APPENDIX I

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 10 June 2010
[CDPC plenary/2010 plenary/oj lp/cdpc list of participants]

CDPC (2010) LP Prov (Bil)

EUROPEAN COMMITTEE ON CRIME PROBLEMS (CDPC)

COMITE EUROPEEN POUR LES PROBLEMES CRIMINELS (CDPC)

59th Plenary Session / 59ème Session plénière

Strasbourg, 7-10 June / 7-10 juin 2010

Agora Building / Bâtiment Agora

Room / Salle G03

LIST OF PARTICIPANTS / LISTE DES PARTICIPANTS

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Apologised/Excusé

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COMMISSION DES QUESTIONS JURIDIQUES ET DES DROITS DE L'HOMME
**No nomination / Pas de nomination

COMMITTEE ON EQUAL OPPORTUNITIES FOR WOMEN AND MEN /
COMMISSION SUR L'EGALITE DES CHANCES POUR LES FEMMES ET LES HOMMES
**No nomination / Pas de nomination

CONGRESS OF LOCAL AND REGIONAL AUTHORITIES OF THE COUNCIL OF EUROPE / CONGRÈS DES POUVOIRS LOCAUX ET RÉGIONAUX DU CONSEIL DE L'EUROPE
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COUNCIL OF EUROPE COMMISSIONER FOR HUMAN RIGHTS / COMMISSAIRE AUX DROITS DE L'HOMME DU CONSEIL DE L'EUROPE
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MEXICO / MEXIQUE
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* * * * *

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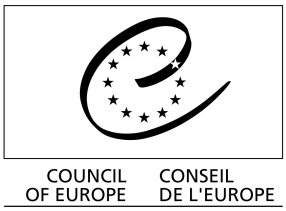
APPENDIX II



Strasbourg, 4 June 2010
CDPC/CDPC 2010plenary/OJ+LP/cdpc (2010) OJ prov. – E

CDPC (2010) OJ

EUROPEAN COMMITTEE ON CRIME PROBLEMS (CDPC)

59th Plenary Session

Strasbourg, 7-10 June 2010
09:30 am

AGENDA

Council of Europe / Conseil de l'Europe
Agora Building / Bâtiment Agora
Room G 03 / Salle G 03

1. Opening of the meeting

2. Adoption of the draft agenda

Working documents

Draft agenda	CDPC (2010) OJ Prov
Draft annotated agenda	CDPC (2010) 08

3. Council for Penological Co-operation (PC-CP)

Working documents

Revised Terms of Reference of the PC-CP	PC-CP (2010) 13

Information document on the seminar on sentence enforcement systems

- Agenda of the Seminar	CDPC (2010) 01 INF
- Conclusions of the Seminar	CDPC (2010) 02 INF

a. Foreign nationals in prisons

Working documents

Ad Hoc Terms of Reference of the Council for Penological Co-operation (PC-CP) relating to detained foreign nationals	PC-CP (2010) 01rev2

b. Dangerous offenders and preventive detention

Working documents

Dangerousness	PC-CP (2010) 03
Dangerousness and risk	PC-CP (2010) 02
Background paper on preventive detention	CDPC-BU(2010) 04rev2
Preliminary draft comparative study on the sentencing, management and treatment of 'dangerous' offenders	PC-CP (2010) 10

c. SPACE statistics

Information documents

SPACE I (Annual Penal Statistics of the Council Of Europe) – Survey 2008 **(*please note document is 122 pages long)**	PC-CP (2010) 07
SPACE II (Annual Penal Statistics of the Council of Europe on-custodial sanctions and measures served) **(*please note that the document is 59 pages long)**	PC-CP (2010) 09

4. Committee of experts on the operation of European conventions on co-operation in criminal matters (PC-OC)

Working documents

Discussion paper on the current and future role of the PC-OC	PC-OC (2010) 06
List of Decisions of the 58th meeting of the PC-OC (4-6 May)	PC-OC (2010) 11
Revised Terms of Reference of the PC-OC for 2011-2012	PC-OC (2010) 12

a. Report on progress made regarding the modernisation of the European Convention on Extradition

Working document

Mandate given by the CDPC to the PC-OC concerning normative measures	PC-OC (2007) 06

b. Possible consolidation of the European Convention on Extradition and its additional protocols

Working document

Information document on options for consolidation	PC-OC (2010) 04

c. Procedural rights in the context of international co-operation in criminal matters

Working documents

Final activity report of the Committee of Experts on Transnational Criminal Justice (PC-TJ)	PC-TJ (2005) 10

d. Project on "Effective Practical tools to facilitate judicial co-operation in criminal matters"

Working document

Report on the implementation of the first phase of the project **(*please note that the document is 36 pages long)**	DG-HL (2010) 6

5. Trafficking in organs

Working documents

Trafficking in organs, tissues and cells and trafficking in human beings for the purpose of removal of organs. Joint Council of Europe /United Nations study **(*please note document is 103 pages long)**	GR-J (2010) 01
Trafficking in organs executive summary	Exec summary
Questionnaire on trafficking in organs	CDPC (2010) 01
Replies to the questionnaire	CDPC (2010) 02
Draft opinion of the CDPC	CDPC (2010) 05

6. Standard model provisions

Working documents

Standard Model Provisions in the Council of Europe Legal Instruments in the Criminal Field	CDPC (2010) 21

7. Scientific proof in criminal matters

Working documents

Summary of arguments: Scientific evidence in Europe	CDPC-BU (2010) 22
Final Report: Scientific evidence in Europe	CDPC (2010) 10

8. Preliminary report/study on the subject of victims

Working documents

Report on the standing and rights of victims in criminal proceedings	CDPC-BU (2010) 25rev

9. Police matters

Working documents

Future activities on police matters	CDPC (2010) 09

10. The 30th Council of Europe Conference of Ministers of Justice (Istanbul, November 2010)

Working documents

Theme of the Conference	CDPC-BU (2010) 17
Elements for Resolution	CDPC-BU (2010) 27 rev

11. Protection of children against sexual exploitation and sexual abuse

Working documents

Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse	Convention
Chart of signatures and ratifications	Chart of signatures and ratifications

12. Violence against women/domestic violence

Working documents

Draft Convention on preventing and combating violence against women and domestic violence	Draft Convention

13. MONEYVAL

Working documents

MONEYVAL mandate and CDPC	CDPC-BU (2010) 19
MONEYVAL mandate	Mandate
Future mandate of MONEYVAL	CDPC-BU (2010) 23

14. Child-friendly justice

Working documents

Fifth Draft of the Council of Europe guidelines on child-friendly justice **(final version)**	CJ-S-CH (2010) 11 E
Compilation of comments made by delegations of the CDPC on the draft guidelines on child-friendly justice	CDPC (2010) 04

15. Exchange of views with the Chairs of the Consultative Council of European Prosecutors (CCPE) and the Consultative Council of European Judges (CCJE)

16. Parliamentary Assembly (PACE) Recommendations

Working Documents

PACE Recommendation 1905 (2010)	Recommendation
Draft CDPC opinion on Recommendation 1905 (2010)	CDPC (2010) 03

17. Information points

a. Cybercrime

Working documents

Financing of activities of the Parties under the Convention on Cybercrime	T-CY (2010) 03 E

b. Medicrime

Working documents

Draft Convention	CDPC (2009) 15 Fin
Draft explanatory report (for information) * 24 pages	CDPC (2009) 16 Fin

c. Cooperation between the European Union and the Council of Europe regarding criminal matters

Working documents

Possible areas of cooperation between the Council of Europe and the European Union in the field of criminal law (Criminal Law Division)	CDPC-BU (2010) 09rev

18. Elections

a. Election of a PC-CP member

Working documents

Election of a PC-CP member	CDPC (2010) 03 INF

b. Election of a member of the CDPC bureau

Working documents

Memorandum concerning the elections for the CDPC	CDPC (2010) 07

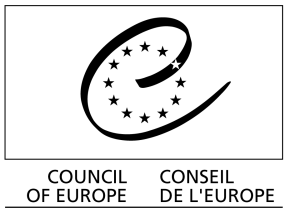
19. Any other business

Working documents
Revised Terms of Reference of the CDPC CDPC (2010) 06

20. Date of the next CDPC Bureau and Plenary meetings

21. Adoption of decisions

APPENDIX III



Strasbourg, 17 May 2010
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PC-CP (2010) 10rev

EUROPEAN COMMITTEE ON CRIME PROBLEMS
(CDPC)

Council for Penological Co-operation
(PC-CP)

THE SENTENCING, MANAGEMENT AND TREATMENT OF 'DANGEROUS' OFFENDERS

Document prepared by Mrs Nicola Padfield, Scientific expert, Fitzwilliam College, University of Cambridge, UK

The sentencing, management and treatment of 'dangerous' offenders

Scoping Paper

(*following discussions, May 2010)*

Introduction

At its 63rd Meeting (Strasbourg, 17 – 19 March 2010), the Committee held its first discussions with me, as scientific expert appointed to this project, on the future shape of the project. It was agreed that I would present a short scoping document, based on the decisions taken at the CDPC Bureau meeting on 1-2 March 2010 and on discussions held by the PC-CP, outlining possible directions for the project at the committee's next meeting, in May 2010.

The project seeks to identify key issues in relation to the management/treatment of dangerous offenders within European criminal justice systems. The key issues involve balancing public expectations of safety with the offender's right to fair treatment.

Limits of the project: It does not deal with the civil detention of people who have not been subject to criminal proceedings; nor is there a separate focus on juvenile offenders.

The purpose of this scoping paper: The Report will recognise the wide variety of current practice, and highlight good practice and human rights issues. In the following sections, I explore what I consider to be key parts of the project, developed as a result of discussions with the PC-CP.

Issues to be developed in the Report:

Background

1. The treatment of long-term and 'dangerous offenders' has become an important question in many Council of Europe member states, and thus for the CDPC, with concerns raised from a number of different perspectives. It was agreed by the CDPC that the PC-CP will carry out a study of the concept of dangerous offenders, following the conclusions of the 14th Conference of Directors of Prison Administration (CDAP), organised jointly with the Austrian Ministry of Justice (Vienna, 19-21 November 2007) which had discussed issues relating to managing prisons in an increasingly complex environment and more specifically the management of vulnerable groups of prisoners (women, juveniles, foreigners, elderly and mentally disordered) as well as of prisoners detained for terrorism or organised crime.

2. Meanwhile, the First Resolution of the 29th Council of Europe Conference of Ministers of Justice (18-19 June 2009), held at Tromsø, Norway, (on preventing and responding to domestic violence) resolved (at paragraph 23):

> to entrust the European Committee on Crime Problems (CDPC), in co-operation with other competent bodies of the Council of Europe, to examine existing best practices in member states, in full respect of human rights, related to:
> a. the assessment of the risk of re-offending and the danger to victims and society posed by perpetrators of acts of domestic violence;
> b. the supervision and treatment of such perpetrators in serious and repeated cases, in closed settings and in the community, including surveillance techniques;
> c. programmes and measures aimed at helping perpetrators improve self-control and behaviour- management and, where possible, repairing the harm done to victims.

3. The PC-CP considered this resolution at its 62nd meeting (21-23 September 2009) and shared the opinion of the CDPC Bureau that this study should be carried out within the framework of the intended study of the concept of dangerous offenders and of their supervision and treatment. I was invited to the 63rd meeting (17-19 March 2010) after which I prepared a draft scoping paper which was discussed at the 64th meeting (5-7 May 2010). This document is thus the final scoping paper, outlining the work which it is proposed that I will carry out over the next four months: a draft report will be discussed at the September 2010 PC-CP meeting. It was also decided that the draft report will be circulated afterwards to all CDPC delegations for possible comments/additions regarding the situation in their respective country and will be finalised for the PC-CP meeting in December 2010.

Defining, identifying and measuring the 'dangerous'

4. *Sentencing laws and procedures*

(i) The definition of a 'dangerous offender' adopted for the purposes of this Report by the PC-CP is **'an offender who has caused very serious personal physical or psychological harm and who presents a high probability of re-offending, causing similar harm'.**

5. The Report will explore how and why this definition was adopted. It will point out how sentencing decisions are made: very differently in some countries where there may be a separate sentencing hearing after the finding of guilt/conviction. Some countries use the term 'dangerous' in their sentencing legislation: e.g. in England and Wales. Many countries identify different 'subgroups' of offenders who may be allocated more severe penalties and/or preventive detention because of their perceived 'dangerousness': for example:

- Recidivists/dangerous recidivists/habitual repeat offenders
- sex offenders
- murderers
- terrorists
- the mentally ill or dangerously disturbed
- addicts in need of treatment
- neo-fascists/neo-nazis
- members of organised crime gangs/groups??

6. The Report will catalogue these differences, by including examples and 'case studies' to illustrate different categorisations. It will discuss the sometimes conflicting aims of punishment, and the need for consistency and clarity. It is not necessary (or feasible) within the constraints of this project to make a total inventory of all sentence categories, as applied in all member countries: it is important to recognise this, especially as this is a fast moving field, with many recent changes in many jurisdictions. As Vallotton points out (PC-CP (2010) 03), 'dangerousness' is essentially a political concept, with perceptions of dangerousness changing over time and place. By including a variety of examples the Report will seek to show that these categorisations are often based as much on political imperatives as on criminological evidence. It will point out that those who commit domestic violence may be just as 'dangerous' as those who present a more public danger. The Report will also briefly review the academic literature (in English and French only) on the ethical problems arising from identifying anyone as 'dangerous': e.g. Lippke (2008). This explains why the Report seeks to limit the definition of 'dangerous offender': many of the categories listed above are likely to be over-inclusive: including not only the dangerous, but also those who are not truly 'dangerous', according to our definition.

7. The law on post-sentencing decision-making varies greatly: this Report will identify the variety of ways in which key decisions can be categorised, and the different systems of penal and administrative procedures applied. (This will build on the work already done on early release in Padfield, van Zyl Smit and Dunkel (2010). I am already in correspondence with several academics involved in this earlier research to identify issues relevant to the current project).

Clinical expertise

(ii) The various roles of clinical assessments by psychiatrists, psychologists and other experts will also be discussed, at both sentencing and post-sentencing decision-making (e.g. before an offender can be sent to a mental hospital as an involuntary patient; or given treatment for drug or alcohol misuse). This section will identify human rights issues such as the importance of the offender's access to independent advice and expertise[1].

Actuarial risk predictors

(iii) A variety of different actuarial tools may be used, for different purposes and at different stages in the process. The paper will provide examples of some of the most used tools:

- The Risk Management Authority in Scotland maintains a directory of approved assessment tools (see www.RMAscotland.gov.uk).
- OASys (the Offender Assessment System, developed in the late 1990s by the Home Office Probation Unit and HM Prison Service for use in England and Wales, and used very often in post-conviction, pre-sentence reports)
- OGRS (Offender Group Reconviction Scale. OGRS) introduced in England and Wales in 1996 to establish a uniform national reconviction score that could be used by all Probation Services in England and Wales. It calculates the probability that a convicted offender (18 years plus) will be convicted at least once within two years for any type of offence. Initially it contained only six demographic and criminal history factors and was used to provide probation officers with guidance in writing pre-sentence reports. The latest version (OGRS 3) is based on age at the date of the current caution, non-custodial sentence or discharge from custody; gender; the type of offence for which the offender has currently been cautioned or convicted; the number of times the offender has previously been cautioned and convicted; and the length in years of their recorded criminal history (see Justice, 2009 for an excellent account).
- Risk Matrix 2000 (RM2000) (also known as the Thornton Matrix) is an evidence-based risk assessment tool, using static factors, for men over 18 with at least one conviction for a sexual offence. It is included in all parole assessment reports in England and Wales involving sexual offenders. STABLE 2007 examines the enduring dynamic risk factors amenable to intervention; ACUTE 2007 assess factors suggestive of sexual recidivism taking place within a short period of time.
- The Hare Psychopathy Checklist-Revised (this not a risk assessment tool but a tool for identifying psychopathy)

8. This section will also discuss the limitations and dangers of using both clinical and actuarial methods to label ('box') people: it is important to identify the enormous consequences of such labels[2]. There are dangers of racial and gender bias, and most importantly, the danger that 'risk aversion' encourages the identification of 'false positives': people should only be detained because of 'dangerousness' if that danger is vivid[3]. (An understanding of the practical routes in and out of 'boxes', and of judicial oversight of processes is crucial to the project – see below).

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[1] Note European Probation Rules, rule 46: Offenders shall be given the opportunity, where appropriate, to be involved in the preparation of [reports], and … its contents must be communicated to them and/or to their legal representative.

[2] See European Prison Rules, rule 71: Where national systems use assessment instruments, staff shall be trained to understand their potential value and limitations and to use these in support of their professional judgment.

[3] The concept of vivid danger has three main components: **seriousness** (what type and degree of injury is in contemplation?); **temporality**, which breaks down into **frequency** (over a given period, how many injurious acts are expected?) and **immediacy** (how soon is the next injurious act?), and **certainty** (how sure are we that this person has acted as predicted?) (Bottoms and Brownsword 1983).

Mentally disordered offenders

9. The Report must be careful to distinguish the 'criminally responsible' (CR) from the 'not-criminally-responsible' (NCR). But the NCR are as likely to be detained as the CR. This Report will examine some difficult issues:

- This report is not primarily concerned with the NCR. Yet the subject cannot be ignored: there is no clear and agreed division between those who are prosecuted and those who are not. Most countries have a procedural test which focuses on the ability of the suspect to understand court proceedings. As well, a person is not criminally liable who, when the act was committed, was suffering from a mental disorder which 'destroys his discernment or his ability to control his action' (to cite the French CP Art 122). But in practice this test may be applied in very different ways[4].

- The Report's focus will be on those who have been held to be CR: it will identify the routes which mentally ill offenders may follow through the criminal justice system. It is well known that the numbers of people in prison suffering from mental illnesses and disabilities is very (too?) high. Those who are CR but mentally ill may receive less punishment because they are less culpable. This may be explicit (see Art 34 of the Greek Penal Code, for an example): but paradoxically these offenders may then serve more restrictive, supposedly non-punitive, preventive detention (see below).

- Those labelled CR at the time of trial may be transferred from criminal justice institutions (prison) to civilian institutions (hospitals) during their sentence. They are particularly vulnerable to the abuse of rights as they move backwards and forwards through the two different systems. In many countries there are also institutions which may be difficult to classify between the penal and the civil: for example, institutions for social defence (Belgium) or *casa di cura e custodia*, and *ospedale psichiatrico giudiziale* (Italy). There are mixed institutions in which people may be detained under either criminal or civil law. This is an important topic: in several countries there are significant initiatives to limit the use of secure/judicial psychiatric hospitals (Italy; England).

10. In most systems, there are prisons and hospitals of varying degrees of security: offenders in both prisons and hospitals should be held in the least restrictive environment possible. Yet often both mentally disordered prisoners and patients may be held in conditions which are more secure than strictly necessary for what may be largely administrative convenience. Thus, the Report will identify not just issues relating to the detention of offenders, but also to levels of security and the variety of appropriate regimes and treatments.

Providing dangerous offenders with opportunities for resocialization/ rehabilitation/ reintegration

11. The right to liberty, which lies at the heart of the European Convention on Human Rights, applies to those who have served their sentences. It is also of course in the public interest that offenders should be successfully reintegrated into mainstream society. The Report will contain a short Annex on relevant Council of Europe texts (as well as relevant EU and international law) and analysing relevant jurisprudence of the ECtHR (see outline Annex attached, simply for scoping purposes).

12. Central to this study is an analysis of how dangerous offenders can be helped to lead law-abiding lives. It is very difficult to identify a line between custodial and community stages in

[4] The Report will refer to Recommendation (2004)10 of the Committee of Ministers to member states concerning the protection of the human rights and dignity of persons with mental disorder and Recommendation (2009) 3 of the Committee of Ministers to member states on monitoring the protection of human rights and dignity of persons with mental disorder.

the implementation of a sentence: freedom is often gained in small steps. But the main emphasis of the Report will be on measures applied either in custody or in the community:

(a) In custodial settings

13. The Report will discuss both the literature on 'what works' and on the reality of the poverty of provision for this category of offender within custodial institutions. During a criminal penalty, when a system allows for flexible early release, a prisoner may have to satisfy the court or tribunal which decides questions of release that he or she has reduced their risk of re-offending (by completing courses in prison, by finding accommodation or employment, for example). Clearly if the offender is not facilitated to do this, his chance of early release is diminished and his right to reintegration diminished. The Report will give examples of risk reduction programmes such as sex offender, anger management, drug and alcohol and violence reduction programmes. Temporary release is often an important step on the way to more permanent release.

14. For those who are in custody simply for the protection of the public (as a measure of prevention: see below), it is important that they have enhanced opportunities to rebut the state's view that it is necessary to detain them. Yet in many countries they will be held in ordinary prisons. Where they are held in separate wings of ordinary prisons, the conditions may not be any better than the conditions in ordinary prisons (indeed, they may be worse). It is important to underline that those who are being held not as punishment, but simply for public protection, should be held in conditions as tolerable as possible.

(b) In the community

15. Most dangerous offenders are at some point released into the community. Here the focus will be on identifying strategies for both risk management and risk reduction. Offenders may need support and help in accessing organisations (such as education and healthcare) in the community in order to maximise their prospects for avoiding re-offending. Rehabilitative programmes, such as those which deal with problems associated with drugs and alcohol, are more likely to be successful in community settings than in prison. The Report will underline the value of informed consent to treatment. Yet the level of support offered to prisoners on release in many countries is often poor. Where there is supervision, it may be aimed largely at monitoring the risk of re-offending (electronic monitoring; recall to prison; other forms of supervision and surveillance; sex offender registers/FIJAIS; ban from gun license; contact banning orders; exclusion orders etc) rather than helping the prisoner reduce the risk of re-offending. Managing dangerous offenders in the community is not straightforward: supervision and support (building trust and legitimacy) may be more effective than surveillance. This Report will therefore highlight examples of 'good practice' in ways in which offenders can be supported and managed in the community.

Secure preventive detention

16. The Report will define secure preventive detention as the detention of offenders for the purpose of public protection (as opposed to deserved or proportionate punishment). The following categories will be discussed:

- systems which explicitly do not allow secure preventive detention, or non-punitive sentencing (for example, Slovenia and (on most definitions) Spain).

- systems which use the life sentences as a public protection measure. Most European countries have some form of life sentence. This may be imposed for desert reasons (including 'whole life' sentences or life without parole) on those who have committed the most heinous crimes, but several countries explicitly use life or indeterminate sentences in order to keep in custody those who are considered to pose a significant risk of re-offending. The obvious examples are the United Kingdom and Ireland where significant numbers of offenders receive a life sentence, where a minimum term for punishment is fixed by the sentencing judge and the prisoner is only

subsequently released on the direction of a Parole Board. Practice varies elsewhere: for example, Switzerland's "internement à vie pour les délinquants sexuels ou violents jugés dangereux et non amendables".

- systems which identify longer than commensurate sentences for certain categories of offender: examples will be given of systems which include longer sentences for, for example, those who are recidivists or dangerous recidivists (France). This is sometimes justified because the repeat offender simply 'deserves' more punishment, or may be simply for public protection. The penal justification is not always made explicit in the law.

- systems which use measures explicitly of public protection (for example, *detention de sûreté* or *Sicherungsverwahrung* or *misure di sicurezza*), imposed at the time of sentence. These measures of prevention may be imposed as well as, or instead of, a criminal penalty. They may be for a fixed term, or indefinite. In several countries there has been debate whether such a measure is a criminal penalty or a civil order. Where there is a fundamental differentiation between criminal sanctions and measures of public protection, these differences may not translate easily between jurisdictions. However the differences may often be illusory: if the person is in custody (in prison, hospital or elsewhere), perhaps indefinitely, any post-sentence detention restricts liberty and should be fair and proportionate. This Report will seek to identify the threshold for preventive detention: what level of risk must the offender present before he/she can be detained? What measures are in place to ensure their release as soon as practicable? A detailed and inclusive description of all variations is inappropriate: the point of the Report is to identify core issues and concerns, not to provide an accurate up-to-date description of the law in theory and practice in all Council of Europe countries.
- some countries allow measures of prevention to be imposed at the end of the criminal penalty, or at the end of the custodial part of the penalty. These are exceptionally custodial, but more often impose limits on the offender's freedom by way of conditions. The Report will identify common conditions imposed in different jurisdictions.

17. However secure preventive detention is defined, it is essential that those detained are able to challenge their detention, or the limits on their freedom, before a court at regular intervals. Clearly the frequency of review may vary not only between jurisdictions, but also depending on the 'box' in which the offender finds himself. The nature and composition of courts and tribunals vary (judges only, or multidisplinary), and their powers as well. In reality, the 'gatekeepers' may be those professional and/or administrative officers responsible for preparing release plans. A court is unlikely to recommend the release of a 'dangerous' offender unless this is recommended. Targets set for prisoner/patients must be achievable.

