of Europe on gender mainstreaming", encouraging them to use this strategy in their programmes of activities.

215. Following these recommendations of the Committee of Ministers, Article 17 indicates that when developing, implementing and assessing measures contained in Chapter III, Parties to the Convention shall apply this strategy of gender mainstreaming which, as mentioned before, is a strategy to reach the goal of gender equality.

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16. Agreement on the Suppression of the Traffic in Women and Children of 18 May 1904.

CHAPTER IV – SUBSTANTIVE CRIMINAL LAW

216. Chapter IV comprises nine articles. Articles 18, 19 and 20 are concerned with making certain acts criminal offences. This kind of harmonisation facilitates action against crime at national and international level, for several reasons. Firstly, harmonisation of countries' domestic law is a way of avoiding a criminal preference for committing offences in a Party which previously had less strict rules. Secondly, it becomes possible to promote exchange of useful common data and experience. Shared definitions can also assist research and promote comparability of data at national and regional level, thus making it easier to gain an overall picture of crime. Lastly, international cooperation (in particular extradition and mutual legal assistance) is facilitated, for example as regards the rules on dual criminal liability.

217. The offences referred to in these articles represent a minimum consensus which does not preclude adding to them in domestic law.

218. The drafters likewise considered whether to introduce a provision on an offence of laundering the proceeds of trafficking in human beings. Trafficking in human beings is an extremely lucrative criminal activity and they recognised the importance of the question. Article 6 of the *Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime* (ETS No. 141) requires Parties to make laundering a criminal offence. However, Article 6, paragraph 4, of that Convention allows Parties to restrict the offence to laundering the proceeds of certain underlying offences. As, at the time of drawing up the present convention, a Council of Europe committee of experts was drawing up a protocol to Convention No. 141 requiring that trafficking in human beings be treated as an offence underlying laundering, the drafters decided not to include such a provision in the Convention. They took the view that laundering was better dealt with in a cross-sector legal instrument – one dealing with cooperation in several areas of crime – such as Convention No.141 rather than a specific instrument like the present Convention.

219. It should be noted that, in the case of European Union member States, Article 1 of the *Council Framework Decision on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime* provides that member States are to take the necessary steps not to make or uphold reservations in respect of Article 6 of the 1990 convention as far as serious offences are concerned[17].

220. This chapter likewise contains further provisions on criminalisation of acts dealt with in Articles 18 to 20. The provisions deal with attempt and aiding or abetting (Article 21), corporate liability (Article 22), sanctions and measures (Article 23), aggravating circumstances (Article 24) and previous convictions (Article 25).

221. Article 26 deals with criminal non-liability of victims of trafficking.

Article 18 – Criminalisation of trafficking in human beings

222. Article 18 seeks to have trafficking in human beings treated as a criminal offence. The obligation laid down in Article 18 is identical to that in Article 5 of the Palermo Protocol and is very similar to the one in Article 1 of the *Council Framework Decision of 19 July 2002 on combating trafficking in human beings*.

223. Under Article 18, Parties are required to criminalise trafficking in human beings as defined in Article 4, whether by means of a single criminal offence or by combining several offences covering, as a minimum, all conduct capable of falling within the definition. It is thus necessary to use the definition in Article 4 in order to determine the ingredients of the offence or offences which Article 18 of the Convention requires Parties to establish.

224. As explained above, trafficking in human beings is a combination of ingredients that has to be made a criminal offence, and not the ingredients taken in isolation. Thus, for example, the Convention does not create any obligation to criminalise the following when taken individually: *abduction, deception, threats, forced labour, slavery or exploitation of the prostitution of others*.

225. In accordance with the definition, the offence laid down in Article 18 is constituted at an early stage: a person does not have to have been exploited for there to be trafficking in human beings. It is sufficient that they have been subjected to one of the acts in the definition by one of the means in the definition for the purpose of exploitation. There is thus trafficking of human beings before any actual exploitation of the individual.

17. Such offences in any event include offences which are punishable by deprivation of liberty or a detention order for a maximum of more than one year or, as regards States which have a minimum threshold for offences in their legal system, offences punishable by deprivation of liberty or a detention order for a minimum of more than six months.

226. Under Article 4(b), where there is the threat or use of force or other forms of coercion or where there is abduction, fraud, deception, abuse of power or of a position of vulnerability, or giving or receiving of payments or benefits to achieve the consent of a person having control over another person, the consent of the victim does not alter the offenders' criminal liability.

227. Under Article 4(c) and (d), none of these means is necessary to the offence if a person aged under 18 is involved as a victim. Consequently, to prove trafficking in human beings the prosecuting authorities need establish only that there has been an act such as recruitment or transportation of a child for the purpose of exploitation.

228. The offence has to be committed intentionally for there to be criminal liability. The interpretation of the word "intentionally" is left to domestic law. It is nonetheless necessary to bear in mind that Article 4(a) provides for a specific element of intention in that the types of conduct listed in it are engaged in "for the purpose of exploitation". For the purposes of the Convention, therefore, there is trafficking in human beings only when that specific intention is present.

Article 19 – Criminalisation of the use of services of a victim

229. Under this provision, Parties must consider making it a criminal offence to knowingly use the services of a victim of trafficking.

230. Several considerations prompted the drafters to include this provision in the Convention. The main one was the desire to discourage the demand for exploitable people that drives trafficking in human beings.

231. The provision targets the client whether of a victim of trafficking for sexual exploitation or of a victim of forced labour or services, slavery or practices similar to slavery, servitude or organ removal.

232. It could, for example, be made a criminal offence, under this provision, for the owner of a business to knowingly use trafficked workers made available by the trafficker. In such a case the business owner could not be treated as criminally liable under Article 18 – not having him/herself recruited the victims of the trafficking (the culprit is the trafficker) and not having him/herself used any of the means referred to in the definition of trafficking – but would be guilty of a criminal offence under Article 19. The client of a prostitute who knew full well that the prostitute had been trafficked could likewise be treated as having committed a criminal offence under Article 19, as could someone who knowingly used a trafficker's services to obtain an organ.

233. An important point is that Article 19 targets use of the services which are the subject of the exploitation dealt with in Article 4(a). Article 19 is intended not to prevent victims of trafficking from carrying on an occupation or hinder their social rehabilitation but to punish those, who by buying the services exploited, play a part in exploiting the victim. Similarly, the provision is not concerned with using the services of a prostitute as such. That comes under Article 19 only if the prostitute is exploited in connection with trafficking of human beings – that is, when the components of the Article 4 definition are present together. As explained above, the Convention is concerned with exploitation of the prostitution of others and other forms of sexual exploitation only in the context of trafficking in human beings. It defines neither "exploitation of the prostitution of others" nor "other forms of sexual exploitation". It therefore does not affect the way in which Parties deal with prostitution in their domestic law.

234. To be liable for punishment under Article 19, a person using the services of a trafficking victim must do so "in the knowledge that the person is a victim of trafficking in human beings". In other words the user must be aware that the person is a trafficking victim and cannot be penalised if unaware of it. Proving knowledge may be a difficult matter for the prosecution authorities. A similar difficulty arises with various other types of criminal law provision requiring evidence of some non-material ingredient of an offence. However, the difficulty of finding evidence is not necessarily a conclusive argument for not treating a given type of conduct as a criminal offence.

235. The evidence problem is sometimes overcome – without injury to the principle of presumption of innocence – by inferring the perpetrator's intention from the factual circumstances. That approach has been expressly recommended in other international conventions. For instance, Article 6, paragraph 2.c, of the *Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime* (ETS No. 141) states that "knowledge, intent or purpose required as an element of an offence set forth in that paragraph may be inferred from objective, factual circumstances". Similarly, Article 6, paragraph 2.f, on criminalising the laundering of the proceeds of crime, of the *United Nations Convention against Transnational Organized Crime* states: "Knowledge, intent or purpose required as an element of an offence set forth in paragraph 1 of this article may be inferred from objective, factual circumstances".

236. Aware of the value of a measure such as the one provided for in Article 19, while also acknowledging the problems of collecting evidence, it was considered that this provision should encourage Parties to adopt the measure, without making it a binding provision.

Article 20 – Criminalisation of acts relating to travel or identity documents

237. The purpose of Article 20 is to treat certain acts in relation to travel or identity documents as criminal offences when committed to allow trafficking of human beings. Such documents are important tools of transnational trafficking. False documents are often used to traffic victims through countries and into the countries where they will be exploited. Consequently, identifying the channels through which false documents pass may bring to light criminal networks engaged in trafficking in human beings.

238. Article 20(a) and (b) is modelled on Article 6, paragraph 1, of the *Protocol against the Smuggling of Migrants by Land, Air and Sea, supplementing the United Nations Convention against Transnational Organized Crime*. The two sub-paragraphs deal with making a fraudulent travel or identity document and procuring or providing such a document. However – unlike Article 6, paragraph 1.b.ii, of the UN protocol, the Convention is not concerned with possession of a fraudulent document.

239. The travel or identity documents with which Article 20 deals are official documents such as identity cards or passports. Article 3(c) of the *Protocol against the Smuggling of Migrants by Land, Air and Sea, supplementing the United Nations Convention against Transnational Organized Crime* defines "fraudulent travel or identity document" as: "… any travel or identity document:

i. That has been falsely made or altered in some material way by anyone other than a person or agency lawfully authorised to make or issue the travel or identity document on behalf of a State; or

ii. That has been improperly issued or obtained through misrepresentation, corruption or duress or in any other unlawful manner; or

iii. That is being used by a person other than the rightful holder".

240. Clearly, victims of trafficking in human beings may be given false documents by their traffickers. Like the Protocol against the Smuggling of Migrants by Land, Air and Sea (Article 5) the Convention does not make persons liable to prosecution for having been subjected to the types of conduct it deals with.

241. Article 20(c) takes into account that traffickers very often take trafficking victims' travel and identity papers from them as a way of exerting pressure on them. The drafters felt that this could usefully be made a criminal offence in that it was relatively simple to prove and could thus be an effective law-enforcement tool against traffickers.

242. Sub-paragraph c. – unlike sub-paragraphs a. and b. – does not refer to fraudulent documents. The reason for this is that the law of some countries gives no particular protection to fraudulent travel and identity documents, so that taking or destroying them is not an offence. Some CAHTEH members took the view, however, that, in terms of pressure on and intimidation of the victim, the effect was exactly the same whether the documents taken from them were authentic or fraudulent. The drafters accordingly decided to delete the reference to fraudulence of documents so as to leave Parties free to decide whether to make it a criminal offence to retain, remove, conceal, damage or destroy a fraudulent travel or identity document.

Article 21 – Attempt and aiding or abetting

243. The purpose of this article is to establish additional offences relating to attempted commission of certain offences defined in the Convention and aiding or abetting commission of some.

244. Paragraph 1 requires Parties to establish as criminal offences aiding or abetting the commission of any of the offences under Articles 18 and 20 of the Convention. Liability arises for aiding or abetting where the person who commits a crime established in the Convention is aided by another person who also intends the crime to be committed. Treating the offence established by Article 19 (using a victim's services) as a form of aiding and abetting was ruled out as conceptually impossible.

245. With regard to paragraph 2, on attempt, it was likewise felt that treating the Article 19 offence as attempt gave rise to conceptual difficulties. Attempted commission of some of the acts dealt with in Article 20 was likewise considered to be too tenuous to be made an offence. Moreover, some legal systems limit the offences for which attempt is punishable. Consequently, Parties are required to make attempt an offence only in connection with the offences established in Articles 18 and 20(a).

246. As with all the offences established under the Convention, attempt and aiding or abetting must be intentional.

Article 22 – Corporate liability

247. Article 22 is consistent with the current legal trend towards recognising corporate liability. The intention is to make commercial companies, associations and similar legal entities ("legal persons") liable for criminal actions performed on their behalf by anyone in a leading position in them. Article 22 also contemplates liability where someone in a leading position fails to supervise or check on an employee or agent of the entity, thus enabling them to commit any of the offences established in the Convention.

248. Under paragraph 1, four conditions need to be met for liability to attach. First, one of the offences described in the Convention must have been committed. Second, the offence must have been committed for the entity's benefit. Third, a person in a leading position must have committed the offence (including aiding and abetting). The term "person who has a leading position" refers to someone who is organisationally senior, such as a director. Fourth, the person in a leading position must have acted on the basis of one of his or her powers (whether to represent the entity or take decisions or perform supervision), demonstrating that that person acted under his or her authority to incur liability of the entity. In short, paragraph 1 requires Parties to be able to impose liability on legal entities solely for offences committed by such persons in leading positions.

249. In addition, paragraph 2 requires Parties to be able to impose liability on a legal entity ("legal person") where the crime is committed not by the leading person described in paragraph 1 but by another person acting on the entity's authority, i.e. one of its employees or agents acting within their powers. The conditions that must be fulfilled before liability can attach are: 1) the offence was committed by an employee or agent of the legal entity; 2) the offence was committed for the entity's benefit; and 3) commission of the offence was made possible by the leading person's failure to supervise the employee or agent. In this context failure to supervise should be interpreted to include not taking appropriate and reasonable steps to prevent employees or agents from engaging in criminal activities on the entity's behalf. Such appropriate and reasonable steps could be determined by various factors, such as the type of business, its size, and the rules and good practices in force.

250. Liability under this article may be criminal, civil or administrative. It is open to each Party to provide, according to its legal principles, for any or all of these forms of liability as long as the requirements of Article 23, paragraph 2, are met, namely that the sanction on measure be "effective, proportionate and dissuasive" and include monetary sanctions.

251. Paragraph 4 makes it clear that corporate liability does not exclude individual liability. In a particular case there may be liability at several levels simultaneously – for example, liability of one of the legal entity's organs, liability of the legal entity as a whole and individual liability in connection with one or the other.

Article 23 – Sanctions and measures

252. This article is closely linked to Articles 18 to 21, which define the various offences that should be made punishable under criminal law. In accordance with the obligations imposed by those articles, Article 23 requires Parties to match their action to the seriousness of the offences and lay down criminal penalties which are "effective, proportionate and dissuasive". In the case of an individual ("natural person") committing the offence established in accordance with Article 18, Parties must provide for prison sentences that can give rise to extradition. It should be noted that, under Article 2 of the *European Convention on Extradition* (ETS No. 24), extradition is to be granted in respect of offences punishable under the laws of the requesting and requested Parties by deprivation of liberty or under a detention order for a maximum period of at least one year or by a more severe penalty.

253. Legal entities whose liability is to be established under Article 22 are also to be liable to sanctions that are "effective, proportionate and dissuasive", which may be criminal, administrative or civil in character. Paragraph 2 requires Parties to provide for the possibility of imposing monetary sanctions on legal persons.

254. Paragraph 3 places a general obligation on Parties to adopt appropriate legal instruments enabling them to confiscate or otherwise deprive offenders (e.g. by so-called "civil" confiscation) of the instrumentalities and proceeds of criminal offences established under Article 18 and Article 20(a) of the Convention. Paragraph 3 has to be read in the light of the *Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime* (ETS No. 141). That Convention is based on the idea that confiscating the proceeds of crime is an effective anti-crime weapon. As trafficking in human beings is nearly always engaged in for

financial profit, measures depriving offenders of assets linked to or resulting from the offence are clearly needed in this field as well. As it is difficult to conceive of the types of act referred to in Articles 19 and 20(b) and (c) generating substantial proceeds or necessitating particular instrumentalities, paragraph 3 refers only to Articles 18 and 20(a).

255. Article 1 of the Laundering Convention defines "confiscation", "instrumentalities", "proceeds" and "property" as used in that article. By "confiscation" is meant a penalty or measure, ordered by a court following proceedings in relation to a criminal offence or criminal offences, resulting in final deprivation of property. "Instrumentalities" covers the whole range of things which may be used, or intended for use, in any manner, wholly or in part, to commit the criminal offences defined in Article 18 and Article 20(a). "Proceeds" means any economic advantage or financial saving from a criminal offence. It may consist of any "property" (see the interpretation of that term below). The wording of the paragraph takes into account that there may be differences of national law as regards the type of property which can be confiscated after an offence. It can be possible to confiscate items which are (direct) proceeds of the offence or other property of the offender which, though not directly acquired through the offence, is equivalent in value to its direct proceeds ("substitute assets"). "Property" must therefore be interpreted, in this context, as any property, corporeal or incorporeal, movable or immovable, and legal documents or instruments evidencing title to or interest in such property. It should be noted that Parties are not bound to provide for criminal-law confiscation of substitute assets since the words "or otherwise deprive" allow "civil" confiscation.

256. Paragraph 4 of Article 23 provides for closure of any establishment used to carry out trafficking in human beings. This measure is likewise provided for in paragraph 45 of *Recommendation No. R(2000)11 of the Committee of Ministers to member States on action against trafficking in human beings for the purpose of sexual exploitation* and, in the context of sexual exploitation of children, in paragraph 42 of *Recommendation Rec(2001)16 of the Committee of Ministers to member States on the protection of children against sexual exploitation*. Paragraph 4 also allows the perpetrator to be banned, temporarily or permanently, from carrying on the activity in the course of which the offence was committed.

257. The Convention provides for such measures so that action can be taken against establishments which might be used as cover for trafficking in human beings, such as matrimonial agencies, placement agencies, travel agencies, hotels or escort services. The measures are also intended to reduce the risk of further victims by closing premises on which trafficking victims are known to have been recruited or exploited (such as bars, hotels, restaurants or textile workshops) and banning people from carrying on activities which they used to engage in trafficking.

258. This provision does not require Parties to provide for closure of establishments as a criminal penalty. Parties may, for example, use administrative closure measures. "Establishment" means any place in which any aspect of trafficking in human beings occurs. The provision applies to whoever has title to the establishment, be they a legal person or a natural person.

259. To avoid penalising persons not involved in trafficking in human beings (for example, the owner of an establishment where trafficking in human beings has been carried on without his or her knowledge), the provision specifies that closures of establishments are "without prejudice to the rights of *bona fide* third parties".

Article 24 – Aggravating circumstances

260. Article 24 requires Parties to ensure that certain circumstances (mentioned in sub-paragraphs a, b, c and d) are regarded as aggravating circumstances in the determination of the penalty for offences established in accordance with Article 18 of this Convention.

261. The first of the aggravating circumstances is where the trafficking endangered the victim's life deliberately or by gross negligence. This aggravating circumstance is likewise laid down in Article 3, paragraph 2, of the *European Union Council Framework Decision of 19 July 2002 on combating trafficking in human beings*. The circumstance arises, for example, where the conditions in which trafficking victims are transported are so bad as to endanger their lives.

262. The second aggravating circumstance is where the offence was committed against a child – that is, for the purposes of the Convention, against a person aged under 18.

263. The third aggravating circumstance is where the trafficking was committed by a public official in the performance of his or her duties.

264. The fourth aggravating circumstance is where the offence involved a criminal organisation. The Convention does not define "criminal organisation". In applying this provision, however, Parties may take their

line from other international instruments which define the concept. For example, Article 2(a) of the *United Nations Convention against Transnational Organized Crime* defines "organised criminal group" as "a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit". *Recommendation Rec(2001)11 of the Committee of Ministers to member States concerning guiding principles on the fight against organised crime* and the *Joint Action of 21 December 1998 adopted by the Council of the European Union on the basis of Article K.3 of the Treaty on European Union, on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union* give very similar definitions of "organised criminal group" and "criminal organisation".

Article 25 – Previous convictions

265. Trafficking in human beings is often carried on transnationally by criminal organisations whose members may have been tried and convicted in more than one country. At domestic level, many legal systems provide for a harsher penalty where someone has previous convictions. In general, only conviction by a national court counts as a previous conviction resulting in a harsher penalty. Traditionally, previous convictions by foreign courts were discounted on the grounds that criminal law is a national matter and that there can be differences of national law, and because of a degree of suspicion of decisions by foreign courts.

266. Such arguments have less force today in that internationalisation of criminal-law standards – as a response to internationalisation of crime – is tending to harmonise different countries' law. In addition, in the space of a few decades, countries have adopted instruments such as the ECHR whose implementation has helped build a solid foundation of common guarantees that inspire greater confidence in the justice systems of all the participating States.

267. The principle of international recidivism is established in a number of international legal instruments. Under Article 36, paragraph 2.iii, of the *New York Convention of 30 March 1961 on Narcotic Drugs*, for example, foreign convictions have to be taken into account for the purpose of establishing recidivism, subject to each Party's constitutional provisions, legal system and national law. Under Article 1 of the *Council Framework Decision of 6 December 2001 amending Framework Decision 2000/383/JHA on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro*, European Union member States must recognise as establishing habitual criminality final decisions handed down in another member State for counterfeiting of currency.

268. The fact remains that at international level there is no standard concept of recidivism and the law of some countries does not have the concept at all. The fact that foreign convictions are not always brought to the courts' notice for sentencing purposes is an additional practical difficulty.

269. To meet these difficulties, Article 25 provides for the possibility to take into account final sentences passed by another Party in assessing a sentence. To comply with the provision Parties may provide in their domestic law that previous convictions by foreign courts – like convictions by the domestic courts – are to result in a harsher penalty. They may also provide that, under their general powers to assess the individual's circumstances in setting the sentence, courts should take convictions into account.

270. This provision does not place any positive obligation on courts or prosecution services to take steps to find out whether persons being prosecuted have received final sentences from another Party's courts. It should nevertheless be noted that, under Article 13 of the *European Convention on Mutual Assistance in Criminal Matters* (ETS No. 30), a Party's judicial authorities may request from another Party extracts from and information relating to judicial records, if needed in a criminal matter.

271. In order to stay within the framework of this Convention, the drafters of Article 25 had in mind only previous convictions based on the national implementation of Articles 18 and 20.a. In cases of reciprocal criminalisation of offences covered under Article 19 and the remaining sub-paragraphs of 20, previous convictions based on these provisions can be taken into account.

Article 26 – Non-punishment provision

272. Article 26 constitutes an obligation on Parties to adopt and/or implement legislative measures providing for the possibility of not imposing penalties on victims, on the grounds indicated in the same article.

273. In particular, the requirement that victims have been compelled to be involved in unlawful activities shall be understood as comprising, at a minimum, victims that have been subject to any of the illicit means referred to in Article 4, when such involvement results from compulsion.

274. Each Party can comply with the obligation established in Article 26, by providing for a substantive criminal or procedural criminal law provision, or any other measure, allowing for the possibility of not punishing victims when the above-mentioned legal requirements are met, in accordance with the basic principles of every national legal system.

CHAPTER V – INVESTIGATION, PROSECUTION AND PROCEDURAL LAW

275. This chapter contains provisions for adapting Parties' criminal procedure for two purposes: to protect victims of trafficking and assist prosecution of the traffickers.

276. The drafters considered whether to introduce into this chapter an article to facilitate collection of evidence by special investigative methods and on confiscating the proceeds of crime. As this matter is already dealt with in Article 4 of the *Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime* (ETS No. 141) it was thought better not to have a similar provision in the Convention. The view was taken that any revision of the provisions of Convention No. 141 dealing with the matter might result in inconsistencies with the present convention. It was therefore deemed preferable for the present specialised convention not to incorporate a provision from a convention like Convention No. 141, intended to apply to a large number of offences and not to a particular area of crime.

Article 27 – *Ex parte* and *ex officio* applications

277. Article 27, paragraph 1, is intended to enable the authorities to prosecute offences under the Convention without the necessity of a complaint from the victim. The aim is to avoid traffickers' subjecting victims to pressure and threats in attempts to deter them from complaining to the authorities. Some States require that crimes, which were committed outside of their territories, must be the object of a claim by the victim or of a denunciation by a foreign authority in order to institute proceedings. The words "at least when the offence has been committed in whole or in part on its territory" enable these States not to modify their legislation on this matter.

278. Article 27, paragraph 2, is modelled on Article 11, paragraph 2, of the *European Union Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings*. Its purpose is to make it easier for a victim to complain by allowing him or her to lodge the complaint with the competent authorities of his or her State of residence. If the competent authority with which the complaint has been lodged decides that it does not itself have jurisdiction in the matter, then it must forward the complaint without delay to the competent authority of the Party in whose territory the offence was committed. The obligation in Article 27, paragraph 2, is an obligation merely to forward the complaint to that competent authority and does not place any obligation on the State of residence to institute an investigation or proceedings.

279. Under paragraph 3, each Party shall ensure to non-governmental organisations and other associations which aim at fighting trafficking in human beings or protecting human rights the possibility to assist and/or support the victim with his or her consent during criminal proceedings concerning the offence of trafficking in human beings.

Article 28 – Protection of victims, witnesses and collaborators with the judicial authorities

280. In addition to victims, other persons may also be witness or intelligence sources in the fight against trafficking. But there are real risks to them in giving statements, acting as witnesses and/or exchanging intelligence.

281. Under Article 28, Parties must take the necessary measures to provide effective and appropriate protection to victims, collaborators with the judicial authorities, witnesses and members of such persons' families. The protection of family members is only "when necessary" in that the families themselves are sometimes involved in the trafficking. Similarly, the protection to collaborators with the judicial authorities is only "as appropriate".

282. The question of protection for witnesses and persons collaborating with the judicial authorities was comprehensively dealt with by the Council of Europe in *Recommendation No. R(97)13 of the Committee of Ministers to member States concerning intimidation of witnesses and the rights of the defence*, adopted on 10 September 1997. The recommendation establishes a set of principles as guidance for national law on witness intimidation, whether the code of criminal procedure or out-of-court protection measures. The recommendation offers member States a list of measures which could help protect the interests both of witnesses

and of the criminal justice system effectively, while guaranteeing the defence appropriate opportunities to exercise its rights in criminal proceedings. Some of these measures are referred to in Article 28, paragraph 2.

283. The drafters of the Convention, basing themselves in particular on Recommendation No. R(97)13, interpreted the term "those who report the criminal offences established in accordance with Article 18 of this Convention or otherwise cooperate with the investigating or prosecuting authorities" as referring to persons who faced criminal charges or had been convicted of offences established in accordance with Article 18 of this Convention and who agreed to cooperate with criminal-justice authorities, in particular by giving information about trafficking offences in which they had taken part so that the offences could be investigated and prosecutions brought.

284. The word "witnesses" refers to persons who possess information relevant to criminal proceedings concerning human-trafficking offences under Article 18 of the Convention and it includes whistle blowers and informers.

285. Intimidation of witnesses, whether direct or indirect, may take different forms, but its purpose is nearly always to get rid of evidence against defendants so that they have to be acquitted.

286. The protection measures referred to in Article 28, paragraph 2, are examples. The expression "effective and appropriate protection", as used in Article 28, paragraph 1, refers to the need to adapt the level of protection to the threats to victims, collaborators with the judicial authorities, witnesses, informers and, when necessary, members of such persons' families. The measures required depend on the assessment of the risks such persons run. In some cases, for example, it will be sufficient to install preventive technical equipment, agree an alert procedure, record incoming and outgoing telephone calls or provide a confidential telephone number, a protected car registration number or a mobile phone for emergency calls. Other cases will require bodyguards or, in extreme circumstances, further-reaching witness-protection measures such as a change of identity, employment and place of residence. In addition, paragraph 3 provides that a child victim shall be afforded special protection measures taking into account the best interests of the child.

287. If protection measures are to be effective, it will very often also be necessary to ensure that the traffickers remain ignorant of these measures. Parties will then have to make sure that any information about the protection measures is safe from unauthorised access.

288. Regarding the period during which the protection measures have to be provided, the Convention aims in a non-exhaustive manner at the period of investigation and of the proceedings or the period following them. The period in which protection measures have to be provided depends on the threats upon the persons.

289. Protection measures should be granted only when the beneficiary persons have consented. Even though, in principle (in relation to the respect of the persons as well as for the effectiveness of the envisaged measures), the persons' consent to the measures aimed at protecting them must be given, in some situations (for example some emergency situations in which the persons are in shock) protective measures must be taken even without the consent of the person to be protected.

290. Victims, witnesses, collaborators of justice and members of the families of these persons are not the only persons who could be subject to intimidation by traffickers. Often, the latter intimidate members of NGOs and other groups supporting victims of trafficking. For this reason, paragraph 4 provides that Parties must ensure appropriate protection to them, in particular physical protection, when necessary, ie. in case of serious intimidation.

291. Because trafficking in human beings is often international and some countries are small, paragraph 5 encourages Parties to enter into agreements or arrangements with other countries so as to implement Article 28. They should make it possible to improve the protection afforded under Article 28. Thus, for example, an endangered person may need to be given a new place of residence. In a very small country, or if there is a risk of the person being easily found again by those threatening him or her, the only solution, to guarantee effective protection, is sometimes to arrange a new place of residence for them in another country. In addition, in some cases victims hesitate to bring legal proceedings in the receiving country because of the threat of reprisals by the traffickers against family members who remain in the country of origin. Effective protection of victims' families necessitates close cooperation between the country of origin and the receiving country, and this cooperation could also be brought about by bilateral or multilateral agreements as referred to in Article 28, paragraph 5, between the countries concerned. In this connection, reference should be made to Recommendation No. R(97)13 of the Committee of Ministers to member States of the Council of Europe concerning the intimidation of witnesses and the rights of the defence.

Article 29 – Specialised authorities and co-ordinating bodies

292. Under paragraph 1, Parties have to adopt the necessary measures to promote specialisation of persons or units in anti-human-trafficking action and victim protection. Each country must have anti-trafficking specialists. There must also be sufficient numbers of them and they need appropriate resources. The staff of specialised authorities and coordinating bodies should, as far as possible, be composed of women and men. The specialisation requirement does not mean, however, that there has to be specialisation at all levels of implementing the legislation. In particular, it does not mean that each prosecution service or police station has to have a specialist unit or an expert in trafficking in human beings. Equally, the provision implies that, where necessary to counter trafficking effectively and protect victims, there must be units with responsibility for implementing the measures, and staff with adequate training.

293. Specialisation can take various forms: countries can opt to have a number of specialist police officers, judges, prosecutors and administrative officers or to have agencies or units with special responsibility for various aspects of combating trafficking. Such agencies or units can be either special services set up to take charge of anti-trafficking action or they can be specialist units within existing bodies. Such units need to have the capability and the legal and material resources to at least receive and centralise all the information necessary for preventing trafficking and unmasking it. In addition, and independently of the role of other national bodies dealing with international cooperation, such specialist authorities could also act as partners to foreign anti-trafficking units.

294. Such persons or units must have the necessary independence to be able to perform effectively. It should be noted that the independence of authorities specialising in anti-trafficking action should not be absolute: the police, the administrative authorities and the prosecution services should as far as possible integrate and co-ordinate their action. The degree of independence that specialist services need is the degree necessary for them to perform their functions satisfactorily.

295. Trafficking in human beings is often a transnational criminal activity perpetrated by organised networks which, typically, are mobile and adapt rapidly to change (for example, changes in a country's law) by redeploying. For example, some trafficking organisations have been found to have a rotation system for the women they exploit, moving them from place to place so as to avert surveillance. To be effective, action against such organisations must be co-ordinated. Article 29, paragraph 2, stresses the need to co-ordinate policy and action of public agencies responsible for combating trafficking in human beings. Such co-ordination may be performed by specially established co-ordination bodies.

296. To combat trafficking effectively and protect its victims, it is essential that public authorities have proper training. Paragraph 3 specifies that such training must cover methods of preventing trafficking, prosecuting the traffickers and protecting the victims. To make agencies aware of the special features of trafficking victims' predicament, it is provided that training must also deal with human rights. Training should also emphasise victims' needs, victim reception and appropriate treatment of victims by the criminal justice system.

297. This training must be provided for relevant officials engaged in prevention of and action to combat trafficking in human beings. "Relevant officials" covers persons and services liable to have contact with trafficking victims, such as law-enforcement officials, immigration and social services, embassy or consulate staff, staff of border checkpoints and soldiers or police on international peacekeeping missions. The Convention seeks to take in the people likeliest to be faced with victims of trafficking in human beings, for it is extremely important that staff of the services concerned be trained in recognising signs of a trafficking offence and collecting and circulating information relevant to anti-trafficking action, and also that they be fully aware of their potential importance for identifying and helping victims.

298. Paragraph 4 provides that Parties shall consider appointing national rapporteurs or other mechanisms for monitoring the anti-trafficking activities of State institutions and the implementation of national legislation requirements. The institution of a national rapporteur has been established in the Netherlands, where it is an independent institution, with its own personnel, whose mission is to ensure the monitoring of anti-trafficking activities. It has the power to investigate and make recommendations to persons and institutions concerned and makes an annual report to the parliament containing its findings and recommendations.

Article 30 – Court proceedings

299. Court proceedings in human-trafficking cases – as often with any serious form of crime – may have unfortunate consequences for the victims: a victim giving evidence against traffickers or claiming compensation for injury suffered is liable to come under pressure or be subjected to threats from criminal elements.

Media coverage of cases is liable to worsen the problem by seriously invading victims' privacy, making it even more difficult for them to reintegrate socially.

300. Article 30 therefore requires Parties to adapt their judicial procedure so as to protect victims' privacy and ensure their safety. The measures to be introduced under this provision are different from those provided for in Article 28. The measures provided for in Article 28 have to do with extrajudicial protection whereas the measures referred to in Article 30 are concerned with the procedural measures to be introduced.

301. In criminal procedure there are values – defence rights on the one hand, victim and witness privacy and safety on the other – which converge and sometimes clash. In addition, procedure varies greatly from country to country: a method of victim and witness protection employed in one system may be incompatible with the basic principles of another.

302. The drafters accordingly took the view that the only possible solution was for the Convention to contain a provision on court proceedings which was compulsory as to the objectives (safeguarding victims' private life and, if necessary, identity and guaranteeing victim safety and protection from intimidation) but which left it to the Parties to decide how to attain the objectives.

303. The words "in accordance with the conditions defined by its internal law" underline that Parties are at liberty to employ whatever means they consider best to achieve the Convention's objectives (protecting victims' private life and, where appropriate, their identity, and ensuring victims' safety and protection from intimidation). In the case of child victims, the Convention states that Parties must take special care of their needs and ensure their rights to special protection measures as a child will usually be more vulnerable than an adult and likelier to be intimidated.

304. The law in some countries provides for audiovisual recording of hearings of children and safeguarding such hearings by such means as: limiting the people allowed to attend the hearing and view the recording; allowing the child to request a break in recording at any time and making a full, word-for-word transcription of the hearing on request. Such recordings and written records may then be used in court instead of having the child appear in person.

305. Some legal systems likewise allow children to appear before the court by videoconference. The child is heard in a separate room, possibly in the presence of an expert and technicians. To limit as far as possible the psychological impact on the child of being in the same room as the accused or being with them by videoconference, the sigh tlines of both can be restricted so that the child cannot see the accused and/or *vice versa*. If, for instance, the child were to appear at the hearing, he or she could give evidence from behind a screen.

306. Article 30 states that measures must comply with Article 6 ECHR: care must be taken that measures maintain a balance between defence rights and the interests of victims and witnesses. In its *Doorson v. the Netherlands* judgment of 26 March 1996 (Reports of Judgments and Decisions, 1996-II, paragraph 70), the Court held:

> "It is true that Article 6 does not explicitly require the interests of witnesses in general, and those of victims called upon to testify in particular, to be taken into consideration. However, their life, liberty or security of person may be at stake, as may interests coming generally within the ambit of Article 8 of the Convention. Such interests of witnesses and victims are in principle protected by other, substantive provisions of the Convention, which imply that Contracting States should organise their criminal proceedings in such a way that those interests are not unjustifiably imperilled. Against this background, principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify."

307. The question of witness protection was dealt with in *Recommendation No. R (97) 13 of the Committee of Ministers to member States concerning intimidation of witnesses and the rights of the defence*. European Court of Human Rights case-law should also be used as a guide to the various methods that can be used to protect victims' private life and ensure their safety. The following means can be used, in accordance with the ECHR and the Court's case-law, to achieve the objectives of Article 30:

Non-public hearings

308. The Court's case-law is that public deliberations are a fundamental principle of Article 6, paragraph 1 (see *Axen v. Germany*, 8 December 1983, Series A No. 72, paragraph 25). However the ECHR does not make that an absolute principle: Article 6, paragraph 1, itself states that "the press and public may be excluded from all or part of the trial in the interests of morals … where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice".

Audiovisual technology

309. Use of audio and video technology for taking evidence and conducting hearings may, as far as possible, avoid repetition of hearings and of some face-to-face contact, thus making court proceedings less traumatic. In recent years, a number of countries have developed the use of technology in court proceedings, if necessary adapting the procedural rules on taking evidence and hearing victims. This is particularly the case with victims of sexual assault. However, this step has not yet been taken in all Council of Europe member States, in addition to which victims of trafficking are far from having the benefit of such protection measures, even in countries whose court system recognises the validity of these methods.

310. In addition to the possible use of audio and video technology for avoiding traumatic or repeat testimony, it should be pointed out that victims can be influenced by the mental pressure of being brought face to face with the accused in the courtroom. To give them proper protection it is sometimes advisable to avoid their being present in court at the same time as the accused and to allow them to testify in another room. Whether it is the accused or the victim who is moved from the courtroom, video links or other video technology can be used to enable the parties to follow the proceedings. Such measures are necessary to spare them any unnecessary stress or disturbance when they give their evidence; the trial therefore has to be organised in such a way as to avoid, as far as possible, any unwelcome influence that might hinder establishing the truth or deter victims and witnesses from making statements.

311. Such methods are advocated in paragraph 6 of *Recommendation No. R(97)13 of the Committee of Ministers to member States on intimidation of witnesses and the rights of the defence*, Article A.8 of the *European Union Council Resolution of 23 November 1995 on the protection of witnesses in the fight against international organized crime*, and Article 24 of the United Nations *Convention against Transnational Organized Crime*.

Recordings of testimony

312. Under European Court of Human Rights case-law admissibility of evidence is primarily a matter for regulation by national law (see judgments in *Schenk v. Switzerland*, 12 July 1988, Series A, No. 140, and *Doorson v. the Netherlands*, 26 March 1996, Reports 1996-II, among others) and as a general rule it is for the national courts to assess the evidence before them (see *Barberà, Messegué and Jabardo v. Spain*, judgment of 6 December 1988, Series A, No. 146). The Court's task under the ECHR is not to give a ruling as to whether statements of witnesses were properly admitted as evidence, but rather to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair (see *inter alia* the aforementioned Doorson judgment).

313. The Court has ruled that the use as evidence of statements obtained at the stage of the police enquiry and the judicial investigation is not in itself inconsistent with paragraphs 3(d) and 1 of Article 6 provided that the rights of the defence have been respected. As a rule these rights require that the defendant has had an adequate and proper opportunity to challenge and question a witness against him either when the witness was making the statements or at a later stage in the proceedings. The lack of any confrontation deprives the defendant of a fair trial if the testimony obtained before the trial was the sole basis for convicting him, because of the inadmissible restriction on proper exercise of defence rights (*Saïdi v. France*, judgment of 20 September 1993, Series A, No.261-C, paragraph 44, for instance). In addition, Article 6 does not confer an absolute right on the defendant to call witnesses. It is normally for the national courts to decide whether it is necessary or advisable to call a witness (*Bricmont v. Belgium*, judgment of 7 July 1989, Series A, No.158).

314. In criminal cases concerning sexual violence, the Court allows certain measures to be taken in order to protect the victim, provided that such measures are reconcilable with proper exercise of defence rights. To safeguard these the judicial authorities may be required to take measures to compensate for the hindrances to the defence (*Doorson v. the Netherlands, op cit.*, and *P.S. v. Germany*, 20 December 2001).

315. In *S.N. v. Sweden* (judgment of 2 July 2002, Reports 2002-V), the Court held that the applicant could not be said to have been denied his rights under Article 6, paragraph 3.d, on the ground that he had been unable to examine or have examined the witnesses during the trial and appeal proceedings. "Having regard to the special features of criminal proceedings concerning sexual offences ... this provision cannot be interpreted as requiring in all cases that questions be put directly by the accused or his or her defence counsel, through cross-examination or by other means".

316. The Court added: "The Court notes that the videotape of the first police interview was shown during the trial and appeal hearings and that the record of the second interview was read out before the District Court and the audiotape of that interview was played back before the Court of Appeal. In the circumstances of the

case, these measures must be considered sufficient to have enabled the applicant to challenge M.'s statements and his credibility in the course of the criminal proceedings."

317. However, the Court made a point of reiterating, in that judgment, that evidence obtained from a witness under conditions in which the rights of the defence could not be secured to the extent normally required by the ECHR should be treated with extreme care.

Anonymous testimony

318. Anonymous testimony is an especially tricky issue in that protection for threatened persons must go hand in hand with protecting the rights of the defence. For instance, the United Nations *Recommended Principles on Human Rights and Trafficking in human beings* state, in Guideline 6, that "There should be no public disclosure of the identity of trafficking victims and their privacy should be respected and protected to the extent possible, while taking into account the right of any accused person to a fair trial."

319. As regards the preliminary investigation stages, the European Commission of Human Rights held: "In the course of their duties police officers may well have occasion to take confidential information from persons with a legitimate interest in remaining anonymous; if such anonymity were to be refused and if these people were to be required to appear in court, much information needed if crimes are to be punished would never be brought to the knowledge of the prosecuting authorities" (Application No.8718/78, decision of 4 May 1979, Decisions and Reports 16, p.200). The European Court of Human Rights has likewise stated several times that the ECHR does not preclude reliance, at the investigation stage of criminal proceedings, on sources such as anonymous informants but that subsequent use of anonymous statements as sufficient evidence to found a conviction is a different matter and can raise problems with regard to the Convention (see *Kostovski v. the Netherlands*, judgment of 20 November 1989, Series A, No.166, paragraph 44, and *Doorson v. the Netherlands*, judgment of 26 March 1996, Reports 1996-II, paragraph 69). Witness anonymity is therefore permissible at the investigation stage for reasons of expediency in so far as the information obtained in this way is to be used not as evidence but to enable evidence to be found.

320. As regards the trial stage, the above principle governing admissibility of evidence likewise applies. While all the evidence must normally be produced in the presence of the accused at a public hearing with a view to adversarial argument, there are exceptions to that principle, which, however, must not infringe the rights of the defence. As a general rule paragraphs 3(d) and 1 of Article 6 require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him, either when he makes his statements or at a later stage (see *Ludi v. Switzerland*, judgment of 15 June 1992, Series A, No.238, paragraph 47). The Court takes the view that the use of anonymous statements to found a conviction is not in all circumstances incompatible with the ECHR (see, for example, *Doorson v. the Netherlands*, judgment of 26 March 1996, Reports 1996-II, paragraph 69, and *Van Mechelen and Others v. the Netherlands*, judgment of 23 April 1997, Reports 1997-III, paragraph 52).

321. For use of anonymous testimony to be permissible it has to be justified by the circumstances of the case (*Kok v. the Netherlands*, 4 July 2000, Reports 2000-VI, p.655). In *Doorson v. the Netherlands* the Court held: *"… principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify."* Threats to life, liberty or security potentially justify anonymity. It is for the national courts to examine the seriousness and well-foundedness of the reasons for witness anonymity in the particular case (see *Visser v. the Netherlands*, judgment of 14 February 2002, paragraph 47). In the *Doorson* judgment (paragraph 71) the Court nonetheless accepted use of anonymous testimony even in the absence of any specific threats made by the defendant. It held: "… the decision to maintain [the witnesses'] anonymity cannot be regarded as unreasonable per se. Regard must be had to the fact, as established by the domestic courts and not contested by the applicant [Mr Doorson], that drug dealers frequently resorted to threats or actual violence against persons who gave evidence against them".

322. Also, to safeguard the rights of the defence, the procedures followed by the judicial authorities must adequately counterbalance the handicaps under which the defence labours as a result of witness anonymity. As observed by the Court: "If the defence is unaware of the identity of the person it seeks to question, it may be deprived of the very particulars enabling it to demonstrate that he or she is prejudiced, hostile or unreliable. Testimony or other declarations inculpating an accused may well be designedly untruthful or simply erroneous and the defence will scarcely be able to bring this to light if it lacks the information permitting it to test the author's reliability or cast doubt on his credibility" (*Kostovski v. the Netherlands*, judgment of 20 November 1989, Series A, No.166, paragraphs 42 and 43). In its decision on the admissibility of Application No.43149/98 (*Kok v. the Netherlands*, 4 July 2000, Reports 2000-VI, p.657) the Court said that, to

determine whether the arrangements for hearing an anonymous witness gave guarantees that adequately counterbalanced the difficulties caused to the defence, it was necessary to take into account to what extent the anonymous testimony had been crucial to the applicant's conviction. If the testimony was not crucial to conviction, then the defence is considerably less handicapped.

323. In *Doorson v. the Netherlands* the Court held that it was compatible with defence rights for an anonymous witness to have been questioned by an investigating judge who knew the witness's identity in the presence of the defendant's counsel (though not of the defendant), as the counsel had been able to ask the witness whatever questions he considered to be in the interests of the defence except questions which might have resulted in disclosure of the witness's identity (judgment of 26 March 1996, Reports 1996-II, paragraph 73). However, the same interrogation approach, except that the defence counsel was not in the investigating judge's chamber and that communication was via a sound link, was held to be unsatisfactory in the circumstances of another case because it prevented the defence from observing the witness's demeanour. The Court held: "It has not been explained to the Court's satisfaction why it was necessary to resort to such extreme limitations on the right of the accused to have the evidence against them given in their presence, or why less far-reaching measures were not considered (*Van Mechelen and Others v. the Netherlands*, judgment of 23 April 1997, Reports 1997-III, paragraph 60). In this connection, the Court referred to the possibilities of using make-up or disguise or preventing eye-contact. However, it has since declared inadmissible a further application against the Netherlands in a case in which an anonymous witness had been heard in precisely the same way as in the Van Mechelen case, and so it can no longer be stated that Article 6, as interpreted by the Court, necessarily requires – regardless, in particular, of the decisiveness of the anonymous testimony for the conviction decision – that the defence be enabled to observe, face to face, the reactions of anonymous witnesses to its direct questions (*Kok v. the Netherlands*, decision of 4 July 2000, Reports 2000-VI).

324. A further requirement is that the trial and appeal courts have sufficient information to be able to form an opinion as to an anonymous witness' credibility. Such information must indicate how reliable and credible the witness is and why he or she wishes to remain anonymous (see *Van Mechelen and Others v. the Netherlands*, judgment of 23 April 1997, Reports 1997-III, paragraph 62, and *Doorson v. the Netherlands*, judgment of 26 March 1996, Reports 1996-II, paragraph 73).

325. Lastly, even when counterbalancing procedures are found to compensate sufficiently the handicaps under which the defence labours, a conviction should not be based either solely or to a decisive extent on anonymous statements (see *Doorson v. the Netherlands*, judgment of 26 March 1996, Reports 1996-II, paragraph 76).

326. The position, therefore, under the Court's case-law, is that the Court's task is not to give a ruling as to whether statements of witnesses were properly admitted as evidence, but rather to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair. In addition, while evidence must, as a rule, be produced before the accused in a public hearing with a view to adversarial debate, there are some exceptions provided that measures are taken to counterbalance the handicaps to the defence.

Article 31 – Jurisdiction

327. This article lays down various requirements whereby Parties must establish jurisdiction over the offences with which the Convention is concerned.

328. Paragraph 1(a) is based on the territoriality principle. Each Party is required to punish the offences established under the Convention when they are committed on its territory. For example, a Party in whose territory someone is recruited by one of the means and for one of the exploitation purposes referred to in Article 4(a) has jurisdiction to try the human-trafficking offence laid down in Article 18. The same applies to Parties through or in whose territory that person is transported.

329. Paragraph 1(b) and (c) are based on a variant of the territoriality principle. These sub-paragraphs require each Party to establish jurisdiction over offences committed on ships flying its flag or aircraft registered under its laws. This obligation is already in force in the law of many countries, ships and aircraft being frequently considered to be an extension of a country's territory. This type of jurisdiction is extremely useful when the ship or aircraft is not located in the country's territory at the time of commission of the crime, as a result of which paragraph 1(a) would not be available as a basis for asserting jurisdiction. In the case of a crime committed on a ship or aircraft outside the territory of the flag or registry Party, it might be that without this rule there would not be any country able to exercise jurisdiction. In addition, if a crime is committed on board a ship or aircraft which is merely passing through the waters or airspace of another State, there may

be significant practical impediments to the latter State's exercising its jurisdiction and it is therefore useful for the registry State to also have jurisdiction.

330. Paragraph 1(d) is based on the nationality principle. The nationality theory is most frequently applied by countries with a civil-law tradition. Under it, nationals of a country are obliged to comply with its law even when they are outside its territory. Under sub-paragraph d., if one of its nationals commits an offence abroad, a Party is obliged to be able to prosecute if the conduct involved is also an offence under the law of the country where it took place or the conduct took place outside any country's territorial jurisdiction. Paragraph 1(d) also applies to stateless persons whose usual place of residence is in the Party's territory.

331. Paragraph 1(e) is based on the principle of passive personality. It is linked to the nationality of the victim and identifies particular interests of national victims to the general interests of the State. Hence, according to sub-paragraph (e), if a national is a victim of an offence abroad, the Partie has to have the possibility to start the related proceedings.

332. Paragraph 2 allows Parties to enter reservations to the jurisdiction grounds laid down in paragraph 1 (d) and (e). However, no reservation is permitted with regard to establishment of jurisdiction under sub-paragraphs a., b. or c. or with regard to the obligation to establish jurisdiction in cases falling under the principle of *aut dedere aut judicare* (extradite or prosecute) under paragraph 3, i.e. where a Party has refused to extradite an alleged offender on the basis of his or her nationality and the offender is present in its territory. Jurisdiction established on the basis of paragraph 3 is necessary to ensure that Parties that refuse to extradite a national have the legal ability to undertake investigations and proceedings domestically instead, if asked to do so by the Party that requested extradition under the terms of the relevant international instruments.

333. In the case of trafficking in human beings, it will sometimes happen that more than one Party has jurisdiction over some or all of the participants in an offence. For example, a victim may be recruited in one country, then transported and harboured for exploitation in another. In order to avoid duplication of effort, unnecessary inconvenience to witnesses and competition between law-enforcement officers of the countries concerned, or to otherwise facilitate the efficiency or fairness of proceedings, the affected Parties are required to consult in order to determine the proper venue for prosecution. In some cases it will be most effective for them to choose a single venue for prosecution; in others it may be best for one country to prosecute some participants, while one or more other countries prosecute others. Either method is permitted under this paragraph. Finally, the obligation to consult is not absolute: consultation is to take place "where appropriate". Thus, for example, if one of the Parties knows that consultation is not necessary (e.g. it has received confirmation that the other Party is not planning to take action), or if a Party is of the view that consultation may impair its investigation or proceeding, it may delay or decline consultation.

334. The bases of jurisdiction set out in paragraph 1 are not exclusive. Paragraph 5 of this article permits Parties to establish other types of criminal jurisdiction according to their domestic law. Thus, in matters of trafficking in human beings, some States exercise criminal jurisdiction whatever the place of the offence or nationality of the perpetrator.

CHAPTER VI – INTERNATIONAL CO-OPERATION AND CO-OPERATION WITH CIVIL SOCIETY

335. Chapter VI sets out the provisions on international cooperation between Parties to the Convention. The provisions are not confined to judicial cooperation in criminal matters. They are also concerned with cooperation in trafficking prevention and in victim protection and assistance.

336. As regards judicial cooperation in the criminal sphere, the Council of Europe already has a substantial body of standard-setting instruments. Mention should be made here of the *European Convention on Extradition* (ETS No. 24), the *European Convention on Mutual Assistance in Criminal Matters* (ETS No. 30), the protocols to these (ETS Nos. 86, 98, 99 and 182) and the *Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime* (ETS No. 141). These treaties are cross-sector instruments applying to a large number of offences, not to one particular type of crime.

337. The drafters opted not to reproduce in the present convention provisions identical to those in cross-sector instruments like the aforementioned ones. They took the view that the latter are better adapted to harmonisation of standards and can be revised to achieve better cooperation between Parties. They had no wish to set up a separate general system of mutual assistance which would take the place of other relevant instruments or arrangements. They took the view that it would be more convenient to have recourse generally to the arrangements set up under the mutual assistance and extradition treaties already in force, enabling

mutual assistance and extradition specialists to use the instruments and arrangements they were familiar with and avoiding any confusion that might arise from setting up competing systems. This chapter therefore comprises only those provisions which offer special added value in relation to existing conventions. The Convention (Article 32) nonetheless requires Parties to cooperate to the widest extent possible under the existing instruments. As the Convention provides for a monitoring mechanism (Chapter VII), which, among other things, is to be responsible for monitoring the implementation of Article 32, the manner in which such cross-sector instruments are applied to combating trafficking in human beings is likewise to be monitored.

Article 32 – General principles and measures for international co-operation

338. Article 32 sets out the general principles which are to govern international co-operation.

339. Firstly, the Parties must cooperate with one another "to the widest extent possible". This principle requires them to provide extensive cooperation to one another and to minimise impediments to the smooth and rapid flow of information and evidence internationally.

340. Then, Article 32 contains the general part of the obligation to cooperate: cooperation must include the prevention of and combat against trafficking in human beings (first indent), the protection of and assistance to victims (second indent) and to investigations or proceedings concerning criminal offences established in accordance with this Convention (third indent), ie. the offences established in conformity with Articles 18, 20 and 21. Taking into account the dual criminality principle, this cooperation can take place as regards the offence contained in Article 19 only between those Parties which criminalise in their internal law the acts contained in this article. The application of the dual criminality principle will limit this cooperation, as regards the offence established in Article 19 of this Convention, to the Parties having included such an offence in their internal law.

341. Lastly, cooperation is to be provided in accordance with relevant international and regional instruments, arrangements agreed on the basis of uniform or reciprocal legislation, and domestic law. The general principle is thus that the provisions of Chapter VI neither cancel nor replace the provisions of relevant *international* instruments. Reference to such instruments or arrangements is not confined to instruments in force at the time the present convention comes into force but also applies to any instruments adopted subsequently. In relation to this Convention, relevant general agreements and instruments should have precedence in matters of judicial cooperation.

342. Parties also have to cooperate with each other, in accordance with the provisions of this Convention. Thus, as regards international cooperation to protect and assist victims, Article 33 provides for special measures relating to endangered persons. Article 34, paragraph 4, refers to transmission of any information necessary for providing the rights conferred by Articles 13, 14 and 16 of the Convention.

343. As regards international cooperation in criminal matters for the purposes of investigations or proceedings, the general principle is that the provisions of Chapter VI neither cancel nor replace the provisions of relevant international or regional instruments on mutual legal assistance and extradition, reciprocal arrangements between Parties to such instruments and relevant provisions of domestic law concerning international cooperation. In this area, the relevant international instruments include the *European Convention on Extradition* (ETS No. 24), the *European Convention on Mutual Assistance in Criminal Matters* (ETS No. 30) and the protocols to these (ETS Nos. 86, 98, 99 and 182). In the case of European Union member States, the European arrest warrant introduced by the *Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States* is likewise relevant. As regards cooperation to seize the proceeds of trafficking, and in particular to identify, locate, freeze and confiscate assets associated with trafficking in human beings and its resultant exploitation, the *Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime* (ETS No. 141) is relevant.

344. It follows that international cooperation in criminal matters must continue to be granted under these instruments and other bilateral or multilateral treaties on extradition and mutual assistance applying to criminal matters.

345. Mutual assistance may also stem from arrangements on the basis of uniform or reciprocal legislation. This concept exists in other Council of Europe conventions, in particular the *European Convention on Extradition* (ETS No. 24), which used it to allow Parties which had an extradition system based on "uniform laws", i.e. the Scandinavian countries, or Parties with a system based on reciprocity, i.e. Ireland and the United Kingdom, to regulate their mutual relations on the sole basis of that system. That provision had to be adopted because those countries did not regulate their relations in extradition matters on the basis of international agreements but did so or do so by agreeing to adopt uniform or reciprocal domestic laws.

Article 33 – Measures relating to endangered or missing persons

346. This provision requires a Party to warn another Party if it has information that suggests that a person referred to in Article 28, paragraph 1, (a victim, a witness, a person co-operating with the judicial authorities or a relative of such a person) is in immediate danger in the territory of the other Party. Such information might, for example, come from a victim reporting pressures or threats from traffickers against members of the victim's family in the country of origin. The Party receiving such information is required to take appropriate protection measures as provided for in Article 28.

Article 34 – Information

347. Article 34 deals with supply of information. It has to do with all the types of cooperation dealt with in Chapter VI, i.e. not just international cooperation in criminal matters but also cooperation to prevent and combat trafficking in human beings and protect and assist victims.

348. Article 34, paragraph 1, places a duty on a requested Party to inform the requesting Party of the final result of action taken further to a request for international cooperation. It also requires that the requested Party inform the requesting Party promptly if circumstances make it impossible to meet the request or are liable to significantly delay meeting it.

349. Paragraphs 2 and 3 are concerned with information spontaneously provided for purposes of cooperation in criminal matters. This article is derived from provisions in earlier Council of Europe instruments, such as Article 10 of the *Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime* (ETS No. 141), Article 28 of the *Criminal Law Convention on Corruption* (ETS No. 173) and Article 26 of the *Convention on Cybercrime* (ETS No. 185). It is an increasingly frequent occurrence for a Party to possess valuable information that it believes may assist another Party in a criminal investigation or proceedings, and which the Party conducting the investigation or proceedings is not aware exists. In such cases no request for mutual assistance will be forthcoming. This provision empowers the country in possession of the information to forward it to the other country without a prior request, within the limit of its internal law. The provision was thought useful because, under the laws of some countries, such a positive grant of legal authority is needed in order to provide assistance in the absence of a request. A Party is not under any obligation to spontaneously forward information to another Party; it has full discretion to do so in the light of the circumstances of the particular case. In addition, spontaneous disclosure of information does not preclude the disclosing Party from investigating or instituting proceedings in relation to the facts disclosed if it has jurisdiction.

350. Paragraph 3 addresses the fact that in some circumstances a Party will only forward information spontaneously if sensitive information is kept confidential or other conditions can be imposed on use of the information. In particular, confidentiality will be an important consideration in cases where important interests of the providing State could be endangered if the information is made public, e.g. where it is necessary not to reveal how the information was obtained or that a criminal group is being investigated. If advance enquiry reveals that the receiving Party cannot comply with a condition made by the providing Party (e.g. it cannot comply with a confidentiality condition because the information is needed as evidence at a public trial), the receiving Party must advise the providing Party, which then has the option of not providing the information. If the receiving Party agrees to the condition, however, it must honour it. It is foreseen that conditions imposed under this article would be consistent with those that a providing Party could impose further to a request for mutual assistance from the receiving Party.

351. To guarantee the effectiveness of the rights established in Articles 13, 14 and 16 of the Convention, paragraph 4 requires Parties to transmit without delay, subject to compliance with Article 11 of the Convention, requested information necessary for granting the entitlements conferred by these articles.

Article 35 – Co-operation with civil society

352. The strategic partnership referred to in this article, between national authorities and public officials and civil society, means the setting up of co-operative frameworks through which State actors-fulfil their obligations under the Convention, by coordinating their efforts with civil society.

353. Such strategic partnerships may be achieved by regular dialogue through the establishment of round-table discussions involving all actors. Practical implementation of the purposes of the convention may be formalised through, for instance, the conclusion of memoranda of understanding between national authorities and non-governmental organisations for providing protection and assistance to victims of trafficking.

CHAPTER VII – MONITORING MECHANISM

354. Chapter VII of the Convention contains provisions which aim at ensuring the effective implementation of the Convention by the Parties. The monitoring system foreseen by the Convention, which is undoubtedly one of its main strengths, has two pillars: on the one hand, the Group of Experts on action against trafficking in human beings (GRETA) is a technical body, composed of independent and highly qualified experts in the area of human rights, assistance and protection to victims and the fight against trafficking in human beings, with the task of adopting a report and conclusions on each Party's implementation of the Convention; on the other hand, there is a more political body, the Committee of the Parties, composed of the representatives in the Committee of Ministers of the Parties to the Convention and of representatives of Parties non-members of the Council of Europe, which may adopt recommendations, on the basis of the report and conclusions of GRETA, addressed to a Party concerning the measures to be taken to follow up GRETA's conclusions.

Article 36 – Group of experts on action against trafficking in human beings

355. As indicated above, GRETA is in charge of monitoring the implementation of the Convention by the Parties. It shall have a minimum of 10 and a maximum of 15 members.

356. Paragraph 2 of this Article stresses the need to ensure geographical and gender balance, as well as a multidisciplinary expertise, when appointing GRETA's members, who shall be nationals of States Parties to the Convention.

357. Paragraph 3 underlines the main competences of the experts sitting in GRETA, as well as the main criteria for their election, which can be summarised as follows: "independence and expertise".

358. Paragraph 4 indicates that the procedure for the election of the members of GRETA (but not the election of the members) shall be determined by the Committee of Ministers. This is understandable as the election procedure is an important part of the application of the Convention. Being a Council of Europe Convention, the drafters felt that such a function should still rest with the Committee of Ministers and the Parties themselves will then be in charge of electing the members of GRETA. Before deciding on the election procedure, the Committee of Ministers shall consult with and obtain the unanimous consent of all Parties. Such a requirement recognises that all Parties to the Convention should be able to determine such a procedure and are on an equal footing.

Article 37 – Committee of the Parties

359. Article 37 sets up the other pillar of this monitoring system, which is the more political "Committee of the Parties", composed as indicated above.

360. The Committee of the Parties will be convened the first time by the Secretary General of the Council of Europe, within a year from the entry into force of the Convention, in order to elect the members of GRETA. It will then meet at the request of a third of the Parties, of the Secretary General of the Council of Europe or of the President of GRETA.

361. The setting up of this body will ensure equal participation of all the Parties alike in the decision-making process and in the monitoring procedure of the Convention and will also strengthen cooperation between the Parties and between them and GRETA to ensure proper and effective implementation of the Convention.

362. The Rules of Procedure of the Committee of the Parties need to take due account of the specificities regarding the number of votes cast by the European Community in matters falling within its competence. It is also understood that the rules of procedure of the Committee of the Parties need to be drafted so as to make sure that the Parties to this Convention, including the European Community, will be effectively monitored under Article 38, paragraph 7.

Article 38 – Procedure

363. Article 38 details the functioning of the monitoring procedure and the interaction between GRETA and the Committee of the Parties.

364. Paragraph 1 makes it clear that the evaluation procedure is divided in cycles and that GRETA will select the provisions the monitoring will concentrate upon. The idea is that GRETA will autonomously define at the beginning of each cycle the provisions for the monitoring procedure during the period concerned.

365. Paragraph 2 states that GRETA will determine the most appropriate means to carry out the evaluation. This may include a questionnaire or any other request for information. This paragraph makes it clear that the Party concerned must respond to GRETA's requests.

366. Paragraph 3 indicates that GRETA may also receive information from civil society.

367. Paragraph 4 underlines that, subsidiarily, GRETA may organise country visits to get more information from the Party concerned. The drafters stressed that country visits should be a subsidiary means and that they should be carried out only when necessary. These country visits have to be organised in cooperation with the competent authorities of the Party concerned and the "contact person" to be appointed by that Party.

368. Paragraphs 5 and 6 describe the drafting phase of both the report and the conclusions of GRETA. From these provisions, it is clear that GRETA has to carry out a dialogue with the Party concerned when preparing the report and the conclusions. It is through such a dialogue that the provisions of the Convention will be properly implemented. GRETA will publish its report and conclusions, together with any comments by the Party concerned. Such report and conclusions are sent at the same time to the Party concerned and the Committee of the Parties. This completes the task of GRETA with respect to that Party and the provision/s concerned. The reports of GRETA, which will be made public as far from their adoption, cannot be changed or modified by the Committee of the Parties.

369. Paragraph 7 deals with the role of the Committee of the Parties in the monitoring procedure. It indicates that the Committee of the Parties may adopt recommendations indicating the measures to be taken by the Party concerned to implement GRETA's conclusions, if necessary setting a date for submitting information on their implementation, and promoting cooperation to ensure the proper implementation of the Convention. This mechanism will ensure the respect of the independence of GRETA in its monitoring function, while introducing a "political" dimension into the dialogue between the Parties.

CHAPTER VIII – RELATIONSHIP WITH OTHER INTERNATIONAL INSTRUMENTS

Article 39 – Relationship with the *Protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the United Nations Convention against transnational organized crime*

370. The purpose of Article 39 is to clarify the relationship between the Convention and the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, supplementing the *United Nations Convention against Transnational Organized Crime*.

371. Article 39 has two main objectives: (i) to make sure that the Convention does not interfere with rights and obligations deriving from provisions of the Palermo Protocol and (ii) to make clear that the Convention reinforces, as requested by the Committee of Ministers in the terms of reference it issued to the CAHTEH, the protection afforded by the United Nations instrument and develops the standards it lays down.

Article 40 – Relationship with other international instruments

372. Article 40 deals with the relationship between the Convention and other international instruments.

373. In accordance with the 1969 Vienna Convention on the Law of Treaties, Article 40 seeks to ensure that the Convention harmoniously coexists with other treaties – whether multilateral or bilateral – or instruments dealing with matters which the Convention also covers. This is particularly important for international instruments which ensure greater protection and assistance for victims of trafficking. Indeed, this Convention intends to strengthen victims' protection and assistance and for this reason paragraph 1 of Article 40 aims at ensuring that this Convention does not prejudice the rights and obligations derived from other international instruments to which Parties to the present Convention are also Parties or shall become Parties and which contain provisions on matters governed by this Convention and which ensure greater protection and assistance for victims of trafficking. This provision clearly shows, once more, the overall aim of this Convention, which is to protect and promote the human rights of victims of trafficking and to ensure the highest level of protection to them.

374. Paragraph 2 states positively that Parties may conclude bilateral or multilateral agreements – or any other international instrument – relating to the matters which the Convention governs. However, the wording makes clear that Parties are not allowed to conclude any agreement which derogates from the Convention.

375. In relation to paragraph 3 of Article 40, upon the adoption of the Convention, the European Community and the member States of the European Union, made the following declaration:

> "The European Community/European Union and its Member States reaffirm that their objective in requesting the inclusion of a "disconnection clause" is to take account of the institutional structure of the Union when acceding to international conventions, in particular in case of transfer of sovereign powers from the Member States to the Community.
>
> This clause is not aimed at reducing the rights or increasing the obligations of a non-European Union party vis-à-vis the European Community/European Union and its Member States, inasmuch as the latter are also parties to this Convention.
>
> The disconnection clause is necessary for those parts of the convention which fall within the competence of the Community / Union, in order to indicate that European Union Member States cannot invoke and apply the rights and obligations deriving from the Convention directly among themselves (or between themselves and the European Community / Union). This does not detract from the fact that the Convention applies fully between the European Community/European Union and its Member States on the one hand, and the other Parties to the Convention, on the other; the Community and the European Union Members States will be bound by the Convention and will apply it like any party to the Convention, if necessary, through Community / Union legislation. They will thus guarantee the full respect of the Convention's provisions vis-à-vis non-European Union parties."

As an instrument made in connection with the conclusion of a treaty, within the meaning of Article 31 paragraph 2(b) of the Vienna Convention on the Law of Treaties, this declaration forms part of the "context" of this Convention.

376. The European Community would be in a position to provide, for the sole purpose of transparency, necessary information about the division of competence between the Community and its Member States in the area covered by the present Convention, inasmuch as this does not lead to additional monitoring obligations placed on the Community.

377. Under paragraph 4, the provisions of the Convention do not affect the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law. Thus, the exercise of fundamental rights should not be prevented on the pretext of taking action against trafficking in human beings. This paragraph is particularly concerned with the 1951 Convention and 1967 Protocol relating to the Status of Refugees. The fact of being a victim of trafficking in human beings cannot preclude the right to seek and enjoy asylum and Parties shall ensure that victims of trafficking have appropriate access to fair and efficient asylum procedures. Parties shall also take whatever steps are necessary to ensure full respect for the principle of *non-refoulement*.

CHAPTER IX – AMENDMENTS TO THE CONVENTION

Article 41 – Amendments

378. Amendments to the provisions of the Convention may be proposed by the Parties. They must be communicated to all Council of Europe member States, to any signatory, to any Party, to the European Community and any State invited to sign or accede to the Convention.

379. The Group of Experts on Action against Trafficking in Human Beings (GRETA) will prepare an opinion on the proposed amendment which will be submitted to the Committee of Ministers. After considering the proposed amendment and the GRETA opinion, the Committee of Ministers can adopt the amendment. Such amendments adopted by the Committee of Ministers must be forwarded to the Parties for acceptance. Before deciding on the amendment, the Committee of Ministers shall consult with and obtain the unanimous consent of all Parties. Such a requirement recognises that all Parties to the Convention should be able to participate in the decision-making process concerning amendments and are on an equal footing.

CHAPTER X – FINAL CLAUSES

380. With some exceptions, the provisions in this chapter are essentially based on the Model Final Clauses for Conventions and Agreements concluded within the Council of Europe, which the Committee of Ministers approved at the Deputies' 315th meeting, in February 1980. Articles 42 to 47 either use the standard language of the model clauses or are based on long-standing treaty-making practice at the Council of Europe. It should be noted in this connection that the model clauses have been adopted as a non-binding set of provisions. As pointed out in the introduction to the model clauses, "these model final clauses are only intended to facilitate the task of committees of experts and avoid textual divergences which would not have any real justification. A model is in no way binding and different clauses may be adapted to fit particular cases."

Article 42 – Signature and entry into force

381. The Convention is open for signature not only by Council of Europe member States but also the European Community and States not members of the Council of Europe (Canada, the Holy See, Japan, Mexico and the United States) which took part in drawing it up. Once the Convention enters into force, in accordance with paragraph 3, other non-member States not covered by this provision may be invited to accede to the Convention in accordance with Article 43, paragraph 1.

382. Article 42, paragraph 3, sets the number of ratifications, acceptances or approvals required for the Convention's entry into force at 10. This figure reflects the belief that a significant group of States is needed to successfully set about addressing the challenge of trafficking in human beings. The number is not so high, however, as to unnecessarily delay the Convention's entry into force. In accordance with the treaty-making practice of the Organisation, of the ten initial States, at least eight must be Council of Europe members.

Article 43 – Accession to the Convention

383. After consulting the Parties and obtaining their unanimous consent, the Committee of Ministers may invite any State not a Council of Europe member which did not participate in drawing up the Convention to accede to it. This decision requires the two-thirds majority provided for in Article 20.d of the Statute of the Council of Europe and the unanimous vote of the Parties to this Convention.

Article 44 – Territorial application

384. Article 44, paragraph 1, specifies the territories to which the Convention applies. Here it should be pointed out that it would be incompatible with the object and purpose of the Convention for States Parties to exclude parts of their territory from application of the Convention without valid reason (such as the existence of different legal systems applying in matters dealt with in the Convention).

385. Article 44, paragraph 2, is concerned with extension of application of the Convention to territories for whose international relations the Parties are responsible or on whose behalf they are authorised to give undertakings.

Article 45 – Reservations

386. Article 45 specifies that the Parties may make use of the reservation as defined in Article 31, paragraph 2. No other reservation may be made.

Article 46 – Denunciation

387. In accordance with the United Nations Vienna Convention on the Law of Treaties, Article 46 allows any Party to denounce the Convention.

Article 47 – Notification

388. Article 47 lists the notifications that, as the depositary of the Convention, the Secretary General of the Council of Europe is required to make, and it also lays down the entities (States and the European Community) to receive such notifications.

Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse – CETS No. 201

Lanzarote, 25.X.2007

Preamble

The member States of the Council of Europe and the other signatories hereto;

Considering that the aim of the Council of Europe is to achieve a greater unity between its members;

Considering that every child has the right to such measures of protection as are required by his or her status as a minor, on the part of his or her family, society and the State;

Observing that the sexual exploitation of children, in particular child pornography and prostitution, and all forms of sexual abuse of children, including acts which are committed abroad, are destructive to children's health and psycho-social development;

Observing that the sexual exploitation and sexual abuse of children have grown to worrying proportions at both national and international level, in particular as regards the increased use by both children and perpetrators of information and communication technologies (ICTs), and that preventing and combating such sexual exploitation and sexual abuse of children require international co-operation;

Considering that the well-being and best interests of children are fundamental values shared by all member States and must be promoted without any discrimination;

Recalling the Action Plan adopted at the 3rd Summit of Heads of State and Governments of the Council of Europe (Warsaw, 16-17 May 2005), calling for the elaboration of measures to stop sexual exploitation of children;

Recalling in particular the Committee of Ministers Recommendation No. R (91) 11 concerning sexual exploitation, pornography and prostitution of, and trafficking in, children and young adults, Recommendation Rec(2001)16 on the protection of children against sexual exploitation, and the Convention on Cybercrime (ETS No. 185), especially Article 9 thereof, as well as the Council of Europe Convention on Action against Trafficking in Human Beings (CETS No. 197);

Bearing in mind the Convention for the Protection of Human Rights and Fundamental Freedoms (1950, ETS No. 5), the revised European Social Charter (1996, ETS No. 163), and the European Convention on the Exercise of Children's Rights (1996, ETS No. 160);

Also bearing in mind the United Nations Convention on the Rights of the Child, especially Article 34 thereof, the Optional Protocol on the sale of children, child prostitution and child pornography, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, as well as the International Labour Organization Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour;

Bearing in mind the Council of the European Union Framework Decision on combating the sexual exploitation of children and child pornography (2004/68/JHA), the Council of the European Union Framework Decision on the standing of victims in criminal proceedings (2001/220/JHA), and the Council of the European Union Framework Decision on combating trafficking in human beings (2002/629/JHA);

Taking due account of other relevant international instruments and programmes in this field, in particular the Stockholm Declaration and Agenda for Action, adopted at the 1st World Congress against Commercial Sexual Exploitation of Children (27-31 August 1996), the Yokohama Global Commitment adopted at the 2nd World Congress against Commercial Sexual Exploitation of Children (17-20 December 2001), the Budapest Commitment and Plan of Action, adopted at the preparatory Conference for the 2nd World Congress against Commercial Sexual Exploitation of Children (20-21 November 2001), the United Nations General Assembly Resolution S-27/2 "A world fit for children" and the three-year programme "Building a Europe for and with children", adopted following the 3rd Summit and launched by the Monaco Conference (4-5 April 2006);

Determined to contribute effectively to the common goal of protecting children against sexual exploitation and sexual abuse, whoever the perpetrator may be, and of providing assistance to victims;

Taking into account the need to prepare a comprehensive international instrument focusing on the preventive, protective and criminal law aspects of the fight against all forms of sexual exploitation and sexual abuse of children and setting up a specific monitoring mechanism,

Have agreed as follows:

CHAPTER I – PURPOSES, NON-DISCRIMINATION PRINCIPLE AND DEFINITIONS

Article 1 – Purposes

1. The purposes of this Convention are to:

   a. prevent and combat sexual exploitation and sexual abuse of children;

   b. protect the rights of child victims of sexual exploitation and sexual abuse;

   c. promote national and international co-operation against sexual exploitation and sexual abuse of children.

2. In order to ensure effective implementation of its provisions by the Parties, this Convention sets up a specific monitoring mechanism.

Article 2 – Non-discrimination principle

The implementation of the provisions of this Convention by the Parties, in particular the enjoyment of measures to protect the rights of victims, shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, sexual orientation, state of health, disability or other status.

Article 3 – Definitions

For the purposes of this Convention:

   a. "child" shall mean any person under the age of 18 years;

   b. "sexual exploitation and sexual abuse of children" shall include the behaviour as referred to in Articles 18 to 23 of this Convention;

   c. "victim" shall mean any child subject to sexual exploitation or sexual abuse.

CHAPTER II – PREVENTIVE MEASURES

Article 4 – Principles

Each Party shall take the necessary legislative or other measures to prevent all forms of sexual exploitation and sexual abuse of children and to protect children.

Article 5 – Recruitment, training and awareness raising of persons working in contact with children

1. Each Party shall take the necessary legislative or other measures to encourage awareness of the protection and rights of children among persons who have regular contacts with children in the education, health, social protection, judicial and law-enforcement sectors and in areas relating to sport, culture and leisure activities.

2. Each Party shall take the necessary legislative or other measures to ensure that the persons referred to in paragraph 1 have an adequate knowledge of sexual exploitation and sexual abuse of children, of the means to identify them and of the possibility mentioned in Article 12, paragraph 1.

3. Each Party shall take the necessary legislative or other measures, in conformity with its internal law, to ensure that the conditions to accede to those professions whose exercise implies regular contacts with children ensure that the candidates to these professions have not been convicted of acts of sexual exploitation or sexual abuse of children.

Article 6 – Education for children

Each Party shall take the necessary legislative or other measures to ensure that children, during primary and secondary education, receive information on the risks of sexual exploitation and sexual abuse, as well as on the means to protect themselves, adapted to their evolving capacity. This information, provided in collaboration with parents, where appropriate, shall be given within a more general context of information on sexuality and shall pay special attention to situations of risk, especially those involving the use of new information and communication technologies.

Article 7 - Preventive intervention programmes or measures

Each Party shall ensure that persons who fear that they might commit any of the offences established in accordance with this Convention may have access, where appropriate, to effective intervention programmes or measures designed to evaluate and prevent the risk of offences being committed.

Article 8 – Measures for the general public

1. Each Party shall promote or conduct awareness raising campaigns addressed to the general public providing information on the phenomenon of sexual exploitation and sexual abuse of children and on the preventive measures which can be taken.

2. Each Party shall take the necessary legislative or other measures to prevent or prohibit the dissemination of materials advertising the offences established in accordance with this Convention.

Article 9 – Participation of children, the private sector, the media and civil society

1. Each Party shall encourage the participation of children, according to their evolving capacity, in the development and the implementation of state policies, programmes or others initiatives concerning the fight against sexual exploitation and sexual abuse of children.

2. Each Party shall encourage the private sector, in particular the information and communication technology sector, the tourism and travel industry and the banking and finance sectors, as well as civil society, to participate in the elaboration and implementation of policies to prevent sexual exploitation and sexual abuse of children and to implement internal norms through self-regulation or co-regulation.

3. Each Party shall encourage the media to provide appropriate information concerning all aspects of sexual exploitation and sexual abuse of children, with due respect for the independence of the media and freedom of the press.

4. Each Party shall encourage the financing, including, where appropriate, by the creation of funds, of the projects and programmes carried out by civil society aiming at preventing and protecting children from sexual exploitation and sexual abuse.

CHAPTER III – SPECIALISED AUTHORITIES AND CO-ORDINATING BODIES

Article 10 – National measures of co-ordination and collaboration

1. Each Party shall take the necessary measures to ensure the co-ordination on a national or local level between the different agencies in charge of the protection from, the prevention of and the fight against sexual exploitation and sexual abuse of children, notably the education sector, the health sector, the social services and the law-enforcement and judicial authorities.

2. Each Party shall take the necessary legislative or other measures to set up or designate:

   a. independent competent national or local institutions for the promotion and protection of the rights of the child, ensuring that they are provided with specific resources and responsibilities;

   b. mechanisms for data collection or focal points, at the national or local levels and in collaboration with civil society, for the purpose of observing and evaluating the phenomenon of sexual exploitation and sexual abuse of children, with due respect for the requirements of personal data protection.

3. Each Party shall encourage co-operation between the competent state authorities, civil society and the private sector, in order to better prevent and combat sexual exploitation and sexual abuse of children.