18. The Report will explore typical 'journeys' that a 'dangerous' offender may make through the penal system. By using hypothetical case studies, key decisions which influence decisions to release or to lower the restrictions on liberty can be identified in order that recommendations can be made which may be helpful to decision-makers.
The Report will be more qualitative than quantitative. But statistics will be used to illustrate the different use of similar measures in different countries.

Conclusions

19. It would be inappropriate to identify the conclusions of this Report at this stage. However, it is expected that the conclusions will focus on

- the variety of ways in which criminal justice systems currently seek to protect the rights of both victims and of 'dangerous' offenders, and the inevitable tensions/dilemmas confronted

- the risks associated with the use of the label 'dangerous'; and with public expectations of 'safety' in the current European political context

- examples of good practice in the management and treatment of 'dangerous' offenders

Bibliography

20. There is an increasing literature on all the areas of the (vast) subjects discussed above. Much of this literature may be country-specific, and indeed only available in one language. This Report will include a relevant bibliography of materials (in English and French).

Annex I

Clearly the project needs to be firmly grounded in the law and jurisprudence of the European Convention on Human Rights. The final paper will contain a review of:

(i) relevant Council of Europe texts (+ EU law? International law?) e.g. Resolution (76)2 on the treatment of long-term prisoners on 17 February 1976; Rec (1999) 22 concerning prison overcrowding and prison population inflation; Rec (2003) 22 on conditional release; Rec (2006) 2 on the European Prison Rules: "In the case of those prisoners with longer sentences in particular, steps shall be taken to ensure a gradual return to life in free society" (107.2); Reports by the Commissioner for Human Rights; and The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT).

(ii) *an analysis of the key jurisprudence of the ECtHR*.

The rights of victims and society as developed in cases such as *Osman v United Kingdom*, 28 October 1998. More recently, in *Maiorano v. Italy* (28634/06) 2nd section; 15 December 2009, the Court unanimously found a breach of Art 2 doubting the decision to release him (for taking inadequate note of the evidence of his behaviour in prison) and critical of the failure of the prosecutor to refer the case back to Supervision Tribunal. Nor had the disciplinary investigations by the Ministry of Justice satisfied the procedural requirements of Art 2. And in *Rantsev v Cyprus and Russia* 25965/04 [2010] ECHR 22 (First section; 7 January 2010) the ECtHR also found a procedural violation of Art 2 by Cyprus because of the failure to conduct an effective investigation into R's death; also breaches of Art 4 by both Cyprus and Russia, and a breach of Art 5 by Russia.

However, the rights of the victim and of society do not override the rights of the offender, which have to be explored in the light of *Van Droogenbroeck v Belgium* (A/50) (1982) 4 E.H.R.R. 443; *E v Norway* 11701/85 [1990] ECHR 17 (29 August 1990) etc. The Court in *Rusu v Austria* Application No. 34082/02 (First section; 2 October 2008**)**; (2009) 49 EHRR 28, [2008] ECHR 959 found for the detained person: detention of an individual is such a serious measure that it will be arbitrary unless it is justified as a last resort where other less severe measures have been considered and found to be insufficient to safeguard the individual or public interest which might require that the person concerned be detained. See also *Leger v France 19324/02* 30 March 2009. Also *Kafkaris v Cyprus* (21906/04) (2009) 49 E.H.R.R. 35; 25 B.H.R.C. 591 where the Grand Chamber is significantly split (10-7) on whether there is a breach of Art 3. For the majority, "at the present time there is not yet a clear and commonly accepted standard amongst the member States of the Council of Europe concerning life sentences and, in particular, their review and method of adjustment. Moreover, no clear tendency can be ascertained with regard to the system and procedures implemented in respect of early release" (see paragraph 104). Yet the minority identify a clear breach of art 3. A majority of 15-2 find a breach of art 7 with regard to the quality of the law applicable at the material time; This complex decision merits clear analysis: note the impassioned dissent of Judge Borrego who criticises the Court's "ivory tower reasoning".

Two recent decisions brought against Germany underlie some of the uncertainties underlying our project: in *Puttrus v Germany* 1241/06 [2009] ECHR 687 (24 March 2009) the 5th section decided that the appellant's claim was inadmissible. The appellant argued that his detention for more than 24 years was disproportionate, not least as he had been sentenced to a much shorter term of imprisonment. He further argued that the domestic courts' failure to hear the medical experts who had examined him in person at a hearing, despite the fact that they had taken different views on the question whether his detention in a psychiatric hospital had been justified, violated his rights under Art 6 § 3 (d) of the Convention. However, the Court held that his detention was in conformity with the procedural and substantive rules of domestic law, and was not arbitrary. On the other hand, in *M v Germany* 19359/04 [2009] ECHR 2071 (Fifth section; 17 December 2009) the Court unanimously concludes that, where the prolongation of the applicant's preventive detention by the courts responsible for the execution of sentences following a change in the law, there had been a violation of Article 7 § 1 of the Convention.

Annex II

Developing Bibliography

Alvarez, J, (2008) 'Prison et recidive' *Revue de Sciences Criminelles* 667

Beck, U. (2004) *Risk Society: Towards a New Modernity.* London: Sage.

Bottoms, A.E. and Brownsword, R.(1983), 'Dangerousness and Rights' in J. Hinton (ed) *Dangerousness: Problems of Assessment and Prediction*

Brown, J. and Campbell, E., (2010) *The Cambridge Handbook of Forensic Psychology* (Cambridge University Press)

Bradley, K. (2009) The Bradley Report: Lord Bradley's review of people with mental health problems or learning disabilities in the criminal justice system. London: Department of Health.

Buchanan, A., (2002) *Care of the mentally disordered offender in the community* (Oxford UP)

Buchanan, A., Risk of Violence by Psychiatric Patients: Beyond the "Actuarial versus clinical" assessment debate (2008) 59 Psychiatric Services 184

Castellano, U, (2009) 'Beyond the courtroom workgroup: caseworkers as the new satellite of social control' 31 Law& Policy 429-462

Chauvenet , A, Gorgeon, C, Mouhanna, C and Orlic, F (1999) Contraintes et possibles: les pratiques d'execution des mesures en milieu ouvert

Clement, G and Vicentin, J-P (2009), Les bureaux d'exection des peines *Revue de science criminelle* 139

Collins, H, (2007) 'A consideration of discretion, offender attributes and the process of recall' in Padfield, N (ed) *Who to release? Parole, fairness and criminal justice?* (Willan)

Coyle, A (2009) *A Human Rights Approach to Prison Management* (2nd ed)

Craissati, J, (2007) 'The paradoxical effects of stringent risk management: community failure and sex offenders' in Padfield, N (ed) *Who to release? Parole, fairness and criminal justice?* (Willan)

Davis R, et al (2008) 'A synthesis of literature on the effectiveness of community orders' (Rand Europe)

Douglas, H (2008) 'Post-sentence preventive detention: dangerous and risky' Criminal Law Review 854

Dessecker, A, (2009) 'Dangerousness, long prison terms, and preventive measures in Germany' Champ penal Vol VI

Dünkel, F and *Dirk van Zyl Smit*, D, (2004) 'Preventive Detention of Dangerous Offenders Re-examined', 5 German Law Journal 619-637

Dünkel, F., *Drenkhahn, K., Manuela Dudeck, M*. (2009) Long-term imprisonment and the issue of human rights in member states of the European Union

Edgar, K. & Rickford, D. (2009) *Too Little, Too Late: An independent review of unmet mental health need in prison*. London: Prison Reform Trust.

Farrington, D P, et al *Assessing Violence Risk: A Framework for Practice*. 2008.

Garland, D. (2001) *The Culture of Control*. Oxford: Clarendon Press.

Grounds, A, Howes, M and Gelsthorpe, L (2003) 'Discretion in access to forensic psychiatric units' in Gelsthorpe, L and Padfield, N (eds) *Exercising Discretion: Decision-making in the criminal justice system and beyond* (Willan)

Halliday, S, et al (2009) 'Street-level bureaucracy, interprofessional relations, and coping mechanisms: a study of criminal justice social workers in the sentencing process' 31 Law & Policy 405-428

Hare, R D, *The Psychopathy Checklist Revised* (1999) Toronto: Multi-Health Systems

Hebenton, B and Seddon, T, 'From dangerousness to precaution: managing sexual and violent offenders in an insecure and uncertain age' (2009) BJ Crim 343

Holloway, K and Grounds, A, 'Discretion and the release of mentally disordered offenders' in Gelsthorpe, L and Padfield, N (eds) *Exercising Discretion: Decision-making in the criminal justice system and beyond* (Willan)

Herzog Evans, M. (2008) *Droit de l'execution des peines* (Dalloz)

Herzog-Evans, M. (2009) 'Loi penitentiare no. 2009-1436 du 24 novembre 2009: changement de paradigme penologique et toute puissance administrative' *Recueil Dalloz*

Hudson, B (2003) *Justice in the Risk Society: challenging and re-affirming justice in late modernity*, London: Sage
Justice (2009) *A New Parole System for England and Wales* (Justice)
Kemshall, H. and Wood, J. (2007), 'Beyond Public Protection: An Examination of Community Protection and Public Health Approaches to High-Risk Offenders', *Criminology & Criminal Justice*, 7: 203-22.
Lévy, R, (2007) 'Pardons and amnesties as policy instruments in contemporary France' in Tonry, M. (ed) *Crime, Punishment, And Politics In Comparative Perspective*, (Chicago: University Of Chicago Press).
Liebling, A and Price, D, (2003) 'Prison officers and the use of discretion' in Gelsthorpe, L and Padfield, N (eds) *Exercising Discretion: Decision-making in the criminal justice system and beyond* (Willan)
Lippke, R. L. 'No easy way out: Dangerous offenders and Preventive Detention (2008) 27 Law and Philosophy 383
Littlechild, B. and Fearns, D, eds. (2005) *Mental Disorder and criminal justice: policy, provision and practice* (Russell House)
Mackay, R, and Brookbanks, W (2005) 'Protecting the unfit to plead: a comparative analysis of the "trial of the facts"' 2 *Judicial Review* 173-195
Mansuy, I, (2005) 'The principle of legality and the execution of sentences in France and Germany: Law = Rights?' *Champ penal*
McNeill, F et al (2009) 'Risk, responsibility and reconfiguration: penal adaptation and misadaptation' 11 Punishment & Society 419-442
Mucchielli, L (Ed), *La frenesie securitaire: retour a l'ordre et nouveau controle social*
Nash, M and Williams, A, (2010) *The Handbook of Public Protection* (Willan)
Padfield, N, van Zyl Smit, and Duenkel, D (eds) *Release from Prison: European policy and practice* (Willan)
Padfield, N, and Maruna, S, 'The Revolving Door at the Prison Gate: Exploring the dramatic increase in recalls to prison' (2006) 6 Criminology and Criminal Justice 329-352
Poncela, P, (2007) Finir sa peine: libre ou suivi? *Revue de Sciences Criminelles* 883
Poncela, P, (2008) La crise du logement penitentiaire *Revue de Sciences Criminelles* 972
Queloz, N et al, 'Augmentation de la populations des malades mentaux incarceres' (2008) KJS 13
Reuflet, K, (2009) 'France' in Padfield, N, van Zyl Smit, and Duenkel, D (eds) *Release from Prison: European policy and practice* (Willan)
Roché, S (2005) The Transferability of Evaluation and the What Works Approach in France 11 *European Journal on Criminal Policy and Research*, pp. 297-320.
Roché, S. (2007) 'Criminal Justice Policy in France: Illusions of Severity', in Tonry, M. (ed) *Crime, Punishment, And Politics In Comparative Perspective*, (Chicago: University Of Chicago Press).
Shea, E. (2009) 'Elections and the Fear of Crime: the case of France and Italy' (2009) 15 *Eup J on Crime Policy and Research* 83
Tamburino, G, 'Peine sans santé ou santé sans peine? De l'incompatbilité au binome: expériences et démarches italiennes' (2008) KJS 9
Tournier, P et Kensey, A, Custodial sentences: adjustment or erosion? (2001) *Penal Issues* 19
Van Zyl Smit, D, *Taking Life Imprisonment Seriously in National and International Law* (2009) OUP
Van Zyl Smit, D and Dünkel, F, *Imprisonment Today and Tomorrow - International Perspectives on Prisoners' Rights and Prison Conditions* (2nd ed., 2001)
Van Zyl Smit, D and Snacken, S, *Principles of European Prison law and Policy* (2009) OUP
Walker, N, *Dangerous People* (1996)
Warsmann, J-L (2003) *Les peines alternatives à la détention, les modalités d'exécution des courtes peines, la préparation des détenus à la sortie de prison*

APPENDIX IV

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 10 June 2010
pc-cp/docs 2010/pc-cp (2010) 13rev2 – e

PC-CP (2010) 13rev2

EUROPEAN COMMITTEE ON CRIME PROBLEMS
(CDPC)

Council for Penological Co-operation
(PC-CP)

DRAFT TERMS OF REFERENCE OF THE COUNCIL FOR PENOLOGICAL CO-OPERATION (PC-CP)

Draft terms of reference of the Council for Penological Co-operation (PC-CP)
Fact sheet

Name of Committee:	Council for Penological Co-operation (PC-CP)
Compliance with Resolution Res(2005)47:	No The term of office of the Chair is three years as adopted by the Committee of Ministers at their 335th meeting (June 1981) and revised at the 600th meeting of their Deputies (September 1997), and 967th meeting (14 June 2006) which constitutes a dispensation from Article 12.e of Appendix 1 of Resolution Res(2005)47.
Programme of Activities: project(s)	**Doc CM(2010)42rev, 30 April 2010, Appendix I Programme of Activities for 2011: Pillar: RULE OF LAW, Sector: Strengthening the Rule of Law and Developing Common Standards, Programme:** Development of common standards and policies; **Sector: Ensuring Justice, Programme**: Prisons and police.
Project relevance:	Implementation of: the Declaration and the Action Plan adopted at the Third Summit of the Heads of State and Government of the Council of Europe (16-17 May 2005, Warsaw) in particular chapters I.2 and 1.4. Resolution No. 1 of the 29th Council of Europe Conference of Ministers of Justice (18 -19 June 2009, Tromsø, Norway); the Conclusions of the 15th Conference of Directors of Prison Administration (CDAP) (9-11 September 2009, Edinburgh, UK).
Project added value:	The Council of Europe is the leading European organisation in the field of penitentiary questions and community sanctions and measures. Four very important texts have been adopted recently in this area, namely Recommendation No. R (92) 16 on the European Rules on community sanctions and measures, Recommendation Rec(2006)2 on the European Prison Rules (EPR), Recommendation Rec(2008)11 on the European Rules for juvenile offenders subject to sanctions or measures and Recommendation CM/Rec(2010)1 on the Council of Europe Probation Rules. The PC-CP has the task to re-examine on a regular basis the EPR and the European Rules for juvenile offenders subject to sanctions or measures; to prepare the Conferences of Directors of Prison Administration (CDAP) and to provide guidance with regard to the collection and publication of the annual penal statistics of the Council of Europe SPACE I and SPACE II. The PC-CP is currently drafting one standard-setting instrument (a recommendation on foreign nationals in prison) and a European Code on prison staff ethics and is carrying out a study on dangerous offenders.
Financial information:	4 meetings per year of 9 members, 4 scientific experts (1 meeting during the Conference of Directors of Prison Administration). 1 enlarged meeting per year attended by 47 CoE member states in addition to the 9 members and 4 scientific experts. The PC-CP has an annual budget of € 112 000 of which: - 4 X €13 000 per meeting for the reimbursement of the travel and per diem costs of 9 members and of the 4 scientific experts - 1 X (€47 000 + € 13 000) for the enlarged meeting for the reimbursement of the travel and per diem costs of one representative per 47 member states and of the 9 members and of the 4 scientific experts. A separate budget is provided for: - € 22 500 for interpretation; - € 10 000 for translation;

	- € 19 000 for consultancy fees and for document production (including SPACE I and SPACE II).

Draft terms of reference of the Council for Penological Co-operation (PC-CP)[1]

1. Name of Committee: Council for Penological Co-operation (PC-CP)

2. Type of Committee: Ad hoc Advisory Group

3. Source of terms of reference: Committee of Ministers, on the suggestion of the European Committee on Crime Problems (CDPC)

4. Terms of reference:

Having regard to:

- Resolution Res(2005)47 on committees and subordinate bodies, their terms of reference and working methods;

- the Declaration and Action Plan adopted by the Third Summit of Heads of State and Government of the Council of Europe (Warsaw, 16-17 May 2005), in particular in particular chapters I.2 and 1.4.;

- the Council of Europe conventions and their protocols as well as to the recommendations of the Committee of Ministers in the penal field;[2]

- the relevant case law of the European Court of Human Rights;

- the standards developed by the Committee for the Prevention of Torture and Inhuman and Degrading Treatment and Punishment (CPT);

- the work of the Commissioner for Human Rights; and

- the relevant recommendations of the Parliamentary Assembly.[3]

Under the authority of the CDPC and in relation with the implementation of the Programme of Activities for 2011 (**Doc CM(2010)42rev, 30 April 2010, Appendix I) Pillar : RULE OF LAW, Sector : Strengthening the Rule of Law and Developing Common Standards, Programme** - Development of common standards and policies; **Sector : Ensuring Justice, Programme** - Prisons and police, the PC-CP
is instructed to:

i. follow the development of European prison systems and of the services concerned with the implementation of community sanctions and measures;

ii. examine the functioning and implementation of the European Prison Rules, the European Rules on

[1] Adopted: see CM/Del/Concl(87)410/35(10) and CM(87)167, Addendum V
Revised: see CM(91)118, item I.B.9 and CM/Del/Concl(91)461/20a(9)
see CM/Del/Dec(94)516/10.4 and CM(94)112, item 3
see CM/Del/Dec(94)523, item 11.3
see CM/Del/Dec(95)551, item 11.2 (first part) concl10
see also CM/Del/Dec(96)572, item 10.1 and CM(96)99, Appendix VII
see CM/Del/Dec(97)600, item 10.2a and Appendix 18 (Appendix 19 for the revised rules of procedure)
see CM/Del/Dec(2006)967, item 10.3.

[2] European Treaty Series of the relevant conventions: 24, 30, 51, 82, 86, 98, 99, 112, 126, 167 and 182. Reference number of the relevant recommendations: R (82) 16; R (82) 17; R (84) 11; R (84) 12; R (88) 13; R (89) 12; R (92) 16; R (93) 6; R (97) 12; R (98) 7; R (99) 19; R (99) 22; Rec(2000)22; Rec(2003)22; Rec(2003)23; Rec(2006)2 and Rec(2006)13.

[3] Inter alia Rec 1257 (1995); Rec 1469 (2000); Rec 1656 (2004) and Rec 1747 (2006).

community sanctions and measures, the European Rules for juvenile offenders subject to sanctions or measures, the Council of Europe Probation Rules as well as of other relevant Committee of Ministers recommendations, and make proposals for improving their practical application and if necessary for their updating;

iii. make proposals to the CDPC for revision of existing legal instruments and other legal acts in the penal field with a view to achieving coherence and comprehensiveness of the standards in the area;

iv. prepare new draft legal instruments and reports on penological matters on the basis of ad hoc terms of reference;

v. formulate opinions on penological matters at the request of the CDPC and of member states;

vi. while taking account of the progress of its ongoing work, prepare, under its responsibility and within its field of competence, proposals to the CDPC for the Programme of Activities for the coming years;

vii. prepare the Conferences of Directors of Prison Administration (CDAP) and choose rapporteurs;

viii. provide guidance with regard to the collection and publication of the annual penal statistics of the Council of Europe SPACE I and SPACE II.

5. Composition of the Committee:

5.A. Members

The PC-CP shall be composed of 9 members, elected by the CDPC, with the following desirable qualifications: high-level representatives of prison administrations and/or of services entrusted with the implementation of community sanctions and measures; researchers or other experts having a thorough knowledge of penological questions.

The Council of Europe budget will bear their travel and subsistence expenses.

5.B. Member states

i. The member states of the Council of Europe may send their representatives to an enlarged annual meeting of the Group.

The Council of Europe budget will bear the travel and subsistence expenses of one representative per member state of the Council of Europe participating in the enlarged annual meeting of the Group.

The member states of the Council of Europe may send (a) representative(s) to other meetings of the Group, without the right to vote or defrayal of expenses.

Participants

5.C.

i. The following bodies may each send a representative to meetings of the Group, without the right to vote and at the charge of the corresponding Council of Europe budget sub-heads:

- European Committee on Crime Problems (CDPC);
- European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT).

ii. The Parliamentary Assembly may send a representative/representatives to meetings of the Group, without the right to vote and at the charge of its administrative budget.

iii. The Council of Europe Commissioner for Human Rights may send a representative/representatives to meetings of the Group, without the right to vote and at the charge of its administrative budget.

5.D. Other participants

i. The European Union may send representatives to meetings of the Group, without the right to vote or defrayal of expenses.

ii. The following intergovernmental organisations may send representatives to meetings of the Group, without the right to vote or defrayal of expenses:

- United Nations Subcommittee on Prevention of Torture (SPT);
- United Nations Children's Fund (UNICEF).

5.E. Observers

The following non-governmental organisations may send a representative to meetings of the Group, without the right to vote or defrayal of expenses:

- the European Organisation for Probation (CEP);
- International Centre for Prison Studies ;
- Penal Reform International (PRI)
- International Association of Juvenile and Family Court Magistrates (IAJFCM).

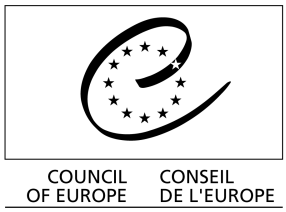
6. Working methods and structures:

In its work, the PC-CP shall be assisted, within the limits of budgetary appropriations, by four scientific experts with specific knowledge of relevant legislation and legal practice, of international norms and conventions relating to penitentiary issues and community sanctions and measures, as well as of the European Convention on Human Rights and the ensuing case law and of recent developments in research and practice in the different European member states.

7. Duration:

These terms of reference will begin on 1 January 2011 and will expire on 31 December 2013.

APPENDIX V



Strasbourg, 15 May 2010
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EUROPEAN COMMITTEE ON CRIME PROBLEMS
(CDPC)

Bureau
(CDPC-BU)

STANDARD MODEL PROVISIONS IN COUNCIL OF EUROPE CONVENTIONS IN THE FIELD OF CRIMINAL LAW

GUIDELINES FOR DRAFTERS

prepared by
the Directorate General of Human Rights and Legal Affairs (DG-HL)

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1. Introduction

At its 58th Plenary Session (12-16 October 2009), the CDPC instructed the Secretariat to look at the conventions and other relevant instruments in criminal field in order to examine the possibility of drafting standard model provisions on certain issues such as jurisdiction, sanctions and liability of legal persons, international cooperation, monitoring mechanisms to be used in future Council of Europe legal instruments in the criminal field and to report to the Bureau on the results of this work.

The present guidelines take into account the drafting issues that have most frequently been raised in past negotiations when preparing Council of Europe legal instruments in criminal field, are of a non-binding character and only intended to serve as inspiration for drafters of future legal instruments. The examples of provisions cited in the Appendix are only to serve as the starting point for drafters. Modifications of, and various choices among, model provisions will have to be made depending on the subject matter of the convention in question. The commentaries below and the notes for the drafters accompanying the examples cannot, and do not, replace the explanatory reports to the legal instruments, from which the examples have been selected, and should not be considered as official interpretations of these instruments.

2. Jurisdiction

Though the terminology is not universally agreed, jurisdiction in criminal cases may be asserted on the basis of any of the following principles or varieties thereof: the territorial principle, the nationality and passive nationality principles, the objective territorial principle, the protective principle or the principle of universal jurisdiction.

The principles of jurisdiction most frequently used in Council of Europe conventions are:

- *the territorial principle* (territory of a Party, ships flying the flag of a Party, aircrafts registered under the laws of a Party);
- *the nationality principle* (nationals of a Party or persons having their habitual residence in the territory of a Party);
- *the passive nationality principle* (victims are nationals of a Party or persons having their habitual residence in the territory of a Party).

In this context, it should be noted that, whereas jurisdiction based on the territorial principle is obligatory, it is normally possible to enter reservations to the obligation to exercise jurisdiction based on the nationality and passive nationality principles.