CHAPTER IV – PROTECTIVE MEASURES AND ASSISTANCE TO VICTIMS

Article 11 – Principles

1. Each Party shall establish effective social programmes and set up multidisciplinary structures to provide the necessary support for victims, their close relatives and for any person who is responsible for their care.

2. Each Party shall take the necessary legislative or other measures to ensure that when the age of the victim is uncertain and there are reasons to believe that the victim is a child, the protection and assistance measures provided for children shall be accorded to him or her pending verification of his or her age.

Article 12 – Reporting suspicion of sexual exploitation or sexual abuse

1. Each Party shall take the necessary legislative or other measures to ensure that the confidentiality rules imposed by internal law on certain professionals called upon to work in contact with children do not constitute an obstacle to the possibility, for those professionals, of their reporting to the services responsible for child protection any situation where they have reasonable grounds for believing that a child is the victim of sexual exploitation or sexual abuse.

2. Each Party shall take the necessary legislative or other measures to encourage any person who knows about or suspects, in good faith, sexual exploitation or sexual abuse of children to report these facts to the competent services.

Article 13 – Helplines

Each Party shall take the necessary legislative or other measures to encourage and support the setting up of information services, such as telephone or Internet helplines, to provide advice to callers, even confidentially or with due regard for their anonymity.

Article 14 – Assistance to victims

1. Each Party shall take the necessary legislative or other measures to assist victims, in the short and long term, in their physical and psycho-social recovery. Measures taken pursuant to this paragraph shall take due account of the child's views, needs and concerns.

2. Each Party shall take measures, under the conditions provided for by its internal law, to co-operate with non-governmental organisations, other relevant organisations or other elements of civil society engaged in assistance to victims.

3. When the parents or persons who have care of the child are involved in his or her sexual exploitation or sexual abuse, the intervention procedures taken in application of Article 11, paragraph 1, shall include:

- the possibility of removing the alleged perpetrator;
- the possibility of removing the victim from his or her family environment. The conditions and duration of such removal shall be determined in accordance with the best interests of the child.

4. Each Party shall take the necessary legislative or other measures to ensure that the persons who are close to the victim may benefit, where appropriate, from therapeutic assistance, notably emergency psychological care.

CHAPTER V – INTERVENTION PROGRAMMES OR MEASURES

Article 15 – General principles

1. Each Party shall ensure or promote, in accordance with its internal law, effective intervention programmes or measures for the persons referred to in Article 16, paragraphs 1 and 2, with a view to preventing and minimising the risks of repeated offences of a sexual nature against children. Such programmes or measures shall be accessible at any time during the proceedings, inside and outside prison, according to the conditions laid down in internal law.

2. Each Party shall ensure or promote, in accordance with its internal law, the development of partnerships or other forms of co-operation between the competent authorities, in particular health-care services and the social services, and the judicial authorities and other bodies responsible for following the persons referred to in Article 16, paragraphs 1 and 2.

3. Each Party shall provide, in accordance with its internal law, for an assessment of the dangerousness and possible risks of repetition of the offences established in accordance with this Convention, by the persons referred to in Article 16, paragraphs 1 and 2, with the aim of identifying appropriate programmes or measures.

4. Each Party shall provide, in accordance with its internal law, for an assessment of the effectiveness of the programmes and measures implemented.

Article 16 – Recipients of intervention programmes and measures

1. Each Party shall ensure, in accordance with its internal law, that persons subject to criminal proceedings for any of the offences established in accordance with this Convention may have access to the programmes or measures mentioned in Article 15, paragraph 1, under conditions which are neither detrimental nor contrary to the rights of the defence and to the requirements of a fair and impartial trial, and particularly with due respect for the rules governing the principle of the presumption of innocence.

2. Each Party shall ensure, in accordance with its internal law, that persons convicted of any of the offences established in accordance with this Convention may have access to the programmes or measures mentioned in Article 15, paragraph 1.

3. Each Party shall ensure, in accordance with its internal law, that intervention programmes or measures are developed or adapted to meet the developmental needs of children who sexually offend, including those who are below the age of criminal responsibility, with the aim of addressing their sexual behavioural problems.

Article 17 – Information and consent

1. Each Party shall ensure, in accordance with its internal law, that the persons referred to in Article 16 to whom intervention programmes or measures have been proposed are fully informed of the reasons for the proposal and consent to the programme or measure in full knowledge of the facts.

2. Each Party shall ensure, in accordance with its internal law, that persons to whom intervention programmes or measures have been proposed may refuse them and, in the case of convicted persons, that they are made aware of the possible consequences a refusal might have.

CHAPTER VI – SUBSTANTIVE CRIMINAL LAW

Article 18 – Sexual abuse

1. Each Party shall take the necessary legislative or other measures to ensure that the following intentional conduct is criminalised:

   a. engaging in sexual activities with a child who, according to the relevant provisions of national law, has not reached the legal age for sexual activities;

   b. engaging in sexual activities with a child where:

   – use is made of coercion, force or threats; or

   – abuse is made of a recognised position of trust, authority or influence over the child, including within the family; or

   – abuse is made of a particularly vulnerable situation of the child, notably because of a mental or physical disability or a situation of dependence.

2. For the purpose of paragraph 1 above, each Party shall decide the age below which it is prohibited to engage in sexual activities with a child.

3. The provisions of paragraph 1.a are not intended to govern consensual sexual activities between minors.

Article 19 – Offences concerning child prostitution

1. Each Party shall take the necessary legislative or other measures to ensure that the following intentional conduct is criminalised:

   a. recruiting a child into prostitution or causing a child to participate in prostitution;

   b. coercing a child into prostitution or profiting from or otherwise exploiting a child for such purposes;

   c. having recourse to child prostitution.

2. For the purpose of the present article, the term "child prostitution" shall mean the fact of using a child for sexual activities where money or any other form of remuneration or consideration is given or promised as payment, regardless if this payment, promise or consideration is made to the child or to a third person.

Article 20 – Offences concerning child pornography

1. Each Party shall take the necessary legislative or other measures to ensure that the following intentional conduct, when committed without right, is criminalised:

   a. producing child pornography;

   b. offering or making available child pornography;

   c. distributing or transmitting child pornography;

   d. procuring child pornography for oneself or for another person;

   e. possessing child pornography;

   f. knowingly obtaining access, through information and communication technologies, to child pornography.

2. For the purpose of the present article, the term "child pornography" shall mean any material that visually depicts a child engaged in real or simulated sexually explicit conduct or any depiction of a child's sexual organs for primarily sexual purposes.

3. Each Party may reserve the right not to apply, in whole or in part, paragraph 1.a and e to the production and possession of pornographic material:

   – consisting exclusively of simulated representations or realistic images of a non-existent child;

   – involving children who have reached the age set in application of Article 18, paragraph 2, where these images are produced and possessed by them with their consent and solely for their own private use.

4. Each Party may reserve the right not to apply, in whole or in part, paragraph 1.f.

Article 21 – Offences concerning the participation of a child in pornographic performances

1. Each Party shall take the necessary legislative or other measures to ensure that the following intentional conduct is criminalised:

   a. recruiting a child into participating in pornographic performances or causing a child to participate in such performances;

   b. coercing a child into participating in pornographic performances or profiting from or otherwise exploiting a child for such purposes;

   c. knowingly attending pornographic performances involving the participation of children.

2. Each Party may reserve the right to limit the application of paragraph 1.c to cases where children have been recruited or coerced in conformity with paragraph 1.a or b.

Article 22 – Corruption of children

Each Party shall take the necessary legislative or other measures to criminalise the intentional causing, for sexual purposes, of a child who has not reached the age set in application of Article 18, paragraph 2, to witness sexual abuse or sexual activities, even without having to participate.

Article 23 – Solicitation of children for sexual purposes

Each Party shall take the necessary legislative or other measures to criminalise the intentional proposal, through information and communication technologies, of an adult to meet a child who has not reached the age set in application of Article 18, paragraph 2, for the purpose of committing any of the offences established in accordance with Article 18, paragraph 1.a, or Article 20, paragraph 1.a, against him or her, where this proposal has been followed by material acts leading to such a meeting.

Article 24 – Aiding or abetting and attempt

1. Each Party shall take the necessary legislative or other measures to establish as criminal offences, when committed intentionally, aiding or abetting the commission of any of the offences established in accordance with this Convention.

2. Each Party shall take the necessary legislative or other measures to establish as criminal offences, when committed intentionally, attempts to commit the offences established in accordance with this Convention.

3. Each Party may reserve the right not to apply, in whole or in part, paragraph 2 to offences established in accordance with Article 20, paragraph 1.b, d, e and f, Article 21, paragraph 1.c, Article 22 and Article 23.

Article 25 – Jurisdiction

1. Each Party shall take the necessary legislative or other measures to establish jurisdiction over any offence established in accordance with this Convention, when the offence is committed:

   a. in its territory; or

   b. on board a ship flying the flag of that Party; or

   c. on board an aircraft registered under the laws of that Party; or

   d. by one of its nationals; or

   e. by a person who has his or her habitual residence in its territory.

2. Each Party shall endeavour to take the necessary legislative or other measures to establish jurisdiction over any offence established in accordance with this Convention where the offence is committed against one of its nationals or a person who has his or her habitual residence in its territory.

3. Each Party may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, by a declaration addressed to the Secretary General of the Council of Europe, declare that it reserves the right not to apply or to apply only in specific cases or conditions the jurisdiction rules laid down in paragraph 1.e of this article.

4. For the prosecution of the offences established in accordance with Articles 18, 19, 20, paragraph 1.a, and 21, paragraph 1.a and b, of this Convention, each Party shall take the necessary legislative or other measures to ensure that its jurisdiction as regards paragraph 1.d is not subordinated to the condition that the acts are criminalised at the place where they were performed.

5. Each Party may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, by a declaration addressed to the Secretary General of the Council of Europe, declare that it reserves the right to limit the application of paragraph 4 of this article, with regard to offences established in accordance with Article 18, paragraph 1.b, second and third indents, to cases where its national has his or her habitual residence in its territory.

6. For the prosecution of the offences established in accordance with Articles 18, 19, 20, paragraph 1.a, and 21 of this Convention, each Party shall take the necessary legislative or other measures to ensure that its jurisdiction as regards paragraphs 1.d and e is not subordinated to the condition that the prosecution can only be initiated following a report from the victim or a denunciation from the State of the place where the offence was committed.

7. Each Party shall take the necessary legislative or other measures to establish jurisdiction over the offences established in accordance with this Convention, in cases where an alleged offender is present on its territory and it does not extradite him or her to another Party, solely on the basis of his or her nationality.

8. When more than one Party claims jurisdiction over an alleged offence established in accordance with this Convention, the Parties involved shall, where appropriate, consult with a view to determining the most appropriate jurisdiction for prosecution.

9. Without prejudice to the general rules of international law, this Convention does not exclude any criminal jurisdiction exercised by a Party in accordance with its internal law.

Article 26 – Corporate liability

1. Each Party shall take the necessary legislative or other measures to ensure that a legal person can be held liable for an offence established in accordance with this Convention, committed for its benefit by any natural person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on:

   a. power of representation of the legal person;

   b. an authority to take decisions on behalf of the legal person;

   c. an authority to exercise control within the legal person.

2. Apart from the cases already provided for in paragraph 1, each Party shall take the necessary legislative or other measures to ensure that a legal person can be held liable where the lack of supervision or control by a natural person referred to in paragraph 1 has made possible the commission of an offence established in accordance with this Convention for the benefit of that legal person by a natural person acting under its authority.

3. Subject to the legal principles of the Party, the liability of a legal person may be criminal, civil or administrative.

4. Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offence.

Article 27 – Sanctions and measures

1. Each Party shall take the necessary legislative or other measures to ensure that the offences established in accordance with this Convention are punishable by effective, proportionate and dissuasive sanctions, taking into account their seriousness. These sanctions shall include penalties involving deprivation of liberty which can give rise to extradition.

2. Each Party shall take the necessary legislative or other measures to ensure that legal persons held liable in accordance with Article 26 shall be subject to effective, proportionate and dissuasive sanctions which shall include monetary criminal or non-criminal fines and may include other measures, in particular:

   a. exclusion from entitlement to public benefits or aid;

   b. temporary or permanent disqualification from the practice of commercial activities;

c. placing under judicial supervision;

d. judicial winding-up order.

3. Each Party shall take the necessary legislative or other measures to:

a. provide for the seizure and confiscation of:

– goods, documents and other instrumentalities used to commit the offences established in accordance with this Convention or to facilitate their commission;

– proceeds derived from such offences or property the value of which corresponds to such proceeds;

b. enable the temporary or permanent closure of any establishment used to carry out any of the offences established in accordance with this Convention, without prejudice to the rights of *bona fide* third parties, or to deny the perpetrator, temporarily or permanently, the exercise of the professional or voluntary activity involving contact with children in the course of which the offence was committed.

4. Each Party may adopt other measures in relation to perpetrators, such as withdrawal of parental rights or monitoring or supervision of convicted persons.

5. Each Party may establish that the proceeds of crime or property confiscated in accordance with this article can be allocated to a special fund in order to finance prevention and assistance programmes for victims of any of the offences established in accordance with this Convention.

Article 28 – Aggravating circumstances

Each Party shall take the necessary legislative or other measures to ensure that the following circumstances, in so far as they do not already form part of the constituent elements of the offence, may, in conformity with the relevant provisions of internal law, be taken into consideration as aggravating circumstances in the determination of the sanctions in relation to the offences established in accordance with this Convention:

a. the offence seriously damaged the physical or mental health of the victim;

b. the offence was preceded or accompanied by acts of torture or serious violence;

c. the offence was committed against a particularly vulnerable victim;

d. the offence was committed by a member of the family, a person cohabiting with the child or a person having abused his or her authority;

e. the offence was committed by several people acting together;

f. the offence was committed within the framework of a criminal organisation;

g. the perpetrator has previously been convicted of offences of the same nature.

Article 29 – Previous convictions

Each Party shall take the necessary legislative or other measures to provide for the possibility to take into account final sentences passed by another Party in relation to the offences established in accordance with this Convention when determining the sanctions.

CHAPTER VII – INVESTIGATION, PROSECUTION AND PROCEDURAL LAW

Article 30 – Principles

1. Each Party shall take the necessary legislative or other measures to ensure that investigations and criminal proceedings are carried out in the best interests and respecting the rights of the child.

2. Each Party shall adopt a protective approach towards victims, ensuring that the investigations and criminal proceedings do not aggravate the trauma experienced by the child and that the criminal justice response is followed by assistance, where appropriate.

3. Each Party shall ensure that the investigations and criminal proceedings are treated as priority and carried out without any unjustified delay.

4. Each Party shall ensure that the measures applicable under the current chapter are not prejudicial to the rights of the defence and the requirements of a fair and impartial trial, in conformity with Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

5. Each Party shall take the necessary legislative or other measures, in conformity with the fundamental principles of its internal law:

- to ensure an effective investigation and prosecution of offences established in accordance with this Convention, allowing, where appropriate, for the possibility of covert operations;
- to enable units or investigative services to identify the victims of the offences established in accordance with Article 20, in particular by analysing child pornography material, such as photographs and audiovisual recordings transmitted or made available through the use of information and communication technologies.

Article 31 – General measures of protection

1. Each Party shall take the necessary legislative or other measures to protect the rights and interests of victims, including their special needs as witnesses, at all stages of investigations and criminal proceedings, in particular by:

a. informing them of their rights and the services at their disposal and, unless they do not wish to receive such information, the follow-up given to their complaint, the charges, the general progress of the investigation or proceedings, and their role therein as well as the outcome of their cases;

b. ensuring, at least in cases where the victims and their families might be in danger, that they may be informed, if necessary, when the person prosecuted or convicted is released temporarily or definitively;

c. enabling them, in a manner consistent with the procedural rules of internal law, to be heard, to supply evidence and to choose the means of having their views, needs and concerns presented, directly or through an intermediary, and considered;

d. providing them with appropriate support services so that their rights and interests are duly presented and taken into account;

e. protecting their privacy, their identity and their image and by taking measures in accordance with internal law to prevent the public dissemination of any information that could lead to their identification;

f. providing for their safety, as well as that of their families and witnesses on their behalf, from intimidation, retaliation and repeat victimisation;

g. ensuring that contact between victims and perpetrators within court and law enforcement agency premises is avoided, unless the competent authorities establish otherwise in the best interests of the child or when the investigations or proceedings require such contact.

2. Each Party shall ensure that victims have access, as from their first contact with the competent authorities, to information on relevant judicial and administrative proceedings.

3. Each Party shall ensure that victims have access, provided free of charge where warranted, to legal aid when it is possible for them to have the status of parties to criminal proceedings.

4. Each Party shall provide for the possibility for the judicial authorities to appoint a special representative for the victim when, by internal law, he or she may have the status of a party to the criminal proceedings and where the holders of parental responsibility are precluded from representing the child in such proceedings as a result of a conflict of interest between them and the victim.

5. Each Party shall provide, by means of legislative or other measures, in accordance with the conditions provided for by its internal law, the possibility for groups, foundations, associations or governmental or non-governmental organisations, to assist and/or support the victims with their consent during criminal proceedings concerning the offences established in accordance with this Convention.

6. Each Party shall ensure that the information given to victims in conformity with the provisions of this article is provided in a manner adapted to their age and maturity and in a language that they can understand.

Article 32 – Initiation of proceedings

Each Party shall take the necessary legislative or other measures to ensure that investigations or prosecution of offences established in accordance with this Convention shall not be dependent upon the report or accusation made by a victim, and that the proceedings may continue even if the victim has withdrawn his or her statements.

Article 33 – Statute of limitation

Each Party shall take the necessary legislative or other measures to ensure that the statute of limitation for initiating proceedings with regard to the offences established in accordance with Articles 18, 19, paragraph 1.a and b, and 21, paragraph 1.a and b, shall continue for a period of time sufficient to allow the efficient starting of proceedings after the victim has reached the age of majority and which is commensurate with the gravity of the crime in question.

Article 34 – Investigations

1. Each Party shall adopt such measures as may be necessary to ensure that persons, units or services in charge of investigations are specialised in the field of combating sexual exploitation and sexual abuse of children or that persons are trained for this purpose. Such units or services shall have adequate financial resources.

2. Each Party shall take the necessary legislative or other measures to ensure that uncertainty as to the actual age of the victim shall not prevent the initiation of criminal investigations.

Article 35 – Interviews with the child

1. Each Party shall take the necessary legislative or other measures to ensure that:

   a. interviews with the child take place without unjustified delay after the facts have been reported to the competent authorities;

   b. interviews with the child take place, where necessary, in premises designed or adapted for this purpose;

   c. interviews with the child are carried out by professionals trained for this purpose;

   d. the same persons, if possible and where appropriate, conduct all interviews with the child;

   e. the number of interviews is as limited as possible and in so far as strictly necessary for the purpose of criminal proceedings;

   f. the child may be accompanied by his or her legal representative or, where appropriate, an adult of his or her choice, unless a reasoned decision has been made to the contrary in respect of that person.

2. Each Party shall take the necessary legislative or other measures to ensure that all interviews with the victim or, where appropriate, those with a child witness, may be videotaped and that these videotaped interviews may be accepted as evidence during the court proceedings, according to the rules provided by its internal law.

3. When the age of the victim is uncertain and there are reasons to believe that the victim is a child, the measures established in paragraphs 1 and 2 shall be applied pending verification of his or her age.

Article 36 – Criminal court proceedings

1. Each Party shall take the necessary legislative or other measures, with due respect for the rules governing the autonomy of legal professions, to ensure that training on children's rights and sexual exploitation and sexual abuse of children is available for the benefit of all persons involved in the proceedings, in particular judges, prosecutors and lawyers.

2. Each Party shall take the necessary legislative or other measures to ensure, according to the rules provided by its internal law, that:

   a. the judge may order the hearing to take place without the presence of the public;

   b. the victim may be heard in the courtroom without being present, notably through the use of appropriate communication technologies.

CHAPTER VIII – RECORDING AND STORING OF DATA

Article 37 – Recording and storing of national data on convicted sexual offenders

1. For the purposes of prevention and prosecution of the offences established in accordance with this Convention, each Party shall take the necessary legislative or other measures to collect and store, in accordance with the relevant provisions on the protection of personal data and other appropriate rules and guarantees

as prescribed by domestic law, data relating to the identity and to the genetic profile (DNA) of persons convicted of the offences established in accordance with this Convention.

2. Each Party shall, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, communicate to the Secretary General of the Council of Europe the name and address of a single national authority in charge for the purposes of paragraph 1.

3. Each Party shall take the necessary legislative or other measures to ensure that the information referred to in paragraph 1 can be transmitted to the competent authority of another Party, in conformity with the conditions established in its internal law and the relevant international instruments.

CHAPTER IX – INTERNATIONAL CO-OPERATION

Article 38 – General principles and measures for international co-operation

1. The Parties shall co-operate with each other, in accordance with the provisions of this Convention, and through the application of relevant applicable international and regional instruments, arrangements agreed on the basis of uniform or reciprocal legislation and internal laws, to the widest extent possible, for the purpose of:

   a. preventing and combating sexual exploitation and sexual abuse of children;

   b. protecting and providing assistance to victims;

   c. investigations or proceedings concerning the offences established in accordance with this Convention.

2. Each Party shall take the necessary legislative or other measures to ensure that victims of an offence established in accordance with this Convention in the territory of a Party other than the one where they reside may make a complaint before the competent authorities of their State of residence.

3. If a Party that makes mutual legal assistance in criminal matters or extradition conditional on the existence of a treaty receives a request for legal assistance or extradition from a Party with which it has not concluded such a treaty, it may consider this Convention the legal basis for mutual legal assistance in criminal matters or extradition in respect of the offences established in accordance with this Convention.

4. Each Party shall endeavour to integrate, where appropriate, prevention and the fight against sexual exploitation and sexual abuse of children in assistance programmes for development provided for the benefit of third states.

CHAPTER X – MONITORING MECHANISM

Article 39 – Committee of the Parties

1. The Committee of the Parties shall be composed of representatives of the Parties to the Convention.

2. The Committee of the Parties shall be convened by the Secretary General of the Council of Europe. Its first meeting shall be held within a period of one year following the entry into force of this Convention for the tenth signatory having ratified it. It shall subsequently meet whenever at least one third of the Parties or the Secretary General so requests.

3. The Committee of the Parties shall adopt its own rules of procedure.

Article 40 – Other representatives

1. The Parliamentary Assembly of the Council of Europe, the Commissioner for Human Rights, the European Committee on Crime Problems (CDPC), as well as other relevant Council of Europe intergovernmental committees, shall each appoint a representative to the Committee of the Parties.

2. The Committee of Ministers may invite other Council of Europe bodies to appoint a representative to the Committee of the Parties after consulting the latter.

3. Representatives of civil society, and in particular non-governmental organisations, may be admitted as observers to the Committee of the Parties following the procedure established by the relevant rules of the Council of Europe.

4. Representatives appointed under paragraphs 1 to 3 above shall participate in meetings of the Committee of the Parties without the right to vote.

Article 41 – Functions of the Committee of the Parties

1. The Committee of the Parties shall monitor the implementation of this Convention. The rules of procedure of the Committee of the Parties shall determine the procedure for evaluating the implementation of this Convention.

2. The Committee of the Parties shall facilitate the collection, analysis and exchange of information, experience and good practice between States to improve their capacity to prevent and combat sexual exploitation and sexual abuse of children.

3. The Committee of the Parties shall also, where appropriate:

   a. facilitate the effective use and implementation of this Convention, including the identification of any problems and the effects of any declaration or reservation made under this Convention;

   b. express an opinion on any question concerning the application of this Convention and facilitate the exchange of information on significant legal, policy or technological developments.

4. The Committee of the Parties shall be assisted by the Secretariat of the Council of Europe in carrying out its functions pursuant to this article.

5. The European Committee on Crime Problems (CDPC) shall be kept periodically informed regarding the activities mentioned in paragraphs 1, 2 and 3 of this article.

CHAPTER XI – RELATIONSHIP WITH OTHER INTERNATIONAL INSTRUMENTS

Article 42 – Relationship with the United Nations Convention on the Rights of the Child and its Optional Protocol on the sale of children, child prostitution and child pornography

This Convention shall not affect the rights and obligations arising from the provisions of the United Nations Convention on the Rights of the Child and its Optional Protocol on the sale of children, child prostitution and child pornography, and is intended to enhance the protection afforded by them and develop and complement the standards contained therein.

Article 43 – Relationship with other international instruments

1. This Convention shall not affect the rights and obligations arising from the provisions of other international instruments to which Parties to the present Convention are Parties or shall become Parties and which contain provisions on matters governed by this Convention and which ensure greater protection and assistance for child victims of sexual exploitation or sexual abuse.

2. The Parties to the Convention may conclude bilateral or multilateral agreements with one another on the matters dealt with in this Convention, for purposes of supplementing or strengthening its provisions or facilitating the application of the principles embodied in it.

3. Parties which are members of the European Union shall, in their mutual relations, apply Community and European Union rules in so far as there are Community or European Union rules governing the particular subject concerned and applicable to the specific case, without prejudice to the object and purpose of the present Convention and without prejudice to its full application with other Parties.

CHAPTER XII – AMENDMENTS TO THE CONVENTION

Article 44 – Amendments

1. Any proposal for an amendment to this Convention presented by a Party shall be communicated to the Secretary General of the Council of Europe and forwarded by him or her to the member States of the Council of Europe, any signatory, any State Party, the European Community, any State invited to sign this Convention in accordance with the provisions of Article 45, paragraph 1, and any State invited to accede to this Convention in accordance with the provisions of Article 46, paragraph 1.

2. Any amendment proposed by a Party shall be communicated to the European Committee on Crime Problems (CDPC), which shall submit to the Committee of Ministers its opinion on that proposed amendment.

3. The Committee of Ministers shall consider the proposed amendment and the opinion submitted by the CDPC and, following consultation with the non-member States Parties to this Convention, may adopt the amendment.

4. The text of any amendment adopted by the Committee of Ministers in accordance with paragraph 3 of this article shall be forwarded to the Parties for acceptance.

5. Any amendment adopted in accordance with paragraph 3 of this article shall enter into force on the first day of the month following the expiration of a period of one month after the date on which all Parties have informed the Secretary General that they have accepted it.

CHAPTER XIII – FINAL CLAUSES

Article 45 – Signature and entry into force

1. This Convention shall be open for signature by the member States of the Council of Europe, the non-member States which have participated in its elaboration as well as the European Community.

2. This Convention is subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

3. This Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date on which 5 signatories, including at least 3 member States of the Council of Europe, have expressed their consent to be bound by the Convention in accordance with the provisions of the preceding paragraph.

4. In respect of any State referred to in paragraph 1 or the European Community, which subsequently expresses its consent to be bound by it, the Convention 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 its instrument of ratification, acceptance or approval.

Article 46 – Accession to the Convention

1. After the entry into force of this Convention, the Committee of Ministers of the Council of Europe may, after consultation of the Parties to this Convention and obtaining their unanimous consent, invite any non-member State of the Council of Europe, which has not participated in the elaboration of the Convention, to accede to this Convention by a decision taken by the majority provided for in Article 20.d of the Statute of the Council of Europe, and by unanimous vote of the representatives of the Contracting States entitled to sit on the Committee of Ministers.

2. In respect of any acceding State, the Convention 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 of the instrument of accession with the Secretary General of the Council of Europe.

Article 47 – Territorial application

1. Any State or the European Community 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 Convention shall apply.

2. Any Party may, at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Convention to any other territory specified in the declaration and for whose international relations it is responsible or on whose behalf it is authorised to give undertakings. In respect of such territory, the Convention 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 of the Council of Europe. 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 48 – Reservations

No reservation may be made in respect of any provision of this Convention, with the exception of the reservations expressly established. Any reservation may be withdrawn at any time.

Article 49 – Denunciation

1. Any Party may, at any time, denounce this Convention 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.

Article 50 – Notification

The Secretary General of the Council of Europe shall notify the member States of the Council of Europe, any State signatory, any State Party, the European Community, any State invited to sign this Convention in accordance with the provisions of Article 45 and any State invited to accede to this Convention in accordance with the provisions of Article 46 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 Convention in accordance with Articles 45 and 46;

d. any amendment adopted in accordance with Article 44 and the date on which such an amendment enters into force;

e. any reservation made under Article 48;

f. any denunciation made in pursuance of the provisions of Article 49;

g. any other act, notification or communication relating to this Convention.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at Lanzarote, this 25th day of October 2007, 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, to the non-member States which have participated in the elaboration of this Convention, to the European Community and to any State invited to accede to this Convention.

Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse – CETS No. 201

Explanatory Report

I. The Committee of Ministers of the Council of Europe took note of this Explanatory Report at its 1002nd meeting held at its Deputies' level, on 12 July 2007. The Convention was opened for signature in Lanzarote (Spain), on 25 October 2007, on the occasion of the 28th Conference of European Ministers of Justice.

II. The text of this explanatory report does not constitute an instrument providing an authoritative interpretation of the Convention, although it might be of such a nature as to facilitate the application of the provisions contained therein.

I. INTRODUCTION

a. Sexual exploitation and abuse of children and authoritative international instruments

1. Sexual exploitation and sexual abuse are some of the worst forms of violence against children. According to UNICEF, approximately two million children are used in the "sex industry" each year. There are more than one million images of some ten to twenty thousand sexually abused children posted on the Internet.

2. Of these ten to twenty thousand children, only a few hundred are identified. The rest are anonymous, abandoned, and most likely still abused.

3. There are no statistics on the total amount of sexual abuse of children in Europe, but it is well known that there is a considerable discrepancy between the number of reported cases of sexual abuse of children to the police and social services and actual cases. It is also recognised that children usually experience extreme difficulties in telling anyone about being sexually abused, because very often they are violated by a person in their close social or family circle or because they are threatened. Thus, the available data shows that, in Council of Europe countries, the majority of sexual abuse against children is committed within the family framework, by persons close to the child or by those in the child's social environment.

4. The main international existing instrument in the field of protection of children's rights, including against sexual exploitation, is the United Nations Convention on the Rights of the Child (hereafter CRC, United Nations, 1989). It protects children from all forms of sexual exploitation and abuse, abduction, sale and trafficking, any other form of exploitation and from cruel or inhuman treatment. The pertinent provisions of the CRC, like those in Articles 1, 11, 21 and 32-37, are formulated in general and broad terms.

5. Article 34 the CRC requires States Parties to protect children against "all forms of sexual exploitation and sexual abuse", including the inducement or coercion of a child to engage in any unlawful sexual activity, the exploitative use of children in prostitution or other unlawful sexual practices, and the exploitative use of children in pornographic performances and materials.

6. As to the sexual exploitation of children, the only universal treaty specifically addressing this topic is the Optional Protocol to the CRC on the Sale of Children, Child Pornography and Child Prostitution (United Nations, 2000). The Protocol criminalises certain acts in relation to the sale of children, child prostitution and child pornography, including attempt, complicity and participation. It does not cover comprehensively and in detail issues such as child-friendly judicial procedures, although it lays down minimum standards on the protection of the child victim in criminal justice processes. The Protocol provides for the right of victims to seek compensation. It encourages the strengthening of international cooperation and assistance and the adoption of extra-territorial legislation, but it does not provide for exemption from the dual criminality principle.

7. Compliance with the CRC and its Protocols is monitored by the Committee on the Rights of the Child, which has come to the conclusion that children in Europe are not sufficiently protected against sexual exploitation and abuse. In particular the Committee underlines the lack of exhaustive national criminal legislation in this field in the State Parties, especially as concerns trafficking of children, "sex tourism" and child pornography, the lack of a clearly defined minimum age for consenting sexual relations and lack of protection for chhildren against abuse on the Internet. It has, for example, recommended that States develop an effective system of reporting and investigation, within a child-sensitive inquiry and judicial procedure, avoiding repeated interviews of child victims, in order to ensure better protection of child victims, including the protection of their right to privacy.

8. The European Social Charter (ETS 035, Council of Europe, 1961 and revised in 1996) provides in Article 7 that children and young persons have the right to special protection against physical and moral danger to which they are exposed. Article 17 of the Revised Social Charter (ETS 163) contains the right for children and young persons to appropriate social, legal and economic protection. Sub-paragraph 1 b of Article 17 states that Governments shall take all appropriate and necessary measures designed to protect children and young persons against negligence, violence or exploitation.

9. The European Committee of Social Rights has interpreted the provisions of the Charter as the right of children to protection against all forms of sexual exploitation, in particular from involvement in the "sex industry". The Committee has set up definitions for child prostitution, child pornography and trafficking of children for sexual purposes. All these forms of exploitation should be criminalised if the child is below 18 years of age. The Committee has also taken into account the evolution of technology, wanting Internet service providers to be responsible for controlling the material they host, securing the best monitoring system for activities on the Internet and logging procedures.

10. The Convention on Cybercrime (ETS 185, Council of Europe, 2001) has a specific provision, in Article 9, criminalising child pornography when use has been made of a computer system. It contains a definition of child pornography and calls on the States Parties to criminalise the production, offering/making available, distribution/transmitting, procuring and possession of child pornography. The important procedural and international co-operation measures contained in this Convention also apply to other criminal offences committed by means of a computer system and the collection of evidence in electronic form of a criminal offence (e.g., in the case of the sexual exploitation or sexual abuse of children).

11. In May 2005 the Council of Europe Convention on Action against Trafficking in Human Beings (CETS 197) was adopted. The Convention contains a definition of trafficking in human beings, in Article 4, giving special attention to victims below the age of 18. It includes several protection mechanisms for victims of trafficking, such as the right to a recovery and reflection period and the right to residence permits. It contains specific provisions as regards child victims of trafficking, for example the right to access to education. Also, during and after investigation as well as during court proceedings victims shall receive special protection. With regard to children, the best interests of the child shall be taken into account.

12. In 2001, the Committee of Ministers of the Council of Europe adopted Recommendation (2001) 16 on the Protection of Children against Sexual Exploitation. It calls for criminalisation of acts amounting to the sexual exploitation of children, in particular child prostitution, child pornography and trafficking of children for sexual purposes. It also provides that States should provide for special measures for child victims of sexual exploitation during court proceedings and for ensuring that the child's rights are safeguarded throughout proceedings, that judicial authorities should give these cases priority, and that the limitation period for criminal proceedings should begin when the child reaches majority. Also, it calls for improved international cooperation and the adoption and implementation of extra-territorial jurisdiction, without the requirement for dual criminality.

13. The Council of the European Union adopted, in 2003, the Framework Decision on combating the sexual exploitation of children and child pornography (2004/68/JHA) according to which the Member States are

obliged to criminalise certain behaviours and provide for a minimum level of maximum penalties incurred for these offences. The offences linked to sexual exploitation relate to prostitution and use of force/threats or a position of trust/authority for sexual relations. Offences related to child pornography are criminalised whether or not they involve the use of a computer system. Also, instigation, aiding, abetting and attempts relating to the above-mentioned offences should be criminalised. The Framework Decision states that extra-territorial jurisdiction shall be put in place by virtue of the principle of "*aut dedere aut judicare*", and that the victims shall be considered particularly vulnerable in the criminal proceedings (with reference to the EU Framework Decision on the standing of victims in criminal proceedings).

14. In 2001 the Council of the European Union adopted a Framework Decision on the standing of victims in criminal proceedings (2001/220/JHA) where special protective measures for victims of crimes are set up. When there is a need to protect a victim from giving evidence in open court, the court may decide that the victim can testify in a manner which enables this objective. States shall encourage personnel involved in proceedings or working with victims to receive special training, in particular regarding the most vulnerable groups.

15. Furthermore, the Council of the European Union adopted a Framework Decision on combating trafficking in human beings (2002/629/JHA) which provides in particular for a harmonisation of criminal offences in this field.

16. Article 3 of the International Labour Organisation Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (1999) includes "the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances" in the definition of the worst forms of child labour.

17. Special mention should be made of the two World Congresses on the commercial sexual exploitation of children, held in Stockholm in 1996 and in Yokohama in 2001, since progress in the implementation of their conclusions has been monitored by the Council of Europe. These congresses adopted the Stockholm Declaration and Agenda for Action and the Yokohama Global Commitment.

18. The Stockholm Declaration and Agenda for Action promotes cooperation between States and all sectors of society and includes recommendations to criminalise the commercial sexual exploitation of children and other forms of sexual exploitation of children, as well as to penalise offenders. Perpetrators shall not only be subject to legal sanctions, but should also be offered rehabilitation possibilities. The Declaration and Agenda for Action also recommends that States put in place extra-territorial legislation. It develops standards for child-friendly judicial procedures and strengthens victims' rights to legal aid and judicial remedies. It calls for the development and implementation of national plans of action and national focal points. Furthermore, it provides for victims to have access to child-friendly personnel and support services in all sectors, particularly in the legal, social and health fields.

19. The Yokohama Global Commitment, adopted at the 2nd World Congress, reaffirmed the Stockholm Declaration and Agenda for Action. It also states that all actors shall take adequate measures to address the negative aspects of new technologies, in particular child pornography on the Internet.

20. Prior to the 2nd World Congress, the Council of Europe organised a preparatory meeting for Europe and Central Asia that adopted the Budapest Commitment and Plan of Action. This document seeks to strengthen networks of cooperation between national and international law enforcement agencies and to promote the development of international arrest warrants for traffickers. The Council of Europe was appointed to monitor the progress of the implementation of these commitments and to support States in this task.

21. A follow-up meeting to Yokohama was held in Ljubljana in 2005. In the conclusions of this Yokohama Review Conference, good practices in the implementation of the commitments made in Stockholm and Yokohama were highlighted and focus was placed on new and emerging issues. One working group focused on child-friendly judicial proceedings, recommending the drafting of a new convention to specifically address this issue.

b. Action of the Council of Europe

22. The Council of Europe has been working hard for more than 15 years to help its member States fight the destructive phenomenon of sexual exploitation and sexual abuse of children. It has developed a number of texts dealing specifically with these issues. The Council of Europe has been actively involved in the two World Congresses against commercial sexual exploitation of children, held in Stockholm in 1996 and in Yokohama in 2001. On 27 September 2002 the Parliamentary Assembly of the Council of Europe adopted Resolution 1307 (2002) on the sexual exploitation of children: zero tolerance. The Assembly called for Council of Europe

member States to adopt a dynamic policy on impunity, together with procedures giving priority to the rights of child victims and their views and aiming at arresting criminals without giving them the slightest opportunity to elude justice.

23. The political commitment by the member States of the Council of Europe to fight sexual exploitation of children was affirmed at the second Summit of Heads of State and Governments (Strasbourg, November 1997). The Action Plan adopted at this Summit called upon the member States to review national legislation with the aim of ensuring common standards for the protection of children suffering from or at risk of inhuman treatment to extend their co-operation, within the Council of Europe, with a view to preventing all forms of exploitation of children, including through the production, sale, marketing and possession of pornographic material involving children.

24. The Heads of State and Governments of the Council of Europe member States reaffirmed this commitment at their third Summit in Warsaw in May 2005. At this Summit the protection of children against all forms of violence was declared a top priority within the Organisation. The Action Plan reads:

> *We will take specific action to eradicate all forms of violence against children. We therefore decide to launch a three year programme of action to address social, legal, health and educational dimensions of the various forms of violence against children. We shall also elaborate measures to stop sexual exploitation of children, including legal instruments if appropriate, and involve civil society in this process. Coordination with the United Nations in this field is essential, particularly in connection with follow-up to the Optional Protocol to the Convention on the Rights of the Child, on the sale of children, child prostitution and child pornography.*

25. Following this Action Plan, the Council of Europe launched a programme entitled "Building a Europe for and with children". This is a response to the Organisation's mandate to guarantee an integrated approach to promoting children's rights covering the social, legal, educational and health dimensions relevant to protecting children from various forms of violence. It comprises two closely related stands: the promotion of children's rights and the protection of children from violence. The programme's main objective is to help all decision makers and players concerned to design and implement national strategies for the protection of children's rights and the prevention of violence against children.

c. The Council of Europe Convention on the Protection of Children against Sexual Exploitation and Abuse

26. In 2002, the Committee of Ministers of the Council of Europe appointed a Group of Specialists on the Protection of Children against Sexual Exploitation (PC-S-ES). The PC-S-ES drafted model terms of reference for national focal points on the protection of children against sexual exploitation. It also produced an assessment of the member States' legislation in this field. However, due to the difficulties in producing an exhaustive and satisfactory assessment, the PC-S-ES decided to develop a log frame which would be sent to States to fill in.

27. A tool enabling States to implement the various undertakings they subscribed to in the field of the fight against sexual exploitation and abuse of children, "REACT on sexual exploitation and abuse of children", was drafted and sent to member States in 2004. The document listed all commitments made by States in the above mentioned instruments and also provided the possibility for States to submit additional information.

28. At the end of 2004, 23 States had replied, and the replies were analysed by an independent expert at the beginning of 2005. The analysis showed that, in numerous ways, implementation of the commitments made by member States had not been fully achieved. A set of recommendations was submitted to the member States through the European Committee on Crime Problems (CDPC).

29. Based on the analysis of REACT, the PC-S-ES organised a follow-up conference to the 2nd World Congress against Commercial Sexual Exploitation of Children. The conference, "Yokohama Review for Europe and Central Asia – Combating sexual exploitation of children", was held in Ljubljana in July 2005. Some of the recommendations from the working groups and seminars were directed to the Council of Europe for further action. The recommendation that the Council of Europe should draft a binding instrument regarding child-friendly judicial procedures in cases of sexual exploitation and abuse was particularly highlighted.

30. Following the conclusions of the Third Summit of Heads of State and Governments of the Council of Europe, held in Warsaw in May 2005, which call for the elaboration of measures to stop sexual exploitation of children, including legal instruments if appropriate, the Committee of Ministers adopted, on 22 March 2006, the specific terms of reference setting up the Committee of Experts on the Protection of Children against Sexual Exploitation and Sexual Abuse (PC-ES) which had the task of conducting "a review of the implementation

of the existing international instruments on the protection of children against sexual exploitation and, if necessary, instruments on legal co-operation, with a view to evaluate the need for an additional international legally binding instrument, containing a follow-up mechanism, or a non-binding instrument, and/or amendments to the existing instruments" and "if the need for an additional instrument is established, subject to the approval of the CDPC, prepare such an instrument."

31. In May 2006, the PC-ES started its work by reviewing the provisions and implementation of the commitments and international instruments dealing with sexual exploitation of children:

- The United Nations Convention on the Rights of the Child;
- The Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography;
- International Labour Organisation Convention 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour;
- The European Social Charter (Revised);
- The Convention on Cybercrime;
- The Council of Europe Convention on Action against Trafficking in Human Beings;
- The Council of the European Union Framework Decision on combating the sexual exploitation of children and child pornography;
- The Council of the European Union Framework Decision on the standing of victims in criminal procedures;
- The Stockholm Declaration and Agenda for Action;
- The Yokohama Global Commitment;
- The Budapest Commitment and Plan of Action;
- Recommendation Rec (2001) 16 on the protection of children against sexual exploitation.

32. It concluded that there was a need for a new binding instrument to protect children against sexual exploitation and sexual abuse. The drafting procedure of the new instrument began in September 2006. Meetings of the Committee were held, in May, September, October, December 2006, February and March 2007, to draw up the text.

II. COMMENTARY ON THE PROVISIONS OF THE CONVENTION

Preamble

33. The Preamble contains an enumeration of the most important international legal instruments, programmes and action plans which directly deal with sexual exploitation and sexual abuse of children in the framework of the Council of Europe, the European Union, the United Nations and the International Labour Organisation. In particular it should be underlined that, as mentioned above, the Council of Europe has prepared an important number of instruments to examine and combat sexual exploitation and abuse of children from different aspects. During the negotiation process of this Convention all these international legal instruments have been taken into account.

34. The Preamble sets out the basic aims of the Convention which include, in particular, protecting children against sexual exploitation and sexual abuse whoever the perpetrators, providing assistance to victims and promoting the fight against sexual exploitation and sexual abuse of children notably because of the increase in these phenomena.

35. Attention is drawn to the fact that the measures provided for in this Convention do not prejudice the development of preventive mechanisms, means of investigation and forms of co-operation under other international conventions, in particular the Convention on Cybercrime, which contains provisions designed to make it easier to prevent and punish child pornography disseminated through the use of computer systems.

36. These measures are without prejudice to the positive obligations on States to protect the rights recognised by the Convention for the Protection of Human Rights and Fundamentals Freedoms (hereafter ECHR).

CHAPTER I – PURPOSES, NON-DISCRIMINATION PRINCIPLE AND DEFINITIONS

Article 1 – Purposes

37. Paragraph 1 deals with the purposes of the Convention, its two main aims being to prevent and combat sexual exploitation and sexual abuse of children (a), and to protect the rights of child victims (b).

38. Sub-paragraph c deals with national and international cooperation. Measures to be taken at the national level are contained in Chapter II (Preventive measures), Chapter III (Specialised authorities and coordinating bodies), Chapter IV (Protective measures and assistance to victims), Chapter V (Intervention programmes or measures), Chapter VI (Substantive criminal law), Chapter VII (Investigation, prosecution and procedural law) and Chapter VIII (Recording and storing of data). The national measures stress the importance of cooperation and collaboration between the various competent bodies and services which may be involved.

39. International cooperation as established by the Convention (Chapter IX) is not confined to criminal matters but also takes in preventing sexual exploitation and sexual abuse and assisting and protecting victims.

40. Paragraph 2 underlines that, in order to ensure the effective implementation of its provisions by the Parties, the Convention sets up a special monitoring mechanism. This is a means of ensuring Parties' compliance with the Convention and is a guarantee of the Convention's long-term effectiveness (see comments on Chapter X).

Article 2 – Non-discrimination principle

41. This article prohibits discrimination in Parties' implementation of the Convention and in particular in enjoyment of measures to protect and promote victims' rights. The meaning of discrimination in Article 2 is identical to that given to it under Article 14 ECHR.

42. The concept of discrimination has been interpreted consistently by the European Court of Human Rights in its case-law concerning Article 14 ECHR. In particular this case-law has made clear that not every distinction or difference of treatment amounts to discrimination. As the Court has stated, for example in the *Abdulaziz, Cabales and Balkandali v. the United Kingdom* judgment, "a difference of treatment is discriminatory if it 'has no objective and reasonable justification', that is, if it does not pursue a 'legitimate aim' or if there is not a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised".

43. The list of non-discrimination grounds in Article 2 is identical to that in Article 14 ECHR and the list contained in Protocol No.12 to the ECHR. However, the negotiators wished to include also the non-discrimination grounds of sexual orientation, state of health and disability. Taking the definition of "child" set out in the United Nations Convention on the Rights of the Child, therefore also covering teenagers experiencing their first affective relationships and discovering sex and their own sexual orientation, and considering that recent research has highlighted a specific risk of sexual violence against, and sexual abuse and exploitation of, minors of homosexual orientation, it was decided to include "sexual orientation" among the factors for non-discrimination set out in this article. "State of health" includes in particular HIV status. The list of non-discrimination grounds is not exhaustive but indicative. It is worth pointing out that the European Court of Human Rights has applied Article 14 to discrimination grounds not explicitly mentioned in that provision (see, for example, as concerns the ground of sexual orientation, the judgment of 21 December 1999 in *Salgueiro da Silva Mouta v. Portugal*). The reference to "or other status" could refer, for example, to children of refugee or immigrant populations or "street children" whose legal status is unclear.

44. Article 2 refers to "implementation of the provisions of this Convention by Parties". These words seek to specify the extent of the prohibition on discrimination. In particular, Article 2 prohibits a victim's being discriminated against in the enjoyment of measures – as provided for in Chapter IV of the Convention – to protect their rights.

Article 3 – Definitions

45. Article 3 provides several definitions which are applicable throughout the Convention:

Definition of "child"

46. The definition of a "child" is the same as provided in the *Council of Europe Convention on Action against Trafficking in Human Beings*, i.e. any person under the age of 18 years. It should be noted that in certain

articles of the Convention relating to offences a different age is specified. For example, the solicitation of children for sexual purposes is a criminal offence only in relation to children below the legal age before which it is prohibited to engage in sexual activities with them.

Definition of "sexual exploitation and sexual abuse of children"

47. Article 3 b contains a definition of sexual exploitation and sexual abuse of children which includes all the behaviour referred to in Articles 18 to 24 of this Convention.

48. International instruments have mainly had regard to facts committed for commercial aims in laying down rules for the protection of children (prostitution, child pornography, child trafficking). However, experience shows that this approach is too narrow for insuring protection of children against the abuse that any adult can inflict on their physical and mental well-being. Children can just as easily be victims within the family as in their close social surroundings. Such cases, in which the commercial aspect is, in the majority of cases, absent are nevertheless the most frequent and statistics demonstrate that the perpetrators of child sexual abuse are usually persons close to the victim (parents, grandparents, neighbours, teachers etc).

49. Key existing international instruments refer in the main only to "sexual assault" as a general term for all sexual molestation of children. The negotiators felt it would be better to use the expression sexual abuse which is more appropriate in this context.

Definition of "victim"

50. There are many references to victims, in particular in Chapter IV (Protective measures and assistance to victims) which enumerates several measures for the benefit of children. The negotiators felt therefore it was essential to define this expression.

51. A victim is "any child exploitation or sexual abuse". It is important to note that the facts of the sexual exploitation or abuse do not have to be established before a child is to be considered a victim.

CHAPTER II – PREVENTIVE MEASURES

52. This chapter contains measures to be implemented at the national level. Policies or strategies to prevent the sexual exploitation and sexual abuse of child knowledge of the possible signals which could be given by children, as well as the provision of, and easy access to, information about sexual exploitation and sexual abuse, their effects, their consequences and how best to combat them.

Article 4 – Principles

53. The main aim of the Convention – to prevent sexual exploitation and sexual abuse of children from taking place – is reflected in this article.

Article 5 – Recruitment, training and awareness raising of persons working in contact with children

54. Paragraphs 1 and 2 are intended to ensure that persons who have regular contacts with children have sufficient awareness of the rights of children and their protection, and an adequate knowledge of sexual exploitation and sexual abuse of children. This provision lists the categories of persons involved: those who work with children in education, health, social protection, judicial, and law enforcement sectors as well as those who deal with children in the fields of sport, culture and leisure activities. The provision does not refer to professional contacts with children, but is left open for anyone who deals with children in any capacity. This is particularly intended to cover persons who carry out voluntary activities with children.

55. The reference to the "rights of children" covers the rights as laid down in the United Nations Convention on the Rights of the Child, including for example, the right to life (Article 6), the right to be protected from economic exploitation (Article 32), the right to be protected from all forms of physical or mental violence, including sexual abuse (Article 19).

56. Paragraph 2 also requires persons having regular contacts with children to have adequate knowledge and awareness to recognise cases of sexual exploitation and sexual abuse and of the possibility of reporting to the services responsible for child protection any situation where they have reasonable grounds for believing that a child is the victim of sexual exploitation or sexual abuse, as provided in Article 12 paragraph 1. It

should be noted that there is no specific training obligation in this provision. Having "adequate knowledge" could imply training or otherwise providing information for people who come in contact with children so that children who are victims of sexual exploitation or sexual abuse can be identified as early as possible, but it is left to Parties to decide how to achieve this.

57. Paragraph 3 sets an obligation for the Parties to ensure that candidates are screened prior to the exercise of professions involving regular contacts with children to ensure that they have not been convicted of acts of sexual exploitation or sexual abuse of children. In certain member States, this obligation can be applied also to voluntary activities. The addition of "in conformity with its internal law" permits States to implement the provision in a way which is compatible with internal rules, in particular the provisions on rehabilitation and reintegration of offenders. Moreover, this provision does not intend to interfere with specific legal provisions in those States which provide for the deletion of offenders' criminal records after a certain period of time.

Article 6 – Education for children

58. The negotiators considered that it is primarily the responsibility of parents to educate children generally in questions of sexuality and on the risks of sexual exploitation or sexual abuse. However, there may be situations where the parents are not able or willing to do this, such as where a parent is involved in the abuse of the child or where the cultural traditions of the community do not allow such matters to be openly discussed. Moreover, children sometimes pay more attention to what is explained to them in other contexts than at home, and notably at school when professionals (such as, for example, teachers, doctors, psychologists) provide the relevant information. Therefore, Article 6 provides the obligation for States to ensure that children are educated at primary and secondary level on the risks of sexual exploitation and sexual abuse, and how to protect themselves and request help.

59. The purpose of this information is to enable children better to protect themselves against the risk of sexual exploitation and abuse. Such information must not, however, have the effect of relieving adults and State authorities of their duty to protect children against all forms of sexual exploitation and sexual abuse.

60. The article refers to the provision of this information "during primary and secondary education". No reference is made to schools, since some children are educated at home and these children are also covered by the provision. The information referred to does not necessarily have to form part of a teaching programme, but could be provided in a non-formal educational context. School clearly has an important role to play in this respect, but the collaboration of parents is also required "where appropriate". Situations where this may not be appropriate include where a child is an orphan, or where the parents are implicated in investigations or proceedings for sexual abuse of the child.

61. The negotiators felt it was important that children receive this information from as early in their lives as possible, with any information made available to them in a form which is "adapted to their evolving capacity", in other words appropriate for their age and maturity.

62. Providing isolated information on sexual exploitation or sexual abuse outside the general context of normal sexuality could be disturbing to children. Therefore, the information to be provided on the risks of sexual exploitation and abuse should be given within the general context of sex education. Care should also be taken to ensure that this information does not undermine adults in the eyes of the child. It is important that children are also able to trust adults.

63. The last part of the article refers to situations of risk, especially those involving the use of new information and communication technologies. These are commonly regarded as a medium for the transmission of data, and are intended to refer in particular to the use of the Internet and third-generation technology (3G) which permits access to the Internet through mobile phones. Education and awareness programmes for all children on the safe use of the Internet are essential.

Article 7 – Preventive intervention programmes or measures

64. The negotiators wanted to provide for the possibility for people who are afraid that they might actually go ahead and behave in such a way that constitutes an offence of a sexual nature against children, as well as persons who have committed such offences but have not been brought to the attention of the authorities, to benefit, if they so wish, from an intervention programme or measure. The provision, which applies to people who are not being investigated or prosecuted or serving a sentence, and is preventive in purpose, is best included in the chapter on preventive measures. As in the case of the intervention programmes and measures provided for in Chapter V, the negotiators did not wish to impose specific models on States Parties, which must simply "ensure" that these programmes or measures are available to the people referred to

in Article 16, should they wish to take advantage of them, and assess, in each particular case, whether the person applying may benefit from them.

Article 8 – Awareness-raising of the general public

65. Article 8 requires Parties to promote or conduct awareness raising campaigns for the general public.

66. Paragraph 2 is intended to prevent or prohibit any advertisement of the offences described in the Convention. The implementation of this provision is left to Parties but they must obviously take into account the case-law of the European Court of Human Rights which, based on Article 10 ECHR, guarantees the right to freedom of expression the exercise of which may be subject to certain formalities, conditions, restrictions or penalties as prescribed by law and necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, or for the protection of health or morals.

Article 9 – Participation of children, the private sector, the media and civil society

67. Paragraph 1 recognises that the development of policies and measures, including action plans, to combat the sexual exploitation and abuse of children must of necessity be informed by children's own views and experiences in accordance with their evolving capacity.

68. Paragraph 2 requires Parties to encourage the information and communication technology sector, the tourism and travel industry and the banking and finance sectors to participate in the elaboration and implementation of policies to prevent sexual exploitation and sexual abuse of children.

69. The use of the broad term "information and communication technology" sector, which ensures that any future developments in this field will also be covered, targets in particular Internet service providers but also mobile phone network operators and search engines. There can be no doubt that the Internet is a medium much used for the purposes of the sexual exploitation and abuse of children. The use of the Internet in the production and dissemination of child pornography and in the trafficking of children for the purposes of sexual exploitation is well documented and receiving attention from a number of national and international bodies. For this reason it is important that Internet service providers themselves are involved in taking steps to raise awareness about sexual exploitation and that, as far as possible, policies are developed to regulate the use of the Internet through their systems.

70. The travel and tourism industry is included specifically to target the so-called "child sex tourism" phenomenon. In some member States, for example, airline companies and airports provide passengers with audiovisual preventive messages presenting the risks of prosecution to which perpetrators of sexual offences committed abroad are exposed.

71. The inclusion of the finance and banking sectors is very important because of the possibility for financial institutions, in cooperation with law enforcement, to disrupt the functioning of financial mechanisms supporting pay for view child abuse websites and to contribute to dismantling them.

72. The reference to the implementation of internal norms is intended to cover codes of conduct or enterprise charters aimed at protecting children from sexual exploitation and abuse. An example of good practice in this domain is the "Code of Conduct to Protect children from Sexual Exploitation in Travel and Tourism", initiated in 1998 by ECPAT in collaboration with the World Tourism Organisation (WTO), which is currently implemented by over 45 companies, tour operators, travel agencies, tourism associations and hotel chains in over 16 countries worldwide. One of its measures is to provide information to travellers through catalogues, posters, brochures, in-flight films, ticket-slips, websites, etc, about the subject of sexual exploitation and sexual abuse of children.

73. "Self-regulation" is regulation by the private sector; "co-regulation" is regulation in the context of a partnership between the private sector and public authorities.

74. Paragraph 3 refers to the role of the media in providing appropriate information on all aspects of sexual exploitation and abuse of children. This function should be exercised with due respect for the fundamental principle of the independence of the media and freedom of the press, in particular concerning the evaluation of the "appropriate" nature of the information provided. There is no doubt that the media play a central role in the provision of information about children and images of childhood in general which significantly influence public stereotypes, assumptions and knowledge about children. Equally though they can play a very positive role in helping to raise awareness about children who are sexually exploited or abused and about the very

nature of sexual exploitation and abuse and the scale of the problem. The provision is intended also to cover the important issue of the respect of privacy of child victims.

75. Paragraph 4 requires Parties to encourage the financing of projects and programmes carried out by civil society aiming at preventing and protecting children from sexual exploitation and sexual abuse. The negotiators wish here to recognise and highlight the important work of NGOs in this field.

CHAPTER III – SPECIALISED AUTHORITIES AND CO-ORDINATING BODIES

Article 10 – National measures of co-ordination and collaboration

76. The first paragraph is concerned to promote a multidisciplinary co-ordination approach by requiring that Parties take measures to ensure the co-ordination on a national or local level between the various agencies responsible for preventing and combating sexual exploitation and abuse of children, in particular the education and health sectors, social services, law enforcement and judicial authorities. The list is not exhaustive. As far as judicial authorities are concerned, the coordination of action by the sectors mentioned should operate with full respect to their independence and to the principle of the separation of powers.

77. There is no doubt that the development of a multi-agency and multi-disciplinary approach to dealing with sexual exploitation and abuse of children is important, premised upon the fact that no single agency would be able to address a problem of such complexity.

78. The reference to "local" level means any level below the national level and is particularly relevant to federal States.

79. Paragraph 2 a requires Parties to set up or designate independent national or local institutions for the promotion and protection of the rights of the child. To ensure that children's rights are being promoted and respected, States should appoint an independent individual or agency, one of whose tasks should be to promote public awareness of sexual exploitation and abuse of children and their long term negative effects, as well as to ensure the respect of the rights of children.

80. A number of countries have created such positions which are known by different names and involve different responsibilities and functions – Children's Ombudsperson, Children's Advocate, Child Rights Commissioner, Committee on Child Rights, etc. There are very few policies in social and public life which do not affect children and one of the functions of an Ombudsperson or Commissioner could be to ensure that all relevant policies and practices at central and local government level are child proofed or have been developed in reference to some form of child impact assessment.

81. Further, it is also important that the development of such an approach is resourced properly and given clear responsibilities.

82. It should also be borne in mind that, in addition to the designation of independent authorities at the level of the member States, the Parliamentary Assembly of the Council of Europe suggested that the appointment, at the European level, of a European Ombudsman for Children would be a powerful resource in promoting awareness about the situation of many children throughout Europe and in co-ordinating policies to better enhance their lives and life experiences (see *Recommendation N° 1460 (2000) of the Parliamentary Assembly*).

83. Paragraph 2 b requires Parties to set up or designate mechanisms for data collection or focal points at the national or local levels, in collaboration with civil society, for observing and evaluating the phenomenon of sexual exploitation and abuse of children. Although there can be no doubt that the sexual exploitation and abuse of children is a serious and increasing problem, there is a lack of accurate and reliable statistics on the nature of the phenomenon and on the numbers of children involved. Policies and measures may not be best developed and appropriately targeted if reliance is placed on inaccurate or misleading information. The obligation provided in paragraph 2 b aims at taking measures to address the lack of information.

84. The data referred to are not intended to cover personal data on individuals, but only statistical data on victims and offenders. Nevertheless, the negotiators wished to highlight the importance of respecting data protection rules in the collection of any data, by including the phrase "with due respect for the requirements of personal data protection".

85. In paragraph 3, in respect of the necessity of a comprehensive and multidisciplinary approach, States are required to encourage co-operation between competent State authorities, civil society and the private sector in the prevention of and fight against sexual exploitation and abuse of children. The reference to civil society is a generic term covering non-governmental organisations and the voluntary sector. This paragraph, as in paragraph 2 b, recognises and supports the important role of civil society in preventing sexual

exploitation and abuse of children. For many children and families, NGO's are more acceptable to them in their search for support than formal State institutions and bodies. For that reason, while responsible for meeting the obligations laid down in Article 10, Parties must involve such bodies in the implementation of preventive measures.

CHAPTER IV – PROTECTIVE MEASURES AND ASSISTANCE TO VICTIMS

86. While the ultimate aim in the fight against sexual abuse and sexual exploitation should be to prevent these actions from taking place, it is also essential to ensure that children who have already been victims of such offences receive the best possible support, protection and assistance, which is the aim of the articles in this chapter.

Article 11 – Principles

87. In paragraph 1, the negotiators wished to highlight the necessity for a multidisciplinary approach to assisting and protecting children victims of sexual offences as well as their close relatives, families or anyone in whose care they are placed. These protection and assistance measures are not meant to benefit all parents and family members in the broad sense but those who, because of their close relationship with the minor, may be directly affected.

88. The point of paragraph 2 is that, while children need special protection measures, it is sometimes difficult to determine whether someone is over or under 18. Paragraph 2 consequently requires Parties to presume that a victim is a child if there are reasons for believing that to be so and if there is uncertainty about their age. Until their age is verified, they must be given the special protection measures for children.

Article 12 – Reporting suspicion of sexual exploitation or sexual abuse

89. Under paragraph 1 Parties must ensure that professionals normally bound by rules of professional secrecy, (such as, for example, doctors and psychiatrists) have the possibility to report to child protection services any situation where they have reasonable grounds to believe that a child is the victim of sexual exploitation or abuse. Although in many member States systems of mandatory reporting are already in place, and are considered to be crucial in detecting abuse and preventing further harm to children, the Convention does not impose an obligation for such professionals to report sexual exploitation or abuse of a child. It only grants these persons the possibility of doing so without risk of breach of confidence. It is important to note that the aim of this provision is to ensure the protection of children rather than the initiation of a criminal investigation. Therefore, paragraph 1 provides for the reporting possibility to child protection services. This does not exclude the possibility provided in certain States to report to other competent services.

90. Each Party is responsible for determining the categories of professionals to which this provision applies. The phrase "professionals who are called upon to work in contact with children" is intended to cover professionals whose functions involve regular contacts with children, as well as those who may only occasionally come into contact with a child in their work.

91. In paragraph 2, Parties are required to encourage any person who has knowledge or suspicion of sexual exploitation or abuse of a child to report to the competent services. It is the responsibility of each Party to determine the competent authorities to which such suspicions may be reported. These competent authorities are not limited to child protection services or relevant social services. The requirement of suspicion "in good faith" is aimed at preventing the provision being invoked to authorise the denunciation of purely imaginary or untruthful facts carried out with malicious intent.

Article 13 – Helplines

92. This article is particularly intended to apply to persons who may be confronted with a situation of sexual exploitation or sexual abuse. It could happen that persons to whom the child is entrusted do not know how to react. Moreover, child victims may also seek to obtain support or advice without knowing who to turn to. This emphasises the importance of the development of means whereby persons can safely reveal that they know about or have been victims of sexual abuse or sexual exploitation, or simply talk to a person outside their usual environment. Therefore Parties must encourage and support the setting up of such information services as telephone or Internet helplines to provide advice to callers. The Convention leaves to Parties any follow up to be give to calls received. These assistance services should be as widely available as possible. In some States, for example, such services are available 24 hours a day, 7 days a week.

Article 14 – Assistance to victims

93. Article 14 sets out the assistance measures which Parties must provide for victims of sexual exploitation and abuse. The aim of the assistance provided for in paragraph 1 is to "assist victims, in the short and long term, in their physical and psycho-social recovery". The authorities must therefore make arrangements for those assistance measures while bearing in mind the specific nature of that aim.

94. The paragraph states that victims should receive assistance "in the short and long term". Any harm caused by the sexual exploitation or abuse of a child is significant and must be addressed. The nature of the harm done by sexual exploitation or abuse means that this aid should continue for as long as is necessary for the child's complete physical and psychosocial recovery. Though this Convention relates primarily to children, the consequences of sexual exploitation or abuse of children may well last into adulthood. For this reason, it is important to establish measures which also provide those adults who were sexually exploited or sexually abused as children the opportunities to reveal these facts and to receive appropriate support and assistance if such assistance is still needed.

95. Assistance to victims in their "physical recovery" involves emergency or other medical treatment. The negotiators wished to draw particular attention to the fact that, given the nature of the offences established in this Convention, the obligation could include all forms of medical screening with special attention to sexually transmissible diseases and HIV infection and their subsequent treatment.

96. "Psycho-social" assistance is needed to help victims overcome the trauma they have been through and return to a normal life in society.

97. The provision stresses that the child's views, needs and concerns must be taken into account when taking the measures pursuant to this paragraph.

98. NGOs often have a crucial role to play in victim assistance. For that reason paragraph 2 specifies that each Party is to take measures, under the conditions provided for by national law, to cooperate with non-governmental organisations, other relevant organisations or other elements of civil society engaged in victim assistance. In many states, NGOs work with the authorities on the basis of partnerships and agreements designed to regulate their co-operation.

99. Paragraph 3 provides for the possibility, where the parents or carers of the victim are involved in the case of sexual exploitation or abuse, of removing either the alleged perpetrator or the victim from the family environment. It is important to stress that this removal should be envisaged as a protection measure for the child and not as a sanction for the alleged perpetrator. The removal of a parent who is the alleged perpetrator of sexual abuse against his or her child could be a good solution when the other parent supports the child victim. The other option may be to remove the child from the family environment. In such case, the length of time of the removal should be determined in the best interests of the child.

100. The negotiators recognised that the application of paragraph 4 would be limited, but felt that in certain particularly serious cases it would be justified for those persons close to the victim, including for example family members, friends and classmates, to benefit from emergency psychological assistance. These assistance measures are not meant to benefit the alleged perpetrators of sexual exploitation and abuse, who can instead benefit from the intervention programmes and measures in Chapter V.

CHAPTER V – INTERVENTION PROGRAMMES OR MEASURES

Article 15 – General principles

101. The provisions in this chapter are an important feature of added value in the Convention. In order to prevent the sexual exploitation and abuse of children the negotiators considered it necessary to draw up provisions designed to prevent repeat offences against children by means of intervention programmes or measures targeting sex offenders. They agreed on the need for a broad, flexible approach focusing on the medical and psycho-social aspects of the intervention programmes or measures offered to sex offenders, and the non-obligatory character of the interventions or measures offered. Regarding the non-obligatory character of the care, this means that these programmes are not necessarily part of the penal system of sanctions and measures but can instead be part of the healthcare and welfare systems. The scheme set up under Chapter V should not interfere with national schemes set up to deal with the treatment of persons suffering from mental disorders.

102. Psychological intervention refers to several therapeutic methods, for example cognitive behavioural therapy or therapy applying a psycho-dynamic approach. Medical intervention principally refers to

anti-hormone therapy (medical castration). Finally, social intervention concerns measures set up to regulate and stabilise the social behaviour of the offender (for example, a prohibition on going to certain places or meeting certain persons), as well as structures facilitating re-integration (such as assistance with administrative matters, job search).

103. In view of the wide range of measures that could be implemented and States' experiences in this area, the negotiators sought to ensure that this provision was highly flexible, particularly by means of frequent reference to the Parties' internal law. The provisions in Chapter V therefore merely set out some fundamental principles, without going into details of the measures or programmes to be introduced. On the other hand, it is up to the States Parties to assess, on a more or less regular basis, the effectiveness and results of the programmes and measures implemented and their scientific relevance.

104. The fundamental principles set out in the three articles of Chapter V are as follows:

- persons undergoing intervention programmes or measures must give their prior consent: no intervention programme or measure may be imposed on them;
- he intervention programmes or measures should be available as soon as possible, to increase the chance of success;
- here should be arrangements for assessing the dangerousness of the persons concerned and the risk of their re-offending;
- arrangements should be made for evaluating the intervention programmes and measures;
- special attention should be paid to the persons concerned who are themselves children;
- he various services responsible, in particular the healthcare and social services, the prison authorities and, with due regard to their independence, the judicial authorities must be co-ordinated.

Article 16 – Recipients of intervention programmes or measures

105. Article 16 identifies three categories of persons to whom intervention programmes or measures should be offered:

- persons prosecuted for any of the offences established in accordance with the Convention;
- persons convicted of any of the offences established in accordance with the Convention;
- children (persons under the age of 18) who sexually offend.

106. It should be remembered that Article 7 also provides for access to intervention programmes and measures for people referred to in paragraph 64 of this report.

107. In the case of persons prosecuted but not yet convicted, the negotiators considered that it should be possible to offer them the benefit of (but not impose) intervention programmes or measures at any time during the investigation or trial. Taking into account the principle of the presumption of innocence, the negotiators took the view that no link should be established between acceptance of an intervention measure and the decisions taken in the course of the proceedings, and that it was up to the persons concerned to decide freely whether or not they wished to benefit from such a measure. Article 16, paragraph 1, refers to the safeguards guaranteed by the rights of the defence, the requirements of a fair trial and the need to observe the rules relating to the principle of the presumption of innocence. In implementing these provisions, Parties are asked to ensure that the prospect of a reduced sentence does not constitute undue pressure to undergo intervention programmes and measures.

108. "Convicted" persons are persons who have received a final judgment of guilt from a judge or court.

109. Article 16, paragraph 3, contains a provision specifically concerning intervention programmes or measures that could be offered to children who have committed sexual offences, to respond to needs linked to their development and treat their sexual behavioural problems. The intervention programmes and measures must be adapted for minors.

Article 17 – Information and consent

110. Article 17 lays particular emphasis on the need to obtain the full consent of persons to whom intervention programmes or measures are offered, for it appears that the success of these depend, in most if not all cases, on the adherence of the person concerned to the measures or programmes implemented. Paragraph 1

emphasises that full consent implies free and informed consent, which presupposes that the person concerned has been informed of the reasons for his or her being offered an intervention programme or measure.

111. The consent requirement means that the persons concerned must be free to refuse the programme or measure proposed, as stated in paragraph 2. In the case of convicted persons, however, the States' domestic law may stipulate that certain measures to suspend or alleviate sentences (e.g. suspended sentence or conditional release) are conditional upon participation in an intervention programme. Conditional release is defined in the Appendix to the Committee of Ministers' Recommendation Rec(2003)22 on conditional release (parole) as "the early release of sentenced prisoners under individualised post-release conditions". In the circumstances, the persons concerned must be fully informed of the consequences of their refusing, such as the inapplicability, by law, of the measure alleviating the sentence.

CHAPTER VI – SUBSTANTIVE CRIMINAL LAW

112. Articles 18 to 23 are concerned with making certain acts criminal offences. This kind of harmonisation facilitates action against crime at national and international level, for several reasons. Firstly, harmonisation of States' domestic law is a way of avoiding a criminal preference for committing acts in a Party which previously had more lenient rules. Secondly, it becomes possible to promote the exchange of useful common data and experience. Shared definitions can also assist research and promote comparability of data at national and regional level, thus making it easier to gain an overall picture of crime. Lastly, international cooperation (in particular extradition and mutual legal assistance) is facilitated (see paragraph 10 above).

113. The offences referred to in these articles represent a minimum consensus which does not preclude supplementing them or establishing higher standards in domestic law.

114. This chapter contains further provisions dealing with aiding or abetting and attempt (Article 24), jurisdiction (Article 25), corporate liability (Article 26), sanctions and measures (Article 27), aggravating circumstances (Article 28) and previous convictions (Article 29).

115. In view of the wide range of domestic legislation and case-law on this point, the negotiators did not consider it appropriate to introduce into the Convention provisions concerning awareness or ignorance, by the alleged perpetrator of the offence, of the victim's age. This question is a matter for the legislation and case-law of each Party, therefore.

116. Moreover, the negotiators acknowledged that in certain circumstances where minors commit offences (such as, for example, where they produce child pornography among themselves and for their own private use but subsequently distribute those images or make them available on the Internet), there may be more appropriate methods of dealing with them and that criminal prosecution should be a last resort.

Article 18 – Sexual abuse

117. Article 18 sets out the offence of sexual abuse of a child. This offence has to be committed intentionally for there to be criminal liability. The interpretation of the word "intentionally" is left to domestic law, but the requirement for intentional conduct relates to all the elements of the offence.

118. Article 18 distinguishes two types of sexual abuse of minors.

119. Firstly, paragraph 1 a criminalises the fact of a person engaging in sexual activities with a child who has not reached the age as defined in domestic law below which it is prohibited to engage in sexual activities with him or her.

120. Secondly, paragraph 1 b criminalises the fact of a person engaging in sexual activities with a child, regardless of the age of the child, where use is made of coercion, force or threats, or when this person abuses a recognised position of trust, authority or influence over the child, or where abuse is made of a particularly vulnerable situation of the child.

121. When assessing the constituent elements of offences, the Parties should have regard to the case-law of the European Court of Human Rights; in this respect, the negotiators wished to recall, subject to the interpretation that may be made thereof, the *M.C. v. Bulgaria* judgment of 4 December 2003, in which the European Court of Human Rights stated that it was "persuaded that any rigid approach to the prosecution of sexual offences, such as requiring proof of physical resistance in all circumstances, risks leaving certain types of rape unpunished and thus jeopardising the effective protection of the individual's sexual autonomy. In accordance with contemporary standards and trends in that area, the member States' positive obligations under Articles 3 and 8 of the Convention must be seen as requiring the penalisation and effective prosecution of

any non-consensual sexual act, including in the absence of physical resistance by the victim" (§ 166). The Court also noted as follows: "Regardless of the specific wording chosen by the legislature, in a number of countries the prosecution of non-consensual sexual acts in all circumstances is sought in practice by means of interpretation of the relevant statutory terms ("coercion", "violence", "duress", "threat", "ruse", "surprise" or others) and through a context-sensitive assessment of the evidence" (§ 161).

122. Under the first indent, where use is made of coercion, force or threats, lack of consent to the sexual activities can be inferred in cases where the child is over the age referred to in Article 18, paragraph 2.

123. The second indent relates to abuse of a recognised position of trust, authority or influence over the child. This can refer, for example, to situations where a relationship of trust has been established with the child, where the relationship occurs within the context of a professional activity (care providers in institutions, teachers, doctors, etc) or to other relationships, such as where there is unequal physical, economic, religious or social power.

124. The second indent provides that children in certain relationships must be protected, even when they have already reached the legal age for sexual activities and the person involved does not use coercion, force or threat. These are situations where the persons involved abuse a relationship of trust with the child resulting from a natural, social or religious authority which enables them to control, punish or reward the child emotionally, economically, or even physically. Such relationships of trust normally exist between the child and his or her parents, family members, foster or adoptive parents, but they could also exist in relation to persons who:

- have parental or caretaking functions; or
- educate the child; or
- provide emotional, pastoral, therapeutic or medical care; or
- employ or have financial control over the child; or
- otherwise exercise control over the child.

Volunteers who look after children in their leisure-time or during voluntary activities, for example at holiday-camps or in youth organisations, can also be viewed as holding positions of trust. This list is not exhaustive, but aims at giving a description of the wide range of the recognised positions of trust, authority or influence.

125. The reference to "including within the family" clearly intends to highlight sexual abuse committed in the family. Research has demonstrated this to be one of the most frequent and most psychologically damaging form of child sexual violence with long-lasting consequences for the victim. Further, the term "family" refers to the extended family.

126. The third indent relates to abuse of a particularly vulnerable situation of the child, notably because of a mental or physical disability or a situation of dependence. Disability includes children with physical and sensory impairments, intellectual disabilities and autism, and mentally ill children. A "situation of dependence" refers not only to children with drug or alcohol addiction problems, but also to situations in which a child has become intoxicated by alcohol or drugs, whether through his or her own actions or by the perpetrator, and whose subsequent vulnerability is then abused. The term dependence also covers other situations in which the child has no other real and acceptable option than to submit to the abuse. The reasons for such situations may be physical, emotional, family-related, social or economic, such as, for example, an insecure or illegal administrative situation, a situation of economic dependence or a fragile state of health. In such a case the child may consent to the sexual relations, but his or her situation of vulnerability renders the capacity to consent invalid. Notions of particular vulnerability of a child and situations of dependence could also cover acts committed against children in the framework of activities within sects which are characterised by a physical and mental isolation of the child who is cut off from the outside world and very often subjected to various forms of brainwashing. The situation of unaccompanied migrant minors could also fall within the situation of particular dependence or vulnerability.

127. The term "sexual activities" is not defined by the Convention. The negotiators preferred to leave to Parties the definition of the meaning and scope of this term.

128. Paragraph 2 reinforces for the purpose of legal certainty the requirement for all Parties to the Convention to define the age below which it is prohibited to engage in sexual activities with a child. The negotiators considered the possibility of harmonising criminal law in this area by establishing a legal age for sexual

relations in the Convention, but as this age varies greatly in member States of the Council of Europe (from age 13 to 17) and even within each member State, depending on the relation which may exist between the perpetrator and the child victim. For these reasons it was decided to leave the definition to each Party.

129. It is not the intention of this Convention to criminalise sexual activities of young adolescents who are discovering their sexuality and engaging in sexual experiences with each other in the framework of sexual development. Nor is it intended to cover sexual activities between persons of similar ages and maturity. For this reason, paragraph 3 states that the Convention does not aim to govern consensual sexual activities between minors, even if they are below the legal age for sexual activities as provided in internal law. It is left to Parties to define what a "minor" is.

Article 19 – Offences concerning child prostitution

130. This article makes certain conducts related to child prostitution criminal offences, including the recruitment or coercion of a child to participate in prostitution and the "recourse" to child prostitution, in other words the use of the "sexual services" of a child prostitute.

131. The demand for child prostitutes has increased markedly, and is often linked to organised crime and involves trafficking. To a greater extent than adult prostitution, the sex trade involving children depends on people who encourage, organise and profit from it. The article therefore establishes links between demand and supply of child prostitutes by requiring criminal sanctions for both the recruiters and the users of child prostitutes. Among those children who are recruited to prostitution, many are in difficult circumstances, for instance runaways, abandoned children and children without material or moral support. The recruiters make use of inducements and pressures to push children into prostitution, taking advantage of their psychological and emotional distress. Owing to the serious harm sustained by child prostitutes, the negotiators felt it was justified to impose penalties on the customers of child prostitutes.

132. A definition of "child prostitution" is provided in paragraph 2. The use of a child in prostitution can be occasional and any kind of remuneration or benefit, not only monetary payment (for example drugs, shelter, clothes, food, etc), whether given or promised, suffices in order to meet the legal requirements of the offence. In addition the remuneration or consideration, or promise of such, is not necessarily to the child but could be to a third party, such as those who take financial profit from child prostitution.

Article 20 – Offences concerning child pornography

133. Article 20 on child pornography is inspired by the Council of Europe's Convention on Cybercrime (Article 9 - offences related to child pornography) which aims at strengthening protective measures for children by modernising criminal law provisions to prevent computer systems from being used to further the sexual abuse and exploitation of children.

134. In the present Convention, the offence is not restricted to child pornography committed by the use of a computer system. Nevertheless, with the ever-increasing use of the Internet this is the primary instrument for trading such material. It is widely believed that such material and on-line practices play a role in supporting, encouraging or facilitating sexual offences against children.

135. Paragraph 1 a. criminalises the production of child pornography and is necessary to combat acts of sexual abuse and exploitation at their source.

136. Paragraph 1 b. criminalises the "offering or making available" of child pornography. It implies that the person offering the material can actually provide it. 'Making available' is intended to cover, for instance, the placing of child pornography on line for the use of others by means of creating child pornography sites. This paragraph also intends to cover the creation or compilation of hyperlinks to child pornography sites in order to facilitate access to child pornography.

137. Paragraph 1 c criminalises the distribution or transmission of child pornography. "Distribution" is the active dissemination of the material. Sending child pornography through a computer system to another person, as well as the selling or giving of child pornographic materials such as photographs or magazines, is covered by the term 'transmitting'.

138. The term "procuring for oneself or for another" in paragraph 1 d means actively obtaining child pornography for personal use or for another person, e.g. by downloading computer data or by buying child pornographic materials, such as films or images.

139. The possession of child pornography, by whatever means, such as magazines, video cassettes, DVDs or portable phones, including stored in a computer system or on a data carrier, as well as a detachable storage device, a diskette or CD-Rom, is criminalised in paragraph 1 e. An effective way to curtail the production of child pornography is to attach criminal consequences to the conduct of each participant in the chain from production to possession.

140. Paragraph 1 f is a new element introduced in this Convention. It is intended to catch those who view child images on line by accessing child pornography sites but without downloading and who cannot therefore be caught under the offence of procuring or possession in some jurisdictions. To be liable the person must both intend to enter a site where child pornography is available and know that such images can be found there. Sanctions must not be applied to persons accessing sites containing child pornography inadvertently. The intentional nature of the offence may notably be deduced from the fact that it is recurrent or that the offences were committed via a service in return for payment.

141. The term 'without right' allows a Party to provide a defence in respect of conduct related to "pornographic material" having an artistic, medical, scientific or similar merit. It also allows activities carried out under domestic legal powers such as the legitimate possession of child pornography by the authorities in order to institute criminal proceedings. Furthermore, it does not exclude legal defences or similar relevant principles that relieve a person of responsibility under specific circumstances.

142. Paragraph 2 is based on the *Optional Protocol to the United Nations Convention on the Rights of the Child*. It defines the term "child pornography" as any visual depiction of a child engaged in real or simulated sexually explicit conduct, or any representation of a child's sexual organs "for primarily sexual purposes". Such images are governed by national standards pertaining to bodily harm, or the classification of materials as obscene or inconsistent with public morals. Therefore, material having an artistic, medical, scientific or similar merit, i.e. where there is absence of sexual purposes, does not fall within the ambit of this provision. The visual depiction includes data stored on computer diskette or on other electronic means or other storage device which are capable of conversion into a visual image.

143. "Sexually explicit conduct" must be defined by Parties. It covers at least the following real or simulated acts: a) sexual intercourse, including genital-genital, oral-genital, anal-genital or oral-anal, between children, or between an adult and a child, of the same or opposite sex; b) bestiality; c) masturbation; d) sadistic or masochistic abuse in a sexual context; or e) lascivious exhibition of the genitals or the pubic area of a child. It is not relevant whether the conduct depicted is real or simulated.

144. Paragraph 3 allows Parties to make reservations in respect of paragraph 1 a and e, i.e. the right not to criminalise the production or possession of images which either consist entirely of simulated representations or realistic images of a child who does not exist in reality, or which involve children who have reached the legal age for sexual activities as prescribed in internal law, where the images are produced and possessed by them with their consent and solely for their own private use. The two reservation possibilities in paragraph 3 exist only in relation to production and possession of such pornographic material. However, when making such a reservation, States Parties should be aware of the rapid developments in technology, which allow producing of extremely lifelike images of child pornography where in reality no child was involved and should avoid covering such productions by their reservation.

145. With regard to paragraph 4, the negotiators included a reservation possibility in whole or in part in relation to paragraph 1 f. The possibility for a reservation in respect of this provision was agreed in particular due to the fact that it introduces a new offence, which would require States to adapt their legislation and practice.

Article 21 – Offences concerning the participation of a child in pornographic performances

146. The United Nations Convention on the Rights of the Child, in its Article 34, requires Parties to take all appropriate measures to prevent "the exploitative use of children in pornographic performances". Similarly, the Council of the European Union Framework Decision on combating sexual exploitation of children and child pornography (2004/68/JHA) provides, in Article 2 (b), for the offence of recruiting a child into participating in pornographic performances. No definition is provided in these instruments on what constitutes pornographic performances involving children.

147. Similarly, the negotiators decided to leave any definition of pornographic performances to the Parties, for example taking into account the public or private, or commercial or non-commercial nature of the

performance. However, the provision is intended to deal essentially with organised live performances of children engaged in sexually explicit conduct.

148. Article 21 incriminates certain conducts relating to the participation of children in pornographic performances. Paragraph 1 a and b are elements relating to the organisation of pornographic performances involving children while c relates to the spectator. As with child prostitution and child pornography, the provision establishes links between the supply and the demand by attaching criminal liability to the organiser of such pornographic performances as well as the customer. Depending on States, this provision may also cover the situation of persons who are spectators of pornographic performances involving the participation of children through such means of communication as webcams.

149. All the acts must be committed intentionally for criminal responsibility to attach. The term "knowingly" was introduced to emphasise the intentional nature of the offence which means that a person must not only intend to attend a pornographic performance but must also know that the pornographic performance will involve children.

150. Paragraph 2 permits Parties to reserve the right to limit the application of paragraph 1 c to cases where the children involved in the pornographic performances have been recruited or coerced into such performances.

Article 22 – Corruption of children

151. Article 22 provides for a new offence which is intended to address the conduct of making a child watch sexual acts, or performing such acts in the presence of children, which could result in harm to the psychological health of the victim, with the risk of serious damage to their personality, including a distorted vision of sex and of personal relationships.

152. This article criminalises the intentional causing of a child below the legal age for sexual activities to witness sexual abuse of other children or adults or sexual activities. It is not necessary for the child to participate in any way in the sexual activities.

153. The offence must be committed intentionally, and "for sexual purposes".

154. The Convention leaves the interpretation of the term "causing" to Parties, but this could include any way in which the child is made to witness the acts, such as by force, coercion, inducement, promise, etc.

Article 23 – Solicitation of children for sexual purposes

155. Article 23 introduces a new offence in the Convention which is not present in other existing international instruments in the field. The solicitation of children for sexual purposes is more commonly known as "grooming". The negotiators felt it was essential for the Convention to reflect the recent but increasingly worrying phenomenon of children being sexually harmed in meetings with adults whom they had initially encountered in cyberspace, specifically in Internet chat rooms or game sites.

156. The term "grooming" refers to the preparation of a child for sexual abuse, motivated by the desire to use the child for sexual gratification. It may involve the befriending of a child, often through the adult pretending to be another young person, drawing the child into discussing intimate matters, and gradually exposing the child to sexually explicit materials in order to reduce resistance or inhibitions about sex. The child may also be drawn into producing child pornography by sending compromising personal photos using a digital camera, web-cam or phone-cam, which provides the groomer with a means of controlling the child through threats. Where a physical meeting is arranged the child may be sexually abused or otherwise harmed.

157. The negotiators felt that simply sexual chatting with a child, albeit as part of the preparation of the child for sexual abuse, was insufficient in itself to incur criminal responsibility. A further element was needed. Article 23, therefore, requires Parties to criminalise the intentional "proposal of an adult to meet a child who has not reached the age set in application of Article 18 paragraph 2" for the purpose of committing any of the offences established in accordance with Article 18 paragraph 1 a or Article 20 paragraph 1 a against him or her. Thus the relationship-forming contacts must be followed by a proposal to meet the child.

158. All the elements of the offence must be committed intentionally. In addition, the "purpose" of the proposal to meet the child for committing any of the specified offences needs to be established before criminal responsibility is incurred.

159. The offence can only be committed "through the use of information and communication technologies". Other forms of grooming through real contacts or non-electronic communications are outside the scope of

the provision. In view of the particular danger inherent in the use of such technologies due to the difficulty of monitoring them the negotiators wished to focus the provision exclusively on the most dangerous method of grooming children which is through the Internet and by using mobile phones to which even very young children increasingly now have access.

160. In addition to the elements specified above the offence is only complete if the proposal to meet "has been followed by material acts leading to such a meeting". This requires concrete actions, such as, for example, the fact of the perpetrator arriving at the meeting place.

Article 24 – Aiding or abetting and attempt

161. The purpose of this article is to establish additional offences relating to aiding or abetting of the offences defined in the Convention and the attempted commission of some.

162. Paragraph 1 requires Parties to establish as criminal offences aiding or abetting the commission of any of the offences established in accordance with the Convention. Liability arises for aiding or abetting where the person who commits a crime is aided by another person who also intends the crime to be committed.

163. With regard to paragraph 2, on attempt, the negotiators felt that treating certain offences, or elements of offences, as attempt gave rise to conceptual difficulties. Moreover, some legal systems limit the offences for which the attempt is punished. For these reasons paragraph 3 permits parties to reserve the right not to criminalise attempt to commit the following offences: offering or making available of child pornography, procuring child pornography for oneself or for another person, possessing child pornography and knowingly obtaining access, through information and communication technologies, to child pornography (Article 20 paragraph 1 b, d, e and f; knowingly attending pornographic performances involving the participation of children (Article 21 paragraph 1 c; corruption of children (Article 22) and solicitation of children for sexual purposes (Article 23). This means that any Party making a reservation as to that provision will have no obligation to criminalise attempt at all, or may select the offences or parts of offences to which it will attach criminal sanctions in relation to attempt. The reservation aims at enabling the widest possible ratification of the Convention while permitting Parties to preserve some of their fundamental legal concepts.

164. As with all the offences established under the Convention, aiding or abetting and attempt must be intentional.

Article 25 – Jurisdiction

165. This article lays down various requirements whereby Parties must establish jurisdiction over the offences with which the Convention is concerned.

166. Paragraph 1 a is based on the territoriality principle. Each Party is required to punish the offences established under the Convention when they are committed on its territory.

167. Paragraph 1 b and c is based on a variant of the territoriality principle. These sub-paragraphs require each Party to establish jurisdiction over offences committed on ships flying its flag or aircraft registered under its laws. This obligation is already in force in the law of many countries, ships and aircraft being frequently under the jurisdiction of the State in which they are registered. This type of jurisdiction is extremely useful when the ship or aircraft is not located in the country's territory at the time of commission of the crime, as a result of which paragraph 1 a would not be available as a basis for asserting jurisdiction. In the case of a crime committed on a ship or aircraft outside the territory of the flag or registry Party, it might be that without this rule there would not be any country able to exercise jurisdiction. In addition, if a crime is committed on board a ship or aircraft which is merely passing through the waters or airspace of another State, there may be significant practical impediments to the latter State's exercising its jurisdiction and it is therefore useful for the registry State to also have jurisdiction.

168. Paragraph 1 d is based on the nationality principle. The nationality theory is most frequently applied by countries with a civil-law tradition. Under it, nationals of a country are obliged to comply with its law even when they are outside its territory. Under sub-paragraph d, if one of its nationals commits an offence abroad, a Party is obliged to be able to prosecute him/her. The negotiators considered that this was a particularly important provision in the context of the fight against sex tourism. Indeed, certain States in which children are abused or exploited either do not have the will or the necessary resources to successfully carry out investigations or lack the appropriate legal framework. Paragraph 4 enables these cases to be tried even where they are not criminalised in the State in which the offence was committed.

169. Paragraph 1 e applies to persons having their habitual residence in the territory of the Party. It provides that Parties shall establish jurisdiction to investigate acts committed abroad by persons having their habitual residence in their territory, and thus contribute to the punishment of sex tourism. However, the criteria of attachment to the State of the person concerned being less strong than the criteria of nationality, paragraph 3 allows Parties not to implement this jurisdiction or only to do it in specific cases or conditions.

170. Paragraph 2 is linked to the nationality of the victim and identifies particular interests of national victims to the general interests of the State. Hence, according to paragraph 2, if a national or a person having habitual residence is a victim of an offence abroad, the Party shall endeavour to establish jurisdiction in order to start proceedings. However, there is no obligation imposed on Parties, as demonstrated by the use of the expression "endeavour".

171. Paragraph 4 represents an important element of added value in this Convention, and a major step forward in the protection of children from certain acts of sexual exploitation and abuse. The provision eliminates, in relation to the most serious offences in the Convention, the usual rule of dual criminality where acts must be criminal offences in the place where they are performed. Its aim is to combat the phenomenon of sex tourism, whereby persons are able to go abroad to commit acts which are classified as criminal offences in their country of nationality. Paragraph 4 enables these cases to be tried even where they are not criminalised in the State in which the offence was committed. This paragraph applies exclusively to the offences defined in Articles 18 (sexual abuse), Article 19 (offences concerning child prostitution), Article 20 paragraph 1 a (production of child pornography) and Article 21 paragraph 1 a and b (offences concerning the participation of a child in pornographic performances) and committed by nationals of the State Party concerned.

172. In paragraph 5, the negotiators wished to introduce the possibility for Parties to reserve the right to limit the application of paragraph 4 with regard to offences established in accordance with Article 18 paragraph 1 b second and third indents. Therefore the reservation may be applied only in relation to situations where abuse is made of a recognised position of trust, authority or influence over the child including within his or her family, or when abuse is made of a particularly vulnerable situation of the child. It was considered that these types of offences are not typically committed by "sex tourists". Thus, Parties should have the possibility to limit the application of paragraph 4 to cases where a person actually has his or her habitual residence in the State of nationality and has travelled to the country where the offence has been committed. Such reservations should not cover cases of persons working abroad for limited periods of time, such as those involved in humanitarian or military postings or other similar missions.

173. Paragraph 6 prohibits the subordination of the initiation of proceedings in the State of nationality or of habitual residence to the conditions usually required of a complaint of the victim or a denunciation from the authorities of the State in which the offence took place. Indeed, certain States in which children are sexually abused or exploited do not always have the necessary will or resources to carry out investigations. In these conditions, the requirement of an official denunciation or of a complaint of the victim often constitutes an impediment to the prosecution. This paragraph applies exclusively to the offences defined in Articles 18 (sexual abuse), Article 19 (offences concerning child prostitution), Article 20 paragraph 1 a (production of child pornography) and Article 21 (offences concerning the participation of a child in pornographic performances).

174. Paragraph 7 concerns the principle of *aut dedere aut judicare* (extradite or prosecute). Jurisdiction established on the basis of paragraph 6 is necessary to ensure that Parties that refuse to extradite a national have the legal ability to undertake investigations and proceedings domestically instead, if asked to do so by the Party that requested extradition under the terms of the relevant international instruments.

175. In certain cases of sexual exploitation or abuse of children, it may happen that more than one Party has jurisdiction over some or all of the participants in an offence. For example, a child may be recruited into prostitution in one country, then transported and exploited in another. In order to avoid duplication of procedures and unnecessary inconvenience for witnesses or to otherwise facilitate the efficiency or fairness of proceedings, the affected Parties are required to consult in order to determine the proper venue for prosecution. In some cases it will be most effective for them to choose a single venue for prosecution; in others it may be best for one country to prosecute some alleged perpetrators, while one or more other countries prosecute others. Either method is permitted under this paragraph. Finally, the obligation to consult is not absolute; consultation is to take place "where appropriate". Thus, for example, if one of the Parties knows that consultation is not necessary (e.g. it has received confirmation that the other Party is not planning to take action), or if a Party is of the view that consultation may impair its investigation or proceeding, it may delay or decline consultation.

176. The bases of jurisdiction set out in paragraph 1 are not exclusive. Paragraph 9 of this article permits Parties to establish other types of criminal jurisdiction according to their domestic law. Thus, in matters of the sexual exploitation and abuse of children, some States exercise criminal jurisdiction whatever the place of the offence or nationality of the perpetrator.

Article 26 – Corporate liability

177. Article 26 is consistent with the current legal trend towards recognising corporate liability. The intention is to make commercial companies, associations and similar legal entities ("legal persons") liable for criminal actions performed on their behalf by anyone in a leading position in them. Article 26 also contemplates liability where someone in a leading position fails to supervise or check on an employee or agent of the entity, thus enabling them to commit any of the offences established in the Convention.

178. Under paragraph 1, four conditions need to be met for liability to attach. First, one of the offences described in the Convention must have been committed. Second, the offence must have been committed for the entity's benefit. Third, a person in a leading position must have committed the offence (including aiding and abetting). The term "person who has a leading position" refers to someone who is organisationally senior, such as a director. Fourth, the person in a leading position must have acted on the basis of one of his or her powers (whether to represent the entity or take decisions or perform supervision), demonstrating that that person acted under his or her authority to incur liability of the entity. In short, paragraph 1 requires Parties to be able to impose liability on legal entities solely for offences committed by such persons in leading positions.

179. In addition, paragraph 2 requires Parties to be able to impose liability on a legal entity ("legal person") where the crime is committed not by the leading person described in paragraph 1 but by another person acting on the entity's authority, i.e. one of its employees or agents acting within their powers. The conditions that must be fulfilled before liability can attach are: 1) the offence was committed by an employee or agent of the legal entity; 2) the offence was committed for the entity's benefit; and 3) commission of the offence was made possible by the leading person's failure to supervise the employee or agent. In this context failure to supervise should be interpreted to include not taking appropriate and reasonable steps to prevent employees or agents from engaging in criminal activities on the entity's behalf. Such appropriate and reasonable steps could be determined by various factors, such as the type of business, its size, and the rules and good practices in force.

180. Liability under this article may be criminal, civil or administrative. It is open to each Party to provide, according to its legal principles, for any or all of these forms of liability as long as the requirements of Article 27 paragraph 2 are met, namely that the sanction or measure be "effective, proportionate and dissuasive" and include monetary sanctions.

181. Paragraph 4 makes it clear that corporate liability does not exclude individual liability. In a particular case there may be liability at several levels simultaneously – for example, liability of one of the legal entity's organs, liability of the legal entity as a whole and individual liability in connection with one or other.

Article 27 – Sanctions and measures

182. This article is closely linked to Articles 18 to 23, which define the various offences that should be made punishable under criminal law. In accordance with the obligations imposed by those articles, Article 27 requires Parties to match their action to the seriousness of the offences and lay down criminal penalties which are "effective, proportionate and dissuasive". In the case of an individual committing the offence, Parties must provide for prison sentences that can give rise to extradition. It should be noted that, under Article 2 of the European Convention on Extradition (ETS No. 24), extradition is to be granted in respect of offences punishable under the laws of the requesting and requested Parties by deprivation of liberty or under a detention order for a maximum period of at least one year or by a more severe penalty.

183. Legal entities whose liability is to be established under Article 26 are also to be liable to sanctions that are "effective, proportionate and dissuasive", which may be criminal, administrative or civil in character. Paragraph 2 requires Parties to provide for the possibility of imposing monetary sanctions on legal persons.

184. In addition, paragraph 2 provides for other measures which may be taken in respect of legal persons, with particular examples given: exclusion from entitlement to public benefits or aid; temporary or permanent disqualification from the practice of commercial activities; placing under judicial supervision; or a judicial winding-up order. The list of measures is not mandatory or exhaustive and Parties are free to envisage other measures.

185. Paragraph 3 requires Parties to ensure that measures concerning seizure and confiscation of certain documents, goods and the proceeds derived from offences can be taken. This paragraph has to be read in

the light of the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS No. 141), which is based on the idea that confiscating the proceeds of crime is an effective anti-crime weapon. As certain of the offences related to the sexual exploitation of children, in particular child prostitution, are often undertaken for financial profit, measures depriving offenders of assets linked to or resulting from the offence are clearly needed in this field as well.

186. The Convention does not contain definitions of the terms "confiscation", "instrumentalities", "proceeds" and "property". However, Article 1 of the Laundering Convention provides definitions for these terms which may be used for the purposes of this Convention. By "confiscation" is meant a penalty or measure, ordered by a court following proceedings in relation to a criminal offence or criminal offences, resulting in final deprivation of property. "Instrumentalities" covers the whole range of things which may be used, or intended for use, in any manner, wholly or in part, to commit the criminal offences. "Proceeds" means any economic advantage or financial saving from a criminal offence. It may consist of any "property" (see the interpretation of that term below). The wording of the paragraph takes into account that there may be differences of national law as regards the type of property which can be confiscated after an offence. It can be possible to confiscate items which are (direct) proceeds of the offence or other property of the offender which, though not directly acquired through the offence, is equivalent in value to its direct proceeds ("substitute assets"). "Property" must therefore be interpreted, in this context, as any property, corporeal or incorporeal, movable or immovable, and legal documents or instruments evidencing title to or interest in such property. It should be noted that Parties are not bound to provide for criminal-law confiscation of substitute assets since the words "or otherwise deprive" allow "civil" confiscation.

187. Paragraph 3 b of Article 27 provides for closure of any establishment used to carry out any of the offences established in the Convention. This measure is identical to Article 23 paragraph 4 of the Council of Europe Convention on Action against Trafficking in Human Beings. Alternatively, the provision also allows the perpetrator to be banned, temporarily or permanently, from carrying on the activity involving contact with children, whether professional or voluntary, in the course of which the offence was committed.

188. The Convention provides for such measures so that action can be taken against establishments which might be used as a cover for sexually exploiting or abusing children, such as matrimonial agencies, placement agencies, travel agencies, hotels or escort services. The measures are also intended to reduce the risk of further victims by closing premises on which victims are known to have been recruited or exploited (such as cabarets, bars, hotels or restaurants) and banning people from carrying on activities which they used to engage in acts of child sexual exploitation or abuse.

189. This provision does not require Parties to provide for closure of establishments or a ban on activity involving contacts with children as a criminal penalty. Parties may, for example, use administrative closure measures or a ban on activity involving contacts with children. "Establishment" means any place in which any aspect of sexual exploitation or abuse of children occurs. The provision applies to whoever has title to the establishment, be they a legal person or a natural person.

190. To avoid penalising persons not involved in sexual exploitation or abuse of children (for example, the owner of an establishment where sexual exploitation or abuse has been carried on without his or her knowledge), the provision specifies that closures of establishments are "without prejudice to the rights of *bona fide* third parties".

191. The Convention provides also for the possibility for Parties to adopt other measures in relation to perpetrators, such as the withdrawal of parental rights. This measure could be taken, for instance, in relation to a person who was removed from the family environment as an assistance measure to the victim in accordance with Article 14 paragraph 3.

192. Other measures designed to make it possible to monitor and supervise convicted perpetrators of offences might be considered in order, for example, to facilitate assessment of the risk of re-offending or to ensure that intervention programmes and measures are effective. Such measures might include placing under supervision convicted persons, persons subject to suspended sentences or conditional release, as well as persons who have served their sentences.

193. Paragraph 5 suggests that Parties could allocate the proceeds of crime or property confiscated to a special fund to finance prevention and assistance programmes for victims of any of the offences established in the Convention. This provision could be linked with that of Article 9 paragraph 4 which encourages the financing of projects and programmes carried out by civil society aiming at preventing and protecting children from sexual exploitation and abuse.

Article 28 – Aggravating circumstances

194. Article 28 requires Parties to ensure that certain circumstances (mentioned in sub-paragraphs a to g) may be taken into consideration as aggravating circumstances in the determination of the penalty for offences established in this Convention. These circumstances must not already form part of the constituent elements of the offence. This principle applies to cases where the aggravating circumstances already form part of the constituent elements of the offence in the national law of the State Party. For example, the aggravating circumstance in c cannot be raised in relation to the offence of sexual abuse of a child where abuse is made of a particularly vulnerable situation of the child, in accordance with Article 18 paragraph 1 b, because the abuse of a particularly vulnerable situation of the child is a constitutive element of the offence itself.

195. By the use of the phrase "may be taken into consideration", the negotiators highlight that the Convention places an obligation on Parties to ensure that these aggravating circumstances are available for judges to consider when sentencing offenders, although there is no obligation on judges to apply them. The reference to "in conformity with the relevant provisions of internal law" is intended to reflect the fact that the various legal systems in Europe have different approaches to aggravating circumstances and permits Parties to retain some of their fundamental legal concepts.

196. The first of the aggravating circumstances is where the offence seriously damaged the physical or mental health of the victim. Some of the offences in this Convention may not involve any "physical" harm to a child, such as the corruption of a child for sexual purposes or the solicitation of a child for sexual purposes, but the psychological impact may have profound and long-lasting consequences. In addition, for example, infection with HIV as a result of the offence should be considered as seriously damaging the physical or mental health of the victim.

197. The second aggravating circumstance is where the offence was preceded or accompanied by acts of torture or serious violence. Article 3 ECHR enshrines the freedom of all persons from torture or inhuman or degrading treatment or punishment. In the case of *Ireland v. the United Kingdom* (1978) the European Court of Human Rights defined torture as "deliberate inhuman treatment causing very serious and cruel suffering". Inhuman treatment or punishment is described as "the infliction of intense physical and mental suffering". The reference to torture in this paragraph therefore involves both physical as well as mental anguish suffered by the victim before or during the commission of the offence. In a very young child, for example, certain acts involving kidnapping and sequestration could cause severe physical and mental suffering.

198. The third aggravating circumstance is where the offence was committed against a particularly vulnerable victim. Examples of vulnerability include where the child is physically or mentally disabled or socially handicapped; children without parental care, such as street children or unaccompanied immigrant minors; children of a very young age; children in a state of intoxication due to the influence of drugs or alcohol.

199. The fourth aggravating circumstance concerns where the offence was committed by a member of the family, a person cohabiting with the child or a person having abused his or her authority. This would cover various situations where the offence has been committed by a parent or other member of the child's family, including the extended family, or any person *in loco parentis*, such as a child-minder or other care provider. A person cohabiting with the child refers to partners of the child's parent or other persons living within the same household as the child. A person having authority refers to anyone who is in a position of superiority over the child, including, for instance, a teacher, employer, an older sibling or other older child.

200. The fifth aggravating circumstance is where the offence was committed by several people acting together. This indicates a collective act committed by more than one person.

201. The sixth aggravating circumstance is where the offence involved a criminal organisation. The Convention does not define "criminal organisation". In applying this provision, however, Parties may take their line from other international instruments which define the concept. For example, Article 2(a) of the United Nations Convention against Transnational Organized Crime defines "organised criminal group" as "a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit". Recommendation Rec(2001)11 of the Committee of Ministers to member States concerning guiding principles on the fight against organised crime and the Joint Action of 21 December 1998 adopted by the Council of the European Union on the basis of Article K.3 of the Treaty on European Union, on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union give very similar definitions of "organised criminal group" and "criminal organisation".

202. The seventh aggravating circumstance is where the perpetrator has previously been convicted of offences of the same nature. By including this, the negotiators draw attention to the particular risk of recidivism for those who commit sexual offences against children.

Article 29 – Previous convictions

203. Sexual exploitation or sexual abuse of children is sometimes carried on transnationally by criminal organisations or by individual persons who have been tried and convicted in more than one country. At domestic level, many legal systems provide for a different, often harsher, penalty where someone has previous convictions. In general, only conviction by a national court counts as a previous conviction. Traditionally, previous convictions by foreign courts were not taken into account on the grounds that criminal law is a national matter and that there can be differences of national law, and because of a degree of suspicion of decisions by foreign courts.

204. Such arguments have less force today in that internationalisation of criminal-law standards – as a pendent to internationalisation of crime – is tending to harmonise different countries' law. In addition, in the space of a few decades, countries have adopted instruments such as the ECHR whose implementation has helped build a solid foundation of common guarantees that inspire greater confidence in the justice systems of all the participating States.

205. The principle of international recidivism is established in a number of international legal instruments. Under Article 36(2)(iii) of the *New York Convention of 30 March 1961 on Narcotic Drugs*, for example, foreign convictions have to be taken into account for the purpose of establishing recidivism, subject to each Party's constitutional provisions, legal system and national law. Under Article 1 of the Council Framework Decision of 6 December 2001 amending Framework Decision 2000/383/JHA on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro, European Union member States must recognise as establishing habitual criminality final decisions handed down in another member State for counterfeiting of currency.

206. The fact remains that at international level there is no standard concept of recidivism and the law of some countries does not have the concept at all. The fact that foreign convictions are not always brought to the courts' notice for sentencing purposes is an additional practical difficulty. However Article 3 of the Draft Council Framework Decision on taking account of convictions in the member States of the European Union in the course of new criminal proceedings, which was politically agreed on 4 December 2006, firstly established in a general way – without limitation to specific offences – the obligation of taking into account a previous conviction handed down in another (member) State.

207. Therefore Article 29 provides for the possibility to take into account final sentences passed by another Party in assessing a sentence. To comply with the provision Parties may provide in their domestic law that previous convictions by foreign courts are to result in a harsher penalty. They may also provide that, under their general powers to assess the individual's circumstances in setting the sentence, courts should take those convictions into account. This possibility should also include the principle that the offender should not be treated less favourably than he would have been treated if the previous conviction had been a national conviction.

208. This provision does not place any positive obligation on courts or prosecution services to take steps to find out whether persons being prosecuted have received final sentences from another Party's courts. It should nevertheless be noted that, under Article 13 of the European Convention on Mutual Assistance in Criminal Matters (ETS 30), a Party's judicial authorities may request from another Party extracts from and information relating to judicial records, if needed in a criminal matter.

CHAPTER VII – INVESTIGATION, PROSECUTION AND PROCEDURAL LAW

209. In this Chapter, which is devoted to aspects relating to the phases of investigation and prosecution of acts involving the sexual exploitation and sexual abuse of children, the negotiators wished to stress the vital importance of ensuring that the procedures take due account of the particular vulnerability of children facing such procedures as victims or witness (see paragraph 10 above).

210. Several issues which would provide an added value were identified in relation to:

a. the adoption of specific investigation and criminal procedure measures ensuring that the needs of the child are taken into account (for example, in the field of the protection of privacy and hearings with children);

b. limitation periods for certain offences established in accordance with this Convention (confirmation of the principle according to which the limitation period should run beyond the age of majority of the child);

c. training for staff responsible for judicial procedures (specialisation in the services or individuals responsible for investigations and proceedings in the field of sexual exploitation and abuse of children);

d. the protection of children, ensuring that they are shielded from risks of reprisals and repeat victimisation.

Article 30 – Principles

211. Existing international legal instruments on the protection of children give only an indication of the need for a special judicial procedure adapted to the child victim. Recommendation Rec (2001) 16, which is certainly the most detailed such instrument, recalls in particular the need to safeguard child victims' rights without violating the rights of suspects, the need to respect child victims' private life and to provide special conditions for hearings with children. The Optional Protocol to the Convention on the Rights of the Child, which deals exclusively with the sale of children, child prostitution and child pornography, provides in Article 8 for recognition of child victims' vulnerability, adaptation of procedures to their special needs, their right to be kept informed of the progress of proceedings and to be represented when their interests are at stake, protection of their privacy and, lastly, protection from intimidation and retaliation. In Resolution 1307 (2002) the Parliamentary Assembly of the Council of Europe calls on member States to give priority attention to the rights of child victims unable to express their views.

212. Beyond these objectives, the definition and implementation of rules of procedure adapted to child victims are left to the discretion and initiative of each State. Recent analyses, including REACT, highlight the differences and discrepancies in the area.

213. The negotiators considered that a number of provisions should be made to implement a child-friendly and protective procedure for child victims in criminal proceedings. However, paragraph 4 underlines that these measures should not violate the rights of the defence and the principles of a fair trial as set out in Article 6 ECHR.

214. The central issue has to do with the child's testimony which constitutes a major challenge in the procedures of numerous States, as witnessed by a number of cases that have received intensive media coverage and the changes that criminal procedure systems have undergone in the last decades. In this context, it has become urgently important for States to adopt procedural rules guaranteeing and safeguarding children's testimony.

215. This is why paragraphs 1 and 2 establish two general principles to the effect that investigations and judicial proceedings concerning acts of sexual exploitation and sexual abuse of children must always be conducted in a manner which protects the best interests and rights of children, and must aim to avoid exacerbating the trauma which they have already suffered.

216. Paragraph 3 recognises the principle according to which investigations and proceedings should be treated as priority and without unjustified delays, as the excessive length of proceedings may be understood by the child victim as a denial of his testimony or a refusal to be heard and could exacerbate the trauma which he or she has already suffered. The negotiators wished to emphasise that this provision reflects the principle established in Article 6 ECHR, which states that "everyone is entitled to a (…) hearing within a reasonable time" and that in proceedings involving children, this principle should be applied with particular care. This is especially true where measures involving the removal of the alleged perpetrator or the victim from his or her family have been taken.

217. Paragraph 5, first indent, states that the Parties must take the necessary legislative or other measures to ensure an effective investigation and prosecution of the offences established in the Convention. This is a general obligation which applies to all the offences established in the Convention. It is for the Parties to decide on the methods of investigation to be used. However, States should allow, where appropriate and in conformity with the fundamental principles of their internal law, the use of covert operations. It is left to the Parties to decide on when and under which circumstances such investigative methods should be allowed, taking into account, *inter alia*, the principle of proportionality in relation to the rules of evidence and regarding the nature and seriousness of the offences under investigation.

218. The second indent urges parties to develop techniques for examining material containing pornographic images in order to make it easier to identify victims. It is essential that every possible means be used

to facilitate their identification, not least in the context of co-operation between States, as provided for additionally in Article 38 paragraph 1.

Article 31 – General measures of protection

219. This article contains a non-exhaustive list of child-friendly procedures designed to protect children during proceedings.

220. These general measures of protection apply at all stages of the proceedings, both during the investigations (whether they are carried out by a police service or a judicial authority) and during trial proceedings.

221. First of all, the article sets out the right of children (and their families or legal representatives) to be informed of developments in the investigations and proceedings in which they are involved as victims. In this respect, the provision provides that victims should be informed of their rights and of the services at their disposal and, unless they do not wish to receive such information, the follow-up given to their complaint, the charges, the general progress of the investigations or proceedings, and their role as well as the outcome of their cases. The negotiators stressed the importance of the obligation to inform children and their families when a person prosecuted or convicted of sexual offences against the child concerned is released, at any rate where this seems necessary (for instance, in cases where there is a risk of retaliation or intimidation or when, because the victim and the perpetrator live near each other, they might accidentally find themselves face to face with each other). This information should be provided "in a manner adapted" to the age of the child.

222. The article goes on to list a number of procedural rules designed to implement the general principles set out in Article 31: the possibility, for victims, of being heard, of supplying evidence, of having their privacy, particularly their identity and image, protected, and of being protected against any risk of retaliation and repeat victimisation. The negotiators wished to stress that the protection of the victim's identity, image and privacy extends to the risk of "public" disclosure, and that these requirements should not prevent this information being revealed in the context of the actual proceedings, in order to respect the principles that both parties must be heard and the inherent rights of the defence during a criminal prosecution.

223. Paragraph 1, sub-paragraph g, is designed to protect children who are victims of sexual exploitation or sexual abuse, in particular by preventing their being further traumatised through contact, on the premises of the investigation services and in court, with the alleged perpetrator of the offence. This provision applies to all stages of the criminal proceedings (including the investigation), with certain exceptions: the investigation services and the judicial authority must be able to waive this requirement in the best interests of the child (for example when the child wants to attend the hearing) or when contact between the child and the alleged perpetrator is necessary or useful for ensuring that the proceedings take place satisfactorily (for example, when a confrontation appears necessary).

224. Paragraph 2 also covers administrative proceedings, since procedures for compensating victims are of this type in some States. More generally, there are also situations in which protective measures, even in the context of criminal proceedings, may be delegated to the administrative authorities.

225. Paragraph 3 provides for access, free of charge, where warranted, to legal aid for victims of sexual exploitation and sexual abuse. The negotiators wanted to take account of conditions to which the granting of legal aid is subject under the Parties' domestic law, as these vary considerably from country to country. Judicial and administrative procedures are often highly complex and victims therefore need the assistance of legal counsel to be able to assert their rights satisfactorily. This provision does not afford victims an automatic right to free legal aid. The conditions under which such aid is granted must be determined by each Party to the Convention when the victim is entitled to be a party to the criminal proceedings.

226. In addition to Article 31 paragraph 3, the Parties must take account of Article 6 ECHR. Even though Article 6, paragraph 3.c. ECHR provides for the free assistance of an officially assigned defence counsel only in the case in persons charged with criminal offences, the case law of the European Court of Human Rights (*Airey v. Ireland* judgement, 9 October 1979) also, in certain circumstances, recognises the right to free assistance from an officially assigned defence counsel in civil proceedings, under Article 6, paragraph 1 ECHR, which is interpreted as enshrining the right of access to a court for the purposes of obtaining a decision concerning civil rights and obligations (*Golder v. United Kingdom* judgment, 21 February 1975). The Court took the view that effective access to a court might necessitate the free assistance of a lawyer. For instance, the Court considered that it was necessary to ascertain whether it would be effective for the person in question to appear in court without the assistance of counsel, i.e. whether he could argue his case adequately and satisfactorily. To this end, the Court took account of the complexity of the proceedings and the passions involved – which might be incompatible with the degree of objectivity needed in order to plead in court – so

as to determine whether the person in question was in a position to argue his own case effectively and held that, if not, he should be able to obtain free assistance from an officially assigned defence counsel. Thus, even in the absence of legislation affording access to an officially assigned defence counsel in civil cases, it is up to the court to assess whether, in the interests of justice, a destitute party unable to afford a lawyer's fees must be provided with legal assistance.

227. Paragraph 4 makes provision for the situation in cases of sexual abuse within the family, in which the holders of parental responsibility, while responsible for defending the child's interests, are involved in some way in the proceedings in which the child is a victim (where there is a "conflict of interest"). In such cases, this provision makes it possible for the child to be represented in judicial proceedings by a special representative appointed by the judicial authorities. This may be the case when, for example, the holders of parental responsibility are the perpetrators or joint perpetrators of the offence, or the nature of their relationship with the perpetrator is such that they cannot be expected to defend the interests of the child victim with impartiality.

228. Paragraph 5 provides for the possibility for various organisations to support victims. The reference to conditions provided for by internal law highlights the fact that it is up to the States to make provision for assistance or support, but that they are free to do so in accordance with the rules laid down in their national systems, for example by requiring certification or approval of the organisations, foundations, associations and other bodies concerned.

229. Paragraph 6 of this article refers to written or other materials that must be available in the languages most widely used in the country.

Article 32 – Initiation of proceedings

230. Article 32 is designed to enable the public authorities to prosecute offences established in accordance with the Convention without the victim having to file a complaint. The purpose of this provision is to facilitate prosecution, in particular by ensuring that victims do not withdraw their complaints because of pressure or threats by the perpetrators of offences.

Article 33 – Statute of limitation

231. This provision is considered to be an essential feature of added value in the Convention. It provides that the limitation period continues to run for a sufficient period of time to allow prosecutions to be effectively initiated after the child has reached the age of majority. Indeed, it is acknowledged that many child victims of sexual abuse are unable, for various reasons, to report the offences perpetrated against them before reaching the age of majority. The expression "a sufficient period of time to allow prosecutions to be effectively initiated after the child has reached the age of majority" means, firstly, that the child must have sufficient time to file a complaint and, secondly, that the prosecution authorities must be in a position to bring prosecutions for the offences concerned.

232. In order to meet the requirements of proportionality that apply to criminal proceedings, however, the negotiators restricted the application of this principle to the offences provided in Articles 18, 19, paragraph 1 a and b, and 21, paragraph 1 a and b, in respect of which there is justification for extending the limitation period.

Article 34 – Investigations

233. Article 34 lays down the principle that professionals responsible for criminal proceedings concerning the sexual exploitation or sexual abuse of children should be trained in this area.

234. In view of the roles of the various agencies generally responsible for investigating child sexual exploitation and sexual abuse (police, prosecution services, child protection and health services), Parties could set up interdisciplinary services to carry out investigations, with the aim of enhancing professional competence and of preventing re-victimisation of the victim by repetitive procedures. Comprehensive and multi-agency child-friendly services for victims under one roof (often known as "Children's House") could, for example, be set up.

235. In order to take account of the diversity of States, resources available and systems for organising investigation services, the negotiators wanted to make this provision very flexible, the aim being that it should be possible to mobilise specialised personnel or services for investigations into the sexual exploitation and abuse of children. Thus, Article 34 provides for specialised units, services or, quite simply, persons, for example when the size of the State concerned is such that there is no need to set up a special service.

Article 35 – Interviews with the child

236. This provision concerns interviews with the child both during investigations and during trial proceedings. During investigations, it applies regardless of the type of authority (police or judicial authority) conducting the interview. The main purpose of the provision is the same as that described more generally in connection with Article 30: to safeguard the interests of the child and ensure that he or she is not further traumatised by the interviews. To this end, as provided for in paragraph 3, it should be possible to implement the measures in question when there is doubt about the age of the victim and it cannot be established with certainty that he or she is under the age of majority.

237. In order to achieve these objectives, Article 35 lays down a set of rules designed to limit the number of successive interviews with children, which force them to relive the events they have suffered, and enable them to be interviewed by the same people, who have been trained for the purpose, in suitable premises and a setting that is reassuring, in particular because of the presence of the child's legal representative or, where appropriate, a person of his or her choice.

238. Paragraph 2, provides that interviews with a child victim or, where appropriate, those with a child witness, may be videotaped for use as evidence during the criminal proceedings. The main objective of this provision is to protect children against the risk of being further traumatised. The videotaped interview can serve multiple purposes, including medical examination and therapeutic services, thus facilitating the aim of limiting the number of interviews as far as possible. It reflects practices successfully developed over the last few years in numerous countries.

239. The negotiators agreed, however, that implementation of the provisions of this article required a degree of flexibility to take into account the age of the child, the availability of specialised personnel, requirements relating to criminal proceedings and all kinds of needs connected with the effectiveness of the investigation. This flexibility is reflected in the use of such expressions as "where necessary", "if possible", "where appropriate" and "as appropriate". At the same time, the negotiators agreed that the competent authorities should be able to refuse to allow the legal representative or person chosen by the child to be present when the circumstances of the case are such that there is reason to believe that the presence of the person in question is undesirable, for example because that person has been involved in the offence or there is a conflict between his or her interests and those of the child.

Article 36 – Criminal court proceedings

240. This article contains provisions specific to criminal court proceedings.

241. Paragraph 1, which echoes Article 34, paragraph 1, lays down the principle that those involved in judicial proceedings (in particular judges, prosecutors and lawyers) should be able to receive training in children's rights and in the area of sexual exploitation and sexual abuse of children. The obligations of the States Parties in this respect must naturally take account of requirements stemming from the independence of the judicial professions and the autonomy they enjoy in respect of the organisation of training for their members. It is for this reason that paragraph 1 does not require training to be provided, but states that it should be available to professionals wishing to receive it.

242. Paragraph 2 contains provisions adapting certain principles governing criminal proceedings in order to protect children and make it easier to interview them. These principles concern the presence of the public and arrangements for ensuring that both parties are represented. Thus, sub-paragraph a allows the judge to order the hearing to take place without the presence of the public, and sub-paragraph b enables the child to be heard without necessarily being confronted with the physical presence of the alleged perpetrator, in particular through the use of videoconferencing.

CHAPTER VIII – RECORDING AND STORING OF DATA

Article 37 – Recording and storing of national data on convicted sexual offenders

243. The negotiators' objective was to ensure that certain data on perpetrators of the offences defined in the Convention are recorded and stored for the purposes of prevention and prosecution of such offences. This obligation applies only to data relating to the identity and the genetic profile (DNA number code) of convicted persons and not to the sample itself, which have been shown to be extremely useful in criminal investigations in the identification of recidivist perpetrators of crimes. Data revealing sexual preference, medical data and data relating to previous convictions are, according to Article 6 of the Council of Europe Convention

for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS 108), considered as sensitive data requiring special protection.

244. The negotiators agreed that the Convention should leave to Parties as much flexibility as possible in deciding the modalities of the implementation of this obligation.

245. Article 37 does not impose the establishment of a "database", still less a single database. The data in question and the past history of the persons concerned may therefore very well be included in separate databases. This means it is also possible for information about sex offenders to exist in databases that do not necessarily contain only information about such offenders.

246. Paragraph 1 of this provision lays down that data on persons convicted of the offences set out in the Convention must be recorded and stored "in accordance with the relevant provisions on the protection of personal data and other appropriate rules and guarantees as prescribed by domestic law" in each State. As far as the former aspect is concerned, reference should be made to Convention ETS 108.

247. Article 5 specifically stipulates that "personal data undergoing automatic processing shall be: a) obtained and processed fairly and lawfully; b) stored for specified and legitimate purposes and not used in a way incompatible with those purposes; c) adequate, relevant and not excessive in relation to the purposes for which they are stored; d) accurate and, where necessary, kept up to date; e) preserved in a form which permits identification of the data subjects for no longer than is required for the purpose for which those data are stored". The explanatory report states that "the different provisions of this article aim at the fulfilment of two fundamental legal standards. On the one hand the information should be correct, relevant and not excessive in relation to its purpose. On the other hand its use (gathering, storage, dissemination) should likewise be correct". Furthermore, "the reference to "purposes" in sub-paragraphs b and c indicates that it should not be allowed to store data for undefined purposes. The way in which the legitimate purpose is specified may vary in accordance with national legislation". Lastly, "the requirement appearing under sub-paragraph e concerning the time-limits for the storage of data in their name-linked form does not mean that data should after some time be irrevocably separated from the name of the person to whom they relate, but only that it should not be possible to link readily the data and the identifiers".

248. Where data security is concerned, the explanatory report to Convention ETS 108 specifies that "there should be specific security measures for every file, taking into account its degree of vulnerability, the need to restrict access to the information within the organisation, requirements concerning long-term storage, and so forth. The security measures must be appropriate, i.e. adapted to the specific function of the file and the risks involved. They should be based on the current state of the art of data security methods and techniques in the field of data processing".

249. The reference to "appropriate rules and guarantees as prescribed by domestic law" of each State takes into account the different national rules on the collecting and storing of DNA. They contain, for example, precise criteria for the identification of "the natural or legal person, public authority, agency or any other body who is competent according to the national law to decide what should be the purpose of the automated data file, which categories of personal data should be stored and which operations should be applied to them." (Article 2 of Convention ETS 108).

250. Given that sex offenders may sometimes be itinerant and have committed offences in several States, it seems essential that States should be able to exchange data concerning their identity and genetic profile. Paragraph 3 creates the requirement that Parties should establish mechanisms which could allow relevant data to be supplied to other Parties in accordance with the rules applicable to international transfer of personal data for the purposes of crime prevention and prosecution.

CHAPTER IX – INTERNATIONAL CO-OPERATION

251. Chapter IX sets out the provisions on international cooperation between Parties to the Convention. The provisions are not confined to judicial cooperation in criminal matters. They are also concerned with cooperation in preventing the sexual exploitation and abuse of children and in protecting and assisting victims (see paragraph 10 above).

252. As regards judicial cooperation in the criminal sphere, the Council of Europe already has a substantial body of standard-setting instruments. Mention should be made here of the European Convention on Extradition (ETS 24), the European Convention on Mutual Assistance in Criminal Matters (ETS 30), their Additional Protocols (ETS 86, 98, 99 and 182), and the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS 141). These treaties are cross-sector instruments applying to a large number

of offences, and can be implemented to permit judicial cooperation in criminal matters in the framework of procedures aiming at the offences established in the Convention.

253. For this reason, the negotiators opted not to reproduce, in this Convention, provisions similar to those included in cross-sectoral instruments such as those mentioned above. For instance, they did not want to introduce separate mutual assistance arrangements that would replace the other instruments and arrangements applicable, on the grounds that it would be more effective to rely, as a general rule, on the arrangements introduced by the mutual assistance and extradition treaties in force, with which practitioners were fully familiar. This Chapter therefore includes only provisions that add something over and above the existing conventions.

254. Moreover, the Parties may agree to co-operate on the basis of existing international instruments, in particular the above-mentioned Council of Europe conventions and, in the case of European Union member States, the instruments adopted in this connection, especially the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States. They may also agree to co-operate by means of arrangements based on uniform or reciprocal legislation. This principle exists in other Council of Europe conventions, in particular the European Convention on Extradition (ETS 24), in order to enable Parties with an extradition system based on uniform legislation, namely the Scandinavian countries, or Parties with a system based on the reciprocal application of their legislation, namely Ireland and the United Kingdom, to base their mutual relations solely on this system.

Article 38 – General principles and measures for international co-operation

255. Article 38 sets out the general principles that should govern international co-operation.

256. First of all, it obliges the Parties to co-operate widely with one another and in particular to reduce, as far as possible, the obstacles to the rapid circulation of information and evidence. The monitoring mechanism provided for in the Convention (Chapter X) may, *inter alia*, cover the implementation of this principle and the way in which existing co-operation instruments are applied to the protection of children against sexual exploitation and sexual abuse.

257. Article 38 then makes it clear that the obligation to co-operate is general in scope: it covers preventing and combating sexual exploitation and sexual abuse of children (first indent), protecting and providing assistance to victims (second indent) and investigations or procedures concerning criminal offences established in accordance with the Convention (third indent).

258. Paragraph 2 is based on Article 11, paragraphs 2 and 3, of the Council of the European Union Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings. It is designed to make it easier for victims to file a complaint by enabling them to lodge it with the competent authorities of the State of residence.

259. These authorities may then either initiate proceedings if their law permits, or pass on the complaint to the authorities of the State in which the offence was committed, in accordance with the relevant provisions of the co-operation instruments applicable to the States in question.

260. Paragraph 3 authorises a Party that makes mutual assistance in criminal matters or extradition conditional on the existence of a treaty to consider the Convention as the legal basis for judicial co-operation with a Party with which it has not concluded such a treaty. This provision, which serves no purpose between Council of Europe member States because of the existence of the *European* Conventions on Extradition and on Mutual Assistance in Criminal Matters, dating from 1957 and 1959 respectively, and the Protocols to them, is of interest because of the possibility provided to third States to accede to the Convention (cf Article 46).

261. Lastly, under paragraph 4, the Parties must endeavour to include preventing and combating the sexual exploitation and sexual abuse of children in development assistance programmes benefiting third States. Many Council of Europe member States carry out such programmes, which cover such varied areas as the restoration or consolidation of the rule of law, the development of judicial institutions, combating crime, and technical assistance with the implementation of international conventions. Some of these programmes may be carried out in countries faced with substantial sexual exploitation and sexual abuse of children. It seems appropriate, in this context, that action programmes should take account of and duly incorporate issues relating to the prevention and punishment of this form of crime.

CHAPTER X – MONITORING MECHANISM

262. Chapter X of the Convention contains provisions which aim at ensuring the effective implementation of the Convention by the Parties. The monitoring system foreseen by the Convention is based essentially on a body, the Committee of the Parties, composed of representatives of the Parties to the Convention, including representatives of Parties that may accede to the Convention under Articles 45 and 46.

Article 39 – Committee of the Parties

263. This article provides for the setting up of a committee under the Convention, the Committee of the Parties, which is a body with the composition described above, responsible for a number of Convention-based follow-up tasks.

264. The Committee of the Parties will be convened the first time by the Secretary General of the Council of Europe, within a year of the entry into force of the Convention by virtue of the 10th ratification. It will then meet at the request of a third of the Parties or of the Secretary General of the Council of Europe.

265. It should be stressed that the negotiators sought to allow the Convention to come into force quickly while deferring the introduction of the monitoring mechanism until such time as the Convention was ratified by a sufficient number of States for it to operate under satisfactory conditions, with a sufficient number of representative States Parties to ensure its credibility.

266. The setting up of this body will ensure equal participation of all the Parties in the decision-making process and in the Convention monitoring procedure and will also strengthen co-operation between the Parties to ensure proper and effective implementation of the Convention.

267. The Committee of the Parties must adopt rules of procedure establishing the way in which the monitoring system of the Convention operates, on the understanding that its rules of procedure must be drafted in such a way that the Parties to the Convention, including the European Community, are effectively monitored.

Article 40 – Other representatives

268. When they drafted this article, the negotiators wanted to send out an important message concerning the participation of bodies other than the Parties themselves in the Convention monitoring mechanism. They therefore referred, firstly, to three institutions of the Council of Europe – the Parliamentary Assembly, the Commissioner for Human Rights and the European Committee on Crime Problems (CDPC) – which are listed in the Article and, secondly, to a number of committees which, by virtue of their responsibilities, would definitely make a worthwhile contribution by taking part in monitoring work on the Convention. These committees are the European Committee on Legal Cooperation (CDCJ), the European Committee of Social Rights (ECSR), the Advisory Council on Youth (CCJ) and the European Committee for Social Cohesion (CDCS), with particular emphasis on the Steering Committee for Human Rights (CDDH).

269. The importance afforded to involving representatives of civil society in the work of the Committee of the Parties is undoubtedly one of the main strengths of the monitoring system provided for by the negotiators. The possibility of admitting representatives of non-governmental organisations and other bodies actively involved in preventing and combating sexual exploitation and abuse of children received strong support and was considered essential if monitoring of the application of the Convention was to be truly effective.

Article 41 – Functions of the Committee of the Parties

270. When drafting this provision, the negotiators wanted to devise as simple and flexible a mechanism as possible, centred on a Committee of the Parties with a broader role in the Council of Europe's legal work on combating the sexual exploitation and abuse of children. The Committee of the Parties is thus destined to serve as a centre for the collection, analysis and sharing of information, experiences and good practice between States to improve their policies for preventing and combating sexual exploitation and abuse of children.

271. With respect to the Convention, the Committee of the Parties has the traditional follow-up competencies and:

a. plays a role in the effective implementation of the Convention, by making proposals to facilitate or improve the effective use and implementation of the Convention, including the identification of any problems and the effects of any declarations made under the Convention;

b. plays a general advisory role in respect of the Convention by expressing an opinion on any question concerning the application of the Convention;

c. serves as a clearing house and facilitates the exchange of information on significant legal, policy or technological developments in relation to the application of the provisions of the Convention.

272. Paragraph 5 states that the European Committee on Crime Problems (CDPC) should be kept periodically informed of the activities mentioned in paragraphs 1, 2 and 3 of Article 41.

CHAPTER XI – RELATIONSHIP WITH OTHER INTERNATIONAL INSTRUMENTS

Article 42 – Relation to the United Nations Convention on the Rights of the Child and its Optional Protocol on the sale of children, child prostitution and child pornography

273. The purpose of Article 42 is to clarify the relationship between the Convention and the United Nations Convention on the Rights of the Child and the Optional Protocol to it on the sale of children, child prostitution and child pornography.

274. Article 42 has two main objectives: (i) to make sure that the Convention does not interfere with rights and obligations deriving from the provisions of the United Nations Convention on the Rights of the Child and the Protocol to it and (ii) to make clear that the Convention reinforces the protection afforded by these United Nations instruments and develops the standards they lay down.

Article 43 – Relation to other international instruments

275. Article 43 deals with the relationship between the Convention and other international instruments.

276. In accordance with the 1969 Vienna Convention on the Law of Treaties, Article 43 seeks to ensure that the Convention harmoniously coexists with other treaties – whether multilateral or bilateral – or instruments dealing with matters which the Convention also covers. This is particularly important in the case of international instruments which ensure greater protection and assistance for child victims of sexual exploitation and abuse. Indeed, this Convention is designed to strengthen the protection of children against all forms of sexual exploitation and abuse. It is also designed to assure victims of sexual exploitation and abuse of assistance. For this reason, Article 43, paragraph 1 aims at ensuring that this Convention does not prejudice the rights and obligations derived from other international instruments to which the Parties to this Convention are also Parties or will become Parties, and which contain provisions on matters governed by this Convention. This provision clearly shows, once more, the overall aim of this Convention, which is to protect the rights of child victims of sexual exploitation and sexual abuse and to assure them of the highest level of protection.

277. Article 43, paragraph 2 states positively that Parties may conclude bilateral or multilateral agreements – or any other legal instrument – relating to the matters which the Convention governs. However, the wording makes clear that Parties are not allowed to conclude any agreement which derogates from this Convention.

278. Following the signature of a Memorandum of Understanding between the Council of Europe and the European Union on 23 May 2007 the CDPC took note that "legal co-operation should be further developed between the Council of Europe and the European Union with a view to ensuring coherence between Community and European Union law and the standards of Council of Europe conventions. This does not prevent Community and European Union law from adopting more far-reaching rules."

279. In relation to paragraph 3 of Article 43, upon the adoption of the Convention, the European Community and the member States of the European Union, made the following declaration:

> "The European Community/European Union and its Member States reaffirm that their objective in requesting the inclusion of a "disconnection clause" is to take account of the institutional structure of the Union when acceding to international conventions, in particular in case of transfer of sovereign powers from the Member States to the Community.
>
> This clause is not aimed at reducing the rights or increasing the obligations of a non-European Union party vis-à-vis the European Community/European Union and its Member States, inasmuch as the latter are also parties to this Convention.
>
> The disconnection clause is necessary for those parts of the convention which fall within the competence of the Community / Union, in order to indicate that European Union Member States cannot invoke and apply the rights and obligations deriving from the Convention directly among themselves (or between themselves and the European Community / Union). This does not detract from the fact that the Convention applies fully between the

European Community/European Union and its Member States on the one hand, and the other Parties to the Convention, on the other; the Community and the European Union Members States will be bound by the Convention and will apply it like any party to the Convention, if necessary, through Community / Union legislation. They will thus guarantee the full respect of the Convention's provisions vis-à-vis non-European Union parties."

As an instrument made in connection with the conclusion of a treaty, within the meaning of Article 31 paragraph 2(b) of the Vienna Convention on the Law of Treaties, this declaration forms part of the "context" of this Convention.

280. The European Community would be in a position to provide, for the sole purpose of transparency, necessary information about the division of competence between the Community and its Member States in the area covered by the present Convention, inasmuch as this does not lead to additional monitoring obligations placed on the Community.

CHAPTER XII – AMENDMENTS TO THE CONVENTION

Article 44 – Amendments

281. Amendments to the provisions of the Convention may be proposed by the Parties. They must be communicated to all Council of Europe member States, to any signatory, to any Party, to the European Community and to any State invited to sign or accede to the Convention.

282. The Committee of the Parties, composed in accordance with Article 39, will prepare an opinion on the proposed amendment, which will be submitted to the Committee of Ministers. After considering the proposed amendment and the opinion submitted by the Committee of the Parties, the Committee of Ministers can adopt the amendment. Before deciding on the amendment, the Committee of Ministers shall consult and obtain the unanimous consent of all Parties. Such a requirement recognises that all Parties to the Convention should be able to participate in the decision-making process concerning amendments and are on an equal footing.

CHAPTER XIII – FINAL CLAUSES

283. With some exceptions, Articles 45 to 50 are essentially based on the Model Final Clauses for Conventions and Agreements concluded within the Council of Europe, which the Committee of Ministers approved at the Deputies' 315th meeting, in February 1980.

Article 45 – Signature and entry into force

284. The Convention is open for signature by Council of Europe member States, the European Community and States not members of the Council of Europe which took part in drawing it up (Canada, the Holy See, Japan, Mexico and the United States). Once the Convention enters into force, in accordance with paragraph 3, other non-member States may be invited to accede to the Convention in accordance with Article 46, paragraph 1.

285. Article 45 paragraph 3 sets the number of ratifications, acceptances or approvals required for the Convention's entry into force at five. This number is not very high in order not to delay unnecessarily the entry into force of the Convention but reflects nevertheless the belief that a minimum group of States is needed to successfully set about addressing the major challenge of protecting children against sexual exploitation and sexual abuse. Of the five states which will make the Convention enter into force, at least three must be Council of Europe members.

Article 46 – Accession to the Convention

286. After consulting the Parties and obtaining their unanimous consent, the Committee of Ministers may invite any State not a Council of Europe member which did not participate in drawing up the Convention to accede to it. This decision requires the two-thirds majority provided for in Article 20.d of the Statute of the Council of Europe and the unanimous vote of the Parties to the Convention having the right to sit on the Committee of Ministers.

Article 47 – Territorial application

287. Article 47, paragraph 1 specifies the territories to which the Convention applies. Here it should be pointed out that it would be incompatible with the object and purpose of the Convention for States Parties

to exclude parts of their territory from application of the Convention without valid reason (such as the existence of different legal systems applying in matters dealt with in the Convention).

288. Article 47, paragraph 2 is concerned with extension of application of the Convention to territories for whose international relations the Parties are responsible or on whose behalf they are authorised to give undertakings.

Article 48 – Reservations

289. Article 48 specifies that the Parties may make use of the reservations expressly authorised by the Convention. No other reservation may be made. The negotiators wish to underline the fact that reservations can be withdrawn at any moment.

Article 49 – Denunciation

290. Article 49 allows any Party to denounce the Convention.

Article 50 – Notifications

291. Article 50 lists the notifications that, as the depositary of the Convention, the Secretary General of the Council of Europe is required to make, and designates the recipients of these notifications (States and the European Community).

Council of Europe Convention on preventing and combating violence against women and domestic violence – CETS No. 210

Istanbul, 11.V.2011

Preamble

The member States of the Council of Europe and the other signatories hereto,

Recalling the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5, 1950) and its Protocols, the European Social Charter (ETS No. 35, 1961, revised in 1996, ETS No. 163), the Council of Europe Convention on Action against Trafficking in Human Beings (CETS No. 197, 2005) and the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS No. 201, 2007);

Recalling the following recommendations of the Committee of Ministers to member States of the Council of Europe: Recommendation Rec(2002)5 on the protection of women against violence, Recommendation CM/Rec(2007)17 on gender equality standards and mechanisms, Recommendation CM/Rec(2010)10 on the role of women and men in conflict prevention and resolution and in peace building, and other relevant recommendations;

Taking account of the growing body of case law of the European Court of Human Rights which sets important standards in the field of violence against women;

Having regard to the International Covenant on Civil and Political Rights (1966), the International Covenant on Economic, Social and Cultural Rights (1966), the United Nations Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW", 1979) and its Optional Protocol (1999) as well as General Recommendation No. 19 of the CEDAW Committee on violence against women, the United Nations Convention on the Rights of the Child (1989) and its Optional Protocols (2000) and the United Nations Convention on the Rights of Persons with Disabilities (2006);

Having regard to the Rome Statute of the International Criminal Court (2002);

Recalling the basic principles of international humanitarian law, and especially the Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (1949) and the Additional Protocols I and II (1977) thereto;

Condemning all forms of violence against women and domestic violence;

Recognising that the realisation of *de jure* and *de facto* equality between women and men is a key element in the prevention of violence against women;

Recognising that violence against women is a manifestation of historically unequal power relations between women and men, which have led to domination over, and discrimination against, women by men and to the prevention of the full advancement of women;

Recognising the structural nature of violence against women as gender-based violence, and that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men;

Recognising, with grave concern, that women and girls are often exposed to serious forms of violence such as domestic violence, sexual harassment, rape, forced marriage, crimes committed in the name of so-called "honour" and genital mutilation, which constitute a serious violation of the human rights of women and girls and a major obstacle to the achievement of equality between women and men;

Recognising the ongoing human rights violations during armed conflicts that affect the civilian population, especially women in the form of widespread or systematic rape and sexual violence and the potential for increased gender-based violence both during and after conflicts;

Recognising that women and girls are exposed to a higher risk of gender-based violence than men;

Recognising that domestic violence affects women disproportionately, and that men may also be victims of domestic violence;

Recognising that children are victims of domestic violence, including as witnesses of violence in the family;

Aspiring to create a Europe free from violence against women and domestic violence,

Have agreed as follows:

CHAPTER I – PURPOSES, DEFINITIONS, EQUALITY AND NON-DISCRIMINATION, GENERAL OBLIGATIONS

Article 1 – Purposes of the Convention

1. The purposes of this Convention are to:

   a. protect women against all forms of violence, and prevent, prosecute and eliminate violence against women and domestic violence;

   b. contribute to the elimination of all forms of discrimination against women and promote substantive equality between women and men, including by empowering women;

   c. design a comprehensive framework, policies and measures for the protection of and assistance to all victims of violence against women and domestic violence;

   d. promote international co-operation with a view to eliminating violence against women and domestic violence;

   e. provide support and assistance to organisations and law enforcement agencies to effectively co-operate in order to adopt an integrated approach to eliminating violence against women and domestic violence.

2. In order to ensure effective implementation of its provisions by the Parties, this Convention establishes a specific monitoring mechanism.

Article 2 – Scope of the Convention

1. This Convention shall apply to all forms of violence against women, including domestic violence, which affects women disproportionately.

2. Parties are encouraged to apply this Convention to all victims of domestic violence. Parties shall pay particular attention to women victims of gender-based violence in implementing the provisions of this Convention.

3. This Convention shall apply in times of peace and in situations of armed conflict.

Article 3 – Definitions

For the purpose of this Convention:

a. "violence against women" is understood as a violation of human rights and a form of discrimination against women and shall mean all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life;

b. "domestic violence" shall mean all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim;

c. "gender" shall mean the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men;

d. "gender-based violence against women" shall mean violence that is directed against a woman because she is a woman or that affects women disproportionately;

e. "victim" shall mean any natural person who is subject to the conduct specified in points a and b;

f. "women" includes girls under the age of 18.

Article 4 – Fundamental rights, equality and non-discrimination

1. Parties shall take the necessary legislative and other measures to promote and protect the right for everyone, particularly women, to live free from violence in both the public and the private sphere.

2. Parties condemn all forms of discrimination against women and take, without delay, the necessary legislative and other measures to prevent it, in particular by:

- embodying in their national constitutions or other appropriate legislation the principle of equality between women and men and ensuring the practical realisation of this principle;
- prohibiting discrimination against women, including through the use of sanctions, where appropriate;
- abolishing laws and practices which discriminate against women.

3. The implementation of the provisions of this Convention by the Parties, in particular measures to protect the rights of victims, shall be secured without discrimination on any ground such as sex, gender, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, sexual orientation, gender identity, age, state of health, disability, marital status, migrant or refugee status, or other status.

4. Special measures that are necessary to prevent and protect women from gender-based violence shall not be considered discrimination under the terms of this Convention.

Article 5 – State obligations and due diligence

1. Parties shall refrain from engaging in any act of violence against women and ensure that State authorities, officials, agents, institutions and other actors acting on behalf of the State act in conformity with this obligation.

2. Parties shall take the necessary legislative and other measures to exercise due diligence to prevent, investigate, punish and provide reparation for acts of violence covered by the scope of this Convention that are perpetrated by non-State actors.

Article 6 – Gender-sensitive policies

Parties shall undertake to include a gender perspective in the implementation and evaluation of the impact of the provisions of this Convention and to promote and effectively implement policies of equality between women and men and the empowerment of women.

CHAPTER II – INTEGRATED POLICIES AND DATA COLLECTION

Article 7 – Comprehensive and co-ordinated policies

1. Parties shall take the necessary legislative and other measures to adopt and implement State-wide effective, comprehensive and co-ordinated policies encompassing all relevant measures to prevent and combat all forms of violence covered by the scope of this Convention and offer a holistic response to violence against women.

2. Parties shall ensure that policies referred to in paragraph 1 place the rights of the victim at the centre of all measures and are implemented by way of effective co-operation among all relevant agencies, institutions and organisations.

3. Measures taken pursuant to this article shall involve, where appropriate, all relevant actors, such as government agencies, the national, regional and local parliaments and authorities, national human rights institutions and civil society organisations.

Article 8 – Financial resources

Parties shall allocate appropriate financial and human resources for the adequate implementation of integrated policies, measures and programmes to prevent and combat all forms of violence covered by the scope of this Convention, including those carried out by non-governmental organisations and civil society.

Article 9 – Non-governmental organisations and civil society

Parties shall recognise, encourage and support, at all levels, the work of relevant non-governmental organisations and of civil society active in combating violence against women and establish effective co-operation with these organisations.

Article 10 – Co-ordinating body

1. Parties shall designate or establish one or more official bodies responsible for the co-ordination, implementation, monitoring and evaluation of policies and measures to prevent and combat all forms of violence covered by this Convention. These bodies shall co-ordinate the collection of data as referred to in Article 11, analyse and disseminate its results.

2. Parties shall ensure that the bodies designated or established pursuant to this article receive information of a general nature on measures taken pursuant to Chapter VIII.

3. Parties shall ensure that the bodies designated or established pursuant to this article shall have the capacity to communicate directly and foster relations with their counterparts in other Parties.

Article 11 – Data collection and research

1. For the purpose of the implementation of this Convention, Parties shall undertake to:

   a. collect disaggregated relevant statistical data at regular intervals on cases of all forms of violence covered by the scope of this Convention;

   b. support research in the field of all forms of violence covered by the scope of this Convention in order to study its root causes and effects, incidences and conviction rates, as well as the efficacy of measures taken to implement this Convention.

2. Parties shall endeavour to conduct population-based surveys at regular intervals to assess the prevalence of and trends in all forms of violence covered by the scope of this Convention.

3. Parties shall provide the group of experts, as referred to in Article 66 of this Convention, with the information collected pursuant to this article in order to stimulate international co-operation and enable international benchmarking.

4. Parties shall ensure that the information collected pursuant to this article is available to the public.

CHAPTER III – PREVENTION

Article 12 – General obligations

1. Parties shall take the necessary measures to promote changes in the social and cultural patterns of behaviour of women and men with a view to eradicating prejudices, customs, traditions and all other practices which are based on the idea of the inferiority of women or on stereotyped roles for women and men.

2. Parties shall take the necessary legislative and other measures to prevent all forms of violence covered by the scope of this Convention by any natural or legal person.

3. Any measures taken pursuant to this chapter shall take into account and address the specific needs of persons made vulnerable by particular circumstances and shall place the human rights of all victims at their centre.

4. Parties shall take the necessary measures to encourage all members of society, especially men and boys, to contribute actively to preventing all forms of violence covered by the scope of this Convention.

5. Parties shall ensure that culture, custom, religion, tradition or so-called "honour" shall not be considered as justification for any acts of violence covered by the scope of this Convention.

6. Parties shall take the necessary measures to promote programmes and activities for the empowerment of women.

Article 13 – Awareness-raising

1. Parties shall promote or conduct, on a regular basis and at all levels, awareness-raising campaigns or programmes, including in co-operation with national human rights institutions and equality bodies, civil society and non-governmental organisations, especially women's organisations, where appropriate, to increase awareness and understanding among the general public of the different manifestations of all forms of violence covered by the scope of this Convention, their consequences on children and the need to prevent such violence.

2. Parties shall ensure the wide dissemination among the general public of information on measures available to prevent acts of violence covered by the scope of this Convention.

Article 14 – Education

1. Parties shall take, where appropriate, the necessary steps to include teaching material on issues such as equality between women and men, non-stereotyped gender roles, mutual respect, non-violent conflict resolution in interpersonal relationships, gender-based violence against women and the right to personal integrity, adapted to the evolving capacity of learners, in formal curricula and at all levels of education.

2. Parties shall take the necessary steps to promote the principles referred to in paragraph 1 in informal educational facilities, as well as in sports, cultural and leisure facilities and the media.

Article 15 – Training of professionals

1. Parties shall provide or strengthen appropriate training for the relevant professionals dealing with victims or perpetrators of all acts of violence covered by the scope of this Convention, on the prevention and detection of such violence, equality between women and men, the needs and rights of victims, as well as on how to prevent secondary victimisation.

2. Parties shall encourage that the training referred to in paragraph 1 includes training on co-ordinated multi-agency co-operation to allow for a comprehensive and appropriate handling of referrals in cases of violence covered by the scope of this Convention.

Article 16 – Preventive intervention and treatment programmes

1. Parties shall take the necessary legislative or other measures to set up or support programmes aimed at teaching perpetrators of domestic violence to adopt non-violent behaviour in interpersonal relationships with a view to preventing further violence and changing violent behavioural patterns.

2. Parties shall take the necessary legislative or other measures to set up or support treatment programmes aimed at preventing perpetrators, in particular sex offenders, from re-offending.

3. In taking the measures referred to in paragraphs 1 and 2, Parties shall ensure that the safety of, support for and the human rights of victims are of primary concern and that, where appropriate, these programmes are set up and implemented in close co-ordination with specialist support services for victims.

Article 17 – Participation of the private sector and the media

1. Parties shall encourage the private sector, the information and communication technology sector and the media, with due respect for freedom of expression and their independence, to participate in the elaboration and implementation of policies and to set guidelines and self-regulatory standards to prevent violence against women and to enhance respect for their dignity.

2. Parties shall develop and promote, in co-operation with private sector actors, skills among children, parents and educators on how to deal with the information and communications environment that provides access to degrading content of a sexual or violent nature which might be harmful.

CHAPTER IV – PROTECTION AND SUPPORT

Article 18 – General obligations

1. Parties shall take the necessary legislative or other measures to protect all victims from any further acts of violence.

2. Parties shall take the necessary legislative or other measures, in accordance with internal law, to ensure that there are appropriate mechanisms to provide for effective co-operation between all relevant state agencies, including the judiciary, public prosecutors, law enforcement agencies, local and regional authorities as well as non-governmental organisations and other relevant organisations and entities, in protecting and supporting victims and witnesses of all forms of violence covered by the scope of this Convention, including by referring to general and specialist support services as detailed in Articles 20 and 22 of this Convention.

3. Parties shall ensure that measures taken pursuant to this chapter shall:

- be based on a gendered understanding of violence against women and domestic violence and shall focus on the human rights and safety of the victim;
- be based on an integrated approach which takes into account the relationship between victims, perpetrators, children and their wider social environment;
- aim at avoiding secondary victimisation;
- aim at the empowerment and economic independence of women victims of violence;
- allow, where appropriate, for a range of protection and support services to be located on the same premises;
- address the specific needs of vulnerable persons, including child victims, and be made available to them.

4. The provision of services shall not depend on the victim's willingness to press charges or testify against any perpetrator.

5. Parties shall take the appropriate measures to provide consular and other protection and support to their nationals and other victims entitled to such protection in accordance with their obligations under international law.

Article 19 – Information

Parties shall take the necessary legislative or other measures to ensure that victims receive adequate and timely information on available support services and legal measures in a language they understand.

Article 20 – General support services

1. Parties shall take the necessary legislative or other measures to ensure that victims have access to services facilitating their recovery from violence. These measures should include, when necessary, services such as legal and psychological counselling, financial assistance, housing, education, training and assistance in finding employment.

2. Parties shall take the necessary legislative or other measures to ensure that victims have access to health care and social services and that services are adequately resourced and professionals are trained to assist victims and refer them to the appropriate services.

Article 21 – Assistance in individual/collective complaints

Parties shall ensure that victims have information on and access to applicable regional and international individual/collective complaints mechanisms. Parties shall promote the provision of sensitive and knowledgeable assistance to victims in presenting any such complaints.

Article 22 – Specialist support services

1. Parties shall take the necessary legislative or other measures to provide or arrange for, in an adequate geographical distribution, immediate, short- and long-term specialist support services to any victim subjected to any of the acts of violence covered by the scope of this Convention.

2. Parties shall provide or arrange for specialist women's support services to all women victims of violence and their children.

Article 23 – Shelters

Parties shall take the necessary legislative or other measures to provide for the setting-up of appropriate, easily accessible shelters in sufficient numbers to provide safe accommodation for and to reach out pro-actively to victims, especially women and their children.

Article 24 – Telephone helplines

Parties shall take the necessary legislative or other measures to set up state-wide round-the-clock (24/7) telephone helplines free of charge to provide advice to callers, confidentially or with due regard for their anonymity, in relation to all forms of violence covered by the scope of this Convention.

Article 25 – Support for victims of sexual violence

Parties shall take the necessary legislative or other measures to provide for the setting up of appropriate, easily accessible rape crisis or sexual violence referral centres for victims in sufficient numbers to provide for medical and forensic examination, trauma support and counselling for victims.

Article 26 – Protection and support for child witnesses

1. Parties shall take the necessary legislative or other measures to ensure that in the provision of protection and support services to victims, due account is taken of the rights and needs of child witnesses of all forms of violence covered by the scope of this Convention.

2. Measures taken pursuant to this article shall include age-appropriate psychosocial counselling for child witnesses of all forms of violence covered by the scope of this Convention and shall give due regard to the best interests of the child.

Article 27 – Reporting

Parties shall take the necessary measures to encourage any person witness to the commission of acts of violence covered by the scope of this Convention or who has reasonable grounds to believe that such an act may be committed, or that further acts of violence are to be expected, to report this to the competent organisations or authorities.

Article 28 – Reporting by professionals

Parties shall take the necessary measures to ensure that the confidentiality rules imposed by internal law on certain professionals do not constitute an obstacle to the possibility, under appropriate conditions, of their reporting to the competent organisations or authorities if they have reasonable grounds to believe that a serious act of violence covered by the scope of this Convention, has been committed and further serious acts of violence are to be expected.

CHAPTER V – SUBSTANTIVE LAW

Article 29 – Civil lawsuits and remedies

1. Parties shall take the necessary legislative or other measures to provide victims with adequate civil remedies against the perpetrator.

2. Parties shall take the necessary legislative or other measures to provide victims, in accordance with the general principles of international law, with adequate civil remedies against State authorities that have failed in their duty to take the necessary preventive or protective measures within the scope of their powers.

Article 30 – Compensation

1. Parties shall take the necessary legislative or other measures to ensure that victims have the right to claim compensation from perpetrators for any of the offences established in accordance with this Convention.

2. Adequate State compensation shall be awarded to those who have sustained serious bodily injury or impairment of health, to the extent that the damage is not covered by other sources such as the perpetrator, insurance or State-funded health and social provisions. This does not preclude Parties from claiming regress for compensation awarded from the perpetrator, as long as due regard is paid to the victim's safety.

3. Measures taken pursuant to paragraph 2 shall ensure the granting of compensation within a reasonable time.

Article 31 – Custody, visitation rights and safety

1. Parties shall take the necessary legislative or other measures to ensure that, in the determination of custody and visitation rights of children, incidents of violence covered by the scope of this Convention are taken into account.

2. Parties shall take the necessary legislative or other measures to ensure that the exercise of any visitation or custody rights does not jeopardise the rights and safety of the victim or children.

Article 32 – Civil consequences of forced marriages

Parties shall take the necessary legislative or other measures to ensure that marriages concluded under force may be voidable, annulled or dissolved without undue financial or administrative burden placed on the victim.

Article 33 – Psychological violence

Parties shall take the necessary legislative or other measures to ensure that the intentional conduct of seriously impairing a person's psychological integrity through coercion or threats is criminalised.

Article 34 – Stalking

Parties shall take the necessary legislative or other measures to ensure that the intentional conduct of repeatedly engaging in threatening conduct directed at another person, causing her or him to fear for her or his safety, is criminalised.

Article 35 – Physical violence

Parties shall take the necessary legislative or other measures to ensure that the intentional conduct of committing acts of physical violence against another person is criminalised.