When choosing which principles of jurisdiction should be used in a given legal instrument, the drafters should take into account the subject matter of that instrument. In most cases, the territorial principle, possibly in conjunction with the nationality and passive nationality principles would suffice. However, the specific nature of the criminal conduct in question could necessitate the application of more far-reaching principles. An obvious example is terrorism, where variations of the protective principle (i.e. where a criminalised conduct threatens some interest of the forum state itself regardless of where it is committed) is applied. In short, jurisdiction provisions should always be tailored to the specific needs in terms of effectively combating the targeted criminal conduct.

In addition to the principles of jurisdiction to be applied by the Parties to the convention, articles dealing with jurisdiction often also contain a provision on the principle of “extradite or prosecute” (*aut dedere, aut judicare)*. In accordance with this principle, a Party is obliged to establish jurisdiction over, and prosecute, an alleged offender, present on its territory, whom it has declined to extradite to another Party having so requested, solely on the basis of the nationality of the alleged offender.

The principle of "double criminality" (i. e. making the establishment of jurisdiction over a criminalised act dependent on the criminalisation of the act in the place where it was performed and not only in the focal state) is a common principle in most penal law systems. In very exceptional cases, a provision eliminating the usual principle of "double criminality" can be added to an article on jurisdiction. So far, such a provision has only been used in the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS No. 201). Here the specific purpose was to combat the phenomenon of "sex tourism", whereby the offender would go abroad to commit acts that were criminalised under the Convention in his/her country of nationality. Without such a provision, it was deemed that the Convention would not fulfill one of its aims.

Some, but not all, articles on jurisdiction contain a provision on positive jurisdiction conflicts, i.e. situations where more than one Party asserts jurisdiction and where Parties are hence required to consult among themselves to establish which Party should be in charge of prosecution. It should be noted that the European Convention on the Transfer of Proceedings in Criminal Matters (ETS No. 73) in Articles 30 – 34 regulates the issue of "plurality of criminal proceedings". It could be considered to make a reference to the principles contained in this horizontal instrument in the explanatory report accompanying the convention being drafted.

Finally, all jurisdiction articles should contain a safeguard clause to the effect that the convention in question does not exclude any criminal jurisdiction exercised by a Party under its national law.

3. International cooperation (Mutual legal assistance and extradition)

In the framework of the Council of Europe co-operation on criminal law matters, the issues of mutual legal assistance and extradition are governed by a number of horizontal instruments, namely the European Convention on Extradition (ETS No. 24) from 1957 and the European Convention on Mutual Assistance in Criminal Matters (ETS No. 30) from 1959 together with their Additional Protocols and the Convention on Laundering, Search, Seizure and Confiscation of Proceeds from Crime (ETS No. 141) from 1990.

In addition, a number of specialised criminal law instruments contain detailed provisions on mutual legal assistance and extradition, e.g. the Convention on Cybercrime (ETS No. 185). On the other hand, many conventions only contain a general provision enabling a Party to process a request for legal assistance or extradition from a Party with which it has not concluded such a treaty, by considering the convention in question as the proper legal basis for mutual legal assistance and extradition in respect of offences established under that 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 report accompanying the convention being drafted. This approach to common rules in Council of Europe legal instruments in criminal matters with regard to international cooperation is a clear example of the important role of the CDPC in defining unambiguous criminal law policies for practitioners.

In the case of the Convention on Cybercrime, it was deemed necessary to include provisions on mutual legal assistance, partly because of the Convention being open for accession by non-member states. In practice it has turned out that very few Parties to that Convention actually make use of these provisions[1]. Consequently, in the Council of Europe Convention on Counterfeiting of Medical Products and Similar Crimes involving Threats to Public Health

[1] See "Summary of the replies to the questionnaire on Mutual Legal Assistance in Computer-Related Cases" prepared by the PC-OC for the CDPC (doc. PC-OC (2009) 05).

(hereafter "Medicrime Convention")[2] such provisions were not included, despite this draft Convention similarly being open for accession by non-member states.

4. Obligation to criminalise

A question often encountered by drafters is whether the obligation for a Party to establish a prohibited conduct as an offence under its domestic law should always be interpreted as an obligation to *criminalise* the prohibited conduct, or if the Parties have the choice between criminal and administrative procedures when transposing a convention and in particular its provisions on substantive criminal law.

Where there are no indications to the contrary, the starting point should be the criminalisation, cf. the usual chapter heading "Substantive criminal law" .

However, the use of slightly different wordings in recent conventions, including, in particular, the Medicrime Convention, seem to support a more flexible interpretation, allowing for Parties to apply administrative procedures, measures and sanctions where appropriate. As always, drafters must look at the aims of the convention and how best to ensure their attainment, as well as take into account the seriousness of the prohibited conduct, when deciding on obliging Parties to apply criminal or administrative (or other legal) sanctions.

It is clear that the wording "establish as offences" used in the above mentioned Medicrime Convention can be interpreted as covering also administrative procedures, measures and sanctions, and is not only referring to criminalisation, as would be the case, if the wordings "establish as criminal offences", "ensure that the following intentional conduct is criminalised" or "adopt such appropriate measures as may be necessary to establish as criminal offences" had been used.

Another option for drafters is to clearly indicate in the legal instrument in question which conducts should be subject to criminalisation, and which could be subject to administrative sanctions. An example in this regard is offered by the Convention on the Protection of the Environment through Criminal Law (ETS no. 172) from 1998, which contains separate provisions on criminalisation and administrative measures and sanctions.

5. Sanctions and measures

The core principle of all provisions on sanctions and measures in Council of Europe conventions in the field of criminal law is that Parties must ensure that offences established in accordance with the conventions are punishable by "effective, proportionate and dissuasive" sanctions taking into account their seriousness.

As regards sanctions and measures to which legal persons are subject, these should equally be effective, proportionate and dissuasive and include criminal or non-criminal monetary sanctions. In addition, the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS No. 201) has very detailed provisions on the sanctions and measures to be applied in the case of legal persons and with regard to seizure and confiscation. A similar model was also used in the Medicrime Convention.

Given the increasing focus on international regulation and co-operation against highly specialised criminal conducts, the model provided by CETS No. 201 seems appropriate for this subject matter, as it allows the drafters of an instrument to set out in detail the specific sanctions and measures that will most effectively serve to combat the prohibited conduct in question. However, the choice of model provision depends on the drafters' appreciation of how the aims of convention in question are best attained.

[2] At the time of writing, the Medicrime Convention had not yet been adopted by the Committee of Ministers.

6. Liability of legal persons

The provision on the criminal, civil or administrative liability of legal persons (corporate liability) is standard in all recent conventions. This provision is generally considered useful in terms of holding legal persons (corporations) accountable for possible criminal acts committed on their behalf by a natural person in their service. Legal persons are also liable in cases where it is the lack of control with a natural person under its authority which has made the commission of the offence possible.

Similarly worded provisions on the liability of legal persons can be found in Article 10 of the United Nations Convention Against Transnational Organized Crime ("Palermo Convention") from 2000, and in recent legal acts of the European Union, e.g. Article 6 of Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law.

7. Various other issues

An issue that confronts all drafters and negotiators of criminal law instruments of the Council of Europe is the choice between the following formulations: "Each Party shall take the necessary legislative **and** other measures"/"Each Party shall take the necessary legislative **or** other measures". Both formulations have been used in the past, and it is clear from the context that regardless of whether the words "and" or "or" is used, the intention is **to oblige Parties to transpose the conventions in question in their domestic systems through both legislative and other measures, as appropriate**. In order to ensure a certain coherence in the wording of legal instruments, drafters are recommended to use the word "and" in future instruments.

Another issue is **how to refer to the various steering bodies of the Council of Europe**, in the case of criminal law conventions the CDPC. Historically, the CDPC has always been referred to explicitly in conventions. However the Directorate of Legal Advice and Public International Law of the Secretariat (DLAPIL) has recently pointed out that – over the expected lifetime of a convention – steering bodies may be re-named, replaced by others or abolished. Hence, in order to avoid the need for re-opening negotiations on a convention already in force merely with a view to amending the references to steering bodies, the DLAPIL has proposed that explicit references to such bodies should be avoided and replaced by a more neutral wording, e.g. the one used in Article 16 of the Council of Europe Framework Convention on the Value of Cultural Heritage for Society:

"The Committee of Ministers, pursuant to Article 17 of the Statute of the Council of Europe, shall nominate an appropriate committee or specify an existing committee to monitor the application of the Convention, which will be authorised to make rules for the conduct of its business".

There is as yet no final decision by the Committee of Ministers on how to tackle this issue, and explicit references to the CDPC can therefore still be made in the text of a criminal law convention. In any case, it should be clarified in the accompanying explanatory report that the CDPC may be substituted by another steering body as decided by the Committee of Ministers.

As regards **monitoring mechanisms**, it should be noted that most criminal law conventions will need a monitoring mechanism. Such a mechanism may be very light, consisting basically in a "Committee of the Parties" which*, inter alia*, is tasked with monitoring the correct application of the convention in question, or conversely it may be a specialised body, as was the case of GRETA established under the Council of Europe Convention on Action against Trafficking in Human Beings (CETS No. 197). In any case, the choice of monitoring mechanism will depend on the subject matter of a convention. For more information, drafters are referred to the annexed document prepared by the Secretariat on "Monitoring mechanisms within the Council of Europe" from 2009 (Appendix II).

Most Council of Europe legal instruments are open to **signature and subsequent ratification or accession by non-member states**, and standard provisions governing their accession and association in the decision making processes of the Committee of Ministers have been developed. Due to the horizontal implications of this kind of provisions, drafters should generally not deviate from the aforesaid standard formulations. The Committee of Ministers is currently examining if a lighter procedure for signature/accession by non-member states should be introduced in order to facilitate their full participation in the co-operation under certain conventions of the Council of Europe.

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Appendix I

Jurisdiction

CETS No. 173: Criminal Law Convention on Corruption

NOTE FOR THE DRAFTERS: This is an example of the basic territorial jurisdiction combined with variations of the nationality principle. Article 17(3) contains the "aut dedere, aut judicare" principle. Article 17(4) contains the safeguard clause on criminal jurisdiction under national law.

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.

CETS No. 196: Council of Europe Convention on the Prevention of Terrorism

NOTE FOR THE DRAFTERS: In addition to the basic territorial principle combined with the nationality principle contained in Article 14(1), Article 14(2) contains four variations of the protective principle. Article 14(5) contains a provision on positive jurisdiction conflict.

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.

CETS No. 201: Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse

NOTE FOR THE DRAFTERS: Article 25(1) contains the basic territoriality principle combined with variations on the nationality principle. Letter "e" is a (rather far-reaching) sub-variety of the nationality principle. Article 25(2) contains the passive nationality principle. Article 25(4) contains the exception from the rule of double criminality. Article 25(6) ensures that proceedings can be initiated in the state of nationality or of habitual residence of the alleged offender even if a complaint by a victim has not been made in the state in which the offence took place, or the authorities of that state have not denunciated the alleged offender. Article 25(7) contains the aut dedere, aut judicare principle. Article 25(8) contains a provision on positive jurisdiction conflicts and Article 25(9) the safeguard clause on criminal jurisdiction under national law.

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 endeavor 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.

International cooperation (Mutual legal assistance and extradition)

CETS No. 201: Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse

NOTE FOR THE DRAFTERS: This is an example of the standard short provision on international co-operation, including mutual legal assistance and extradition. The key part of the provision in this regard is paragraph 3, whereas paragraphs 1, 2 and 4 contain rules more specific to the topic of this Convention.

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.

ETS No. 185: Convention on Cybercrime

NOTE FOR THE DRAFTERS: In the Convention on Cybercrime eleven articles are dedicated to international co-operation, including mutual legal assistance and extradition. The key provisions in respect of mutual legal assistance in this Convention are Articles 24 – 28. Articles 29 – 34 are concerned with matters more specific to the topic of cybercrime.

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.

Obligation to criminalise

CETS: No. 201: Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse

NOTE FOR THE DRAFTERS: The two provisions cited below are both obliging Parties to criminalise the Conducts prohibited under the Convention, but using slightly different wordings ("Each Party shall take the necessary legislative or other measures to ensure that the following intentional conduct is criminalised "/ Each Party shall take the necessary legislative or other measures to criminalise"). There is however no legal difference in the obligation for Parties to the Convention.

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.

Draft Council of Europe Convention on Counterfeiting of Medical Products and Similar Crimes involving Threats to Public Health (Medicrime Convention)

NOTE FOR THE DRAFTERS: This is an example of the intended "neutral" wording ("establish as offences under its domestic law") used throughout the draft Medicrime Convention in order to leave the national legislator with the choice of criminalisation or applying administrative procedures, measures and sanctions. In the case of Article 5 (counterfeiting of medical products), most Parties would criminalise due to the seriousness of the prohibited conduct.

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, 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 paragraph 1, as regards excipients, parts and materials, and paragraph 2, as regards excipients.

ETS No. 172: Convention on the Protection of the Environment through Criminal Law

NOTE FOR THE DRAFTERS: Unlike most legal instruments in the criminal law field, this Convention operates not only with intentional, but also negligent offences. In Article 4, Parties are given the choice between criminalisation and the application of administrative, procedures, measures and sanctions. It should be noted that the conducts enumerated in Article 4 are considered to cover less serious aspects of the conducts described in the preceding Articles 2 and 3, which both contain an obligation for Parties to criminalise.

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.

Sanctions and measures

ETS No. 173: Criminal Law Convention on Corruption

NOTE FOR THE DRAFTERS: This instrument contains an example of the basic, generally worded, provision on sanctions and measures, which does not set out in details any additional measures to be imposed by Parties on alleged offenders. Parties are thus free to impose or not measures beyond the scope of confiscation of proceeds from the crime.

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.

CETS No. 201: Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse

NOTE FOR THE DRAFTERS: As mentioned above, this Convention contains a detailed catalogue of additional measures aimed specifically at perpetrators of sexual exploitation and sexual abuse of children. This model allows drafters to tailor the response to be taken by Parties vis-à-vis alleged offenders thereby ensuring a higher degree of legal harmonisation between Parties as part of the strategy to deny offenders "safe havens" in which to operate.

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.

Liability of legal persons

CETS no. 201: Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse

NOTE FOR THE DRAFTERS: This is an example of the standard provision on the liability of legal persons. Drafters should avoid departing from this clear and straightforward wording, which, in the experience of the Secretariat, hardly ever gives raise to problems in terms of interpretation or implementation.

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.

Participation of non-member states

CETS no. 201: Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse

NOTE FOR THE DRAFTERS: This instrument contains an example of the standard provisions dealing with the participation of non-member states in a Council of Europe convention.Article 44 sets out in detail the procedure to be followed in case of amending the instrument, in particular on how to involve non-member states in the relevant decisions of the Committee of Ministers. Article 45 (1) specifies that non-member states having participated in the elaboration of the Convention may sign and reatify on the same footiong as member states. Article 46 describes the procedure for inviting a non-member state to accede to the Convention after its entry into force. It should be noted that the Committee of Ministers can only invite new Parties to accede after having consulted all the existing Parties, including non-member states, cf. Article 46 (1).

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.

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Appendix II

Strasbourg, 23 April 2009

CAHVIO (2009) 7

AD HOC COMMITTEE ON PREVENTING AND COMBATING VIOLENCE AGAINST WOMEN AND DOMESTIC VIOLENCE (CAHVIO)

MONITORING MECHANISMS WITHIN THE COUNCIL OF EUROPE

Information document prepared by the
Directorate General of Human Rights and Legal Affairs

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A Introduction

1. The Council of Europe has set up various follow-up mechanisms to international legal instruments, mostly conventions, which differ in type, legal nature and functioning, but have a common aim, i.e. to ensure the proper implementation by States of these instruments.

2. The most well known and important of these follow-up mechanisms is the European Court of Human Rights set up under the European Convention on Human rights (as amended by Protocol No. 11).

3. Numerous other Council of Europe conventions establish committees which meet regularly to exchange views on, and assess the application of, these conventions (see, for instance, the Criminal Law and Civil Law Conventions on Corruption [ETS 173 and 174], the Convention on Cybercrime [ETS 185], the Council of Europe Convention on Action against Trafficking in Human Beings [CETS 197], and the Convention on the Prevention of Terrorism [CETS 196].

4. In addition to the above, a number of other effective monitoring or follow-up mechanisms have been set up within the Council of Europe. The descriptions below outline how some of these monitoring mechanisms function.

B The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment [ETS N°126 –Stra sbourg, 26.11.1987]

5. The Convention, which came into force on 1 February 1989, provides for the setting up of a committee, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT). "The Committee [CPT] shall, by means of visits, examine the treatment of persons deprived of their liberty with a view to strengthening, if necessary, the protection of such persons from torture and from inhuman or degrading treatment or punishment."
6. The CPT's Members are independent and impartial experts from a variety of backgrounds, including lawyers, medical doctors and specialists in prison or police matters. They are elected for a four-year term by the Committee of Ministers, the Council of Europe's decision-making body, and can be re-elected twice. One Member is elected in respect of each contracting state.
7. The CPT visits places of detention (e.g. prisons and juvenile detention centres, police stations, holding centres for immigration detainees and psychiatric hospitals) to see how persons deprived of their liberty are treated and, if necessary, to recommend improvements to States.

8. CPT delegations visit contracting States periodically but may organise additional "ad hoc" visits if necessary. The Committee must notify the State concerned about the on-site visit but need not specify the period between the notification and the actual visit.

9. The recommendations which the CPT may formulate on the basis of facts found during the visit are included in a report which is sent to the State concerned and is the starting point for an ongoing dialogue. The reports are strictly confidential unless a State authorises its publication.

C <u>European Social Charter [ETS No. 035 – Turin, 18.10.1961] and Revised European Social Charter [ETS No.163 –Strasbourg, 03.05.1996]</u>

10. The European Social Charter is a treaty that protects fundamental social rights and freedoms and establishes a supervisory mechanism guaranteeing their respect by the States parties. The Revised European Social Charter entered in force in 1998 and it is replacing the 1961 European Social Charter at a steady pace.

11. The European Committee of Social Rights is the body in charge of ascertaining whether countries have honoured the undertakings set out in the Charter. Its 13 independent, impartial Members are elected by the Committee of Ministers for a period of six years, renewable once. The Committee determines whether or not national law and practice in the States parties are in conformity with the Charter (Article 24 of the Charter, as amended by the 1991 Turin Protocol).

12. The control of conformity may occur through two different types of procedures:

a) A monitoring procedure based on national reports.

13. Every year the States parties submit a report indicating how they implement the Charter in law and in practice. The Committee examines the reports and decides whether or not the situations in the countries concerned are in conformity with the Charter. Its decisions, known as “conclusions”, are published every year.

b) A collective complaints procedure

14. Under a protocol opened for signature in 1995, which came into force in 1998, collective complaints of violations of the Charter may be lodged with the European Committee of Social Rights. The complaint is directed against one of the state parties that have ratified the protocol and concerns one or more provisions of the Charter.

15. The Committee examines the complaint and, if the formal requirements have been met, declares it admissible and a written procedure is set in motion, with an exchange of memorials between the parties.

16. The Committee then takes a decision on the merits of the complaint, which it forwards to the parties concerned and the Committee of Ministers in a report, which is made public within four months of its being forwarded.

17. Finally, the Committee of Ministers adopts a resolution. If appropriate, it may recommend that the state concerned take specific measures to bring the situation into line with the Charter.

D The Group of States against Corruption (GRECO)

18. The Group of States against corruption (GRECO), is an Enlarged Partial Agreement of the Council of Europe set up in 1999. Member States of the Council of Europe, non-Member States and the European Community may participate in GRECO on an equal footing.

19. 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.

20. GRECO carries out evaluation procedures, which are divided into rounds, in respect of each of its Members. GRECO adopts a questionnaire for each evaluation round addressed to all the Members concerned. GRECO appoints different evaluation teams to evaluate each Member by carrying out an on-site evaluation visit. The evaluation teams are composed of experts appointed by the State parties to GRECO.

21. The team prepares a preliminary draft report assessing the state of the law and the practice in relation to the provisions selected for the evaluation round. The draft report is submitted to GRECO for discussion and adoption. The report contains recommendations addressed to the Member to improve its domestic laws and practices. GRECO invites the Member to report on the measures taken in order to comply with these recommendations.

E The Convention on Cybercrime [ETS N°185 - Strasbo urg, 08.11.2001]

22. The Convention on Cybercrime is the first international treaty on crimes committed via the Internet and other computer networks, dealing particularly with infringements of copyright, computer-related fraud, child pornography and violations of network security. Its main objective is to pursue a common criminal policy aimed at the protection of society against cybercrime, especially by adopting appropriate legislation and fostering international co-operation. The Convention entered into force on 1 July 2004.

23. Article 46 of the Convention 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.

24. The procedure is flexible and it is left to the parties to decide how and when to convene if they so wish. The Cybercrime Convention Committee (T-CY) met for the first time in Strasbourg in March 2006.

F Council of Europe Convention on Action against Trafficking in Human Beings [CETS N°197 – Strasbourg, 03.05.05]

25. The Council of Europe Convention on Action against Trafficking in Human Beings mainly focuses on the protection of victims of trafficking and the safeguarding of their rights. It aims at preventing trafficking as well as prosecuting traffickers.

26. The Convention provides for the setting up of an independent monitoring mechanism guaranteeing parties' compliance with its provisions. It has two pillars:

a) the Group of Experts against Trafficking in Human Beings (GRETA)

27. GRETA is in charge of monitoring the implementation of the Convention. It should have a minimum of 10 and a maximum of 15 Members among nationals of States parties to the Convention. It is a technical body composed of independent and highly qualified experts in the area of human rights, assistance and protection to victims, with the task of adopting a report and conclusions on each party's implementation of the Convention.

b) the Committee of the Parties

28. The Committee of the Parties, a political body, is composed of representatives in the Committee of Ministers of the parties to the Convention and of representatives of parties non-Members of the Council of Europe.

29. Article 38 of the Convention details the functioning of the monitoring procedure and the interaction between GRETA and the Committee of the Parties. The evaluation procedure will be divided into rounds. At the beginning of each round GRETA will autonomously define the provisions to be monitored and determine the most appropriate means to carry out the evaluation. This is likely to commence by requesting the Parties to complete a questionnaire which could then be followed up with additional requests for information. If GRETA considers it necessary it may also request information from civil society and/or organise country visits in order to obtain more information.

30. When GRETA has received all the necessary information it will prepare its draft report which will be sent to the Party concerned for comments. When the comments have been received GRETA will prepare its final report and conclusions which will be sent at the same time to the Party concerned and the Committee of the Parties. GRETA's final report together with the Party's

comments will be made public and is not subject to modification by the Committee of the Parties.

31. 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.

G The Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse

32. In July 2007, the Council of Europe adopted the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse. This instrument is the first to establish the various forms of sexual abuse of children as criminal offences, including such abuse committed in the home or the family.

33. 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.

34. The Committee of the Parties is 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. With respect to the Convention, the Committee of the Parties shall monitor the implementation of the Convention 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.

H The Commissioner for Human Rights

35. The Commissioner for Human Rights is an independent institution within the Council of Europe, mandated to promote the awareness of and respect for human rights in the 46 Council of Europe Member States.

36. The initiative for setting up the institution was taken by the Council of Europe's Heads of State and Government at their Second Summit in Strasbourg in October 1997. On 7 May 1999, the Committee of Ministers

adopted a resolution which instituted the Office of the Commissioner and elaborated the Commissioner's mandate.

37. The fundamental objectives of the Commissioner for Human Rights are laid out in Resolution (99) 50 on the Council of Europe Commissioner for Human Rights:

- To foster the effective observance of human rights, and assist Member States in the implementation of Council of Europe human rights standards;
- To promote education in and awareness of human rights in Council of Europe Member States;
- To identify possible shortcomings in the law and practice concerning human rights;
- To facilitate the activities of national ombudsperson institutions and other human rights structures; and
- To provide advice and information regarding the protection of human rights across the region.

38. The Commissioner's Office cannot act upon individual complaints, but the Commissioner can draw conclusions and take wider initiatives on the basis of reliable information regarding human rights violations suffered by individuals.

39. The Commissioner seeks to engage in permanent dialogue with Council of Europe Member States and conducts official country missions for a comprehensive evaluation of the human rights situation.

40. The Commissioner's reports contain both an analysis of human rights practices and detailed recommendations about possible ways of improvement. The reports are presented to the Committee of Ministers and the Parliamentary Assembly. Subsequently they are published and widely circulated in the policy-making and NGO community as well as the media.

41. A few years after the official visit to a country, the Commissioner or his Office carries out a follow-up visit to assess the progress made in implementing the recommendations. The Commissioner issues a follow-up report, which is also widely publicised.

42. When the Commissioner considers it appropriate, his Office issues recommendations regarding a specific human rights issue in a single Member state (or several).