Article 36 – Sexual violence, including rape

1. Parties shall take the necessary legislative or other measures to ensure that the following intentional conducts are criminalised:

   a. engaging in non-consensual vaginal, anal or oral penetration of a sexual nature of the body of another person with any bodily part or object;

   b. engaging in other non-consensual acts of a sexual nature with a person;

   c. causing another person to engage in non-consensual acts of a sexual nature with a third person.

2. Consent must be given voluntarily as the result of the person's free will assessed in the context of the surrounding circumstances.

3. Parties shall take the necessary legislative or other measures to ensure that the provisions of paragraph 1 also apply to acts committed against former or current spouses or partners as recognised by internal law.

Article 37 – Forced marriage

1. Parties shall take the necessary legislative or other measures to ensure that the intentional conduct of forcing an adult or a child to enter into a marriage is criminalised.

2. Parties shall take the necessary legislative or other measures to ensure that the intentional conduct of luring an adult or a child to the territory of a Party or State other than the one she or he resides in with the purpose of forcing this adult or child to enter into a marriage is criminalised.

Article 38 – Female genital mutilation

Parties shall take the necessary legislative or other measures to ensure that the following intentional conducts are criminalised:

a. excising, infibulating or performing any other mutilation to the whole or any part of a woman's labia majora, labia minora or clitoris;

b. coercing or procuring a woman to undergo any of the acts listed in point a;

c. inciting, coercing or procuring a girl to undergo any of the acts listed in point a.

Article 39 – Forced abortion and forced sterilisation

Parties shall take the necessary legislative or other measures to ensure that the following intentional conducts are criminalised:

a. performing an abortion on a woman without her prior and informed consent;

b. performing surgery which has the purpose or effect of terminating a woman's capacity to naturally reproduce without her prior and informed consent or understanding of the procedure.

Article 40 – Sexual harassment

Parties shall take the necessary legislative or other measures to ensure that any form of unwanted verbal, non-verbal or physical conduct of a sexual nature with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment, is subject to criminal or other legal sanction.

Article 41 – Aiding or abetting and attempt

1. Parties shall take the necessary legislative or other measures to establish as an offence, when committed intentionally, aiding or abetting the commission of the offences established in accordance with Articles 33, 34, 35, 36, 37, 38.a and 39 of this Convention.

2. Parties shall take the necessary legislative or other measures to establish as offences, when committed intentionally, attempts to commit the offences established in accordance with Articles 35, 36, 37, 38.a and 39 of this Convention.

Article 42 – Unacceptable justifications for crimes, including crimes committed in the name of so-called "honour"

1. Parties shall take the necessary legislative or other measures to ensure that, in criminal proceedings initiated following the commission of any of the acts of violence covered by the scope of this Convention, culture, custom, religion, tradition or so-called "honour" shall not be regarded as justification for such acts. This covers, in particular, claims that the victim has transgressed cultural, religious, social or traditional norms or customs of appropriate behaviour.

2. Parties shall take the necessary legislative or other measures to ensure that incitement by any person of a child to commit any of the acts referred to in paragraph 1 shall not diminish the criminal liability of that person for the acts committed.

Article 43 – Application of criminal offences

The offences established in accordance with this Convention shall apply irrespective of the nature of the relationship between victim and perpetrator.

Article 44 – Jurisdiction

1. Parties shall take the necessary legislative or other measures to establish jurisdiction over any offence established in accordance with this Convention, when the offence is committed:

   a. in their territory; or

   b. on board a ship flying their flag; or

   c. on board an aircraft registered under their laws; or

   d. by one of their nationals; or

   e. by a person who has her or his habitual residence in their territory.

2. Parties shall endeavour to take the necessary legislative or other measures to establish jurisdiction over any offence established in accordance with this Convention where the offence is committed against one of their nationals or a person who has her or his habitual residence in their territory.

3. For the prosecution of the offences established in accordance with Articles 36, 37, 38 and 39 of this Convention, Parties shall take the necessary legislative or other measures to ensure that their jurisdiction is not subordinated to the condition that the acts are criminalised in the territory where they were committed.

4. For the prosecution of the offences established in accordance with Articles 36, 37, 38 and 39 of this Convention, Parties shall take the necessary legislative or other measures to ensure that their jurisdiction as regards points d and e of paragraph 1 is not subordinated to the condition that the prosecution can only be initiated following the reporting by the victim of the offence or the laying of information by the State of the place where the offence was committed.

5. Parties shall take the necessary legislative or other measures to establish jurisdiction over the offences established in accordance with this Convention, in cases where an alleged perpetrator is present on their territory and they do not extradite her or him to another Party, solely on the basis of her or his nationality.

6. When more than one Party claims jurisdiction over an alleged offence established in accordance with this Convention, the Parties involved shall, where appropriate, consult each other with a view to determining the most appropriate jurisdiction for prosecution.

7. Without prejudice to the general rules of international law, this Convention does not exclude any criminal jurisdiction exercised by a Party in accordance with its internal law.

Article 45 – Sanctions and measures

1. Parties shall take the necessary legislative or other measures to ensure that the offences established in accordance with this Convention are punishable by effective, proportionate and dissuasive sanctions, taking into account their seriousness. These sanctions shall include, where appropriate, sentences involving the deprivation of liberty which can give rise to extradition.

2. Parties may adopt other measures in relation to perpetrators, such as:

   – monitoring or supervision of convicted persons;

   – withdrawal of parental rights, if the best interests of the child, which may include the safety of the victim, cannot be guaranteed in any other way.

Article 46 – Aggravating circumstances

Parties shall take the necessary legislative or other measures to ensure that the following circumstances, insofar as they do not already form part of the constituent elements of the offence, may, in conformity with

the relevant provisions of internal law, be taken into consideration as aggravating circumstances in the determination of the sentence in relation to the offences established in accordance with this Convention:

a. the offence was committed against a former or current spouse or partner as recognised by internal law, by a member of the family, a person cohabiting with the victim or a person having abused her or his authority;

b. the offence, or related offences, were committed repeatedly;

c. the offence was committed against a person made vulnerable by particular circumstances;

d. the offence was committed against or in the presence of a child;

e. the offence was committed by two or more people acting together;

f. the offence was preceded or accompanied by extreme levels of violence;

g. the offence was committed with the use or threat of a weapon;

h. the offence resulted in severe physical or psychological harm for the victim;

i. the perpetrator had previously been convicted of offences of a similar nature.

Article 47 – Sentences passed by another Party

Parties shall take the necessary legislative or other measures to provide for the possibility of taking into account final sentences passed by another Party in relation to the offences established in accordance with this Convention when determining the sentence.

Article 48 – Prohibition of mandatory alternative dispute resolution processes or sentencing

1. Parties shall take the necessary legislative or other measures to prohibit mandatory alternative dispute resolution processes, including mediation and conciliation, in relation to all forms of violence covered by the scope of this Convention.

2. Parties shall take the necessary legislative or other measures to ensure that if the payment of a fine is ordered, due account shall be taken of the ability of the perpetrator to assume his or her financial obligations towards the victim.

CHAPTER VI – INVESTIGATION, PROSECUTION, PROCEDURAL LAW AND PROTECTIVE MEASURES

Article 49 – General obligations

1. Parties shall take the necessary legislative or other measures to ensure that investigations and judicial proceedings in relation to all forms of violence covered by the scope of this Convention are carried out without undue delay while taking into consideration the rights of the victim during all stages of the criminal proceedings.

2. Parties shall take the necessary legislative or other measures, in conformity with the fundamental principles of human rights and having regard to the gendered understanding of violence, to ensure the effective investigation and prosecution of offences established in accordance with this Convention.

Article 50 – Immediate response, prevention and protection

1. Parties shall take the necessary legislative or other measures to ensure that the responsible law enforcement agencies respond to all forms of violence covered by the scope of this Convention promptly and appropriately by offering adequate and immediate protection to victims.

2. Parties shall take the necessary legislative or other measures to ensure that the responsible law enforcement agencies engage promptly and appropriately in the prevention and protection against all forms of violence covered by the scope of this Convention, including the employment of preventive operational measures and the collection of evidence.

Article 51 – Risk assessment and risk management

1. Parties shall take the necessary legislative or other measures to ensure that an assessment of the lethality risk, the seriousness of the situation and the risk of repeated violence is carried out by all relevant authorities in order to manage the risk and if necessary to provide co-ordinated safety and support.

2. Parties shall take the necessary legislative or other measures to ensure that the assessment referred to in paragraph 1 duly takes into account, at all stages of the investigation and application of protective measures, the fact that perpetrators of acts of violence covered by the scope of this Convention possess or have access to firearms.

Article 52 – Emergency barring orders

Parties shall take the necessary legislative or other measures to ensure that the competent authorities are granted the power to order, in situations of immediate danger, a perpetrator of domestic violence to vacate the residence of the victim or person at risk for a sufficient period of time and to prohibit the perpetrator from entering the residence of or contacting the victim or person at risk. Measures taken pursuant to this article shall give priority to the safety of victims or persons at risk.

Article 53 – Restraining or protection orders

1. Parties shall take the necessary legislative or other measures to ensure that appropriate restraining or protection orders are available to victims of all forms of violence covered by the scope of this Convention.

2. Parties shall take the necessary legislative or other measures to ensure that the restraining or protection orders referred to in paragraph 1 are:

- available for immediate protection and without undue financial or administrative burdens placed on the victim;
- issued for a specified period or until modified or discharged;
- where necessary, issued on an *ex parte* basis which has immediate effect;
- available irrespective of, or in addition to, other legal proceedings;
- allowed to be introduced in subsequent legal proceedings.

3. Parties shall take the necessary legislative or other measures to ensure that breaches of restraining or protection orders issued pursuant to paragraph 1 shall be subject to effective, proportionate and dissuasive criminal or other legal sanctions.

Article 54 – Investigations and evidence

Parties shall take the necessary legislative or other measures to ensure that, in any civil or criminal proceedings, evidence relating to the sexual history and conduct of the victim shall be permitted only when it is relevant and necessary.

Article 55 – *Ex parte* and *ex officio* proceedings

1. Parties shall ensure that investigations into or prosecution of offences established in accordance with Articles 35, 36, 37, 38 and 39 of this Convention shall not be wholly dependant upon a report or complaint filed by a victim if the offence was committed in whole or in part on its territory, and that the proceedings may continue even if the victim withdraws her or his statement or complaint.

2. Parties shall take the necessary legislative or other measures to ensure, in accordance with the conditions provided for by their internal law, the possibility for governmental and non-governmental organisations and domestic violence counsellors to assist and/or support victims, at their request, during investigations and judicial proceedings concerning the offences established in accordance with this Convention.

Article 56 – Measures of protection

1. Parties shall take the necessary legislative or other measures to protect the rights and interests of victims, including their special needs as witnesses, at all stages of investigations and judicial proceedings, in particular by:

a. providing for their protection, as well as that of their families and witnesses, from intimidation, retaliation and repeat victimisation;

b. ensuring that victims are informed, at least in cases where the victims and the family might be in danger, when the perpetrator escapes or is released temporarily or definitively;

c. informing them, under the conditions provided for by internal law, of their rights and the services at their disposal and the follow-up given to their complaint, the charges, the general progress of the investigation or proceedings, and their role therein, as well as the outcome of their case;

d. enabling victims, in a manner consistent with the procedural rules of internal law, to be heard, to supply evidence and have their views, needs and concerns presented, directly or through an intermediary, and considered;

e. providing victims with appropriate support services so that their rights and interests are duly presented and taken into account;

f. ensuring that measures may be adopted to protect the privacy and the image of the victim;

g. ensuring that contact between victims and perpetrators within court and law enforcement agency premises is avoided where possible;

h. providing victims with independent and competent interpreters when victims are parties to proceedings or when they are supplying evidence;

i. enabling victims to testify, according to the rules provided by their internal law, in the courtroom without being present or at least without the presence of the alleged perpetrator, notably through the use of appropriate communication technologies, where available.

2. A child victim and child witness of violence against women and domestic violence shall be afforded, where appropriate, special protection measures taking into account the best interests of the child.

Article 57 – Legal aid

Parties shall provide for the right to legal assistance and to free legal aid for victims under the conditions provided by their internal law.

Article 58 – Statute of limitation

Parties shall take the necessary legislative and other measures to ensure that the statute of limitation for initiating any legal proceedings with regard to the offences established in accordance with Articles 36, 37, 38 and 39 of this Convention, shall continue for a period of time that is sufficient and commensurate with the gravity of the offence in question, to allow for the efficient initiation of proceedings after the victim has reached the age of majority.

CHAPTER VII – MIGRATION AND ASYLUM

Article 59 – Residence status

1. Parties shall take the necessary legislative or other measures to ensure that victims whose residence status depends on that of the spouse or partner as recognised by internal law, in the event of the dissolution of the marriage or the relationship, are granted in the event of particularly difficult circumstances, upon application, an autonomous residence permit irrespective of the duration of the marriage or the relationship. The conditions relating to the granting and duration of the autonomous residence permit are established by internal law.

2. Parties shall take the necessary legislative or other measures to ensure that victims may obtain the suspension of expulsion proceedings initiated in relation to a residence status dependent on that of the spouse or partner as recognised by internal law to enable them to apply for an autonomous residence permit.

3. Parties shall issue a renewable residence permit to victims in one of the two following situations, or in both:

a. where the competent authority considers that their stay is necessary owing to their personal situation;

b. where the competent authority considers that their stay is necessary for the purpose of their co-operation with the competent authorities in investigation or criminal proceedings.

4. Parties shall take the necessary legislative or other measures to ensure that victims of forced marriage brought into another country for the purpose of the marriage and who, as a result, have lost their residence status in the country where they habitually reside, may regain this status.

Article 60 – Gender-based asylum claims

1. Parties shall take the necessary legislative or other measures to ensure that gender-based violence against women may be recognised as a form of persecution within the meaning of Article 1, A (2), of the 1951 Convention relating to the Status of Refugees and as a form of serious harm giving rise to complementary/ subsidiary protection.

2. Parties shall ensure that a gender-sensitive interpretation is given to each of the Convention grounds and that where it is established that the persecution feared is for one or more of these grounds, applicants shall be granted refugee status according to the applicable relevant instruments.

3. Parties shall take the necessary legislative or other measures to develop gender-sensitive reception procedures and support services for asylum-seekers as well as gender guidelines and gender-sensitive asylum procedures, including refugee status determination and application for international protection.

Article 61 – Non-refoulement

1. Parties shall take the necessary legislative or other measures to respect the principle of non-refoulement in accordance with existing obligations under international law.

2. Parties shall take the necessary legislative or other measures to ensure that victims of violence against women who are in need of protection, regardless of their status or residence, shall not be returned under any circumstances to any country where their life would be at risk or where they might be subjected to torture or inhuman or degrading treatment or punishment.

CHAPTER VIII – INTERNATIONAL CO-OPERATION

Article 62 – General principles

1. Parties shall co-operate with each other, in accordance with the provisions of this Convention, and through the application of relevant international and regional instruments on co-operation in civil and criminal matters, arrangements agreed on the basis of uniform or reciprocal legislation and internal laws, to the widest extent possible, for the purpose of:

   a. preventing, combating and prosecuting all forms of violence covered by the scope of this Convention;

   b. protecting and providing assistance to victims;

   c. investigations or proceedings concerning the offences established in accordance with this Convention;

   d. enforcing relevant civil and criminal judgments issued by the judicial authorities of Parties, including protection orders.

2. Parties shall take the necessary legislative or other measures to ensure that victims of an offence established in accordance with this Convention and committed in the territory of a Party other than the one where they reside may make a complaint before the competent authorities of their State of residence.

3. If a Party that makes mutual legal assistance in criminal matters, extradition or enforcement of civil or criminal judgments imposed by another Party to this Convention conditional on the existence of a treaty receives a request for such legal co-operation from a Party with which it has not concluded such a treaty, it may consider this Convention to be the legal basis for mutual legal assistance in criminal matters, extradition or enforcement of civil or criminal judgments imposed by the other Party in respect of the offences established in accordance with this Convention.

4. Parties shall endeavour to integrate, where appropriate, the prevention and the fight against violence against women and domestic violence in assistance programmes for development provided for the benefit of third States, including by entering into bilateral and multilateral agreements with third States with a view to facilitating the protection of victims in accordance with Article 18, paragraph 5.

Article 63 – Measures relating to persons at risk

When a Party, on the basis of the information at its disposal, has reasonable grounds to believe that a person is at immediate risk of being subjected to any of the acts of violence referred to in Articles 36, 37, 38 and 39 of this Convention on the territory of another Party, the Party that has the information is encouraged to transmit it without delay to the latter for the purpose of ensuring that appropriate protection measures are taken.

Where applicable, this information shall include details on existing protection provisions for the benefit of the person at risk.

Article 64 – Information

1. The requested Party shall promptly inform the requesting Party of the final result of the action taken under this chapter. The requested Party shall also promptly inform the requesting Party of any circumstances which render impossible the carrying out of the action sought or are likely to delay it significantly.

2. A Party may, within the limits of its internal law, without prior request, forward to another Party information obtained within the framework of its own investigations when it considers that the disclosure of such information might assist the receiving Party in preventing criminal offences established in accordance with this Convention or in initiating or carrying out investigations or proceedings concerning such criminal offences or that it might lead to a request for co-operation by that Party under this chapter.

3. A Party receiving any information in accordance with paragraph 2 shall submit such information to its competent authorities in order that proceedings may be taken if they are considered appropriate, or that this information may be taken into account in relevant civil and criminal proceedings.

Article 65 – Data Protection

Personal data shall be stored and used pursuant to the obligations undertaken by the Parties under the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108).

CHAPTER IX – MONITORING MECHANISM

Article 66 – Group of experts on action against violence against women and domestic violence

1. The Group of experts on action against violence against women and domestic violence (hereinafter referred to as "GREVIO") shall monitor the implementation of this Convention by the Parties.

2. GREVIO shall be composed of a minimum of 10 members and a maximum of 15 members, taking into account a gender and geographical balance, as well as multidisciplinary expertise. Its members shall be elected by the Committee of the Parties from among candidates nominated by the Parties for a term of office of four years, renewable once, and chosen from among nationals of the Parties.

3. The initial election of 10 members shall be held within a period of one year following the entry into force of this Convention. The election of five additional members shall be held following the 25th ratification or accession.

4. The election of the members of GREVIO shall be based on the following principles:

   a. they shall be chosen according to a transparent procedure from among persons of high moral character, known for their recognised competence in the fields of human rights, gender equality, violence against women and domestic violence, or assistance to and protection of victims, or having demonstrated professional experience in the areas covered by this Convention;

   b. no two members of GREVIO may be nationals of the same State;

   c. they should represent the main legal systems;

   d. they should represent relevant actors and agencies in the field of violence against women and domestic violence;

   e. they shall sit in their individual capacity and shall be independent and impartial in the exercise of their functions, and shall be available to carry out their duties in an effective manner.

5. The election procedure of the members of GREVIO shall be determined by the Committee of Ministers of the Council of Europe, after consulting with and obtaining the unanimous consent of the Parties, within a period of six months following the entry into force of this Convention.

6. GREVIO shall adopt its own rules of procedure.

7. Members of GREVIO, and other members of delegations carrying out the country visits as set forth in Article 68, paragraphs 9 and 14, shall enjoy the privileges and immunities established in the appendix to this Convention.

Article 67 – Committee of the Parties

1. The Committee of the Parties shall be composed of the representatives of the Parties to the Convention.

2. The Committee of the Parties shall be convened by the Secretary General of the Council of Europe. Its first meeting shall be held within a period of one year following the entry into force of this Convention in order to elect the members of GREVIO. It shall subsequently meet whenever one third of the Parties, the President of the Committee of the Parties or the Secretary General so requests.

3. The Committee of the Parties shall adopt its own rules of procedure.

Article 68 – Procedure

1. Parties shall submit to the Secretary General of the Council of Europe, based on a questionnaire prepared by GREVIO, a report on legislative and other measures giving effect to the provisions of this Convention, for consideration by GREVIO.

2. GREVIO shall consider the report submitted in accordance with paragraph 1 with the representatives of the Party concerned.

3. Subsequent evaluation procedures shall be divided into rounds, the length of which is determined by GREVIO. At the beginning of each round GREVIO shall select the specific provisions on which the evaluation procedure shall be based and send out a questionnaire.

4. GREVIO shall define the appropriate means to carry out this monitoring procedure. It may in particular adopt a questionnaire for each evaluation round, which shall serve as a basis for the evaluation procedure of the implementation by the Parties. This questionnaire shall be addressed to all Parties. Parties shall respond to this questionnaire, as well as to any other request of information from GREVIO.

5. GREVIO may receive information on the implementation of the Convention from non-governmental organisations and civil society, as well as from national institutions for the protection of human rights.

6. GREVIO shall take due consideration of the existing information available from other regional and international instruments and bodies in areas falling within the scope of this Convention.

7. When adopting a questionnaire for each evaluation round, GREVIO shall take due consideration of the existing data collection and research in the Parties as referred to in Article 11 of this Convention.

8. GREVIO may receive information on the implementation of the Convention from the Council of Europe Commissioner for Human Rights, the Parliamentary Assembly and relevant specialised bodies of the Council of Europe, as well as those established under other international instruments. Complaints presented to these bodies and their outcome will be made available to GREVIO.

9. GREVIO may subsidiarily organise, in co-operation with the national authorities and with the assistance of independent national experts, country visits, if the information gained is insufficient or in cases provided for in paragraph 14. During these visits, GREVIO may be assisted by specialists in specific fields.

10. GREVIO shall prepare a draft report containing its analysis concerning the implementation of the provisions on which the evaluation is based, as well as its suggestions and proposals concerning the way in which the Party concerned may deal with the problems which have been identified. The draft report shall be transmitted for comments to the Party which undergoes the evaluation. Its comments shall be taken into account by GREVIO when adopting its report.

11. On the basis of all the information received and the comments by the Parties, GREVIO shall adopt its report and conclusions concerning the measures taken by the Party concerned to implement the provisions of this Convention. This report and the conclusions shall be sent to the Party concerned and to the Committee of the Parties. The report and conclusions of GREVIO shall be made public as from their adoption, together with eventual comments by the Party concerned.

12. Without prejudice to the procedure of paragraphs 1 to 8, the Committee of the Parties may adopt, on the basis of the report and conclusions of GREVIO, recommendations addressed to this Party (a) concerning the measures to be taken to implement the conclusions of GREVIO, if necessary setting a date for submitting information on their implementation, and (b) aiming at promoting co-operation with that Party for the proper implementation of this Convention.

13. If GREVIO receives reliable information indicating a situation where problems require immediate attention to prevent or limit the scale or number of serious violations of the Convention, it may request the urgent

submission of a special report concerning measures taken to prevent a serious, massive or persistent pattern of violence against women.

14. Taking into account the information submitted by the Party concerned, as well as any other reliable information available to it, GREVIO may designate one or more of its members to conduct an inquiry and to report urgently to GREVIO. Where warranted and with the consent of the Party, the inquiry may include a visit to its territory.

15. After examining the findings of the inquiry referred to in paragraph 14, GREVIO shall transmit these findings to the Party concerned and, where appropriate, to the Committee of the Parties and the Committee of Ministers of the Council of Europe together with any comments and recommendations.

Article 69 – General recommendations

GREVIO may adopt, where appropriate, general recommendations on the implementation of this Convention.

Article 70 – Parliamentary involvement in monitoring

1. National parliaments shall be invited to participate in the monitoring of the measures taken for the implementation of this Convention.

2. Parties shall submit the reports of GREVIO to their national parliaments.

3. The Parliamentary Assembly of the Council of Europe shall be invited to regularly take stock of the implementation of this Convention.

CHAPTER X – RELATIONSHIP WITH OTHER INTERNATIONAL INSTRUMENTS

Article 71 – Relationship with other international instruments

1. This Convention shall not affect obligations arising from other international instruments to which Parties to this Convention are Parties or shall become Parties and which contain provisions on matters governed by this Convention.

2. The Parties to this Convention may conclude bilateral or multilateral agreements with one another on the matters dealt with in this Convention, for purposes of supplementing or strengthening its provisions or facilitating the application of the principles embodied in it.

CHAPTER XI – AMENDMENTS TO THE CONVENTION

Article 72 – Amendments

1. Any proposal for an amendment to this Convention presented by a Party shall be communicated to the Secretary General of the Council of Europe and forwarded by her or him to the member States of the Council of Europe, any signatory, any Party, the European Union, any State invited to sign this Convention in accordance with the provisions of Article 75, and any State invited to accede to this Convention in accordance with the provisions of Article 76.

2. The Committee of Ministers of the Council of Europe shall consider the proposed amendment and, after having consulted the Parties to this Convention that are not members of the Council of Europe, may adopt the amendment by the majority provided for in Article 20.d of the Statute of the Council of Europe.

3. The text of any amendment adopted by the Committee of Ministers in accordance with paragraph 2 shall be forwarded to the Parties for acceptance.

4. Any amendment adopted in accordance with paragraph 2 shall enter into force on the first day of the month following the expiration of a period of one month after the date on which all Parties have informed the Secretary General of their acceptance.

CHAPTER XII – FINAL CLAUSES

Article 73 – Effects of this Convention

The provisions of this Convention shall not prejudice the provisions of internal law and binding international instruments which are already in force or may come into force, under which more favourable rights are or would be accorded to persons in preventing and combating violence against women and domestic violence.

Article 74 – Dispute settlement

1. The Parties to any dispute which may arise concerning the application or interpretation of the provisions of this Convention shall first seek to resolve it by means of negotiation, conciliation, arbitration or by any other methods of peaceful settlement accepted by mutual agreement between them.

2. The Committee of Ministers of the Council of Europe may establish procedures of settlement to be available for use by the Parties in dispute if they should so agree.

Article 75 – Signature and entry into force

1. This Convention shall be open for signature by the member States of the Council of Europe, the non-member States which have participated in its elaboration and the European Union.

2. This Convention is subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

3. This Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date on which 10 signatories, including at least eight member States of the Council of Europe, have expressed their consent to be bound by the Convention in accordance with the provisions of paragraph 2.

4. In respect of any State referred to in paragraph 1 or the European Union, which subsequently expresses its consent to be bound by it, the Convention 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 its instrument of ratification, acceptance or approval.

Article 76 – Accession to the Convention

1. After the entry into force of this Convention, the Committee of Ministers of the Council of Europe may, after consultation of the Parties to this Convention and obtaining their unanimous consent, invite any non-member State of the Council of Europe, which has not participated in the elaboration of the Convention, to accede to this Convention by a decision taken by the majority provided for in Article 20.d of the Statute of the Council of Europe, and by unanimous vote of the representatives of the Parties entitled to sit on the Committee of Ministers.

2. In respect of any acceding State, the Convention 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 of the instrument of accession with the Secretary General of the Council of Europe.

Article 77 – Territorial application

1. Any State or the European Union 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 Convention shall apply.

2. Any Party may, at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Convention to any other territory specified in the declaration and for whose international relations it is responsible or on whose behalf it is authorised to give undertakings. In respect of such territory, the Convention 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 of the Council of Europe. 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 78 – Reservations

1. No reservation may be made in respect of any provision of this Convention, with the exceptions provided for in paragraphs 2 and 3.

2. Any State or the European Union may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, by a declaration addressed to the Secretary General of the

Council of Europe, declare that it reserves the right not to apply or to apply only in specific cases or conditions the provisions laid down in:

- Article 30, paragraph 2;
- Article 44, paragraphs 1.e, 3 and 4;
- Article 55, paragraph 1 in respect of Article 35 regarding minor offences;
- Article 58 in respect of Articles 37, 38 and 39;
- Article 59.

3. Any State or the European Union may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, by a declaration addressed to the Secretary General of the Council of Europe, declare that it reserves the right to provide for non-criminal sanctions, instead of criminal sanctions, for the behaviours referred to in Articles 33 and 34.

4. Any Party may wholly or partly withdraw a reservation by means of a declaration addressed to the Secretary General of the Council of Europe. This declaration shall become effective as from its date of receipt by the Secretary General.

Article 79 – Validity and review of reservations

1. Reservations referred to in Article 78, paragraphs 2 and 3, shall be valid for a period of five years from the day of the entry into force of this Convention in respect of the Party concerned. However, such reservations may be renewed for periods of the same duration.

2. Eighteen months before the date of expiry of the reservation, the Secretariat General of the Council of Europe shall give notice of that expiry to the Party concerned. No later than three months before the expiry, the Party shall notify the Secretary General that it is upholding, amending or withdrawing its reservation. In the absence of a notification by the Party concerned, the Secretariat General shall inform that Party that its reservation is considered to have been extended automatically for a period of six months. Failure by the Party concerned to notify its intention to uphold or modify its reservation before the expiry of that period shall cause the reservation to lapse.

3. If a Party makes a reservation in conformity with Article 78, paragraphs 2 and 3, it shall provide, before its renewal or upon request, an explanation to GREVIO, on the grounds justifying its continuance.

Article 80 – Denunciation

1. Any Party may, at any time, denounce this Convention 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.

Article 81 – Notification

The Secretary General of the Council of Europe shall notify the member States of the Council of Europe, the non-member States which have participated in its elaboration, any signatory, any Party, the European Union, and any State invited to accede to this Convention 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 Convention in accordance with Articles 75 and 76;
d. any amendment adopted in accordance with Article 72 and the date on which such an amendment enters into force;
e. any reservation and withdrawal of reservation made in pursuance of Article 78;
f. any denunciation made in pursuance of the provisions of Article 80;
g. any other act, notification or communication relating to this Convention.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at Istanbul, this 11th day of May 2011, 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, to the non-member States which have participated in the elaboration of this Convention, to the European Union and to any State invited to accede to this Convention.

APPENDIX – PRIVILEGES AND IMMUNITIES (ARTICLE 66)

1. This appendix shall apply to the members of GREVIO mentioned in Article 66 of the Convention, as well as to other members of the country visit delegations. For the purpose of this appendix, the term "other members of the country visit delegations" shall include the independent national experts and the specialists mentioned in Article 68, paragraph 9, of the Convention, staff members of the Council of Europe and interpreters employed by the Council of Europe accompanying GREVIO during its country visits.

2. The members of GREVIO and the other members of the country visit delegations shall, while exercising their functions relating to the preparation and the carrying out of country visits, as well as the follow-up thereto, and travelling in connection with those functions, enjoy the following privileges and immunities:

   a. immunity from personal arrest or detention and from seizure of their personal baggage, and immunity from legal process of every kind in respect of words spoken or written and all acts performed by them in their official capacity;

   b. exemption from any restrictions on their freedom of movement on exit from and return to their country of residence, and entry into and exit from the country in which they exercise their functions, and from alien registration in the country which they are visiting or through which they are passing in the exercise of their functions.

3. In the course of journeys undertaken in the exercise of their functions, the members of GREVIO and the other members of the country visit delegations shall, in the matter of customs and exchange control, be accorded the same facilities as those accorded to representatives of foreign governments on temporary official duty.

4. The documents relating to the evaluation of the implementation of the Convention carried by members of GREVIO and other members of the country visit delegations shall be inviolable insofar as they concern the activity of GREVIO. No stoppage or censorship shall be applied to the official correspondence of GREVIO or to official communications of members of GREVIO and other members of the country visit delegations.

5. In order to secure for the members of GREVIO and the other members of the country visit delegations complete freedom of speech and complete independence in the discharge of their duties, the immunity from legal process in respect of words spoken or written and all acts done by them in discharging their duties shall continue to be accorded, notwithstanding that the persons concerned are no longer engaged in the discharge of such duties.

6. Privileges and immunities are granted to the persons mentioned in paragraph 1 of this appendix in order to safeguard the independent exercise of their functions in the interests of GREVIO and not for their personal benefit. The waiver of immunities of the persons mentioned in paragraph 1 of this appendix shall be made by the Secretary General of the Council of Europe in any case where, in his or her opinion, the immunity would impede the course of justice and where it can be waived without prejudice to the interests of GREVIO.

Council of Europe Convention on preventing and combating violence against women and domestic violence – CETS No. 210

Explanatory Report

I. INTRODUCTION

1. Violence against women, including domestic violence, is one of the most serious forms of gender-based violations of human rights in Europe that is still shrouded in silence. Domestic violence – against other victims such as children, men and the elderly – is also a hidden phenomenon which affects too many families to be ignored.

2. Prevalence rates for Europe do not exist, but many member states have increasingly conducted surveys to measure the extent of violence against women nationally. Although methodologies vary, an overview of these surveys suggests that across countries, one-fifth to one-quarter of all women have experienced physical violence at least once during their adult lives and more than one-tenth have suffered sexual violence involving the use of force. Figures for all forms of violence, including stalking, are as high as 45%. The majority of such violent acts are carried out by men in their immediate social environment, most often by partners and ex-partners.

3. Secondary data analysis support a conservative estimate that about 12% to 15% of all women have been in a relationship of domestic abuse after the age of 16. Many more continue to suffer physical and sexual violence from former partners even after the break-up, indicating that, for a large number of women, ending an abusive relationship does not necessarily mean physical safety.

4. Domestic violence against children is widespread and studies have revealed the link between domestic violence against women and child physical abuse, as well as the trauma that witnessing violence in the home causes in children. For other forms of domestic violence, such as elderly abuse and domestic violence against men, reliable data is relatively scarce.

5. Violence against women is a worldwide phenomenon. The Committee on the Elimination of Discrimination against Women (CEDAW Committee) of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (hereafter CEDAW) in its general recommendation on violence against women No. 19 (1992) helped to ensure the recognition of gender-based violence against women as a form of discrimination against women. The United Nations General Assembly, in 1993, adopted a Declaration on the Elimination of Violence against Women that laid the foundation for international action on violence against women. In 1995, the Beijing Declaration and Platform for Action identified the eradication of violence against women as a strategic objective among other gender equality requirements. In 2006, the UN Secretary-General published his In-depth study on all forms of violence against women, in which he identified the manifestations and international legal frameworks relating to violence against women, and also compiled details of "promising practices" which have shown some success in addressing this issue.

6. As a regional instrument open for ratification and accession to non-member states, the Council of Europe Convention on preventing and combating violence against women and domestic violence complements and expands the standards set by other regional human rights organisations in this field. The Inter-American Convention on the prevention, punishment and eradication of violence against women, adopted in 1994 by the Organisation of American States, and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted in 2003 by the African Union, both address the issue of violence against women. More comprehensive in nature, the Council of Europe Convention significantly reinforces action to prevent and combat violence against women and domestic violence at world level.

ACTION OF THE COUNCIL OF EUROPE

7. One of the primary concerns of the Council of Europe, representing 47 member states and their 800 million citizens, is to safeguard and protect human rights. Violence against women, including domestic violence, undermines the core values on which the Council of Europe is based.

8. Since the 1990ies, the Council of Europe, in particular its Steering Committee for Equality between Women and Men (CDEG), has undertaken a series of initiatives to promote the protection of women against violence. In 1993, the 3rd European Ministerial Conference on Equality between Women and Men was devoted to *Strategies for the elimination of violence against women in society: the media and other means*.

9. An Action Plan to Combat Violence against Women which had subsequently been developed provided the first comprehensive policy framework for national administrations. This was followed up in 2002 by the adoption of Council of Europe Recommendation Rec(2002)5 of the Committee of Ministers to member states on the protection of women against violence. It represents a milestone in that it proposes, for the first time in Europe, a comprehensive strategy for the prevention of violence against women and the protection of victims in all Council of Europe member states. Since 2002, it has served as the most important reference text for member states in combating violence against women. Its implementation is regularly monitored by means of a monitoring framework to evaluate progress. Several monitoring cycles were completed and their outcome assessed and published. They showed that, in particular in the areas of legislation, police investigation and prosecution much had been done to enhance the criminal law response to violence against women. Nonetheless, many gaps remain. In other areas, notably the provision of services for victims, signs of progress are scarce.

10. To give new impetus to the eradication of violence against women, and to reaffirm their commitment to this aim, the Heads of State and Government of the Council of Europe member states decided at their Third Summit (Warsaw, 16-17 May 2005) to carry out a large-scale campaign on the issue, devised and closely monitored by the Council of Europe Task Force to Combat Violence against Women, including Domestic Violence, whose members were appointed by the Secretary General of the Council of Europe.

11. The Campaign was conducted at three levels: intergovernmental, parliamentary and local. Member states were asked to make significant progress in four main areas: legal and policy measures, support and protection for victims, data collection and awareness-raising. They were also invited to carry out national campaigns to lobby for stronger implementation of Recommendation Rec(2002)5 on the protection of women against violence, which more than half the member states did.

12. Thanks to the unique role of the Parliamentary Assembly of the Council of Europe, comprising delegations from all 47 national parliaments, there was a strong parliamentary dimension to the Campaign. Many parliamentarians have, individually and jointly, pushed for changes in legislation to protect women from gender-based violence. By organising parliamentary debates and hearings on violence against women, but also in interviews and public statements, parliamentarians have greatly contributed to raising awareness of this topic. Parliamentarians in many member states continue to actively lobby for change and have created a "Network of Contact Parliamentarians" who are committed to combating violence against women at national level.

13. The campaign revealed the magnitude of the problem in Europe, but it also brought to light examples of good practice and initiatives in many different member states. It increased awareness among key actors and helped place the various forms of violence against women on the political agenda.

14. Furthermore, the assessment of national measures to address violence against women carried out by the Task Force showed the need for harmonised legal standards and the collection of relevant data to ensure that victims across Europe benefit from the same level of protection and support. The Task Force therefore

recommended in its Final Activity Report (EG-TFV (2008) 6), that the Council of Europe develop a human rights convention to prevent and combat violence against women.

15. Moreover, the European Ministers of Justice decided during their 27th Conference (Yerevan, Armenia, 12-13 October 2006), to assess the need for a Council of Europe legal instrument on violence against the partner, while being aware that such violence can be based on discriminating prejudices in terms of inequalities resulting from gender, origins and economic dependency. Following the results of the "Feasibility study for a convention on against domestic violence" (CDPC (2007)09 rev), it was concluded by the European Committee for Crime Problems (CDPC) that such an instrument would be necessary.

16. The Parliamentary Assembly has long taken a firm political stance against all forms of violence against women. It has adopted a number of resolutions and recommendations on the various forms of violence against women; in particular, Resolution 1247 (2001) on female genital mutilation, Resolution 1582 (2002) on domestic violence, Resolution 1327 (2003) on so-called "honour crimes", Recommendation 1723 (2005) on forced marriages and child marriages, Recommendation 1777 (2007) on sexual assaults linked to "date-rape drugs" and, more recently, Resolution 1654 (2009) on Feminicides and Resolution 1691 (2009) on rape of women, including marital rape.

17. The Parliamentary Assembly has repeatedly called for legally-binding standards on preventing, protecting against and prosecuting the most severe and widespread forms of gender-based violence and has expressed its support to the drafting of the Council of Europe Convention on preventing and combating violence against women and domestic violence.

THE COUNCIL OF EUROPE CONVENTION ON PREVENTING AND COMBATING VIOLENCE AGAINST WOMEN AND DOMESTIC VIOLENCE

18. In response to the recommendations by the Task Force to develop a convention on violence against women and the results of the feasibility study on a convention on violence against the partner, the Committee of Ministers decided to set up a multi-disciplinary committee mandated to develop legally-binding standards that would cover both these areas: violence against women and domestic violence.

19. As a result, the Ministers' Deputies of the Council of Europe adopted, at their 1044th meeting on 10 December 2008, the terms of reference for the Ad Hoc Committee on Preventing and Combating Violence against Women and Domestic Violence (CAHVIO) to prepare one or more legally binding instrument[s] "to prevent and combat domestic violence, including specific forms of violence against women, other forms of violence against women, and to protect and support the victims of such violence as well as prosecute the perpetrators". The Deputies also requested that CAHVIO "present, by 30 June 2009, an interim report on its position on the subjects and contents of the proposed instrument(s), its working methods and the time table for its work, in order to allow the Committee of Ministers to take a decision, where necessary, on these matters". The interim report reflected the opinion of the Committee that the focus of the Convention was to be on the elimination of violence against women. Furthermore, the Convention would deal with domestic violence which affects women disproportionately, while allowing for the application of its provisions to all victims of domestic violence. At its 1062nd meeting of 1 July 2009, the Deputies "took note of the interim report (…)" and "invited the CAHVIO to continue its work in accordance with the work programme and timetable set out in the interim report and, in particular, to prepare the instruments proposed in the report". On that basis, in December 2009, CAHVIO started negotiations on the Convention on preventing and combating violence against women and domestic violence. CAHVIO held six meetings, in December 2009 and February, June/July, September, November and December 2010 to finalise the text.

20. The text of the draft convention was approved by the CAHVIO during its meeting in December 2010 and transmitted to the Committee of Ministers for submission to the Parliamentary Assembly for opinion. On 11 March 2011, the Parliamentary Assembly gave its opinion on the draft convention.

21. Building on Recommendation Rec(2002)5 on the protection of women against violence, the Convention sets, for the first time in Europe, legally-binding standards to prevent violence against women and domestic violence, protect its victims and punish the perpetrators. It fills a significant gap in human rights protection for women and encourages Parties to extend its protection to all victims of domestic violence. It nonetheless frames the eradication of violence against women in the wider context of achieving substantive equality between women and men and thus significantly furthers recognition of violence against women as a form of discrimination.

II. COMMENTARY ON THE PROVISIONS OF THE CONVENTION

Preamble

22. The Preamble reaffirms the commitment of the signatories to human rights and fundamental freedoms. It recalls only the most important international legal instruments which directly deal with the scope of this Convention in the framework of the Council of Europe and the United Nations.

23. During the negotiation process of this Convention, these international legal instruments, in particular those prepared by the Council of Europe, have been taken into account. In addition, the drafters bore in mind the following recommendations of the Council of Europe Parliamentary Assembly: Recommendation 1450 (2000) on Violence against women in Europe, Recommendation 1582 (2002) on Domestic violence against women, Recommendation 1723 (2005) on Forced marriages and child marriages, Recommendation 1759 (2006) on Parliaments united in combating domestic violence against women, Recommendation 1777 (2007) on Sexual assaults linked to "date-rape drugs", Recommendation 1817 (2007) on Parliaments united in combating domestic violence against women: mid-term assessment of the Campaign, Recommendation 1847 (2008) on Combating violence against women: towards a Council of Europe convention, Recommendation 1873 (2009) on Sexual violence against women in armed conflict, Recommendation 1868 (2009) on Action to combat gender-based human rights violations, including abduction of women and girls, Recommendation 1861 (2009) on Feminicides, Recommendation 1881 (2009) on the urgent need to combat so-called 'honour crimes', Recommendation 1887 (2009) on Rape of women, including marital rape, Recommendation 1891 (2009) on Migrant women: at particular risk from domestic violence and Recommendation 1905 (2010) on Children who witness domestic violence. Similarly, the drafters took into consideration Recommendation 260(2009) Combating domestic violence against women and Resolution 279(2009) Combating domestic violence against women of the Congress of Local and Regional Authorities of the Council of Europe.

24. Furthermore, the negotiations were inspired by the following political declarations:

a. the Declaration and Programme of Action adopted at the 5th European Ministerial Conference on Equality between Women and Men (Skopje, 22-23 January 2003);

b. the Action Plan adopted at the Third Summit of the Heads of State and Government of the Council of Europe (Warsaw, 16-17 May 2005);

c. the Declaration "Making gender equality a reality" adopted by the Committee of Ministers of the Council of Europe (Madrid, 12 May 2009);

d. the Resolution no. 1 on preventing and responding to domestic violence adopted at the 29th Council of Europe Conference of Ministers of Justice (Tromsø, Norway, 18-19 June 2009);

e. the Action Plan and Resolution adopted at the 7th Council of Europe Conference of Ministers responsible for Equality between Women and Men (Baku, 24-25 May 2010);

f. the Beijing Declaration and Platform for Action adopted at the Fourth World Conference of Women in 1995, the report of the Ad Hoc Committee of the whole of the 23rd special session of the United Nations General Assembly (Beijing + 5 – political declaration and outcome document) as well as the political declaration from the 49th session of the United Nations Commission on the Status of Women in 2005 (Beijing + 10) and 54th session of the United Nations Commission on the Status of Women in 2010 (Beijing + 15) and Women 2000: Gender Equality, Development and Peace for the 21st Century.

25. The Preamble sets out the basic aim of the Convention: the creation of a Europe free from violence against women and domestic violence. To this end, it firmly establishes the link between achieving gender equality and the eradication of violence against women. Based on this premise, it recognises the structural nature of violence against women and that it is a manifestation of the historically unequal power relations between women and men. Consequently, the Preamble sets the scene for a variety of measures contained in the Convention that frame the eradication of violence against women within the wider context of combating discrimination against women and achieving gender equality in law and in fact. It should also be noted that the term "discrimination against women" should be interpreted as constituting "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field" as provided in Article 1 of CEDAW. At the same time the drafters wished to

acknowledge that violence against women and domestic violence may be explained and understood in various manners at structural, group and individual levels. Violence against women and domestic violence are complex phenomena and it is necessary to use a variety of approaches in combination with each other in order to understand them.

26. The drafters wished to emphasise that violence against women seriously violates and impairs or nullifies the enjoyment by women of their human rights, in particular their fundamental rights to life, security, freedom, dignity and physical and emotional integrity, and that it therefore cannot be ignored by governments. Moreover, they recognised that violence affects not only women adversely, but society as a whole and that urgent action is therefore required. Finally, they stressed the fact that some groups of women, such as women and girls with disabilities, are often at greater risk of experiencing violence, injury, abuse, neglect or negligent treatment, maltreatment or exploitation, both within and outside the home.

27. In addition to affirming that violence against women, including domestic violence against women, is a distinctly gendered phenomenon, the signatories clearly recognise that men and boys may also be victims of domestic violence and that this violence should also be addressed. Where children are concerned, it is acknowledged that they do not need to be directly affected by the violence to be considered victims but that witnessing domestic violence is also traumatising and therefore sufficient to victimise them.

28. The drafters wished to stress that the obligations contained in this Convention do not require Parties to take measures that run counter to constitutional rules or fundamental principles relating to the freedom of the press and the freedom of expression in other media.

29. It is important to note that the measures contained in the Convention are without prejudice to the positive obligations on states to protect the rights recognised by the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter ECHR). Measures should also take into account the growing body of case law of the European Court of Human Rights which sets important standards in the field of violence against women, and which provided guidance to the drafters for the elaboration of numerous positive obligations and measures needed to prevent such violence.

CHAPTER I – PURPOSES, DEFINITIONS, EQUALITY AND NON-DISCRIMINATION, GENERAL OBLIGATIONS

Article 1 – Purposes of the Convention

30. Paragraph 1 sets out the purposes of the Convention. Paragraph 1 (a) states as the specific purpose of the Convention the protection of women against all forms of violence, as well as the prevention, prosecution and elimination of violence against women and domestic violence.

31. In line with the recognition contained in the preamble that there is a link between eradicating violence against women and achieving gender equality in law and in fact , paragraph 1 (b) specifies that the Convention will contribute to the elimination of all forms of discrimination against women and promote substantive equality between women and men. The drafters considered it essential to clearly state this as one of the purposes of the Convention.

32. Paragraph 1 (c) reflects the need for a comprehensive approach to the protection of and assistance to all victims of violence against women and domestic violence. The forms of violence covered by the scope of this Convention have devastating consequences on victims. It is necessary to design a comprehensive framework to not only ensure their further safety, re-establish their physical and psychological health but to also enable them to re-build their lives. This framework should be grounded on a human-rights based approach.

33. Paragraph 1 (d) deals with international co-operation, about which Chapter VIII contains details. International co-operation is not confined to legal co-operation in criminal and civil matters but extends to the exchange of information to prevent criminal offences established under the Convention and to ensure protection from immediate harm.

34. Eliminating violence requires extensive multi-agency co-operation as part of an integrated approach. Ensuring this approach to preventing and combating violence is stated as the final purpose of the Convention in Paragraph 1 (e). It is further developed in Chapter II and other sections of the Convention.

35. Paragraph 2 underlines that, in order to ensure the effective implementation of its provisions by the Parties, the Convention sets up a special monitoring mechanism. This is a means of ensuring Parties' compliance with the Convention and is a guarantee of the Convention's long-term effectiveness (see comments on Chapter IX).

Article 2 – Scope of the Convention

36. Paragraph 1 states that the focus of this Convention is on all forms of violence against women which includes domestic violence committed against women. The drafters considered it important to emphasise that the majority of victims of domestic violence are women.

37. The provision contained in paragraph 2 on the scope of the Convention encourages Parties to apply this Convention also to domestic violence committed against men and children. It is therefore up to the Parties to decide whether to extend the applicability of the Convention to these victims. They may do so in the manner they consider the most appropriate, taking notably account of the specific national situation and of the developments in their society. However, with a view to keeping the focus on the various forms of gender-based violence committed against women, paragraph 2 requires Parties to pay particular attention to victims of this form of violence when implementing the Convention. This means that gender-based violence against women, in its various manifestations, one of which is domestic violence, must lie at the heart of all measures taken in implementation of the Convention.

38. The basic principles of international humanitarian law and the Rome Statute of the International Criminal Court, which are referred to in the Preamble to the Convention, affirm individual criminal responsibility under international law for violence that occurs primarily (but not exclusively) during armed conflict. Article 7 of the Rome Statute (crimes against humanity committed as part of a widespread or systematic attack directed against any civilian population) and Article 8 (war crimes) include crimes of violence committed largely against women such as rape and sexual violence. However, the forms of violence covered by the present Convention do not cease during armed conflict or periods of occupation. Paragraph 3 therefore provides for the continued applicability of the Convention during armed conflict as complementary to the principles of international humanitarian law and international criminal law.

Article 3 – Definitions

39. Article 3 provides several definitions which are applicable throughout the Convention.

Definition of "violence against women"

40. The definition of "violence against women" makes clear that, for the purpose of the Convention, violence against women shall be understood to constitute a violation of human rights and a form of discrimination. This is in line with the purpose of the Convention set out in Article 1 (b) and needs to be borne in mind when implementing the Convention. The second part of the definition is the same as contained in Council of Europe Recommendation Rec(2002) 5 of the Committee of Ministers to member states on the protection of women against violence, the CEDAW Committee General Recommendation No. 19 on violence against women (1992), as well as in Article 1 of the United Nations Declaration on the Elimination of All Forms of Violence against Women. The drafters have, however, expanded it to include the notion of "economic harm" which can be related to psychological violence.

Definition of "domestic violence"

41. Article 3 (b) provides a definition of domestic violence that covers acts of physical, sexual, psychological or economic violence between members of the family or domestic unit, irrespective of biological or legal family ties. In line with what is mentioned in paragraph 40, economic violence can be related to psychological violence. Domestic violence includes mainly two types of violence: intimate-partner violence between current or former spouses or partners and inter-generational violence which typically occurs between parents and children. It is a gender neutral definition that encompasses victims and perpetrators of both sexes.

42. Domestic violence as intimate-partner violence includes physical, sexual, psychological or economic violence between current or former spouses as well as current or former partners. It constitutes a form of violence which affects women disproportionately and which is therefore distinctly gendered. Although the term "domestic" may appear to limit the context of where such violence can occur, the drafters recognised that the violence often continues after a relationship has ended and therefore agreed that a joint residence of the victim and perpetrator is not required. Inter-generational domestic violence includes physical, sexual, psychological and economic violence by a person against her or his child or parent (elderly abuse) or such violence between any other two or more family members of different generations. Again, a joint residence of the victim and perpetrator is not required.

Definition of "gender"

43. As the Convention places the obligation to prevent and combat violence against women within the wider framework of achieving equality between women and men, the drafters considered it important to define the term "gender". In the context of this Convention, the term gender, based on the two sexes, male and female, explains that there are also socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men. Research has shown that certain roles or stereotypes reproduce unwanted and harmful practices and contribute to make violence against women acceptable. To overcome such gender roles, Article 12 (1) frames the eradication of prejudices, customs, traditions and other practices which are based on the idea of the inferiority of women or on stereotyped gender roles as a general obligation to prevent violence. Elsewhere, the Convention calls for a gendered understanding of violence against women and domestic violence as a basis for all measures to protect and support victims. This means that these forms of violence need to be addressed in the context of the prevailing inequality between women and men, existing stereotypes, gender roles and discrimination against women in order to adequately respond to the complexity of the phenomenon. The term "gender" under this definition is not intended as a replacement for the terms "women" and "men" used in the Convention.

Definition of "gender-based violence against women"

44. The term "gender-based violence against women" is used throughout the Convention and refers to violence that is directed against a woman because she is a woman or that affects women disproportionately. It differs from other types of violence in that the victim's gender is the primary motive for the acts of violence described under lit.a. In other words, gender-based violence refers to any harm that is perpetrated against a woman and that is both the cause and the result of unequal power relations based on perceived differences between women and men that lead to women's subordinate status in both the private and public spheres. This type of violence is deeply rooted in the social and cultural structures, norms and values that govern society, and is often perpetuated by a culture of denial and silence. The use of the expression "gender-based violence against women" in this Convention is understood as equivalent to the expression "gender-based violence" used in the CEDAW Committee General Recommendation No. 19 on violence against women (1992), the United Nations General Assembly Declaration on the Elimination of Violence against Women (1993) and Recommendation Rec(2002)5 of the Committee of Ministers of the Council of Europe to member states on the protection of women against violence (2002). This expression is to be understood as aimed at protecting women from violence resulting from gender stereotypes, and specifically encompasses women.

Definition of "victim"

45. The Convention contains a large number of references to victims. The term "victim" refers to both victims of violence against women, and victims of domestic violence, as defined in Article 3 (a) and Article 3 (b) respectively. While only women, including girls, can be victims of violence against women, victims of domestic violence may include men and women as well as children. In line with other international human rights treaties, the term "child" shall mean any person under the age of eighteen years. The term "victim" should be understood in accordance with the scope of the Convention.

Definition of "women"

46. Conscious of the fact that many of the forms of violence covered by the Convention are perpetrated against both women and girls, the drafters did not intend to limit the applicability of the Convention to adult victims only. Lit.f. therefore clearly states that the term "women" includes girls under the age of eighteen years.

47. This Convention is an agreement between states, which would create obligations only for them. The provisions contained in Articles 3 and 4 do not create any new rights but clarify existing human rights. Any obligations for individuals would follow from such legislative and other measures which Parties adopt in accordance with the Convention.

Article 4 – Fundamental rights, equality and non-discrimination

48. Paragraph 1 states the principle that every person has the right to live free from violence in the public and the private sphere. With a view to the focus of the Convention, the drafters considered it important to include the particular obligation to promote and protect this right for women which are predominantly victims of gender-based violence.

49. Discrimination against women provides a breeding ground for tolerance towards violence against women. Any measures taken to prevent and combat violence against women need to promote equality between women and men as only substantive equality will prevent such violence in the future. In the Opuz v. Turkey judgment, the European Court of Human Rights has discussed the interconnection between discrimination and violence against women and has held that gender-based violence constitutes a form of discrimination because it mainly affects women and women were not protected by the law on an equal footing with men.

50. For these reasons, paragraph 2 affirms the principle of substantive equality between women and men by requiring Parties to not only condemn all forms of discrimination against women, but to enshrine the principle of equality in law, ensure its practical realisation as well as prohibit discrimination by law and abolish any discriminatory legislation and practices. It recognises that the enjoyment of the right to be free from violence is interconnected with the Parties' obligation to secure equality between women and men to exercise and enjoy all civil, political, economic, social and cultural rights as set out in the human rights instruments of the Council of Europe, particularly the ECHR and its Protocols and the European Social Charter, and other international instruments, particularly CEDAW, to which they are Parties.

51. It is important to note that this paragraph provides Parties with two options to meet the requirement of enshrining in law the principle of equality between women and men: a constitutional amendment or its embodiment in other legislative act. Furthermore, the obligation to ensure the practical realisation of equality between women and men addresses the fact that enshrining it in law is often insufficient and that practical measures are required to implement this principle in a meaningful way.

52. Paragraph 3 prohibits discrimination in Parties' implementation of the Convention. The meaning of discrimination is identical to that given to it under Article 14 of the ECHR. The list of non-discrimination grounds draws on that in Article 14 ECHR as well as the list contained in Protocol No. 12 to the ECHR. It is worth pointing out that the European Court of Human Rights has applied Article 14 to discrimination grounds not explicitly mentioned in that provision (see, for example, as concerns the ground of sexual orientation, the judgment of 21 December 1999 in *Salgueiro da Silva Mouta v. Portugal*).

53. In light of this case law, the drafters wished to add the following non-discrimination grounds which are of great relevance to the subject-matter of the Convention: gender, sexual orientation, gender identity, age, state of health, disability, marital status, and migrant or refugee status or other status, meaning that this is an open-ended list. Research into help-seeking behaviour of victims of violence against women and domestic violence, but also into the provision of services in Europe shows that discrimination against certain groups of victims is still wide-spread. Women may still experience discrimination at the hands of law enforcement agencies or the judiciary when reporting an act of gender-based violence. Similarly, gay, lesbian and bisexual victims of domestic violence are often excluded from support services because of their sexual orientation. Certain groups of individuals may also experience discrimination on the basis of their gender identity, which in simple terms means that the gender they identify with is not in conformity with the sex assigned to them at birth. This includes categories of individuals such as transgender or transsexual persons, cross-dressers, transvestites and other groups of persons that do not correspond to what society has established as belonging to "male" or "female" categories. Furthermore, migrant and refugee women may also be excluded from support services because of their residence status. It is important to point out that women tend to experience multiple forms of discrimination as may be the case of women with disabilities or/and women of ethnic minorities, Roma, or women with HIV/AIDS infection, to name a few. This is no different when they become victims of gender-based violence.

54. The extent of the prohibition on discrimination contained in paragraph 3 is much more limited than the prohibition of discrimination against women contained in paragraph 2 of this article. It requires Parties to refrain from discrimination in the implementation of the provisions of this Convention, whereas paragraph 2 calls on Parties to condemn discrimination in areas beyond the remit of the Convention.

55. Paragraph 4 refers to special measures which a Party to the Convention may wish to take to enhance the protection of women from gender-based violence – measures which would benefit women only. This provision does not overrule the general prohibition of discrimination. Drawing on Article 4 of CEDAW, this paragraph stipulates that special measures which aim at preventing and protecting women from gender-based violence and which do not address men do not constitute a form of discrimination. This is in line with the concept of discrimination as interpreted by the European Court of Human Rights in its case law concerning Article 14 ECHR. In particular, this case law has made clear that not every distinction or difference of treatment amounts to discrimination. As the Court has stated, for example in the *Abdulaziz, Cabales and Balkandali v. the United Kingdom* judgment, "a difference of treatment is discriminatory if it has no objective and reasonable justification, that is, if it does not pursue a legitimate aim or if there is not a reasonable relationship

of proportionality between the means employed and the aim sought to be realised". The fact that women experience gender-based violence, including domestic violence, to a significantly larger extent than men can be considered an objective and reasonable justification to employ resources and take special measures for the benefit of women victims only.

56. See also paragraph 47.

Article 5 – State obligations and due diligence

57. Under international law a state is responsible for the commission of an internationally wrongful act which is attributable to it, through the conduct of their agents such as the police, immigration officials and prison officers. This principle is set out in the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts (2001), which are widely accepted as customary international law. Under international human rights law, the state has both negative duties and positive duties: state officials must both respect the law and refrain from the commission of internationally wrongful acts and must protect individuals from their commission by other non-state actors. Article 5, paragraph 1, addresses the state obligation to ensure that their authorities, officials, agents, institutions and other actors acting on behalf of the state refrain from acts of violence against women, whereas paragraph 2 sets out Parties' obligation to exercise due diligence in relation to acts covered by the scope of this Convention perpetrated by non-state actors. In both cases, failure to do so will incur state responsibility.

58. A requirement of due diligence has been adopted in a number of international human rights instruments, interpretations, and judgments with respect to violence against women. These include CEDAW Committee General Recommendation No. 19 on violence against women (1992), Article 4 of the United Nations General Assembly Declaration on the Elimination of Violence against Women (1993), the Convention on the Prevention of Violence against Women (Convention of *Belém do Pará*, 1994) adopted by the Organisation of American States as well as the Council of Europe Recommendation Rec(2002)5 of the Committee of Ministers to member states on the protection of women against violence (2002). Furthermore, the content of Article 5 reflects the case-law of the European Court of Human Rights. In its recent case law on domestic violence, the Court has adopted the obligation of due diligence (see the judgment of *Opuz v. Turkey*, 2009). It has established that the positive obligation to protect the right to life (Article 2 ECHR) requires state authorities to display due diligence, for example by taking preventive operational measures, in protecting an individual whose life is at risk.

59. Against the backdrop of these developments in international law and jurisprudence, the drafters considered it important to enshrine a principle of due diligence in this Convention. It is not an obligation of result, but an obligation of means. Parties are required to organise their response to all forms of violence covered by the scope of this Convention in a way that allows relevant authorities to diligently prevent, investigate, punish and provide reparation for such acts of violence. Failure to do so incurs state responsibility for an act otherwise solely attributed to a non-state actor. As such, violence against women perpetrated by non-state actors crosses the threshold of constituting a violation of human rights as referred to in Article 2 insofar as Parties have the obligation to take the legislative and other measures necessary to exercise due diligence to prevent, investigate, punish and provide reparation for acts of violence covered by the scope of this Convention, as well as to provide protection to the victims, and that failure to do so violates and impairs or nullifies the enjoyment of their human rights and fundamental freedoms.

60. The term "reparation" may encompass different forms of reparation under international human rights law such as restitution, compensation, rehabilitation, satisfaction, and guarantee of non-repetition. As regards compensation, it is important to note that this form of reparation shall only be provided by a Party under the conditions set out in Article 30 (2) of this Convention. Finally, term "non-state actor" refers to private persons, a concept which is already expressed in point II of Council of Europe Recommendation Rec (2002)5 on the protection of women against violence.

Article 6 – Gender-sensitive policies

61. Since Article 6 is placed under Chapter I which also deals with general obligations of Parties, it application extends to all other articles of this Convention. The nature of this obligation is two-fold. On the one hand, it requires Parties to ensure a gender perspective is applied not only when designing measures in the implementation of the Convention, but also when evaluating their impact. This means that a gender impact assessment needs to be carried out in the planning stage of any measure which a Party takes in the implementation of this Convention. It further means that during the evaluation stage, Parties are required to determine whether there is a gender differential in the impact of the provisions.

62. On the other hand, this article calls on Parties to promote and implement policies aimed at achieving equality between women and men and at empowering women. This obligation complements the obligation to condemn and prohibit discrimination contained in Article 4, paragraph 2. Convinced of the need to achieve equality between women and men and to empower women in order to put an end to all forms of violence covered by the scope of this Convention, the drafters believed it essential to place an obligation on Parties that goes beyond the specific measures to be taken to prevent and combat such violence in order to achieve this goal. This ties in with the purposes of the Convention listed in Article 1, in particular the promotion of substantive equality between women and men, including by empowering women, as expressed in Article 1 (b).

CHAPTER II – INTEGRATED POLICIES AND DATA COLLECTION

63. Similar to other recent conventions negotiated at the level of the Council of Europe, this Convention follows the "3 P structure" of "**P**revention", "**P**rotection", and "**P**rosecution". However, since an effective response to all forms of violence covered by the scope of this Convention requires more than measures in these three fields, the drafters considered it necessary to include an additional "P" (integrated **P**olicies).

Article 7 – Comprehensive and co-ordinated policies

64. Paragraph 1 requires Parties to devise and implement policies which would comprise a multitude of measures to be taken by different actors and agencies and which, taken as a whole, offer a holistic response to violence against women. This obligation is further developed in paragraph 2. It requires Parties to ensure that the adopted policies are implemented by way of effective multi-agency co-operation. Good practice examples in some member states show that results are enhanced when law enforcement agencies, the judiciary, women's non-governmental organisations, child protection agencies and other relevant partners join forces on a particular case, for example to carry out an accurate risk assessment or devise a safety plan. This type of co-operation should not rely on individuals convinced of the benefits of sharing information but requires guidelines and protocols for all agencies to follow, as well as sufficient training of professionals on their use and benefits.

65. To ensure that the expertise and perspective of relevant stakeholders, agencies and institutions contribute to any policy-making in this field, paragraph 3 calls for the involvement of "all relevant actors, such as government agencies, the national, regional and local parliaments and authorities, national human rights institutions and civil society organisations". This is a non-exhaustive list of actors, which the drafters intended to cover, in particular, women's non-governmental organisations and migrant organisations, but also religious institutions. National human rights institutions refer to those established in accordance with the UN principles for national institutions for the promotion and protection of human rights, adopted by United Nations General Assembly Resolution 48/134, 1993. As national human rights institutions exist in many member states of the Council of Europe, the drafters considered it important to include these in the list of relevant actors, where they exist. This provision does not contain the obligation to set up such institutions where they do not exist. By including national, regional and local parliaments in this provision, the drafters wished to reflect the different levels of law-making powers in Parties with a federal system. One way of ensuring the elements of comprehensive and co-ordinated policies on the one hand and the involvement of all relevant institutions and agencies on the other would be by drawing up national action plans.

Article 8 – Financial resources

66. This article aims at ensuring the allocation of appropriate financial and human resources for both activities carried out by public authorities and those of relevant non-governmental and civil society organisations. Across Council of Europe member states, different practice exists when it comes to government funding for non-governmental organisations (hereinafter NGOs) involved in preventing and combating all forms of violence covered by the scope of this Convention. The obligation placed on Parties is therefore that of allocating financial and human resources for activities carried out by NGOs and civil society.

67. In view of the different economic circumstances of member states, the drafters chose to limit the scope of this obligation to the allocation of appropriate resources. This means that the resources allocated need to be suitable for the target set or measure to be implemented.

Article 9 – Non-governmental organisations and civil society

68. In many member states, the overwhelming majority of services for victims of domestic violence, and also services for victims of other various forms of violence against women, are run by non-governmental or civil society organisations. They have a long tradition of providing shelter, legal advice, medical and psychological counselling as well as of running hotlines and other essential services.

69. The purpose of this article is to emphasise the important contribution these various organisations make to preventing and combating all forms of violence covered by the scope of this Convention. It therefore requires Parties to the Convention to recognise their work by, for example, tapping into their expertise and involving them as partners in multi-agency co-operation or in the implementation of comprehensive government policies which Article 7 calls for. Beyond such recognition, this article requires Parties to the Convention to actively encourage and support the work of these dedicated NGOs and civil society organisations. This means enabling them to carry out their work in the best possible way. Although Article 9 refers only to NGOs and civil society active in combating violence against women, this should not prevent Parties from going further and supporting the work that is carried out by NGOs and civil society focusing on domestic violence in its wider scope.

Article 10 – Co-ordinating body

70. Paragraph 1 entails the obligation to entrust one or more official government bodies with four specific tasks: co-ordinating, implementing, monitoring and evaluating the policies and measures which the respective Party to the Convention has devised to prevent and combat all forms of violence covered by the scope of this Convention. This can be done by setting up new official bodies or mandating official bodies already in existence with these tasks. The term "official body" is to be understood as any entity or institution within government. It may be a body set up or already in existence either at national or regional level. Size, staffing and funding are to be decided by the Parties, as well as which entity it shall be answerable to and any reporting obligations it shall have. Regarding the tasks of implementation, monitoring and evaluation this body should be in existence on the respective level of a Party's structure which is responsible for the carrying out of the measures. This means that in a federal government structure it may be necessary to have more than one body.

71. The four tasks which this body or bodies are mandated to undertake aim at ensuring that the various measures taken by the Party in implementation of this Convention are well co-ordinated and lead to a concerted effort of all agencies and all sectors of government. Moreover, they aim at ensuring the actual implementation of any new policies and measures. The monitoring task bestowed upon these bodies is limited to the monitoring of how and how effectively policies and measures to prevent and combat all forms of violence covered by the scope of this Convention are being implemented at the national and/or regional and local level. It does not extend to monitoring compliance with the Convention as a whole which is a task performed by the independent, international monitoring mechanism set up in Chapter IX of the Convention (see comments on Chapter IX). Lastly, the evaluation of policies and measures which these bodies are mandated to carry out comprises the scientific evaluation of a particular policy or measure in order to assess whether it meets the needs of victims and fulfils its purpose as well as to uncover unintended consequences. This will require robust administrative and population-based data, which Article 11 obliges Parties to the Convention to collect. For this reason, bodies created under this article are also assigned the task of co-ordinating the collection of the necessary data and to analyse and disseminate its results. Some member states have set up observatories on violence against women which already collect a vast variety of data. While these may serve as examples, the drafters decided to leave to the Parties the decision on how to ensure the co-ordination, analysis and dissemination of data by the bodies in question.

72. Paragraph 2 of this article authorises these bodies to receive information within the framework of this Convention which the respective Party has taken in compliance with Chapter VIII (see comments on Chapter VIII). It is important to note that, for data protection reasons, the authorisation is limited to receiving information of a general nature (see comments on Article 65). The obligation is therefore confined to ensuring that bodies created under this article are kept informed, in a general manner and without references to individual cases, of international co-operation activities, including mutual legal assistance in civil and criminal matters. The purpose is to allow them to fulfil its role.

73. The information and knowledge acquired through the exchange of experiences and practice is of great value in preventing and combating all forms of violence covered by the scope of this Convention. Paragraph 3 therefore equips bodies created under this article with the ability to seek contact with and set up working relations with its counterparts created in other Parties to the Convention. This will allow for important cross-fertilisation that is mutually productive and will lead to further harmonisation of practice.

Article 11 – Data collection and research

74. Systematic and adequate data collection has long been recognised as an essential component of effective policy-making in the field of preventing and combating all forms of violence covered by the scope of this Convention. Despite this recognition, examples of systematically collected administrative or population-based data in Council of Europe member states are rare. Additionally, available data are seldom comparable across countries nor over time, resulting in a limited understanding of the extent and the evolution of the problem. Preventing and combating violence against women and domestic violence requires evidence-based policy-making. This implies effectively documenting the magnitude of violence by producing robust, comparative data in order to guide policy and to monitor the implementation of measures to address the problem. This chapter contains the obligation to address the importance of regularly collecting representative and comparable data to the devising and implementation of policies to prevent and combat all forms of violence covered by the scope of this Convention. It establishes the type of data that will need to be collected, analysed and prepared for dissemination by the co-ordinating body or bodies created under Article 10 and provided to the Group of independent experts (GREVIO) responsible for the monitoring of the implementation of the Convention (see Chapter IX). Additionally, it highlights the need to support research in the field of violence against women and domestic violence.

75. The nature of the obligation contained in paragraph 1 is twofold. First, in order to design and implement evidence-based policies and assess whether they meet the needs of those exposed to violence, lit.a requires Parties to collect disaggregated relevant statistical data at regular intervals on cases of all forms of violence covered by the scope of this Convention. Accurate statistical information specifically designed to target victims and perpetrators of such violence is not only important in efforts to raise awareness among policy-makers and the public on the seriousness of the problem, but can also encourage reporting by victims or witnesses. Relevant statistical data may include administrative data collected from statistics compiled by health care services and social welfare services, law enforcement agencies and NGOs, as well as judicial data recorded by judicial authorities, including public prosecutors. Appropriately collected statistical administrative and judicial data can contribute to Parties' national response to all forms of violence covered by the scope of this Convention by seeking information about the performance of government institutions as well as information on crimes that authorities are dealing with within the criminal procedure. Service-based administrative data includes for instance the systematic recording of data on how victims of such violence are using services and how government agencies as well as the public (and private) health sector, in return, are serving them in their plight to seek justice, medical care, counselling, housing or other support. Agency-based client data on service use is not only limited to assessing the effectiveness of policies in place, but can also provide a basis for estimating the administrative cost of such violence. Furthermore, judicial data can provide information on the sentences and characteristics of convicted persons, as well as on conviction rates.

76. Consequently, public authorities such as the judiciary, the police and social welfare services will need to set-up data systems in place that go beyond the internal recording of the needs of the agency. Again, in order to show if there has been an improvement or a decline in the effectiveness of prevention, protection and prosecution measures and policies, relevant statistical administrative and judicial data should be collected at regular intervals. The usefulness and relevance of such data depend above all on the quality of its recording. Although, the drafters felt it best to leave to the Parties the choice of data categories used, as a minimum requirement, recorded data on victim and perpetrator should be disaggregated by sex, age, type of violence as well as the relationship of the perpetrator to the victim, geographical location, as well as other factors deemed relevant by Parties such as disability. Recorded data should also contain information on conviction rates of perpetrators of all forms of violence covered by the scope of this Convention, including the number of protection orders issued. The Council of Europe study on "Administrative data collection on domestic violence in Council of Europe member states" (EG-VEW-DC(2008)Study) identifies these and other categories and designs a model approach containing recommendations on the collection of administrative data beyond current practices.

77. Secondly, lit.b creates the obligation for Parties to support research in the field of all forms of violence covered by the scope of this Convention. It is essential that Parties base their policies and measures to prevent and combat such forms of violence on state-of-the art research and knowledge in this field. Research is a key element of evidence-based policy-making and can thus contribute greatly to improving day-to-day, real-world responses to violence against women and domestic violence by the judiciary, support services and law enforcement agencies. This provision therefore requires Parties to undertake to support research efforts in order to pursue further knowledge of the root causes and effects of the problem, incidences and conviction rates, as well as of the efficiency of measures taken in implementation of the Convention.

78. Paragraph 2 details Parties' obligation to endeavour conducting population-based surveys. This implies collecting data that are statistically representative of the target population so that they can be easily generalised to the larger population. Population-based surveys can provide more general sociologically oriented insights into the prevalence, nature, determinants and consequences of all forms of violence covered by the scope of this Convention. They can also provide reliable data on victims' experiences of violence, on the reasons for not reporting, on the services received, as well as victims' opinions of and attitudes towards such violence. Parties are additionally obliged to conduct such surveys at regular intervals in order to make a pertinent and comparative assessment of the prevalence and the trends in all forms of violence covered by the scope of this Convention by tracking developments longitudinally. In this case, the choice of population sample size and the regularity of such studies is left to the Parties. Depending on the Party, the scope of the surveys may be national, regional or local. It is however important to note that the combination of these levels can provide a macroscopic view of the phenomenon while also highlighting local or regional specificities. When designing population-based surveys, Parties may refer to the World Health Organisation (WHO) Multi-country Study on Women's Health and Domestic Violence against Women as well as to the International Violence Against Women Survey (IVAWS).

79. The drafters considered it important to highlight the distinction between population-based surveys and statistical administrative and judicial data for they serve different purposes and answer different questions. While the first can shed light on the level of severity and frequency as well as on the socio-economic and cultural factors leading to violence against women and domestic violence, the second can contribute to address capacity issues of government agencies and evaluate the effectiveness of services provided for victims of such violence. Using both types of data collection methods in conjunction can help gain an in-depth picture of the problem. Due to a lack of shared definitions and common indicators for evaluating the prevalence and trends of violence against women and domestic violence, data that are available rarely allow for cross-country comparison. Consequently, it would be beneficial for Parties to align the collection of data with standardised indicators and methods already in existence or currently under development. Parties should take into account existing developments or initiatives to provide reliable and comparable data such as the European Union Agency for Fundamental Rights violence against women survey.

80. As laid out in Article 65 the process of collecting, storing and transforming collected data should comply with standards on data protection as contained in the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108), to ensure confidentiality and respect for the privacy of victims, perpetrators and other persons involved. The standards laid out in Article 65 do not only apply in cases of transnational data exchange, but to all processes of collecting, storing and transforming of collected data.

81. Complementing Article 68 (7), the third paragraph of this article entails the obligation of Parties to provide the independent Group of experts referred to in Chapter IX with the information collected in order to stimulate international co-operation and enable international benchmarking. This not only allows the identification of existing good practice but also contributes to its harmonisation across the Parties to the Convention.

82. Finally, paragraph 4 contains the obligation to ensure that the information collected pursuant to Article 11 is available to the public. It is however left to the Parties to determine the form and means, as well as the type of information that is to be made available. In making information collected pursuant to Article 11 available to the public, Parties shall pay special attention to the privacy rights of persons affected.

CHAPTER III - PREVENTION

83. This chapter contains a variety of provisions that come under the heading of prevention in the wide sense of the term. Preventing violence against women and domestic violence requires far-reaching changes in attitude of the public at large, overcoming gender stereotypes and raising awareness. Local and regional authorities can be essential actors in implementing these measures by adapting them to specific realities.

Article 12 – General obligations

84. This article comprises a number of general preventive measures which lay the foundation and represent over-arching principles for more specific obligations contained in the subsequent articles of this chapter.

85. The obligations contained in paragraph 1 are based on the conviction of the drafters that existing patterns of behaviour of women and men are often influenced by prejudices, gender stereotypes and gender-biased customs or traditions. Parties to the Convention are therefore required to take measures that are necessary to promote changes in mentality and attitudes. The purpose of this provision is to reach the hearts

and minds of individuals who, through their behaviour, contribute to perpetuate the forms of violence covered by the scope of this Convention. As a general obligation, this paragraph does not go into detail as to propose specific measures to take, leaving it within the discretion of the Party.

86. Paragraph 2 requires Parties to the Convention to take the necessary legislative and other measures to prevent all forms of violence covered by the scope of this Convention by any natural or legal person. Depending on the national legal system, some of these measures may require the passing of a law while others may not.

87. In addition to the prohibition of discrimination contained in Article 4, paragraph 3, this paragraph requires positive action to ensure that any preventive measures specifically address and take into account the needs of vulnerable persons. Perpetrators often choose to target such persons because they know that they are less likely to be able to defend themselves, or seek prosecution of the perpetrator and other forms of reparation, because of their situation. For the purpose of this Convention, persons made vulnerable by particular circumstances include: pregnant women and women with young children, persons with disabilities, including those with mental or cognitive impairments, persons living in rural or remote areas, substance abusers, prostitutes, persons of national or ethnic minority background, migrants – including undocumented migrants and refugees, gay men, lesbian women, bi-sexual and transgender persons as well as HIV-positive persons, homeless persons, children and the elderly.

88. Paragraph 4 underlines that all members of society can make an important contribution to the prevention of violence and should be encouraged to do so. As many of the forms of violence covered by the scope of this Convention are perpetrated primarily by men and boys, the drafters considered it important to emphasise their particular role in the prevention of such violence. Bearing in mind the fact that the majority of men and boys are not perpetrators, the drafters wanted to point out that their contribution can take on many forms in particular as role models, agents of change and advocates for equality between women and men and mutual respect. By speaking out against violence, engaging other men in activities to promote gender equality and acting as role models by actively taking on a caring role and family responsibilities men have an important contribution to make.

89. Paragraph 5 clearly states that culture, custom, religion, tradition or so-called "honour" shall not be invoked to justify any act of violence covered by the scope of this Convention. Parties to the Convention are therefore obliged to ensure that their national laws do not contain loopholes for interpretations inspired by such convictions. Moreover, this obligation extends to the prevention of any official statements, reports or proclamations that condone violence on the basis of culture, custom, religion, tradition or so-called "honour". This provision also establishes a key principle according to which the prohibition of any of the acts of violence set out in the Convention can never be invoked as a restriction of the perpetrator's cultural or religious rights and freedoms. This principle is important for societies where distinct ethnic and religious communities live together and in which the prevailing attitudes towards the acceptability of gender-based violence differ depending on the cultural or religious background.

90. Rounding off the list of general preventive measures, paragraph 6 calls for the promotion of specific programmes and activities for the empowerment of women. This means empowerment in all aspects of life, including political and economic empowerment. This obligation is a reflection of the greater aim of achieving gender equality by increasing women's agency and reducing their vulnerability to violence.

Article 13 – Awareness-raising

91. The purpose of this article is to ensure that the general public is fully informed of the various forms of violence that women experience on a regular basis as well as of the different manifestations of domestic violence. This would help all members of society to recognise such violence, speak out against it and support its victims as neighbours, friends, relatives or colleagues, where possible and appropriate. The obligation entails the running of public awareness-raising campaigns or programmes on a regular basis that address and explain these issues in a gender-sensitive manner. Awareness-raising activities should include the dissemination of information on equality between women and men, non-stereotyped gender roles, and non-violent conflict resolution in interpersonal relationships. Moreover, the drafters considered it important that any campaign highlight the harmful consequences for children which violence against women and domestic violence may have in its direct or indirect form.

92. Many NGOs have a long tradition of carrying out successful awareness-raising activities – at local, regional or national level. This provision therefore encourages the co-operation with national human rights institutions and equality bodies, civil society and NGOs, in particular women's organisations, where appropriate, in order to reach out to the general public. This however, is a non-exhaustive list of actors, which the

drafters intended to cover. Furthermore, the inclusion of "where appropriate" in the provision means that Parties are not obliged to set up such bodies or institutions where they do not exist. Finally, it should be noted that the term women's organisations refers to women's NGOs working in the area of protection and support for women victims of violence against women.

93. Paragraph 2 extends the obligation to the dissemination of concrete information on available government or non-government preventive measures. This means the wide dissemination of information leaflets or posters or on-line information material on services which the police or the local community offers, contact information of local, regional or national services such as helplines or shelters and much more.

Article 14 – Education

94. Attitudes, convictions and behavioural patterns are shaped very early on in life. The promotion of gender equality, mutual respect in interpersonal relationships and non-violence must start as early as possible and is primarily a responsibility of parents. Educational establishments, however, have an important role to play in enhancing the promotion of these values.

95. In paragraph 1, this article addresses the need to design, where Parties deem appropriate, teaching material for all levels of education (primary, secondary and tertiary education) that promotes such values and enlightens learners with respect to the various forms of violence covered by the scope of this Convention. Where Parties deem teaching material appropriate, it needs to be adapted to the capacity of learners, which would, for example, require primary school teaching material to meet the intellectual capacity of primary school students. Teaching material means any type of formally developed and approved material that forms part of the curriculum and that, where appropriate, all teachers at a particular school have access to and are required or requested to use in class. As the words "where appropriate" indicate, the drafters did not want to impose a specific model on the Parties. Rather, this provision leaves it to the Parties to decide which type of schooling and which age group of learners they consider such teaching material to be appropriate for. The drafters decided on this wording to allow for a maximum of flexibility in the implementation of this provision also taking into account different possibilities between Parties in determining teaching materials. Some states for instance determine the teaching aims in their formal curriculum while leaving it to the schools to decide on the proper working methods and teaching materials to be used to reach these aims. The term "formal curriculum" refers to the planned programme of objectives, content, learning experiences, resources and assessment offered by a school where appropriate. It does not refer to incidental lessons which can be learnt at school because of particular school policies.

96. Paragraph 2 extends the obligation to promote the principles of equality between women and men, non-stereotyped gender roles, mutual respect, non-violent conflict resolution in interpersonal relationships in all informal educational facilities as well as any sports, cultural and leisure facilities as well as the media. Across Council of Europe member states, many different forms of informal education exist and are often referred to in many different ways. Generally, the term "informal educational facilities" refers to organised education activity outside formal systems, such as community or religious education facilities, activities, projects and institutions based on social pedagogy, and any other type of educational activity offered by community groups and other organisations (such as boy scouts or girl scouts, summer camps, after school activities, etc.). Sports, cultural and leisure facilities refer to facilities which offer leisure activities in the areas of sports, music, arts or any other field and which contribute to the lifelong process of learning from everyday experience.

97. Furthermore, this paragraph requires Parties to the Convention to include the media in their measures to promote the above principles. It is important to note that the drafters clearly indicated that any measures taken in this regard shall have due regard to the fundamental principle of the independence of the media and the freedom of the press.

Article 15 – Training of professionals

98. The training and sensitisation of professionals to the many causes, manifestations and consequences of all forms of violence covered by the scope of this Convention provides an effective means of preventing such violence. Training not only allows to raise awareness among professionals on violence against women and domestic violence, but contributes to changing the outlooks and the conduct of these professionals with regard to the victims. Furthermore, it significantly improves the nature and quality of the support provided to victims.

99. It is vital that professionals in regular contact with victims or perpetrators have appropriate knowledge of the issues associated with these kinds of violence. For this reason, paragraph 1 places an obligation on Parties to provide or strengthen appropriate training for the relevant professionals dealing with victims or

perpetrators of all acts of violence covered by the scope of this Convention on issues such as the prevention and detection of such violence, equality between women and men, the needs and rights of victims, as well as on how to prevent secondary victimisation. Initial vocational training and in-service training should enable the relevant professionals to acquire the appropriate tools for identifying and managing cases of violence, at an early stage, and to take preventive measures accordingly, by fostering the sensitivity and skills required to respond appropriately and effectively on the job. The drafters felt it best to leave to the Parties how to organise the training of relevant professionals. However, it is important to ensure that relevant training be on-going and sustained with appropriate follow-up to ensure that newly acquired skills are adequately applied. Finally, it is important that relevant training should be supported and reinforced by clear protocols and guidelines that set the standards staff are expected to follow in their respective fields. The effectiveness of these protocols where relevant, should be regularly monitored, reviewed and, where necessary, improved.

100. The relevant professionals may include professionals in the judiciary, in legal practice, in law enforcement agencies and in the fields of health care, social work and education. When providing training for professionals involved in judicial proceedings (in particular judges, prosecutors and lawyers), Parties must take account of requirements stemming from the independence of the judicial professions and the autonomy they enjoy in respect of the organisation of training for their members. The drafters wished to stress that this provision does not contravene the rules governing the autonomy of legal professions but that it requires Parties to ensure that training is made available to professionals wishing to receive it.

101. The content of paragraph 2 is linked to the greater aim of the Convention to establish a comprehensive approach to prevent and combat all forms of violence covered by its scope. This provision requires Parties to encourage that the training referred to in paragraph 1 also includes training on coordinated multi-agency co operation, complementing in this way the obligations laid down in Article 7 of this Convention. Consequently, professionals should also be taught skills in multi-agency working, equipping them to work in co-operation with other professionals from a wide range of fields.

Article 16 – Preventive intervention and treatment programmes

102. Preventive intervention and treatment programmes have been developed to help perpetrators change their attitudes and behaviour in order to prevent further acts of domestic violence and sexual violence.

103. Paragraph 1 requires Parties to the Convention to establish or support the establishment of programmes, where they do not exist, or support any existing programmes, for perpetrators of domestic violence. Many different models for working with perpetrators exist and the decision on how they should be run rests with the Parties or service providers. However, the following core elements should be respected in all models.

104. Domestic violence intervention programmes should be based on best practice and what research reveals about the most effective ways of working with perpetrators. Programmes should encourage perpetrators to take responsibility for their actions and examine their attitudes and beliefs towards women. This type of intervention requires skilled and trained facilitators. Beyond training in psychology and the nature of domestic violence, they need to possess the necessary cultural and linguistic skills to enable them to work with a wide diversity of men attending such programmes. Moreover, it is essential that these programmes are not set up in isolation but closely co-operate with women's support services, law enforcement agencies, the judiciary, probation services and child protection or child welfare offices where appropriate. Participation in these programmes may be court-ordered or voluntary. In either case, it may influence a victim's decision to stay with or leave the abuser or provide the victim with a false sense of security. As a result, priority consideration must be given to the needs and safety of victims, including their human rights.

105. The second paragraph of this article contains the obligation to set up or support treatment programmes for perpetrators of sexual assault and rape. These are programmes specifically designed to treat convicted sex offenders, in and outside prison, with a view to minimising recidivism. Across Council of Europe member states, many different models and approaches exist. Again, the drafters felt it best to leave to the Parties and/or service providers how to run such programmes. Their ultimate aim must be preventing re-offending and successfully reintegrating perpetrators into the community.

Article 17 – Participation of the private sector and the media

106. Paragraph 1 contains two different obligations. First, it requires Parties to the Convention to encourage the private sector, the information and communication technology sector (hereafter ICT sector), and the media, to participate not only in the development of local, regional or national policies and efforts to prevent violence against women, but also to take part in their implementation. If and what type of action is taken

is left to the individual company. The importance of this as regards media is such that the text specifically signals that the Parties' encouragement has to respect freedom of expression and media's independence; the latter should be seen in particular from the perspective of editorial independence.

107. Secondly, it requires Parties to encourage the private sector, the ICT sector, and the media, to set guidelines and self-regulatory standards to enhance respect for the dignity of women and thus contribute to preventing violence against them. However, the reference in Article 17, paragraph 1, to policies, guidelines and self-regulatory standards to prevent violence against women should be construed as encouraging more private companies to establish protocols or guidelines on, for example, how to deal with cases of sexual harassment in the workplace. It is also intended to encourage the ICT sector and the media to adopt self-regulatory standards to refrain from harmful gender stereotyping and spreading degrading images of women or imagery which associates violence and sex. Moreover, it means encouraging these actors to establish ethical codes of conduct for a rights-based, gender-sensitive and non-sensationalist media coverage of violence against women. All these measures must be taken with due respect for the fundamental principles relating to the freedom of expression, the freedom of the press and the freedom of the arts.

108. The Council of Europe, through its Committee of Ministers and its Parliamentary Assembly, have long called for an end to gender stereotyping and inequality between women and men by issuing the following recommendations:

- Recommendation No. R (84)17 of the Committee of Ministers to member states on equality between women and men in the media;
- Recommendation 1555 (2002) by the Parliamentary Assembly of the Council of Europe on the image of women in the media;
- Recommendation 1799 (2007) by the Parliamentary Assembly of the Council of Europe on the image of women in advertising;
- Resolution 1751 (2010) and Recommendation 1931 (2010) by the Parliamentary Assembly of the Council of Europe on combating sexist stereotypes in the media.

109. The aim of this article is to give these efforts new impetus to achieve the long-term goal of preventing and combating all forms of violence covered by the scope of this Convention. As the Steering Committee on the Media and New Communication Services (CDMC) indicated in comments to the above-mentioned Recommendation 1931 (2010), "Dealing with gender stereotypes will contribute to reducing inequality, including gender violence which is one of its most unacceptable expressions. Given that addressing this issue effectively will inevitably have to take account of the fundamental principle of media's independence, purely regulatory measures may not provide a satisfactory response. The task therefore falls largely to the media themselves which have to incorporate the principle of equal presentation and fair treatment of various persons with their specific identities in their professional codes and self-regulatory mechanisms and to combat stereotypes as an everyday practice. It may be even more effective to consider solutions through governance models and approaches.".

CHAPTER IV – PROTECTION AND SUPPORT

110. While the ultimate aim of the Convention is the prevention of all forms of violence covered by its scope, victims require adequate protection from further violence, support and assistance to overcome the multiple consequences of such violence and to rebuild their lives. This chapter contains a range of obligations to set up specialised as well as more general support services to meet the needs of those exposed to violence.

Article 18 – General obligations

111. This article sets out a number of general principles to be respected in the provision of protective and supportive services.

112. Paragraph 1 contains the general obligation of taking legislative or other measures for the protection of all victims within their territory from any further acts of violence covered by this Convention.

113. In line with the general multi-agency and comprehensive approach promoted by the Convention, paragraph 2 requires Parties to the Convention to ensure that, in accordance with internal law, there are appropriate mechanisms in place that provide for effective co-operation among the following agencies which the drafters have identified as relevant: the judiciary, public prosecutors, law enforcement agencies, local and regional authorities and NGOs. By adding "other relevant organisations" the drafters have ensured that this

list is non-exhaustive to allow for co-operation with any other organisation a Party may deem relevant. The term "mechanism" refers to any formal or informal structure such as agreed protocols, round-tables or any other method that enables a number of professionals to co-operate in a standardised manner. It does not require the setting up of an official body or institution.

114. The emphasis placed on co-operation among these actors stems from the conviction that the forms of violence covered by the Convention are best addressed in a concerted and co-ordinated manner by a number of agencies. Law enforcement agencies who are often the first to be in contact with victims when called to a crime scene need to be able to refer a victim to specialist support services, for example a shelter or a rape crisis centre often run by NGOs. These support services will then support the victim by providing medical care, the collection of forensic evidence if required, psychological and legal counselling. They will also help the victim in taking the next step, which often requires dealing with the judiciary. It is important to note that this obligation is not limited to victims but extends to witnesses as well, bearing particularly in mind child witnesses.

115. Paragraph 3 lists a number of aims and criteria which protective and support services should pursue or be based on. First, all measures taken shall be based on a gendered understanding of violence against women and domestic violence. This means that services offered need to demonstrate an approach, relevant to their users, which recognises the gendered dynamics, impact and consequences of these forms of violence and which operates within a gender equality and human rights framework.

116. Secondly, this paragraph requires any such measures to take into account the relationship between victims, perpetrators, children and their wider environment to avoid the risk of addressing their needs in isolation or without acknowledging their social reality. The drafters considered it important to ensure that the needs of victims are assessed in light of all relevant circumstances to allow professionals to take informed and suitable decisions. The term "integrated approach" refers to the integrated human rights based approach addressed as the "three P approach", aiming to integrated prevention, protection and prosecution.

117. Thirdly, measures and services that mean well but do not adequately take into consideration the devastating effects of violence and the length of the recovery process or that treat victims insensitively run the risk of re-victimising service users.

118. Furthermore, paragraph 3 requires all measures to aim at the empowerment and economic independence of women victims of such violence. This means ensuring that victims or service users are familiar with their rights and entitlements and can take decisions in a supportive environment that treats them with dignity, respect and sensitivity. At the same time, services need to instil in victims a sense of control of their lives, which in many cases includes working towards financial security, in particular economic independence from the perpetrator.

119. Some examples in which services, including branches of law enforcement agencies, are located in the same building or in close proximity to one another and co-operate have shown to significantly increase levels of satisfaction with services and have, in some cases, increased the willingness of victims to press charges or go through with a case. These examples are known as "One-stop-shops" and have been tried and tested for domestic violence services but can easily be adapted to other forms of violence. For this reason, paragraph 3 calls on Parties to strive to locate services in the same building.

120. Lastly, paragraph 3 requires Parties to the Convention to ensure that the available support services are made available to vulnerable persons and address their specific needs. The term "vulnerable persons" refers to the same list of persons as explained in the comments under Article 12. Parties should make these services available to victims independently of their socio-economic status and provide them free of charge, where appropriate.

121. The purpose of paragraph 4 is to point to a serious grievance which victims often encounter in seeking help and support. Many services, public and private, make their support dependent on the willingness of the victim to press charges or testify against the perpetrator. If, for reasons of fear or emotional turmoil and attachment the victim is unwilling to press charges or refuses to testify in court, he or she will not receive counselling or accommodation. This goes against the principle of empowerment and a human rights-based approach and must be avoided. It is important to note that this provision refers first and foremost to general and specialist support services referred to in Articles 20 and 22 of the Convention – with the exception of legal aid services.

122. Some of the forms of violence covered by the scope of this Convention may have an international dimension. Victims of violence such as forced marriages or domestic violence, but also women or girls threatened with being genitally mutilated and who are outside of their country of nationality require consular protection and, possibly, medical and financial assistance. Paragraph 5 requires Parties to take appropriate

measures to provide the necessary consular assistance and if appropriate other protection and assistance, which includes assistance to victims of violent crime, assistance in the event of arrest or detention, relief and repatriation of distressed nationals, issuance of new identity documentation and other consular support.

123. This obligation is not limited to nationals of a Party to the Convention but extends to all other victims who, in accordance with their obligations under international law, are entitled to national protection by that Party, for example nationals of a member state of the European Union which does not itself offer protection through a permanent representation (embassy, general consulate or consulate) as provided for by Article 20 (2) lit. c of the Treaty on the Functioning of the European Union.

Article 19 – Information

124. In the immediate aftermath of violence, victims are not always in a position to take fully informed and empowered decisions and many lack a supportive environment. This provision lays particular emphasis on the need to ensure that victims are provided with information on the different types of support services and legal measures available to them. This requires providing information on where to get what type of help, if necessary in a language other than the national language(s), and in a timely manner, meaning at a time when it is useful for victims. This, however, does not oblige Parties to the Convention to offer information in any language but to concentrate on the languages most widely spoken in their country and in accessible form. The term "adequate information" refers to information that sufficiently fills the victim's need for information. This could include, for example, providing not just the name of a support service organisation, but handing out a leaflet that contains its contact details, opening hours and information on the exact services it offers.

Article 20 – General support services

125. In the provision of services for victims, a distinction is made between general and specialist support services. General support services refer to help offered by public authorities such as social services, health services, employment services, which provide long-term help and are not exclusively designed for the benefit of victims only but serve the public at large. By contrast, specialist support services have specialised in providing support and assistance tailored to the – often immediate – needs of victims of specific forms of violence against women or domestic violence and are not open to the general public. While these may be services run or funded by government authorities, the large majority of specialist services are offered by NGOs.

126. The obligation contained in Article 20, paragraph 1, requires public welfare services such as housing services, employment or unemployment services, public education and training services, public psychological and legal counselling services, but also financial support services to address, when necessary, the specific needs of victims of the forms of violence covered by the scope of this Convention. While many victims can already be found among the clients of such services, their particularly difficult situation and trauma is not necessarily sufficiently or systematically addressed or taken into account. Parties to the Convention are thus required to ensure victims are granted access to such services, treated in a supportive manner and that their needs are properly addressed.

127. Health and social services are often the first to come in contact with victims. Paragraph 2 seeks to ensure that these services are adequately resourced to respond to their long-term needs. Furthermore, it places an emphasis on the importance of training staff members on the different forms of violence, the specific needs of victims and how to respond to them in a supportive manner.

Article 21 – Assistance in individual/collective complaints

128. This provision sets out the obligation of Parties to ensure that victims have information on and access to applicable regional and international complaints mechanisms. The term "applicable" refers only to those regional and international complaints mechanisms that have been ratified by the Parties to this Convention. Council of Europe member states are state parties to a significant number of regional and international human rights treaties, and most have accepted the jurisdiction of the corresponding treaty bodies and complaints mechanisms. Upon exhausting national remedies, victims of all forms of violence covered by the scope of this Convention therefore have recourse to a number of existing regional and international complaints mechanisms. These can be open to individuals, who can, for example, turn to the European Court of Human Rights or the CEDAW Committee for further legal redress. They can also be of a collective nature, meaning that they are available to groups of victims – an example would be the collective complaints mechanism under the European Social Charter.

129. By ensuring that victims have "information on and access to" these mechanisms, the drafters wished to stress that victims should be provided with information on the admissibility rules and procedural

requirements relating to the applicable regional and international complaint mechanisms, and that, upon exhaustion of national remedies, Parties should not impede in any way access to these mechanisms.

130. The provision also aims at promoting the availability of sensitive and knowledgeable assistance to victims in presenting such complaints, which may be provided by the state, bar associations, relevant NGOs or other possible actors. "Assistance" may consist of the provision of information and legal advice. The assistance provided should be well informed and adapted to the needs of the victim, so as to facilitate the access to applicable complaint mechanisms by the victim.

Article 22 – Specialist support services

131. Complementing the obligation contained in Article 20, this and the following provisions require Parties to the Convention to set up or arrange for a well-resourced specialist support sector.

132. The aim of such specialised support is to ensure the complex task of empowering victims through optimal support and assistance catered to their specific needs. Much of this is best ensured by women's organisations and by support services provided, for example, by local authorities with specialised and experienced staff with in-depth knowledge of gender-based violence. It is important to ensure these services are sufficiently spread throughout the country and accessible for all victims. Moreover, these services and their staff need to be able to address the different types of violence covered by the scope of this Convention and provide support to all groups of victims, including hard-to-reach groups. The types of support that such dedicated services need to offer include providing shelter and safe accommodation, immediate medical support, the collection of forensic medical evidence in cases of rape and sexual assault, short and long-term psychological counselling, trauma care, legal counselling, advocacy and outreach services, telephone helplines to direct victims to the right type of service and specific services for children as victims or witnesses.

Article 23 – Shelters

133. This article requires Parties to provide for the setting up of appropriate, easily accessible shelters in sufficient numbers as an important means of fulfilling the obligation to provide protection and support. The purpose of shelters is to ensure immediate, preferably around-the-clock, access to safe accommodation for victims, especially women and children, when they are no longer safe at home. Temporary housing alone or general shelters such as those for the homeless, are not sufficient and will not provide the necessary support or empowerment. Victims face multiple, interlocking problems related to their health, safety, financial situation and the well-being of their children. Specialised women's shelters are best equipped to address these problems, because their functions go beyond providing a safe place to stay. They provide women and their children with support, enable them to cope with their traumatic experiences, leave violent relationships, regain their self-esteem and lay the foundations for an independent life of their own choosing. Furthermore, women's shelters play a central role in networking, multi-agency co-operation and awareness-raising in their respective communities.

134. To fulfil their primary task of ensuring safety and security for women and children, it is crucial that all shelters apply a set of standards. To this end, the security situation of each victim should be assessed and an individual security plan should be drawn up on the basis of that assessment. The technical security of the building is another key issue for shelters as violent attacks by the perpetrators are a threat not only to the women and their children, but also to the staff and other people in the surrounding area. Moreover, effective co-operation with the police on security issues is indispensable.

135. This provision calls for shelters to be set up in sufficient numbers to provide appropriate temporary accommodation for all victims. Each type of violence requires a different kind of support and protection, and staff need to be trained to provide these. The term "sufficient numbers" is intended to ensure that the needs of all victims are met, both in terms of shelter places and specialised support. The Final Activity Report of the Council of Europe Task Force to Combat Violence against Women, including Domestic Violence (EG-TFV (2008)6) recommends safe accommodation in specialised women's shelters, available in every region, with one family place per 10 000 head of population. However, the number of shelter places should depend on the actual need. For shelters on other forms of violence, the number of places to be offered will again depend on the actual need.

Article 24 – Telephone helplines

136. Helplines are one of the most important ways of enabling victims to find help and support. A helpline with a widely advertised public number that provides support and crisis counselling and refers to face-to-face

services, such as shelters, counselling centres or the police, forms the cornerstone of any support and advice service in relation to all the forms of violence covered by the scope of this Convention. This article therefore contains the obligation to set up state-wide telephone helplines which are available around the clock and which are free of charge. Many victims find themselves without documentation and resources and would find it difficult to buy a telephone card or find the necessary change to pay for a phone call. Having to pay even a very small amount of money can present a burden to many seeking help, hence the requirement to offer the call to a helpline free of charge. Furthermore in many telephone systems non-toll free calls can be traced via the telephone bill, thus indicating to the perpetrator that the victim is seeking help and therefore possibly endangering the victim further. The Final Activity Report of the Council of Europe Task Force to Combat Violence against Women, including Domestic Violence (EG-TFV (2008)6) recommends the establishment of at least one free national helpline covering all forms of violence against women operating 24 hours a day 7 days a week and providing crisis support in all relevant languages.

137. Many victims find it difficult to actively seek help and the threshold for making a call and sharing intimate and personal details is high. It is therefore important that callers may remain anonymous, are counselled by persons who are trained in dealing with such situations and that helplines provide information and support confidentially if callers so wish. In some countries, it is equally important to provide assistance in several languages to ease the language barrier that some callers might face.

Article 25 – Support for victims of sexual violence

138. The traumatic nature of sexual violence, including rape, requires a particularly sensitive response by trained and specialised staff. Victims of this type of violence need immediate medical care and trauma support combined with immediate forensic examinations to collect the evidence needed for prosecution. Furthermore, there is often a great need for psychological counselling and therapy – often weeks and months after the event.

139. Article 25 therefore lays particular emphasis on providing this type of specialised support by obliging Parties to provide for the setting-up of accessible rape crisis or sexual violence referral centres in sufficient numbers. It is important to note that Parties are provided with an alternative, not with the obligation to set up both types of centres.

140. Rape crisis centres may take on many different forms. Typically, these centres offer long-term help that centres on counselling and therapy by offering face-to-face counselling, support groups and contact with other services. They also support victims during court proceedings by providing woman-to-woman advocacy and other practical help.

141. Sexual violence referral centres, on the other hand, may specialise in immediate medical care, high-quality forensic practice and crisis intervention. They can for instance be set up in a hospital setting to respond to recent sexual assault by carrying out medical checks and referring the victim to specialised community-based organisations for further services. They also may concentrate on immediate and adequate referral of the victim to appropriate, specialised organisations as to provide the necessary care as determined by Article 25. Research has shown that it is good practice to carry out forensic examinations regardless of whether the matter will be reported to the police, and to offer the possibility of having samples taken and stored so that the decision as to whether or not to report the rape can be taken at a later date.

142. The requirement to provide for the setting up of such centres places an obligation on Parties to the Convention to ensure that this is done in sufficient numbers, but also to ensure their easy access and that their services are carried out in an appropriate manner. The Final Activity Report of the Council of Europe Task Force to Combat Violence against Women, including Domestic Violence (EG-TFV (2008)6) recommends that one such centre should be available per every 200.000 inhabitants and that their geographic spread should make them accessible to victims in rural areas as much as in cities. The term "appropriate" is intended to ensure that the services offered are suitable for the needs of victims.

Article 26 – Protection and support for child witnesses

143. Exposure to physical, sexual or psychological violence and abuse between parents or other family members has a severe impact on children. It breeds fear, causes trauma and adversely affects their development.

144. For this reason, Article 26 sets out the obligation to ensure that, when providing services and assistance to victims with children who have witnessed violence, the latter's rights and needs are taken into account. The term "child witnesses" refers not only to children who are present during the violence and actively witness it, but to those who are exposed to screams and other sounds of violence while hiding close by or who

are exposed to the long term consequences of such violence. It is important to recognise and address the victimisation of children as witnesses of all forms of violence covered by the scope of this Convention and their right to support. Paragraph 2 therefore calls for age and developmentally appropriate best evidence-based psychosocial interventions that are specifically tailored to children to cope with their traumatic experiences where necessary. All services offered must give due regard to the best interests of the child.

Article 27 – Reporting

145. With the requirement of encouraging the reporting by any person who witnesses or has reasonable grounds to suspect that an act of violence covered by the scope of this Convention may be committed, the drafters wished to highlight the important role that individuals – friends, neighbours, family members, colleagues, teachers or other members of the community – can play in breaking the silence that often closes in around violence. It is the responsibility of each Party to determine the competent authorities to which such suspicions may be reported. These can be law enforcement agencies, child protection services or any other relevant social services. The term "reasonable grounds" refers to an honest belief reported in good faith.

Article 28 – Reporting by professionals

146. Under this article Parties to the Convention must ensure that professionals normally bound by rules of professional secrecy (such as, for example, doctors and psychiatrists) have the possibility to report to competent organisations or authorities if they have reasonable grounds to believe that a serious act of violence covered by the scope of this Convention has been committed and that further serious acts of such violence are to be expected. These are cumulative requirements for reporting and cover, for example, typical cases of domestic violence where the victim has already been subjected to serious acts of violence and further violence is likely to occur.

147. It is important to note that this provision does not impose an obligation for such professionals to report. It only grants these persons the possibility of doing so without any risk of breach of confidence. While confidentiality rules may be imposed by legislation, issues of confidentiality and breach of such may also be governed by codes of ethics or professional standards for the different professional groups. This provision seeks to ensure that neither type of confidentiality rule would stand in the way of reporting serious acts of violence. The aim of this provision is to protect life and limb of victims rather than the initiation of a criminal investigation. It is therefore important to enable those professionals who, after careful assessment, wish to protect victims of violence.

148. The term "under appropriate conditions" means that Parties may determine the situations or cases to which this provision applies. For instance, Parties may make the obligation contained in Article 28 contingent on the prior consent of the victim, with the exception of some specific cases such as where the victim is a minor or is unable to protect her or himself due to physical or mental disabilities. Moreover, each Party is responsible for determining the categories of professionals to which this provision applies. The term "certain professionals" is intended to cover any number of professionals whose functions involve contact with women, men and children who may be victims of any of the forms of violence covered by the scope of this Convention. Additionally, this article does not affect the rights, in conformity with Article 6 ECHR, of those accused of acts to which this Convention applies, whether in civil or criminal proceedings.

CHAPTER V – SUBSTANTIVE LAW

149. As is the case in other Council of Europe conventions on combating specific forms of violence, abuse or ill-treatment, substantive law provisions form an essential part of the instruments. It is clear from research on national legislation currently in force on violence against women and domestic violence that many gaps remain. Therefore, it is necessary to strengthen legal protection and reparation and to take into account existing good practice when introducing changes into the legislative systems of all member states in order to effectively prevent and combat these forms of violence. The drafters examined the appropriate criminal, civil and administrative-law measures to be introduced, to ensure that the Convention covers the various situations associated with the acts of violence concerned. As a result, this chapter contains a range of preventive, protective and compensatory measures for victims and introduces punitive measures against perpetrators of those forms of violence which require a criminal law response.

150. This chapter sets out the obligation to ensure a variety of civil law remedies to allow victims to seek justice and compensation – primarily against the perpetrator, but also in relation to state authorities if they have failed in their duty to diligently take preventive and protective measures.

151. Chapter V also establishes a number of criminal offences. This type of harmonisation of domestic law facilitates action against crime at the national and international level, for several reasons. Often, national measures to combat violence against women and domestic violence are not carried out in a systematic manner or remain incomplete due to gaps in legislation.

152. The primary aim of criminal law measures is to guide Parties in putting into place effective policies to rein in violence against women and domestic violence – both of which are still, unfortunately, widespread crimes in Europe and beyond.

153. The drafters agreed that, in principle, all criminal law provisions of the Convention should be presented in a gender-neutral manner; the sex of the victim or perpetrator should thus, in principle, not be a constitutive element of the crime. However, this should not prevent Parties from introducing gender-specific provisions.

154. The drafters decided that this Convention should avoid covering the same conduct already dealt with in other Council of Europe conventions, in particular the Convention on Action against Trafficking in Human Beings (CETS No. 197) and the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS No. 201).

155. The obligations contained in Articles 33 to 39 require Parties to the Convention to ensure that a particular intentional conduct is criminalised. The drafters agreed on this wording to oblige Parties to criminalise the conduct in question. However, the Convention does not oblige Parties to necessarily introduce specific provisions criminalising the conduct described by the Convention. With regard to Article 40 (sexual harassment) and taking account of the specific nature of this conduct, the drafters considered that it could be subject to remedy either under criminal law sanctions or other legal sanctions. Finally, the offences established in this chapter represent a minimum consensus which does not preclude supplementing them or establishing higher standards in domestic law.

156. In conformity with general principles of criminal law a legally valid consent may lift criminal liability. Furthermore, other legally justifiable acts, for example, acts committed in self-defence, defence of property, or for necessary medical procedures, would not give rise to criminal sanctions under this Convention.

Article 29 – Civil lawsuits and remedies

157. Paragraph 1 of this provision aims at ensuring that victims of any of the forms of violence covered by the scope of this Convention can turn to the national legal system for an adequate civil law remedy against the perpetrator. On the one hand, this includes civil law remedies which allow a civil law court to order a person to stop a particular conduct, refrain from a particular conduct in the future or to compel a person to take a particular action (injunctions). A civil law remedy of this type can be used, for example, to help girls and boys faced with the prospect of being married against their will to have their passport or other important documentation handed to them from anybody withholding it against their will (parents, guardians or any family members). Such injunctions help to provide protection against acts of violence.

158. On the other hand, and depending on the national legal order of the Party, civil law remedies offered under this provision may also include court orders that deal more specifically with acts of violence covered by the scope of this Convention, such as barring orders, restraining orders and non-molestation orders as referred to in Article 53. These are particularly relevant in cases of domestic violence and complement the immediate and often short-term protection offered by emergency protection orders as referred to in Article 52.

159. Moreover, civil law should provide for legal remedies against defamation and libel in the context of stalking and sexual harassment, in case where such acts are not covered by the criminal legislation of the Parties.

160. All civil law orders are issued following an application by the victim or - depending on the legal system - a third party and cannot be issued *ex officio*.

161. While paragraph 1 aims at providing victims with civil remedies against the perpetrator, paragraph 2 ensures that victims are provided with remedies against state authorities which have failed in their duty to take the necessary preventive or protective measures.

162. It reiterates the principle of liability of state authorities, who, in accordance with Article 5 of this Convention are under the obligation to diligently prevent, investigate and, punish acts of violence covered by the scope of this Convention. Failure to comply with this obligation can result in legal responsibility and civil law needs to offer remedies to address such failure. These remedies include, inter alia, civil law action for damages which need to be available for negligent and grossly negligent behaviour. The extent of state

authorities' civil liability remains governed by the internal law of the Parties which have the discretion to decide what kind of negligent behaviour is actionable.

163. The obligation contained in paragraph 2 is in line with case law of the European Court of Human Rights concerning the failure of public authorities to comply with their positive obligation under Article 2 ECHR (right to life). In the *Osman v. the United Kingdom* judgment, and again the *Opuz v. Turkey* judgment, the Court has stated that "where there is an allegation that the authorities have violated their positive obligation to protect the right to life in the context of their above-mentioned duty to prevent and suppress offences against the person, it must be established to its satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk." The Court explicitly stated that responsibility for such failure is not limited to gross negligence or wilful disregard of the duty to protect life.

164. In the event of death of the victim, the available remedies shall be accessible to her or his descendants.

Article 30 – Compensation

165. This article sets out the right to compensation for damages suffered as a result of any of the offences established by this Convention. Paragraph 1 establishes the principle that it is primarily the perpetrator who is liable for damages and restitution.

166. Compensation can also be sought from insurance companies or from state-funded health and social security schemes. Paragraph 2 establishes a subsidiary obligation for the state to compensate. The conditions relating to the application for compensation may be established by internal law such as the requirement that the victim has first and foremost sought compensation from the perpetrator. The drafters emphasised that state compensation should be awarded in situations where the victim has sustained serious bodily injury or impairment of health. It should be noted that the term "bodily injury" includes injuries which have caused the death of the victim, and that "impairment of health" encompasses serious psychological damages caused by acts of psychological violence, as referred to in Article 33. Although the scope of state compensation is limited to "serious" injury and impairment of health, this does not preclude Parties from providing for more generous compensation arrangements, nor from setting higher and/or lower limits for any or all elements of compensation to be paid by the state. In particular, this provision is without prejudice to the obligations of the Parties to the European Convention on the Compensation of Victims of Violent Crimes (ETS No. 116).

167. The subsidiary obligation for the state to compensate does not preclude Parties from claiming regress for compensation awarded from the perpetrator as long as due regard is paid to the victim's safety. The reference to the "victim's safety" requires Parties to ensure that any measures taken to claim regress for compensation from the perpetrator give due consideration to the consequences of these measures for the safety of the victim. This covers in particular situations where the perpetrator may want to avenge her or himself against the victim for having to pay compensation to the state.

168. This provision does not preclude an interim state contribution to the compensation of the victim. A victim urgently needing help may not be able to await the outcome of often complicated proceedings. In such cases, the Parties can provide that the state or the competent authority may subrogate in the rights of the person compensated for the amount of the compensation paid or, if later the person compensated obtains reparation from any other source, may reclaim totally or partially the amount of money awarded.

169. In the event that state compensation is paid to the victim because the perpetrator is unwilling or unable although court-ordered to do so, the state shall have recourse against the perpetrator.

170. To ensure compensation by the state, Parties may set up state compensation schemes as specified in Articles 5 and 6 of the European Convention on the Compensation of Victims of Violent Crimes.

171. It should be noted that paragraph 2 of this article is open to reservations, pursuant to Article 78 (2) of this Convention. This possibility of reservations is without prejudice to the obligations of the Parties pursuant to other international instruments in this field, such as the aforementioned European Convention on the Compensation of Victims of Violent Crimes.

172. As many victims of the forms of violence covered by this Convention may not have the nationality of the Party in whose territory the crime was committed, subsidiary state compensation should extend to nationals and non-nationals.

173. Paragraph 3 aims to ensure that compensation be granted within reasonable time, meaning within an appropriate time-scale.

174. It is important to note that compensation may not only be awarded under civil or administrative law but also under criminal law as part of a criminal law sanction.

Article 31 – Custody, visiting rights and safety

175. This provision aims at ensuring that judicial authorities do not issue contact orders without taking into account incidents of violence covered by the scope of this Convention. It concerns judicial orders governing the contact between children and their parents and other persons having family ties with children. In addition to other factors, incidents of violence against the non-abusive carer as much as against the child itself must be taken into account when decisions on custody and the extent of visitation rights or contact are taken.

176. Paragraph 2 addresses the complex issue of guaranteeing the rights and safety of victims and witnesses while taking into account the parental rights of the perpetrator. In particular in cases of domestic violence, issues regarding common children are often the only ties that remain between victim and perpetrator. For many victims and their children, complying with contact orders can present a serious safety risk because it often means meeting the perpetrator face-to-face. Hence, this paragraph lays out the obligation to ensure that victims and their children remain safe from any further harm.

Article 32 – Civil consequences of forced marriages

177. This article deals with the legal consequences of a forced marriage and ensures that such marriages may be "voidable, annulled or dissolved". For the purpose of this provision, a "voidable" marriage is a marriage considered to be valid but which may be rendered void if challenged by one of the parties; an "annulled" marriage is deprived of its legal consequences, whether challenged by a party or not. A "dissolved" marriage, such as in case of divorce, is deprived of legal consequences only from the date of dissolution. The drafters bore in mind that the concrete implementation of this article with regard to the terms used (voidable, annulled, dissolved) may vary, depending on the concepts provided for in Parties' civil law.

178. It is important that legal action as required under this provision is easily available and does not place an undue financial and administrative burden on the victim. This means that any procedures set up for the annulment or dissolution of a forced marriage shall not present insurmountable difficulties or indirectly lead to financial hardship on the part of the victim. Furthermore, the form of ending the marriage should not affect the rights of the victim of forced marriage.

Article 33 – Psychological violence

179. This article sets out the offence of psychological violence. The drafters agreed to criminally sanction any intentional conduct that seriously impairs another person's psychological integrity through coercion or threats. The interpretation of the word "intentional" is left to domestic law, but the requirement for intentional conduct relates to all the elements of the offence.

180. The extent of the offence is limited to intentional conduct which **seriously** impairs and damages a person's psychological integrity which can be done by various means and methods. The Convention does not define what is meant by serious impairment. Use must be made of coercion or threats for behaviour to come under this provision.

181. This provision refers to a course of conduct rather than a single event. It is intended to capture the criminal nature of an abusive pattern of behaviour occurring over time – within or outside the family. Psychological violence often precedes or accompanies physical and sexual violence in intimate relationships (domestic violence). However, it may also occur in any other type of setting, for example in the work place or school environment. It is important to stress that pursuant to Article 78, paragraph 3, of this Convention, any state or the European Union may declare that it reserves the right to provide for non-criminal sanctions, instead of criminal sanctions in relation to psychological violence. The intention of the drafters was to preserve the principle of criminalisation of psychological violence in the Convention, while allowing flexibility where the legal system of a Party provides only for non-criminal sanctions in relation to these behaviours. Nevertheless, sanctions should be effective, proportionate and dissuasive, regardless of whether Parties chose to provide for criminal or non-criminal sanctions.

Article 34 – Stalking

182. This article establishes the offence of stalking, which is defined as the intentional conduct of repeatedly engaging in threatening conduct directed at another person, causing her or him to fear for her or his safety. This comprises any repeated behaviour of a threatening nature against an identified person which has the consequence of instilling in this person a sense of fear. The threatening behaviour may consist of repeatedly following another person, engaging in unwanted communication with another person or letting another person know that he or she is being observed. This includes physically going after the victim, appearing at her or his place of work, sports or education facilities, as well as following the victim in the virtual world (chat rooms, social networking sites, etc.). Engaging in unwanted communication entails the pursuit of any active contact with the victim through any available means of communication, including modern communication tools and ICTs.

183. Furthermore, threatening behaviour may include behaviour as diverse as vandalising the property of another person, leaving subtle traces of contact with a person's personal items, targeting a person's pet, or setting up false identities or spreading untruthful information online.

184. To come within the remit of this provision, any act of such threatening conduct needs to be carried out intentionally and with the intention of instilling in the victim a sense of fear.

185. This provision refers to a course of conduct consisting of repeated significant incidents. It is intended to capture the criminal nature of a pattern of behaviour whose individual elements, if taken on their own, do not always amount to criminal conduct. It covers behaviour that is targeted directly at the victim. However, Parties may also extend it to behaviour towards any person within the social environment of the victim, including family members, friends and colleagues. The experience of stalking victims shows that many stalkers do not confine their stalking activities to their actual victim but often target any number of individuals close to the victim. Often, this significantly enhances the feeling of fear and loss of control over the situation and therefore may be covered by this provision.

186. Finally, just as it is the case with psychological violence, Article 78, paragraph 3, provides for the possibility of any state or the European Union to declare that it reserves the right to provide for non-criminal sanctions, as long as they are effective, proportionate and dissuasive. Providing for a restraining order should be seen as a non-criminal sanction within the possibility of a reservation. Once more, the intention of the drafters was to preserve the principle of criminalisation of stalking, while allowing flexibility where the legal system of a Party provides only for non-criminal sanctions in relation to stalking.

Article 35 – Physical violence

187. This article criminalises any intentional act of physical violence against another person irrespective of the context in which it occurs.

188. The term "physical violence" refers to a bodily harm suffered as a result of the application of immediate and unlawful physical force. It encompasses also violence resulting in the death of the victim.

Article 36 – Sexual violence, including rape

189. This article establishes the criminal offence of sexual violence, including rape. Paragraph 1 covers all forms of sexual acts which are performed on another person without her or his freely given consent and which are carried out intentionally. The interpretation of the word "intentionally" is left to domestic law, but the requirement for intentional conduct relates to all the elements of the offence.

190. Lit. a refers to the vaginal, anal or oral penetration of another person's body which that person has not consented to. The penetration may be performed with a bodily part or an object. By requiring the penetration to be of a sexual nature, the drafters sought to emphasise the limits of this provision and avoid problems of interpretation. The term "of a sexual nature" describes an act that has a sexual connotation. It does not apply to acts which lack such connotation or undertone. Lit b. covers all acts of a sexual nature without the freely given consent of one of the parties involved which fall short of penetration. Lastly, lit. c. covers situations in which the victim is caused without consent to perform or comply with acts of a sexual nature with or by a person other than the perpetrator. In relationships of abuse, victims are often forced to engage in sexual acts with a person chosen by the perpetrator. The purpose of lit.c. is to cover scenarios in which the perpetrator is not the person who performs the sexual act but who causes the victim to engage in sexual activity with a third person provided that this conduct has some connection to the intentional conduct that must be criminalised pursuant to Article 36 of the Convention.

191. When assessing the constituent elements of offences, the Parties should have regard to the case-law of the European Court of Human Rights. In this respect, the drafters wished to recall, subject to the interpretation that may be made thereof, the *M.C. v. Bulgaria* judgment of 4 December 2003, in which the Court stated that it was "persuaded that any rigid approach to the prosecution of sexual offences, such as requiring proof of physical resistance in all circumstances, risks leaving certain types of rape unpunished and thus jeopardising the effective protection of the individual's sexual autonomy. In accordance with contemporary standards and trends in that area, the member states' positive obligations under Articles 3 and 8 of the Convention must be seen as requiring the penalisation and effective prosecution of any non-consensual sexual act, including in the absence of physical resistance by the victim" (§ 166). The Court also noted as follows: "Regardless of the specific wording chosen by the legislature, in a number of countries the prosecution of non-consensual sexual acts in all circumstances is sought in practice by means of interpretation of the relevant statutory terms ("coercion", "violence", "duress", "threat", "ruse", "surprise" or others) and through a context-sensitive assessment of the evidence" (§ 161).

192. Prosecution of this offence will require a context-sensitive assessment of the evidence in order to establish on a case-by-case basis whether the victim has freely consented to the sexual act performed. Such an assessment must recognise the wide range of behavioural responses to sexual violence and rape which victims exhibit and shall not be based on assumptions of typical behaviour in such situations. It is equally important to ensure that interpretations of rape legislation and the prosecution of rape cases are not influenced by gender stereotypes and myths about male and female sexuality.

193. In implementing this provision, Parties to the Convention are required to provide for criminal legislation which encompasses the notion of lack of freely given consent to any of the sexual acts listed in lit.a to lit.c. It is, however, left to the Parties to decide on the specific wording of the legislation and the factors that they consider to preclude freely given consent. Paragraph 2 only specifies that consent must be given voluntarily as the result of the person's free will, as assessed in the context of the surrounding circumstances.

194. Paragraph 3 spells out the obligation of Parties to the Convention to ensure that the criminal offences of sexual violence and rape established in accordance with this Convention are applicable to all non-consensual sexual acts, irrespective of the relationship between the perpetrator and the victim. Sexual violence and rape are a common form of exerting power and control in abusive relationships and are likely to occur during and after break-up. It is crucial to ensure that there are no exceptions to the criminalisation and prosecution of such acts when committed against a current or former spouse or partner as recognised by internal law.

Article 37 – Forced marriage

195. This article establishes the offence of forced marriage. While some victims of forced marriage are forced to enter into a marriage in the country in which they live (paragraph 1), many others are first taken to another country, often that of their ancestors, and are forced to marry a resident of that country (paragraph 2). For this reason, the drafters felt it important to include in this provision two types of conduct: forcing a person to enter into a marriage and luring a person abroad with the purpose of forcing this person to enter into marriage.

196. The type of conduct criminalised in paragraph 1 is that of forcing an adult or a child to enter into a marriage. The term "forcing" refers to physical and psychological force where coercion or duress is employed. The offence is complete when a marriage is concluded to which at least one party has – due to the above circumstances - not voluntarily consented to.

197. Paragraph 2 criminalises the act of luring a person abroad with the intention of forcing this person to marry against her or his will. The marriage does not necessarily have to be concluded. The term "luring" refers to any conduct whereby the perpetrator entices the victim to travel to another country, for example by using a pretext or concocting a reason such as visiting an ailing family member. The intention must cover the act of luring a person abroad, as well as the purpose of forcing this person into a marriage abroad. The drafters felt that this act should be covered by the criminal law of the Parties so as to take into account the standards established under other legally-binding international instruments.

Article 38 – Female genital mutilation

198. Due to the nature of female genital mutilation (FGM), this is one of the criminal offences that break with the principle of gender neutrality of the criminal law part of this Convention. It sets out the criminal offence of female genital mutilation, the victims of which are necessarily women or girls. It aims at criminalising the traditional practice of cutting away certain parts of the female genitalia which some communities perform on their female members. The drafters considered it important to establish female genital mutilation as a

criminal offence in this Convention because this practice causes irreparable and lifelong damage and is usually performed without the consent of the victim.

199. Lit.a criminalises the act of excising, infibulating or performing any other mutilation to the whole or any part of the labia majora, labia minora or clitoris including when performed by medical professionals, as enshrined in the WHO World Health Assembly Resolution 61.16 on accelerating actions to eliminate female genital mutilation. The term "excising" refers to the partial or total removal of the clitoris and the labia majora. "Infibulating", on the other hand, covers the closure of the labia majora by partially sewing together the outer lips of the vulva in order to narrow the vaginal opening. The term "performing any other mutilation" refers to all other physical alterations of the female genitals.

200. Lit.b, on the other hand, covers the act of assisting the perpetrator to perform acts in lit.a by coercing or procuring a woman to undergo the excision, infibulation or mutilation of her labia majora, labia minora or clitoris. This part of the provision is limited to adult victims only.

201. Lit.c criminalises the act of assisting the perpetrator to perform acts in lit.a by inciting, coercing or procuring a girl to undergo the excision, infibulation or mutilation of her labia majora, labia minora or clitoris. This part of the provision is limited to girl victims only and includes situations in which anyone, in particular parents, grandparents or other relatives coerce their daughter or relative to undergo the procedure. The drafters felt it important to differentiate between adult and child victims because they did not wish to criminalise the incitement of women to undergo any of the acts listed in lit.a.

202. In applying lit.b and lit.c, an individual is not to be taken to have intentionally committed the offence merely because the offence resulting from the coercion, procurement or incitement was foreseeable. The individual's actions must also be able to cause the acts in lit.a to be committed.

Article 39 – Forced abortion and forced sterilisation

203. This article makes certain intentional acts related to women's natural reproductive capacity a criminal offence. This is another provision that breaks with the principle of gender neutrality of the criminal law part of this Convention.

204. Lit.a establishes the criminal offence of forced abortion performed on a woman or girl. This refers to the intentional termination of pregnancy without the prior and informed consent of the victim. The termination of pregnancy covers any of the various procedures that result in the expulsion of all the products of conception. To come within the remit of this provision, the abortion must be carried out without the prior and informed consent of the victim. This covers any abortion that is performed without a fully informed decision taken by the victim.

205. Lit.b on the other hand establishes the criminal offence of forced sterilisation of women and girls. This offence is committed if surgery is performed which has the purpose or effect of terminating a woman's or girl's capacity to naturally reproduce if this is done without her prior and informed consent. The term sterilisation refers to any procedure which results in the loss of the ability to naturally reproduce. As in lit.a, the sterilisation must be carried out without the prior and informed consent of the victim. This covers any sterilisation that is performed without a fully informed decision taken by the victim in line with standards set in the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (ETS No. 164).

206. It is not the intention of this Convention to criminalise any medical interventions or surgical procedures which are carried out for example with the purpose of assisting a woman by saving her life or for assisting a woman who lacks capacity to consent. Rather, the aim of this provision is to emphasise the importance of respecting women's reproductive rights by allowing women to decide freely on the number and spacing of their children and by ensuring their access to appropriate information on natural reproduction and family planning.

Article 40 – Sexual harassment

207. This article sets out the principle that sexual harassment be subject to criminal or "other" legal sanction, which means that the drafters decided to leaving to the Parties to choose the type of consequences the perpetrator would face when committing this specific offence. While generally considering it preferable to place the conduct dealt with by this article under criminal law, the drafters acknowledged that many national legal systems consider sexual harassment under civil or labour law. Consequently, Parties may choose to deal with sexual harassment either by their criminal law or by administrative or other legal sanctions, while ensuring that the law deals with sexual harassment.

208. The type of conduct covered by this provision is manifold. It includes three main forms of behaviour: verbal, non-verbal or physical conduct of a sexual nature unwanted by the victim. Verbal conduct refers to words or sounds expressed or communicated by the perpetrator, such as jokes, questions, remarks, and may be expressed orally or in writing. Non-verbal conduct, on the other hand, covers any expressions or communication on the part of the perpetrator that do not involve words or sounds, for example facial expressions, hand movements or symbols. Physical conduct refers to any sexual behaviour of the perpetrator and may include situations involving contact with the body of the victim. As in Article 36, any of these forms of behaviour must be of a sexual nature in order to come within the remit of this provision. Furthermore, any of the above conduct must be unwanted on the part of the victim, meaning imposed by the perpetrator. Moreover, the above acts must have the purpose or effect of violating the dignity of the victim. This is the case if the conduct in question creates an intimidating, hostile, degrading, humiliating or offensive environment. It is intended to capture a pattern of behaviour whose individual elements, if taken on their own, may not necessarily result in a sanction.

209. Typically, the above acts are carried out in a context of abuse of power, promise of reward or threat of reprisal. In most cases, victim and perpetrator know each other and their relationship is often characterised by differences in hierarchy and power. The scope of application of this article is not limited to the field of employment. However, it should be noted that the requirements for liability can differ depending on the specific situation in which the conduct takes place.

Article 41 – Aiding or abetting and attempt

210. The purpose of this article is to establish additional offences relating to aiding or abetting of the offences defined in the Convention and the attempted commission of some.

211. Paragraph 1 requires Parties to the Convention to establish as offences aiding or abetting the commission of any of the following offences established in accordance with the Convention: psychological violence (Article 33), stalking (Article 34), physical violence (Article 35), sexual violence, including rape (Article 36), forced marriage (Article 37), female genital mutilation (Article 38 lit.a), and forced abortion and forced sterilisation (Article 39).

212. The drafters wished to emphasise that the terms "aiding or abetting" do not only refer to offences established by a Party in its criminal law, but may also refer to offences covered by administrative or civil law. This is of particular importance since, pursuant to Article 78, paragraph 3, Parties may provide for non-criminal sanctions in relation to psychological violence (Article 33) and stalking (Article 34).

213. With regard to paragraph 2, on attempt, the drafters felt that treating certain offences as attempt gave rise to conceptual difficulties. Moreover, some legal systems limit the offences for which the attempt is punished. For these reasons, it requires Parties to establish as an offence the attempt to commit the following offences only: serious cases of physical violence (Article 35), sexual violence including rape (Article 36), forced marriage (Article 37), female genital mutilation (Article 38 lit.a), and forced abortion and forced sterilisation (Article 39).

214. With regard to physical violence (Article 35) the drafters acknowledged that the offence as established by the Convention has a very broad scope. It also covers cases of simple assault for which an attempt is difficult to construct. Parties therefore have the discretion to establish as an offence the attempt to commit physical violence only for serious cases of physical violence. The Convention also does not preclude Parties to cover attempt by other offences.

215. As with all the offences established under the Convention, aiding and abetting and attempt must be intentional.

Article 42 – Unacceptable justifications for crimes, including crimes committed in the name of so-called "honour"

216. The drafters enshrined in this Convention an important general principle: nobody under the jurisdiction of the courts of one of the Parties to this Convention will be allowed to validly invoke what he or she believes to be an element of his or her culture, religion or other form of personal reason to justify the commission of what is simply an element of a criminal offence, i.e. violence against women. In order to address crimes committed in the name of so-called "honour" the drafters intended to ensure that crimes committed to punish a victim for her or his behaviour are not justified. Consequently, this article sets out the obligation for Parties, in paragraph 1, to ensure that culture, custom, religion, tradition or so-called "honour", are not

regarded as justification for any of the acts of violence covered by the scope of this Convention. This means that Parties are required to ensure that criminal law and criminal procedural law do not permit as justifications claims of the accused justifying his or her acts as committed in order to prevent or punish a victim's suspected, perceived or actual transgression of cultural, religious, social or traditional norms or customs of appropriate behaviour.

217. In addition, this provision requires Parties to ensure that personal convictions and individual beliefs of judicial actors do not lead to interpretations of the law that amount to a justification on any of the above-mentioned grounds. Paragraph 1 thus reinforces for the particular area of criminal law the obligation contained in Article 12, paragraph 5, of the Convention.

218. To avoid criminal liability, these acts are often committed by a child below the age of criminal responsibility, which is instigated by an adult member of the family or community. For this reason, the drafters considered it necessary to set out, in paragraph 2, the criminal liability of the instigator(s) of such crimes in order to avoid gaps in criminal liability. Paragraph 2 applies to acts established in accordance with this Convention where the child is the principal perpetrator, it does not apply to offences established in accordance with Articles 38 (b), 38 (c) and 41.

Article 43 – Application of criminal offences

219. A large number of the offences established in accordance with this Convention are offences typically committed by family members, intimate partners or others in the immediate social environment of the victim. There are many examples from past practice in Council of Europe member states that show that exceptions to the prosecution of such cases were made, either in law or in practice, if victim and perpetrator were, for example, married to each other or had been in a relationship. The most prominent example is rape within marriage, which for a long time had not been recognised as rape because of the relationship between victim and perpetrator.

220. For this reason, the drafters considered it necessary to establish the principle that the type of relationship between victim and perpetrator shall not preclude the application of any of the offences established in this Convention.

Article 44 – Jurisdiction

221. This article lays down various requirements whereby Parties must establish jurisdiction over the offences with which the Convention is concerned.

222. Paragraph 1 (a) is based on the principle of territoriality. Parties are required to punish the offences established in accordance with the Convention when they are committed on their territory.

223. Paragraph 1 (b) and (c) is based on a variant of the principle of territoriality. These sub-paragraphs require Parties to establish jurisdiction over offences committed on ships flying their flag or aircraft registered under their laws. This obligation is already in force in the law of many countries, ships and aircraft being frequently under the jurisdiction of the state in which they are registered. This type of jurisdiction is extremely useful when the ship or aircraft is not located in the country's territory at the time of commission of the crime, as a result of which paragraph 1 (a) would not be available as a basis for asserting jurisdiction. In the case of a crime committed on a ship or aircraft outside the territory of the flag or registry Party, it might be that without this rule there would not be any country able to exercise jurisdiction. In addition, if a crime is committed on board a ship or aircraft which is merely passing through the waters or airspace of another state, there may be significant practical impediments to the latter state's exercising its jurisdiction and it is therefore useful for the registry state to also have jurisdiction.

224. Paragraph 1 (d) is based on the principle of nationality. The nationality theory is most frequently applied by countries with a civil law tradition. Under this principle, nationals of a country are obliged to comply with its law even when they are outside its territory. Under sub-paragraph (d), if one of its nationals commits an offence abroad, a Party is obliged to be able to prosecute her or him. The drafters considered this a particularly important provision in combating certain forms of violence against women. Indeed, some states in which women and girls are subjected to rape or sexual violence, forced marriage, female genital mutilation, crimes committed in the name of so-called "honour" and forced abortion and forced sterilisation, do not have the will nor the necessary resources to successfully carry out investigations or they lack the appropriate legal framework. Paragraph 2 enables these cases to be tried even where they are not criminalised in the state in which the offence was committed.

225. Paragraph 1 (e) applies to persons having their habitual residence in the territory of the Party. It provides that Parties shall establish jurisdiction to investigate acts committed abroad by persons having their habitual residence in their territory, and thus contributes to the punishment of acts of violence committed abroad. Article 78, paragraph 2, on reservations allows Parties not to implement this jurisdiction or only to do so in specific cases or conditions.

226. Paragraph 2 is linked to the nationality or residence status of the victim. It is based on the premise that the particular interests of national victims overlap with the general interest of the state to prosecute crimes committed against its nationals or residents. Hence, if a national or person having habitual residence is a victim of an offence abroad, the Party shall endeavour to establish jurisdiction in order to start proceedings. However, there is no obligation imposed on Parties, as demonstrated by the use of the expression "endeavour".

227. Paragraph 3 represents an important element of added value in this Convention, and a major step forward in the protection of victims. The provision eliminates, in relation to the most serious offences of the Convention, the usual rule of dual criminality where acts must be criminal offences in the place where they are committed. Its aim is to combat in particular certain forms of violence against women which may be – or are most frequently - committed outside the territory of application of this Convention, such as forced marriage, female genital mutilation, forced abortion and forced sterilisation. Therefore, this paragraph applies exclusively to the offences defined in Article 36 (sexual violence including rape), Article 37 (forced marriage), Article 38 (female genital mutilation), and Article 39 (forced abortion and forced sterilisation) and committed by nationals of the Party concerned. Article 78, paragraph 2, on reservations allows Parties not to implement this jurisdiction or only to do so in specific cases or conditions.

228. In paragraph 4, the drafters wished to prohibit the subordination of the initiation of proceedings of the most serious offences in the state of nationality or of habitual residence to the conditions usually required of a complaint of the victim or the laying of information by the authorities of the state in which the offence took place. The aim of this provision is to facilitate the prosecution of offences committed abroad. As some states do not possess the necessary will or resources to carry out investigations of certain forms of violence against women and domestic violence, the requirement of a complaint of the victim or the filing of charges by the relevant authorities often constitutes an impediment to prosecution. This paragraph applies exclusively to the offences defined in Article 36 (sexual violence including rape), Article 37 (forced marriage), Article 38 (female genital mutilation), and Article 39 (forced abortion and forced sterilisation) and committed by nationals of the Party concerned. Article 78, paragraph 2, on reservations allows Parties not to implement this jurisdiction or only to do so in specific cases or conditions.

229. Paragraph 5 concerns the principle of *aut dedere aut judicare* (extradite or prosecute). Jurisdiction established on the basis of paragraph 5 is necessary to ensure that Parties that refuse to extradite a national have the legal ability to undertake investigations and proceedings domestically instead, if asked to do so by the Party that requested extradition under the terms of the relevant international instruments. Paragraph 4 does not prevent Parties from establishing jurisdiction only if the offence is punishable in the territory where it was committed, or if the offence is committed outside the territorial jurisdiction of any state.

230. It may happen that in some cases of violence covered by the scope of this Convention more than one Party has jurisdiction over some or all of the participants in the offence. For example, a woman may be lured into the territory of another state and forced to marry against her will. In order to avoid duplication of procedures and unnecessary inconvenience for victims and witnesses or to otherwise facilitate the efficiency or fairness of proceedings, the affected Parties are, in accordance with paragraph 6, required to consult in order to determine the proper venue for prosecution. In some cases it will be most effective for them to choose a single venue for prosecution; in others it may be best for one country to prosecute some alleged perpetrators, while one or more other countries prosecute others. Either method is permitted under this paragraph. Finally, the obligation to consult is not absolute; consultation is to take place "where appropriate". Thus, for example, if one of the Parties knows that consultation is not necessary (e.g. it has received confirmation that the other Party is not planning to take action), or if a Party is of the view that consultation may impair its investigations or proceedings, it may delay or decline consultation.

231. The bases of jurisdiction set out in paragraph 1 of this article are not exclusive. Paragraph 7 permits Parties to establish other types of criminal jurisdiction according to their domestic law.

Article 45 – Sanctions and measures

232. This article is closely linked to Articles 33 to 41 which define the various offences that should be made punishable under criminal law. However, it applies to all types of sanctions, regardless of whether they are of

a criminal nature or not. In accordance with these obligations imposed by those articles, Article 45 requires Parties to match their action with the seriousness of the offences and lay down sanctions which are "effective, proportionate and dissuasive". This includes providing for prison sentences that can give rise to extradition where this is appropriate. The drafters decided to leave it to the Parties to decide on the type of offence established in accordance with the Convention that merits a prison sentence. It should be noted that, under Article 2 of the European Convention on Extradition (ETS No. 24), extradition is to be granted in respect of offences punishable under the laws of the requesting and requested Parties by deprivation of liberty or under a detention order for a maximum period of at least one year or by a more severe sanction.

233. In addition, paragraph 2 provides for other measures which may be taken in relation to perpetrators. The provision lists two examples: the monitoring or supervision of convicted persons and the withdrawal of parental rights, if the best interests of the child, which may include the safety of the victim, cannot be guaranteed in any other way. The reference to the "best interest of the child" in the latter example is in line with the ruling of the European Court of Human Rights in the Zaunegger v. Germany judgment of 3 December 2009, which stated that in the majority of member states, "decisions regarding the attribution of custody are to be based on the child's best interest" (§60). In particular, measures taken in relation to parental rights should never lead to endangering or causing harm to the child. Although the granting of parental rights and contact with the child are often related issues, the drafters bore in mind that some Parties may distinguish these issues in their internal law, and thus allow a parent to have contact with the child without granting her or him parental rights. In particular in cases of domestic violence against one parent and witnessed by a child, it may not be in the best interest of the child to continue contact with the abusive parent. Ensuring contact with the abusive parent may not only have a negative impact on the child, but may also pose a serious risk to the safety of the abuser's victim, because it often gives the perpetrator a reason to contact or see the victim and may not be in line with a restraining or barring order in place. It is important to ensure that all legal measures taken to protect victims are consistent and are not thwarted by legal measures taken in other contexts.

Article 46 – Aggravating circumstances

234. Article 46 requires Parties to ensure that the circumstances mentioned in sub-paragraphs a – i may be taken into consideration as aggravating circumstances in the determination of the penalty for offences established in the Convention. These circumstances must not already form part of the constituent elements of the offence. This principle applies to cases where the aggravating circumstances already form part of the constituent elements of the offence in the national law of the Party.

235. By the use of the phrase "may be taken into consideration", the drafters wished to highlight that the Convention places an obligation on Parties to ensure that these aggravating circumstances are available for judges to consider when sentencing perpetrators although there is no obligation on judges to apply them. In addition, the reference to "in conformity with the relevant provisions of internal law" is intended to reflect the fact that the various legal systems in Europe have different approaches to aggravating circumstances and therefore permits Parties to retain some of their legal concepts. This gives flexibility to Parties in implementing this provision without notably obliging them to modify their principles related to the application of sanctions in the criminal law systems.

236. The first of the aggravating circumstances, lit.a, is where the offence was committed against a former or current spouse or partner as recognised by internal law, by a member of the family, a person cohabiting with the victim or a person having abused her or his authority. This would cover various situations where the offence was committed by the former or current marital partner or non-marital partner as recognised by internal law. It would also include members of the victim's family, such as parents and grand-parents and children or persons having a family related dependant relationship with the victim. Any person cohabiting with the victim refers to persons living within the same household other than family members. A person having authority refers to anyone who is in a position of superiority over the victim, including for example a teacher or employer. The common element of these cases is the position of trust which is normally connected with such a relationship and the specific emotional harm which may emerge from the misuse of this trust when committing an offence within such a relationship. In this paragraph the reference to "partners as recognised by internal law" means that, as a minimum, former or current partners shall be covered in accordance with the conditions set out in internal law, bearing in mind that it is the intimacy and trust connected with the relationship that makes it an aggravating circumstance.

237. The second aggravating circumstance, lit.b, concerns offences that are committed repeatedly. This refers to any of the offences established by this Convention as well as any related offence which are committed by the same perpetrator more than once during a certain period of time. The drafters thereby decided

to emphasise the particularly devastating effect on a victim who is repeatedly subjected to the same type of criminal act. This is often the case in situations of domestic violence, which inspired the drafters to require the possibility of increased court sentences. It is important to note that the facts of an offence of a similar nature which led to a conviction of the same perpetrator may not be considered as a repeated act referred to under lit.b but constitute an aggravating circumstance of their own under lit.i.

238. The third aggravating circumstance, lit. c, refers to offences committed against a person made vulnerable by particular circumstances (see paragraph 87 for the indicative list of possible vulnerable persons).

239. The fourth aggravating circumstance, lit.d, covers offences committed against a child or in the presence of a child, which constitutes a form of victimisation of the child in itself. The drafters wished to highlight the particularly culpable behaviour if any of the offences established by this Convention are committed against a child.

240. The fifth aggravating circumstance, lit.e, is where the offence was committed by two or more people acting together. This indicates a collective act committed by two or more people.

241. The sixth aggravating circumstance, lit.f, refers to offences preceded or accompanied by extreme levels of violence. This refers to acts of physical violence that are particularly high in intensity and present a serious risk to the life of the victim.

242. The seventh aggravating circumstance, lit.g, concerns the use or threat of a weapon. By including this, the drafters emphasise the particularly culpable behaviour of employing a weapon, as it may cause serious violence, including the death of the victim.

243. The eighth aggravating circumstance, lit.h, is where the offence resulted in severe physical or psychological harm for the victim. This indicates offences which cause particularly serious physical or psychological suffering, in particular long-term health consequences for the victim.

244. The last aggravating circumstance, lit.i, is where the perpetrator has previously been convicted of offences of a similar nature. By including this, the drafters draw attention to the particular risk of recidivism for many of the offences covered by the Convention, in particular domestic violence.

Article 47 – Sentences passed by another Party

245. Some of the offences established in accordance with this Convention can have a transnational dimension or may be carried out by perpetrators who have been tried and convicted in another country or in more than one country. At the domestic level, many legal systems provide for a different, often harsher, penalty where someone has previous convictions. In general, only convictions by a national court count as a previous conviction. Traditionally, convictions by foreign courts are not necessarily taken into account on the grounds that criminal law is a national matter and that there can be differences of national law, and because of a degree of suspicion of decisions by foreign courts.

246. Such arguments have less force today in that internationalisation of criminal law standards – as a result of the internationalisation of crime – is tending to harmonise the laws of different countries. In addition, in the space of a few decades, countries have adopted instruments such as the ECHR whose implementation has helped build a solid foundation of common guarantees that inspire greater confidence in the justice systems of all the participating states.

247. The principle of international recidivism is established in a number of international legal instruments. Under Article 36(2)(iii) of the New York Convention of 30 March 1961 on Narcotic Drugs, for example, foreign convictions have to be taken into account for the purpose of establishing recidivism, subject to each Party's constitutional provisions, legal system and national law. Under Article 1 of the Council Framework Decision of 6 December 2001 amending Framework Decision 2000/383/JHA on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the Euro, European Union member states must recognise as establishing habitual criminality final decisions handed down in another member state for counterfeiting of currency.

248. The fact remains that at international level there is no standard concept of recidivism and the laws of some countries do not include the concept at all. The fact that foreign convictions are not always brought to the courts' notice for sentencing purposes is an additional practical difficulty. However, Article 3 of the Council Framework Decision 2008/675/JHA on taking account of convictions in the member states of the European Union in the course of new criminal proceedings, firstly establishes in a general way – without

limitation to specific offences – the obligation of taking into account a previous conviction handed down in another (member) state.

249. Therefore, Article 47 provides for the possibility of taking into account final sentences passed by another Party in assessing a sentence. To comply with the provision Parties may provide in their domestic law that previous convictions by foreign courts are to result in a harsher penalty when they are known to the competent authority. They may also provide that, under their general powers to assess the individual's circumstances in setting the sentence, courts should take those convictions into account. This possibility should also include the principle that the perpetrator should not be treated less favourably than he would have been treated if the previous conviction had been a national conviction.

250. This provision does not place any positive obligation on courts or prosecution services to take steps to find out whether persons being prosecuted have received final sentences from another Party's courts. It should nevertheless be noted that, under Article 13 of the European Convention on Mutual Assistance in Criminal Matters (ETS No. 30), a Party's judicial authorities may request from another Party extracts from and information relating to judicial records, if needed in a criminal matter.

Article 48 – Prohibition of mandatory alternative dispute resolution processes or sentencing

251. The domestic law of many Council of Europe member states provides for alternative dispute resolution processes and sentencing – in criminal and in civil law. In particular in family law, methods of resolving disputes alternative to judicial decisions are considered to better serve family relations and to result in more durable dispute resolution. In some legal systems, alternative dispute resolution processes or sentencing such as mediation or conciliation are also used in criminal law.

252. While the drafters do not question the advantages these alternative methods present in many criminal and civil law cases, they wish to emphasise the negative effects these can have in cases of violence covered by the scope of this Convention, in particular if participation in such alternative dispute resolution methods are mandatory and replace adversarial court proceedings. Victims of such violence can never enter the alternative dispute resolution processes on a level equal to that of the perpetrator. It is in the nature of such offences that such victims are invariably left with a feeling of shame, helplessness and vulnerability, while the perpetrator exudes a sense of power and dominance. To avoid the re-privatisation of domestic violence and violence against women and to enable the victim to seek justice, it is the responsibility of the state to provide access to adversarial court proceedings presided over by a neutral judge and which are carried out on the basis of the national laws in force. Consequently, paragraph 1 requires Parties to prohibit in domestic criminal and civil law the mandatory participation in any alternative dispute resolution processes.

253. Paragraph 2 of this article aims at preventing another unintended consequence which legal measures may have on the victim. Many of the perpetrators of the offences established by the Convention are members of the family of the victim. Moreover, they are often the sole breadwinners of the family and therefore the only source of a possibly limited/small family income. Ordering the perpetrator to pay a fine will consequently have a bearing on the family income or his ability to pay alimony and may result in financial hardship for the victim. Such a measure may thus present an indirect punishment of the victim. This provision therefore requires Parties to ensure that any fine that a perpetrator is ordered to pay shall not indirectly lead to financial hardship on the part of the victim. It is important to note that it does not impinge on the independence of the judiciary and an individual approach to sanctions.

CHAPTER VI – INVESTIGATION, PROSECUTION, PROCEDURAL LAW AND PROTECTIVE MEASURES

254. This chapter contains a variety of provisions that cover a broad range of issues related to investigation, prosecution, procedural law and protection against all forms of violence covered by the scope of this Convention, in order to reinforce the rights and duties laid out in the previous chapters of the Convention.

Article 49 – General obligations

255. The drafters wanted to prevent that incidents of violence against women and domestic violence are assigned low priority in investigations and judicial proceedings, which contributes significantly to a sense of impunity among perpetrators and has helped to perpetuate high levels of acceptance of such violence. In order to achieve this goal, paragraph 1 sets out the obligation to ensure that investigations and judicial

proceedings in relation to all forms of violence covered by the scope of this Convention are carried out without undue delay. This will help to secure vital evidence, enhance conviction rates and put an end to impunity. It is important to note that while it is essential to ensure swift investigations and proceedings, it is equally important to respect the rights of victims during these stages. Paragraph 1 therefore requires Parties to avoid to the extent possible aggravating any harm experienced by victims during investigations and judicial proceedings and to provide them with assistance during criminal proceedings.

256. Paragraph 2 complements the obligation by establishing the obligation to ensure that the investigation and prosecution of cases of all forms of violence covered by the scope of this Convention are carried out in an effective manner. This means, for example, establishing the relevant facts, interviewing all available witnesses, and conducting forensic examinations, based on a multi-disciplinary approach and using state-of-the-art criminal investigative methodology to ensure a comprehensive analysis of the case. The drafters considered it important to spell out as part of this obligation the need to ensure that all investigations and procedures are carried out in conformity with fundamental principles of human rights and with regard to a gendered understanding of violence. This means, in particular, that any measures taken in implementation of this provision are not prejudicial to the rights of the defence and the requirements of a fair and impartial trial, in conformity with Article 6 ECHR.

Article 50 – Immediate response, prevention and protection

257. Paragraph 1 requires law enforcement agencies to promptly and appropriately react by offering adequate and immediate protection to victims, while paragraph 2 calls for their prompt and appropriate engagement in the prevention of and protection against all forms of violence covered by the scope of this Convention, including the employment of preventive operational measures and the collection of evidence.

258. Compliance with this obligation includes, for example, the following:

- the right of the responsible law enforcement agencies to enter the place where a person at risk is present;
- the treatment and giving advice to victims by the responsible law enforcement agencies in an appropriate manner;
- hearing victims without delay by specially-trained, where appropriate female, staff in premises that are designed to establish a relationship of trust between the victim and the law enforcement personnel; and
- provide for an adequate number of female law enforcement officers, including at high levels of responsibility.

259. Effective measures should be taken to prevent the most blatant forms of violence which are murder or attempted murder. Each such case should be carefully analysed in order to identify any possible failure of protection in view of improving and developing further preventive measures.

Article 51 – Risk assessment and risk management

260. Concerns for the victim's safety must lie at the heart of any intervention in cases of all forms of violence covered by the scope of this Convention. This article therefore establishes the obligation to ensure that all relevant authorities, not limited to the police, effectively assess and devise a plan to manage the safety risks a particular victim faces on a case-by-case basis, according to standardised procedure and in co-operation and co-ordination with each other. Many perpetrators threaten their victims with serious violence, including death, and have subjected their victims to serious violence in the past. It is therefore essential that any risk assessment and risk management consider the probability of repeated violence, notably deadly violence, and adequately assess the seriousness of the situation.

261. The purpose of this provision is to ensure that an effective multi-agency network of professionals is set up to protect high-risk victims. The risk assessment must therefore be carried out with a view to managing the identified risk by devising a safety plan for the victim in question in order to provide co-ordinated safety and support if necessary.

262. However, it is important to ensure that any measures taken to assess and manage the risk of further violence allow for the rights of the accused to be respected at all times. At the same time, it is of paramount importance that such measures do not aggravate any harm experienced by victims and that investigations and judicial proceedings do not lead to secondary victimisation.

263. Paragraph 2 extends the obligation to ensure that the risk assessment referred to in the first paragraph of this article duly takes into account reliable information on the possession of firearms by perpetrators. The possession of firearms by perpetrators not only constitutes a powerful means to exert control over victims, but also increases the risk of homicide. This is particularly the case in post-conflict situations or in countries with a tradition of firearms ownership, which can provide perpetrators with greater access to these weapons. However, very serious cases of violence against women and domestic violence are committed with the use of firearms in all other countries as well. For this reason, the drafters felt it essential to place on Parties the obligation to ensure that any assessment of the risks faced by a victim should systematically take into consideration, at all stages of the investigation and application of protective measures, whether the perpetrator legally or illegally possesses or has access to firearms in order to guarantee the safety of victims. For example, in issuing emergency barring orders, restraining or protection orders, and when sentencing following criminal convictions for any of the forms of violence covered by the scope of this Convention, Parties may adopt, within their domestic legal systems, such measures as may be necessary to enable immediate confiscation of firearms and ammunition. Additionally, in order to cover all weapons that could be used in serious cases of violence, notably combat-type knives, Parties are encouraged to take into account, as far as possible, the possession of or access to such weapons.

Article 52 – Emergency barring orders

264. In situations of immediate danger, the most effective way of guaranteeing the safety of a domestic violence victim is by achieving physical distance between the victim and the perpetrator. In many cases, this requires one of the two to leave, for a certain period of time, the joint residence or the perpetrator to leave the victim's residence. Rather than placing the burden of hurriedly seeking safety in a shelter or elsewhere on the victim, who is often accompanied by dependant children, often with very few personal affairs and for an indefinite period of time, the drafters considered it important to ensure the removal of the perpetrator to allow the victim to remain in the home. Therefore, this provision establishes the obligation of equipping the competent authorities, with the power to order, a perpetrator of domestic violence to leave the residence of the victim and to bar him or her from returning or contacting the victim. The immediate danger must be assessed by the relevant authorities. The drafters decided to leave to the Parties to decide on the length of period for such an order, but the period should be sufficient to provide effective protection to the victim. Existing examples of such orders in Council of Europe member states range between 10 days and four weeks, with or without the possibility of renewal. Equally, the drafters decided to leave to the Parties to identify and empower, in accordance with their national legal and constitutional systems, the authority competent to issue such orders and the applicable procedure.

265. The term "immediate danger" refers to any situations of domestic violence in which harm is imminent or has already materialised and is likely to happen again.

266. Lastly, this provision requires Parties to ensure that any measures taken in its implementation give due consideration to the safety of the victim or person at risk. This shows the protective nature of this measure.

Article 53 – Restraining or protection orders

267. This provision sets out the obligation to ensure that national legislation provides for restraining and/or protection orders for victims of all forms of violence covered by the scope of this Convention. Furthermore, it establishes a number of criteria for such orders to ensure that they serve the purpose of offering protection from further acts of violence.

268. Although this provision refers to restraining "or" protection orders, the drafters bore in mind that the national legislation of certain Parties may provide for the combined use of restraining and protection orders. A restraining or protection order may be considered complementary to a short-term emergency barring order. Its purpose is to offer a fast legal remedy to protect persons at risk of any of the forms of violence covered by the scope of this Convention by prohibiting, restraining or prescribing a certain behaviour by the perpetrator. This wide range of measures covered by such orders means that they exist under various names such as restraining order, barring order, eviction order, protection order or injunction. Despite these differences, they serve the same purpose: preventing the commission of violence and protect the victim. For the purpose of this Convention, the drafters decided to use the term restraining or protection order as an umbrella category.

269. The drafters decided to leave to the Parties to choose the appropriate legal regime under which such orders may be issued. Whether restraining or protection orders are based in civil law, criminal procedure law or administrative law or in all of them will depend on the national legal system and above all on the necessity for effective protection of victims.