43. The Commissioner is further mandated to promote awareness of human rights in Council of Europe Member States. To this end, the Commissioner's Office organises and co-organises seminars and events on various human rights themes, and seeks to engage in permanent dialogue with governments, civil society organisations and educational institutions in order to improve the public's awareness of Council of Europe human rights standards.

I Examples of provisions on monitoring in recent Council of Europe instruments

The Convention on Cybercrime

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.

Council of Europe Convention on the Prevention of Terrorism

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.

Council of Europe Convention on Action against Trafficking in Human Beings

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.

The Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse

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.

APPENDIX VI

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

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EUROPEAN COMMITTEE ON CRIME PROBLEMS
(CDPC)

SCIENTIFIC EVIDENCE IN EUROPE – ADMISSIBILITY, APPRAISAL AND EQUALITY OF ARMS

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Scientific evidence in Europe – Admissibility, appraisal and equality of arms

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Comparative study on scientific evidence drawn up for the Bureau of the Council of Europe's European Committee on Crime Problems (CDPC).

Lausanne, 25 May 2010

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Introduction

The purpose of this report is to assess the use of scientific evidence in criminal proceedings in Europe, to describe how it is currently interpreted and appraised, and to study the impact of this evidence in terms of equality of arms. This is a topical issue because criminal justice is making increasing use of scientific evidence[1], and this evidence is becoming increasingly complex. At the same time, the lawyers and citizens called upon to assess scientific evidence still lack the necessary training and are generally unfamiliar with how scientific facts are produced and the implications of this for the nature of the knowledge produced[2]. The debate is also fuelled by famous cases highlighting sometimes major dysfunctions in the laboratories working with the justice system and exaggerated interpretations of analytical findings, sometimes going so far as to prompt questions about the scientific nature of certain forensic fields.

Our presentation will start with a brief reminder of the criticisms levelled recently at the various forensic fields in Europe and the United States. The aim is to understand the reasoning behind the recent report of the US National Research Council (2009) or the recommendations of the Law Commission (2009) in England and Wales. We consider it important to review the situation and will emphasise the difficulty of formulating solutions on the basis of anecdotal cases.

We will then outline the advantages and disadvantages generally ascribed to the accusatorial and inquisitorial systems as regards the use of scientific evidence. That will enable us to move on to a discussion of the principle of equality of arms and the specific risks which these two main procedural systems present from that point of view.

The admissibility of scientific evidence will then be approached from a comparative standpoint. The main legislative options chosen in Europe and North America will be reviewed.

But once scientific evidence has been admitted into court, it still has to be properly appraised. One section of this report will therefore focus on the difficulties of interpretation and appraisal.

Lastly, we will suggest some possible ways of facilitating the evaluation of scientific evidence by judicial bodies. Several of them take the form of adjustments to the way forensic scientists and lawyers interact, which may be implemented independently of the general procedural system (accusatorial or inquisitorial).

Case literature

The increased use of DNA testing in criminal prosecutions had an unexpected corollary in the 1990s: it had been sold by its promoters as a fantastic tool for identifying perpetrators, but it now revealed a significant potential for ruling out suspects. At the same time, it allowed a fresh approach in the study of the causes of judicial errors by offering a "safe" standard against which methods of investigation and judicial processes could be measured.

The Innocence Project[3], for example, by using DNA testing to exonerate a large number of people serving long prison sentences, highlighted the great weakness of certain traditional types

1 The word "evidence" is used as a generic term in this document. Strictly speaking, from a scientific standpoint, facts established by means of forensic techniques constitute evidence for the investigation and become proof once the decision-maker (judge or jury) recognises its probative value in relation to the legal issue raised.

2 See Redmayne (1997, pp. 1028-1035).

3 Project conducted at the Cardozo Law School (Yeshiva University, New York, United States) by the lawyers Barry Scheck and Peter Neufeld which has so far made it possible to prove the innocence of 245 wrongly convicted persons, including 13 sentenced to death.

of evidence (witness evidence, confessions etc), but also identified the problematical role played by the sometimes faulty use of scientific evidence.

A body of literature has therefore grown up over the last few years criticising the errors made, intentionally or not, in the use of scientific evidence. But what is the scale of the phenomenon? What forensic disciplines are most affected by these bad practices? And how much credence should really be lent to publications adopting what is often a very alarmist tone?

A few years ago, Donald Kennedy (2003), editor of the prestigious Science magazine, posed a thought-provoking question: is the combination of the words "science" and "forensic" not an oxymoron? In support of this, he noted a blatant discrepancy between scientific standards in the field of forensic genetics and the lack of structured research as to the reliability of other forensic techniques (such as fingerprinting). The question persists, as may be seen from a reading of the recent report by the American National Research Council (2009), which describes an alarming situation in the majority of forensic sections in American laboratories, the only field to stand up to scrutiny being that of forensic genetics. We propose to conduct a realistic review of the situation below while emphasising the difficulty of formulating solutions solely on the basis of anecdotal cases.

The forensic sciences are not infallible and several publications make this point. This literature is not recent and is part of a welcome critical movement. We identify three main categories of publications which feed on one another. The first category use as their starting point cases in which questionable use of scientific evidence potentially contributed to a miscarriage of justice. They are often also based on the publication of performance tests established by the forensic laboratories. The second category are linked to the introduction of DNA profiling techniques in judicial investigation. Lastly, the third category are associated with the changes in the rules of admissibility in the United States starting in 1993 (*Daubert*[4], *Kuhmo Tire*[5] and *Joiner*[6] cases, following the 1923 *Frye*[7] decision).

Performance tests

In the United States, the first collaborative test programmes were established in the 1970s under the aegis of the LEAA (Law Enforcement Assistance Administration) and the alarming results of these assessments did not escape the notice of the judicial community. Several publications have since called on parties to adopt a critical, or indeed offensive, attitude when technical evidence is introduced by the prosecuting authorities. The seminal work here is that of Imwinkelried (1981, 1992). More recently, the excellent Modern Scientific Evidence (Faigman *et al.*, 2007) has become the indispensable source book for judges.

There is no doubt that the results of controlled-situation tests have established the regulation of laboratory procedures as a priority. Jonakait (1991) observed not only that there could be loopholes in procedures, but, furthermore, that training and research, mainly in the traditional forensic science fields, were non-existent. The same finding was made last year by the NRC (2009)[8]. At the same time, because of the rapid increase in the number of scientific techniques available to judicial bodies, training for judges in these specialist fields has become indispensable to avoid a situation where they would be required to accept the findings of scientific experts as an *ipse dixit.* Throughout most of the 20th century, however, the task of judging the admissibility of scientific evidence, although legally the judge's responsibility, in fact lay implicitly with the scientific community because the *Frye* decision established a demarcation line between

4 *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 113 S. Ct. 2786 (1993).
5 *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).
6 *General Electric v. Joiner* 522 U.S. 136 (1997).
7 *Frye v. United States* 293 F 1013 (D.C. Cir. 1923).
8 For over a year, this report has been the subject of intense debate both in the specialist press and in certain major scientific journals such as Nature. See in this connection (Editorial, 2010; Gilbert, 2010; Neufeld & Scheck, 2010; Spinney, 2010).

acceptable and unacceptable science based on recognition of the scientific field in question by the scientific community concerned. Frye thus established a more restrictive principle than the liberal criterion of Federal Rule of Evidence FRE 702 adopted in 1975. The lack of very specific criteria in FRE 702 made it an extremely flexible rule, opening courtrooms to techniques which were not recognised by the community concerned and had not yet stood the test of time (Huber, 1990).

However, with the explosion in the use of technical methods, *Frye* was criticised by specialist lawyers as being too selective and vague, preventing certain advanced techniques from being made available to prosecuting authorities because they had not yet obtained the seal of approval of the community concerned (Giannelli, 1980). Increasing reliance on experts in civil cases also led to the use of techniques of doubtful reliability. In this connection, the book by Huber (1991a) is particularly revealing in pointing to the danger that some techniques dismissed as "junk science" might be admitted into court. It was only a short step from civil to criminal cases: Giannelli (1993) noted at around the same time the lack of any real opportunities for the defence to call on experts and the limited opportunities for disputing the substance of expert scientific evidence because there was no requirement to disclose all the relevant technical documents.

The advent of genetic profiling

This general trend towards increased use of scientific techniques for criminal prosecution purposes suddenly accelerated with the possibilities offered by genetic profiling from 1990 onwards (more specifically DNA testing). Its introduction in courtrooms was gradual and was accompanied by heated debate, mainly in the English-speaking countries[9], which was eventually settled by two reports by the American NRC (1992, 1996). This intense debate – fuelled by certain high-profile cases (Giannelli, 1997) – undoubtedly prompted thinking about analytical procedures and their accreditation, disclosure practices, defence access to expert resources and the need for independent studies. Following publication of the second NRC report (1996), controversy over the admissibility of evidence based on forensic genetics died down, to the point that this technical method has become the new standard against which all forensic techniques are now measured (Lynch, 2003).

DNA testing has thus emerged as an indispensable tool in bringing to light judicial errors, especially in the context of the Innocence Project in the United States. Genetic evidence has made it possible to exonerate over 200 people, including some on death row (Gross, 2008).

The use of forensic genetics in the courts is still giving rise to criticism in publications (Thompson, 2006) highlighting serious errors committed in certain laboratories (in Houston, for example). The points which are still under debate, and have been since the 1990s (Thompson, 1993, 1995) despite technological advances, include :

- decision-making criteria regarding allele designation in genetic profiles (without judgment being influenced by a knowledge of the known profiles in the file) (Krane *et al.*, 2008; Thompson, 2009b) ;

- estimation of the risk of laboratory error and its inclusion in quantified assessment of results (Koehler, 1997; Thompson *et al.*, 2003) ;

- statistical interpretation of DNA mixtures[10], also discussed by the UK Court of Appeal[11];
- the use of ultrasensitive techniques as in the recently tried Omagh Bombing case[12] or the Reed, Reed & Garmson case[13] ;

9 See for example (Thompson & Ford, 1990; Thompson, 1993).

10 See in particular (Gill *et al.*, 2006; Morling *et al.*, 2007; Gill *et al.*, 2008; Balding & Buckleton, 2009; Stringer *et al.*, 2009).

11 *R. v. Richard Bates*, UK Court of Appeal, [2006] EWCA Crim 1395.

- issues relating to the transfer and persistence of biological fluids, as in the Weller[14] or Reed & Reed[15] cases. The type of question raised is no longer: "Whose is the DNA found on his fingers?", but "As a result of what activities did this DNA end up on his fingers?".

The dialectic between scientists and commentators is therefore constructive, encouraging transparency and recognition of the fact that contamination exists and must be controlled through appropriate quality assurance procedures. Lastly, it is sufficient to bear in mind that, however technologically advanced the tests may be, they are performed by human beings who are not infallible and that errors can be made despite the existence of a safety net with a very fine mesh due to all the protocols that have been put in place (Imwinkelried, 1991).

New admissibility criteria established by the US Supreme Court

The third factor is the radical new approach adopted by the US Supreme Court in the *Daubert* decision. By establishing specific criteria[16] (going beyond that of "general acceptance" stated several decades earlier in the *Frye* decision) which the judge must consider in assessing the admissibility of scientific evidence, American commentators forced lawyers and scientists to take a fresh look at all the forensic sciences (even the least controversial) through this new prism. From the moment the *Daubert* decision was published, critical commentators began to demand a re-appraisal of the traditional fields of forensic science[17]. As Jonakait put it (1993-1994, p. 2117) : "If *Daubert* is taken seriously, then much of forensic science is in serious trouble". From this period onwards, a significant increase was seen in the number of articles calling for a scientific approach more in line with the *Daubert* criteria in such fields as handwriting and signature analysis[18], tongue prints[19], firearms and tool marks[20], and bite marks[21].
For all these disciplines, there was also a call to abandon absolute scientific conclusions often based on the vague concept of individualisation or uniqueness[22], in favour of more modest conclusions recognising the sometimes imperfect performances measured in these disciplines. Although Collaborative Testing Services (world leader in production and management of quality tests in forensic science) recently stressed that the error rates obtained in the performance tests it administers are not a good indicator of the error rate associated with the disciplines concerned (Collaborative Testing Services Inc., 2010), Koehler (2008) recommends using these results (following appropriate analysis) to help ensure that technical evidence is used in a fully informed way. The culmination of this criticism was perhaps the call by Saks and Koehler (2005) for a change of paradigm to ensure that the rigour and transparency associated with forensic genetics were adopted in all other fields of forensic science. These conclusions were eventually incorporated into the latest NRC report (2009).

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12 *The Queen v. Sean Hoey* [2007] NICC 49. See also (Caddy *et al.*, 2008; McCartney, 2008a, 2008b; Budowle *et al.*, 2009; Gill & Buckleton, 2009).

13 *R. v. David Reed and Terence Reed, R. v. Neil Garmson*, UK Court of Appeal, [2009] EWCA Crim 2698.

14 *R. v. Peter Weller*, UK Court of Appeal, [2010] EWCA Crim 1085.

15 *R. v. David Reed and Terence Reed, R. v. Neil Garmson*, UK Court of Appeal, [2009] EWCA Crim 2698.

16 Check (a) whether the theory or technique has been tested; (b) whether it has been subjected to peer review and publication; (c) whether the potential error rates associated with the method are known; (d) whether the technique is subject to standardised procedures and quality controls; (e) whether the technique is accepted by the scientific community concerned.

17 See in particular (Jonakait, 1991; Saks & Koehler, 1991; Faigman *et al.*, 1994; Saks, 1998; Risinger & Saks, 2003).

18 (Risinger *et al.*, 1989; Saks & Risinger, 1996; Mnookin, 2001b).

19 (Cole, 2000, 2001; Mnookin, 2001a; Epstein, 2002; Imwinkelried, 2002; Sombat, 2002; Cole, 2003; Lawson, 2003; Mnookin, 2003; Saks, 2003; Benedict, 2004; Cole, 2004a, 2004b; Steele, 2004; Cole, 2005a; Schwinghammer, 2005; Zabell, 2005; Cole, 2006a; Meintjes-van der Walt, 2006; Cole, 2007; Haber & Haber, 2008; Mnookin, 2008; Haber & Haber, 2009).

20 (Steele, 2002 ; Schwartz, 2004, 2005; Nichols, 2007; Schwartz, 2007).

21 (Pretty & Sweet, 2001; Kieser, 2005; Bowers, 2006).

22 See in this connection (McLachlan, 1995; Saks & Koehler, 2008; Champod, 2009; Cole, 2009; Kaye, 2009a; Kaye, 2009c).

"Causes célèbres" in the different areas of forensic science

A series of "causes célèbres" have fuelled this critical movement. Below are some cases illustrating the problems encountered in several forensic fields:

Biological traces: A case preceding the use of forensic genetics is that of Lindy and Michael Chamberlain in Australia, who were convicted on the basis of a faulty interpretation of blood stains in their car and tears in the clothing of their child (Morling, 1987). This case contributed to the founding of the National Institute of Forensic Science[23] in Australia, as did the Pratt case, which involved highly questionable use of micro-traces (paint, fragments, etc.)(Shannon, 1984). The Preece case[24] in Scotland brought out the need for rules of disclosure in relation to technical evidence. In this case, the expert (Dr Clift) omitted to mention the results of serological analyses on the victim's body fluids. These results put into perspective the positive results obtained for Preece.

The use of DNA evidence did not change things, as shown by Fred Zain's deliberate falsification of DNA evidence (Giannelli, 2005) and by the recent practices of several American laboratories, including the one in Houston, making little use of accredited protocols (Giannelli, 2007; Thompson, 2008).

Bite marks: The Krone case (Bowers, 1996; Anonymous, 2002) and the Brooks and Brewer cases[25], handled by the highly controversial Dr West, are perfect examples of exaggeration in the interpretation of technical evidence, lending it an associative strength going far beyond what is scientifically acceptable.

Tongue marks: Over 20 cases of wrong matches were documented by Cole (Cole, 2005b, 2006b). The recent Mayfield case, in which a trace detected during the investigation of the Madrid bomb attacks in 2004 was wrongly matched up to him by three FBI experts and an independent expert, has been the subject of several published inquiries[26]. Cole says that this is possibly only the tip of the iceberg.
The Mayfield case also serves to highlight the risks posed by cognitive bias, which may, on several levels, corrupt the decisions taken by a forensic expert[27]. The report by the Office of the Inspector General (2006) states that the repetition of the four errors can be partly accounted for by the fact that the three experts who conducted their comparative examinations after the first expert were perfectly aware of the latter's final conclusion. Cognitive bias would therefore seem to have contributed to misidentification in this case. The lack of a mechanism for reducing context effects on operators was also identified in the NRC report (2009) as a major source of concern, especially in fields (such as fingerprinting or handwriting and signature analysis) with a large comparative component left entirely to an expert's judgment[28].

Comparative hair analysis: Many cases of dubious matches have been highlighted in the Innocence Project (Giannelli, 2002). The Guy Paul Morin case discussed below is also significant in this respect.

Comparative fibre analysis: Among other factors, evidence based on comparative analysis of fibres (fibres found on the girl matching the carpet in the suspect's car) and of hair played a significant part in the conviction of Guy Paul Morin in Canada. Morin was acquitted by the Ontario Court of Appeal after DNA analysis had shown that the traces of sperm found on

23 http://www.nifs.com.au/

24 *Preece v H.M. Advocate* [1981] Crim.L.R. 783.

25 http://abcnews.go.com/TheLaw/story?id=4311309&page=1

26 The reports connected with the Mayfield case are as follows: (Stacey, 2004; Smrz *et al.*, 2006; United States Department of Justice & Office of the Inspector General - Oversight and Review Division, 2006).

27 On cognitive risks, see Dror (2009), Thompson (2009a) and Dror & Cole (2010) and the relevant references.

28 The field of forensic genetics is not immune to the risk of cognitive bias (Thompson, 1995; Krane *et al.*, 2008), but the problem is less salient that in the more traditional areas of forensic science.

the murdered child's underwear could not be his. A public inquiry headed by Kaufman revealed major shortcomings in laboratory work and interaction between experts, police and judges with regard to hair and fibre evidence (Kaufman, 1998). As regards specifically the results of comparative hair analysis, the report by the committee of inquiry notes that the use by experts of vague conclusions such as "the hair might come from…", "the fibres are consistent with…" or "the fibres match", which lend themselves to a range of interpretations, was one of the causes leading to the attribution of disproportionate probative value to evidence which actually made only a limited contribution to the establishment of the facts. Where fibres are concerned, in addition to the fact that the experts provided both the inquiry and the trial court with flawed information, serious problems of contamination were brought to light. Even more seriously, subsequent technical evidence supporting the defence's line of argument was, conveniently, not disclosed.

Comparative lead bullet analysis: Following the doubts voiced by Tobin (a former FBI specialist) about the technique used (Imwinkelried & Tobin, 2003; Tobin, 2004), an investigation conducted by a committee of the NRC (National Research Council - Committee on Scientific Assessment of Bullet Lead Elemental Composition Comparison, 2004) and a debate in the specialist literature[29], the technique used routinely by the FBI was quite simply abandoned owing to the lack of an adequate validation procedure.

Fire investigation: The Willingham case (Grann, 2009), still under investigation in Texas, offers some alarming indicators regarding the quality of the techniques used during the investigation.

Explosive residue analysis (Schurr, 1993): The Judith Ward[30], Birmingham Six[31] and Maguire Seven[32] cases in the United Kingdom are emblematic of the errors committed in the 1970s in analysis of explosive residues - and specifically, in all these cases, nitro-glycerine: an expert whose competence was disputed (Dr Skuse), experts lacking objectivity and failing in their duty of transparency (Mr Elliott & Mr Higgs), unspecific method of characterisation, contamination of samples, lack of declared and standardised protocols, lack of disclosure.

The Maguire Seven case was the subject of a public inquiry (May Inquiry), which was subsequently transformed into the Royal Commission on Criminal Justice (Runciman Report (1993)). The findings led to substantial changes in the rules of disclosure, the setting up of a forensic service independent of the prosecuting authorities (now the Forensic Science Service Ltd) and the setting up of the Criminal Cases Review Commission (CCRC) and its Scottish counterpart, the SCCRC (Nobles & Schiff, 2001).

Ear print analysis: In the Dallagher[33] and Kempster[34] cases, ear prints (found at the crime scene) were used as the only means of identifying the two suspects. In both cases, the Court of Appeal, without stating that the technical evidence was inadmissible under UK case-law, nevertheless urged caution in assessing its associative strength. The subsequent DNA analysis in the Dallagher case (the DNA profile obtained from the ear print did not match Dallagher's) certainly played a large part in the authorities' decision to discontinue the proceedings. But it would be wrong to see the results of this analysis as incontrovertible proof of Dallagher's innocence[35].

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29 See the following articles: (Finkelstein & Levin, 2005; Thompson, 2005; Kaye, 2006; Kaasa *et al.*, 2007)

30 *R v Ward* (1993) 96 Cr. App. R. 1.

31 *R. v. McIlkenny* (1991), 93 Cr. App. R. 287 (C.A.).

32 *R. v. Maguire & Ors.* (1992), 94 Cr. App. R. 133.

33 *R. v. Mark Dallagher*, UK Court of Appeal - Criminal Division, [2002] EWCA Crim 1903.

34 *R. v. Mark J. Kempster*, UK Court of Appeal - Criminal Division, [2003] EWCA Crim 3555.
R. v. Mark J. Kempster, UK Court of Appeal - Criminal Division, [2008] EWCA Crim 975.

35 See in this connection the article by Schiffer & Champod (2008).

Comparative analysis of body odours by dogs: The technique of training dogs to recognise individuals (in identity parades) on the basis of odour samples taken at the crime scene is used in a number of European countries, notably in Poland, France and the Netherlands. The increased use of these techniques by credible bodies might lead one to believe that the results (positive or negative) have very great probative force. Nevertheless, several commentators advise caution[36].

Submission of a statistical argument to the court: Meintjes-van der Walt (2001, p. 166) gives a perfect summing-up of the issues involved: "The problem surrounding experts expressing probabilities in such a way that they trespass on the ultimate issue is however an issue that decision-makers should give careful consideration to when evaluating such evidence". The proper presentation of a statistical argument, such as, for example, the probabilities associated with the results of a comparison of genetic profiles, is not an easy matter, from both the expert's and the court's point of view. The UK Court of Appeal gave some guidelines following the Deen case and especially the Doheny & Adams cases[37]. Forensic genetics experts are urged to take account of these recommendations and to avoid falling into the now clearly identified but, unfortunately, still common trap of the "prosecutor's fallacy" or the "inversion fallacy"[38]. The US Supreme Court, ruling in the McDaniel et al. v. Brown case[39], recently acknowledged the danger of this error, which leads to overestimation of the real significance of technical evidence (Kaye, 2009b). The Keir case[40] in Australia is another good example of this.

The situation is by no means clarified in the other countries, leaving ample scope for error. This is a major source of concern, which is manifest in all cases where the statistical argument carries significant weight. Recent cases in which experts were called upon to express an opinion on the probability of occurrence of multiple sudden infant deaths (eg the Sally Clark[41] or Angela Cannings[42] cases in the United Kingdom) have shown once again how essential it is for the court to be able to assess figures without committing syllogistic errors that can result in undue importance being attached to the statistical argument. A similar situation arose in the case of Lucia de Berk in the Netherlands, resulting in an acquittal in April 2010 (Lucy, 2006; Meester *et al.*, 2006).

Forensic science as a source of judicial error ?

The above-mentioned British and American cases (Giannelli, 2007; Garrett & Neufeld, 2009) and Canadian cases (MacFarlane, 2006) are regularly cited, along with other incidents, in the literature on judicial errors. All the studies on this subject reflect ambivalent feelings with regard to expert scientific opinion.

On the one hand, the forensic sciences have been identified as a leading cause in the error process. Obvious shortcomings are generally noticeable with regard to training, the quality of scientific protocols or assessment of the actual significance of technical evidence. The catalogue of causes, involving technical elements to varying degrees, has alarmed a number of observers. However, the number of such cases[43] should be kept in perspective and viewed in relation to all the other criminal or civil cases deriving benefit from the forensic sciences.

36 Refer to the following articles: (Broeders, 2006; Tomaszewski & Girdwoyn, 2006; Wojcikiewicz, 2009).

37 *R v Alan James Doheny, R v Gary Adams*, UK Court of Appeal - Criminal Division, [1996] EWCA Crim 728.

38 The following two articles provide a detailed explanation of this error of reasoning; Balding et Donnelly (1994) et Leung (2002).

39 *McDaniel, Warden, et al. v. Troy Brown*, Supreme Court of the United States, 558 U.S. (2010).

40 *R. v Keir*, Supreme Court of New South Wales (Court of Criminal Appeal), CCA 60092/00 SC 70049/98.

41 *R v Sally Clark*, UK Court of Appeal - Criminal Division, [2003] EWCA Crim 1020. The case is well described in (Johnson, 2004; Nobles & Schiff, 2005).

42 *R v Angela Cannings*, UK Court of Appeal - Criminal Division, [2004] EWCA Crim 1.

43 Saks & Koehler (2005) give a large percentage (63%) of cases of judicial error where the forensic sciences were at fault. This figure was quickly put in perspective by Collins and Jarvis (2009).

On the other, the forensic sciences have been instrumental in proving certain judicial errors. Advances in DNA testing have much to do with this [44]. These technical advances have led to changes in the rules in the United States, enabling sentenced persons to apply for their cases to be reopened.

Before we go further with our analysis, however, it should be noted, as Edmond (2002) has already done, that analysis of scientific contributions as a cause of judicial error has been essentially asymmetrical in that it has shown greater severity in examining evidence against the defendant, in order to highlight any weaknesses in it, and has been generous in admitting exonerating evidence, displaying little rigour in testing its reliability and, consequently, (relatively) easily accepting the person's innocence. Now, while the asymmetry of this reasoning may be justified from a legal point of view because the evidentiary requirements are themselves unequal in criminal cases[45] - a position which we do not endorse[46] - it is indefensible from a scientific standpoint. Consequently, as Thompson (2008) points out, everyone in the criminal-law system has found it very reassuring to be able to lay the blame on a few black sheep and to propose individual actions rather than undertake a systematic analysis focusing not solely on individuals, but on the system in its entirety. Schiffer (2009) reaches the same conclusion.

Modern scientific techniques bring unquestionable benefits to the judicial system, but these techniques must be employed in an appropriate scientific and legal framework. The report by Canadian prosecutors revisits a number of judicial errors and restates some self-evident proposals for the forensic sciences (Heads of Prosecutions Committee Working Group, 2004): the need for courts to properly assess the role of experts and not allow them to usurp their decision-making role, the need to obtain appropriate conclusions in expert reports (without exaggerating their contribution) and the existence of providers of expert forensic opinions outside state channels. MacFarlane (2006) notes the need for a special assessment in admissibility proceedings when the technical evidence is based on new technologies. We will take up these points again later.

[44] See in this connection (National Institute of Justice, 1996; Garrett, 2008; Garrett & Neufeld, 2009).

[45] The prosecution must prove the defendant's guilt beyond reasonable doubt (or the judge or jury must be personally convinced thereof), while the defence only has to instil reasonable doubt in order to secure acquittal.

[46] We believe that the reliability of incriminating and exonerating evidence should be examined in a similar way, this issue being independent of that of the decision threshold.

Dealing with evidence in criminal justice systems of the accusatorial and inquisitorial traditions

General structures

The aim of this section is to give a brief description of the two main kinds of procedural arrangements in use in European states[47]. Although the distinction is exaggerated, with a good number of legal systems borrowing from the other kind, it does seem vital to give thought to the structure of legal systems before taking a critical approach to the interpretation of scientific evidence by lawyers.

In a legal system of the **accusatorial tradition**, the prosecution and defence present two versions of the facts to a jury which is required to decide which of the two versions is accurate. The judge acts as a mediator: his or her role is primarily passive and reactive. The impetus to take the investigation forward is thus provided by the parties, which bear responsibility for adducing evidence in support of their position (producing substantive evidence, having their witnesses and experts interviewed). A complex body of rules determines which evidence is admissible and which must be excluded from the proceedings. A set of rules on disclosure also ensures that each party is aware of the information needed for the trial to be prepared fairly. The proceedings are mainly oral, and the trial holds a central position, as it is only at that stage that the jury takes cognisance of the case. The witnesses (including experts) are directly examined and cross-examined by the parties during the proceedings.

In a legal system of the **inquisitorial** tradition, the investigation is conducted by an examining judge, who seeks incriminating and exonerating evidence with a view to establishing the truth; he or she collects substantive evidence, interviews witnesses and appoints experts if that proves to be necessary. The system is governed by the principle of freedom of evidence, according to which all forms of evidence are a priori admissible, with just a few exceptions. The examining judge has in his or her possession the case-file containing all the documents relating to the proceedings and all the accumulated evidence, and this file can be consulted by all the parties. This preliminary phase, which is secret, written and non-adversarial, is sometimes[48] followed by an oral, public and adversarial phase: the examining judge then forwards the case-file to a (different) judge who, or to a court which, holds proceedings based mainly on the material already in the file, of which the judge/court will therefore have prior knowledge. The judge/court can also decide to take further evidence, if insufficient information is considered to be available to reach a verdict. During the trial, witnesses and experts are usually examined by the judge, who thus has an active role and takes a more directive approach.

Dealing with evidence

When it comes to collecting and dealing with evidence in general, the benefits and drawbacks that the two systems are generally considered to have are set out below.

In **inquisitorial systems**:

- the neutrality of the investigation depends on the impartiality of the examining judge responsible for the case;

[47] We refer to this distinction between accusatorial and inquisitorial systems because these terms are convenient, but we are aware that some writers prefer to call the latter either a "mixed system" or the "reformed system" and use the adjective "inquisitorial" only when referring to the secret written procedure used in mainland Europe from the 13th century onwards (Damaška, 1973, pp. 556-557).

[48] In practice, the examining judge is, in certain legal systems, empowered to convict in a number of less serious cases, thus bringing these cases to an end at that point.

- the contribution of the defence to the building of the case is limited, a corollary of the examining judge's neutrality being that the parties have a limited power of investigation of their own[49];
- since the judge/court has prior knowledge of the case before the trial, some people perceive a risk of bias, one all the higher for the fact that a neutral judge conducted the investigation before him or her and considered that the incriminating evidence was sufficient for committal for trial;
- during the trial, the parties cannot cross-examine the witnesses and experts giving evidence unfavourable to them, and this is sometimes deemed to deprive them of an effective means of challenging those persons' credibility[50];
- the defence generally has complete knowledge of the case-file and the evidence gathered[51]. Although further evidence may be adduced by the parties or requested by the court during the hearing, the surprise effect is not part of such a judicial culture.

In **accusatorial system**s:

- the role that the defence is able to play in the investigation is theoretically greater;
- the role of the defence is nevertheless frequently limited in practice by the resources at the defendant's disposal[52];
- certain investigative acts can be carried out only by the public authority (such as conducting a search). Thus, *de facto*, the two parties are not in the same situation[53];
- *cross-examination* is considered to be a very effective means of testing the credibility of witnesses;
- examination of witnesses and experts by the parties directly may bring a risk of their evidence being distorted for the examiner's own purposes, especially if the persons under examination, while competent in their own field, are inexperienced in the art of public speaking (as is typical of experts);
- the arrangements for disclosure of information are asymmetrical[54], which is not conducive to a transparent assessment of scientific evidence[55].

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49 Coercive measures (searches, telephone tapping, etc) being prohibited to them. Also sometimes prohibited to them is contact with witnesses outside the procedural framework; otherwise Bar ethics discourage this practice. It is always open to the defence to offer evidence, which may be refused by the examining judge on the grounds that it is not relevant or that the facts have already been sufficiently proven. This brings us back to the concept of assessment of evidence at an early stage, which may, in our opinion, be problematic when that evidence is scientific, as such evidence is widely assumed to be accurate, and it will often be difficult for the defence to demonstrate the merits of a challenge to the accuracy thereof.

50 Questions are put mainly by the judge, who may authorise counsel to address the persons being interviewed directly. In such a case, however, counsel are expected to show restraint, and there is no cross-examination as such, comparable to that in accusatorial systems.

51 This statement nevertheless has to be qualified: in practice, the defendant's right of access to the file at certain stages of the procedure and right to participate in dealing with evidence (including expert report writing activities) may be restricted by certain legal systems.

52 It is clearly understood that persons in financial hardship may benefit from free legal aid, and that this may cover the costs of any expert report. Such persons will, however, be in a weaker position than the prosecution when it comes to commissioning an expert report or a second expert report, since the costs thereby incurred always entail a risk of financial loss, and the degree of inclination to take such a risk depends on the level of financial resources available.

53 Spencer (2002a, p. 626) drew the conclusion that, in England, "the duty to look for evidence for the defence belongs to nobody", and points out that, in order to alleviate this shortcoming, a "public defender" exists in certain Australian and American jurisdictions, with a status equivalent to that of the public prosecutor, and he or she is responsible for this task when the defendant so requests.

54 In practice, the prosecution service in the United Kingdom has, since 2003, been required to communicate to the defence the material collected during the investigation which might have an influence on the outcome of the case (principle of relevance), and this applies even if the material concerned is not presented as evidence at the trial. The defence, for its part, has to communicate to the prosecution its main arguments relating both to the facts and to the law. The prosecution must then reconsider the relevance of additional information on the basis of the defence arguments presented by the accused and, if need be, communicate this (Durston, 2008, p 55; Sommer, 2009, p 146).

55 We agree with the idea that, where scientific expert reports are concerned, disclosure should be symmetrical and complete. To this end, expert reports should be as full as is possible (Meintjes-van der Walt, 2003, p. 93).

Scientific evidence in particular

Where the use of scientific experts more specifically is concerned, different solutions have been adopted for the two systems[56].

Accusatorial systems rely first and foremost[57] on presentations by experts chosen by the parties, instructed and financed by them, having the same status as witnesses[58]. The main advantages and drawbacks in terms of scientific evidence which this procedural structure is acknowledged to have are set out below[59].

- the system masks areas of agreement between good scientists and encourages arguments between experts well trained in rhetoric;
- experts cannot convey their results freely, for this is always done through an examination or cross-examination, and is therefore always distorted in one direction or another; it should be pointed out in this context that, in such a system, written reports submitted by experts are traditionally brief, by which is meant largely factual, since it is during the adversarial proceedings that the contribution of the technical material in the case-file will be discussed and will take shape;
- the system is more exposed to the risk of evidence being given by (knowingly or unwittingly[60]) biased experts;
- experts are chosen for their ability to impress the court[61], and not for their scientific skills;
- the defence needs to have sufficient financial resources to be able to use experts with a reputation as good as prosecution experts';
- the accusatorial system theoretically makes it possible to cast effective doubt on any questionable statements made by the expert of one of the parties;
- if experts can potentially be perceived as the parties' "hired guns", science loses its capacity to persuade, whereas it is precisely for its reliability that science is used by the justice system;
- cross-examination is an inappropriate way of sorting the wheat from the chaff where scientific evidence is concerned: the expert's cognitive capacities (perception and memory), motivation and prejudice are frequently not in doubt, but the methodology itself may be biased and give false results[62].

As for **inquisitorial systems**, most use official experts, sometimes included on lists or from accredited laboratories, appointed by an examining judge or the court[63] and working under their

56 Although the dividing lines between them are not hermetic. While the Italian procedure is accusatorial, experts can be appointed by the authority (and the parties may also have *consulenti tecnici*).

57 Courts in the United Kingdom also make use of experts whom they appoint during the sentencing phase (Spencer, 2002a, p 633), and courts in the United States have for many years been able to call on the services of an independent scientific adviser in order to establish the facts, although they rarely do so (Black *et al.*, 1994, p 793).

58 Although their field of action is greater than that of witnesses, since they can inter alia give their opinion (and not merely recount the facts), state the opinion of their scientific colleagues (notwithstanding the prohibition of hearsay evidence), make their statement in written form (something rarely allowed for other witnesses, who have to comply with the principle of immediacy) and be paid. On this subject, see Alldridge (1999, p 149).

59 On these matters, see Spencer (1992), Alldridge (1999) and Lucas (1989).

60 It also has to be borne in mind that the expert has received instructions from one of the parties and is not therefore certain to receive all the relevant information about the question raised.

61 Spencer (1992) goes as far as to claim that the skills of the convincing expert and the good scientist are irreconcilable, for the former has to be self-confident and sure of his or her results, and uphold these under cross-examination, whereas the latter's main quality is open-mindedness.

62 Black, Ayala & Saffran-Brinks (1994, p 789).

63 However, not everyone who has scientific knowledge and works on a criminal investigation has expert status. In French law, in fact, the scene-of-crime officer who takes the first samples and carries out the first tests during an investigation does not have the status of an expert, as he or she has not been appointed by a court. The expert proper is the person who subsequently comments on the work done by the scene-of-crime officer (Spencer, 1992, p. 227). In Swiss law, the status of these officers is uncertain. The new Federal Code of Criminal Procedure (which comes into force on 1 January 2011) seems to settle the issue by making them subject to a more flexible expert reporting system (Vuille, 2010). The appropriateness of this regulation is nevertheless questionable. In practice, some officers make use of this distinction to evade unpleasant

supervision[64], with a status superior to that of witnesses. The parties are not completely cut off from the expert reporting process, since it is sometimes possible for them to request that certain specific questions be put to the expert (and therefore certain tests carried out)[65], to make comments on the expert's report once it has been placed in the case-file, to raise supplementary questions and possibly request the appointment of an expert to give a second opinion[66], to request the expert at the hearing to clarify material which is still unclear[67], and to have their own private expert interviewed. The main advantages and drawbacks of these systems are set out below[68].

- there is a risk that a court may place a considerable amount of trust in incompetent experts, protected by their special status from acrimonious attacks by the defence[69];
- in certain fields of expertise[70], this problem is counterbalanced by a system of accreditation (or official lists) intended to guarantee the competence and reliability of the scientists who assist the justice system. In practice, however, these accreditations sometimes create a situation in which the best qualified experts work exclusively with the prosecuting authorities, not only depriving the defence of valuable resources, but also, over the longer term, raising questions as to their neutrality, and may at the very least give rise to an impression that an obstacle is being placed in the way of the defence;
- the parties may raise questions throughout the procedure, giving the expert an opportunity to reconsider his or her position calmly and impartially (in his or her own office or that of an examining judge[71]), and this, in our opinion, is beneficial.

In the next section, we shall study the principle of equality of arms and the procedural stages during which it may be infringed when scientific evidence is being dealt with. The European Convention on Human Rights is binding on states which have different procedural traditions, whether accusatorial or inquisitorial, and is therefore implicitly based on the idea that the structure of the judicial system is not in itself a relevant factor in the context of compliance with the principle of equality of arms. The two kinds of system are deemed to be equally capable of guaranteeing a fair trial[72].

However, as we have tried to show in the preceding paragraphs, use is made of scientific experts according to a different logic in the two systems, and the problems associated with the preparation and interpretation of scientific evidence arise to varying degrees, depending on whether the expert has been appointed by the authority or commissioned by one of the parties. As we give thought to the use of science by the justice system, therefore, we cannot leave completely out of consideration the procedure in which it takes place, although, as we shall

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questions which might be put to them, relying specifically on their lack of expert status in the strict sense. In accusatorial systems, however, this difference does not exist, and all scientific officers are in the same position, whether they are involved in the procedure during the investigation phase or only during the trial.

64 Some inquisitorial systems allow the parties to make use of "private experts" taken on, instructed and paid by them. In such cases, provision is made for them to participate in the procedure, which grants them a status which may or may not be equivalent to that of the official experts. Other inquisitorial systems are silent about scientific advisers taken on by the parties, and here the court receives reports by such persons as mere arguments by a party, is not obliged to interview them at the hearing and, if applicable, may decide to interview them as mere witnesses. Italian law provides for scientific advisers to be appointed for each of the parties, and they work with the official expert (Art 230 CPP/Italy).

65 Art 165 CPP/France, Art 184 CPP/Switzerland.

66 Which will be all the easier to obtain if the defence successfully argues about the shortcomings of the initial expert report. This is an area which is certainly crucial where equality of arms is concerned.

67 Art 168 CPP/France.

68 On these questions, see Spencer (1992) and Alldridge (1999).

69 Spencer (2002a, p 634).

70 In Switzerland, for example, DNA tests can be carried out only by one of the six laboratories accredited by the Federal Department of Justice and Police. But there is no system of accreditation for many other fields of scientific expertise. In France, in contrast, all the experts involved in court proceedings have to go through a relatively cumbersome procedure in order to be included on the official lists of experts (Art 157 CPP/France; in exceptional cases on the basis of a reasoned decision, an expert whose name is not on the list may nevertheless be chosen).

71 Spencer (1992), p 232.

72 Summers (2006, p 104).

explain below, a large portion of the problems that this raises can be resolved by setting minimum requirements in respect of the substance and assessment of expert reports in both systems.

Equality of arms

Concept

Equality of arms is a principle which derives from the guarantee of a fair trial[73]. It requires equality between the parties in procedural terms, meaning that each of them must have a reasonable opportunity to present its case in conditions which do not place it at a clear disadvantage vis-à-vis the other parties[74]. Equality of arms is not in itself a right, but a principle intended to ensure that the parties' rights are realised in a balanced manner. The parties must also have the right of equal access to relevant information[75] and an equal opportunity to have their say and present their arguments and observations, and their scientific experts must be given equivalent status[76]. The concept does not, however, have absolute scope. According to settled case-law, equality of arms is a matter to be assessed on a concrete basis (ie in each individual case), and with the procedure as a whole being taken into account (and not each part thereof)[77].

Related to the concept of equality of arms[78] is the principle of adversarial proceedings, implying first and foremost the defendant's right to be present at the different stages of the procedure[79], and, secondly, the right of the defence to an opportunity to have knowledge of and consider the arguments of the opposing party[80] and, in particular, to comment on the evidence presented[81].

The expert's position in the procedure and its effect on equality of arms

The concept of equality of arms thus implies a comparative study of the respective positions of the parties in the procedure. In a system of the accusatorial tradition, in which each of the parties appoints its own experts, this means that the defence expert must be placed on the same footing as his or her prosecution counterpart[82]. And in an inquisitorial system? While the prosecution certainly is the defence's "opposing party", what is the status of an expert appointed by the court?

In an inquisitorial system, the expert is regarded as theoretically neutral[83], irrespective of whether his or her conclusions incriminate the defendant or are favourable to him or her. The European

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73 ECHR, case of *Delcourt v. Belgium* of 17 January 1970, § 28; ECHR, case of *Brandstetter v. Austria* of 28 August 1991, § 66.

74 ECHR, case of *Dombo Beheer B.V. v. the Netherlands* of 27 October 1993, § 33. Thus the perspective is a comparative one, and the principle is not violated if both parties were deprived to an equivalent extent of the opportunity to act (Trechsel, 2005, p 97).

75 Subject to the disclosure arrangements in accusatorial systems. In inquisitorial systems, all relevant information is collated in the case-file, to which the parties have access (sometimes subject to restrictions at certain stages of the procedure).

76 ECHR, case of *Brandstetter v. Austria* of 28 August 1991.

77 ECHR, case of *Mantovanelli v. France* of 17 February 1997.

78 Both are component parts of the right to a fair trial. This distinction, while useful in the civil context, may seem somewhat theoretical in the criminal framework, since the evidence which the defence may wish to challenge is always presented by the prosecution, and the two principles are therefore violated simultaneously (Summers, 2006, p 119).

79 A principle to which there are, however, some exceptions, particularly in appeal courts.

80 It has been deemed incompatible with the principle of adversarial proceedings for the prosecutor to decide unilaterally not to disclose certain information in order to protect a paramount public interest; a court ruling has to be issued on this subject (ECHR, case of *Rowe and Davis v. the United Kingdom* of 16 February 2000, § 66-67). On the other hand, if the defence is informed of the existence of the evidence and has the opportunity to challenge the court's decision authorising non-disclosure, the principle has not been violated.

81 ECHR, case of *Brandstetter v. Austria* of 28 August 1991, § 66-67; ECHR, case of *Rowe and Davis v. the United Kingdom* of 16 February 2000, § 60.

82 For instance, if the prosecution expert has the right to examine a witness or another expert directly, the defence expert must be given the same right.

83 Although Article 6 § 1 of the European Convention guarantees the right to a fair hearing by an independent and impartial tribunal without specifying any requirement for experts to meet the same standards, the European Court of Human Rights recognises that the conclusions of an expert appointed by that tribunal may well have considerable influence on its decision. In this context, an expert's lack of neutrality may violate the principle of equality of arms. As in respect of the tribunal, the question of impartiality is therefore examined from two

Court of Human Rights, however, has ruled in a number of judgments involving inquisitorial-type procedures that the defence had been placed in a disadvantageous position and that equality of arms had therefore been violated, since no corrective action had been taken.

In its judgment in the case of ***Eggertsdottir v. Iceland***[84], the Court considered whether the composition of the body of experts gave rise to legitimate fears of prevention of equality. The applicant in that case complained about the membership of the body which had supplied to the Icelandic Supreme Court an expert opinion on the possible causal relationship between alleged failures by the medical profession and the disability from which she suffered. The body concerned (the SMLB, State Medico-Legal Board), acting on the court's instructions, was made up of nine members, four of whom were employed at the hospital where the events had occurred, although they had played no part in these. Three of them were also members of the Forensic Chamber to which the Board had previously referred the matter for examination. The European Court of Human Rights considered that this situation gave rise to understandable apprehensions in the applicant as to the impartiality of the court, and that these apprehensions were objectively justified, in so far as the members of the SMLB had not only been instructed to give an opinion on a certain issue, an opinion which might or might not have differed from the opinion previously expressed by their National and University Hospital colleagues or the Chief Medical Executive, but had also been instructed to assess their colleagues' acts, while knowing that the Chief Medical Executive had already supported those colleagues in a document written in reaction to the judgment at first instance. Furthermore, it emerged from the judgment of the Icelandic Supreme Court that the SMLB's expert opinion had carried significant weight in its decision. Equality of arms had thus been violated.

The Court also recognised a violation of the principle of equality of arms in the case of ***Stoimenov v. the former Yugoslav Republic of Macedonia***[85]. The defendant had been prosecuted for production of, and trade in, narcotic substances. The products seized, which the defendant denied were narcotics, had been analysed by a laboratory attached to the Ministry of the Interior, which had found evidence against the defendant on the basis of reports supplied by an expert concluding that the substance was indeed opium. The applicant had asked for a second expert opinion, on the grounds that the expert was not independent and that there were doubts as to the accuracy of the reports. This request was dismissed. The domestic court convicted the applicant, largely on the basis of the expert reports. The Court took the view that the expert should be considered to be the prosecution's expert, since he had not been appointed by a court, but by the Ministry of the Interior, ie the authority which subsequently initiated the prosecution, and that the applicant should have been allowed a second expert report. He had in practice had no opportunity to have the products at issue analysed by a private scientific expert, as the products had been confiscated by the authority.

In the judgment in the case of ***Bönisch v. Austria***[86], the Court recognised a violation of the principle of equality of arms because the expert (acting on the instructions of the court) had set in motion the criminal prosecution and should therefore have been considered to be a prosecution expert, and consequently the expert presented by the defence should have been placed on an equal footing with him, which had not been the case, as the defence expert had been interviewed as a mere witness, whereas the prosecution expert had been interviewed as an expert and allowed to attend the hearings, put questions to the defendant and to witnesses and comment on their evidence.

The situation was different, on the other hand, in the case of ***Brandstetter v. Austria***[87]. The court had appointed an expert and subsequently refused to interview any other expert but him.

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angles: in the subjective sphere, a judge's personal impartiality is presumed to exist until it is proved otherwise. Irrespective of the judge's attitude, however, if one of the parties entertains doubts as to his or her impartiality, the question has to be asked of whether these doubts are objectively justified.

84 ECHR, case of *Sara Lind Eggertsdottir v. Iceland* of 5 July 2007.

85 ECHR, case of *Stoimenov v. the former Yugoslav Republic of Macedonia* of 5 April 2007.

86 ECHR, case of *Bönisch v. Austria* of 6 May 1985.

87 ECHR, case of *Brandstetter v. Austria* of 28 August 1991.

The expert instructed by the court belonged to the same institute as the person who had set in motion the criminal action, but the Court refused to regard him as a prosecution expert, because the defence did not successfully establish objective facts which would have called into question the expert's impartiality, and his mere belonging to the institute which had set in motion the prosecution was not sufficient to cast doubt on his neutrality. Taking any other view, according to the Court, would have had the effect of restricting to an intolerable extent the number of experts at the disposal of the court system. Furthermore, the mere fact that the expert appointed by the court presented evidence for the prosecution did not oblige the court to appoint other experts at the request of the defence.