270. Paragraph 2 contains a number of specifications for restraining and protection orders. The first indent requires these orders to offer immediate protection and to be available without undue financial or administrative burdens placed on the victim. This means that any order should take effect immediately after it has been issued and shall be available without lengthy court proceedings. Any court fees levied against the applicant, most likely the victim, shall not constitute an undue financial burden which would bar the victim from applying. At the same time, any procedures set up to apply for a restraining or protection order shall not present insurmountable difficulties for victims.

271. The second indent calls for the order to be issued for a specified or a determined period or until modified or discharged. This follows from the principle of legal certainty that requires the duration of a legal measure to be spelt out clearly. Furthermore, it shall cease to be in effect if changed or discharged by a judge or other competent official.

272. The third indent requires Parties to ensure that in certain cases these orders may be issued, where necessary, on an ex parte basis with immediate effect. This means a judge or other competent official would have the authority to issue a temporary restraining or protection order based on the request of one party only.It should be noted that, in accordance with the general obligations provided for under Article 49 (2) of this Convention, the issuing of such orders must not be prejudicial to the rights of the defence and the requirements of a fair and impartial trial, in conformity with Article 6 ECHR. This means notably that the person against whom such an order has been issued should have the right to appeal it before the competent authorities and according to the appropriate internal procedures.

273. The fourth indent seeks to ensure the possibility for victims to obtain a restraining or protection order whether or not they choose to set in motion any other legal proceedings. For example, where such orders exist, research has shown that many victims who want to apply for a restraining or protection order may not be prepared to press criminal charges (that would lead to a criminal investigation and possibly criminal proceedings) against the perpetrator. Standing to apply for a restraining or protection order shall therefore not be made dependent on the institution of criminal proceedings against the same perpetrator. Similarly, they should not be made dependent on the institution of divorce proceedings, etc. At the same time, the fact that criminal or civil proceedings concerning the same set of facts are underway against the same perpetrator shall not prevent a restraining or protection order from being issued. This, however, does not exclude the right of the Parties to provide in national legislation that after receiving a motion to issue a restraining or protective order, criminal proceedings may be instituted.

274. The fifth indent requires Parties to take measures to ensure that the existence of a restraining or protection order may be introduced in any other legal proceedings against the same perpetrator. The aim of this provision is to allow for the fact that such an order has been issued against the perpetrator to be known to any other judge presiding over legal proceedings against the same person.

275. Paragraph 3 aims at ensuring respect for restraining and protection orders by requiring "effective, proportionate and dissuasive" sanctions for any breach of such orders. These sanctions may be of a criminal law or other legal nature and may include prison sentences, fines or any other legal sanction that is effective, proportionate and dissuasive.

276. Lastly, since establishing the truth in domestic violence cases may, at times, be difficult, Parties may consider limiting the possibility of the adversary/the perpetrator to thwart attempts of the victim to seek protection by taking the necessary measures to ensure that, in cases of domestic violence, restraining and protection orders as referred to in paragraph 1 may not be issued against the victim and perpetrator mutually. Also, Parties should consider banning from their national legislation any notions of provocative behaviour in relation to the right to apply for restraining or protection orders. Such concepts allow for abusive interpretations that aim at discrediting the victim and should be removed from domestic violence legislation. Finally, Parties may also consider taking measures to ensure that standing to apply for restraining or protection orders referred to in paragraph 1 is not limited to victims. These measures are of particular relevance in relation to legally incapable victims, as well as regarding vulnerable victims who may be unwilling to apply for restraining or protection orders for reasons of fear or emotional turmoil and attachment.

Article 54 – Investigations and evidence

277. In judicial proceedings evidence relating to the sexual history and sexual conduct of a victim is sometimes exploited in order to discredit the evidence presented by the victim. The defence sometimes uses previous sexual behaviour history evidence in order to challenge the respectability, the credibility and the lack of consent of victims. This particularly regards cases of sexual violence, including rape. Presenting this type

of evidence may reinforce the perpetuation of damaging stereotypes of victims as being promiscuous and by extension immoral and not worthy of the protection provided by civil and criminal law. This may lead to de facto inequality, since victims, who are overwhelmingly women, are more likely to be provided with this protection if they are judged to be of a respectable nature.

278. The drafters felt it essential to emphasise that a victim's past sexual behaviour should not be considered as an excuse for acts of violence against women and domestic violence allowing to exonerate the perpetrator or to diminish his liability. However, they were conscious of the fact that, in some Parties to the Convention, the admissibility and consideration of evidence lies within the discretion of the judge, whereas in others, it is strictly pre-determined by the rules of criminal procedural law. Article 54 entails the obligation for Parties to take the necessary legislative or other measures to ensure that evidence relating to the sexual history and sexual conduct of the victim shall be permitted or considered only when it is relevant and necessary. This means that the provision restricts the admissibility of such evidence, in both civil or criminal proceedings, to cases where it is relevant to a specific issue at trial and if it is of significant probative value. Therefore, it does not rule out the admissibility of such evidence. Where judges admit previous sexual history evidence, it should only be presented in a way that does not lead to secondary victimisation. Victims should have access to legal recourse without suffering additional trauma because of their sexual history and conduct.

Article 55 – *Ex parte* and *ex officio* proceedings

279. Conscientious of the particularly traumatising nature of the offences covered by this article, the drafters sought to ease the burden which lengthy criminal investigations and proceedings often place on the victims while at the same time ensuring that perpetrators are brought to justice. The aim of this provision is therefore to enable criminal investigations and proceedings to be carried out without placing the onus of initiating such proceedings and securing convictions on the victim.

280. Paragraph 1 places on Parties the obligation to ensure that investigations into a number of categories of offences shall not be "wholly dependant" upon the report or complaint filed by a victim and that any proceedings underway may continue even after the victim has withdrawn her or his statement or complaint. The drafters decided to use the terms "wholly dependant" in order to address procedural differences in each legal system, bearing in mind that ensuring the investigations or prosecution of the offences listed in this article is the responsibility of the state and its authorities. In particular, the drafters were of the opinion that acts resulting in severe bodily harm or deprivation of life must be addressed promptly and directly by competent authorities. The fact that many of the offences covered by this Convention are perpetrated by family members, intimate partners or persons in the immediate social environment of the victim and the resulting feelings of shame, fear and helplessness lead to low numbers of reporting and, subsequently, convictions. Therefore, law enforcement authorities should investigate in a proactive way in order to gather evidence such as substantial evidence, testimonies of witnesses, medical expertise, etc., in order to make sure that the proceedings may be carried out even if the victim withdraws her or his statement or complaint at least with regard to serious offences, such as physical violence resulting in death or bodily harm.

281. Paragraph 1 of this article is open to reservations in respect of Article 35 regarding minor offences, pursuant to Article 78, paragraph 2, of this Convention. The drafters wished to make a clear distinction between serious offences of physical violence resulting in severe bodily harm or deprivation of life which would be then excluded by this possibility of reservation and other, minor, offences of physical violence which do not lead to such consequences. However, it is left to Parties to determine what constitutes "minor offences" of physical violence.

282. With a view to empowering victims and to encouraging them to go through with criminal proceedings, paragraph 2 requires Parties to ensure that victim organisations, specifically trained domestic violence counsellors or other types of support/advocacy services may assist and support victims during investigations and judicial proceedings. Good practice examples have shown that victims who are supported or assisted by a specialist support service during investigations and proceedings are more likely to file a complaint and testify and are better equipped to take on the emotionally challenging task of actively contributing to the outcome of proceedings. The type of service which this paragraph refers to is not of a legal, but a practical/psychological nature. It includes psychologically/emotionally preparing victims to endure testifying in front of the accused, accompanying victims to court and/or assisting them in any other practical and emotional way.

Article 56 – Measures of protection

283. This provision is inspired by Article 31, paragraph 1 of the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS No. 201). Paragraph 1 contains a non-exhaustive list of

procedures designed to protect victims of all forms of violence covered by the scope of this Convention during proceedings. These measures of protection apply at all stages of the proceedings, both during the investigations, whether they are carried out by law enforcement agencies or judicial authorities, and during trial proceedings. Although there is no legal necessity to do so, as it is always open to Parties to adopt measures more favourable than those provided for in any part of the Convention, the drafters wished to make it clear that the measures of protection referred to are indicative. Parties are thus free to grant additional measures of protection. It is important to highlight that throughout Article 56, paragraph 1, where there is mention that measures need to be taken in accordance with internal law or "where possible", it underlines that Parties are at liberty to employ whatever means they consider best to achieve the provision's objectives. This is the case of lit. c, d, g and i.

284. First of all, lit.a contains the obligation for Parties to take the necessary legislative or other measures in order to provide for the protection of victims, as well as that of their families and witnesses. Parties must ensure that victims are safe from intimidation, retaliation and repeat victimisation.

285. In relation to lit.b, the drafters stressed the importance of the obligation to inform victims when the perpetrator is released temporarily or definitely or escapes, at least in cases where the victims and the family might be in danger. This does not prevent Parties to inform victims in other circumstances where this seems necessary (for instance, in cases where there is a risk of retaliation or intimidation or when, because the victim and the perpetrator live near each other, they might accidentally find themselves face to face with each other). Some legal systems require the prior application by the victim to receive this information. In these cases Parties shall inform the victim of this possibility.

286. Furthermore, lit.c sets out the right of victims (and their families or legal representatives in the case of child victims) to be informed of developments in the investigations and proceedings in which they are involved as victims. In this respect, the provision provides that victims should be informed of their rights and of the services at their disposal and the follow-up given to their complaint, the charges, the general progress of the investigations or proceedings, and their role as well as the outcome of their cases. Although this is not included in the provision, Parties should ensure that this information be provided in a language that they understand (see comments on Article 19).

287. With regard to lit.d, this provision aims at enabling victims to be heard, to supply evidence and to choose the means of having their views, needs and concerns presented and considered. Parties shall take the necessary measures to ensure that the presentation and consideration of the victims' views, needs and concerns is assured directly or through an intermediary.

288. Lit.e deals more specifically with general assistance to victims to ensure that their rights and interests are duly presented and taken into account at all stages of investigations and judicial proceedings.

289. The obligation contained in lit.f, entails taking the necessary measures in order to ensure that the victims' privacy is protected. This requires taking measures, where appropriate and in accordance with internal law, to prevent the public dissemination of any information that could lead to the identification of victims. The drafters wished to stress, however, that the protection of the victim's image and privacy extends to the risk of "public" disclosure, and that these requirements should not prevent this information being revealed in the context of the actual proceedings, in order to respect the principles that both parties must be heard and the inherent rights of the defence during a criminal prosecution.

290. Lit.g is designed to protect victims, in particular by preventing their being further traumatised through contact, on the premises of the investigation services and in court, with the alleged perpetrator of the offence. This provision applies to all stages of the criminal proceedings (including the investigation), with certain exceptions: the investigation services and the judicial authority must be able to waive this requirement for example when the victim wishes to attend the hearing or when contact between the victim and the alleged perpetrator is necessary or useful for ensuring that the proceedings take place satisfactorily (for example, when a confrontation appears necessary).

291. Lit.h lays out the obligation of providing victims, where necessary, with independent and competent interpreters. Some legal systems require a sworn-in interpreter to establish independence. Due to the difference in status of victims in the different judicial systems, the drafters considered it important, to make it clear in the text of the Convention that this applies when victims are parties to the proceedings or when they are giving evidence. Many victims do not speak, or barely speak, the language of the country where they were subject to acts of violence against women and domestic violence. Ignorance of the language adds to their isolation and is one of the factors preventing them from claiming their rights. In such cases access to interpreters is needed to help them during investigations and judicial proceedings. This is an essential measure

for guaranteeing access to rights, which is a prerequisite for access to justice and Parties should envisage providing victims with interpreters free of charge.

292. Finally, lit.i places an obligation on Parties to ensure that victims are enabled to testify in the courtroom without being present or at least without the presence of the alleged perpetrator. The law in some countries provides for audiovisual recording of hearings of victims and safeguarding such hearings by such means as: limiting the people allowed to attend the hearing and view the recording; allowing the victim to request a break in recording at any time and making a full, word-for-word transcription of the hearing on request. Such recordings and written records may then be used in court instead of having the victim appear in person. Some legal systems likewise allow victims to appear before the court by videoconference. The victim is heard in a separate room, possibly in the presence of an expert and technicians. To limit as far as possible the psychological impact on the victim of being in the same room as the perpetrator or being with them by videoconference, the sightlines of both can be restricted so that the victim cannot see the perpetrator and/or vice versa. If, for instance, the victim were to appear at the hearing, she or he could give evidence from behind a screen or give evidence where the perpetrator does not appear in the court room. Parties must therefore ensure the obligation laid out in this provision, where available, through the use of appropriate communication technologies.

293. In the case of child victims and child witnesses, paragraph 2 states that Parties must take special care of their needs and ensure their rights to special protection measures as a child will usually be more vulnerable than an adult and likelier to be intimidated. Consequently, special protection measures must give due regard to the best interests of the child, which may include measures such as not obliging a child to testify in the presence of the perpetrator. With regard to the term "child witness" see also comments on Article 26.

Article 57 – Legal aid

294. In the immediate aftermath of violence many victims of violence against women and domestic violence may be forced to leave all their belongings or jobs behind on a moment's notice. Judicial and administrative procedures are often highly complex and victims need the assistance of legal counsel to be able to assert their rights satisfactorily. In these cases, it might be difficult for victims to effectively access legal remedies because of the high costs which can be involved in seeking justice. For this reason the drafters believed it essential to place an obligation on Parties to provide for the right to legal assistance and to free legal aid for victims under the conditions provided by their internal law. This provision is inspired by Article 15, paragraph 2, of the Council of Europe Convention on Action against Trafficking in Human Beings (CETS No.197).

295. Article 57 does not give the victim an automatic right to free legal aid. It is for each Party to decide the requirements for obtaining such aid. In addition to this provision, Parties must take account of Article 6 ECHR. Even though Article 6 paragraph 3 (c) ECHR provides for free assistance from an officially appointed lawyer only in criminal proceedings, European Court of Human Rights case-law (*Airey v. Ireland* judgment, 9 October 1979) also recognises, in certain circumstances, the right to free legal assistance in a civil matter on the basis of Article 6 paragraph 1 ECHR, interpreted as establishing the right to a court for determination of civil rights and obligations (see *Golder v. the United Kingdom*, judgment of 21 February 1975). The Court's view is that effective access to a court may necessitate free legal assistance. Its position is that it must be ascertained whether appearance before a court without the assistance of a lawyer would be effective in the sense that the person concerned would be able to present their case properly and satisfactorily. Here the Court has taken into account the complexity of procedures and the emotional character of a situation - which might be scarcely compatible with the degree of objectivity required by advocacy in court - in deciding whether someone was in a position to present her or his own case effectively. If not, he or she must be given free legal assistance. Thus, even in the absence of legislation granting free legal assistance in civil matters, it must be assessed whether, in the interest of justice, an applicant who is without financial means should be granted legal assistance if unable to afford a lawyer.

Article 58 – Statute of limitation

296. This provision provides that the limitation period for initiating legal proceedings continues to run for a sufficient period of time to allow prosecutions to be effectively initiated after the victim has reached the age of majority. The obligation therefore applies in relation to child victims only, who are often unable, for various reasons, to report the offences perpetrated against them before reaching the age of majority. The expression "for a period of time sufficient to allow the efficient initiation of proceedings" means, firstly, once these children become adults, they must have a sufficiently long time to overcome their trauma, thus enabling them

to file a complaint and, secondly, that the prosecution authorities must be in a position to bring prosecutions for the offences concerned.

297. In order to meet the requirements of proportionality that apply to criminal proceedings, however, the drafters restricted the application of this principle to the offences provided in Articles 36, 37, 38 and 39, in respect of which there is justification for extending the limitation period. Nevertheless, Article 78, paragraph 2, on reservations allows future Parties to declare that they reserve the right not to apply this principle or to apply it only in specific cases or conditions in respect of Articles 37, 38 and 39.

CHAPTER VII – MIGRATION AND ASYLUM

298. Migrant women, including undocumented migrant women, and women asylum-seekers form two subcategories of women that are particularly vulnerable to gender-based violence. Despite their difference in legal status, reasons for leaving their home country and living conditions, both groups are, on the one hand, at increased risk of experiencing violence against women and, on the other hand, face similar difficulties and structural barriers in overcoming violence.

299. This chapter contains a number of obligations that aim at introducing a gender-sensitive understanding of violence against migrant women and women asylum-seekers. For example, it introduces the possibility of granting migrant women who are victims of gender-based violence an independent residence status. Furthermore, it establishes the obligation to recognise gender-based violence against women as a form of persecution and contains the obligation to ensure that a gender-sensitive interpretation be given when establishing refugee status. In addition, this chapter establishes the obligation of introducing gender-sensitive procedures, guidelines and support services in the asylum process. Finally, it contains provisions pertaining to the respect of the *non-refoulement* principle with regard to victims of violence against women.

300. The provisions laid out in Articles 60 and 61 of this Convention are intended to be read so that they are compatible with the 1951 Convention relating to the Status of Refugees and Article 3 of the European Convention of Human Rights as interpreted by the European Court of Human Rights. In addition, these provisions do not go beyond the scope of application of the said instruments but give them a practical dimension.

Article 59 – Residence status

301. Research has shown that fear of deportation or loss of residence status is a very powerful tool used by perpetrators to prevent victims of violence against women and domestic violence from seeking help from authorities or from separating from the perpetrator. Most Council of Europe member states require spouses or partners to remain married or in a relationship for a period ranging from one to three years for the spouse or partner to be granted an autonomous residence status. As a result, many victims whose residence status is dependant on that of the perpetrator stay in relationships where they are forced to endure situations of abuse and violence for long periods of time.

302. The drafters considered it necessary to ensure that the risk of losing their residence status should not constitute an impediment to victims leaving an abusive and violent marriage or relationship. The obligation contained in paragraph 1 requires Parties to the Convention to take the necessary legislative or other measures to ensure that migrant victims whose residence status is conditional on marriage or on being in a relationship are granted an autonomous residence permit of a limited validity in the event of the dissolution of the marriage or the relationship.

303. Paragraph 1 specifies that an autonomous residence permit should be granted in the event of particularly difficult circumstances. Parties should consider being a victim of the forms of violence covered by the scope of this Convention committed by the spouse or partner or condoned by the spouse or partner as a particularly difficult circumstance. The drafters felt it best to let Parties establish, in accordance with internal law, the conditions relating to the granting and duration of the autonomous residence permit, following an application by the victim. This includes establishing which public authorities are competent to decide if the relationship has dissolved as a consequence of the violence endured by the victim and what evidence is to be produced by the victim. Evidence of violence may include, for example, police records, a court conviction, a barring or protection order, medical evidence, an order of divorce, social services records or reports from women's NGOs, to name a few.

304. Moreover, paragraph 1 highlights the fact that independent/autonomous permits should be granted irrespective of the duration of the marriage or the relationship. It contains the obligation to ensure that victims of all forms of violence covered by the scope of this Convention be granted autonomous residence permits in her or his own right, even if the marriage or the relationship ceases before the end of the probationary

period. This will allow victims to obtain the necessary protection from authorities without fearing that the perpetrator will retaliate by withdrawing or threatening to withdraw residence benefits under the perpetrator's control. This is also particularly important in cases of forced marriages, where victims are forced to remain married for the probationary period unless they are prepared to be deported upon divorce.

305. Furthermore, paragraph 1 applies to spouses or partners as recognised by internal law. Unmarried partners are included in the provision to the extent that several Council of Europe member states grant residence permits to partners who are able to demonstrate, under the conditions laid down by internal law, that they have been living in a relationship analogous to marriage or that the relationship is of a permanent nature.

306. The second paragraph refers to cases where victims who have joined their spouses or partners under a family reunification scheme, face repatriation because of expulsion proceedings initiated against their abusive and violent spouse or partner. In most Council of Europe member states, the residence status of spouses or partners is connected to that of the sponsor spouse or partner. This means that the victim continues to be subjected to abuse in her or his country of origin, resulting in *de facto* denial of protection. This is particularly relevant in cases where the country of origin has lower prevention, protection and prosecution standards in the field of violence against women and domestic violence than the host country. The expulsion of such victims does not only have negative implications for their lives, but can also constitute an obstacle to law enforcement authorities endeavouring to combat violence against women and domestic violence. As a result, paragraph 2 requires Parties to take appropriate measures to ensure that victims that find themselves in such situations be given the possibility to obtain the suspension of expulsion proceedings against themselves to apply for a residence status on humanitarian grounds. Paragraph 2 is applicable to cases where the sponsor spouse or partner is a perpetrator of domestic violence, in these cases, her or his spouse or partner, the victim, will be expelled together with the perpetrator. The purpose of this paragraph is to provide protection from expulsion; it does not constitute a residence permit in itself.

307. Paragraph 3 is inspired by Article 14 (1) of the Council of Europe Convention on Action against Trafficking in Human Beings (CETS No.197). The paragraph places the obligation on Parties to issue victims of domestic violence with renewable residence permits under the conditions established by internal law. It lays down two requirements for issuing a residence permit. Firstly, it covers situations where the victim's personal circumstances are such that it would be unreasonable to compel them to leave the national territory (lit.a). Whether the victim meets the personal situation requirement is to be decided on account of factors such as the victim's safety, state of health, family situation, or the situation in their country of origin among others. Secondly, it establishes the requirement of the co-operation with the competent authorities in cases where investigation or criminal proceedings have been initiated against the perpetrator (lit.b). This means that a residence permit may be granted to the victim if the co-operation and testimony of the victim are necessary in investigation and criminal proceedings. The duration of the residence permit is to be decided by the Parties, though the established length should be compatible with the provision's purpose. Moreover, Parties to the Convention have the obligation to provide renewable permits. The non-renewal or the withdrawal of a residence permit are subject to the conditions provided for in the internal law of the Party.

308. Paragraph 4 covers situations where a victim of forced marriage in possession of a residence permit for a Party to the Convention is brought into another country resulting in a loss of residence status in the country where he or she habitually reside. In most Council of Europe member states, a residence permit becomes invalid if the holder leaves the country for more than a stipulated number of consecutive months. However, this condition only bears in mind persons that leave the country voluntarily. If victims of forced marriages are taken abroad involuntarily and thus overstay the guaranteed or expiry period of time outside the Party in which they habitually reside, their residence status will become invalid. For this reason, this paragraph obliges Parties to the Convention to provide for the possibility for such victims to regain their residence status on account of them being forced to leave the country where they habitually reside, in particular in the event of the dissolution or annulment of the marriage.

309. Finally, it should be noted that Article 78, paragraph 2, on reservations allows future Parties to this Convention to reserve the right not to apply or to apply only in specific cases or conditions the provisions laid down in Article 59.

Article 60 – Gender-based asylum claims

310. Asylum law has long failed to address the difference between women and men in terms of why and how they experience persecution. This gender blindness in the establishment of refugee status and of international protection has resulted in situations where claims of women fleeing from gender-based violence have gone unrecognised. In the past decade, however, developments in international human rights law and

standards as well as in case law, have led an increasing number of Council of Europe member states to recognise some forms of violence against women as a form of gender-related persecution within the meaning of Article 1 A(2) of the 1951 Convention relating to the Status of Refugees. There is no doubt that rape and other forms of gender-related violence, such as female genital violence, dowry-related violence, serious domestic violence, or trafficking, are acts which have been used as forms of persecution, whether perpetrated by state or non-state actors.

311. Although paragraph 1 consecrates what is already being undertaken in practice, the drafters considered it important to include the obligation of Parties to take the necessary legislative or other measures to ensure that gender-based violence against women may be recognised as a form of persecution within the meaning of Article 1 A(2) and as a form of serious harm. In other words, Parties to the Convention are required to recognise that gender-specific violence may amount to persecution, and lead to the granting of refugee status. The recognition of gender-based violence as a form of persecution within the meaning of Article 1 A(2) implies recognising that a woman may be persecuted because of her gender, i.e. because of her identity and status as a woman. Parties also have the obligation to ensure that gender-based violence against women may be recognised as a form of serious harm giving rise to complementary/subsidiary protection. This does not imply that all gender-based violence is automatically considered "serious harm". This means that international protection may be granted to women who are third country nationals or who are stateless and who have not qualified as a refugee, but if returned to their country of origin or where they previously resided would face gender-based violence, which would amount to inhuman or degrading treatment or seriously threaten the life of the individual. Consequently, the right to international protection is not limited to protection under the 1951 Convention, but can also be derived from other well established international and regional standards such as the ECHR or the European Union Qualification Directive. At the same time, it is not the intention of this paragraph to overrule the provisions of the 1951 Convention, in particular with regard to the conditions of granting refugee status imposed by Article 1 of this Convention.

312. Paragraph 2 complements the obligation laid out in paragraph 1. The obligation contained in this provision is two-fold. On the one hand, it requires Parties to ensure that a gender-sensitive interpretation is given to each of the 1951 Convention grounds. The well-founded fear of persecution must be related to one or more of the 1951 Convention grounds. In the examination of the grounds for persecution, gender-based violence is often seen to fall within the ground of "membership of a particular social group", overlooking the other grounds. Ensuring a gender-sensitive interpretation implies recognising and understanding how gender can have an impact on the reasons behind the type of persecution or harm suffered. On the other hand, paragraph 2 requires Parties to allow for the possibility of granting refugee status should it be established that the persecution feared is for one of these grounds. It is important to note that adopting a gender-sensitive interpretation does not mean that all women will automatically be entitled to refugee status. What amounts to a well-founded fear of persecution will depend on the particular circumstances of each individual case. It is particularly important to note that the refugee status should be granted "according to the applicable relevant instruments", that is to say, under the conditions expressly provided by these instruments, such as, for instance, by Article 1 of the 1951 Convention.

313. Regarding persecution on the grounds of race or on the grounds of nationality, women may face certain types of persecution that specifically affect them. Examples are sexual violence and control of reproduction in cases of racial and ethnic "cleansing". Concerning persecution on the grounds of religion, women may be persecuted for not conforming to religious norms and customs of acceptable behaviour. This is particularly true in cases of crimes committed in the name of so-called "honour" which affect women disproportionately. Persecution on the grounds of membership of a particular social group has increasingly been put forward in gender-related claims and has gradually acquired international support. In considering women fleeing from gender-related persecution such as female genital mutilation, forced marriage and even serious domestic violence as forming a "particular social group", women may be granted asylum. Some women can thus be identified as a particular group and that shares a common innate, unchangeable or otherwise fundamental characteristic other than the common experience of fleeing persecution. Finally, persecution on the ground of political opinion can include persecution on the grounds of opinions regarding gender roles. Some women may be persecuted, for example, for not conforming to society's roles and norms of acceptable behaviour and for speaking out against traditional gender roles. When taking the necessary measures in order to ensure a gender-sensitive interpretation of the refugee definition, Parties may refer to the UNHCR Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, May 2002. Additionally, when ensuring that a gender-sensitive interpretation is given to each of the convention grounds, Parties may if

they wish, extend the interpretation to individuals who are gay, lesbian, bisexual or transgender, who may also face particular forms of gender-related persecution and violence.

314. Paragraph 3 contains several obligations. The first obligation placed on Parties is that of developing gender-sensitive reception procedures that take into account women's and men's differences in terms of experiences and specific protection needs to ensure their right to safety when considering standards of treatment for the reception of asylum-seekers. Examples of gender-sensitive reception procedures may include inter alia: the identification of victims of violence against women as early in the process as possible; the separate accommodation of single men and women; separate toilet facilities, or at a minimum, different timetables established and monitored for their use by males and females; rooms that can be locked by their occupants; adequate lighting throughout the reception centre; guard protection, including female guards, trained on the gender-specific needs of residents; training of reception centre staff; code of conduct applying also to private service providers; formal arrangements for intervention and protection in instances of gender-based violence; and provision of information to women and girls on gender-based violence and available assistance services.

315. Paragraph 3 also places the obligation to develop support services for asylum-seekers that provide assistance in a gender-sensitive manner and that cater to their particular needs. This could include taking measures such as providing additional psycho-social and crisis counselling, as well as medical care for survivors of trauma since for example, many female asylum-seekers have been exposed to sexual or other forms of abuse and are therefore particularly vulnerable. Support services should also aim at empowering women and enable them to actively rebuild their lives.

316. Developing and implementing gender guidelines is essential for the relevant actors to understand how they can include gender-sensitive elements into their policies and practice. Guidelines provide an essential reference point in order to enhance awareness of special protection needs for women asylum-seekers that have been victims or are at risk of gender-based violence. Parties must however bear in mind that in order to ensure their success, specific measures should be taken to ensure that such guidelines are implemented. Guidelines should cover the enhancement of awareness and responsiveness to cultural and religious sensitivities or personal factors as well as the recognition of trauma.

317. In order to properly examine asylum claims by women and girls who are victims of gender-based violence, paragraph 3 entails the obligation to develop gender-sensitive asylum procedures, which include procedures governing refugee status determination and application for international protection (see also paragraph 312 *in fine*). It encompasses *inter alia*: the provision to women of information on asylum procedures; the opportunity for women dependents to have a personal interview separately and without the presence of family members; the opportunity for women to raise independent needs for protection and gender-specific grounds leading to a separate application for international protection; the elaboration of gender guidelines on the adjudication of asylum claims, and training. It also encompasses gender-sensitive interviews led by an interviewer, and assisted by an interpreter when necessary; the possibility for the applicant to express a preference for the sex of their interviewer and interpreter which the Parties will accommodate where it is reasonable to do so; and the respect of confidentiality of the information gathered through interviews. For further guidance, Parties may refer to the work of the Parliamentary Assembly in this field, and in particular to Resolution 1765 (2010) and Recommendation 1940 (2010) on gender-related claims for asylum.

318. In the previous four paragraphs of this section, a list has been detailed of possible measures that Parties may take when implementing the provisions laid out in paragraph 3. The reason for this is that the drafters wished to include in the Explanatory Report some examples of good practices which have already been developed in several states. However, it should be noted that paragraph 3 leaves to each Party the choice of which gender-sensitive procedures, guidelines and support services are to be developed.

Article 61 – *Non-refoulement*

319. Enshrined in Article 33 of the 1951 Convention relating to the Status of Refugees, the principle of *non-refoulement* constitutes a pillar of asylum and of international refugee protection and has acquired the status of customary international law. This means that the principle applies to all states, irrespective of whether they are bound or not by the 1951 Convention.

320. The principle of *non-refoulement* is of particular relevance to asylum-seekers and refugees. According to this principle, subject to certain exceptions and limitations as laid down in the 1951 Convention, states shall not expel or return an asylum seeker or refugee to any country where their life or freedom would be threatened. Article 3 of the ECHR also prevents a person being returned to a place where they would be at real risk

of being subjected to torture or inhuman or degrading treatment or punishment. Expelling or returning a person to persecution contravenes the commitment of the international community to ensure the enjoyment of human rights of all persons. The *non-refoulement* principle also includes not prohibiting access to the territory of a country to asylum-seekers who have arrived at its borders or who are prevented to access its borders.

non-refoulement principle also includes not prohibiting access to the territory of a country to asylum-seekers who have arrived at its borders or who are prevented to access its borders.

321. The protection against refoulement applies to any person who is a refugee under the terms of the 1951 Convention. It also applies asylum-seekers whose status has not formally been determined and who may be subjected to persecution if returned to their country of origin or of habitual residence. Paragraph 1 entails the obligation under international law for states to respect the principle of *non-refoulement* in relation to victims of gender-based violence who may fear persecution if returned.

322. Paragraph 2 confirms that the obligation to respect the *non-refoulement* principle applies equally to victims of violence against women who are in need of protection complementing in this way the first paragraph. More specifically, paragraph 2 reiterates the obligation for Parties to take the necessary legal or other measures to ensure that victims of violence against women and in need of protection, shall not be returned under any circumstances if there were a real risk, as a result, of arbitrary deprivation of life or torture or inhuman or degrading treatment or punishment. It is important to ensure that these obligations are complied with irrespective of the status or residence of the women concerned. This means that this protection against return applies to all victims of violence against women that have not yet had their asylum claim determined as refugees under the 1951 Convention regardless of their country of origin or residence status, and who would face gender-based violence amounting to the ill-treatment described above if expelled/deported. Even if their claim for asylum is refused, states should ensure that these persons will not be expelled/deported to a country where there is a real risk to that they will be subject to torture or inhuman or degrading treatment or punishment. This paragraph is not to be read, however, as contradicting the relevant provisions of the 1951 Convention, and in particular does not preclude the application of Article 33, paragraph 2, of that Convention.

CHAPTER VIII – INTERNATIONAL CO-OPERATION

323. Chapter VIII sets out the provisions on international co-operation between Parties to the Convention. The provisions are not confined to judicial co-operation in criminal and civil matters but are also concerned with co-operation in preventing all forms of violence covered by the scope of this Convention and assisting victims of that violence.

324. As regards judicial co-operation in general and more specifically in the criminal sphere, the Council of Europe already has a substantial body of standard-setting instruments. Mention should be made here of the European Convention on Extradition (ETS No.24), the European Convention on Mutual Assistance in Criminal Matters (ETS No.30), their Additional Protocols (ETS No. 86, 98, 99 and 182), European Convention on the International Validity of Criminal Judgments (ETS No. 70), the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS No. 141) and the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No. 198). These treaties are cross-sector instruments applying to a large number of offences, and can be implemented to permit judicial co-operation in criminal matters in the framework of procedures aiming at the offences established in the Convention. As all member states of the Council of Europe are parties to the European Convention on Extradition and the European Convention on Mutual Legal Assistance, drafters are generally advised not to reproduce provisions on mutual legal assistance and extradition in specialised instruments, but to include the aforementioned general provision and otherwise refer to the horizontal instruments in the explanatory memorandum accompanying the convention being drafted.

325. For this reason, the drafters opted not to reproduce, in this Convention, provisions similar to those included in cross-sectoral instruments such as those mentioned above. For instance, they did not want to introduce separate mutual assistance arrangements that would replace the other instruments and arrangements applicable, on the grounds that it would be more effective to rely, as a general rule, on the arrangements introduced by the mutual assistance and extradition treaties in force, with which practitioners were fully familiar. This chapter therefore includes only provisions that add something over and above the existing conventions.

Article 62 – General principles

326. Article 62 sets out the general principles that should govern international co-operation.

327. First of all, it obliges the Parties to co-operate widely with one another and in particular to reduce, as far as possible, the obstacles to the rapid circulation of information and evidence.

328. Article 62 then makes it clear that the obligation to co-operate is general in scope: it covers preventing, combating and prosecuting all forms of violence covered by the scope of this Convention (lit.a), protecting and providing assistance to victims (lit.b), investigations or procedures concerning criminal offences established in accordance with the Convention (lit.c) and enforcement of relevant of civil and criminal judgments issued by Parties (lit.d).

329. Paragraph 2 is based on Article 11, paragraphs 2 and 3, of the Council of the European Union Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings. It is designed to make it easier for victims to file a complaint by enabling them to lodge it with the competent authorities of the state of residence.

330. These authorities may then either initiate proceedings if their law permits, or pass on the complaint to the authorities of the state in which the offence was committed, in accordance with the relevant provisions of the co-operation instruments applicable to the states in question.

331. Paragraph 3 authorises a Party that makes mutual assistance in criminal matters, extradition or enforcement of civil and criminal judgments conditional on the existence of a treaty to consider the Convention as the legal basis for judicial co-operation with a Party with which it has not concluded such a treaty. This provision, which serves no purpose between Council of Europe member states as regards mutual assistance in criminal matters and extradition because of the existence of the European Conventions on Extradition and on Mutual Assistance in Criminal Matters, dating from 1957 and 1959 respectively, and the Protocols thereto, is of interest because of the possibility provided to third states to accede to the Convention.

332. Lastly, under paragraph 4, the Parties must endeavour to include preventing and combating violence against women and domestic violence in development assistance programmes benefiting third states. Many Council of Europe member states carry out such programmes, which cover such varied areas as the restoration or consolidation of the rule of law, the development of judicial institutions, combating crime, and technical assistance with the implementation of international conventions. Some of these programmes may be carried out in countries faced with substantial violence against women and domestic violence. It seems appropriate, in this context, that action programmes should take account of and duly incorporate issues relating mainly to the prevention of these forms of crimes, including with a view to facilitating the protection of victims in accordance with Article 18, paragraph 5.

Article 63 – Measures relating to persons at risk

333. The main objective pursued by this provision is again to encourage Parties to this Convention to enhance the exchange of information and, in addition in this specific case, to prevent certain acts of violence against women and domestic violence related to a number of offences established by this Convention from happening. Some of the forms of violence covered by the scope of this Convention may have a transnational dimension. For this reason, the drafters identified some of the offences established in this Convention, such as forced marriage or female genital mutilation, and established the principle according to which a Party that is in possession of information providing reasonably evidence that a person is at immediate risk of being subject to any of the acts of violence referred to should transmit this information to the Party where these acts of violence could happen. The information needs to be based on "reasonable grounds" that an immediate risk exists. The drafters did not consider it necessary to elaborate in the Convention criteria on what constitutes reasonable grounds. It is therefore left to the Parties to establish, according to the information collected on a case-by-case basis, when to share this information in order to prevent such acts of violence. This information includes details on protection orders taken for the benefit of the persons at risk.

Article 64 – Information

334. Article 64 substantiates a principle already present in the international co-operation field, and in particular in the criminal field, which provides for an efficient and timely exchange of information between states in order to either prevent a possible offence as established in accordance with this Convention, to initiate investigation on such an offence or to prosecute a perpetrator. In particular, paragraph 1 requires the requested Party to communicate to the requesting Party the outcome of any action undertaken. Paragraph 2

leaves to each Party the choice (wording used, may, clearly does not make this action as compulsory) whether or not to forward to another Party information related to its own investigations. This may be done "without prior request" by the other Party.

335. Similarly, paragraph 3 establishes the principle according to which when a Party receives information (which concerns in general a central administrative authority dealing with international co-operation in criminal matters), this Party shall submit that information to the relevant authorities which, according to its internal law, are competent to deal with this information. In general, the relevant authorities are for instance the police, prosecution service or judge. The relevant authorities will then consider whether or not that information is to appropriate for their investigations or judicial proceedings. It is important to note that the exchange of information required under this provision is not limited to criminal investigations or proceedings but extends to civil law action, including protection orders.

Article 65 – Data protection

336. This provision refers to the question of personal data regarding all forms of violence covered by the scope of this Convention. Because of the possible dangers to individuals, in particular to victims, if data concerning them were to circulate without any safeguards or checks, Article 65 specifically refers to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No.108) as regards the storing and usage of data. The article states that this provision applies pursuant to the obligations undertaken by the Parties under the above-mentioned convention. However, this does prevent Parties that are not Parties under Convention No. 108, to ratify this Convention. Convention No. 108 provides, in particular, that personal data are to be stored only for specified lawful purposes and are not to be used in any way incompatible with those purposes. It also provides that such data are not to be stored in any form allowing identification of the data subject or for any longer than is necessary for the purposes for which the data are recorded and stored. Convention No.108 likewise makes it compulsory to take appropriate security measures preventing unauthorised access to and alteration or disclosure of data.

CHAPTER IX – MONITORING MECHANISM

337. Chapter IX of the Convention contains provisions which aim at ensuring the effective implementation of the Convention by the Parties. In its interim report, the CAHVIO stated that "The Committee is of the opinion that a strong and independent monitoring mechanism is of utmost importance to ensure that an adequate response to this problem is given in all Parties to the Convention." Consequently, the drafters considered that the monitoring system foreseen by the Convention should be one of its strengths. The monitoring mechanism is designed to cover the scope of this Convention. The Convention sets up a Group of experts on action against violence against women and domestic violence (hereafter "GREVIO") which is an expert body, composed of independent and highly qualified experts in the fields of human rights, gender equality, violence against women and domestic violence, criminal law and in assistance to and protection of victims of violence against women and domestic violence, with the task of "monitoring the implementation of this Convention by the Parties". The Convention also establishes a Committee of the Parties, composed of the representatives of the Parties to the Convention.

Article 66 – Group of experts on action against violence against women and domestic violence (GREVIO)

338. As indicated above, GREVIO is in charge of monitoring the implementation of the Convention by the Parties. It shall have a minimum of 10 and a maximum of 15 members.

339. Paragraph 2 of this Article stresses the need to ensure geographical and gender balance, as well as a multidisciplinary expertise, when electing GREVIO's members, who shall be nationals of Parties to the Convention. Candidates to the GREVIO are nominated by the Parties and elected by the Committee of the Parties.

340. Paragraph 3 establishes criteria of election of GREVIO's members in relation to the number of ratifications of the Convention.

341. Paragraph 4 underlines the main competences of the experts sitting in GREVIO, as well as the main criteria for their election, which can be summarised as follows: "independence and expertise". In particular, members of the GREVIO should represent relevant actors and agencies working in the field of violence against women and domestic violence. If nominated by the Parties, this may include for instance NGO representatives.

342. Paragraph 5 indicates that the procedure for the election of the members of GREVIO (but not the election of the members itself) shall be determined by the Committee of Ministers. This is understandable as the election procedure is an important part of the application of the Convention. Being a Council of Europe Convention, the drafters felt that such a function should still rest with the Committee of Ministers and the Parties themselves will then be in charge of electing the members of GREVIO. Before deciding on the election procedure, the Committee of Ministers shall consult with and obtain the unanimous consent of all Parties. Such a requirement recognises that all Parties to the Convention should be able to determine such a procedure and are on an equal footing.

343. Paragraph 6 states that GREVIO establishes its own rules of procedure.

344. The purpose of paragraph 7 is to allow all members of country visit delegations provided for in Article 68 paragraphs 9 and 14 to be on equal footing and benefit from the same privileges and immunities. The General Agreement on Privileges and Immunities of the Council of Europe is open to member states only. However, the Convention is also open to non-member states. With regard to other Council of Europe conventions providing for country visits, the usual procedure is for the Committee of Ministers to ask for a bilateral agreement to be signed by non-member states, resulting in a lengthy process that can delay their accession to a convention. For this reason, and as a precautionary step for the future, this provision is directly included in the body of the Convention to avoid lengthy procedures in order to negotiate bilateral agreements with non-member states.

Article 67 – Committee of the Parties

345. Article 67 sets up the other pillar of this monitoring system, which is the political body ("Committee of the Parties"), composed as indicated above.

346. The Committee of the Parties will be convened the first time by the Secretary General of the Council of Europe, within a year from the entry into force of the Convention, in order to elect the members of GREVIO. It will then meet at the request of a third of the Parties, of the Secretary General of the Council of Europe or of the President of GREVIO.

347. The setting up of this body will ensure equal participation of all the Parties alike in the decision-making process and in the monitoring procedure of the Convention and will also strengthen co-operation between the Parties and between them and GREVIO to ensure the proper and effective implementation of the Convention.

348. Paragraph 3 states that the Committee of the Parties establishes its own rules of procedure.

Article 68 – Procedure

349. Article 68 details the functioning of the monitoring procedure and the interaction between GREVIO and the Committee of the Parties.

350. Paragraphs 1 and 2 establish that GREVIO consider a report on general legislative and other measures undertaken by each Party to give effect to the provisions of this Convention with the representatives of the Party concerned. This report is submitted by the Party and it is based on a questionnaire developed by the GREVIO. The idea is to have a baseline of legislative and other measures the Parties have in place, when acceding to the Convention, with regard to the concrete and general implementation of the Convention.

351. Paragraph 3 makes it clear that the evaluation procedure following the first report and assessment as indicated in paragraphs 1 and 2 is divided into rounds and that GREVIO will select the provisions the monitoring will concentrate on. The idea is that GREVIO will autonomously define, at the beginning of each round, the provisions for the monitoring procedure during the period concerned.

352. Paragraph 4 states that GREVIO will determine the most appropriate means to carry out the evaluation. This may include a questionnaire or any other request for information. The term "questionnaire" refers to a set of written questions or guidelines to gain information of a qualitative and quantitative nature on measures taken in implementation of the Convention. It goes beyond the collection of statistical/numeric data which the monitoring framework on the implementation of Recommendation Rec (2002)5 on the protection of women against violence assured. Moreover, this paragraph makes it clear that the Party concerned must respond to GREVIO's requests. Parties to the Convention should not be required to answer on the implementation of Recommendation Rec (2002)5 on the protection of women against violence.

353. Paragraph 5 establishes the important principle that GREVIO may receive information by the NGOs, civil society as well as national institutions for the protection of human rights.

354. Paragraphs 6, 7 and 8 introduce the principle that GREVIO should make the best possible use of any existing source of information. That is also in order to avoid unnecessary duplication of work and activities already carried out in other instances.

355. Paragraph 9 underlines that, subsidiarily, GREVIO may organise country visits. The drafters wanted to make it clear that country visits should be a subsidiary means of monitoring and that they should be carried out only when necessary, in two specific cases: 1) if the information gained is insufficient and there are no other feasible ways of reliably gaining the information or 2) in case the GREVIO receives reliable information indicating a situation where problems require immediate attention to prevent or limit the scale or number of serious violations of the Convention. These country visits must be organised in co-operation with the competent authorities of the Party concerned, meaning that they are established in advance and that dates are fixed in co-operation with national authorities which are notified in due time.

356. Paragraphs 10 and 11 describe the drafting phase of both the report and the conclusions of GREVIO. From these provisions, it appears clear that GREVIO has to carry out a dialogue with the Party concerned when preparing the report and the conclusions. It is through such a dialogue that the provisions of the Convention will be properly implemented. GREVIO will publish its report and conclusions, together with any comments by the Party concerned. This completes the task of GREVIO with respect to that Party and the provisions concerned. The reports and conclusions of GREVIO, which will be made public as from their adoption, cannot be changed or modified by the Committee of the Parties.

357. Paragraph 12 deals with the role of the Committee of the Parties in the monitoring procedure. It indicates that the Committee of the Parties may adopt recommendations indicating the measures to be taken by the Party concerned to implement GREVIO's conclusions, if necessary setting a date for submitting information on their implementation, and promoting co-operation to ensure the proper implementation of the Convention. This mechanism will ensure the respect of the independence of GREVIO in its monitoring function, while introducing a "political" dimension to the dialogue between the Parties.

358. Paragraphs 13, 14 and 15 provide for a special procedure according to which GREVIO is entitled to request the submission of a report by the Party concerned related to measures taken by that Party to prevent a serious, massive or persistent pattern of any of the acts of violence covered by the Convention. The condition for requesting a special report is that GREVIO receives reliable information indicating a situation where problems require immediate attention to prevent or limit the scale or number of serious violations of the Convention". On the basis of the information received (by the Party concerned and by any other source of information), GREVIO may designate one or more of its members to conduct an inquiry and to report urgently to the GREVIO. In very exceptional cases, this inquiry could also include a visit to the country concerned. The main role of the appointed "rapporteur(s)" should be collecting all necessary information and ascertaining the facts in relation to the specific situation. The rules of procedure of GREVIO will establish the details of the functioning of this "inquiry procedure". However, the main objective is to allow GREVIO to have a more precise explanation and understanding of situations where, according to reliable information, a considerable number of victims of the same acts of violence are involved. The findings of the inquiry shall be transmitted to the Party concerned and, where appropriate, to the Committee of the Parties and the Committee of Ministers of the Council of Europe together with any comments and recommendations.

Article 69 – General recommendations

359. Drawing inspiration from Article 21 (1) of CEDAW, this article provides for the possibility of GREVIO to adopt, where appropriate, general recommendations on the implementation of this Convention. General recommendations have a common meaning for all Parties and concern articles or themes that are included in this Convention. They are not country-specific. Although these general recommendations are not legally-binding, they serve as an important reference for Parties by developing a greater understanding of the different themes in the Convention and offering clear guidance that can contribute to an effective implementation of the provisions contained in the Convention. These recommendations should also be part of future monitoring rounds.

Article 70 – Parliamentary involvement in monitoring

360. This provision sets out the role of national parliaments in monitoring the implementation of this Convention. In paragraphs 1 and 2, it contains the obligation of Parties to the Convention to invite national

parliaments to participate in the monitoring (paragraph 1) and to submit the reports of GREVIO to them for consultation (paragraph 2). The drafters emphasised the important role which national parliaments take on in implementing the Convention, which, in many cases, requires legislative changes. As a result, they considered it essential to involve national parliaments in assessing the implementation of the Convention.

361. Paragraph 3 of this provision specifies the involvement of the Parliamentary Assembly of the Council of Europe in the monitoring of measures taken by Parties in the implementation of this Convention. The first provision of this kind in a Council of Europe Convention, it states that the Parliamentary Assembly shall be invited to regularly take stock of the implementation of the Convention. With this provision, the drafters wished to recognise the important role which the Parliamentary Assembly played in placing the issue of violence against women on the political agenda both of the Council of Europe and of its member states. Following the Assembly's longstanding commitment to this issue and the high number of recommendations adopted in this field, the Assembly's participation in the monitoring of this Convention significantly enhances its results.

CHAPTER X – RELATIONSHIP WITH OTHER INTERNATIONAL INSTRUMENTS

Article 71 – Relationship with other international instruments

362. Article 71 deals with the relationship between the Convention and other international instruments.

363. In accordance with the 1969 Vienna Convention on the Law of Treaties, Article 71 seeks to ensure that the Convention harmoniously coexists with other treaties – whether multilateral or bilateral – or instruments dealing with matters which the Convention also covers. This includes for instance the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols, the European Social Charter (revised, ETS No. 163), the Council of Europe Convention on Action against Trafficking in Human Beings (CETS No. 197), the United Nations Convention on the Elimination of All Forms of Discrimination Against Women and its Optional Protocol, the Convention on the Rights of the Child and its Optional Protocols on the involvement of children in armed conflict, and on the sale of children, child prostitution and child pornography, the International Convention on the Elimination of All Forms of Racial Discrimination and its Optional Protocol, the 1951 Convention relating to the Status of Refugees and its Optional Protocol and the United Nations Convention on the Rights of Persons with Disabilities.

364. This Convention is designed to strengthen the protection and ensure the support for victims of violence against women and domestic violence. For this reason, Article 71, paragraph 1 aims at ensuring that this Convention does not prejudice the obligations derived from other international instruments to which the Parties to this Convention are also Parties or will become Parties, and which contain provisions on matters governed by this Convention. This provision clearly shows, once more, the overall aim of this Convention, which is to protect the rights of victims of violence against women and domestic violence and to assure them of the highest level of protection.

365. Article 71, paragraph 2, states positively that Parties may conclude bilateral or multilateral agreements – or any other legal instrument – relating to the matters which the Convention governs. However, the wording makes clear that Parties are not allowed to conclude any agreement which derogates from this Convention.

CHAPTER XI – AMENDMENTS TO THE CONVENTION

366. Amendments to the provisions of the Convention may be proposed by the Parties. They must be communicated to the Secretary General of the Council of Europe and to all Council of Europe member states, to any signatory, to any Party, to the European Union and to any state invited to sign or accede to the Convention.

367. As a next step, the Committee of Ministers examines and adopts the amendment. Before deciding on the amendment, the Committee of Ministers shall consult and obtain the unanimous consent of all Parties to the Convention. Such a requirement recognises that all Parties to the Convention should be able to participate in the decision-making process concerning amendments and are on an equal footing.

CHAPTER XII – FINAL CLAUSES

368. With some exceptions, the provisions in this chapter are essentially based on the Model Final Clauses for Conventions and Agreements concluded within the Council of Europe, which the Committee of Ministers approved at the Deputies' 315th meeting in February 1980. Articles 73 to 81 either use the standard language of the model clauses or are based on long-standing treaty-making practice at the Council of Europe.

Article 73 – Effects of this Convention

369. Article 73 safeguards those provisions of internal law and binding international instruments which provide additional protection to persons against violence against women and domestic violence; this Convention shall not be interpreted so as to restrict such protection. The phrase "more favourable rights" refers to the possibility of putting a person in a more favourable position than provided for under the Convention.

Article 74 – Dispute settlement

370. The drafters considered it important to include in the text of the Convention an article on dispute settlement, which imposes an obligation on the Parties to seek first of all a peaceful settlement of any dispute concerning the application or the interpretation of the Convention.

371. The various types of peaceful settlement mentioned in the first paragraph of this article (negotiation, conciliation and arbitration) are commonly recognised under international law. These methods of settlement are not cumulative, so that Parties are not obliged to exhaust all of them before having recourse to other methods of peaceful settlement. Any procedure for solving disputes shall be agreed upon by the Parties concerned.

372. Paragraph 2 provides that the Committee of Ministers of the Council of Europe may establish a non-judicial procedure which Parties could use if a dispute arises in relation to the application or the interpretation of the Convention. The drafters chose not to refer to judicial procedures such as the one governing the International Court of Justice, since several states having participated in the elaboration of this Convention had not accepted the mandatory competence of this judicial body and did not wish to do so concerning this specific Convention. However, this article does not preclude Parties in dispute from submitting their case to the International Court of Justice if they should so agree.

Article 75 – Signature and entry into force

373. Paragraph 1 states that the Convention is open for signature not only by Council of Europe member states but also the European Union and states not member of the Council of Europe (Canada, the Holy See, Japan, Mexico and the United states) which took part in drawing it up. Once the Convention enters into force, in accordance with paragraph 3, other non-member states not covered by this provision may be invited to accede to the Convention in accordance with Article 76, paragraph 1.

374. Paragraph 2 states that the Secretary General of the Council of Europe is the depositary of the instruments of ratification, acceptance or approval of this Convention.

375. Paragraph 3 sets the number of ratifications, acceptances or approvals required for the Convention's entry into force at 10. This figure reflects the belief that a significant group of states is needed to successfully set about addressing the challenge of preventing and combating violence against women and domestic violence. The number is not so high, however, as to unnecessarily delay the Convention's entry into force. In accordance with the treaty-making practice of the Organisation, of the ten initial states, at least eight must be Council of Europe members.

Article 76 – Accession to the Convention

376. After consulting the Parties and obtaining their unanimous consent, the Committee of Ministers may invite any state not a Council of Europe member which did not participate in drawing up the Convention to accede to it. This decision requires the two-thirds majority provided for in Article 20.d of the Statute of the Council of Europe and the unanimous vote of the Parties to this Convention.

Article 77 – Territorial application

377. Paragraph 1 specifies the territories to which the Convention applies. Here it should be pointed out that it would be incompatible with the object and purpose of the Convention for states Parties to exclude parts of their territory from application of the Convention without valid reason (such as the existence of different legal systems applying in matters dealt with in the Convention).

378. Paragraph 2 is concerned with extension of application of the Convention to territories for whose international relations the Parties are responsible or on whose behalf they are authorised to give undertakings.

379. In respect of this particular Convention and without prejudice to the provisions in Article 44, this Convention does not create any extra-territorial obligations.

Article 78 – Reservations

380. Article 78 specifies that no reservation may be made in relation to any provision of this Convention, with the exceptions provided for in paragraphs 2 and 3 of this article. The declarations of reservation made pursuant to paragraphs 2 and 3 should explain the reasons why a reservation was sought by a Party.

381. The articles listed in paragraph 2 of this article are provisions for which unanimous agreement was not reached among the drafters despite the efforts achieved in favour of compromise. These reservations aim at enabling the largest possible ratification of the Convention, whilst permitting Parties to preserve some of their fundamental legal concepts. The provisions concerned are the following: Article 30, paragraph 2 (state compensation); Article 44, paragraphs 1 e, 3 and 4 (jurisdiction); Article 55, paragraph 1 (*ex parte* and *ex officio* proceedings); Article 58 (statute of limitation); Article 59 (residence status). It should be noted that the possibility of reservation has been further restricted regarding Articles 55 and 58, since reservations to Article 55, paragraph 1 are permissible only in respect of Article 35 regarding minor offences, in the same way as reservations to Article 58 are permissible only in respect of Articles 37, 38 and 39.

382. Paragraph 3 provides for a specific form of reservation in relation to Articles 33 (psychological violence) and 34 (stalking). Parties may reserve the right to provide for non-criminal sanctions, instead of the criminal sanctions, for the behaviours referred to in these articles. Consequently, this possibility of reservation does not apply to the articles mentioned as a whole, but only to the way they may be implemented by the Parties at the national level.

383. Paragraph 4, by making it possible to withdraw reservations at any time, aims at reducing in the future divergences between legislations which have incorporated the provisions of this Convention.

Article 79 – Validity and review of reservations

384. Reservations are exceptions to the uniform implementation of the standards provided for by the Convention. Therefore, the drafters considered it appropriate to provide for a periodic review of the reservations in order to encourage Parties to lift them or to indicate the reasons for maintaining them. Pursuant to paragraph 1, reservations referred to in Article 78, paragraphs 2 and 3 have a limited validity of 5 years. This duration was settled in order to strike a balance between on the one hand, the objective of progressive elimination of existing reservations with the need, on the other hand, to ensure that Parties have sufficient time to re-examine their reservations at the national level. After this deadline, reservations will lapse unless they are expressly renewed. In any event, it is necessary for Parties to inform the Secretary General of the Council of Europe of their intentions regarding existing reservations.

385. Paragraph 2 contains a procedure for the automatic lapsing of non-renewed reservations. Finally, pursuant to Article 79, paragraph 3, Parties shall provide to GREVIO, before its renewal or upon request, an explanation on the grounds justifying the continuation of a reservation. In cases of renewal of a reservation, there shall be no need of a prior request by GREVIO. In all cases GREVIO will have the possibility of examining the explanations provided by the Party to justify the continuance of its reservations.

Article 80 – Denunciation

386. In accordance with the United Nations Vienna Convention on the Law of Treaties, Article 80 allows any Party to denounce the Convention.

Article 81 – Notification

387. Article 81 lists the notifications that, as the depositary of the Convention, the Secretary General of the Council of Europe is required to make, and it also designates the recipients of these notifications (states and the European Union).

Council of Europe Convention on the counterfeiting of medical products and similar crimes involving threats to public health – CETS No. 211

Moscow, 28.X.2011

Text corrected in accordance with the Committee of Ministers' decision (1151st meeting of the Ministers› Deputies, 18-19 September 2012).

Preamble

The member States of the Council of Europe and the other signatories to this Convention,

Considering that the aim of the Council of Europe is to achieve a greater unity between its members;

Noting that the counterfeiting of medical products and similar crimes by their very nature seriously endanger public health;

Recalling the Action Plan adopted at the Third Summit of Heads of State and Government of the Council of Europe (Warsaw, 16-17 May 2005), which recommends the development of measures to strengthen the security of European citizens;

Bearing in mind the Universal Declaration of Human Rights, proclaimed by the United Nations General Assembly on 10 December 1948, the Convention for the Protection of Human Rights and Fundamental Freedoms (1950, ETS No. 5), the European Social Charter (1961, ETS No. 35), the Convention on the Elaboration of a European Pharmacopoeia (1964, ETS No. 50) and its Protocol (1989, ETS No. 134), the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (1997, ETS No. 164) and the Additional Protocols thereto (1998, ETS No. 168, 2002, ETS No.186, 2005, CETS No. 195, 2008, CETS No. 203) and the Convention on Cybercrime (2001, ETS No. 185);

Also bearing in mind the other relevant work of the Council of Europe, particularly the decisions of the Committee of Ministers and work of the Parliamentary Assembly, notably Resolution AP(2001)2 concerning the pharmacist's role in the framework of health security, the replies adopted by the Committee of Ministers on 6 April 2005 and on 26 September 2007, concerning respectively, Parliamentary Assembly Recommendations 1673 (2004) on "Counterfeiting: problems and solutions" and 1794 (2007) on the "Quality of medicines in Europe", as well as relevant programmes conducted by the Council of Europe;

Having due regard to other relevant international legal instruments and programmes, conducted notably by the World Health Organisation, in particular the work of the group IMPACT, and by the European Union, as well as in the forum of the G8;

Determined to contribute effectively to the attainment of the common goal of combating crime involving counterfeiting of medical products and similar crimes involving threats to public health, by introducing notably new offences and penal sanctions relative to these offences;

Considering that the purpose of this Convention is to prevent and combat threats to public health, giving effect to the provisions of the Convention concerning substantive criminal law should be carried out taking into account its purpose and the principle of proportionality;

Considering that this Convention does not seek to address issues concerning intellectual property rights;

Taking into account the need to prepare a comprehensive international instrument which is centred on the aspects linked to prevention, protection of victims and criminal law in combating all forms of counterfeiting of medical products and similar crimes involving threats to public health, and which sets up a specific follow-up mechanism;

Recognising that, to efficiently combat the global threat posed by the counterfeiting of medical products and similar crimes, close international co-operation between Council of Europe member States and non-member States alike should be encouraged,

Have agreed as follows:

CHAPTER I – OBJECT AND PURPOSE, PRINCIPLE OF NON-DISCRIMINATION, SCOPE, DEFINITIONS

Article 1 – Object and purpose

1. The purpose of this Convention is to prevent and combat threats to public health by:

   a. providing for the criminalisation of certain acts;

   b. protecting the rights of victims of the offences established under this Convention;

   c. promoting national and international co-operation.

2. In order to ensure effective implementation of its provisions by the Parties, this Convention sets up a specific follow-up mechanism.

Article 2 – Principle of non-discrimination

The implementation of the provisions of this Convention by the Parties, in particular the enjoyment of measures to protect the rights of victims, shall be secured without discrimination on any ground such as sex, race, colour, language, age, religion, political or any other opinion, national or social origin, association with a national minority, property, birth, sexual orientation, state of health, disability or other status.

Article 3 – Scope

This Convention concerns medical products whether they are protected under intellectual property rights or not, or whether they are generic or not, including accessories designated to be used together with medical devices, as well as the active substances, excipients, parts and materials designated to be used in the production of medical products.

Article 4 – Definitions

For the purposes of this Convention:

a. the term "medical product" shall mean medicinal products and medical devices;

b. the term "medicinal product" shall mean medicines for human and veterinary use, which may be:

   i. any substance or combination of substances presented as having properties for treating or preventing disease in humans or animals;

   ii. any substance or combination of substances which may be used in or administered to human beings or animals either with a view to restoring, correcting or modifying physiological functions

by exerting a pharmacological, immunological or metabolic action, or to making a medical diagnosis;

iii. an investigational medicinal product;

c. the term "active substance" shall mean any substance or mixture of substances that is designated to be used in the manufacture of a medicinal product, and that, when used in the production of a medicinal product, becomes an active ingredient of the medicinal product;

d. the term "excipient" shall mean any substance that is not an active substance or a finished medicinal product, but is part of the composition of a medicinal product for human or veterinary use and essential for the integrity of the finished product;

e. the term "medical device" shall mean any instrument, apparatus, appliance, software, material or other article, whether used alone or in combination, including the software, designated by its manufacturer to be used specifically for diagnostic and/or therapeutic purposes and necessary for its proper application, designated by the manufacturer to be used for human beings for the purpose of:

i. diagnosis, prevention, monitoring, treatment or alleviation of disease;

ii. diagnosis, monitoring, treatment, alleviation of or compensation for an injury or handicap;

iii. investigation, replacement or modification of the anatomy or of a physiological process;

iv. control of conception;

and which does not achieve its principal intended action in or on the human body by pharmacological, immunological or metabolic means, but which may be assisted in its function by such means;

f. the term "accessory" shall mean an article which whilst not being a medical device is designated specifically by its manufacturer to be used together with a medical device to enable it to be used in accordance with the use of the medical device intended by the manufacturer of the medical device;

g. the terms "parts" and "materials" shall mean all parts and materials constructed and designated to be used for medical devices and that are essential for the integrity thereof;

h. the term "document" shall mean any document related to a medical product, an active substance, an excipient, a part, a material or an accessory, including the packaging, labeling, instructions for use, certificate of origin or any other certificate accompanying it, or otherwise directly associated with the manufacturing and/or distribution thereof;

i. the term "manufacturing" shall mean:

i. as regards a medicinal product, any part of the process of producing the medicinal product, or an active substance or an excipient of such a product, or of bringing the medicinal product, active substance or excipient to its final state;

ii. as regards a medical device, any part of the process of producing the medical device, as well as parts or materials of such a device, including designing the device, the parts or materials, or of bringing the medical device, the parts or materials to their final state;

iii. as regards an accessory, any part of the process of producing the accessory, including designing the accessory, or of bringing the accessory to its final state;

j. the term "counterfeit" shall mean a false representation as regards identity and/or source;

k. the term "victim" shall mean any natural person suffering adverse physical or psychological effects as a result of having used a counterfeit medical product or a medical product manufactured, supplied or placed on the market without authorisation or without being in compliance with the conformity requirements as described in Article 8.

CHAPTER II – SUBSTANTIVE CRIMINAL LAW

Article 5 – Manufacturing of counterfeits

1. Each Party shall take the necessary legislative and other measures to establish as offences under its domestic law, the intentional manufacturing of counterfeit medical products, active substances, excipients, parts, materials and accessories.

2. As regards medicinal products and, as appropriate, medical devices, active substances and excipients, paragraph 1 shall also apply to any adulteration thereof.

3. Each State or the European Union may, at the time of signature or when depositing its instrument of ratification, acceptance or approval, by a declaration addressed to the Secretary General of the Council of Europe, declare that it reserves the right not to apply, or to apply only in specific cases or conditions, paragraph 1, as regards excipients, parts and materials, and paragraph 2, as regards excipients.

Article 6 – Supplying, offering to supply, and trafficking in counterfeits

1. Each Party shall take the necessary legislative and other measures to establish as offences under its domestic law, when committed intentionally, the supplying or the offering to supply, including brokering, the trafficking, including keeping in stock, importing and exporting of counterfeit medical products, active substances, excipients, parts, materials and accessories.

2. Each State or the European Union may, at the time of signature or when depositing its instrument of ratification, acceptance or approval, by a declaration addressed to the Secretary General of the Council of Europe, declare that it reserves the right not to apply, or to apply only in specific cases or conditions, paragraph 1, as regards excipients, parts and materials.

Article 7 – Falsification of documents

1. Each Party shall take the necessary legislative and other measures to establish as offences under its domestic law the making of false documents or the act of tampering with documents, when committed intentionally.

2. Each State or the European Union may, at the time of signature or when depositing its instrument of ratification, acceptance or approval, by a declaration addressed to the Secretary General of the Council of Europe, declare that it reserves the right not to apply, or to apply only in specific cases or conditions, paragraph 1, as regards documents related to excipients, parts and materials.

Article 8 – Similar crimes involving threats to public health

Each Party shall take the necessary legislative and other measures to establish as offences under its domestic law, when committed intentionally, in so far as such an activity is not covered by Articles 5, 6 and 7:

a. the manufacturing, the keeping in stock for supply, importing, exporting, supplying, offering to supply or placing on the market of:

   i. medicinal products without authorisation where such authorisation is required under the domestic law of the Party; or

   ii. medical devices without being in compliance with the conformity requirements, where such conformity is required under the domestic law of the Party;

b. the commercial use of original documents outside their intended use within the legal medical product supply chain, as specified by the domestic law of the Party.

Article 9 – Aiding or abetting and attempt

1. Each Party shall take the necessary legislative and other measures to establish as offences when committed intentionally, aiding or abetting the commission of any of the offences established in accordance with this Convention.

2. Each Party shall take the necessary legislative and other measures to establish as an offence the intentional attempt to commit any of the offences established in accordance with this Convention.

3. Each State or the European Union may, at the time of signature or when depositing its instrument of ratification, acceptance or approval, by a declaration addressed to the Secretary General of the Council of Europe, declare that it reserves the right not to apply, or to apply only in specific cases or conditions, paragraph 2 to offences established in accordance with Articles 7 and 8.

Article 10 – Jurisdiction

1. Each Party shall take the necessary legislative and other measures to establish jurisdiction over any offence established in accordance with this Convention, when the offence is committed:

   a. in its territory; or

   b. on board a ship flying the flag of that Party; or

   c. on board an aircraft registered under the laws of that Party; or

   d. by one of its nationals or by a person habitually residing in its territory.

2. Each Party shall take the necessary legislative and other measures to establish jurisdiction over any offence established in accordance with this Convention, when the victim of the offence is one of its nationals or a person habitually resident in its territory.

3. Each Party shall take the necessary legislative and other measures to establish jurisdiction over any offence established in accordance with this Convention, when the alleged offender is present in its territory and cannot be extradited to another Party because of his or her nationality.

4. Each State or the European Union may, at the time of signature or when depositing its instrument of ratification, acceptance or approval, by a declaration addressed to the Secretary General of the Council of Europe, declare that it reserves the right not to apply, or to apply only in specific cases or conditions, the jurisdiction rules laid down in paragraph 1, sub-paragraph d, and paragraph 2 of this article.

5. Where more than one Party claims jurisdiction over an alleged offence established in accordance with this Convention, the Parties concerned shall consult, where appropriate, with a view to determining the most appropriate jurisdiction for prosecution.

6. Without prejudice to the general rules of international law, this Convention shall not exclude any criminal jurisdiction exercised by a Party in accordance with its domestic law.

Article 11 – Corporate liability

1. Each Party shall take the necessary legislative and other measures to ensure that legal persons can be held liable for offences established in accordance with this Convention, when committed for their benefit by any natural person, acting either individually or as part of an organ of the legal person, who has a leading position within it based on:

   a. a power of representation of the legal person;

   b. an authority to take decisions on behalf of the legal person;

   c. an authority to exercise control within the legal person.

2. Apart from the cases provided for in paragraph 1, each Party shall take the necessary legislative and other measures to ensure that a legal person can be held liable where the lack of supervision or control by a natural person referred to in paragraph 1 has made possible the commission of an offence established in accordance with this Convention for the benefit of that legal person by a natural person acting under its authority.

3. Subject to the legal principles of the Party, the liability of a legal person may be criminal, civil or administrative.

4. Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offence.

Article 12 – Sanctions and measures

1. Each Party shall take the necessary legislative and other measures to ensure that the offences established in accordance with this Convention are punishable by effective, proportionate and dissuasive sanctions, including criminal or non-criminal monetary sanctions, taking account of their seriousness. These sanctions shall include, for offences established in accordance with Articles 5 and 6, when committed by natural persons, penalties involving deprivation of liberty that may give rise to extradition.

2. Each Party shall take the necessary legislative and other measures to ensure that legal persons held liable in accordance with Article 11 are subject to effective, proportionate and dissuasive sanctions, including criminal or non-criminal monetary sanctions, and may include other measures, such as:

a. temporary or permanent disqualification from exercising commercial activity;

b. placing under judicial supervision;

c. a judicial winding-up order.

3. Each Party shall take the necessary legislative and other measures to:

a. permit seizure and confiscation of:

i. medical products, active substances, excipients, parts, materials and accessories, as well as goods, documents and other instrumentalities used to commit the offences established in accordance with this Convention or to facilitate their commission;

ii. proceeds of these offences, or property whose value corresponds to such proceeds;

b. permit the destruction of confiscated medical products, active substances, excipients, parts, materials and accessories that are the subject of an offence established under this Convention;

c. take any other appropriate measures in response to an offence, in order to prevent future offences.

Article 13 – Aggravating circumstances

Each Party shall take the necessary legislative and other measures to ensure that the following circumstances, in so far as they do not already form part of the constituent elements of the offence, may, in conformity with the relevant provisions of domestic law, be taken into consideration as aggravating circumstances in determining the sanctions in relation to the offences established in accordance with this Convention:

a. the offence caused the death of, or damage to the physical or mental health of, the victim;

b. the offence was committed by persons abusing the confidence placed in them in their capacity as professionals;

c. the offence was committed by persons abusing the confidence placed in them as manufacturers as well as suppliers;

d. the offences of supplying and offering to supply were committed having resort to means of large scale distribution, such as information systems, including the Internet;

e. the offence was committed in the framework of a criminal organisation;

f. the perpetrator has previously been convicted of offences of the same nature.

Article 14 – Previous convictions

Each Party shall take the necessary legislative and other measures to provide for the possibility to take into account final sentences passed by another Party in relation to the offences of the same nature when determining the sanctions.

CHAPTER III – INVESTIGATION, PROSECUTION AND PROCEDURAL LAW

Article 15 – Initiation and continuation of proceedings

Each Party shall take the necessary legislative and other measures to ensure that investigations or prosecution of offences established in accordance with this Convention should not be subordinate to a complaint and that the proceedings may continue even if the complaint is withdrawn.

Article 16 – Criminal investigations

1. Each Party shall take the necessary measures to ensure that persons, units or services in charge of criminal investigations are specialised in the field of combating counterfeiting of medical products and similar crimes involving threats to public health or that persons are trained for this purpose, including financial investigations. Such units or services shall have adequate resources.

2. Each Party shall take the necessary legislative and other measures, in conformity with the principles of its domestic law, to ensure effective criminal investigation and prosecution of offences established in accordance with this Convention, allowing, where appropriate, for the possibility for its competent authorities of carrying out financial investigations, of covert operations, controlled delivery and other special investigative techniques.

CHAPTER IV – CO-OPERATION OF AUTHORITIES AND INFORMATION EXCHANGE

Article 17 – National measures of co-operation and information exchange

1. Each Party shall take the necessary legislative and other measures to ensure that representatives of health authorities, customs, police and other competent authorities exchange information and co-operate in accordance with domestic law in order to prevent and combat effectively the counterfeiting of medical products and similar crimes involving threats to public health.

2. Each Party shall endeavour to ensure co-operation between its competent authorities and the commercial and industrial sectors as regards risk management of counterfeit medical products and similar crimes involving threats to public health.

3. With due respect for the requirements of the protection of personal data, each Party shall take the necessary legislative and other measures to set up or strengthen mechanisms for:

a. receiving and collecting information and data, including through contact points, at national or local levels and in collaboration with private sector and civil society, for the purpose of preventing and combating the counterfeiting of medical products and similar crimes involving threats to public health;

b. making available the information and data obtained by the health authorities, customs, police and other competent authorities for the co-operation between them.

4. Each Party shall take the necessary measures to ensure that persons, units or services in charge of co-operation and information exchange are trained for this purpose. Such units or services shall have adequate resources.

CHAPTER V – MEASURES FOR PREVENTION

Article 18 – Preventive measures

1. Each Party shall take the necessary legislative and other measures to establish the quality and safety requirements of medical products.

2. Each Party shall take the necessary legislative and other measures to ensure the safe distribution of medical products.

3. With the aim of preventing counterfeiting of medical products, active substances, excipients, parts, materials and accessories, each Party shall take the necessary measures to provide, *inter alia*, for:

a. training of healthcare professionals, providers, police and customs authorities, as well as relevant regulatory authorities;

b. the promotion of awareness-raising campaigns addressed to the general public providing information about counterfeit medical products;

c. the prevention of illegal supplying of counterfeit medical products, active substances, excipients, parts, materials and accessories.

CHAPTER VI – MEASURES FOR PROTECTION

Article 19 – Protection of victims

Each Party shall take the necessary legislative and other measures to protect the rights and interests of victims, in particular by:

a. ensuring that victims have access to information relevant to their case and which is necessary for the protection of their health;

b. assisting victims in their physical, psychological and social recovery;

c. providing, in its domestic law, for the right of victims to compensation from the perpetrators.

Article 20 – The standing of victims in criminal investigations and proceedings

1. Each Party shall take the necessary legislative and other measures to protect the rights and interests of victims at all stages of criminal investigations and proceedings, in particular by:

   a. informing them of their rights and the services at their disposal and, unless they do not wish to receive such information, the follow-up given to their complaint, the possible charges, the general progress of the investigation or proceedings, and their role therein as well as the outcome of their cases;

   b. enabling them, in a manner consistent with the procedural rules of domestic law, to be heard, to supply evidence and to choose the means of having their views, needs and concerns presented, directly or through an intermediary, and considered;

   c. providing them with appropriate support services so that their rights and interests are duly presented and taken into account;

   d. providing effective measures for their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation.

2. Each Party shall ensure that victims have access, as from their first contact with the competent authorities, to information on relevant judicial and administrative proceedings.

3. Each Party shall ensure that victims have access, provided free of charge where warranted, to legal aid when it is possible for them to have the status of parties to criminal proceedings.

4. Each Party shall take the necessary legislative and other measures to ensure that victims of an offence established in accordance with this Convention committed in the territory of a Party other than the one where they reside can make a complaint before the competent authorities of their State of residence.

5. Each Party shall provide, by means of legislative or other measures, in accordance with the conditions provided for by its domestic law, the possibility for groups, foundations, associations or governmental or non-governmental organisations, to assist and/or support the victims with their consent during criminal proceedings concerning the offences established in accordance with this Convention.

CHAPTER VII – INTERNATIONAL CO-OPERATION

Article 21 – International co-operation in criminal matters

1. The Parties shall co-operate with each other, in accordance with the provisions of this Convention and in pursuance of relevant applicable international and regional instruments and arrangements agreed on the basis of uniform or reciprocal legislation and their domestic law, to the widest extent possible, for the purpose of investigations or proceedings concerning the offences established in accordance with this Convention, including seizure and confiscation.

2. The Parties shall co-operate to the widest extent possible in pursuance of the relevant applicable international, regional and bilateral treaties on extradition and mutual legal assistance in criminal matters concerning the offences established in accordance with this Convention.

3. If a Party that makes extradition or mutual legal assistance in criminal matters conditional on the existence of a treaty receives a request for extradition or legal assistance in criminal matters from a Party with which it has no such a treaty, it may, acting in full compliance with its obligations under international law and subject to the conditions provided for by the domestic law of the requested Party, consider this Convention as the legal basis for extradition or mutual legal assistance in criminal matters in respect of the offences established in accordance with this Convention.

Article 22 – International co-operation on prevention and other administrative measures

1. The Parties shall co-operate on protecting and providing assistance to victims.

2. The Parties shall, without prejudice to their internal reporting systems, designate a national contact point which shall be responsible for transmitting and receiving requests for information and/or co-operation in connection with the fight against counterfeiting of medical products and similar crimes involving threats to public health.

3. Each Party shall endeavour to integrate, where appropriate, prevention and combating of the counterfeiting of medical products and similar crimes involving threats to public health into assistance or development programmes provided for the benefit of third States.

CHAPTER VIII – FOLLOW-UP MECHANISM

Article 23 – Committee of the Parties

1. The Committee of the Parties shall be composed of representatives of the Parties to the Convention.

2. The Committee of the Parties shall be convened by the Secretary General of the Council of Europe. Its first meeting shall be held within a period of one year following the entry into force of this Convention for the tenth signatory having ratified it. It shall subsequently meet whenever at least one third of the Parties or the Secretary General so requests.

3. The Committee of the Parties shall adopt its own rules of procedure.

4. The Committee of the Parties shall be assisted by the Secretariat of the Council of Europe in carrying out its functions.

5. A contracting Party which is not a member of the Council of Europe shall contribute to the financing of the Committee of the Parties in a manner to be decided by the Committee of Ministers upon consultation of that Party.

Article 24 – Other representatives

1. The Parliamentary Assembly of the Council of Europe, the European Committee on Crime Problems (CDPC), as well as other relevant Council of Europe intergovernmental or scientific committees, shall each appoint a representative to the Committee of the Parties in order to contribute to a multisectoral and multidisciplinary approach.

2. The Committee of Ministers may invite other Council of Europe bodies to appoint a representative to the Committee of the Parties after consulting them.

3. Representatives of relevant international bodies may be admitted as observers to the Committee of the Parties following the procedure established by the relevant rules of the Council of Europe.

4. Representatives of relevant official bodies of the Parties may be admitted as observers to the Committee of the Parties following the procedure established by the relevant rules of the Council of Europe.

5. Representatives of civil society, and in particular non-governmental organisations, may be admitted as observers to the Committee of the Parties following the procedure established by the relevant rules of the Council of Europe.