Sometimes it is not so much the position of the expert in the procedure which raises a problem as the impact of his or her evidence, deemed to be unfair for some external reason. In the case of ***G.B. v. France***[88], a psychiatric expert[89] was handed, while he was being interviewed, documents relating to the applicant's previous criminal activity, including offences of rape and sexual assault, and which the public prosecutor's office had placed in the case-file at the beginning of the hearing. He was granted a 15-minute adjournment of the hearing in which to read these. When the hearing resumed, he completely changed the assessment of the situation that he had made in his written report, which he had initially confirmed orally. The defence then requested a second expert report, which was refused, and the applicant was ultimately sentenced to 18 years' imprisonment. He complained that he had not received a fair trial, particularly because his request for a second expert opinion had been rejected. The Court pointed out that a court's refusal to appoint a second expert when the first expert's conclusions were unfavourable to the defendant did not, per se, constitute a violation of the Convention[90]. However, the Court also took the view that, in that case, the expert had not just expressed a different opinion during the hearing from the one which appeared in his written report, but had performed a complete volte-face during one and the same hearing. Such an abrupt change of opinion was very likely to have made an impression on the members of the jury and therefore to have influenced the verdict. A second expert report should therefore have been ordered.

These few ECHR judgments show that there are some cases, notwithstanding the supposedly neutral position of the expert in the inquisitorial system, in which this neutrality is no longer ensured and the way in which the results of the expert examination are presented can no longer be regarded as fair. In such cases, the remedy advocated by the Court is to require courts to appoint a second expert who would act as a kind of "defence expert" in order to counterbalance the effects of the first expert report[91].

It is nevertheless our opinion that this should in fact be a last resort, for this solution brings with it its own problems, as we shall see later. In particular, it does not solve the main problem, that of knowing how the courts will assess two expert reports setting out differing theories. We therefore suggest that thought be given to an earlier stage of the procedure, the time at which expert reports are written, whatever the position of the expert in the procedure. We call for maximum exchange of information between experts and parties, from the moment that experts are appointed, for a surprise effect can only be detrimental to a balanced and considered assessment of scientific evidence. For it is indeed expert reports or statements that need to be balanced and to reflect the respective positions of the different parties.

88 ECHR, case of *G.B. v. France* of 2 October 2001.

89 In this instance we move beyond the field of reports by experts in hard sciences, but this particular case seems to provide a relevant illustration of the need for transparency when expert reports are drawn up.

90 ECHR, case of *Brandstetter v. Austria* of 28 August 1991, § 46.

91 The influence of the *Bönisch* and *Brandstetter* cases on the decisions taken by domestic courts is shown by an example from the Supreme Court of the Netherlands (Hoge Raad, 24 April 1992, NJ 1992, 644) recognising the right to a second expert opinion if certain formal conditions are met (Jakobs & Sprangers, 2000, p 379).

Participation by the defence in the production of expert reports

In order to be intellectually complete and to serve the cause of justice as effectively as possible, the work of scientific experts must always comprise an evaluation of their technical findings in the light of two opposing hypotheses: the facts as stated by the prosecution and the explanations put forward by the defence. This makes it crucial for experts to be told as soon as possible the position taken by the defendant in respect of the acts of which he or she is accused, and to be advised of any new evidence which might influence their assessment of the two conflicting hypotheses. This is why criminal procedure should allow sufficient scope for the parties (and more specifically the defence) to intervene at an early stage of the investigations and throughout the process.

In its judgment in the case of ***Mantovanelli v. France***[92], the Court took the view that the principle of adversarial proceedings had been violated in a case in which one of the parties had not been informed of the date on which the expert would interview witnesses and examine certain documents. It had not been given an opportunity to attend to put questions to the said witnesses and request additional investigations. It had not therefore been able to participate in the production of the report, a report which, once it had been drawn up, was likely to influence the court significantly, because of the complexity of the questions raised and the significant linkage between the question put to the expert and the one which the court was to decide.

The Court nevertheless pointed out that the principle of adversarial proceedings could not give rise to a general right to be present during the expert's activities, as the principle should be applied to the proceedings before the "tribunal" in the broad sense. One member of the Court, furthermore, in a dissenting opinion, stated that the principle of adversarial proceedings had to be respected in the proceedings "as a whole"[93], so it was sufficient for a party to have the opportunity to challenge the expert report in court when the evidence was assessed.

We agree with the two arguments adduced by the Court. It is difficult to imagine, particularly where reports by technical experts are concerned, the parties and their defence counsel, possibly accompanied by private advisers, "supervising" the expert's activities and monitoring the way in which he or she carries them out[94]. This would prevent the expert from taking an impartial approach to his or her work. It is, however, vital for the defence to participate, by putting questions to the expert prior to the report process and by making observations after the report has been delivered or after the expert has been interviewed at the hearing. This is the only way of guaranteeing that the expert will work in a balanced way and examine all the relevant hypotheses.

Definition of an expert report

Introduction of a broad right of participation for the defence in the production of expert reports can serve equality of arms only in so far as national legislation provides an appropriate definition of the expert report. It would in fact be conceivable for the defence in some cases to be denied some of its rights, as the law would define certain kinds of tests as routine operations automatically entrusted to certain laboratories and thereby to some extent falling outside the regulations on expert reports[95].

92 ECHR, case of *Mantovanelli v. France* of 17 February 1997, § 33 and 34.

93 In other words the proceedings must be regarded as a single entity, and not in terms of their separate phases.

94 Criminal procedure in Italy provides for scientific advisers to the parties to be present during the reporting expert's activities (Art 230/2 CPP/Italy).

95 See, for instance, Switzerland's new criminal procedure, which excludes from the ordinary arrangements for expert reports a range of laboratory tests deemed to be reliable enough not to have to be commissioned in an adversarial context (cf Art 184 (3), 2nd sentence, CPP; see Vuille (2010).

Potential risks in terms of equality of arms

In both accusatorial and inquisitorial systems, the defendant is placed in a position of disadvantage as compared to the prosecution, so equality of arms may well be infringed. This occurs for the following reasons inter alia[96]:

- *Stage at which the defence intervenes*
  The second or defence expert becomes involved at a later stage than the official/prosecution expert, being appointed either in response to the first expert report or by defence counsel, in which case a suspect has already been arrested. So, during the critical phase in which samples are taken, who ensures that the crime scene is examined in a neutral and comprehensive manner? How can a second or defence expert carry out the same tests as the official/prosecution expert if the latter has (several weeks or months previously) used destructive methods leaving no further scope whatsoever for analysis?

  The shortcomings of the investigation at this stage are very difficult (or may even be impossible) to make good, inevitably placing the defence at a disadvantage vis-à-vis the prosecution. Consequently, in many cases, the second or defence expert will not examine samples in their original form, but those pre-selected and prepared by the official/prosecution experts[97], and his or her role will usually be confined to an examination after the event of the work done by the official/prosecution expert[98].

- *Shortage of experts*
  In any given field, and in any given court, it is frequently the case that few experts sufficiently independent in professional terms and capable of giving a reliable and useful opinion are available. The situation in this respect is similar in countries of both the inquisitorial and the accusatorial traditions. A court may therefore have difficulty finding an appropriate expert[99], in the same way as defence counsel may have difficulty locating a skilled expert working in equivalent conditions to those of prosecution experts[100]. Assuming that European harmonisation occurs, it would be an advantage to pool experts together in their specialist fields.

- *Lack of scientific knowledge and resources on the part of the defence*
  It is the specific task of those who write expert reports for the courts to give those courts knowledge that they need but do not possess; a lack of knowledge thus clearly exists. In our opinion, however, the problem runs deeper than this: firstly, lawyers and judges are unaware of the underlying scientific implications of an expert report, which they consider to be in principle accurate[101], making it awkward for the defence to challenge it in any way and extremely unlikely that such a challenge would be successful.

  And secondly, even if they wished to make a critical assessment of an expert report, their scientific knowledge is so incomplete that they would be incapable of identifying the evidence which might give rise to a problem. It will frequently be up to the defence to demonstrate why the expert report needs to be called into question and, should this be the case, why a second report is necessary, which is a very difficult task if the lawyer has

96 On these issues, see Roberts (1994, p 477) and Spencer (1992, p 221ss).

97 Roberts (1994, p 491)

98 Spencer (2002a, p 633); Alldridge (1999). In an inquisitorial system, the fact that it can only point to alleged shortcomings in the official expert report may have the effect of discrediting the defence (as it is criticising a person selected by the court).

99 A problem which was also noted in the Eggertsdottir case (ECHR, *case of Sara Lind Eggertsdottir v. Iceland* of 5 July 2007).

100 The court, or the prosecution, effectively holds a long and varied address list, as well as enjoying well tried and tested working relations with skilled experts working for accredited bodies. The second or defence expert, in contrast, will have to be sought outside these well-known communities and will not have the same level of prestige, and the court, or defence counsel, will not enjoy the same relationship of trust with him or her as with an expert with whom they have been working for a long time.

101 For the reasons already mentioned: trust in science in general, and in the appointed expert in particular.

no scientific training[102]. The defence can, of course, obtain the assistance of a private adviser for this purpose, but has to pay for this if it does so (at least on a provisional basis, pending the decision on the case).

The second generation of scientific evidence (here we are using Murphy's suggested terminology[103]) raises even more problems in terms of the defence's access to the facilities needed in order to refute effectively the official/prosecution expert's statements. In particular, it calls for highly complicated and very costly analytical instruments[104], its use involves databases managed by governments[105], and its interpretation in terms of discriminant power is sometimes done with the assistance of databases constructed in a way which is difficult for the defence to ascertain[106].

In our opinion, accusatorial and inquisitorial systems alike do not lend themselves to sound management of scientific evidence. The accusatorial system, by giving the parties prime responsibility for finding evidence, presents the risk of penalising the defendants who are already at the greatest disadvantage. Furthermore, it entrusts to the judge or jurors the task of assessing scientific evidence in the worst conditions imaginable, ie in a spirit of "contradiction for contradiction's sake", and it seems to us that these persons have little capacity to determine the probative value to be given to such evidence on the sole basis of the scientific merits of the evidence, irrespective of the personality and behaviour of the experts and lawyers during the hearing. As for the inquisitorial system, it is based first and foremost on the court's trust in an expert assumed to be both neutral and competent. Hardly ever is the expert's work in fact called into question, and when it is, the evidence is not assessed on its scientific merits, but on the basis of exogenous factors. The assessment of evidence can therefore be described as similar, and unsatisfactory, in both systems, for it is based on elements extraneous to the scientific method itself.

102 In this context, see Murphy (forthcoming, pp 24-25).

103 Murphy (forthcoming, pp 4-6) distinguishes between first and second generation scientific evidence, the latter having added value because (1) it is found in the context of a wide range of offences; (2) it is very frequently detected by the persons responsible for finding evidence at a crime scene; (3) developments in this field have often coincided with the introduction of databases offering a significant investigative capacity (easy identification of suspects). In addition, second generation scientific evidence is distinguished from that of the first generation by two facts: (4) it is based on complex techniques, and (5) it raises hitherto (almost) unknown ethical issues and issues relating to privacy.

104 Which brings us back to the question of the number of experts available in any given area, and also to that of access to accredited laboratories (which sometimes refuse to carry out tests other than on the instructions of a judicial authority, and cannot therefore be instructed by a lawyer to produce a private expert report; a lawyer wishing to obtain such a report will thus have to use non-accredited laboratories or persons, and this will in principle have a detrimental effect on the court's assessment).

105 Databases on which the DNA and/or fingerprints of persons convicted or under suspicion and evidence found at crime scenes are stored.

106 In the DNA field, for instance, the rarity of a profile (and consequently the degree to which it is incriminating) is calculated using databases which record the frequency of occurrence of certain genetic characteristics in a given population. These databases are not public, meaning that the defence's experts have no access to them, and cannot know how they have been created.

Admissibility of scientific evidence

Introduction

Contemporary European legal systems are familiar with the principle of freedom of evidence, meaning that a court may consider any type of evidence to establish the facts (there is no exhaustive list of admissible types of evidence[107] and in general there is no mandatory evidence whose absence would prevent conviction[108]). Yet there are two kinds of exception to this rule[109]:

A first category of evidence cannot be admitted because, despite its (hypothetical) reliability, **considerations extraneous to the quest for truth** dictate that it be left out of account. Thus certain legal systems, both accusatorial and inquisitorial, preclude consideration of a number of classes of evidence when adduced contrary to the statutory provisions[110], for example in breach of the prohibition of torture, by means limiting the free will of the person subjected to them (hypnosis, narco-analysis etc) or again in breach of the procedural rules governing the manner of obtaining certain evidence (searches or telephone tapping without a valid warrant, questioning of a witness not having been informed of his or her rights, taking a biological sample outside the legal framework, etc). This stems from a concern to ensure that the state complies with the same rules of conduct as it imposes on its citizens in the prosecution of offences.

A second category of evidence cannot be admitted because it would be **detrimental to the discovery of the truth.** It is excluded because it poses too great a risk of biasing the decision-maker (judge or jury) in relation to what it really contributes to the proceedings. Continental legal systems are traditionally less responsive to this argument than the British and American ones, and hold that the judge trying a case is capable of assigning the due probative force to all evidence adduced, without needing to make an initial selection[111]. Thus they know no *exclusionary rules* based on this second argument[112], whereas the Common Law accepts that a

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107 This is the case with Swiss law. Some legal systems, however, exhaustively list the admissible types of evidence (for example, Netherlands law; see Meintjes-van der Walt, 2001, p. 148). Sometimes it is not the evidence but its very object that is ruled out. For example, Article 220 (2) CPP/Italy prohibits establishing the defendant's "tendency to break the law" by taking expert evidence.

108 By way of an exception, the law compels the court to avail itself of certain kinds of evidence. In Swiss law, it must for example appoint a psychiatric expert before ordering an internment measure, a medical expert to carry out an autopsy, etc. In German law, the court cannot make a finding of guilt before it has assessed one of the 5 types of evidence prescribed in the *Strafprozessordnung* (Juy-Birmann, 2002, p. 325).

109 The European Court of Human Rights holds that admissibility of evidence is a matter for regulation under national law (EurCourtHR, case of *Schenk v. Switzerland* of 12 July 1988, § 46), and rules only as to whether the proceedings, *"considered as a whole, including the way in which evidence was taken, were fair"* (EurCourtHR*, case of Kostovski v. Netherlands* of 20 November 1989, § 39.). That is, unless the gathering of evidence has been done in a way that infringes the Convention, for example under torture, in which case the evidence must be deemed utterly unusable.

110 Whereas certain types of evidence will invariably be dismissed (particularly where contrary to a provision of the ECHR, such as admissions extracted under torture), there will often be a weighing of interests between the seriousness of the offence prosecuted and the importance of the procedural rules infringed in order to obtain the evidence, taking into account the effect that the breach of procedural norms may have had on the reliability of the evidence in question.

111 Some consider that this difference of approach is linked entirely with the presence or absence of a jury, an opinion qualified by others (Damaška, 1973, p. 514).

112 A continental judge may nevertheless refuse to adduce certain evidence (examining a witness, appointing an expert, etc.) despite its cogency, where he holds that such evidence will not alter the opinion which he has already formed of the case. On these issues, see Damaška (1973).

court may decide at its own discretion that a piece of evidence will be dismissed if, for example, its probative value is exceeded by the risk of confusion that it poses[113].

Scientific admissibility

The scientific admissibility of evidence, while subject to fairly precise rules in United States law, as will be shown, is seldom addressed in European legal writings, and continental legal systems[114] seem very uncommunicative on the subject[115]. The question of scientific reliability is seen as intrinsically linked with the assessment of the actual evidence, that is with the determination of its probative value: if its scientific reliability can be challenged, its probative value will be deemed slight, and vice versa[116]. The evidence is thus admitted at the outset, it then being up to the trial court when assigning the evidence its due probative value to take account of any errors that may have rendered it unreliable. US law on the other hand clearly distinguishes between these two phases: admitting expert evidence does not presuppose ruling on its probative value (hence on the comparative worth of two or more expert testimonies), but purely on its ability to assist in the task of deciding the case[117].

The scientific admissibility of scientific evidence may be determined in various ways: for example, focusing solely on the person of the expert and admitting all relevant evidence coming from an accredited expert or, at the other extreme, only raising questions about the intrinsic merits of the evidence itself without regard for the person who has analysed or interpreted it[118].

Black, Ayala & Saffran-Brinks (1994, p. 731) enumerate what they term *"surrogates for understanding science"*, ie criteria used by lawyers to assess scientific evidence which are unsatisfactory because they are not based on an understanding of the evidence adduced but on heuristics of reasoning[119]. Here is a non-exhaustive list of them together with the reasons why they are not enough:

- the *"general acceptance"* of the *Frye* decision: the definition of what should be accepted, in which scientific field, and to what degree of acceptance, makes it difficult to apply this criterion[120];
- *peer review*: this criterion does not indicate whether a technique accepted in scientific literature has been used properly in a given case;

113 *"(…) if its probative value is deemed to be substantially outweighed by the dangers of unfair prejudice or confusion of the issues."* (Durston, 2008, p. 34).

114 It will be seen that English law regarding this question is in the midst of change and seems to be moving towards "Americanisation" of the system.

115 The need to distinguish between procedural and scientific admissibility is furthermore not unanimously accepted, some legal commentators being of the opinion that scientific evidence must be admitted once it is obtained legally (ie is admissible in a procedural sense) and relevant, and any question of its scientific reliability must be part of the assessment of the evidence. Others take the opposite view that, given the complexity of the issues raised, this assessment should be made separately against clear criteria. On this point, see Hayajneh & Al-Rawashdeh (2010) and the quoted authors.

116 Redmayne (2001, p. 118) notes that the concepts of reliability, relevance and probative value are often confused. He also notes that the concept of reliability is at present completely underdeveloped in English law, and proposes a conceptualisation based on the concept of likelihood ratio or LR.

117 Beecher-Monas (2007, p. 7).

118 Alldridge (1999, p. 7).

119 The heuristics of reasoning are mental short-cuts for taking decisions by activating a minimum of mental resources. An example documented in criminological literature is precisely the evaluation of an expert based on extraneous criteria rather than on the substance of what he says; see Ivkovic & Hans (2003), while Honess & Charman (2002) are more guarded. The heuristics of reasoning usually make it possible to take decisions that are good enough for the task at hand (hence their usefulness in terms of moving forward), but also sometimes generate error (as illustrated by the significant body of literature on the pitfalls of intuition in the evaluation of statistics).

120 See para. 5.3 and the criticisms levelled at the *Frye* standard.

- ascertaining the error rates of a test: that can prove misleading if not all its complexities are understood[121];
- focusing on the expert's qualifications rather than on the substance of what he says: the expert's qualifications are a necessary but insufficient condition for a grasp of scientific evidence. Acceptance of the opposite would have the outcome of giving any qualified expert discretion as to what is legally relevant[122]. Furthermore, even a competent expert may have erred in the specific case;
- some assessment criteria focus on the instruments used or on the use made of them, for instance: Is the instrument new? Is it properly maintained? Quite obviously that cannot suffice, otherwise, taking the argument to extremes, a fortune-teller's opinion would be admitted on the pretext that she has a fresh pack of cards;
- finally, other plainly inadequate "surrogates" focus on the impact of an expert's opinion on the decision-maker, more specifically the jury, and especially the clarity with which the expert is able to present his opinion.

These elements, though, do not allow the scientific quality of evidence to be validly assessed. Black , Ayala & Saffran-Brinks (1994, p. 782 ff.) thus suggest the following criteria to help lawyers understand the scientific data before them:

- Explanatory power: a reliable science is descriptive and predictive; it offers a plausible explication for a mechanism;
- Falsifiability: a scientific hypothesis must be formulated in such a way that it can be empirically tested;
- Coherence: a reliable scientific hypothesis is coherent, does not contradict itself, and is not tautological;
- Diversity of the experiments conducted: the soundness of a hypothesis is the greater the more and more varied trials it has withstood;
- Consistency with established scientific theories: scientific knowledge is cumulative, that is a new theory is often founded on knowledge already acquired; a theory that drastically breaks with existing science should thus be viewed with scepticism;
- Use by the scientific community: the fact that a scientific theory is taken up and used by other members of the scientific community is a strong indication of its reliability;
- Precision: very vague generalisations are tenuous and very hard to put through varied experimentation to test their reliability;
- Validation *a posteriori*: an *a posteriori* interpretation of pre-existing data to make them conform to a new hypothesis cannot constitute reliable scientific knowledge;
- Peer review and publication: though insufficient *per se*, these are two important indices of the thoroughness of the work performed.

As will be seen in the following paragraphs, current practice is rather remote from these prescriptions, as some courts apply criteria whose relevance is disputable (and energetically disputed!), while other legal systems adopt virtually a complete laissez-faire attitude and defer to the common sense of their magistrates.

Comparative law

a) The United States system

The United States[123] have seen several admissibility criteria in succession over the past century, which may be summarised as follows[124]:

121 For example, the positive result of an AIDS test with a false negative rate of 2.3% and false positives of 7.4% is deemed symptomatic of the disease in only 5% of cases (because of a low basal frequency, only one out of 250 persons in the population is theoretically infected) (Koehler & Saks, 1991).

122 Faigman (1989, p. 1012); Huber (1991b, p. 199).

123 It should be observed that these criteria are applied variously over US territory because, while the federal courts are subject to the case-law established by the US Supreme Court, the state courts remain independent. As a

In 1923 in the case of ***Frye v. United States***[125], a defendant charged with murder set out to prove his innocence with the help of a forerunner of the lie detector. The evidence was deemed inadmissible on the ground that it sprang from a technique that was not generally accepted in the relevant scientific community[126]. This is what we call the criterion of *"general acceptance".*

Several decades later, this criterion was nevertheless deemed unsatisfactory for several reasons:

- Some considered it too conservative because it was necessary to wait for a method to become widespread in order for it to be used in a judicial context;
- to others, it was on the contrary too permissive because any technique might be made acceptable by defining the "scientific community" somewhat restrictively[127];
- it did not necessarily emphasise the real crux of the problem; for example, an analytical technique could be generally accepted, and so the cogency of the inferences made from the results did not come under scrutiny (Giannelli, 1980);
- the criterion of knowing what constituted "general acceptance" was variously applied by the courts.

Frye was based on the idea that the court should trust the judgment of the scientific community to determine the admissibility of scientific evidence. This conception of the relationship between expert and judge thus (implicitly) presupposed that the scientific community be regarded as a neutral group aspiring only to discern the truth. A major drawback of this approach was that the very persons with an interest in having a method declared admissible were asked for their opinion on it[128].

The entry into force of ***Federal Rule of Evidence* 702**[129] in 1975 sounded the knell of the *Frye* criterion [130]. Indeed, it required that expert testimony be relevant (as well as reliable) in order to be admissible, thereby making the *Frye* criterion insufficient[131]. So there was now a dual requirement of legal relevance to the instant case and scientific reliability of the method[132].

In 1993 in the case of ***Daubert v. Merrell Dow Pharmaceuticals, Inc.***[133], two children born with disabilities claimed damages from the manufacturer of the drug Bendectin, submitting that their mother's taking the drug during pregnancy (to combat morning sickness) had caused their disability. To determine the reliability of the expert testimony brought, the Supreme Court referred to the concept of scientific[134] validity[135], and proposed five criteria for its ascertainment:

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consequence of this, certain states (not the least populous: California, Florida and New York) continue to apply *Frye*.

124 See in particular Michaelis, Flanders & Wulff (2008, p. 215 ff).

125 *Frye v. United States* 293 F 1013 (D.C. Cir. 1923).

126 Note that prior to this judgment, the expert was merely asked about the nature of his qualifications and, if the subject-matter of his work went beyond the average knowledge of the jurors, he was accepted. Not to be content with the qualifications of a single expert, and to consult the scientific community, was thus the great advance ushered in by *Frye* (Huber, 1991b, p. 199). At present an occasional tendency to revert to this old criterion is noted, merely verifying the accreditation of an expert without examining the substance of his statements.

127 On this question, see in particular Cole (2008).

128 Faigman (1999, p. 62).

129 *"If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case."*

130 Whether FRE 702 actually signified that *Frye* should fall was debated for many years. The *Daubert* decision clarified the position by answering this in the affirmative.

131 Sanders, Diamond & Vidmar (2002).

132 The phases of the moon would, for example, constitute scientifically valid and legally relevant information in the field of astronomy but not of astrology (see Black et al., 1994, p. 747 quoting the example given by judge Blackmun in the Daubert decision).

133 *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 113 S. Ct. 2786 (1993).

134 In the case of *Kumho Tire Co. v. Carmichael*, the Supreme Court, while excluding non-scientific knowledge from the ambit of *Daubert*, pointed out that intellectual rigour in reasoning ought to apply not only to scientific knowledge in the true sense but to any type of knowledge drawn from experience or practice.

- the method's falsifiability[136];
- peer review and publication[137];
- the method's margins of error (known or presumed);
- the standards governing application;
- general acceptance in the relevant scientific community[138];

While acknowledging that in general the jury alone should determine the probative value of a piece of evidence, the Supreme Court pointed out that only valid scientific evidence should be put to the jury, and that the judge must therefore evaluate the expert's testimony before its presentation to the jury, thereby vesting the judge with a mandatory role of *gatekeeper*[139]. By this *gatekeeping* procedure it is implicitly acknowledged that the accusatorial system is not a sufficient barrier to admission of unreliable evidence[140]. The *Daubert* factors mentioned above are assessed at the court's absolute discretion (in the light of supporting documents supplied by the parties and examination of their experts). In no circumstances is it expected that the technical element need meet the five criteria in order to be admitted[141].

A sixth criterion was added with the ***General Electric Co. v. Joiner* decision** (1997)[142], viz:

- Relevance to the case before the court, which entails examining the validity of the inferences made between the analyses and their practical application to the stated problem[143].

Indeed, contrary to the idea that had been suggested in *Daubert* of the judge's examination needing to concern only the methodology employed and not the conclusions drawn from it, the Supreme Court held in *Joiner* that the conclusions and the method were always linked in some way, but that, while accepting the reliability of the analysis carried out, the judge must remain free to dismiss the inferences made from it by an expert when they went beyond what was reasonable.

Lastly, as the third pillar of the *"Daubert trilogy"*, the decision in the case of ***Kumho Tire Co. v. Carmichael*** (1999)[144] gave the Supreme Court occasion to specify the scope of this entire set of rules and thereby broadened the obligation imposed on courts to determine the reliability and the relevance of expert opinions where not strictly scientific, but based on observation and long experience[145]. Thus it was no longer a question of applying the *Daubert* criteria rigidly and establishing a taxonomy of reliable and unreliable scientific methods, but much more of encouraging a pragmatic approach based on the instant case before all else. For example, a judge should not enquire whether documentary analysis constitutes, *in abstracto*, an established science, but should know whether a given expert in a given case, working in a given way from

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135 An indiscriminate use of the terms "*validity*" and "*reliability*" is noted in the literature. *Valid* means that the technique yields accurate results (close to the true value established with reference to standards). To be called *reliable*, the technique is expected to afford an adequate degree of precision (of reproducibility) and correctness. In forensics, *reliability* is sought first and foremost.

136 Can the method be tested? Has it actually been tested?

137 Which does not constitute a final test of reliability, but at least increases the likelihood that gross methodological errors will be discerned.

138 *Frye* is thus retained, but solely as one of the validity criteria.

139 Berger (2000, p. 11).

140 DeCoux, (2007, p. 146).

141 Assessments of fingerprint evidence along the lines of *Daubert* speak volumes here (Kaye, 2003).

142 *General Electric Co. v. Joiner* 522 U.S. 136 (1997).

143 This was clarified in the case of *General Electric Co. v. Joiner*, in which the Supreme Court held that questions of method and results could not be totally divorced, because the question of relevance presupposed enquiring to what extent the findings were applicable to the instant case.

144 *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

145 *"skill or experience-based observation"*.

given data, can produce reliable information capable of helping establish the facts[146]. The situation in Canada is observed to be very similar[147].

Contrary to the spirit of *Frye*, the *Daubert, Joiner and Kumho* trilogy of decisions implicitly emphasises the scepticism which the judge must maintain vis-à-vis the expert, who is thus no longer considered a member of an authoritative elite but a social agent comparable to any other, possibly subject to pressure of a political and economic kind that may impair his discernment. In the *Daubert* decision, judge Kozinski furthermore added a criterion to the first five, namely the question whether the scientific knowledge contributed by the expert had been developed in an independent context of research or rather in one linked with the case being tried, which might raise doubts about the objectiveness of those involved[148].

Daubert is nonetheless criticised firstly because the criteria proposed are merely surrogates for understanding; secondly because expert opinions are also made up of complex reasoning processes that do not readily fit into such narrow confines[149]; thirdly because of the active role which it gives the judge, who must enjoy a minimum of scientific competence[150], and lastly because the freedom allowed to the judge generates legal uncertainty, since in a given territory judicial rulings may be divergent. In an opinion dissenting from the *Daubert* decision, judge Rehnquist furthermore condemned this rule requiring each judge to become an *"amateur scientist"*[151]. Following its publication, the NRC report (2009) is expected to have an impact on future decisions, and even court practice, regarding admissibility (Edwards, 2010).

b) The United Kingdom

Expert scientific evidence is generally deemed admissible in English law if it fulfils four conditions:

1) it concerns a subject exceeding the ordinary knowledge and experience of whoever must decide the case;
2) it concerns a subject in a field of knowledge which is sufficiently well organised and recognised to be considered a reliable source of knowledge, a field of which the expert in question has special knowledge that could assist the court in its task;
3) the expert must have acquired through study or experience sufficient knowledge to render his opinion useful to the court[152];
4) the expert must be impartial.

146 Berger (2000, pp. 31-32).

147 Matters of admissibility of technical evidence are settled in Canada by the *R. v Mohan* judgment [1994] 2 S.C.R. 9. This provides for assessment of (1) the relevance of the technical element in the context of the case being tried, (2) the court's need of assistance, (3) absence of an exclusion criterion (particularly in the light of the Canadian Charter) and (4) the expert's qualification. In the event that the testimony brings new techniques into play, the judgment calls for an assessment of the reliability of the technique according to the 5 criteria proposed in the *Daubert* decision. This precedent was confirmed in *R. v. J.J.* [2000] 2 S.C.R. 600.

148 This requirement was subsequently challenged on the ground that forensic sciences had no applications outside the judicial context and thus were never really dissociated from an aim of criminal prosecution (Beecher-Monas, 2007, p. 10). This contention may nevertheless be qualified: a method of identification developed in a context of fundamental research should logically have greater credence than a test improvised to conform to the case in point.

149 Black, Ayala, Saffran-Brinks (1994, pp. 732-733).

150 An American study shows that while 91% of the judges questioned (out of a total of 400 magistrates distributed throughout the territory and belonging to state courts of 1st instance) considered it quite within their jurisdiction to rule on the admissibility of a piece of evidence and that *Daubert* gave them useful guidelines for this, the concepts of falsifiability and error rates were properly understood by only 6% and 4% respectively (as against 90% correct answers concerning the two other criteria of *peer review* and *general acceptance*). See Gatowski et al. (2001). Admittedly, however, these results do not tell us about the practical application of these concepts in actual cases.

151 *Daubert*, 509 U.S. at 601 (Rehnquist, C.J., concurring in part and dissenting in part).

152 These first three criteria are criteria laid down by the *Supreme Court of South Australia* in judgment *R. v. Bonython* (1984, 38 SASR 45, 46,47). Some have likened the 2nd stated condition to the US *Frye* standard. The Law Commission, however, diverges from this position (Law Commission, p. 19-21). In Redmayne's opinion (2001, p. 95), the 3rd criterion stated here is, in English law , the closest approach to a stipulation that expert evidence be reliable.

Concerning the second criterion, the only one of interest in the context of this presentation, English Common Law at present has no well defined rules (along *Daubert* lines) for determining *a priori* the scientific admissibility of evidence[153]: the judge decides at his own discretion whether the evidence affords adequate guarantees of scientific reliability and is relevant[154]. If so, it will rest with the jury to make a determination on the reliability of the method *in concreto*. Some writers criticise this state of affairs on the ground that it effectively saddles the defence with the burden of proving the unreliability of the scientific evidence adduced by the prosecution[155].

In practice, if the expert is accredited or has the necessary qualifications and the subject on which he offers to testify is relevant to the case before the court, his testimony is generally admitted[156]. In sum, the Common Law rejects expert evidence based on charlatanism (astrology for example), accepts "well-established" methods, and lays down the dual requirement of relevance and reliability for the other types of expert submissions (ie most of them)[157]. On the latter point, the *Law Commission* acknowledges that there is no guideline to help judges settle the question of admissibility, and that in practice a "laissez-faire" attitude prevails, with only *"patently unreliable"* methods being excluded [158]. The *House of Commons Science & Technology Committee*[159] considered this situation unsatisfactory and advocated laying down objective, clearly defined criteria to determine the reliability of a technique, which it thought should be modelled on the criteria evolved by the US Supreme Court in the *Daubert* decision.

The recent work of the *Law Commission*, still under discussion, sought to identify the best way of determining the reliability of a scientific technique and also the reliability of the conclusions drawn by the expert in a specific case. At the conclusion of its study, it proposed four possible solutions[160], giving its preference to a criterion of admissibility requiring the judge himself to decide on the reliability of the evidence, which thus corresponds to the solution recommended in the *Daubert* decision. Recognising the limitations of this approach, the *Law Commission* recommends that this model of "gatekeeping" by judges be adopted nonetheless, chiefly because it appears more realistic to assign this function of evaluating scientific reliability to judges than to leave it in the hands of the jurors.

It further proposes that the criteria for determining the admissibility of scientific evidence be as follows[161]:

- The expert's opinion is admissible only if sufficiently reliable;
- The party wishing to submit an expert's opinion bears the burden of proving its reliability;
- The evidence is sufficiently reliable if[162]:
  (a) based on sound principles, techniques and assumptions;
  (b) these principles, theories and assumptions have been properly applied to the case; and
  (c) the evidence follows from those principles, theories and assumptions as applied to the facts of the case.

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153 Such a *"gatekeeper"* role was moreover denied to the judge by the Court of Appeal in decision *R. v. Luttrell* [2004] EWCA Crim 1344 (The Law Commission, 2009, p. 18).

154 These two elements are the necessary criteria for allowing an expert opinion on a given subject (*R. v. Dallagher* [2002] EWCA Crim 1903 para 29; *R. v. Luttrell* [2004] EWCA Crim 1344 para 37). The evidence is deemed relevant if it can be of any help in determining the case (*R. v. Turner* [1975] QB 834).

155 Redmayne (1997, p. 1046) and references given.

156 Alldridge (1999, pp. 154-155)

157 Law Commission (2009, pp. 21-22).

158 Some recent cases discussed in the case literature, such as *Dallagher* and *Clark*, are not unconnected with this reform movement.

159 House of Commons Science and Technology Committee (2005, pp. 75-77).

160 Discretionary decision of the judge with (1) or without guidelines (2), generally accepted criterion in the scientific community (3), criterion of scientific reliability based on the judge's assessment (4).

161 Law Commission (2009, p. 50).

162 The original text is as follows (The Law Commission, 2009, p. 50):

(a) the evidence is predicated on sound principles, techniques and assumptions;
(b) those principles, techniques and assumptions have been properly applied to the facts of the case ; and
(c) the evidence is supported by those principles, techniques and assumptions as applied to the facts of the case.

In order to establish these various criteria, the *Law Commission* proposes that the following elements be taken into account[163]:

- has the method used been tested and, if so, to what extent do the results substantiate that the method is reliable?
- what are the method's error rates?
- is there a body of scientific literature relating to the method in question?
- has the method been subjected to peer review; to what extent is it regarded as reliable?
- what are the qualifications, experience and standing of the expert in the scientific community; has he produced publications on the subject?
- is there an opposing position in the scientific community; what are the qualifications, experience and standing in the scientific community of the persons holding these opposite views?
- are there indications that the expert has acted in breach of his duty of impartiality?

It nevertheless adds that implementation of the *Daubert* criteria in the United Kingdom would necessitate the following ancillary measures:

- a judge might, by way of an exception, in very difficult cases, appoint an expert to assist him; the expert's role would be confined to helping the judge determine the reliability of an expert's opinion but not to comment on the actual object of the expert appraisal;
- adequate training for magistrates called upon to apply these new criteria;
- a system of accreditation for experts, allowing the justice system to guard against certain unreliable types of evidence.

The indirect effect expected to be achieved by these measures is to encourage prospective experts to adopt high standards in order to facilitate their possible formal admission before the courts.

c) Continental legal systems

Contrary to US law especially, continental legal systems often have nothing to say about the scientific criteria to be met by evidence if it is to be deemed reliable and thus given a part in the search for truth, or they settle the question so concisely that it is hard to imagine how the principle will be applied in a specific case[164].

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163 The original text is as follows (The Law Commission, 2009, p. 53 ss.):
"In determining whether scientific (or purportedly scientific) expert evidence is sufficiently reliable to be admitted, the court shall consider the following factors and any other factors considered to be relevant:
(a) whether the principles, techniques and assumptions relied on have been properly tested, and, if so, the extent to which the results of those tests demonstrate that they are sound;
(b) the margin of error associated with the application of, and conclusions drawn from, the principles, techniques and assumptions;
(c) whether there is a body of specialised literature relating to the field;
(d) the extent to which the principles, techniques an assumptions have been considered by other scientists – for example in peer-reviewed publications – and, if so, the extent to which they are regarded as sound in the scientific community;
(e) the expert witness's relevant qualifications, experience and publications and his or her standing in the scientific community;
(f) the scientific validity of opposing views (if any) and the relevant qualifications and experience and professional standing in the scientific community of the scientists who hold those views; and
(g) whether there is evidence to suggest that the expert witness has failed to act in accordance with his or her overriding duty of impartiality."
The Law Commission proposes analogous criteria for assessing experience-based rather than strictly scientific evidence (p. 57).

164 There are, however, a number of exceptions: the Netherlands Court of Cassation (Hoge Raad, January 27, 1998, NJ 1998, 404) issues some general rules on assessment of scientific evidence: an assessment of the theoretical soundness of the technique, of its reliability in being applied, and the expert's qualifications. In Poland too, the Supreme Court invites judges to consider the degree of certainty permitted by the technique and its methodological quality (Girdwoyn & Tomaszewski, 2010). The method is expected to be recognised not only

For instance, Article 244 II of the German *Strafprozessordnung* simply provides that *"das Gericht hat zur Erforschung der Wahrheit die Beweisaufnahme von Amts wegen auf alle Tatsachen und Beweismittel zu erstrecken, die für die Entscheidung von Bedeutung sind". (In order to discover the truth, the court shall take evidence ex officio from every fact and proof that is relevant to the judgment.)* Under the terms of Article 427 (1) of the French Code of Criminal Procedure, offences may be determined by any mode of proof "that can establish the truth"[165]. In Swiss law, finally, the scientific admissibility of evidence is governed by a principle to say the least abstract: *"The criminal justice authorities shall employ all lawful types of evidence which, in the current state of scientific knowledge and experience, are apt to establish the truth."* (Article 139 (2) CPP/Switzerland). In practice the situation is regulated unsystematically, traditional types of evidence being admitted because they always have been (and, so it is believed, because of their long-proven reliability), while calls for expert testimony concerning "outlandish" subjects are rejected. In borderline cases the judge will appoint the expert and decide as to the probative value of the expert testimony according to the intelligibility of the report and in the light of the other facts of the case.

Formally, in countries of the inquisitorial tradition, the question of scientific reliability is thus confused with the actual assessment, that is the question of how much probative force to assign to the various pieces of evidence adduced. There is no test of admissibility as such. That probably has something to do with the procedural arrangements in these countries, where professional judges and the duty to give reasons for decisions are seen as an adequate safeguard against the taking of unreliable and irrelevant evidence[166].

It is therefore plain that magistrates are left to their own devices in taking these decisions, with the risk of disparate practices developing, of unreliable evidence being admitted, or new methods being rejected when they may be perfectly capable to serving justice.

However, this issue has to be seen in relation to the expert's position in proceedings. These systems typified by a "laissez-faire" attitude towards admissibility are precisely the ones where the trust placed in the expert by the court is greatest, since these systems are also the ones which make the greatest use of officially appointed experts. When these various elements are combined, one finds oneself in a system where the position of the defence is extremely precarious: the judge has complete confidence in the expert whom it has appointed since the expert is presumed impartial and competent, the expert testimony need not undergo any formal test of admissibility, it is presumed correct because all players in the criminal justice system regard science as infallible, and the material and intellectual resources of the defence in this respect are limited. To cap it all, and this will be the subject of the next chapter, assessment of the probative force of scientific expertise is a problematical step and there is every reason to believe that at present it is not handled in the best possible way.

Who should determine the scientific admissibility of evidence?

Is a judge the most competent person to determine the scientific admissibility of evidence?

Although a large body of legal and scientific literature post-dating *Daubert* urged lawyers to acquire training in the assessment of scientific evidence, this wish is unrealistic. Contrary to widespread belief, there is no single scientific method which if properly understood would enable a lawyer to understand all the scientific evidence placed before him. Science is a conglomerate of diverse methods that defy reduction to a few criteria calling for yes/no answers. Unlike law,

in specialist circles but also among the scientific community in the broad sense. Moreover, the application of the method should be circumscribed by recognised operational procedures implemented by an institution recognised by judicial bodies.

165 Stefani, Levasseur & Bouloc (2006, p. 109).

166 Langbein (1977, p. 69).

science functions by degrees and it is all a question of relevance to the legal issues of the specific case.

A number of factors argue against entrusting judges with the task of determining the reliability of scientific evidence[167]:

- Judges are not in a position to decide whether a given body of knowledge constitutes a science (it is a question of epistemology or philosophy of the sciences);
- if it is for judges to settle questions of admissibility, this may cause disparity of practice and legal uncertainty (unpredictability of decisions);
- it may unduly prolong proceedings if a judge must continually address the same questions over again, or questions already settled elsewhere;
- (above all under an accusatorial system) advocates of a new technique may have substantial financial interests in its acceptance by the courts and commit a great deal of money to that outcome, thereby placing the defendant in a rather uncomfortable position.

We therefore feel that both the "laissez-faire" attitude of inquisitorial systems and the method of asking magistrates to assess a list of scientific criteria are both unsatisfactory solutions in that they do not guarantee sound use of scientific evidence in criminal proceedings.

[167] Alldridge,(1999, p. 156 ff.); Alldridge (1992a).

Assessing evidence, and more specifically scientific evidence

Courts' discretion to assess evidence

The European Convention on Human Rights does not include the principle that courts have discretion to assess evidence, but it applies in every European country. This means that the courts are not bound by a legal hierarchy of types of evidence and that the law does not lay down in advance their evidential value[168]. An absence of evidence does not prevent a conviction[169] and equally the existence of certain types of evidence does not lead automatically to a guilty verdict[170].

Courts are therefore free to make their own decisions, which means that they can base them on any relevant evidence and are not bound by the requirement of rationality - in other words the obligation to abide by the rules of formal logic and technical and scientific rules[171] – and the prohibition of arbitrary decisions. They may or may not have to give reasons for their decisions, depending on the system.

Although forensic evidence is theoretically subject to the principle of the courts' discretion to assess evidence[172] and should therefore be critically assessed, the day-to-day practice of the courts may be somewhat different. Given such previously mentioned factors as confidence in experts and gaps in judges' scientific knowledge, consideration should be given to how much weight such evidence really carries in satisfying the court.

Assessing scientific evidence

It goes without saying that all those involved in preparing technical evidence, whether as part of the preliminary inquiries, the judicial investigation or the trial phase, must operate within strict practice guidelines. There are now clear rules governing the analytical part, with almost systematic use of accredited protocols, often based on ISO standard 17020. For example, the Council of Europe's 1992 Recommendation R (92) 1 on DNA testing lays down welcome and strict rules to ensure that laboratories carrying out such analyses satisfy certain technical requirements. Recent European Union recommendations, such as Council Framework Decision 2009/905/JHA of 30 November 2009 on accreditation of forensic service providers carrying out laboratory activities, are also concerned with DNA profiling and dactyloscopic data. Other areas of forensic science are moving in the same direction in Europe and the ENFSI (European

168 Certain forms of evidence are considered to be correct until shown to the contrary. This applies, for example, to certain reports prepared by sworn officers under French law (Dervieux, 2002, p. 263).

169 There are however exceptions to this principle because in certain legal systems some evidence must be corroborated.

170 However, there are certain exceptions: for example in British law if the accused opts to plead guilty the court must convict, even if the judge believes otherwise (Spencer, 2002b, p. 196). In other systems there are also irrefutable presumptions as a result of which once evidence is adduced a certain state of affairs is taken to be established. For example, under Article 2.2 of the Swiss road traffic regulations, a certain level of alcohol in the blood as established by a blood test requires the Swiss courts to find automatically that the individual concerned is incapable of driving a vehicle.

171 For Swiss law, see Müller (1992), pp. 66 ff ; Verniory (2000), pp. 393-396. For German law, see Huber (2008), p. 292.

172 There are sometimes limits to the principle. In Switzerland, for example, the courts are free to assess expert evidence as they see fit but must give reasons for their decision if they decide not to accept an expert's conclusions. The established case-law is that courts can reject expert evidence if it is inconsistent or is based on facts which differ from those established in the pre-trial proceedings, or when two experts differ in their opinion.

Network of Forensic Science Institutes) has made an important contribution to drawing up good practices, through its working groups. The ENFSI urges all its members to seek accreditation. In 2007 (Malkoc & Neuteboom, 2007), nearly 40% of laboratories affiliated to the ENFSI were accredited; the current figure is nearly 70%.

While it is important for courts to be reassured that forensic sciences are based on good practices and protocols it has to be said that the high standards that are applied to analyses do not extend to the way the results are interpreted and expressed in expert reports (Willis, 2009). There is no specific standard under ISO 17025 on the drafting of expert reports or the presentation and communication of the results to the judicial authorities. Yet how results are interpreted and communicated to the courts is of fundamental importance. Not only must forensic scientists have the requisite technical and analytical skills, which is generally the case, but they must also develop the capacity to interpret the relevant data (Fereday & Kopp, 2003).

As several writers have noted, there is no single body of rules on interpretation (or terminology) common to all the forensic community. Following the Guy Paul Morin case, the Kaufman commission (Kaufman, 1998) looked at these issues in great depth. In his study of genetic analysis as part of forensic evidence, Verhaegen (1997) was already stressing the need for all laboratories to have effective protocols and systems for interpreting results. According to Garrett and Neufeld (2009), numerous errors of communication can lead to a poor assessment of the significance of technical aspects of a case. Walker & Stockdale (1999, pp. 148-149) conclude their own study: "Thus, there remain problems, especially about the standards employed in analysis and the soundness of the interpretation of results, with the grave danger that the jury will be seduced by the purity of the science without fully considering the impurity of its applications".

The NRC (National Research Council, 2009) report also drew attention to the dangers of using tendentious, or even fallacious, terminology, to the extent that its authors felt the need to make a specific recommendation on the subject.

Legal systems currently apply the principle that courts have discretion to assess evidence, sometimes after cross-examination. There is a paradoxical element here, since courts acknowledge the limits to their technical knowledge by appointing experts, while retaining the right to reject the latter's conclusions if they consider this necessary. In technical areas in particular, courts have no other option but to rely on an expert, though this may be tested in cross-examination, or to choose between two different expert opinions, according to criteria that remain obscure. Yet the courts' freedom to form an opinion on the facts implies that they will apply the principle of rationality and transparency in their decision-making. Simply delegating responsibility to an expert is not compatible with this principle. Such delegation currently causes problems because experts do not use a uniform terminology in their reports and when they are questioned, and because what they say is often partial and only presents the prosecution's case or, at best, is open to several interpretations or even a systematic overestimation of the contribution of the technical component.

We see opportunities for recommendations on the drafting of expert reports from the specific standpoints of how to assess the value of the information, the terminology to be used and how to formulate conclusions. These could help to harmonise European practice, irrespective of the judicial system concerned[173]. Interpreting technical evidence is not an easy task for either scientists or lawyers, This is because it takes place at the interface of two worlds with very different intellectual backgrounds. Several years ago Robertson and Vignaux published what is considered to be the best work on the subject, aimed at judges (Robertson & Vignaux, 1995). Aitken and Taroni (Aitken & Taroni, 2004) offer a more statistical form of approach. We would offer three basic principles for interpreting scientific evidence (Champod & Evett, 2009):

[173] Dr. Sheila Willis, Director of the Irish Forensic Science Laboratory, has recently been awarded ENFSI funding from 2010 to 2013 to look at these issues and make relevant proposals.

1) The scientific element must be interpreted in the light of the circumstances of the particular case. Experts must have a certain amount of information about the case in question so that the results obtained and their interpretation can be put in context;
2) A rational and balanced interpretation of the scientific element is only possible if the results are assessed in the light of both the prosecution and defence cases;
3) The questions that the technical expert must answer are always concerned with the probabilities associated with the technical results obtained (having regard to the respective prosecution and defence cases) and not with the probabilities of the cases themselves[174].

The first principle means that technical experts must be informed at the right moment of the respective cases of the prosecution and defence. Following various judicial errors in Britain, the 1993 report of the Royal Commission on Criminal Justice (Roberts & Willmore, 1993) called for closer communication between experts and the parties.

Under the second principle expert reports would present results that took account of all the hypotheses advanced, irrespective of which party had commissioned the expert. This means that experts working for the prosecution should still be informed of the defence case in order to secure the necessary balance. The same applies to experts appointed by the court or the defence.

The third principle establishes precise terminological rules for the conclusions of expert reports and their presentation to the courts[175].