6. In the appointment of representatives under paragraphs 2 to 5, a balanced representation of the different sectors and disciplines shall be ensured.

7. Representatives appointed under paragraphs 1 to 5 above shall participate in meetings of the Committee of the Parties without the right to vote.

Article 25 – Functions of the Committee of the Parties

1. The Committee of the Parties shall monitor the implementation of this Convention. The rules of procedure of the Committee of the Parties shall determine the procedure for evaluating the implementation of this Convention, using a multisectoral and multidisciplinary approach.

2. The Committee of the Parties shall also facilitate the collection, analysis and exchange of information, experience and good practice between States to improve their capacity to prevent and combat the counterfeiting of medical products and similar crimes involving threats to public health. The Committee may avail itself of the expertise of other relevant Council of Europe committees and bodies.

3. Furthermore, the Committee of the Parties shall, where appropriate:

   a. facilitate the effective use and implementation of this Convention, including the identification of any problems and the effects of any declaration or reservation made under this Convention;

b. express an opinion on any question concerning the application of this Convention and facilitate the exchange of information on significant legal, policy or technological developments;

c. make specific recommendations to Parties concerning the implementation of this Convention.

4. The European Committee on Crime Problems (CDPC) shall be kept periodically informed regarding the activities mentioned in paragraphs 1, 2 and 3 of this article.

CHAPTER IX – RELATIONSHIP WITH OTHER INTERNATIONAL INSTRUMENTS

Article 26 – Relationship with other international instruments

1. This Convention shall not affect the rights and obligations arising from the provisions of other international instruments to which Parties to the present Convention are Parties or shall become Parties and which contain provisions on matters governed by this Convention.

2. The Parties to the Convention may conclude bilateral or multilateral agreements with one another on the matters dealt with in this Convention, for purposes of supplementing or strengthening its provisions or facilitating the application of the principles embodied in it.

CHAPTER X – AMENDMENTS TO THE CONVENTION

Article 27 – Amendments

1. Any proposal for an amendment to this Convention presented by a Party shall be communicated to the Secretary General of the Council of Europe and forwarded by him or her to the Parties, the member States of the Council of Europe, non-member States having participated in the elaboration of this Convention or enjoying observer status with the Council of Europe, the European Union, and any State having been invited to sign this Convention.

2. Any amendment proposed by a Party shall be communicated to the European Committee on Crime Problems (CDPC) and other relevant Council of Europe intergovernmental or scientific committees, which shall submit to the Committee of the Parties their opinions on that proposed amendment.

3. The Committee of Ministers, having considered the proposed amendment and the opinion submitted by the Committee of the Parties, may adopt the amendment.

4. The text of any amendment adopted by the Committee of Ministers in accordance with paragraph 3 of this article shall be forwarded to the Parties for acceptance.

5. Any amendment adopted in accordance with paragraph 3 of this article shall enter into force on the first day of the month following the expiration of a period of one month after the date on which all Parties have informed the Secretary General that they have accepted it.

CHAPTER XI – FINAL CLAUSES

Article 28 – Signature and entry into force

1. This Convention shall be open for signature by the member States of the Council of Europe, the European Union and the non-member States which have participated in its elaboration or enjoy observer status with the Council of Europe. It shall also be open for signature by any other non-member State of the Council of Europe upon invitation by the Committee of Ministers. The decision to invite a non-member State to sign the Convention shall be taken by the majority provided for in Article 20.d of the Statute of the Council of Europe, and by unanimous vote of the representatives of the Contracting States entitled to sit on the Committee of Ministers. This decision shall be taken after having obtained the unanimous agreement of the other States/European Union having expressed their consent to be bound by this Convention.

2. This Convention is subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

3. This Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date on which five signatories, including at least three member States of the Council of Europe, have expressed their consent to be bound by the Convention in accordance with the provisions of the preceding paragraph.

4. In respect of any State or the European Union, which subsequently expresses its consent to be bound by the Convention, it 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 its instrument of ratification, acceptance or approval.

Article 29 – Territorial application

1. Any State or the European Union may, at the time of signature or when depositing its instrument of ratification, acceptance or approval, specify the territory or territories to which this Convention shall apply.

2. Any Party may, at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Convention to any other territory specified in the declaration and for whose international relations it is responsible or on whose behalf it is authorised to give undertakings. In respect of such territory, the Convention 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 of the Council of Europe. 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 30 – Reservations

1. No reservation may be made in respect of any provision of this Convention, with the exception of the reservations expressly established.

2. Each Party which has made a reservation may, at any time, withdraw it entirely or partially by a notification addressed to the Secretary General of the Council of Europe. The withdrawal shall take effect from the date of the receipt of such notification by the Secretary General.

Article 31 – Friendly settlement

The Committee of the Parties will follow in close co-operation with the European Committee on Crime Problems (CDPC) and other relevant Council of Europe intergovernmental or scientific committees the application of this Convention and facilitate, when necessary, the friendly settlement of all difficulties related to its application.

Article 32 – Denunciation

1. Any Party may, at any time, denounce this Convention 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.

Article 33 – Notification

The Secretary General of the Council of Europe shall notify the Parties, the member States of the Council of Europe, the non-member States having participated in the elaboration of this Convention or enjoying observer status with the Council of Europe, the European Union, and any State having been invited to sign this Convention in accordance with the provisions of Article 28, of:

a. any signature;

b. the deposit of any instrument of ratification, acceptance or approval;

c. any date of entry into force of this Convention in accordance with Article 28;

d. any amendment adopted in accordance with Article 27 and the date on which such an amendment enters into force;

e. any reservation made under Articles 5, 6, 7, 9 and 10 and any withdrawal of a reservation made in accordance with Article 30;

f. any denunciation made in pursuance of the provisions of Article 32;

g. any other act, notification or communication relating to this Convention.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done in Moscow, this 28th day of October 2011, 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, to the non-member States which have participated in the elaboration of this Convention or enjoy observer status with the Council of Europe, to the European Union and to any State invited to sign this Convention.

Council of Europe Convention on the counterfeiting of medical products and similar crimes involving threats to public health – CETS No. 211

Explanatory Report

1. The Committee of Ministers of the Council of Europe took note of this Explanatory Report at its 1101st meeting held at its Deputies' level, on 8 December 2010.

2. The text of this Explanatory Report does not constitute an instrument providing an authoritative interpretation of the Convention, although it might be of such a nature as to facilitate the application of the provisions contained therein.

INTRODUCTION

3. Counterfeiting of medical products and similar crimes violate the right to life as enshrined in the European Convention on Human Rights and Fundamental Freedoms, as these criminal and dangerous conducts effectively deny patients the necessary medical treatment and may often be harmful to their health, sometimes even leading to the death of the patient or consumer.

4. In addition to the risk to the health of individuals, the confidence of the general public in health authorities and healthcare systems as such is in risk of being undermined by the circulation on the market of counterfeit and dangerous medical products. The fact that counterfeit medical products have become increasingly difficult to detect without carrying out costly laboratory test means that there is today an omnipresent risk that counterfeit medical products may enter into the legal supply chains for medical products, in the process getting mixed up with legitimate products with potentially disastrous results for public health.

5. Despite the fact that measures at both national and international levels have been taken to curb this problem, both patent protected and generic medical products, as well as the active substances, excipients, parts and materials of which they are made, have increasingly been targeted by counterfeiters. In parallel, the manufacturing and supply of medical products without authorisation or without the products being in compliance with conformity requirements have also become a serious problem.

6. The reason for the strong growth of this type of crime is clearly the relatively low risk of detection and prosecution compared with the potential high financial gains. Using the internet to advertise and supply their inherently dangerous products directly to patients and consumers around the world has proven to be a safe and easy modus operandi for the criminals involved and has given them a global reach. The result is a serious threat to public health of truly global proportions.

7. There is accordingly an urgent need to take decisive repressive and preventive measures against the counterfeiting of medical products and similar crimes in order to protect the lives of individual patients/consumers and public health in general. Though counterfeiting and the unauthorised manufacturing and supply of medicinal products as well as the placing on the market of medical devices that are not in compliance with conformity requirements have already been outlawed at national level in many states, the absence of a

dedicated international legal instrument establishing these activities as criminal offences carrying effective, proportionate and dissuasive penal sanctions and providing the basis for efficient international co-operation to combat them has facilitated the cross-border operation of criminals in this field. The purpose of this Convention is to address these shortcomings.

8. The Council of Europe has long been involved in finding adequate answers to the serious problems posed by the counterfeiting of medical products and other threats to public health, in particular through the work of the European Directorate for the Quality of Medicines and Healthcare (EDQM), but also through decisions of the Committee of Ministers, and resolutions adopted by the Parliamentary Assembly.

9. The Parliamentary Assembly Recommendations 1673 (2004) on "Counterfeiting: problems and solutions", and 1794 (2007) on "The quality of medicines in Europe", the declaration of the G8 Summit in St. Petersburg entitled "Combating IPR piracy and counterfeiting" of 16 July 2006, the declaration of the International Conference "Europe against counterfeit medicines" held in Moscow on 23 and 24 October 2006 and the conclusions of the High-level Conference of the Ministries of Justice and the Interior on "Improving European Co-operation in the Criminal Justice Field", Moscow 9 and 10 November 2006, have all highlighted the need for taking decisive action to protect public health from the dangers posed by the counterfeiting of medical products and similar crimes.

10. Despite the many legal and other challenges inherent in such an undertaking, the drafting of an international legal instrument of the Council of Europe aimed at combating the counterfeiting of medical products and similar crimes involving threats to public health was identified as the most expedient approach.

11. To this end a Group of Specialists on Counterfeit Pharmaceutical Products (PC-S-CP) was set up by a decision of the Committee of Ministers.

12. The PC-S-CP on 23 April 2008 produced a report on the key elements to be included in an international legal instrument in the field of counterfeiting of medical products and similar crimes. In all the group (composed of eleven specialists and with participation from the Parliamentary Assembly of the Council of Europe, a number of member states and the European Commission as observers) held a series of six meetings in Strasbourg to prepare the above report and a preliminary draft Convention. The last meeting, at which a preliminary draft text of the Convention was adopted, took place on 2 to 4 February 2009.

13. Following the adoption of the draft Convention by the PC-S-CP, negotiations were launched in the *ad hoc* Committee on Counterfeiting of Medical products and Similar Crimes Involving Threats to Public Health (PC-ISP) with the participation of all member states and observers of the Council of Europe. The PC-ISP held two meetings in Strasbourg, on 2 to 5 June and 1 to 4 September 2009 respectively.

14. The PC-ISP made a series of amendments to the draft Convention prepared by the PC-S-CP, notably with regard to the provisions on substantive criminal law, and at its last meeting adopted a draft text of the Convention, which was finalised by the European Committee on Crime Problems (CDPC) at its plenary meeting, 12 to 16 October 2009.

Preamble

15. The preamble describes the purpose of the Convention, namely to contribute to combating the counterfeiting of medical products and similar crimes involving threats to public health through penal sanctions, preventive measures and protection of victims. The Convention shall be applied without prejudice to the protection of intellectual property rights. However, the protection of such rights does not fall within the scope of the Convention (see Article 3 below).

16. The preamble underlines that in the application of the provisions of the Convention covering substantive criminal law, due consideration should be given to the purpose of the Convention and to the principle of proportionality.

17. The preamble to the Convention refers to important international players in the field of combating counterfeiting of medical products and similar crimes, namely the World Health Organization of the United Nations (WHO) and its International Medical Products Anti-Counterfeiting Taskforce (IMPACT), the G8, the European Union and the Council of Europe itself. The desirability for Council of Europe member states to extend their co-operation under the Convention to include non-member states is also underlined.

18. In this context, particular reference should be made to the following legal acts of the European Union governing medical products: Directives 2004/27/EC and 2004/24/EC of the European Parliament and of the Council amending Directive 2001/83/EC on the Community code relating to medicinal products for human

use and Directive 2004/28/EC of the European Parliament and of the Council, amending Directive 2001/82/EC on the Community code relating to veterinary medicinal products, as well as Council Directives 90/385/EEC, 93/42/EEC and 98/79/EC concerning medical devices.

CHAPTER I – OBJECT AND PURPOSE, PRINCIPLE OF NON-DISCRIMINATION, SCOPE, DEFINITIONS

Article 1 – Object and purpose

19. Paragraph 1 deals with the object and purposes of the Convention, which are to prevent and combat threats to public health by:

a. providing for the criminalisation of certain acts, namely counterfeiting of medical products and similar crimes, including through the criminalisation of aiding or abetting and attempt;

b. protecting the rights of victims of offences related to the crimes mentioned under a);

c. promoting national and international co-operation against the crimes mentioned under a).

20. Thus the focus of the Convention is on the protection of public health; as it was felt that intellectual property rights are generally adequately protected at both national and international level, the Convention does not cover any issues related to the infringement of intellectual property rights in relation to the counterfeiting of medical products, active substances, excipients, parts and materials. However, the provisions on substantive criminal law of the Convention shall obviously be applied without prejudice to any possible criminal prosecution of infringements of intellectual property rights to which a conduct criminalised under the Convention may also give rise.

21. Paragraph 2 provides for the establishment of a specific follow-up mechanism (Articles 23 – 25) in order to ensure an effective implementation of the Convention.

Article 2 – Principle of non-discrimination

22. This article prohibits discrimination in Parties' implementation of the Convention and in particular in enjoyment of measures to protect and promote victims' rights. The meaning of discrimination in Article 2 is identical to that given to it under Article 14 of the European Convention on Human Rights (ECHR).

23. The concept of discrimination has been interpreted consistently by the European Court of Human Rights in its case-law concerning Article 14 ECHR. In particular, this case-law has made clear that not every distinction or difference of treatment amounts to discrimination. As the Court has stated, for example in the *Abdulaziz, Cabales and Balkandali v. the United Kingdom* judgment, "a difference of treatment is discriminatory if it 'has no objective and reasonable justification', that is, if it does not pursue a 'legitimate aim' or if there is not a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised".

24. The list of non-discrimination grounds in Article 2 is based on that in Article 14 ECHR and the list contained in Article 1 of Protocol No. 12 to the ECHR. However, the negotiators wished to include also the non-discrimination grounds of age, sexual orientation, state of health and disability. "State of health" includes in particular HIV status. The list of non-discrimination grounds is not exhaustive, but indicative, and should not give rise to unwarranted a contrario interpretations as regards discrimination based on grounds not so included. It is worth pointing out that the European Court of Human Rights has applied Article 14 to discrimination grounds not explicitly mentioned in that provision (see, for example, as concerns the ground of sexual orientation, the judgment of 21 December 1999 in *Salgueiro da Silva Mouta v. Portugal*). The reference to "or other status" could refer, for example, to members of refugee or immigrant populations.

25. Article 2 refers to "implementation of the provisions of this Convention by the Parties". These words seek to specify the extent of the prohibition on discrimination. In particular, Article 2 prohibits a victim being discriminated against in the enjoyment of measures – as provided for in Chapter VI of the Convention – to protect their rights.

Article 3 – Scope

26. The scope of the Convention is expressly limited to medicines for human and veterinary use as well as medical devices, their active substances, excipients, parts or materials designated to be used in the production of medical products, including accessories designated to be used together with medical devices as

defined in Article 4, irrespective of the status of these products, active substances, excipients, parts, materials and accessories under intellectual property law. Hence generic medical products are also included under the scope of the Convention.

27. After some discussion due to the particular regulatory approach as regards medical devices as opposed to the situation regarding medicinal products, the *ad hoc* committee decided to include "medical devices" under the scope of the Convention, because of the obvious dangers to public health posed by such devices when counterfeited or manufactured or supplied or placed on the market without being in compliance with the conformity requirements required by the domestic law of the Parties. Consequently, the parts, materials and accessories designated for use in the manufacturing of, or together with, medical devices have been included.

28. The *ad hoc* committee decided not to include the related, but distinct, categories of foodstuffs, cosmetics and biocides under the scope of the Convention, however not excluding that these categories of products could eventually become the subject of additional protocols in the future.

Article 4 – Definitions

29. The article contains several definitions which are used throughout the Convention: "Medical product", "medicinal product", "active substance", "excipient", "medical device", "accessory" "parts" and "materials", "document", "manufacturing", "counterfeit" and "victim".

30. The term medical "medical product", cf. letter a., covers both "medicinal products" and "medical devices".

31. A "medicinal product", as defined in letter b., is to be understood as covering medicines for human and veterinary use. The reason for including medicines for veterinary use under this Convention is the fact that such medicines may directly affect public health through the food chain, and indirectly in cases where diseases are transmitted from animals to humans as a consequence of inefficient veterinary medicines.

32. For the purposes of the Convention, the term "medicinal product" also covers an "investigational medicinal product" (cf. letter b. iii) which may be a pharmaceutical form of an active substance or placebo being tested or used as a reference in a clinical trial, including products already with a marketing authorisation, but used or assembled (formulated or packaged) in a way different from the authorised form, or when used for an unauthorised indication, or when used to gain further information about the authorised form.

33. The definition of medicinal products used in the Convention is inspired by European Union law, in particular Directive 2004/28/EC of the European Parliament and of the Council of 31 March 2004 amending Directive 2001/82/EC on the Community code relating to veterinary medicinal products, Directive 2001/83/EC, as amended, on the Community code relating to medicinal products for human use, and Directive 2001/20/EC of the European Parliament and of the Council of 4 April 2001 on the approximation of the laws, regulations and administrative provisions of the Member states relating to the implementation of good clinical practice in the conduct of clinical trials on medicinal products for human use.

34. A "medical device" is defined in letter e. The definition covers a whole range of devices, from relatively simple objects such as spatulas, devices for oral or parenteral administration to technically complicated devices such as incubators or heart-lung machines, as well as in vitro diagnostic medical devices. The definition used in the Convention is inspired by the legal acts of the European Union on medical devices, in particular Council Directive 93/42/EEC of 14 June 1993 concerning medical devices, Council Directive 90/385/EEC of 20 June 1990 on the approximation of the laws of the Member states relating to active implantable medical devices and Council Directive 98/79/EC on *in vitro* diagnostic medical devices, and the legal acts amending them.

35. A "medicinal product" is composed of "active substances and excipients", which terms are defined in letters c and d. Likewise; a "medical device" is made of "parts" and "materials", which are defined in letter g. Medical devices, may be used with "accessories", which term is defined in letter f.

36. Since the counterfeiting of medical products is often done through falsifying or interfering with the documentation accompanying a medical product, the *ad hoc* committee found it useful to also introduce a new, all-encompassing definition of "document" (cf. letter h). This definition is intended to cover all kinds of documents such as certificates of analysis, certificates of authorisation, licenses, invoices, shipping and freight documents as well as the packaging and labelling of the final medical product. While finished medical products encompass the packaging and labelling, the *ad hoc* committee also wanted to cover the supply of the falsified packaging and labelling separate to the product.

37. Letter i., defining "manufacturing" is split in three parts, one for medicinal products, one for medical devices and one for accessories. The definition of "manufacturing" is based on the current definition used in the framework of co-operation under the World Health Organisation (WHO).

38. Though the terms "counterfeit" and "counterfeiting" are also used in a more narrow sense in the field of protection of intellectual property rights, the *ad hoc* committee decided to use these terms for the purposes of this Convention in the sense in which they are widely understood and used, i. e. corresponding to "false" and "manufacturing a false product and passing it off as genuine".

39. The term "counterfeit" is therefore defined in letter j as a "false representation as regards identity and/or source".

40. For the purposes of this Convention, a medical product shall not be considered as counterfeit for the sole reason that it is not authorised and/or legally marketed in a particular state. Likewise, medical products, which are otherwise legal, shall not be considered as counterfeits for the sole reason that they form part of a sub-standard batch or are suffering from quality defects or non-compliance with good manufacturing or good distribution practices, it being understood that such defects and non-compliance are not resulting from an intentional act or omission on the part of the manufacturer. The *ad hoc* committee decided to consider an adulterated medical product (i.e. a medical product – usually a powder or a liquid – made poorer in quality by intentionally adding or substituting another undeclared substance) simply as a counterfeit and hence not introduce "adulterated medical product" as a specific defined term, different from "counterfeit medical product". Finally, the term "source" should be understood in a wide sense, thus including also the supply and distribution history of the medical product, active substance, excipient, part, material or accessory in question.

41. The *ad hoc* committee suggested to focus the provisions on victims in the Convention on natural persons suffering adverse physical or psychological effects as a result of having used a counterfeit medical product, or a medical product which has been subject to a criminalised conduct as set out in Article 8. Hence, for the purposes of this Convention, physical or legal persons incurring purely financial losses resulting from the conducts criminalised under the Convention are not covered under the definition of "victim" in letter k. Since in some cases the consequences of having used counterfeit or otherwise unsafe medical products may only manifest themselves in the long term, it should be underlined that a person cannot be excluded from enjoying the rights of victims accorded under this Convention merely because he or she has not yet suffered any adverse effects, but is nevertheless likely to do so at a later stage.

CHAPTER II – SUBSTANTIVE CRIMINAL LAW

42. Chapter II contains the substantive criminal law provisions of the Convention. The offences described therein are considered to be so inherently dangerous to public health that Articles 5 to 8 will be applicable also in cases where only a potential threat to public health has been detected, and no actual physical or psychological damages to victims have materialised. In practice, this means that the competent authorities of a Party will not have to prove that a certain conduct on the part of the perpetrator has led to actual damages to public or individual health, as long as the conduct in question falls under one or more of the categories of offences set out in Articles 5 to 8.

43. The offences described in Articles 5 to 8 are only punishable when committed intentionally. The interpretation of the word "intentional" is left to domestic law.

Article 5 – Manufacturing of counterfeits

44. This article obliges Parties to establish as offences the intentional manufacturing of counterfeit medical products, their active substances, excipients, parts, materials and accessories. As regards medicinal products, and as appropriate medical devices, active substances and excipients, this shall also apply to the adulteration thereof. As mentioned under Article 4, "adulteration" has not been specifically defined in this Convention, but the concept of adulteration is to be understood as making a product poorer in quality by injuriously adding or substituting another undeclared substance. As some medical devices either are themselves liquids or powders that can be adulterated, or are integral to the administration of medicinal products that can be adulterated, paragraph 2 also applies to medical devices.

45. Paragraph 3 allows for the Parties to declare reservations with regard to the application of paragraphs 1 in so far as excipients, parts and materials are concerned, and paragraph 2 as regards excipients.

46. The *ad hoc* committee considered this possibility to declare reservations necessary in the light of the different concepts of member states of the Council of Europe with regard to the need for regulating the manufacture of excipients, parts and materials.

Article 6 – Supplying, offering to supply, and trafficking in counterfeits

47. Article 6, paragraph 1, obliges Parties to establish as offences the intentional supplying and trafficking in counterfeit medical products, active substances, excipients, parts, materials and accessories.

48. The terms "supplying" and "offering to supply" are not specifically defined, but understood to cover, in their widest sense, the acts of brokering, procuring, selling, donating or offering for free as well as promoting (including through advertising these products).

49. The act of "offering to supply" is a separate criminal conduct clearly distinct from an "attempt to supply", cf. Article 9. A person may thus "offer to supply" by brokering a deal on counterfeit medical products, or by advertising counterfeit medical products e.g. through a website or by sending so called spam-mails to potential customers. Often these persons are not themselves in possession of the counterfeit medical products in question, but are nevertheless an important link in the illegal distribution chain.

50. This conduct is obviously not the same as an attempt to supply, in which case the supplier is normally in possession of the counterfeit medical products, but for some reason is not able to accomplish the criminalised conduct by actually supplying the customer with counterfeit medical products.

51. As regards the term "trafficking", this term is widely used in international legal instruments in the field of criminal law, such as the United Nations Single Convention on Narcotic Drugs (1961), the United Nations Convention on Psychotropic Substances (1971), the United Nations Convention Against Transnational Organized Crime and its Protocols (2000), in particular the Firearms Protocol, and the Council of Europe Convention on Action against Trafficking in Human Beings (CETS No. 197) (2005) and is not intended to have a different content or scope for the purposes of this Convention. For the purpose of clarity, "keeping in stock, import and export" have been added to illustrate the concept of trafficking.

52. Paragraph 2 allows for the Parties to declare reservations with regard to the application of paragraphs 1 and 2 in so far as excipients, parts and materials are concerned. The *ad hoc* committee considered this possibility to declare reservations necessary in the light of the different concepts of member states of the Council of Europe with regard to the need for regulating the manufacture of excipients, parts and materials of medical devices.

Article 7 – Falsification of documents

53. This article obliges Parties to establish as offences the intentional falsification of documents. Falsification can either take place through the making of a false document from scratch, or through unlawfully amending or changing a document with regard to its content and/or its appearance. In both cases the aim is to deceive the person reading or looking at the document into believing that the medical product, active substance, excipient, part, material or accessory, which the document accompanies, is legitimate and not a counterfeit or the subject of a criminal conduct as described in Article 8, paragraph 1. The term "document" as defined under Article 4 is very broad and covers not only certificates and similar documents used in trade and commerce, but also the packaging and labelling of medical products as well as texts provided on internet sites which are specifically designed to accompany the product in question.

54. Paragraph 2 allows for the Parties to declare reservations with regard to the application of paragraph 1 in so far as documents related to excipients, parts and materials are concerned. The *ad hoc* committee considered this possibility to declare reservations necessary in the light of the different concepts of member states of the Council of Europe with regard to the need for regulating the manufacture of excipients, parts and materials of medical devices.

55. Finally, as regards Articles 5 to 7, it should be noted that the mere possession of counterfeit medical products, active substances, excipients, parts, materials and accessories as well as falsified documents is not specifically criminalised under the Convention. However, possession of such items with an intent to commit any of the criminal acts set out in Articles 5 and 6 could be considered as an attempt under Article 9.

56. The *ad hoc* committee, after some discussion, decided not to provide for the specific criminalisation of the possession of equipment that could be used to commit the criminal acts set out in Articles 5, 6 and 7 as an independent conduct, since it would in practice often prove difficult to establish a sufficiently strong link between the mere possession of equipment, that could theoretically be used for such criminal activity

and the actual activities of counterfeiting, supplying and trafficking in counterfeits, as well as falsification of documents. However, such equipment may of course play an important role as evidence, if that link could be established. Finally, possession of equipment could also be considered as an attempt (see under Article 9), if a criminal intention could be demonstrated.

Article 8 – Similar crimes involving threats to public health

57. The article covers certain offences that are considered by the *ad hoc* committee to be similar to counterfeiting of medical products, as they pose an equally serious threat to public health, but are nevertheless clearly distinct from that conduct by the fact that the medical products subject to Article 8, paragraph 1, are not counterfeited. In fact, these products are intentionally manufactured, kept in stock for supply, imported, exported, supplied, offered to supply, or placed on the market without authorisation (medicinal products) or without being in compliance with the conformity requirements (medical devices) as laid down in the domestic law of the Parties.

58. An example of the offences set out in paragraph 1, is the well attested existence of a sprawling black market for medicinal products for hormonal treatment produced without authorisation as means of doping for sports persons and others, who want to enhance their physical performance artificially. The abuse of such medicinal products can lead to bodily injury and death, and their uncontrolled circulation constitutes in itself a significant threat to public health. Another example is the otherwise legitimate manufacture of a medical product, which is then diverted through the black market for a wholly illegal purpose and gain by criminals with a view to unauthorised supplying or offering to supply thereof. It is a fact that legitimate anabolic steroids used for medical purposes are also sold into the black market for performance enhancement of sports persons and others.

59. In addition to the offences enumerated in paragraph 1 (see above), paragraph 2 obliges Parties to establish as an offence "the commercial use of original documents outside their intended use within the legal medical product supply chain, as required by the domestic law of the Party".

60. With this provision the *ad hoc* committee wanted to target the intentional abuse of original documents for criminal purposes related to the conducts set out in paragraph 1 of the article, e. g. to cover up the fact that a medicinal product has been manufactured without authorisation by pairing the unauthorised product with original documents intended for another – authorised – medicinal product. The commercial use of documents outside of the legal medical product supply chain without criminal intent, such as the legitimate selling and/or buying of waste paper (e.g. unused packaging) for recycling purposes is obviously not covered by the provision.

61. As in the case of Article 6 above, the terms "supplying" and "offering to supply" are not specifically defined, but understood to cover, in their widest sense, the acts of procuring, selling or offering for free as well as brokering and promoting (including through advertising these products).

62. Possession of medicinal products and/or documents with an intent to commit any of the criminal acts set out in Article 8 could be considered as an attempt under Article 9.

Article 9 – Aiding or abetting and attempt

63. The purpose of this article is to establish additional offences relating to aiding or abetting of the offences defined in the Convention and the attempted commission of some.

64. Paragraph 1 requires Parties to establish as offences aiding or abetting the commission of any of the offences established in accordance with the Convention. Liability arises for aiding or abetting where the person who commits a crime is aided by another person who also intends the crime to be committed.

65. Paragraph 2 provides for the criminalisation of an attempt to commit any of the offences established in accordance with the Convention.

66. The interpretation of the word "attempt" is left to domestic law. The principle of proportionality, as referred to in the Preamble of the Convention, should be taken into account by Parties when distinguishing between the concept of attempt and mere preparatory acts which do not warrant criminalisation.

67. Paragraph 3 allows for the Parties to declare reservations with regard to the application of paragraph 2 (attempt) to offences established in accordance with Articles 7 (falsification of documents) and 8 (similar crimes involving threats to public health), due to differences in the criminal law systems of member states of the Council of Europe.

68. As with all the offences established under the Convention, aiding or abetting and attempt must be intentional.

Article 10 – Jurisdiction

69. This article lays down various requirements whereby Parties must establish jurisdiction over the offences with which the Convention is concerned.

70. Paragraph 1, sub-paragraph a, is based on the territoriality principle. Each Party is required to punish the offences established under the Convention when they are committed on its territory.

71. Paragraph 1, sub-paragraphs b and c, are based on a variant of the territoriality principle. These sub-paragraphs require each Party to establish jurisdiction over offences committed on ships flying its flag or aircraft registered under its laws. This obligation is already in force in the law of many countries, ships and aircraft being frequently under the jurisdiction of the state in which they are registered. This type of jurisdiction is extremely useful when the ship or aircraft is not located in the country's territory at the time of commission of the crime, as a result of which paragraph 1 a. would not be available as a basis for asserting jurisdiction. In the case of a crime committed on a ship or aircraft outside the territory of the flag or registry Party, it might be that without this rule there would not be any country able to exercise jurisdiction. In addition, if a crime is committed on board a ship or aircraft which is merely passing through the waters or airspace of another state, there may be significant practical impediments to the latter state's exercising its jurisdiction and it is therefore useful for the Registry State to also have jurisdiction.

72. The first part of paragraph 1, sub-paragraph d, ("by one of its nationals") is based on the nationality principle. The nationality theory is most frequently applied by countries with a civil-law tradition. Under it, nationals of a country are obliged to comply with its law even when they are outside its territory. Under sub-paragraph d, if one of its nationals commits an offence abroad, a Party is obliged to be able to prosecute him/her. The *ad hoc* committee considered that this was a particularly important provision in the context of the fight against the promotion and sale of counterfeit medical products via the internet. Indeed, certain states under whose jurisdiction internet websites used to deal in counterfeit medical products fall either do not have the will or the necessary resources to successfully carry out investigations or lack the appropriate legal framework.

73. The second part of paragraph 1, sub-paragraph d, ("by a person habitually residing in its territory") applies to persons having their habitual residence in the territory of the Party. It provides that Parties shall establish jurisdiction to investigate acts committed abroad by persons habitually residing in their territories, hereby contributing to the efficient punishment of counterfeiting of medical products and similar crimes. However, the criterion of attachment to the state of the person concerned being less strong than the criterion of nationality, paragraph 4 allows Parties not to apply this type of jurisdiction or only to do it in specific cases or conditions.

74. Paragraph 2 is linked to the nationality of the victim and identifies particular interests of national victims to the general interests of the state. Hence, according to paragraph 2, if a national or a person having habitual residence is a victim of an offence abroad, the Party shall establish jurisdiction in order to start proceedings. However, paragraph 4 allows Parties not to apply this type of jurisdiction or only to do so in specific cases or conditions.

75. Paragraph 3 concerns the principle of *aut dedere aut judicare* (extradite or prosecute). Jurisdiction established on the basis of paragraph 3 is necessary to ensure that Parties that refuse to extradite a national have the legal ability to undertake investigations and proceedings domestically instead, if asked to do so by the Party that requested extradition under the terms of the relevant international instruments. Paragraph 3 does not prevent Parties from establishing jurisdiction only if the offence is punishable in the territory where it was committed, or if the offence is committed outside the territorial jurisdiction of any state.

76. Paragraph 4 allows for the Parties to declare reservations with regard to the application of paragraph 1, sub-paragraph d, and paragraph 2, of this article.

77. In certain cases of counterfeiting of medical products and similar crimes, it may happen that more than one Party has jurisdiction over some or all of the participants in an offence. For example, a counterfeit medical product may be manufactured in one country, then trafficked and sold in another. In order to avoid duplication of procedures and unnecessary inconvenience for witnesses or to otherwise facilitate the efficiency or fairness of proceedings, the affected Parties are, in accordance with paragraph 5, required to consult in order to determine the proper venue for prosecution. In some cases it will be most effective for them to choose a

single venue for prosecution; in others it may be best for one country to prosecute some alleged perpetrators, while one or more other countries prosecute others. Either method is permitted under this paragraph. Finally, the obligation to consult is not absolute; consultation is to take place "where appropriate". Thus, for example, if one of the Parties knows that consultation is not necessary (e.g. it has received confirmation that the other Party is not planning to take action), or if a Party is of the view that consultation may impair its investigation or proceeding, it may delay or decline consultation.

78. The bases of jurisdiction set out in paragraph 1 are not exclusive. Paragraph 6 of this article permits Parties to establish other types of criminal jurisdiction according to their domestic law. Thus, in matters of the counterfeiting of medical products and similar crimes, some states exercise criminal jurisdiction whatever the place of the offence or nationality of the perpetrator.

Article 11 – Corporate liability

79. Article 11 is consistent with the current legal trend towards recognising corporate liability. The *ad hoc* committee is of the opinion that due to the gravity of offences in the area of pharmaceutical crime, it is appropriate to include corporate liability in the Convention. The intention is to make commercial companies, associations and similar legal entities ("legal persons") liable for criminal actions performed on their behalf by anyone in a leading position in them. Article 11 also contemplates liability where someone in a leading position fails to supervise or check on an employee or agent of the entity, thus enabling them to commit any of the offences established in the Convention.

80. Under paragraph 1, four conditions need to be met for liability to attach. First, one of the offences described in the Convention must have been committed. Second, the offence must have been committed for the entity's benefit. Third, a person in a leading position must have committed the offence (including aiding and abetting). The term "person who has a leading position" refers to someone who is organisationally senior, such as a director. Fourth, the person in a leading position must have acted on the basis of one of his or her powers (whether to represent the entity or take decisions or perform supervision), demonstrating that that person acted under his or her authority to incur liability of the entity. In short, paragraph 1 requires Parties to be able to impose liability on legal entities solely for offences committed by such persons in leading positions.

81. In addition, paragraph 2 requires Parties to be able to impose liability on a legal entity ("legal person") where the crime is committed not by the leading person described in paragraph 1 but by another person acting on the entity's authority, i.e. one of its employees or agents acting within their powers. The conditions that must be fulfilled before liability can attach are: 1) the offence was committed by an employee or agent of the legal entity; 2) the offence was committed for the entity's benefit; and 3) commission of the offence was made possible by the leading person's failure to supervise the employee or agent. In this context failure to supervise should be interpreted to include not taking appropriate and reasonable steps to prevent employees or agents from engaging in criminal activities on the entity's behalf. Such appropriate and reasonable steps could be determined by various factors, such as the type of business, its size, and the rules and good practices in force.

82. Liability under this article may be criminal, civil or administrative. It is open to each Party to provide, according to its legal principles, for any or all of these forms of liability as long as the requirements of Article 12 paragraph 2 are met, namely that the sanction or measure be "effective, proportionate and dissuasive" and include monetary sanctions.

83. Paragraph 4 makes it clear that corporate liability does not exclude individual liability. In a particular case there may be liability at several levels simultaneously – for example, liability of one of the legal entity's organs, liability of the legal entity as a whole and individual liability in connection with one or other.

Article 12 – Sanctions and measures

84. This article is closely linked to Articles 5 to 8, which define the various offences that should be made punishable under domestic law. In accordance with the obligations imposed by those articles, Article 12 requires Parties to match their action to the seriousness of the offences and lay down sanctions which are "effective, proportionate and dissuasive". In the case of an individual committing an offence established under Articles 5 and 6, Parties must provide for prison sentences that can give rise to extradition. It should be noted that, under Article 2 of the European Convention on Extradition (CETS No. 24), extradition is to be granted in respect of offences punishable under the laws of the requesting and requested Parties by deprivation of liberty or under a detention order for a maximum period of at least one year or by a more severe penalty.

Offences under Article 8 (manufacture and supply without authorisation or without the product being in compliance with regulatory requirements) cover a wide range of behaviour from more formal violations of national administrative requirements to organised acts seriously affecting the health of individuals. While the seriousness is comparable to the behaviour criminalised by Articles 5, 6 and 7, minor violations of regulatory legal requirements (which may be of quite different nature and structure in Parties) may not always necessitate criminal sanctions in the technical sense. Fines of a non-criminal (i.e. regulatory or administrative) nature may therefore be considered sufficient in view of the overall context and structure of domestic law and penal sanctions.

85. Legal entities whose liability is to be established under Article 11 are also to be liable to sanctions that are "effective, proportionate and dissuasive", which may be criminal, administrative or civil in character. Paragraph 2 requires Parties to provide for the possibility of imposing monetary sanctions on legal persons.

86. In addition, paragraph 2 provides for other measures which may be taken in respect of legal persons, with particular examples given: exclusion from entitlement to public benefits or aid; temporary or permanent disqualification from the practice of commercial activities; placing under judicial supervision; or a judicial winding-up order. The list of measures is not mandatory or exhaustive and Parties are free to apply none of these measures or envisage other measures.

87. Paragraph 3 requires Parties to ensure that measures concerning seizure and confiscation of certain documents, goods and the proceeds derived from offences can be taken. This paragraph has to be read in the light of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (CETS No. 141) as well as the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No. 198), which are based on the idea that confiscating the proceeds of crime is an effective anti-crime weapon. As all of the offences related to the counterfeiting of medical products and similar crimes are undertaken for financial profit, measures depriving offenders of assets linked to or resulting from the offence are clearly needed in this field as well.

88. Paragraph 3 a, provides for the seizure and confiscation of medical products, active substances, excipients, parts, materials and accessories, as well as goods, documents and other instrumentalities used to commit the offences established in accordance with the Convention or to facilitate their commission. Moreover, proceeds of the offences, or property whose value corresponds to such proceeds may be seized or confiscated.

89. The Convention does not contain definitions of the terms "confiscation", "instrumentalities", "proceeds" and "property". However, Article 1 of the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime provides definitions for these terms which may be used for the purposes of this Convention. By "confiscation" is meant a penalty or measure, ordered by a court following proceedings in relation to a criminal offence or criminal offences, resulting in final deprivation of property. "Instrumentalities" covers the whole range of things which may be used, or intended for use, in any manner, wholly or in part, to commit the criminal offences. "Proceeds" means any economic advantage or financial saving from a criminal offence. It may consist of any "property" (see the interpretation of that term below). The wording of the paragraph takes into account that there may be differences of national law as regards the type of property which can be confiscated after an offence. It can be possible to confiscate items which are (direct) proceeds of the offence or other property of the offender which, though not directly acquired through the offence, is equivalent in value to its direct proceeds ("substitute assets"). "Property" must therefore be interpreted, in this context, as any property, corporeal or incorporeal, movable or immovable, and legal documents or instruments evidencing title to or interest in such property.

90. Paragraph 3 b, allows for the destruction of medical products, active substances, excipients, parts, materials and accessories that are the subject of an offence established under the Convention.

91. Paragraph 3 c, addresses in a general wording the various administrative measures that Parties may undertake in order to prevent future offences, including re-offending. The permanent or temporary ban on a perpetrator to carry on a commercial or professional activity in connection with which the offence was committed, or the withdrawal of professional licenses from perpetrators are examples of what such measures could include.

Article 13 – Aggravating circumstances

92. Article 13 requires Parties to ensure that certain circumstances (mentioned in letters a. to f.) may be taken into consideration as aggravating circumstances in the determination of the sanction for offences established in this Convention. These circumstances must not already form part of the constituent elements

of the offence. This principle applies to cases where the aggravating circumstances already form part of the constituent elements of the offence in the national law of the State Party.

93. By the use of the phrase "may be taken into consideration", the *ad hoc* committee highlights that the Convention places an obligation on Parties to ensure that these aggravating circumstances are available for judges to consider when sentencing offenders, although there is no obligation on judges to apply them. The reference to "in conformity with the relevant provisions of national law" is intended to reflect the fact that the various legal systems in Europe have different approaches to address those aggravating circumstances and permits Parties to retain their fundamental legal concepts.

94. The first aggravating circumstance (a), is where the offence caused the death of, or damage to the physical or mental health of, the victim. Given the inherent difficulties in linking the consumption of a medicinal product or the use of a medical device directly with the occurrence of a death, the *ad hoc* committee considered that in such cases, it should be up to the national courts of the State Parties to assess the causal link between the conducts criminalised under the Convention and any death or injury sustained as a result thereof.

95. The second aggravating circumstance (b) is where the offence was committed by persons abusing the confidence placed in them in their professional capacity. This category of persons is in the first line obviously health professionals, but the application of the aggravating circumstance is not restricted to health professionals.

96. The third aggravating circumstance (c) is where the offence was committed by persons abusing the confidence placed in them as manufacturers and suppliers.

97. The fourth aggravating circumstance (d) is where the offences of supplying and offering to supply are committed through the use of large scale distribution, including through information technology systems. The *ad hoc* committee found that the use of information systems, including the Internet, for supplying counterfeit medicinal products and the supply and offering to supply thereof without authorisation is one of the most worrying and serious aspects of counterfeiting of medical products and similar crimes today. Given the immense outreach provided by the Internet, counterfeit, and hence dangerous, medical products are now being spread all over the world at an alarming rate, At the same time, due to problems of jurisdiction, it has become increasingly difficult to get at the criminals behind various Internet sites, offering cheap (i.e. mostly counterfeit) medicines or other medical products.

98. The fifth aggravating circumstance (e) is where the offence involved a criminal organisation. The Convention does not define "criminal organisation". In applying this provision, however, Parties may take their line from other international instruments which define the concept. For example, Article 2(a) of the United Nations Convention against Transnational Organised Crime defines "organised criminal group" as "a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit". Recommendation Rec(2001)11 of the Committee of Ministers to member states concerning guiding principles on the fight against organised crime and the EU Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime give very similar definitions of "organised criminal group" and "criminal organisation".

99. The sixth aggravating circumstance (f) is where the perpetrator has previously been convicted of offences of the same nature as those established under the Convention. By including this, the *ad hoc* committee wanted to signal the need to make a concerted effort to combat recidivism in the low risk – high gain area of counterfeiting of medical products and similar crimes.

Article 14 – Previous convictions

100. Counterfeiting of medical products and similar crimes are more often than not perpetrated transnationally by criminal organisations or by individual persons, some of whom may have been tried and convicted in more than one country. At domestic level, many legal systems provide for a different, often harsher, penalty where someone has previous convictions. In general, only conviction by a national court counts as a previous conviction. Traditionally, previous convictions by foreign courts were not taken into account on the grounds that criminal law is a national matter and that there can be differences of national law, and because of a degree of suspicion of decisions by foreign courts.

101. Such arguments have less force today in that internationalisation of criminal-law standards – as a pendent to internationalisation of crime – is tending to harmonise different countries' law. In addition, in the

space of a few decades, countries have adopted instruments such as the ECHR whose implementation has helped build a solid foundation of common guarantees that inspire greater confidence in the justice systems of all the participating states.

102. The principle of international recidivism is established in a number of international legal instruments. Under Article 36 paragraph 2 (iii) of the New York Convention of 30 March 1961 on Narcotic Drugs, for example, foreign convictions have to be taken into account for the purpose of establishing recidivism, subject to each Party's constitutional provisions, legal system and national law. Under Article 1 of the Council Framework Decision of 6 December 2001 amending Framework Decision 2000/383/JHA on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro, European Union member states must recognise as establishing habitual criminality final decisions handed down in another Member state for counterfeiting of currency.

103. The fact remains that at international level there is no standard concept of recidivism and the law of some countries does not have the concept at all. The fact that foreign convictions are not always brought to the courts' notice for sentencing purposes is an additional practical difficulty. However, in the framework of the European Union, Article 3 of the Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the member states of the European Union in the course of new criminal proceedings has established in a general way – without limitation to specific offences – the obligation of taking into account a previous conviction handed down in another (EU Member) state.

104. Therefore Article 14 provides for the possibility to take into account final sentences passed by another Party in assessing a sentence. To comply with the provision Parties may provide in their domestic law that previous convictions by foreign courts are to result in a harsher penalty. They may also provide that, under their general powers to assess the individual's circumstances in setting the sentence, courts should take those convictions into account. This possibility should also include the principle that the offender should not be treated less favourably than he would have been treated if the previous conviction had been a national conviction.

105. This provision does not place any positive obligation on courts or prosecution services to take steps to find out whether persons being prosecuted have received final sentences from another Party's courts. It should nevertheless be noted that, under Article 13 of the European Convention on Mutual Assistance in Criminal Matters (CETS No. 30), a Party's judicial authorities may request from another Party extracts from and information relating to judicial records, if needed in a criminal matter. In the framework of the European Union, the issues related to the exchange of information contained in criminal records between member states are regulated in two legal acts, namely Council Decision 2005/876/JHA of 21 November 2005 on the exchange of information extracted from the criminal record and Council Framework Decision 2009/315/JHA of 26 February 2009 on the organisation and content of the exchange of information extracted from the criminal record between Member states.

CHAPTER III – INVESTIGATIONS, PROSECUTION AND PROCEDURAL LAW

Article 15 – Initiation and continuation of proceedings

106. Article 15 is designed to enable the public authorities to prosecute offences established in accordance with the Convention ex officio, without a victim having to file a complaint. The purpose of this provision is to facilitate prosecution, in particular by ensuring that criminal proceedings may continue regardless of pressure or threats by the perpetrators of offences towards victims.

Article 16 – Criminal investigations

107. The article provides for the specialised criminal investigation and combating of counterfeiting of medical products and similar crimes by persons, units or services of the competent national authorities of State Parties.

108. Paragraph 2 provides for State Parties to ensure the effective investigation and prosecution of offences established under the Convention in accordance with the fundamental principles of their national law. The notion of "principles of national law" should be understood as also encompassing basic human rights, including those provided under Article 6 of the ECHR.

109. "Effective investigation" is further described as including financial investigations, covert operations, controlled delivery and other special investigative techniques. These could encompass electronic and other forms of surveillance as well as infiltration operations. As indicated by the wording "where appropriate",

Parties are not legally obliged to apply any or all of these investigative techniques, but if a Party chooses to conduct investigations using these special techniques, the principle of proportionality, as referred to in the Preamble of the Convention, will also apply.

110. The *ad hoc* committee underlined that "controlled delivery" is one of the most important investigative tools available to authorities in the area of counterfeiting of medical products and similar crimes. The measure of "controlled delivery" is already foreseen by a number of international legal instruments in the field of criminal law, in particular the United Nations Convention Against Transnational Organised Crime and the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and the Second Additional Protocol to the European Convention on Mutual Legal Assistance in Criminal Matters (CETS No. 182).

CHAPTER IV – CO-OPERATION OF AUTHORITIES AND INFORMATION EXCHANGE

Article 17 – National measures of co-operation and information exchange

111. Networking at national level based on a multidisciplinary and multisectoral approach is a key element in the fight against counterfeiting of medical products and similar crimes. Hence, Article 17 provides for the co-operation and information exchange between the competent authorities in order to prevent and combat effectively the counterfeiting of medical products and similar crimes involving threats to public health. In this context, it should be noted that the involvement of health authorities in the prevention and combat of counterfeiting of medical products and similar crimes is a key tool for the efficient protection of public health. In addition, paragraph 2 provides for the facilitation of assistance to be provided by the relevant commercial and industrial sectors to the competent authorities as regards risk management, as these sectors have vast product expertise.

112. The *ad hoc* committee found that the wide range of authorities involved in the fight against counterfeiting of medical products and similar crimes, from law enforcement to health, usually requires a strengthening of the existing frameworks for co-operation. In particular, the Council of Europe model on a network of Single Points of Contact (SPOC) developed by the Committee of Experts on Minimising Public Health Risks posed by Counterfeit Medical Products and Related Crimes (CD-P-PH/CMED) of the Council of Europe served as inspiration for the drafters of the Convention. This Council of Europe SPOC model is already in operation within the EU medicines enforcement sector and has been tabled as a working contact model for the International Medical Product Anti-Counterfeiting Task Force (IMPACT) under the World Health Organization (WHO), by the Permanent Forum on International Pharmaceutical Crime and the International Criminal Police Organization - INTERPOL. However, Article 17 does not in any way oblige Parties to introduce new bodies tasked with co-ordination and information exchange in the field of counterfeiting of medical products and similar crimes.

CHAPTER V – MEASURES FOR PREVENTION

Article 18 – Preventive measures

113. Paragraphs 1 and 2 of this article provide for two key preventive measures in combating counterfeiting of medical products and similar crimes, namely the introduction, at national level, of quality and safety requirements of medical products on the one hand, and measures ensuring the safe distribution of such products on the other. The *ad hoc* committee considered that it should be left to the domestic law of each Party to define the appropriate quality and safety requirements as well as the measures ensuring safe distribution. As one example of the latter type of measures, which a Party may consider to adopt, the introduction of adequate track and trace systems on medical products could be mentioned. Such track and trace systems can have different features, but are essentially ensuring the traceability of a given medical product to its source.

114. As further preventive measures, paragraph 3 requires Parties to provide training of health care professionals, providers, police, customs and relevant regulatory authorities in order to better prevent an combat the counterfeiting of medical products and similar crimes; to promote awareness raising campaigns with the involvement of relevant non-governmental organisations and the media; to supervise all professional activities within the distribution chain of medical products, as well as to develop agreements with Internet Service Providers and Domain Registrars to facilitate actions against websites involved in the promotion and selling of counterfeit medical products.

115. The actions enumerated in paragraphs 1 - 3 are not to be considered as an exhaustive list.

CHAPTER VI – MEASURES FOR PROTECTION

116. The protection of, and assistance to, victims of crime has long been a priority in the work of the Council of Europe.

117. The horizontal legal instrument in this field is the European Convention on the Compensation of Victims of Violent Crime (CETS No. 116) from 1983, which has since been supplemented by a series of recommendations, notably Recommendation No. R (85) 11 on the position of the victim in the framework of criminal law and procedure, Recommendation No. R (87) 21 on the assistance to victims and the prevention of victimisation and Recommendation Rec(2006)8 on assistance to crime victims.

118. Furthermore, the situation of victims has also been addressed in a number of specialised conventions, including the Council of Europe Convention on the Prevention of Terrorism (CETS No. 196), the Council of Europe Convention on Action against Trafficking in Human Beings (CETS No. 197), both from 2005, and the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS No. 201) from 2007.

119. Taking into account the potential grave consequences for victims of counterfeiting of medical products and similar crimes, the *ad hoc* committee found that it was justified to provide specifically for the protection of such victims, and also to ensure that victims of the crimes established under this Convention are being kept informed about relevant developments in their cases by the competent national authorities and that – subject to the domestic law of the Parties – they are being given the possibility to be heard and to supply evidence.

120. It is recalled that, the term "victim" as defined in Article 4, letter k, of the Convention is limited to natural persons suffering adverse physical or psychological effects as a result of one or more of the conducts criminalised by the Convention. Legal persons are not intended to be covered by the provisions on victims in Chapter VI, nor are persons suffering only financial losses in connection with a conduct criminalised under the Convention.

Article 19 – Protection of victims

121. Article 19 provides for the protection of the rights and interests of victims, in particular by requiring Parties to ensure that victims are given access to information relevant for their case and necessary to protect their health; that victims are assisted in their physical, psychological and social recovery, and that victims are provided with the right to compensation under the internal law of the Parties. As regards the right to compensation, the *ad hoc* committee noted that in a number of member states of the Council of Europe, national victim funds are already in existence. However, this provision does not oblige Parties to establish such funds.

Article 20 – The standing of victims in criminal investigations and proceedings

122. This article contains a non-exhaustive list of procedures designed to victims of crimes established under this Convention during investigations and proceedings. These general measures of protection apply at all stages of the criminal proceedings, both during the investigations (whether they are carried out by a police service or a judicial authority) and during criminal trial proceedings.

123. First of all, the article sets out the right of victims to be informed of developments in the investigations and proceedings in which they are involved. In this respect, the provision provides that victims should be informed of their rights and of the services at their disposal and, unless they do not wish to receive such information, the follow-up given to their complaint, the charges, the general progress of the investigations or proceedings, and their role as well as the outcome of their cases. As indicated by the wording "the general progress of the investigation or proceedings", Parties are not always obliged to provide victims with detailed information about aspects of the investigation or the proceedings, as in some situations the proper handling of the case may be adversely affected by the disclosure of information.

124. The article goes on to list a number of procedural rules designed to implement the general principles set out in Article 20: the possibility, for victims, of being heard, of supplying evidence (subject to this being permitted under the domestic law of a Party), choosing the means of having their views, needs and concerns presented, directly or through an intermediary, and of being protected against any risk of retaliation.

125. Paragraph 2 also covers administrative proceedings, since procedures for compensating victims are of this type in some states. More generally, there are also situations in which protective measures, even in the context of criminal proceedings, may be delegated to the administrative authorities.

126. Paragraph 3 provides for access, free of charge, where warranted, to legal aid for victims of counterfeiting of medical products or similar crimes. Judicial and administrative procedures are often highly complex and victims therefore need the assistance of legal counsel to be able to assert their rights satisfactorily. This provision does not afford victims an automatic right to free legal aid. The conditions under which such aid is granted must be determined by each Party to the Convention when the victim is entitled to be a party to the criminal proceedings.

127. In addition to Article 20 paragraph 3, dealing with the status of victims as parties to criminal proceedings, the States Parties must take account of Article 6 of the ECHR. Even though Article 6, paragraph 3.c. of the ECHR provides for the free assistance of an officially assigned defence counsel only in the case of persons charged with criminal offences, the case law of the European Court of Human Rights (Airey v. Ireland judgement, 9 October 1979) also, in certain circumstances, recognises the right to free assistance from an officially assigned defence counsel in civil proceedings, under Article 6, paragraph 1 ECHR, which is interpreted as enshrining the right of access to a court for the purposes of obtaining a decision concerning civil rights and obligations (Golder v. United Kingdom judgment, 21 February 1975). The Court took the view that effective access to a court might necessitate the free assistance of a lawyer. For instance, the Court considered that it was necessary to ascertain whether it would be effective for the person in question to appear in court without the assistance of counsel, i.e. whether he could argue his case adequately and satisfactorily. To this end, the Court took account of the complexity of the proceedings and the passions involved – which might be incompatible with the degree of objectivity needed in order to plead in court – so as to determine whether the person in question was in a position to argue his own case effectively and held that, if not, he should be able to obtain free assistance from an officially assigned defence counsel. Thus, even in the absence of legislation affording access to an officially assigned defence counsel in civil cases, it is up to the court to assess whether, in the interests of justice, a destitute party unable to afford a lawyer's fees must be provided with legal assistance.

128. Paragraph 4 is based on Article 11, paragraphs 2 and 3, of the Framework Decision of 15 March 2001 of the Council of the European Union on the standing of victims in criminal proceedings. It is designed to make it easier for victims to file a complaint by enabling them to lodge it with the competent authorities of the state of residence. A similar provision is also found in Article 38, paragraph 2 of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS No. 201) of 25 October 2007.

129. Paragraph 5 provides for the possibility for various organisations to support victims. The reference to conditions provided for by internal law highlights the fact that it is up to the Parties to make provision for assistance or support, but that they are free to do so in accordance with the rules laid down in their national systems, for example by requiring certification or approval of the organisations, foundations, associations and other bodies concerned.

CHAPTER VII – INTERNATIONAL CO-OPERATION

Article 21 – International co-operation in criminal matters

130. The article sets out the general principles that should govern international co-operation in criminal matters.

131. Paragraph 1 obliges Parties to co-operate, on the basis of relevant international and national law, to the widest extent possible for the purpose of investigations or proceedings of crimes established under the Convention, including for the purpose of carrying out seizure and confiscation measures. In this context, particular reference should be made to the European Convention on Extradition (CETS No. 24), the European Convention on Mutual Assistance in Criminal Matters (CETS No. 30), the European Convention on the Transfer of Sentenced Persons (CETS No. 112), the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (CETS No. 141) and the Council of Europe Convention Laundering, Search, Seizure and Confiscation of the proceeds from Crime and on the Financing of Terrorism (CETS No.198).

132. In the same way as for paragraph 1, paragraph 2 obliges Parties to co-operate, to the widest extent possible and on the basis of relevant international, regional and bilateral legal instruments, on extradition and mutual legal assistance in criminal matters concerning the offences established by the Convention.

133. Paragraph 3 authorises a Party that makes mutual assistance in criminal matters or extradition conditional on the existence of a treaty to consider the Convention as the legal basis for judicial co-operation with a Party with which it has not concluded such a treaty. This provision, which serves no purpose between

Council of Europe member states because of the existence of the European Conventions on Extradition and Mutual Legal Assistance in Criminal Matters, dating from 1957 and 1959 respectively, and the Protocols to them, is of interest because of the possibility provided to third states to sign the Convention (cf. Article 28). The requested Party will act on such a request in accordance with the relevant provisions of its domestic law which may provide for conditions or grounds for refusal. Any action taken shall be in full compliance with its obligations under international law, including obligations under international human rights instruments.

Article 22 – International co-operation on prevention and other administrative measures

134. As indicated by the title, Article 22 covers only administrative measures and is not concerned with international co-operation in criminal matters (see Article 21. above). This provision obliges Parties to co operate on protecting and providing assistance to victims, cf. paragraph 1 of the article.

135. According to paragraph 2, the Parties shall designate a national contact point for receiving requests for information and/or co-operation outside the scope of international co-operation in criminal matters. The national contact point shall be established without prejudice to the internal reporting systems of the Parties. The *ad hoc* committee considered that it should be left to a Party to decide on how it would organise its national point of contact and the mechanism of information transmission with the relevant internal sectors in the fight against counterfeiting of medical products and similar crimes.

136. Paragraph 3 of the article obliges Parties to endeavour to include, where appropriate, preventing and combating the counterfeiting of medical products and similar crimes involving threats to public health in development assistance programmes benefiting third states. Many Council of Europe member states carry out such programmes, which cover such varied areas as the restoration or consolidation of the rule of law, the development of judicial institutions, combating crime, and technical assistance with the implementation of international conventions. Some of these programmes may be implemented in countries faced with substantial problems caused by the activities criminalised under the Convention. In this context, it seems appropriate that such programmes should take account of and duly incorporate issues relating to the prevention and punishment of this form of crime.

CHAPTER VIII – FOLLOW-UP MECHANISM

137. Chapter VIII of the Convention contains provisions which aim at ensuring the effective implementation of the Convention by the Parties. The monitoring system foreseen by the Convention is based essentially on a body, the Committee of the Parties, composed of representatives of the Parties to the Convention.

Article 23 – Committee of the Parties

138. Article 23 provides for the setting-up of a committee under the Convention, the Committee of the Parties, which is a body with the composition described above, responsible for a number of Convention-based follow-up tasks.

139. The Committee of the Parties will be convened the first time by the Secretary General of the Council of Europe, within a year of the entry into force of the Convention by virtue of the 10th ratification. It will then meet at the request of a third of the Parties or of the Secretary General of the Council of Europe.

140. It should be stressed that the *ad hoc* committee intended to allow the Convention to come into force quickly while deferring the introduction of the follow-up mechanism until such time as the Convention was ratified by a sufficient number of states for it to operate under satisfactory conditions, with a sufficient number of representative Parties to ensure its credibility.

141. The setting-up of this body will ensure equal participation of all the Parties in the decision-making process and in the Convention monitoring procedure and will also strengthen co-operation between the Parties to ensure proper and effective implementation of the Convention.

142. The Committee of the Parties must adopt rules of procedure establishing the way in which the monitoring system of the Convention operates, on the understanding that its rules of procedure must be drafted in such a way that the implementation of the Convention by the Parties, including the European Union, is effectively monitored.

143. The Committee of Ministers shall decide on the way in which those Parties which are not member states of the Council of Europe are to contribute to the financing of these activities. The Committee of Ministers

shall seek the opinion of those Parties which are not member states of the Council of Europe before deciding on the budgetary appropriations to be allocated to the Committee of the Parties.

Article 24 – Other representatives

144. Article 24 contains an important message concerning the participation of bodies other than the Parties themselves in the Convention monitoring mechanism in order to ensure a genuinely multisectoral and multidisciplinary approach. It refers, firstly, to the Parliamentary Assembly and the European Committee on Crime Problems (CDPC), and, secondly, more unspecified, to other relevant intergovernmental or scientific committees of the Council of Europe which, by virtue of their responsibilities would definitely make a worthwhile contribution by taking part in the monitoring of the work on the Convention. These committees are the European Committee on Pharmaceuticals and Pharmaceutical Care (CD-P-PH), and the Commission of the European Pharmacopoeia and its Advisory Group of the General Network of Official Medicines Control Laboratories (GeON). In this context, it should be noted that the CD-P-PH is specifically mandated to co-operate with the CDPC to minimise public health risks posed by counterfeit medicines and other forms of pharmaceutical crimes.

145. The importance afforded to involving representatives of relevant international bodies and of relevant official bodies of the Parties, as well as representatives of civil society in the work of the Committee of the Parties is undoubtedly one of the main strengths of the monitoring system provided for by the negotiators. The wording "relevant international bodies" in paragraph 3, is to be understood as inter-governmental bodies active in the field covered by the Convention. The wording "relevant official bodies" in paragraph 4, refers to officially recognised national or international bodies of experts working in an advisory capacity for Parties to the Convention in the field covered by the Convention, in particular as regards medicinal products and medical devices.

146. The possibility of admitting representatives of inter-governmental, governmental and non-governmental organisations and other bodies actively involved in preventing and combating counterfeiting of medical products and similar crimes as observers was considered to be an important issue, if the monitoring of the application of the Convention was to be truly effective.

147. Paragraph 6 prescribes that when appointing representatives as observers under paragraphs 2 to 5 (Council of Europe bodies, international bodies, official bodies of the Parties and representatives of non-governmental organisations), a balanced representation of the different sectors and disciplines involved (the law enforcement authorities, the judiciary, the pharmaceuticals and medical devices authorities, as well as civil society interest groups) shall be ensured.

Article 25 – Functions of the Committee of the Parties

148. When drafting this provision, the *ad hoc* committee wanted to base itself on the similar provision of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS. No. 201), creating as simple and flexible a mechanism as possible, centred on a Committee of the Parties with a broader role in the Council of Europe's legal work on combating the counterfeiting of medical products and similar crimes. The Committee of the Parties is thus destined to serve as a centre for the collection, analysis and sharing of information, experiences and good practice between Parties to improve their policies in this field using a multisectoral and multidisciplinary approach.

149. With respect to the Convention, the Committee of the Parties has the traditional follow-up competencies and:

- plays a role in the effective implementation of the Convention, by making proposals to facilitate or improve the effective use and implementation of the Convention, including the identification of any problems and the effects of any declarations made under the Convention;
- plays a general advisory role in respect of the Convention by expressing an opinion on any question concerning the application of the Convention, including by making specific recommendations to Parties in this respect;
- serves as a clearing house and facilitates the exchange of information on significant legal, policy or technological developments in relation to the application of the provisions of the Convention. In this context, the Committee of the Parties may avail itself of the expertise of other relevant Council of Europe committees and bodies. In addition to the committees mentioned above under the commentary to Article 24, paragraph 1, the Committee of Experts on Minimizing Public Health Risks

posed by Counterfeit Medical Products and Related Crimes (CD-P-PH/CMED), which is, *inter alia*, tasked with the development and promotion of multisectoral risk prevention and management strategies for public health protection from counterfeit medical products and related crimes, and the General European Network of Official Medicines Control Laboratories (OMCL) could be mentioned as examples of such expert committees and bodies of the Council of Europe.

150. Paragraph 4 states that the European Committee on Crime Problems (CDPC) should be kept periodically informed of the activities mentioned in paragraphs 1, 2 and 3 of Article 25.

CHAPTER IX – RELATIONSHIP WITH OTHER INTERNATIONAL INSTRUMENTS

Article 26 – Relationship with other international instruments

151. Article 26 deals with the relationship between the Convention and other international instruments.

152. In accordance with the 1969 Vienna Convention on the Law of Treaties, Article 26 seeks to ensure that the Convention harmoniously coexists with other treaties – whether multilateral or bilateral – or instruments dealing with matters which the Convention also covers. Article 26, paragraph 1 aims at ensuring that this Convention does not prejudice the rights and obligations derived from other international instruments to which the Parties to this Convention are also Parties or will become Parties, and which contain provisions on matters governed by this Convention.

153. Article 26, paragraph 2 states positively that Parties may conclude bilateral or multilateral agreements – or any other legal instrument – relating to the matters which the Convention governs. However, the wording makes clear that Parties are not allowed to conclude any agreement which derogates from this Convention.

154. Following the signature of a Memorandum of Understanding between the Council of Europe and the European Union on 23 May 2007, the CDPC took note that "legal co-operation should be further developed between the Council of Europe and the European Union with a view to ensuring coherence between Community and European Union law and the standards of Council of Europe conventions. This does not prevent Community and European Union law from adopting more far-reaching rules."

CHAPTER X – AMENDMENTS TO THE CONVENTION

Article 27 – Amendments

155. Amendments to the provisions of the Convention may be proposed by the Parties. They must be communicated to all Council of Europe member states, to any signatory, to any Party, to the non-member states having participated in the elaboration of the Convention, to states enjoying observer status with the Council of Europe, to the European Union and to any state invited to sign the Convention.

156. The CDPC and other relevant Council of Europe intergovernmental or scientific committees will prepare opinions on the proposed amendment, which will be submitted to the Committee of the Parties. After considering the proposed amendment and the opinion submitted by the Committee of the Parties, the Committee of Ministers can adopt the amendment. Before deciding on the amendment, the Committee of Ministers shall consult and obtain the unanimous consent of all Parties. Such a requirement recognises that all Parties to the Convention should be able to participate in the decision-making process concerning amendments and are on an equal footing.

CHAPTER XI – FINAL CLAUSES

157. With some exceptions, Articles 28 to 33 are essentially based on the Model Final Clauses for Conventions and Agreements concluded within the Council of Europe, which the Committee of Ministers approved at the Deputies' 315th meeting, in February 1980.

Article 28 – Signature and entry into force

158. The Convention is open for signature by Council of Europe member states, the European Union, and states not members of the Council of Europe which took part in drawing it up (Israel and Japan) and states enjoying observer status with the Council of Europe. In addition, with a view to encouraging the participation of the largest possible non-member States to the Convention, this article provides them with the possibility, subject to an invitation by the Committee of Ministers, to sign and ratify the Convention even before its entry into force. By doing so, this Convention departs from previous Council of Europe treaty practice

according to which non-member States which have not participated in the elaboration of a Council of Europe Convention usually accede to it after its entry into force.

159. Article 28 paragraph 3 sets the number of ratifications, acceptances or approvals required for the Convention's entry into force at five. This number is not very high in order not to delay unnecessarily the entry into force of the Convention but reflects nevertheless the belief that a minimum group of Parties is needed to successfully set about addressing the major challenge of combating counterfeiting of medical products and similar crimes. Of the five Parties which will make the Convention enter into force, at least three must be Council of Europe members.

Article 29 – Territorial application

160. This provision is only concerned with territories having a special status, such as overseas territories, the Faroe Islands or Greenland in the case of Denmark, or Gibraltar, the Isle of Man, Jersey or Guernsey in the case of the United Kingdom.

161. It is well understood, however, that it would be contrary to the object and purpose of this Convention for any contracting Party to exclude parts of its main territory from the Convention's scope and that it was unnecessary to make this point explicit in the Convention.

Article 30 – Reservations

162. Article 30 specifies that the Parties may make use of the reservations expressly authorised by the Convention. No other reservation may be made. The negotiators wish to underline the fact that reservations can be withdrawn at any moment.

Article 31 – Friendly settlement

163. Article 31 provides that the Committee of the Parties, in close co-operation with the European Committee on Crime Problems (CDPC) and other relevant Council of Europe intergovernmental or scientific committees, shall follow the application of the Convention and facilitate the solution of all disputes related thereto between the Parties. Coordination with the CDPC will normally be ensured through the participation of a representative of the CDPC in the Committee of the Parties.

Article 32 – Denunciation

164. Article 32 allows any Party to denounce the Convention.

Article 33 – Notification

165. Article 33 lists the notifications that, as the depositary of the Convention, the Secretary General of the Council of Europe is required to make, and designates the recipients of these notifications (states and the European Union).

Council of Europe Convention against Trafficking in Human Organs – CETS No. 216

Santiago de Compostela, 25.III.2015

Preamble

The member States of the Council of Europe and the other signatories to this Convention;

Bearing in mind the Universal Declaration of Human Rights, proclaimed by the United Nations General Assembly on 10 December 1948, and the Convention for the Protection of Human Rights and Fundamental Freedoms (1950, ETS No. 5);

Bearing in mind the Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (1997, ETS No. 164) and the Additional Protocol to the Convention on Human Rights and Biomedicine concerning Transplantation of Organs and Tissues of Human Origin (2002, ETS No. 186);

Bearing in mind the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention Against Transnational Organized Crime (2000) and the Council of Europe Convention on Action against Trafficking in Human Beings (2005, CETS No. 197);

Considering that the aim of the Council of Europe is to achieve a greater unity between its members;

Considering that the trafficking in human organs violates human dignity and the right to life and constitutes a serious threat to public health;

Determined to contribute in a significant manner to the eradication of the trafficking in human organs through the introduction of new offences supplementing the existing international legal instruments in the field of trafficking in human beings for the purpose of the removal of organs;

Considering that the purpose of this Convention is to prevent and combat trafficking in human organs, and that the implementation of the provisions of the Convention concerning substantive criminal law should be carried out taking into account its purpose and the principle of proportionality;

Recognising that, to efficiently combat the global threat posed by the trafficking in human organs, close international co-operation between Council of Europe member States and non-member States alike should be encouraged,

Have agreed as follows:

CHAPITRE I – PURPOSES, SCOPE AND USE OF TERMS

Article 1 – Purposes

1. The purposes of this Convention are:

   a. to prevent and combat the trafficking in human organs by providing for the criminalisation of certain acts;

   b. to protect the rights of victims of the offences established in accordance with this Convention;

   c. to facilitate co-operation at national and international levels on action against the trafficking in human organs.

2. In order to ensure effective implementation of its provisions by the Parties, this Convention sets up a specific follow-up mechanism.

Article 2 – Scope and use of terms

1. This Convention applies to the trafficking in human organs for purposes of transplantation or other purposes, and to other forms of illicit removal and of illicit implantation.

2. For the purposes of this Convention, the term:

   – "trafficking in human organs" shall mean any illicit activity in respect of human organs as prescribed in Article 4, paragraph 1 and Articles 5, 7, 8 and 9 of this Convention;

   – "human organ" shall mean a differentiated part of the human body, formed by different tissues, that maintains its structure, vascularisation and capacity to develop physiological functions with a significant level of autonomy. A part of an organ is also considered to be an organ if its function is to be used for the same purpose as the entire organ in the human body, maintaining the requirements of structure and vascularisation.

Article 3 – Principle of non-discrimination

The implementation of the provisions of this Convention by the Parties, in particular the enjoyment of measures to protect the rights of victims, shall be secured without discrimination on any ground such as sex, race, colour, language, age, religion, political or any other opinion, national or social origin, association with a national minority, property, birth, sexual orientation, state of health, disability or other status.

CHAPITRE II – SUBSTANTIVE CRIMINAL LAW

Article 4 – Illicit removal of human organs

1. Each Party shall take the necessary legislative and other measures to establish as a criminal offence under its domestic law, when committed intentionally, the removal of human organs from living or deceased donors:

   a. where the removal is performed without the free, informed and specific consent of the living or deceased donor, or, in the case of the deceased donor, without the removal being authorised under its domestic law;

   b. where, in exchange for the removal of organs, the living donor, or a third party, has been offered or has received a financial gain or comparable advantage;

   c. where in exchange for the removal of organs from a deceased donor, a third party has been offered or has received a financial gain or comparable advantage.

2. Any State or the European Union may, at the time of signature or when depositing its instrument of ratification, acceptance or approval, by a declaration addressed to the Secretary General of the Council of Europe, declare that it reserves the right not to apply paragraph 1.a of this article to the removal of human organs from living donors, in exceptional cases and in accordance with appropriate safeguards or consent provisions under its domestic law. Any reservation made under this paragraph shall contain a brief statement of the relevant domestic law.

3. The expression "financial gain or comparable advantage" shall, for the purpose of paragraph 1.*b* and *c*, not include compensation for loss of earnings and any other justifiable expenses caused by the removal or by

the related medical examinations, or compensation in case of damage which is not inherent to the removal of organs.

4. Each Party shall consider taking the necessary legislative or other measures to establish as a criminal offence under its domestic law the removal of human organs from living or deceased donors where the removal is performed outside of the framework of its domestic transplantation system, or where the removal is performed in breach of essential principles of national transplantation laws or rules. If a Party establishes criminal offences in accordance with this provision, it shall endeavour to apply also Articles 9 to 22 to such offences.

Article 5 – Use of illicitly removed organs for purposes of implantation or other purposes than implantation

Each Party shall take the necessary legislative and other measures to establish as a criminal offence under its domestic law, when committed intentionally, the use of illicitly removed organs, as described in Article 4, paragraph 1, for purposes of implantation or other purposes than implantation.

Article 6 – Implantation of organs outside of the domestic transplantation system or in breach of essential principles of national transplantation law

Each Party shall consider taking the necessary legislative or other measures to establish as a criminal offence under its domestic law, when committed intentionally, the implantation of human organs from living or deceased donors where the implantation is performed outside of the framework of its domestic transplantation system, or where the implantation is performed in breach of essential principles of national transplantation laws or rules. If a Party establishes criminal offences in accordance with this provision, it shall endeavour to apply also Articles 9 to 22 to such offences.

Article 7 – Illicit solicitation, recruitment, offering and requesting of undue advantages

1. Each Party shall take the necessary legislative and other measures to establish as a criminal offence under its domestic law, when committed intentionally, the solicitation and recruitment of an organ donor or a recipient, where carried out for financial gain or comparable advantage for the person soliciting or recruiting, or for a third party.

2. Each Party shall take the necessary legislative and other measures to establish as a criminal offence, when committed intentionally, the promising, offering or giving by any person, directly or indirectly, of any undue advantage to healthcare professionals, its public officials or persons who direct or work for private sector entities, in any capacity, with a view to having a removal or implantation of a human organ performed or facilitated, where such removal or implantation takes place under the circumstances described in Article 4, paragraph 1, or Article 5 and where appropriate Article 4, paragraph 4 or Article 6.

3. Each Party shall take the necessary legislative and other measures to establish as a criminal offence, when committed intentionally, the request or receipt by healthcare professionals, its public officials or persons who direct or work for private sector entities, in any capacity, of any undue advantage with a view to performing or facilitating the performance of a removal or implantation of a human organ, where such removal or implantation takes place under the circumstances described in Article 4, paragraph 1 or Article 5 and where appropriate Article 4, paragraph 4 or Article 6.

Article 8 – Preparation, preservation, storage, transportation, transfer, receipt, import and export of illicitly removed human organs

1. Each Party shall take the necessary legislative and other measures to establish as a criminal offence under its domestic law, when committed intentionally:

   a. the preparation, preservation, and storage of illicitly removed human organs as described in Article 4, paragraph 1, and where appropriate Article 4, paragraph 4;

   b. the transportation, transfer, receipt, import and export of illicitly removed human organs as described in Article 4, paragraph 1, and where appropriate Article 4, paragraph 4.

Article 9 – Aiding or abetting and attempt

1. Each Party shall take the necessary legislative and other measures to establish as criminal offences, when committed intentionally, aiding or abetting the commission of any of the criminal offences established in accordance with this Convention.

2. Each Party shall take the necessary legislative and other measures to establish as a criminal offence the intentional attempt to commit any of the criminal offences established in accordance with this Convention.

3. Any State or the European Union may, at the time of signature or when depositing its instrument of ratification, acceptance or approval, by a declaration addressed to the Secretary General of the Council of Europe, declare that it reserves the right not to apply, or to apply only in specific cases or conditions, paragraph 2 to offences established in accordance with Article 7 and Article 8.

Article 10 – Jurisdiction

1. Each Party shall take such legislative or other measures as may be necessary to establish jurisdiction over any offence established in accordance with this Convention, when the offence is committed:

   a. in its territory; or

   b. on board a ship flying the flag of that Party; or

   c. on board an aircraft registered under the laws of that Party; or

   d. by one of its nationals; or

   e. by a person who has his or her habitual residence in its territory.

2. Each Party shall endeavour to take the necessary legislative or other measures to establish jurisdiction over any offence established in accordance with this Convention where the offence is committed against one of its nationals or a person who has his or her habitual residence in its territory.

3. Any State or the European Union may, at the time of signature or when depositing its instrument of ratification, acceptance or approval, by a declaration addressed to the Secretary General of the Council of Europe, declare that it reserves the right not to apply or to apply only in specific cases or conditions the jurisdiction rules laid down in paragraph 1.*d* and *e* of this article.

4. For the prosecution of the offences established in accordance with this Convention, each Party shall take the necessary legislative or other measures to ensure that its jurisdiction as regards paragraphs 1.*d* and *e* of this article is not subordinated to the condition that the prosecution can only be initiated following a report from the victim or the laying of information by the State of the place where the offence was committed.

5. Any State or the European Union may, at the time of signature or when depositing its instrument of ratification, acceptance or approval, by a declaration addressed to the Secretary General of the Council of Europe, declare that it reserves the right not to apply or to apply only in specific cases paragraph 4 of this article.

6. Each Party shall take the necessary legislative or other measures to establish jurisdiction over the offences established in accordance with this Convention, in cases where an alleged offender is present on its territory and it does not extradite him or her to another State, solely on the basis of his or her nationality.

7. When more than one Party claims jurisdiction over an alleged offence established in accordance with this Convention, the Parties involved shall, where appropriate, consult with a view to determining the most appropriate jurisdiction for prosecution.

8. Without prejudice to the general rules of international law, this Convention does not exclude any criminal jurisdiction exercised by a Party in accordance with its internal law.

Article 11 – Corporate liability

1. Each Party shall take the necessary legislative and other measures to ensure that legal persons can be held liable for offences established in accordance with this Convention, when committed for their benefit by any natural person, acting either individually or as part of an organ of the legal person, who has a leading position within it based on:

   a. a power of representation of the legal person;

b. an authority to take decisions on behalf of the legal person;

c. an authority to exercise control within the legal person.

2. Apart from the cases provided for in paragraph 1 of this article, each Party shall take the necessary legislative and other measures to ensure that a legal person can be held liable where the lack of supervision or control by a natural person referred to in paragraph 1 has made possible the commission of an offence established in accordance with this Convention for the benefit of that legal person by a natural person acting under its authority.

3. Subject to the legal principles of the Party, the liability of a legal person may be criminal, civil or administrative.

4. Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offence.

Article 12 – Sanctions and measures

1. Each Party shall take the necessary legislative and other measures to ensure that the offences established in accordance with this Convention are punishable by effective, proportionate and dissuasive sanctions. These sanctions shall include, for offences established in accordance with Article 4, paragraph 1 and, where appropriate, Article 5 and Articles 7 to 9, when committed by natural persons, penalties involving deprivation of liberty that may give rise to extradition.

2. Each Party shall take the necessary legislative and other measures to ensure that legal persons held liable in accordance with Article 11 are subject to effective, proportionate and dissuasive sanctions, including criminal or non-criminal monetary sanctions, and may include other measures, such as:

a. temporary or permanent disqualification from exercising commercial activity;

b. placing under judicial supervision;

c. a judicial winding-up order.

3. Each Party shall take the necessary legislative and other measures to:

a. permit seizure and confiscation of proceeds of the criminal offences established in accordance with this Convention, or property whose value corresponds to such proceeds;

b. enable the temporary or permanent closure of any establishment used to carry out any of the criminal offences established in accordance with this Convention, without prejudice to the rights of bona fide third parties, or deny the perpetrator, temporarily or permanently, in conformity with the relevant provisions of domestic law, the exercise of a professional activity relevant to the commission of any of the offences established in accordance with this Convention.

Article 13 – Aggravating circumstances

Each Party shall take the necessary legislative and other measures to ensure that the following circumstances, in so far as they do not already form part of the constituent elements of the offence, may, in conformity with the relevant provisions of domestic law, be taken into consideration as aggravating circumstances in determining the sanctions in relation to the offences established in accordance with this Convention:

a. the offence caused the death of, or serious damage to the physical or mental health of, the victim;

b. the offence was committed by a person abusing his or her position;

c. the offence was committed in the framework of a criminal organisation;

d. the perpetrator has previously been convicted of offences established in accordance with this Convention;

e. the offence was committed against a child or any other particularly vulnerable person.

Article 14 – Previous convictions

Each Party shall take the necessary legislative and other measures to provide for the possibility to take into account final sentences passed by another Party in relation to the offences established in accordance with this Convention when determining the sanctions.

CHAPITRE III – CRIMINAL PROCEDURAL LAW

Article 15 – Initiation and continuation of proceedings

Each Party shall take the necessary legislative and other measures to ensure that investigations or prosecution of offences established in accordance with this Convention should not be subordinate to a complaint and that the proceedings may continue even if the complaint is withdrawn.

Article 16 – Criminal investigations

Each Party shall take the necessary legislative and other measures, in conformity with the principles of its domestic law, to ensure effective criminal investigation and prosecution of offences established in accordance with this Convention.

Article 17 – International co-operation

1. The Parties shall co-operate with each other, in accordance with the provisions of this Convention and in pursuance of relevant applicable international and regional instruments and arrangements agreed on the basis of uniform or reciprocal legislation and their domestic law, to the widest extent possible, for the purpose of investigations or proceedings concerning the offences established in accordance with this Convention, including seizure and confiscation.

2. The Parties shall co-operate to the widest extent possible in pursuance of the relevant applicable international, regional and bilateral treaties on extradition and mutual legal assistance in criminal matters concerning the offences established in accordance with this Convention.

3. If a Party that makes extradition or mutual legal assistance in criminal matters conditional on the existence of a treaty receives a request for extradition or legal assistance in criminal matters from a Party with which it has no such a treaty, it may, acting in full compliance with its obligations under international law and subject to the conditions provided for by the domestic law of the requested Party, consider this Convention as the legal basis for extradition or mutual legal assistance in criminal matters in respect of the offences established in accordance with this Convention.

CHAPITRE IV – PROTECTION MEASURES

Article 18 – Protection of victims

Each Party shall take the necessary legislative and other measures to protect the rights and interests of victims of offences established in accordance with this Convention, in particular by:

a. ensuring that victims have access to information relevant to their case and which is necessary for the protection of their health and other rights involved;

b. assisting victims in their physical, psychological and social recovery;

c. providing, in its domestic law, for the right of victims to compensation from the perpetrators.

Article 19 – Standing of victims in criminal proceedings

1. Each Party shall take the necessary legislative and other measures to protect the rights and interests of victims at all stages of criminal investigations and proceedings, in particular by:

a. informing them of their rights and the services at their disposal and, upon request, the follow-up given to their complaint, the charges retained, the state of the criminal proceedings, unless in exceptional cases the proper handling of the case may be adversely affected by such notification, and their role therein as well as the outcome of their cases;

b. enabling them, in a manner consistent with the procedural rules of domestic law, to be heard, to supply evidence and have their views, needs and concerns presented, directly or through an intermediary, and considered;

c. providing them with appropriate support services so that their rights and interests are duly presented and taken into account;

d. providing effective measures for their safety, as well as that of their families, from intimidation and retaliation.

2. Each Party shall ensure that victims have access, as from their first contact with the competent authorities, to information on relevant judicial and administrative proceedings.

3. Each Party shall ensure that victims have access to legal aid, in accordance with domestic law and provided free of charge where warranted, when it is possible for them to have the status of parties to criminal proceedings.

4. Each Party shall take the necessary legislative and other measures to ensure that victims of an offence established in accordance with this Convention committed in the territory of a Party other than the one where they reside can make a complaint before the competent authorities of their State of residence.

5. Each Party shall provide, by means of legislative or other measures, in accordance with the conditions provided for by its domestic law, the possibility for groups, foundations, associations or governmental or non-governmental organisations, to assist and/or support the victims with their consent during criminal proceedings concerning the offences established in accordance with this Convention.

Article 20 – Protection of witnesses

1. Each Party shall, within its means and in accordance with the conditions provided for by its domestic law, provide effective protection from potential retaliation or intimidation for witnesses in criminal proceedings, who give testimony concerning offences covered by this Convention and, as appropriate, for their relatives and other persons close to them.

2. Paragraph 1 of this article shall also apply to victims insofar as they are witnesses.

CHAPITRE V – PREVENTION MEASURES

Article 21 – Measures at domestic level

1. Each Party shall take the necessary legislative and other measures to ensure:

   a. the existence of a transparent domestic system for the transplantation of human organs;

   b. equitable access to transplantation services for patients;

   c. adequate collection, analysis and exchange of information related to the offences covered by this Convention in co-operation between all relevant authorities.

2. With the aim of preventing and combatting trafficking in human organs, each Party shall take measures, as appropriate:

   a. to provide information or strengthen training for healthcare professionals and relevant officials in the prevention of and combat against trafficking in human organs;

   b. to promote awareness-raising campaigns addressed to the general public about the unlawfulness and dangers of trafficking in human organs.

3. Each Party shall take the necessary legislative and other measures to prohibit the advertising of the need for, or availability of human organs, with a view to offering or seeking financial gain or comparable advantage.

Article 22 – Measures at international level

The Parties shall, to the widest extent possible, co-operate with each other in order to prevent trafficking in human organs. In particular, the Parties shall:

   a. report to the Committee of the Parties at its request on the number of cases of trafficking in human organs within their respective jurisdictions;

   b. designate a national contact point for the exchange of information pertaining to trafficking in human organs.

CHAPITRE VI – FOLLOW-UP MECHANISM

Article 23 – Committee of the Parties

1. The Committee of the Parties shall be composed of representatives of the Parties to the Convention.

2. The Committee of the Parties shall be convened by the Secretary General of the Council of Europe. Its first meeting shall be held within a period of one year following the entry into force of this Convention for the tenth signatory having ratified it. It shall subsequently meet whenever at least one third of the Parties or the Secretary General so requests.

3. The Committee of the Parties shall adopt its own rules of procedure.

4. The Committee of the Parties shall be assisted by the Secretariat of the Council of Europe in carrying out its functions.

5. A contracting Party which is not a member of the Council of Europe shall contribute to the financing of the Committee of the Parties in a manner to be decided by the Committee of Ministers upon consultation of that Party.

Article 24 – Other representatives

1. The Parliamentary Assembly of the Council of Europe, the European Committee on Crime Problems (CDPC), as well as other relevant Council of Europe intergovernmental or scientific committees, shall each appoint a representative to the Committee of the Parties in order to contribute to a multisectoral and multidisciplinary approach.

2. The Committee of Ministers may invite other Council of Europe bodies to appoint a representative to the Committee of the Parties after consulting the latter.

3. Representatives of relevant international bodies may be admitted as observers to the Committee of the Parties following the procedure established by the relevant rules of the Council of Europe.

4. Representatives of relevant official bodies of the Parties may be admitted as observers to the Committee of the Parties following the procedure established by the relevant rules of the Council of Europe.

5. Representatives of civil society, and in particular non-governmental organisations, may be admitted as observers to the Committee of the Parties following the procedure established by the relevant rules of the Council of Europe.

6. In the appointment of representatives under paragraphs 2 to 5 of this article, a balanced representation of the different sectors and disciplines shall be ensured.

7. Representatives appointed under paragraphs 1 to 5 above shall participate in meetings of the Committee of the Parties without the right to vote.

Article 25 – Functions of the Committee of the Parties

1. The Committee of the Parties shall monitor the implementation of this Convention. The rules of procedure of the Committee of the Parties shall determine the procedure for evaluating the implementation of this Convention, using a multisectoral and multidisciplinary approach.

2. The Committee of the Parties shall also facilitate the collection, analysis and exchange of information, experience and good practice between States to improve their capacity to prevent and combat trafficking in human organs. The Committee may avail itself of the expertise of other relevant Council of Europe committees and bodies.

3. Furthermore, the Committee of the Parties shall, where appropriate:

   a. facilitate the effective use and implementation of this Convention, including the identification of any problems that may arise and the effects of any declaration or reservation made under this Convention;

   b. express an opinion on any question concerning the application of this Convention and facilitate the exchange of information on significant legal, policy or technological developments;

   c. make specific recommendations to Parties concerning the implementation of this Convention.

4. The European Committee on Crime Problems (CDPC) shall be kept periodically informed regarding the activities mentioned in paragraphs 1, 2 and 3 of this article.

CHAPITRE VII – RELATIONSHIP WITH OTHER INTERNATIONAL INSTRUMENTS

Article 26 – Relationship with other international instruments

1. This Convention shall not affect the rights and obligations arising from the provisions of other international instruments to which Parties to the present Convention are Parties or shall become Parties and which contain provisions on matters governed by this Convention.

2. The Parties to the Convention may conclude bilateral or multilateral agreements with one another on the matters dealt with in this Convention, for purposes of supplementing or strengthening its provisions or facilitating the application of the principles embodied in it.

CHAPITRE VIII – AMENDMENTS TO THE CONVENTION

Article 27 – Amendments

1. Any proposal for an amendment to this Convention presented by a Party shall be communicated to the Secretary General of the Council of Europe and forwarded by him or her to the member States of the Council of Europe, the non-member States enjoying observer status with the Council of Europe, the European Union, and any State having been invited to sign this Convention.

2. Any amendment proposed by a Party shall be communicated to the European Committee on Crime Problems (CDPC) and other relevant Council of Europe intergovernmental or scientific committees, which shall submit to the Committee of the Parties their opinions on that proposed amendment.

3. The Committee of Ministers of the Council of Europe shall consider the proposed amendment and the opinion submitted by the Committee of Parties and, after having consulted the Parties to this Convention that are not members of the Council of Europe, may adopt the amendment by the majority provided for in Article 20.*d* of the Statute of the Council of Europe.

4. The text of any amendment adopted by the Committee of Ministers in accordance with paragraph 3 of this article shall be forwarded to the Parties for acceptance.

5. Any amendment adopted in accordance with paragraph 3 of this article shall enter into force on the first day of the month following the expiration of a period of one month after the date on which all Parties have informed the Secretary General that they have accepted it.

CHAPITRE IX – FINAL CLAUSES

Article 28 – Signature and entry into force

1. This Convention shall be open for signature by the member States of the Council of Europe, the European Union and the non-member States which enjoy observer status with the Council of Europe. It shall also be open for signature by any other non-member State of the Council of Europe upon invitation by the Committee of Ministers. The decision to invite a non-member State to sign the Convention shall be taken by the majority provided for in Article 20.*d* of the Statute of the Council of Europe, and by unanimous vote of the representatives of the Contracting States entitled to sit on the Committee of Ministers. This decision shall be taken after having obtained the unanimous agreement of the other States/European Union having expressed their consent to be bound by this Convention.

2. This Convention is subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

3. This Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date on which five signatories, including at least three member States of the Council of Europe, have expressed their consent to be bound by the Convention in accordance with the provisions of the preceding paragraph.

4. In respect of any State or the European Union, which subsequently expresses its consent to be bound by the Convention, it 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 its instrument of ratification, acceptance or approval.

Article 29 – Territorial application

1. Any State or the European Union may, at the time of signature or when depositing its instrument of ratification, acceptance or approval, specify the territory or territories to which this Convention shall apply.

2. Any Party may, at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Convention to any other territory specified in the declaration and for whose international relations it is responsible or on whose behalf it is authorised to give undertakings. In respect of such territory, the Convention 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 of the Council of Europe. 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 30 – Reservations

1. Any State or the European Union may, at the time of signature or when depositing its instrument of ratification, acceptance or approval, declare that it avails itself of one or more of the reservations provided for in Articles 4, paragraph 2; 9, paragraph 3; 10, paragraphs 3 and 5.

2. Any State or the European Union may also, at the time of signature or when deposing its instrument of ratification, acceptance or approval, declare that it reserves the right to apply the Article 5 and Article 7, paragraphs 2 and 3, only when the offences are committed for purposes of implantation, or for purposes of implantation and other purposes as specified by the Party.

3. No other reservation may be made.

4. Each Party which has made a reservation may, at any time, withdraw it entirely or partially by a notification addressed to the Secretary General of the Council of Europe. The withdrawal shall take effect from the date of the receipt of such notification by the Secretary General.

Article 31 – Dispute settlement

The Committee of the Parties will follow in close co-operation with the European Committee on Crime Problems (CDPC) and other relevant Council of Europe intergovernmental or scientific committees the application of this Convention and facilitate, when necessary, the friendly settlement of all difficulties related to its application.

Article 32 – Denunciation

1. Any Party may, at any time, denounce this Convention 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.

Article 33 – Notification

The Secretary General of the Council of Europe shall notify the member States of the Council of Europe, the non-member States enjoying observer status with the Council of Europe, the European Union, and any State having been invited to sign this Convention in accordance with the provisions of Article 28, of:

a. any signature;

b. the deposit of any instrument of ratification, acceptance or approval;

c. any date of entry into force of this Convention in accordance with Article 28;

d. any amendment adopted in accordance with Article 27 and the date on which such an amendment enters into force;

e. any reservation and withdrawal of reservation made in pursuance of Article 30;

f. any denunciation made in pursuance of the provisions of Article 32;

g. any other act, notification or communication relating to this Convention.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done in Santiago de Compostela, this 25th day of March 2015, 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, to the non-member States which enjoy observer status with the Council of Europe, to the European Union and to any State invited to sign this Convention.

Council of Europe Convention against Trafficking in Human Organs – CETS No. 216

Explanatory report

1. The Committee of Ministers of the Council of Europe took note of this explanatory report at a meeting held at Deputies' level on 9 July 2014.

2. The text of this explanatory report does not constitute an instrument providing an authoritative interpretation of the Convention, although it might be of such a nature as to facilitate the application of the provisions contained therein.

INTRODUCTION

3. The existence of a worldwide illicit trade in human organs for the purposes of transplantation is a well-established fact, and various means have been adopted, at national and international levels, to counter this criminal activity, which presents a clear danger to both individual and public health, is in breach of human rights and fundamental freedoms and is an affront to the very notion of human dignity and personal liberty.

4. Hence, both the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention Against Transnational Organized Crime (2000) and the Council of Europe Convention on Action against Trafficking in Human Beings (CETS No. 197) of 16 May 2005 contain provisions criminalising the trafficking in human beings for the purpose of the removal of organs.

5. Furthermore, the Convention for the protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (ETS No. 164) of 4 April 1997 prohibits, in its Article 21, actions that give rise to financial gain from the human body and its parts. This prohibition is consolidated in the Additional Protocol to the Convention on Human Rights and Biomedicine concerning the Transplantation of Organs and Tissues of Human Origin (ETS No. 186) of 24 January 2002, which explicitly prohibits organ trafficking in its Article 22. In accordance with Article 26 of the aforesaid additional protocol, Parties should provide for appropriate sanctions to be applied in the event of infringement of the prohibition.

6. In 2008, the Council of Europe and the United Nations agreed to prepare a "Joint study on trafficking in organs, tissues and cells and trafficking in human beings for the purpose of the removal of organs". This joint study, which was published in 2009, identified a number of issues related to trafficking in human organs, tissues and cells which deserved further consideration, in particular the need to distinguish clearly between trafficking in human beings for the purpose of the removal of organs and the trafficking in human organs per se; the need to uphold the principle of prohibition of making financial gains with the human body or its parts; the need to promote organ donation; the need to collect reliable data on trafficking in organs, tissues and cells and the need for an internationally agreed definition of trafficking in organs, tissues and cells.

7. Most importantly, the joint study contained a recommendation to elaborate an international legal instrument setting out a definition of trafficking in organs, tissues and cells and the measures to prevent such trafficking and protect the victims, in addition to the criminal law measures to punish this crime.

8. Against this background, the Committee of Ministers on 16 November 2010 decided to invite the European Committee on Crime Problems (CDPC), the Steering Committee on Bioethics (CDBI) and the European Committee on Transplantation of Organs (CD-P-TO) to identify the main elements that could form part of a binding international legal instrument and report back to the Committee of Ministers by April 2011.

9. In their report of 20 April 2011, these three steering committees underlined that trafficking in human organs, tissues and cells is a problem of global proportions that violates basic human rights and fundamental freedoms and constitutes a direct threat to individual and public health. The three committees further pointed out that "despite the existence of two binding international legal instruments (namely the aforesaid UN Trafficking Protocol and the Council of Europe Trafficking Convention), important loopholes, that are not sufficiently addressed by these instruments, continue to exist in the international legal framework".

10. In particular, the three steering committees came to the conclusion that existing international legal instruments "only address the scenario where recourse is had to various coercive or fraudulent measures to exploit a person in the context of the removal of organs, but do not sufficiently cover scenarios, in which the donor has – adequately – consented to the removal of organs or – for other reasons – is not considered to be a victim of trafficking in terms of the …. conventions".

11. The three steering committees therefore proposed that the Council of Europe draft a binding international criminal law convention against trafficking in human organs, possibly also covering tissues and cells, to fill the gaps in existing international law.

12. By decisions of 6 July 2011 and 22-23 February 2012 respectively, the Committee of Ministers established the Committee of Experts on Trafficking in Human Organs, Tissues and Cells (PC-TO) and tasked it with the preparation of a draft criminal law convention against trafficking in human organs, and, if appropriate, a draft additional protocol to the aforesaid draft criminal law convention against trafficking in human tissues and cells.

13. The PC-TO held a total of four meetings in Strasbourg, from 13 to 16 December 2011, from 6 to 9 March, from 26 to 29 June, and from 15 to 19 October in 2012, and prepared a preliminary draft convention against trafficking in human organs. It did not draft an additional protocol on tissues and cells and recommended the re-examination of this possibility in the future.

14. The draft text of the Convention was finalised by the European Committee on Crime Problems (CDPC), which approved it at its plenary meeting from 4 to 7 December 2012.

PREAMBLE

Commentary on the preamble

15. The preamble describes the purpose of the Convention, namely to contribute in a significant manner to the eradication of trafficking in human organs by preventing and combating this crime, in particular through the introduction of new offences supplementing the existing international legal instruments in the field of trafficking of human beings for the purpose of the removal of organs.

16. The preamble underlines that in the application of the provisions of the Convention covering substantive criminal law, due consideration should be given to the purpose of the Convention and to the principle of proportionality.

17. Specific reference is made in the preamble to the following legal instruments of the United Nations and the Council of Europe:

- the Universal Declaration of Human Rights (1948);
- the Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention on Human Rights", 1950, ETS No. 5);
- the Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine;
- the Additional Protocol to the Convention on Human Rights and Biomedicine concerning Transplantation of Organs and Tissues of Human Origin;
- the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention Against Transnational Organized Crime (2000);
- the Council of Europe Convention on Action against Trafficking in Human Beings.

CHAPTER I – PURPOSES, SCOPE AND USE OF TERMS

Article 1 – Purposes

18. Paragraph 1 sets out the purposes of the Convention, which are to prevent and combat trafficking in human organs, to protect the rights of victims and to facilitate co-operation at both national and international levels on action against trafficking in human organs.

19. Paragraph 2 provides for the establishment of a specific follow-up mechanism (Articles 23-25) in order to ensure the effective implementation of the Convention.

Article 2 – Scope and use of terms

20. Article 2, paragraph 1, defines the scope of the Convention as applying to trafficking in human organs for purposes of transplantation or other purposes and to other forms of illicit removal and of illicit implantation. The negotiators decided that the notion of trafficking in organs covers all acts of illicit removal provided for in Article 4, paragraph 1, of implantation/use of illicitly removed organs provided in Article 5, and the other acts provided for in Articles 7, 8 and 9. For further explanation on the concept of trafficking in human organs, see paragraph 23. The expression "other forms of illicit removal and of illicit implantation" refers only to actions covered by Article 4, paragraph 4, and Article 6. The legal trade with medicinal products, manufactured from human organs or parts of human organs (such as advanced therapy medicinal products) is not covered by the Convention and shall not be restricted by it.

21. The term "other purposes" is intended to refer to any purpose other than transplantation, for which organs illicitly removed from a donor could now, or in the future, be used. Concerning what constitutes the term "other purposes", the negotiators identified, in particular, scientific research and the use of organs to collect tissue and cells, such as the use of heart valves from a heart illicitly removed, or the use of cells from an organ illicitly removed for cell therapy. But taking into account, inter alia, the progress of scientific research and the future developments in the use of organs for purposes other than implantation, the negotiators decided to leave this open. Consequently, this list of examples is not exhaustive. However, while this Convention applies to the removal of human organs for purposes other than transplantation, the trafficking of tissues and cells falls outside the scope of the Convention.

22. Article 2, paragraph 2, provides two definitions which are applicable throughout the Convention.

23. Definition of "trafficking in human organs". Given the complexity of the criminal actions comprising "trafficking in human organs", involving different actors and different criminal acts, the negotiators of the Convention considered it unnecessary to attempt to formulate an all-encompassing definition of the crime to serve as a basis for specifying the description of the offences in Chapter II of the Convention. Instead, the mandatory provisions contained in Chapter II of the Convention on "Substantive Criminal Law" (Article 4, paragraph 1, and Articles 5, 7, 8 and 9) enumerate the criminal acts which, whether committed on their own or in conjunction with other acts, all constitute trafficking in human organs. Nevertheless, the negotiators considered it necessary to refer to "trafficking in human organs" as a comprehensive phenomenon in other parts of the Convention. Accordingly, Article 2, paragraph 2, contains such a definition of "trafficking in human organs", which consists of a reference to the substantive criminal law provisions setting out the different criminal acts constituting "trafficking in human organs".

24. Definition of "human organ". As regards the definition of "human organ", the negotiators decided to take over the internationally recognised definition used by the European Union in Article 3, sub-paragraph *h*, of its Directive 2010/53/EU of the European Parliament and of the Council of 7 July 2010 on standards of quality and safety of human organs intended for transplantation.

Article 3 – Principle of non-discrimination

25. This article prohibits discrimination in Parties' implementation of the Convention and, in particular, in enjoyment of measures to protect and promote victims' rights. The meaning of discrimination in Article 3 is identical to that used under Article 14 of the European Convention on Human Rights.

26. The concept of discrimination has been interpreted consistently by the European Court of Human Rights in its case law concerning Article 14 of the European Convention on Human Rights. In particular, this case law has made clear that not every distinction or difference of treatment amounts to discrimination. As the Court has stated, for example in the *Abdulaziz, Cabales and Balkandali v. the United Kingdom* judgment of 28 May 1985, "a difference of treatment is discriminatory if it 'has no objective and reasonable justification',

that is, if it does not pursue a 'legitimate aim' or if there is not a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised".

27. The list of non-discrimination grounds in Article 3 is based on that in Article 14 of the European Convention on Human Rights and the list contained in Article 1 of Protocol No. 12 to the same Convention. However, the negotiators wished to include also the non-discrimination grounds of age, sexual orientation, state of health and disability. "State of health" includes in particular HIV status. The list of non-discrimination grounds is not exhaustive, but indicative, and should not give rise to unwarranted a contrario interpretations as regards discrimination based on grounds not so included. It is worth pointing out that the European Court of Human Rights has applied Article 14 to discrimination grounds not explicitly mentioned in that provision (see, for example, as concerns the ground of sexual orientation, the judgment of 21 December 1999 in *Salgueiro da Silva Mouta v. Portugal*). The reference to "or other status" could refer, for example, to members of refugee or immigrant populations.

CHAPTER II – SUBSTANTIVE CRIMINAL LAW

28. Chapter II contains the substantive criminal law provisions of the Convention. It is clear from the wording of the provisions that Parties are only obliged to criminalise the acts set out in the mandatory provisions if they are committed intentionally. The interpretation of the word "intentionally" is left to domestic law, but the requirement for intentional conduct relates to all the elements of the offence. As always in criminal law conventions of the Council of Europe, this does not mean that Parties would not be allowed to go beyond this minimum requirement by also criminalising non-intentional acts.

29. The negotiators decided to leave it open to Parties to decide whether to apply Article 4, paragraph 1, Articles 5, 7 and 9 to the donor or the recipient. There is thus no legal obligation for the States to apply these provisions to the donor and the recipient, whereas for example, the surgeon carrying out the removal or implantation will always be covered by the criminalisation obligation. The negotiators took note that a number of States would – under any circumstances – refrain from prosecuting organ donors for committing these offences. Other States have indicated, however, that organ donors could under their domestic law, under certain conditions, also be considered as having participated in, or even instigated, the trafficking in human organs.

30. As a general principle, the negotiators wished to stress that the obligations contained in this Convention do not require Parties to take measures that run counter to constitutional rules or fundamental principles relating to the freedom of the press and the freedom of expression in other media.

Article 4 – Illicit removal of human organs

31. Article 4, paragraph 1, sub-paragraphs a to c, obliges Parties to the Convention to establish as a criminal offence the removal of human organs from living or deceased donors in the following cases: lack of a free, informed and specific consent by the donor or of authorisation by the domestic law of the Party in question (sub-paragraph *a*); a financial gain or comparable advantage has been offered or received in exchange for the removal of organs from a living donor (sub-paragraph *b*), or a deceased donor (sub-paragraph *c*). Though the illicit removal of human organs may in practice involve elements of all the acts described in sub-paragraphs *a* to *c*, it is enough that one of the three conditions be fulfilled to establish that the crime described in Article 4, paragraph 1, has been committed. The negotiators have chosen not to include the purpose of implantation or other purposes as an element of the offence, to avoid the proof of the purpose of the removal.

32. The negotiators considered that, as a general principle, the concept of consent included in the present Convention should be identical to the one expressed in the Convention on Human Rights and Biomedicine, and its Additional Protocol concerning Transplantation of Organs and Tissues of Human Origin.

33. As regards living donors, Article 13 of the Additional Protocol concerning Transplantation of Organs and Tissues of Human Origin draws on the substance of Article 5 of the Convention on Human Rights and Biomedicine regarding consent to an intervention in the health field, complemented by its Article 19, paragraph 2, regarding consent to organ removal from living donors. Article 13 of the Additional Protocol provides in its first paragraph that "an organ or tissue may be removed from a living donor only after the person concerned has given free, informed and specific consent to it either in written form or before an official body." Its second paragraph specifies that "The person concerned may freely withdraw consent at any time." The fact that consent has to be "specific and given either in written form or before an official body" strengthens the requirements compared to the general rules regarding consent to an intervention in the health field. The explanatory report to the Additional Protocol concerning Transplantation of Organs and Tissues of Human

Origin specifies the ways of obtaining and withdrawing consent: "the donor's consent must also be specific and given in written form or before an official body, a court, a judge or an official notary, for example. The responsibility of this body is to ensure that consent is adequate and informed. The second paragraph provides the freedom to withdraw consent to the removal at any time. There is no requirement for withdrawal of consent to be in writing or to follow any particular form. The donor need simply say no to the removal at any time […]. However, professional standards and obligations may require that the team continue with the procedure if not to do so would seriously endanger the health of the donor." It appears clear that Article 4 of the Convention applies also to any person deprived of his or her liberty, living or deceased, which was at the time of the negotiation of the Convention a major concern expressed by the Parliamentary Assembly of the Council of Europe and shared by many delegations.

34. As regards deceased donors, Article 17 of the Additional Protocol concerning Transplantation of Organs and Tissues of Human Origin provides that "Organs or tissues shall not be removed from the body of a deceased person unless consent or authorisation required by law has been obtained. The removal shall not be carried out if the deceased person had objected to it." According to the explanatory report to this protocol, "Without anticipating the system to be introduced, the article accordingly provides that if the deceased person's wishes are at all in doubt, it must be possible to rely on national law for guidance as to the appropriate procedure. In some States the law permits that if there is no explicit or implicit objection to donation, removal can be carried out. In that case, the law provides means of expressing intention, such as drawing up a register of objections. In other countries, the law does not prejudge the wishes of those concerned and prescribes enquiries among relatives and friends to establish whether or not the deceased person was in favour of organ donation."

35. For the purposes of this Convention, in the case of a living donor, the term "specific" means that the consent must be clearly given and with regard to the removal of a "specific" organ that is precisely identified. In the case of a deceased donor, the latter may have given his or her consent during his or her lifetime to the removal of an organ to be carried out after his or her death; such consent may be given with regard to a specific organ or in more general terms. Any organ removal carried out after the death of the person concerned shall respect the terms of this consent. If the donor has not expressed any wish during his or her lifetime, the removal may only be carried out if the requirements as defined by domestic law regarding authorisation for the removal of organs are met.

36. The wording "removal being authorised under its domestic law" set out in Article 4, paragraph 1, sub-paragraph *a*, covers different concepts as provided for under domestic law which are based on implicit consent of the deceased person or according to which the relatives of the deceased person are entitled to take the decision.

37. Article 20 of the Convention for the Protection of Human Rights and Biomedicine and Article 14 of its Additional Protocol concerning Transplantation of Organs and Tissues of Human Origin prohibit organ removal from persons not able to consent. The provision of paragraph 1, sub-paragraph *a*, of Article 4 of the Convention against Trafficking in Human Organs corresponds to this principle. As stated in the explanatory report to the Convention on Human Rights and Biomedicine regarding Article 6 on the protection of persons not able to consent, the incapacity to consent must be understood in the context of a given intervention and is defined by domestic law. It is for domestic law to determine whether or not a person has the capacity to consent.

38. However, given the specific purpose of the Convention against Trafficking in Human Organs, which is a criminal law convention, Article 4, paragraph 2, provides for the possibility of a reservation to the general rule of establishing as a criminal offence conduct referred to in paragraph 1, sub-paragraph *a*. The reservation is restrictive, limited to living donors and only to exceptional cases. Certain delegations requested the introduction of such a reservation to cover exceptional cases in which the person from whom the organ is removed is not capable of providing consent, as established in paragraph 1, sub-paragraph *a*, and where there are thus no other possible solutions than obtaining consent from a competent institution or an authorised person as provided for in domestic law. This is the case, for example, for children, people with mental disabilities, or any other person under a tutorship. These states wanted to foresee that in such exceptional cases consent may be given by other authorised persons, or even by other competent institutions (for example, courts of law), for the person concerned, in accordance with the safeguards and provisions of internal law. The last sentence obliges any State making use of this reservation option to provide a brief statement of the relevant domestic law, as appears, for example, in the European Convention on Human Rights (Article 57, paragraph 2) and the Convention on Human Rights and Biomedicine (Article 36, paragraph 2).

39. Article 4, paragraph 3, specifies that the expression of "financial gain or comparable advantage" as used in paragraphs 1.*b* and *c* does not include compensation for loss of earnings and any other justifiable expense caused by the removal of an organ or the related medical examinations, or compensation in case of damage which is not inherent to the removal or organs. The negotiators considered it necessary to include this wording, which is taken from the Additional Protocol concerning Transplantation of Organs and Tissues of Human Origin, in order to clearly distinguish the lawful compensation to organ donors in certain cases from the prohibited practice of making financial gains with the human body or its parts.

40. The financial gain or comparable advantage should be understood in a broad context. The gain can be offered to the donor or third person, directly or through intermediaries. The expression "financial gain or comparable advantage" does not apply to an arrangement that is authorised under domestic law, such as arrangements for paired or pooled donation.

41. Paragraph 4 obliges Parties to the Convention to consider establishing as a criminal offence the removal of human organs from living or deceased donors, where the removal is performed outside the framework of its domestic transplantation system, or in breach of essential principles of domestic transplantation laws or rules.

42. The last sentence of paragraph 4 clarifies that while it is left to each Party to decide whether or not – and if so in which respect – it will establish criminal offences covering the conduct described in this paragraph, and while a Party which decides to establish any such criminal offences is not legally obliged to apply also Articles 9 to 22 to such criminal offences, the Party in question is called upon to endeavour to do so.

43. The negotiators were not in agreement over the question of whether or not it would be appropriate to require Parties to sanction organ removal or implantation if performed "outside of the framework of the domestic transplantation systems", that is, outside of the system for procurement and transplantation of organs authorised by the competent authorities of the Party in question, and/or in breach of its domestic transplantation rules or laws. Some States considered that normally any organ removal or transplantation that may be considered to be performed outside of the system (or in breach of transplantation law) would also constitute one of the criminal offences under paragraph 1 of Article 4. Other states did not share this position. Negotiators agreed that it would be appropriate to specifically address these situations in paragraph 4 of Article 4 of the Convention, while recognising that States currently have very different domestic transplantation systems in place, and that the aim of the present Convention is not to harmonise domestic transplantation systems.

44. Similarly, the negotiators recognised that in some States, removal of organs performed outside of the framework of the domestic transplantation system would per se not necessarily be considered as more than a regulatory or minor offence, that is, if the same act does not also fall under paragraph 1 of Article 4.

45. Because of the aforesaid differences in the various domestic transplantation systems and domestic legal systems of States, the negotiators decided to leave a certain margin of appreciation to Parties with regard to whether or not to establish as a criminal offence the removal of organs from living or deceased donors under the conditions described in Article 4, paragraph 4.

Article 5 – Use of illicitly removed organs for purposes of implantation or other purposes than implantation

46. Article 5 obliges the Parties to the Convention to establish as a criminal offence under its domestic law the use of illicitly removed organs – either for implantation or for any other purpose. The reference to Article 4, paragraph 1, indicates that Article 5 shall apply to any case where an organ has been removed under any of the circumstances described in Article 4, paragraph 1.

47. As in the case of implantation, the obligation for Parties to criminalise the subsequent use of the illicitly removed organ is limited to those situations where the perpetrator acts intentionally.

48. In accordance with Article 30, paragraph 2, of the Convention, a Party may decide to limit the application of Article 5 to use for implantation only, or for other uses as specified by that Party.

Article 6 – Implantation of organs outside of the domestic transplantation system or in breach of essential principles of national transplantation law

49. Article 6 obliges Parties to consider establishing as a criminal offence the implantation of organs performed outside of the framework of their domestic transplantation systems, or where the implantation is performed in breach of essential principles of domestic transplantation laws or rules.

50. As in the case of Article 4, paragraph 4, and for the same reasons, the negotiators preferred to leave a certain margin of appreciation to Parties with regard to whether or not to establish as a criminal offence the implantation of organs from living or deceased donors under the conditions described in Article 6.

51. The last sentence of Article 6 clarifies that while it is left to each Party to decide whether or not, and if so in which respect, it will establish criminal offences covering the conduct described in this article, and while a Party which decides to establish any such criminal offences is not legally obliged to apply also Articles 9 to 22 to such criminal offences, the Party is called upon to endeavour to do so.

Article 7 – Illicit solicitation, recruitment, offering and requesting of undue advantages

52. Article 7, paragraph 1, obliges Parties to criminalise the illicit solicitation and recruitment of organ donors and recipients for financial gain or comparable advantage, either for the person soliciting or recruiting or for a third party. The aim of the provision is thus to criminalise the activities of persons operating as an interface between and bringing together donors, recipients and medical staff. These activities constitute an essential element of the trafficking in human organs. The negotiators considered that advertising is a form of solicitation and therefore decided not to include a specific provision on advertising in Article 7. Instead they decided to introduce in Article 21, paragraph 3, an explicit obligation for Parties to prohibit the advertising of the need for, or availability of human organs, with a view to offering or seeking financial gain or comparable advantage. However, this measure does not prevent activities to recruit donors which are authorised under domestic law.

53. It is left to the discretion of Parties, in accordance with their domestic law, to decide whether or not organ donors should be subject to prosecution under this article (see paragraph 29). As the purchase of an organ does not give rise to financial gain or comparable advantage on the part of the buyer, this provision is not applicable to acts performed by a potential organ receiver. The same holds true for somebody acting on behalf of the potential organ receiver, for example, a family member, insofar as this does not give rise to any financial gain or comparable advantage on his or her part.

54. Article 7, paragraphs 2 and 3, obliges Parties to criminalise active and passive corruption of healthcare professionals, public officials or persons working for private sector entities with a view to having a removal or implantation of a human organ performed under the circumstances described in Article 4, paragraph 1, or Article 5 and where appropriate Article 4, paragraph 4, or Article 6. In this context, it should be noted that Article 4, paragraph 4, and Article 6 leave Parties a margin to decide on whether to establish the offences described therein as criminal offences. Hence, the use of the wording "where appropriate" means that when considering establishing the offences contained in Article 4, paragraph 4, and Article 6 as criminal offences, Parties should also consider including them in Article 7, paragraphs 2 and 3.

55. The wording of Article 7, paragraphs 2 and 3, is inspired by Articles 2 and 7 of the Criminal Law Convention on Corruption (ETS No. 173). The negotiators considered it useful to include these provisions in the present Convention, as not all Parties to the Convention will necessarily be Parties to the Criminal Law Convention on Corruption.

Article 8 – Preparation, preservation, storage, transportation, transfer, receipt, import and export of illicitly removed human organs

56. Article 8 obliges Parties to establish the preparation, preservation, storage, transportation, transfer, receipt, import and export of organs removed under the conditions described in Article 4, paragraph 1, and, where appropriate, in Article 4, paragraph 4, when committed intentionally, as a criminal offence. In this context, it should be noted that Article 4, paragraph 4, leaves Parties a margin to decide on whether to establish the offence described therein as a criminal offence. Hence, the use of the wording "where appropriate" means that when considering establishing the offence contained in Article 4, paragraph 4, as a criminal offence, a Party should also consider including it in Article 8.

57. Due to differences in the legal systems of member States, some Parties may, when transposing the Convention into their domestic law, choose to establish offences under the Convention, in particular those enumerated in Article 8, as a separate criminal offence, or consider them as aiding or abetting or attempt under Article 9.

58. Insofar as a Party makes use of the reservation possibility in Article 30, paragraph 2, with regard to Article 5, it will affect the extent to which that Party is obliged to criminalise the conduct described in Article 8.

Article 9 – Aiding or abetting and attempt

59. Paragraph 1 requires Parties to establish as offences acts aiding or abetting the commission of the offences established in accordance with this Convention. Liability arises for aiding or abetting where the person who commits a crime is aided by another person who also intends the crime to be committed.

60. Paragraph 2 provides for the criminalisation of an attempt to commit the offences established in accordance with this Convention.

61. The interpretation of the word "attempt" is left to domestic law. The principle of proportionality, as referred to in the preamble to the Convention, should be taken into account by Parties when distinguishing between the concept of attempt and mere preparatory acts which do not warrant criminalisation.

62. Paragraph 3 allows for the Parties to make reservations with regard to the application of paragraph 2 (attempt) to offences established in accordance with Articles 7 and 8, due to differences in the criminal law systems of member States of the Council of Europe.

63. As with all the offences established under the Convention, it requires the criminalisation of aiding or abetting and attempt only if committed intentionally.

Article 10 – Jurisdiction

64. This article lays down various requirements whereby Parties must establish jurisdiction over the offences with which the Convention is concerned.

65. Paragraph, 1 sub-paragraph *a*, is based on the territoriality principle. Each Party is required to punish the offences established under the Convention when they are committed on its territory.

66. Paragraph 1, sub-paragraphs *b* and *c*, are based on a variant of the territoriality principle. These sub-paragraphs require each Party to establish jurisdiction over offences committed on ships flying its flag or aircraft registered under its laws. This obligation is already in force in the law of many countries, ships and aircraft being frequently under the jurisdiction of the State in which they are registered. This type of jurisdiction is extremely useful when the ship or aircraft is not located in the country's territory at the time of commission of the crime, as a result of which paragraph 1, sub-paragraph *a*, would not be available as a basis for asserting jurisdiction. In the case of a crime committed on a ship or aircraft outside the territory of the flag or registry Party, it might be that without this rule no country would be able to exercise jurisdiction. In addition, if a crime is committed on board a ship or aircraft which is merely passing through the waters or airspace of another State, there may be significant practical impediments to the latter State's exercising its jurisdiction and it is therefore useful for the registry State to also have jurisdiction.

67. Paragraph 1, sub-paragraph *d*, is based on the nationality principle. The nationality theory is most frequently applied by countries with a civil-law tradition. Under it, nationals of a country are obliged to comply with its law even when they are outside its territory. Under sub-paragraph *d*, if one of its nationals commits an offence abroad, a Party is obliged to be able to prosecute him or her. The negotiators considered that this was a particularly important provision in the context of combating trafficking in human organs. Indeed, certain States in which trafficking in human organs takes place either do not have the will or the necessary resources to successfully carry out investigations or lack the appropriate legal framework.

68. Paragraph 1, sub-paragraph *e* applies to persons having their habitual residence in the territory of the Party. It provides that Parties shall establish jurisdiction to investigate acts committed abroad by persons having their habitual residence in their territory, and thus contribute to the punishment of trafficking in human organs.

69. Paragraph 2 is linked to the nationality or residence status of the victim. It is based on the premise that the particular interests of national victims overlap with the general interest of the state to prosecute crimes committed against its nationals or residents. Hence, if a national or person having habitual residence is a victim of an offence abroad, the Party concerned shall endeavour to establish jurisdiction in order to start proceedings. However, there is no obligation imposed on Parties, as demonstrated by the use of the expression "endeavour". In the present Convention there are no provisions providing for the elimination of the usual rule of dual criminality.

70. Paragraph 3 provides for Parties to enter reservations on the application of the jurisdiction rules laid down in paragraph 1, sub-paragraphs *d* and *e*.

71. Paragraph 4 prohibits the subordination of the initiation of proceedings, which is based on the jurisdiction provided for in paragraphs 1.*d* and 1.*e* to the conditions of a complaint of the victim or the laying of information from the authorities of the State in which the offence took place. Indeed, certain States in which trafficking in human organs takes place do not always have the necessary will or resources to carry out investigations. In these conditions, the requirement of the laying of information by the State or of a complaint by the victim often constitutes an impediment to the prosecution. This paragraph applies to all the offences defined in Chapter II (Substantive Criminal Law).

72. In paragraph 5, the negotiators wished to introduce the possibility for Parties to limit the application of paragraph 4 by entering a reservation. Parties making use of this possibility may thus subordinate the initiation of prosecution of alleged trafficking in human organs to cases where a report has been filed by a victim, or the State Party has received a denunciation from the State of the place where the offence was committed.

73. Paragraph 6 concerns the principle of *aut dedere aut judicare* (extradite or prosecute). Jurisdiction established on the basis of paragraph 6 is necessary to ensure that Parties that refuse to extradite a national have the legal ability to undertake investigations and proceedings domestically instead, if asked to do so by the Party that requested extradition under the terms of the relevant international instruments.

74. In certain cases of trafficking in human organs, it may happen that more than one Party has jurisdiction over some or all of the participants in an offence. For example, an organ donor may be recruited in one country and have the organ in question removed in another. In order to avoid duplication of procedures and unnecessary inconvenience for witnesses or to otherwise facilitate the efficiency or fairness of proceedings, the affected Parties are required to consult in order to determine the proper venue for prosecution. In some cases it will be most effective for them to choose a single venue for prosecution; in others it may be best for one country to prosecute some alleged perpetrators, while one or more other countries prosecute others. Either method is permitted under paragraph 7. Finally, the obligation to consult is not absolute; consultation is to take place "where appropriate". Thus, for example, if one of the Parties knows that consultation is not necessary (for example, it has received confirmation that the other Party is not planning to take action), or if a Party is of the view that consultation may impair its investigation or proceeding, it may delay or decline consultation.

75. The bases of jurisdiction set out in paragraph 1 are not exclusive. Paragraph 8 of this article permits Parties to establish other types of criminal jurisdiction according to their domestic law.

Article 11 – Corporate liability

76. Article 11 is consistent with the current legal trend towards recognising corporate liability. The negotiators were of the opinion that due to the gravity of offences related to trafficking in human organs, it is appropriate to include corporate liability in the Convention. The intention is to make commercial companies, associations and similar legal entities ("legal persons") liable for criminal actions performed on their behalf by anyone in a leading position in them. Article 11 also contemplates liability where someone in a leading position fails to supervise or check on an employee or agent of the entity, thus enabling them to commit any of the offences established in the Convention for the benefit of the entity.

77. Under paragraph 1, four conditions need to be met for liability to attach. First, one of the offences described in the Convention must have been committed. Second, the offence must have been committed for the entity's benefit. Third, a person in a leading position must have committed the offence (including aiding and abetting). The term "person who has a leading position" refers to someone who is organisationally senior, such as a director. Fourth, the person in a leading position must have acted on the basis of one of his or her powers (whether to represent the entity or take decisions or perform supervision), demonstrating that that person acted under his or her authority to incur liability of the entity. In short, paragraph 1 requires Parties to be able to impose liability on legal entities solely for offences committed by such persons in leading positions.

78. In addition, paragraph 2 requires Parties to be able to impose liability on a legal entity ("legal person") where the crime is committed not by the leading person described in paragraph 1 but by another person acting on the entity's authority, that is, one of its employees or agents acting within their powers. The conditions that must be fulfilled before liability can attach are: i) the offence was committed by an employee or agent of the legal entity; ii) the offence was committed for the entity's benefit; and iii) commission of the offence was made possible by the leading person's failure to supervise the employee or agent. In this context failure to supervise should be interpreted to include not taking appropriate and reasonable steps to prevent employees or agents from engaging in criminal activities on the entity's behalf. Such appropriate and reasonable

steps could be determined by various factors, such as the type of business, its size, and the rules and good practices in force.

79. Liability under this article may be criminal, civil or administrative. It is open to each Party to provide, according to its legal principles, for any or all of these forms of liability as long as the requirements of Article 12, paragraph 2, are met, namely that the sanction or measure be "effective, proportionate and dissuasive" and include monetary sanctions.

80. Paragraph 4 makes it clear that corporate liability does not exclude individual liability. In a particular case there may be liability at several levels simultaneously: for example, liability of one of the legal entity's organs, liability of the legal entity as a whole and individual liability in connection with one or other.

Article 12 – Sanctions and measures

81. This article is closely linked to Articles 4 to 9, which define the various offences that should be made punishable under domestic law. In accordance with the obligations imposed by those articles, Article 12 requires Parties to match their action to the seriousness of the offences and lay down sanctions which are "effective, proportionate and dissuasive". In the case of an individual committing an offence established under Article 4, paragraph 1, and, where appropriate, Article 5, 7, 8 and 9, Parties must provide for prison sentences that can give rise to extradition. It should be noted that, under Article 2 of the European Convention on Extradition (ETS No. 24), extradition is to be granted in respect of offences punishable under the laws of the requesting and requested Parties by deprivation of liberty or under a detention order for a maximum period of at least one year or by a more severe penalty.

82. Legal entities whose liability is to be established under Article 11 are also to be liable to sanctions that are "effective, proportionate and dissuasive", which may be criminal, administrative or civil in character. Paragraph 2 requires Parties to provide for the possibility of imposing monetary sanctions on legal persons.

83. In addition, paragraph 2 provides for other measures which may be taken in respect of legal persons, with particular examples given: temporary or permanent disqualification from the practice of commercial activities, placement under judicial supervision, or a judicial winding-up order. The list of measures is not mandatory or exhaustive and Parties are free to apply none of these measures or envisage other measures.

84. Paragraph 3 requires Parties to ensure that measures concerning seizure and confiscation of the proceeds derived from criminal offences can be taken. This paragraph has to be read in the light of the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS No. 141), as well as the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No. 198), which are based on the idea that confiscating the proceeds of crime is an effective anti-crime weapon. As most of the criminal offences related to the trafficking in human organs are undertaken for financial profit, measures depriving offenders of assets linked to or resulting from the offence are clearly needed in this field as well.

85. Paragraph 3, sub-paragraph *a*, provides for the seizure and confiscation of proceeds of the offences, or property whose value corresponds to such proceeds.

86. The Convention does not contain definitions of the terms "confiscation", "proceeds" and "property". However, Article 1 of the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime provides definitions for these terms which may be used for the purposes of the Convention against Trafficking in Human Organs. "Confiscation" means a penalty or measure, ordered by a court following proceedings in relation to a criminal offence or criminal offences, resulting in final deprivation of property. "Proceeds" means any economic advantage or financial saving from a criminal offence. It may consist of any "property" (see the interpretation of that term below). The wording of sub-paragraph a of paragraph 3 takes into account that there may be differences of domestic law as regards the type of property which can be confiscated after an offence. It can be possible to confiscate items which are (direct) proceeds of the offence or other property of the offender which, though not directly acquired through the offence, is equivalent in value to its direct proceeds ("substitute assets"). "Property" must therefore be interpreted, in this context, as any property, corporeal or incorporeal, movable or immovable, in addition to legal documents or instruments evidencing title to or interest in such property.

87. Paragraph 3, sub-paragraph *b*, of Article 12 provides for the closure of any establishment used to carry out any of the criminal offences established under the Convention. This measure is almost identical to Article 23, paragraph 4, of the Council of Europe Convention on Action against Trafficking in Human Beings and Article 27, paragraph 3, sub-paragraph *b*, of the Council of Europe Convention on the Protection of Children

against Sexual Exploitation and Sexual Abuse (CETS No. 201). Alternatively, the Parties may foresee provisions allowing the perpetrator to be banned, temporarily or permanently, in conformity with the relevant provisions of domestic law, from carrying on the professional activity in connection with which the criminal offence was committed. The negotiators considered it necessary to make a reference to the domestic law of Parties, since differences exist with regard to the exact measures to be applied and procedures to be followed when banning a person from exercising a professional activity. Moreover differences exist as to whether or not certain professions require the issuing of a licence or other type of authorisation by public authorities.

Article 13 – Aggravating circumstances

88. Article 13 requires Parties to ensure that certain circumstances (mentioned in sub-paragraphs *a* to *e*) may be taken into consideration as aggravating circumstances in the determination of the sanction for offences established in this Convention. This obligation does not apply to cases where the aggravating circumstances already form part of the constituent elements of the offence in the national law of the State Party.

89. By the use of the phrase "may be taken into consideration", the negotiators highlighted that the Convention places an obligation on Parties to ensure that these aggravating circumstances are available for judges to consider when sentencing offenders, although there is no obligation on judges to apply them. The phrase "in conformity with the relevant provisions of domestic law" is intended to reflect the fact that the various legal systems in Europe have different approaches to address these aggravating circumstances and permits Parties to retain their fundamental legal concepts.

90. The first aggravating circumstance *a*, is where the offence caused the death of, or serious damage to the physical or mental health of, the victim. Given the fact that any transplantation carries a significant element of danger for the physical health of both the donor and the recipient, it should be up to the national courts of the Parties to assess the causal link between the acts criminalised under the Convention and any death or injury sustained as a result thereof.

91. The second aggravating circumstance *b* is where the offence was committed by persons abusing the confidence placed in them in their professional capacity. This category of persons is obviously principally health professionals, but also public officials (when acting in their official capacity) would be covered. However, the application of the aggravating circumstance is not restricted to health professionals and public officials.

92. The third aggravating circumstance *c* is where the offence was committed in the framework of a criminal organisation. The Convention does not define "criminal organisation". In applying this provision, however, Parties may be guided by other international instruments which define the concept. For example, Article 2, sub-paragraph *a*, of the United Nations Convention against Transnational Organised Crime defines "organised criminal group" as "a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit". Recommendation Rec(2001)11 of the Committee of Ministers to member States concerning guiding principles on the fight against organised crime and the EU Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime give very similar definitions of "organised crime group" and "criminal organisation".

93. The fourth aggravating circumstance d is where the perpetrator has previously been convicted of offences established under the Convention. By including this, the negotiators wanted to signal the need to make a concerted effort to combat recidivism in the low risk-high financial gain area of trafficking in human organs.

94. The fifth aggravating circumstance e is where the offence was committed against a child or any other particularly vulnerable person. The negotiators were of the opinion that most persons who would qualify as victims of trafficking in human organs are by definition vulnerable for several reasons, for example, because they are in serious financial difficulty (which is the case for many people who agree to have an organ removed against financial gain or comparable advantage) or because they are suffering from severe or even terminal diseases with little chance of survival (which is the case for many recipients of organs). Likewise, children are always particularly vulnerable to crime. Hence, the negotiators would reserve the aggravating circumstance set out in sub-paragraph *e* to situations where the victim is a child or otherwise "particularly vulnerable" because of his or her age, mental development or familial or social dependence on the perpetrator(s). The term "child" is not explicitly defined in the Convention, but should be understood as the same as in the Council of Europe Convention on Action against Trafficking in Human Beings, namely "any person under 18 years

of age". This definition is ultimately derived from the UN Convention on the Rights of the Child (1989), where it is found in Article 1.

Article 14 – Previous convictions

95. Trafficking in human organs is more often than not perpetrated transnationally by criminal organisations or by individual persons, some of whom may have been tried and convicted in more than one country. At domestic level, many legal systems provide for a different, often harsher, penalty where someone has previous convictions. In general, only conviction by a national court counts as a previous conviction. Traditionally, previous convictions by foreign courts were not taken into account on the grounds that criminal law is a national matter and that there can be differences of domestic law, and because of a degree of suspicion regarding decisions by foreign courts.

96. Such arguments have less force today in that the internationalisation of criminal law standards – as a pendent to the internationalisation of crime – is tending to harmonise different countries' law. In addition, in the space of a few decades, countries have adopted instruments such as the European Convention on Human Rights, the implementation of which has helped build a solid foundation of common guarantees that inspire greater confidence in the justice systems of all the participating States.

97. The principle of international recidivism is established in a number of international legal instruments. Under Article 36, paragraph 2.*a* (iii), of the New York Convention of 30 March 1961 on Narcotic Drugs, for example, foreign convictions shall be taken into account for the purpose of establishing recidivism, subject to each Party's constitutional limitations, legal system and domestic law. Another example: under Article 1 of the Council Framework Decision 2001/888/JAI of 6 December 2001 amending Framework Decision 2000/383/JHA on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro, European Union member States must recognise as establishing habitual criminality final decisions handed down in another member State for counterfeiting of currency.

98. The fact remains that at international level there is no standard concept of recidivism and the law of some countries does not have the concept at all. The fact that foreign convictions are not always brought to the courts' notice for sentencing purposes is an additional practical difficulty. However, in the framework of the European Union, Article 3 of the Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the member States of the European Union in the course of new criminal proceedings has established in a general way – without limitation to specific offences – the obligation of taking into account a previous conviction handed down in another (EU member) State.

99. Therefore, Article 14 of the Convention provides for the possibility to take into account final sentences passed by another Party in assessing a sentence. To comply with the provision Parties may provide in their domestic law that previous convictions by foreign courts may, to the same extent as previous convictions by domestic courts would do so, result in a harsher penalty. They may also provide that, under their general powers to assess the individual's circumstances in setting the sentence, courts should take those convictions into account. This possibility should also include the principle that the offender should not be treated less favourably than he would have been treated if the previous conviction had been a national conviction.

100. Under Article 13 of the European Convention on Mutual Assistance in Criminal Matters (ETS No. 30), a Party's judicial authorities may request from another Party extracts from and information relating to judicial records, if needed in a criminal matter. In the framework of the European Union, the issues related to the exchange of information contained in criminal records between member States are regulated in two legal acts, namely Council Decision 2005/876/JHA of 21 November 2005 on the exchange of information extracted from the criminal record and Council Framework Decision 2009/315/JHA of 26 February 2009 on the organisation and content of the exchange of information extracted from the criminal record between member States. However, Article 14 does not place any positive obligation on courts or prosecution services to take steps to find out whether persons being prosecuted have received final sentences from another Party's courts.

CHAPTER III – CRIMINAL PROCEDURAL LAW

Article 15 – Initiation and continuation of proceedings

101. Article 15 is designed to enable the public authorities to prosecute offences established in accordance with the Convention *ex officio*, without a victim having to file a complaint. The purpose of this provision is to facilitate prosecution, in particular by ensuring that criminal proceedings may continue regardless of pressure or threats by the perpetrators of offences towards victims.

Article 16 – Criminal investigations

102. Article 16 provides for Parties to ensure the effective investigation and prosecution of offences established under the Convention in accordance with the fundamental principles of their domestic law. The notion of "principles of domestic law" should be understood as also encompassing basic human rights, including those provided under Article 6 of the European Convention on Human Rights. The negotiators noted that conducting effective criminal investigations may imply the use of special investigation techniques in accordance with the domestic law of the Party in question, such as financial investigations, covert operations and controlled delivery, taking into account the principle of proportionality.

Article 17 – International co-operation

103. The article sets out the general principles that should govern international co-operation in criminal matters.

104. Paragraph 1 obliges Parties to co-operate, on the basis of relevant international and national law, to the widest extent possible for the purpose of investigations or proceedings of crimes established under the Convention, including for the purpose of carrying out seizure and confiscation measures. In this context, particular reference should be made to the European Convention on Extradition, the European Convention on Mutual Assistance in Criminal Matters, the Convention on the Transfer of Sentenced Persons (ETS No. 112), the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and the Council of Europe Convention Laundering, Search, Seizure and Confiscation of the proceeds from Crime and on the Financing of Terrorism.

105. In the same way as for paragraph 1, paragraph 2 obliges Parties to co-operate, to the widest extent possible and on the basis of relevant international, regional and bilateral legal instruments, on extradition and mutual legal assistance in criminal matters concerning the offences established by the Convention.

106. Paragraph 3 invites a Party that makes mutual assistance in criminal matters or extradition conditional on the existence of a treaty to consider the Convention as the legal basis for judicial co-operation with a Party with which it has not concluded such a treaty. This provision is of interest because of the possibility provided to third States to sign the Convention (see Article 28). The requested Party will act on such a request in accordance with the relevant provisions of its domestic law which may provide for conditions or grounds for refusal. Any action taken shall be in full compliance with its obligations under international law, including obligations under international human rights instruments.

CHAPTER IV – PROTECTION MEASURES

107. The protection of, and assistance to, victims of crime has long been a priority in the work of the Council of Europe.

108. The horizontal legal instrument in this field is the 1983 European Convention on the Compensation of Victims of Violent Crimes (ETS No. 116), which has since been supplemented by a series of recommendations, notably Recommendation No. R (85) 11 on the position of the victim in the framework of criminal law and procedure, Recommendation No. R (87) 21 on the assistance to victims and the prevention of victimisation and Recommendation Rec(2006)8 on assistance to crime victims.

109. Furthermore, the situation of victims has also been addressed in a number of specialised conventions, including the Council of Europe Convention on the Prevention of Terrorism (CETS No. 196), the Council of Europe Convention on Action against Trafficking in Human Beings, both of 2005, and the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse of 2007.

110. Taking into account the potential grave consequences for victims of trafficking in human organs, the negotiators found that it was justified to provide specifically for the protection of such victims, and also to ensure that victims of the crimes established under this Convention have access to information relevant to their case and the protection of their health and other rights from the competent national authorities and that – subject to the domestic law of the Parties – they are given the possibility to be heard and to supply evidence.

111. It is recalled that the term "victim" is not defined in the Convention, as the negotiators felt that the determination of who could qualify as victims of trafficking in human organs was better left to the Parties to decide in accordance with their domestic law.

Article 18 – Protection of victims

112. Article 18 provides for the protection of the rights and interests of victims, in particular by requiring Parties to ensure that victims are given access to information relevant for their case and necessary to protect their health and other rights involved, that victims are assisted in their physical, psychological and social recovery, and that victims are provided with the right to compensation from the perpetrators under the domestic law of the Parties. As regards the right to compensation, the negotiators also noted that in a number of member States of the Council of Europe, national victim funds have already been set up. However, this provision does not oblige Parties to establish such funds.

113. Article 18, sub-paragraph *c*, establishes the right of victims to compensation. The compensation is pecuniary and covers both material injury (such as the cost of medical treatment) and non-material damage (the suffering experienced). For the purposes of this article, victims' right to compensation consists in a claim against the perpetrators of the trafficking – it is the traffickers who bear the burden of compensating the victims. If, in the criminal proceedings, the criminal courts are not empowered to determine civil liability towards the victims, it must be possible for the victims to submit their claims to civil courts with jurisdiction in the matter and powers to award damages with interest.

Article 19 – Standing of victims in criminal proceedings

114. This article contains a non-exhaustive list of procedures designed to protect victims of crimes established under this Convention during investigations and proceedings. These general measures of protection apply at all stages of the criminal proceedings, both during the investigations (whether they are carried out by a police service or a judicial authority) and during criminal trial proceedings.

115. First of all, Article 19 sets out the right of victims to be informed of their rights and of the services at their disposal and, upon request, the follow-up given to their complaint, the charges, the state of the criminal proceedings (except in exceptional cases where the proper handling of the case may be adversely affected), their role therein and the outcome of their cases.

116. Article 19 goes on to list a number of procedural rules designed to implement the general principles set out in the provision: the possibility, for victims, (in a manner consistent with the procedural rules of the domestic law of a Party), to be heard, to supply evidence, to have their views, needs and concerns presented and considered, directly or through an intermediary, and in all cases the right to be protected against any risk of intimidation and retaliation.

117. Paragraph 2 also covers administrative proceedings, since procedures for compensating victims are of this type in some States. More generally, there are also situations in which protective measures, even in the context of criminal proceedings, may be delegated to the administrative authorities.

118. Paragraph 3 provides for access, in accordance with domestic law and free of charge, where warranted, to legal aid for victims of trafficking in human organs. Judicial and administrative procedures are often highly complex and victims therefore need the assistance of legal counsel to be able to assert their rights satisfactorily. This provision does not afford victims an automatic right to legal aid. The conditions under which such aid is granted must be determined by each Party to the Convention when the victim is entitled to be a party to the criminal proceedings.

119. In addition to Article 19, dealing with the status of victims as parties to criminal proceedings, the States Parties must take account of Article 6 of the European Convention on Human Rights. Even though Article 6, paragraph 3.*c*, of the European Convention on Human Rights provides for the free assistance of an officially assigned defence counsel only in the case of persons charged with criminal offences, the case law of the European Court of Human Rights (*Airey v. Ireland* judgement, 9 October 1979) also, in certain circumstances, recognises the right to free assistance from an officially assigned defence counsel in civil proceedings, under Article 6, paragraph 1, of the European Convention on Human Rights, which is interpreted as enshrining the right of access to a court for the purposes of obtaining a decision concerning civil rights and obligations (Golder v. United Kingdom judgment, 21 February 1975). The Court took the view that effective access to a court might necessitate the free assistance of a lawyer. For instance, the Court considered that it was necessary to ascertain whether it would be effective for the person in question to appear in court without the assistance of counsel, that is, whether he could argue his case adequately and satisfactorily. To this end, the Court took account of the complexity of the proceedings and the passions involved – which might be incompatible with the degree of objectivity needed in order to plead in court – so as to determine whether the person in question was in a position to argue his own case effectively and held that, if not, he should be able to obtain free assistance from an officially assigned defence counsel. Thus, even in the absence of legislation affording

access to an officially assigned defence counsel in civil cases, it is up to the court to assess whether, in the interests of justice, a destitute party unable to afford a lawyer's fees must be provided with legal assistance.

120. Paragraph 4 is based on Article 17, paragraph 2, of Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime. It is designed to make it easier for victims to file a complaint by enabling them to lodge it with the competent authorities of the State of residence. A similar provision is also found in Article 38, paragraph 2, of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse of 25 October 2007 and in Article 20, paragraph 4, of the Council of Europe Convention on the Counterfeiting of Medical Products and Similar Crimes involving Threats to Public Health (CETS No. 211) of 28 October 2011.

121. Paragraph 5 provides for the possibility for various organisations to support victims. The reference to conditions provided for by internal law highlights the fact that it is up to the Parties to make provision for assistance or support, but that they are free to do so in accordance with the rules laid down in their domestic systems, for example by requiring certification or approval of the organisations, foundations, associations and other bodies concerned.

Article 20 – Protection of witnesses

122. Article 20 is inspired by Article 24, paragraph 1, of the United Nations Convention against Transnational Organized Crime (Palermo Convention) of 2000. Paragraph 1 obliges Parties to provide effective protection from potential retaliation or intimidation for witnesses giving testimony in criminal proceedings concerning trafficking in human organs. As appropriate the protection should be extended to relatives and other persons close to the witnesses. Paragraph 2 of Article 20 provides for the protection of victims insofar as they are witnesses, in the same manner as set out in paragraph 1.

123. It should be noted that the extent of this obligation for Parties to protect witnesses is limited by the wording "within its means and in accordance with the conditions provided for by its domestic law".

CHAPTER V – PREVENTION MEASURES

124. It is standard for recent criminal law conventions of the Council of Europe to contain provisions aiming at the prevention of criminal activity. The present Convention is no exception, and the negotiators found that such preventive measures should be implemented at both national and international levels in order to have effect.

Article 21 – Measures at domestic level

125. The purpose of Article 21 is to prevent trafficking in human organs by obliging Parties to address some of its root causes. Hence, Parties shall, in accordance with paragraph 1, ensure the existence of a transparent domestic system for the transplantation of organs; guarantee equitable access to transplantation services for patients, and finally, ensure adequate collection, analysis and exchange of relevant information pertaining to trafficking in human organs between all relevant domestic authorities. Parties may wish to consider the provisions of Articles 3 to 8 of the Additional Protocol to the Convention on Human Rights and Biomedicine concerning Transplantation of Organs and Tissues of Human Origin, when reviewing their current transplantation systems in the light of this article.

126. The issue of "transparency" is important, because it reduces the risk of illicitly removed organs being introduced into the legitimate domestic transplantation system. "Equitable access to transplantation services" means that Parties should ensure a "level playing field" in terms of the allocation of organs for all patients awaiting implantation. Ensuring strong co-operation between the many different competent authorities involved in combatting trafficking in human organs is a prerequisite for achieving any measure of success. In this respect, the negotiators decided to put special emphasis on the collection, analysis and exchange of information between these authorities, thus enabling them to take timely action to prevent the crimes set out in the Convention.

127. Paragraph 2, sub-paragraph *a*, obliges Parties to take measures, as appropriate, with regard to providing information and strengthening training, for example, on how to detect indications of trafficking in human organs, for healthcare professionals and relevant officials. According to sub-paragraph *b*, Parties are furthermore obliged to promote, as appropriate, awareness-raising campaigns addressed to the general public on the unlawfulness and dangers of trafficking in human organs.

128. Finally, paragraph 3 obliges Parties to prohibit the advertising of the need for, or availability of, human organs "with a view to offering or seeking financial gain or comparable advantage". The negotiators considered this provision necessary, taking into account the existence of, for example, websites where human organs are put up for sale. The implementation of this provision is left to Parties, but they must obviously ensure that it is carried out while respecting their human rights obligations, especially as set forth in the European Convention on Human Rights, the International Covenant on Civil and Political Rights, and any other obligations under international law. The Parties concerned are in particular expected to take into account the case law of the European Court of Human Rights which, based on Article 10 of the European Convention on Human Rights, guarantees the right to freedom of expression, the exercise of which may be subject to certain formalities, conditions, restrictions or penalties as prescribed by law and necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, or for the protection of health or morals (see also paragraph 30). The prohibition on advertising the need for, or availability of human organs, with a view to offering or seeking financial gain or comparable advantage, is intended to target mainly the persons operating as brokers between donors and recipients.

Article 22 – Measures at international level

129. Article 22 obliges Parties to co-operate, to the widest extent possible, with the aim of preventing trafficking in human organs by: (i) reporting to the Committee of the Parties, on its request, on the number of cases of trafficking in human organs within their respective jurisdictions; and (ii) designating a national contact point for the exchange of information of a general nature between Parties pertaining to trafficking in human organs.

130. These measures were deemed necessary by the negotiators in order to be able to assess the impact of the Convention and to ensure effective international co-operation.

CHAPTER VI – FOLLOW-UP MECHANISM

131. Chapter VI of the Convention contains provisions which aim at ensuring the effective implementation of the Convention by the Parties. The follow-up system foreseen by the Convention is based essentially on a body, the Committee of the Parties, composed of representatives of the Parties to the Convention.

Article 23 – Committee of the Parties

132. Article 23 provides for the setting-up of a committee under the Convention, the Committee of the Parties, which is a body with the composition described above, responsible for a number of Convention-based follow-up tasks.

133. The Committee of the Parties will be convened the first time by the Secretary General of the Council of Europe, within a year of the entry into force of the Convention by virtue of the 10th ratification. It will then meet at the request of a third of the Parties or of the Secretary General of the Council of Europe.

134. It should be stressed that the negotiators intended to allow the Convention to come into force quickly while deferring the introduction of the follow-up mechanism until such time as the Convention was ratified by a sufficient number of States for it to operate under satisfactory conditions, with a sufficient number of representative Parties to ensure its credibility.

135. The setting up of this body will ensure equal participation of all the Parties in the decision-making process and in the Convention follow-up procedure and will also strengthen co-operation between the Parties to ensure proper and effective implementation of the Convention.

136. The Committee of the Parties must adopt rules of procedure establishing the way in which the follow-up system of the Convention operates, on the understanding that its rules of procedure must be drafted in such a way that the implementation of the Convention by the Parties, including the European Union, is effectively monitored.

137. The Committee of Ministers shall decide on the way in which those Parties which are not member States of the Council of Europe are to contribute to the financing of these activities. The Committee of Ministers shall seek the opinion of those Parties which are not member States of the Council of Europe before deciding on the budgetary appropriations to be allocated to the Committee of the Parties.

Article 24 – Other representatives

138. Article 24 contains an important message concerning the participation of bodies other than the Parties themselves in the Convention follow-up mechanism in order to ensure a genuinely multisectoral and multidisciplinary approach. It refers, firstly, to the Parliamentary Assembly and the European Committee on Crime Problems (CDPC), and, secondly, less specifically, to other relevant intergovernmental or scientific committees of the Council of Europe which, by virtue of their responsibilities would definitely make a worthwhile contribution by taking part in the follow-up of the work on the Convention. These committees are the Committee on Bioethics (DH-BIO) and the European Committee on Transplantation of Organs (CD-P-TO).

139. The importance afforded to involving representatives of relevant international bodies and of relevant official bodies of the Parties, in addition to representatives of civil society, in the work of the Committee of the Parties is undoubtedly one of the main strengths of the follow-up system provided for by the negotiators. The wording "relevant international bodies" in paragraph 3, is to be understood as intergovernmental bodies active in the field covered by the Convention. The wording "relevant official bodies" in paragraph 4, refers to officially recognised national or international bodies of experts working in an advisory capacity for Parties to the Convention in the field covered by the Convention, in particular as regards bioethics and transplantation of human organs.

140. The possibility of admitting representatives of intergovernmental, governmental and non-governmental organisations and other bodies actively involved in preventing and combating trafficking in human organs as observers was considered to be an important issue, if the follow-up of the application of the Convention was to be truly effective.

141. Paragraph 6 prescribes that when appointing representatives as observers under paragraphs 2 to 5 (Council of Europe bodies, international bodies, official bodies of the Parties and representatives of non-governmental organisations), a balanced representation of the different sectors and disciplines involved (the law-enforcement authorities, the judiciary, the health authorities and civil society interest groups) shall be ensured.

Article 25 – Functions of the Committee of the Parties

142. When drafting this provision, the negotiators wanted to base themselves on the similar provision of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, creating as simple and flexible a mechanism as possible, centred on a Committee of the Parties with a broader role in the Council of Europe's legal work on combating trafficking in human organs. The Committee of the Parties is thus destined to serve as a centre for the collection, analysis and sharing of information, experience and good practice between Parties to improve their policies in this field using a multisectoral and multidisciplinary approach.

143. With respect to the Convention, the Committee of the Parties has the traditional follow-up competencies and:

- plays a role in the effective implementation of the Convention, by making proposals to facilitate or improve the effective use and implementation of the Convention, including the identification of any problems and the effects of any declarations or reservations made under the Convention;
- plays a general advisory role in respect of the Convention by expressing an opinion on any question concerning the application of the Convention, including by making specific recommendations to Parties in this respect. This activity does not entail mutual evaluation or similar intrusive follow-up;
- serves as a clearing house and facilitates the exchange of information on significant legal, policy or technological developments in relation to the application of the provisions of the Convention. In this context, the Committee of the Parties may avail itself of the expertise of relevant committees and other bodies of the Council of Europe.

144. Paragraph 4 states that the European Committee on Crime Problems (CDPC) should be kept periodically informed of the activities mentioned in paragraphs 1, 2 and 3 of Article 25.

CHAPTER VII – RELATIONSHIP WITH OTHER INTERNATIONAL INSTRUMENTS

Article 26 – Relationship with other international instruments

145. Article 26 deals with the relationship between the Convention and other international instruments.

146. In accordance with the 1969 Vienna Convention on the Law of Treaties, Article 26 seeks to ensure that the Convention harmoniously coexists with other treaties – whether multilateral or bilateral – or instruments dealing with matters which the Convention also covers. Article 26, paragraph 1, aims at ensuring that this Convention does not prejudice the rights and obligations derived from other international instruments to which the Parties to this Convention are also Parties or will become Parties, and which contain provisions on matters governed by this Convention.

147. Article 26, paragraph 2, states positively that Parties may conclude bilateral or multilateral agreements – or any other legal instrument – relating to the matters which the Convention governs. However, the wording makes clear that Parties are not allowed to conclude any agreement which derogates from this Convention.

148. Following the signature of a memorandum of understanding between the Council of Europe and the European Union on 23 May 2007, the CDPC took note that "legal co-operation should be further developed between the Council of Europe and the European Union with a view to ensuring coherence between Community and European Union law and the standards of Council of Europe conventions. This does not prevent Community and European Union law from adopting more far-reaching rules."

CHAPTER VIII – AMENDMENTS TO THE CONVENTION

Article 27 – Amendments

149. Amendments to the provisions of the Convention may be proposed by the Parties. They must be communicated to all Council of Europe member States, to the non-member States enjoying observer status with the Council of Europe, to the European Union and to any State invited to sign the Convention.

150. The CDPC and other relevant Council of Europe intergovernmental or scientific committees will prepare opinions on the proposed amendment, which will be submitted to the Committee of the Parties. After considering the proposed amendment and the opinion submitted by the Committee of the Parties, the Committee of Ministers may adopt the amendment by the majority provided for in Article 20.*d* of the Statute of the Council of Europe. Before deciding on the amendment, the Committee of Ministers shall consult and obtain the unanimous consent of all Parties. Such a requirement recognises that all Parties to the Convention should be able to participate in the decision-making process concerning amendments and are on an equal footing.

CHAPTER IX – FINAL CLAUSES

151. With some exceptions, Articles 28 to 33 are essentially based on the Model Final Clauses for Conventions and Agreements concluded within the Council of Europe, which the Committee of Ministers approved at the Deputies' 315th meeting, in February 1980.

Article 28 – Signature and entry into force

152. The Convention is open for signature by Council of Europe member States, the European Union, and States enjoying observer status with the Council of Europe. In addition, with a view to encouraging the participation of the largest possible number of non-member States to the Convention, this article provides them with the possibility, subject to an invitation by the Committee of Ministers, to sign and ratify the Convention even before its entry into force. By doing so, this Convention departs from previous Council of Europe treaty practice, according to which non-member States which have not participated in the drafting of a Council of Europe Convention usually accede to it after its entry into force. However, a precedent to such a provision may be found in the Council of Europe Convention on the Counterfeiting of Medical Products and Similar Crimes involving Threats to Public Health.

153. Article 28, paragraph 3, sets the number of ratifications, acceptances or approvals required for the Convention's entry into force at five. This number is not very high in order not to delay unnecessarily the entry into force of the Convention, but reflects nevertheless the belief that a minimum group of Parties is needed to successfully set about addressing the major challenge of combating trafficking in human organs. Of the five Parties which will allow the Convention to enter into force, at least three must be Council of Europe members.

Article 29 – Territorial application

154. This provision is only concerned with territories having a special status, such as overseas territories, the Faroe Islands or Greenland in the case of Denmark, or Gibraltar, the Isle of Man, Jersey or Guernsey in the case of the United Kingdom.

155. It is well understood, however, that it would be contrary to the object and purpose of this Convention for any contracting Party to exclude parts of its main territory from the Convention's scope and that it was unnecessary to make this point explicit in the Convention.

Article 30 – Reservations

156. The reservations listed in paragraph 1 of this article have been introduced in the Convention with regard to articles for which unanimous agreement was not reached among the negotiators, despite the efforts made in favour of compromise. These reservations aim at enabling the largest possible ratification of the Convention, while permitting Parties to preserve some of their fundamental legal concepts.

157. In addition, Article 30, paragraph 2, allows States and the European Union to enter a reservation limiting the scope of application of Articles 5 and 7, paragraphs 2 and 3, only when the offences are committed for the purpose of implementation and other purposes as specified by them in their reservation.

158. Paragraph 3 specifies that no reservation may be made in relation to any provision of this Convention, with the exceptions provided for in paragraphs 1 and 2 of this article.

159. Paragraph 4, by making it possible to withdraw reservations at any time, aims at reducing future divergences between domestic laws which have incorporated the provisions of this Convention.

Article 31 – Dispute settlement

160. Article 31 provides that the Committee of the Parties, in close co-operation with the European Committee on Crime Problems (CDPC) and other relevant Council of Europe intergovernmental or scientific committees, shall follow the application of the Convention and facilitate the solution of all disputes related thereto between the Parties. Co-ordination with the CDPC will normally be ensured through the participation of a representative of the CDPC in the Committee of the Parties.

Article 32 – Denunciation

161. Article 32 allows any Party to denounce the Convention.

Article 33 – Notification

162. Article 33 lists the notifications that, as the depositary of the Convention, the Secretary General of the Council of Europe is required to make, and designates the recipients of these notifications (States and the European Union).

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The Council of Europe is the continent's leading human rights organisation. It comprises 47 member states, 28 of which are members of the European Union. All Council of Europe member states have signed up to the European Convention on Human Rights, a treaty designed to protect human rights, democracy and the rule of law. The European Court of Human Rights oversees the implementation of the Convention in the member states.

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