The recent AFSP UK and Ireland (Association of Forensic Science Providers, 2009) standards lay down a number of important principles on the drafting of expert reports and statements, including:

– the need for an explicit evaluation of the forensic results in relation both to the facts alleged by the prosecution and the case submitted by the defence. This evaluation must be conducted on the basis of a formal and transparent logical framework;
– experts' ability to present the scientific bases of their analyses;
– the need for experts to document, and report, the various stages of their work and the reasoning behind their conclusions.

The Barry George case highlights the benefits of such standards. Barry George was convicted in 2001 of the murder of the journalist Jill Dando. The prosecution evidence included a textile fibre from the victim's raincoat which matched Mr George's trousers[176] and a particle of firearms discharge residue found in the suspect's pocket nearly a year after the murder. At the first trial the discharge residue was described as "consistent" with the hypothesis that it came from the weapon used to kill Miss Dando[177]. The appeal followed a review by the Criminal Cases Review Commission (CCRC) of the strength of the forensic evidence. The CCRC thought that work undertaken by the Forensic Science Service (FSS) on interpretation should serve as the new means of assessing forensic evidence. It was this work that formed the basis of the AFSP standard referred to above.

When the plausibility of the results was assessed in a balanced manner, taking account of the defence as well as the prosecution cases, it emerged that the discharge residue found in Barry George's pocket could be equally consistent with his having fired the shot (the prosecution argument) or not having fired it (the defence case). In other words the identification of the discharge residue was essentially neutral and did not make it possible in any way to support either of the arguments put forward. The evidence was not useful information for the court and its presentation at the first trial, with the use of the term "consistent", was likely to give it undue

174 Otherwise the technical expert would be making the mistake of “prosecutor’s fallacy” or “inversion fallacy” (see footnote 35) or offering evidence which included more than just an assessment of the scientific elements.
175 More specific recommendations are made by Evett *et al*. (2000).
176 The fibre was to play a relatively minor part in the case.
177 The weapon used to fire the fatal shot was never found.

evidential value. As a result, the court of appeal eventually overturned the first judgment[178]. In preparation for the second trial, the discharge residue was deemed to be inadmissible evidence. Barry George was finally acquitted in August 2008. Had there not been a reassessment of the conclusiveness of this evidence, based on the principles of balance and transparency, he would still be in prison.

[178] *R. v. Barry George*, UK Court of Appeal, [2007] EWCA Crim 2722.

Issues for discussion and possible conclusions

The literature consulted has identified a number of ways of improving the presentation of expert opinions to the courts. Here, we will put forward some of those that appear to offer the most promise, whether the system is basically accusatorial or inquisitorial, based on the principle that the process will benefit from the maximum possible transparency for all those concerned.

Preparing the expert evidence

- *A greater defence input*

  Throughout the period of preparation of the expert evidence and as early as possible in the proceedings, the parties should be able to interact with the expert in a transparent fashion. The parties should not be authorised to be present when the scientific tests are being conducted, since this might interfere with the smooth running of the operation, but they must be allowed to submit working hypotheses that the expert should take into account. We are emphasising here the role of the defence, but naturally experts must also receive appropriate information from the prosecuting authorities[179].

- *Court-appointed experts*

  Many lawyers and scientists operating in accusatorial systems see the notion of court-appointed experts as a miracle solution. We are more sceptical, since experience shows that such experts generally work more with the criminal prosecution authorities than with the defence, and the latter often find it difficult to find an alternative expert of equivalent status. Moreover, the neutrality of court-appointed experts gives them *de facto* a privileged status in that they have the almost total confidence of the court. Add to this the fact that in inquisitorial-type proceedings, there is no "culture" of questioning the word of experts, since defence lawyers have the impression that this could be seen by judges as criticising their choice and therefore be counter-productive for the defence case. Such a system does not therefore contribute to a critical assessment of expert reports and is not sufficient, we believe, to ensure that scientific evidence will receive a rational appraisal[180].

  We do, however, see advantages in employing court-appointed experts to assist courts to assess complex issues involving conflicting evidence presented by the parties. This is the compromise advocated by Patenaude (2003, pp. 170-171) in Canada.

- *Pre-trial conferences and joint expertise[181], and multiple expert witnesses (hot-tubbing)*[182]

  Joint expertise is where different experts whose conclusions are likely to diverge meet outside of the court to identify areas of agreement[183] and then submit to that court only evidence that is still the subject of debate. This saves time by only presenting to the

179 As Roberts and Willmore (1993, p. 137) state, after analysing 27 sets of forensic evidence, "Our research suggests that the superficially attractive objective of shielding the forensic scientist from information which might inappropriately influence her scientific judgment should be abandoned in favour of more productive efforts to improve the extent and quality of the information exchange between FSS scientists and instructing lawyers."

180 The Auld report (1991) presents similar arguments against proposals to increase the number of court-appointed experts in the United Kingdom's accusatorial system.

181 See Part 33, Rule 33(5) of the Criminal Procedure Rules (United Kingdom), following the Auld report (1991). In an accusatorial system this may have the disadvantage that counsel will lose control over their experts. However, the Court of Appeal has recently referred to the benefits of this system in R. v. David Reed and Terence Reed, R. v. Neil Garmson, UK Court of Appeal, [2009] EWCA Crim 2698 and R. v. Weller, [2010] EWCA Crim 1085.

182 For more on this subject see Edmond (2009).

183 For example, they may agree on the way to explain a certain technology, a demonstration of certain phenomena, a glossary of key terms or a chronology of certain events (Sommer, 2009).

courts contested items of evidence, and also helps the defence because each expert is forced to assess the other's point of view[184].

Joint hearings of experts, or so-called hot-tubbing, mean that all the experts are heard in court at the same time. Each presents his or her findings in turn and can then comment on what the others have said. The judge and the parties have an opportunity to ask questions, and the whole process continues informally so that points of agreement and disagreement can be clearly identified.

Such approaches are attractive, but are only significant when the parties or the authorities have commissioned several experts, whose conclusions differ. This does not resolve the problem of how to assess expert evidence when only one expert has been called – which is often the case with inquisitorial proceedings – and no one challenges his or her conclusions.

- *Give precedence to written reports*

  Since scientific evidence is often very complex, it is much easier for the parties to understand, even in countries using the accusatorial system, when it comes in written form, setting out the steps in the process and the findings. It may also be worth encouraging the use of visual aids such as photos and diagrams to back up written or oral explanations.

  Finally, in the interests of transparency, experts should be asked to make their laboratory notes available to the court and the parties (even if they are not made a formal part of the case-file, as in inquisitorial proceedings) during the procedure and when they give evidence in court[185].

Assessing expert evidence

- *Standards of interpretation*

  There should be a standard for the scientific interpretation of results to serve as a guide to the framing of expert reports, the terminology to be used and how conclusions should be expressed. It should be disseminated both among experts and the courts, with appropriate training.

- *Making lawyers more aware of the fallibility of expert evidence and the notion of interpretation*

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184 Roberts (1994, p. 492).

185 Still, in the interests of transparency and to facilitate assessment of experts' work, their reports should include the following:
– the expert's qualifications: training, accreditation and experience;
– an exhaustive account of the information and documents received by the authority, or where appropriate by the parties;
– a detailed description of the operations and procedures carried out;
– the identity and qualifications of the assistants who have helped the expert to produce the report, and a description of their tasks;
– any theoretical disagreements in the relevant field, and the personal position of the expert and the reasons for this position;
– a discussion of the findings, in terms of alternatives put forward;
– the expert's conclusions;
– useful illustrations and references;
– a statement that the expert was informed of his or her procedural obligations, such as professional confidentiality and the consequences of producing an inaccurate expert report.

A good understanding of scientific evidence depends less on the criteria that are adopted than on the willingness of courts to assess critically the material presented to them. Significant efforts must be made to make all those involved in the judicial system fully aware of the weaknesses of forensic reports. However well developed a technique may be, it still has to be applied by humans and errors are always possible. The parties must be aware of this and adopt a critical approach to such reports and the courts must also be conscious of the need to give proper weight to such evidence.

But experts' work does not end with the reading of their analytical findings. The significance of scientific evidence in any particularly case is always subject to interpretation and this cannot be placed within the close confines of an ISO accreditation. When the evidence is taken it has be seen in the general context of the case and there has to be close communication between the expert and the court to ensure that the former provides the latter with useful information and that the latter does not form an exaggerated opinion of the expert's conclusions.

This has to be seen in relation to court-appointed experts. It is not sufficient for the court to rely on the confidence it has in its expert. Nor do joint expert reports and joint hearings of experts offer any solution to this problem.

Supra-national approaches

- *A scientific evidence assessment committee*

  One possibility might be to establish a European body on the lines of the British Forensic Science Advisory Council[186] and Forensic Science Regulator[187] to act as the main adviser to political and judicial authorities on the reliability of the scientific techniques that are used. This is the position adopted by Alldridge (1992b) following his analysis of DNA evidence. In line with technological developments, certain forms of scientific evidence come to be seen by those involved in the judicial field as almost infallible. The more a particular form of scientific evidence is deemed, of itself, to be critical, the more necessary it becomes to subject it to the rigorous assessment of an independent body.

  Such a body would not have binding powers, but could nevertheless issue recommendations to domestic courts that would assist judges when they had to rule on the admissibility of a new forensic technique or the reliability of a new form of evidence, or when it seemed appropriate to abandon a form of evidence that had become obsolete. Such a procedure would take time, which would be quite welcome to certain figures who consider that the judicial system should keep its distance from "cutting edge scientific discoveries"[188]. As Patenaude has remarked (2003, p. 180), the idea is not a new one. It was indeed included in the statutes of the International Academy of Criminalistics, founded in 1929.

- *An international panel of experts*

  As we have seen, the number of experts that the courts can call on is often limited. The result is that in any particular geographical area it may be difficult to find an expert who specialises in the field in question and therefore impossible to find an expert for the defence, or simply a private scientific consultant, in the same field and with the same

186 This body was set up in 1993 on the recommendation of the Runciman report (1993), which followed a number of judicial errors in Great Britain.

187 http://www.homeoffice.gov.uk/police/forensic-science-regulator/

188 Alldridge (1999).

level of experience[189]. It would undoubtedly improve the situation if domestic courts could call on the services of other European experts[190]. The aim would be to establish a European register of experts with its own machinery for registering individuals and recognising laboratories, to ensure that there was a sufficient number of experts available in the increasingly varied fields of forensic science.

- *Code of Ethics*[191]

  A European ethical code for all forensic experts would have particular symbolic significance. It might require those concerned:
  - to perform their duties in a neutral and impartial fashion, on behalf of the court rather than either of the parties;
  - to take account of all relevant information in carrying out their work;
  - to describe clearly the facts and observations on which their opinion was based and report any gaps in the initial data that made it impossible to reach any definitive conclusions;
  - to refuse to reply to questions that fell outside their sphere of responsibility, or which only the court was competent to answer;
  - to advise the court immediately of any change of opinion on the substance of their conclusions, after reporting to or being heard by the court;
  - to provide the court, on request, with their personal notes and any other documentation relevant to the case.

  Saks (1989) provided an overview of ethics codes that existed at the end of the 1980s. The need for such a code of ethics was also one of the specific recommendations of the *National Research Council* (2009) report. The ENFSI also has a code of conduct[192] that includes some of the aforementioned elements. It simply needs to be made more generally applicable.

The increasingly significant advances in the field of scientific evidence are posing fresh challenges to domestic legal systems because of the additional problems they raise in terms of equality of arms, and more specifically the ability of the defence to call on the services of forensic experts of the same standard as those available to the criminal prosecution authorities.

We believe that this calls for a thorough review of the law on how scientific evidence should be presented and assessed by the courts. Given the speed with which forensic techniques are evolving and the day-to-day constraints on the activities of the courts – lack of time, material resources and personnel and the range of cases they have to deal with – it is unreasonable to expect judges, prosecutors and counsel to reach a conclusion on issues that are still sometimes the subject of debate in the scientific community itself. We are conscious of strong pressure to adopt criteria similar to the *Daubert* standard to determine whether scientific evidence is admissible[193]. We have reservations about such an approach. The guidelines laid down in the *Daubert* decision have some merit but they place a considerable burden on judges who completely lack the technical knowledge to apply them properly. We believe that some of the avenues previously explored offer more effective ways of dealing with the challenges of forensic science for the criminal justice system.

One final lesson is provided by the early use of DNA in the courts. If DNA analysis is now considered to be a highly safe forensic technique, this is because in the 1990s the courts, and in

189 This issue was raised in the *Eggertsdottir v. Iceland* judgment. The applicants had questioned the independence of the experts commissioned by the Icelandic government, which had responded that inevitably, given the size of the country, the medical experts representing both sides would work in the same hospital.

190 In 2000, Jakobs and Spangers noted that securing experts for the defence was a problem in the majority of European systems and called for a European list of experts .

191 See Meintjes–van Der Walt (2003, p. 99).

192 http://www.enfsi.eu/page.php?uid=43

193 This is particularly the case with the Law Commission (2009).

particular defence lawyers, put great pressure on forensic experts and the prosecution authorities who employed them. Much effort went into improving their practices and demonstrating that it was a reliable technique before this form of evidence was deemed admissible. Yet in many other areas, forensic experts have failed to address their own shortcomings and the courts should no longer accept evidence whose reliability has not been established. The criminal justice system is forensic science's one and only client and it must therefore insist on a product that fully matches its needs[194].

[194] As Faigman (1999, p. 82) puts it: *"The law is a consumer that receives only as good as it demands."* See also (Thompson, 1997; DeCoux, 2007, p. 135).

Bibliography

Aitken, C. G. G., & Taroni, F. (2004). *Statistics and the evaluation of evidence for forensic scientists* (2nd ed.). Chichester: John Wiley & Sons Ltd.

Alldridge, P. (1992a). Recognising novel scientific techniques: DNA as a test case. *Criminal Law Review*, 687-698.

Alldridge, P. (1992b). Recognizing novel scientific techniques: DNA as a test case. *Criminal Law Review*, 687-198.

Alldridge, P. (1999). Scientific expertise and comparative criminal procedure. *International Journal on Evidence & Proof, 3*, 141-164.

Anonymous. (2002). Man convicted on erroneous bite mark identification finally free – served 10 years for crime he didn't commit. Retrieved June 27, 2004, from http://www.forensic-evidence.com/site/ID/bitemark_ID.html

Association of Forensic Science Providers. (2009). Standards for the formulation of evaluative forensic science expert opinion. *Science & Justice, 49*, 161-164.

Balding, D. J., & Buckleton, J. (2009). Interpreting low template DNA profiles. *Forensic Science International: Genetics, 4*, 1-10.

Balding, D. J., & Donnelly, P. (1994). The prosecutor's fallacy and DNA evidence. *Criminal Law Review*, 711-721.

Beecher-Monas, E. (2007). *Evaluating scientific evidence, an interdisciplinary framework for intellectual due process*. Cambridge: Cambridge University Press.

Benedict, N. (2004). Fingerprints and the Daubert standard for admission of scientific evidence: Why fingerprints fail and a proposed remedy. *Arizona Law Review, 46*, 519-549.

Berger, M. A. (2000). The Supreme court's trilogy on the admissibility of expert testimony. In Federal Judicial Center (Ed.), *Reference manual on scientific evidence* (Second Edition ed., pp. 9-38). Washington: Federal Judicial Center.

Black, B., Ayala, F. J., & Saffran-Brinks, C. (1994). Science and the law in the wake of Daubert: A new search for scientific knowledge. *Texas Law Review, 72*, 715-802.

Bowers, C. M. (1996). DNA and bite mark analysis. *ExpertLaw* http://www.expertlaw.com/library/identification/dna_bite_marks.html.

Bowers, C. M. (2006). Problem-based analysis of bitemark misidentifications: The role of DNA. *Forensic Science International, 159*, S104-S109.

Champod, C. (2009). Identification and individualization. In A. Moenssens & A. Jamieson (Eds.), *Encyclopedia of forensic sciences* (Vol. 3, pp. 1508-1511). London: John Wiley & Sons.

Champod, C., & Evett, I. W. (2009). Evidence interpretation: A logical approach. In A. Moenssens & A. Jamieson (Eds.), *Encyclopedia of forensic sciences* (Vol. 2, pp. 968- 976). London: John Wiley & Sons.

Cole, S. (2000). The myth of fingerprints. *Lingua Franca, 10*, 54-62.

Cole, S. (2001). *Suspect identities: A history of fingerprinting and criminal identification*: Harvard University Press.

Cole, S. (2008). Out of the Daubert fire and into the fryeing pan? Self-validation, meta-expertise and the admissibility of latent print evidence in Frye jurisdictions. *Minnesota Journal of Law, Science & Technology, 9*, 453-541.

Cole, S. A. (2003). Fingerprinting: The first junk science. *Oklahoma City University Law Review, 28*, 73-92.

Cole, S. A. (2004a). Grandfathering evidence: Fingerprint admissibility rulings from *Jennings* to *Llera Plaza* and back again. *American Criminal Law Review, 41*, 1189-1276.

Cole, S. A. (2004b). Jackson Pollock, judge Pollak, and the dilemma of fingerprint expertise. In G. Edmond (Ed.), *Expertise in regulation and law* (pp. 98-120). Burlington, VT: Ashgate Publishing.

Cole, S. A. (2005a). Does yes really mean yes - the attempt to close debate on the admissibility of fingerprint testimony. *Jurimetrics Journal, 45*, 449-464.

Cole, S. A. (2005b). More than zero: Accounting for error in latent fingerprint identification. *The Journal of Criminal Law and Criminology, 95*, 985-1078.

Cole, S. A. (2006a). Is fingerprint identification valid? Rhetorics of reliability in fingerprint proponents' discourse. *Law and Policy, 28*, 109-135.

Cole, S. A. (2006b). The prevalence and potential causes of wrongful conviction by fingerprint evidence. *Golden Gate University Law Review, 37*, 39-105.
Cole, S. A. (2007). Where the rubber meets the road: Thinking about expert evidence as expert testimony. *Villanova Law Review, 52*, 803-842.
Cole, S. A. (2009). Forensics without uniqueness, conclusions without individualization: The new epistemology of forensic identification. *Law Probability and Risk, 8*, 233-255.
Collaborative Testing Services Inc. (2010). CTS statement on the use of proficiency testing data for error rate determinations. www.ctsforensics.com/assets/news/CTSErrorRateStatement.pdf.
Collins, J. M., & Jarvis, J. (2009). The wrongful conviction of forensic science. *Forensic Science Policy & Management: An International Journal, 1*, 17 - 31.
Council of Europe. (1992). Recommendation n° R(92) 1 adopted by the Committee of Ministers of the Council of Europe on 10 February 1992 on "The use of analysis of deoxyribonucleic acid (DNA) within the framework of the criminal justice system".
Council Framework Decision 2009/905/JHA of 30 November 2009 on accreditation of forensic service providers carrying out laboratory activities (2009). *Official Journal of the European Union, L322/14*.
Damaška, M. (1973). Evidentiary barriers to conviction and two models of criminal procedure: A comparative study. *University of Pennsylvania Law Review, 121*, 506-589.
DeCoux, E. L. (2007). The admission of unreliable expert testimony offered by the prosecution: What's wrong with Daubert and how to make it right,. *Utah Law Review*, 131-166.
Dervieux, V. (2002). The French system. In M. Delmas-Marty & J. R. Spencer (Eds.), *European criminal procedures* (pp. 218-291). Cambridge: Cambridge University Press.
Dror, I. (2009). How can Francis Bacon help forensic science? The four idols of human biases. *Jurimetrics Journal, 50*, 93-110.
Dror, I. E., & Cole, S. A. (2010). The vision in “blind” justice: Expert perception, judgment, and visual cognition in forensic pattern recognition. *Psychonomic Bulletin & Review, 17*, 161-167.
Durston, G. (2008). *Evidence*. Oxford: Oxford University Press.
Editorial. (2010). Science in court. *Nature, 464*, 325.
Edmond, G. (2002). Constructing miscarriages of justice: Misunderstanding scientific evidence in high profile criminal appeals. *Oxford Journal of Legal Studies, 22*, 53-89.
Edmond, G. (2009). Merton and the hot tub: Scientific conventions and expert evidence in Australian civil procedure. *Law & Contemporary Problems, 72*, 159-189.
Edwards, H. T. (2010). *The National Academy of Sciences report on forensic sciences: What it means for the bench and bar*. Paper presented at the Conference on the Role of the Court in an Age of Developing Science and Technology, Superior Court of the District of Columbia, Washington D.C., May 6, 2010.
Epstein, R. (2002). Fingerprints meet Daubert: The myth of fingerprint "Science" Is revealed. *Southern California Law Review, 75*, 605-658.
Evett, I. W., Jackson, G., Lambert, J. A., & McCrossan, S. (2000). The impact of the principles of evidence interpretation on the structure and content of statements. *Science and Justice, 40*, 233-239.
Faigman, D. L. (1989). To have and have not: Assessing the value of social science to the law as science and policy. *Emory Law Journal, 38*, 1005.
Faigman, D. L. (1999). *Legal alchemy – the use and misuse of science in the law*. New York: W.H. Freeman and Co.
Faigman, D. L., Kaye, D. H., Saks, M. J., Sanders, J., & Cheng, E. K. (Eds.). (2007). *Modern scientific evidence: The law and science of expert testimony*. Eagan, MN: Thompson/West Publishing Co.
Faigman, D. L., Porter, E., & Saks, M. J. (1994). Check your crystal ball at the courthouse door, please: Exploring the past, understanding the present and worrying about the future of scientific evidence. *Cardozo Law Review, 15*, 1799-1835.
Fereday, M. J., & Kopp, I. (2003). European network of forensic science institutes (ENFSI) and its quality and competence assurance efforts. *Science and Justice, 43*, 99-103.
Finkelstein, M. O., & Levin, B. (2005). Compositional analysis of bullet lead as forensic evidence. *Journal of Law and Policy, 13*, 119-142.

Garrett, B. L. (2008). Judging innocence. *Columbia Law Review, 108*, 55-142.
Garrett, B. L., & Neufeld, P. J. (2009). Invalid forensic science testimony and wrongful convictions. *Virginia Law Review, 95*, 1-97.
Gatowski, S. I., Dobbin, S. A., Richardson, J. T., Ginsburg, G. P., Merlino, M. L., & Dahir, V. (2001). Asking the gatekeepers: A national survey of judges on judging expert evidence in a post-Daubert world. *Law and Human Behavior, 25*, 433-458.
Giannelli, P. C. (1980). The admissibility of novel scientific evidence: Frye v. United States, a half-century later. *Columbia Law Review, 80*, 1197-1250.
Giannelli, P. C. (1993). "Junk science": The criminal cases. *The Journal of Criminal Law and Criminology, 84*, 105-128.
Giannelli, P. C. (1997). The DNA story: An alternative view. *The Journal of Criminal Law and Criminology, 88*, 380-422.
Giannelli, P. C. (2002, December 6-10). *Scientific evidence and miscarriages of justice.* Paper presented at the 16th Conference of the International Society for the Reform of Criminal Law, Charleston, SC.
Giannelli, P. C. (2005). Forensic science. *The Journal of Law, Medicine & Ethics, 33*, 535-544.
Giannelli, P. C. (2007). Wrongful convictions and forensic science: The need to regulate crime labs. *North Carolina Law Review, 86*, 163-236.
Gilbert, N. (2010). Dna's identity crisis. *Nature, 364*, 347.
Gill, P., Brenner, C. H., Buckleton, J. S., Carracedo, A., Krawczak, M., Mayr, W. R., et al. (2006). DNA commission of the international society of forensic genetics: Recommendations on the interpretation of mixtures. *Forensic Science International, 160*, 90-101.
Gill, P., Brown, R. M., Fairley, M., Lee, L., Smyth, M., Simpson, N., et al. (2008). National recommendations of the technical UK DNA working group on mixture interpretation for the NDNAD and for court going purposes. *Forensic Science International: Genetics, 2*, 76-82.
Girdwoyn, P., & Tomaszewski, T. (2010). Admissibility of scientific evidence -- an old problem in a new era [abstract]. *Science & Justice, 50*, 33-34.
Grann, D. (2009, September, 7). Trial by fire*. The New Yorker,* p. http://www.newyorker.com/reporting/2009/2009/2007/090907fa_fact_grann?currentPage=all,
Gross, S. R. (2008). Convicting the innocent. *Annual Review of Law and Social Science, 4*, 173-192.
Haber, L., & Haber, R. N. (2008). Scientific validation of fingerprint evidence under Daubert. *Law Probability and Risk, 7*, 87-109.
Haber, L., & Haber, R. N. (2009). *Challenges to fingerprints*. Tucson, Arizona: Lawyers & Judges Publishing Company, Inc.
Hayajneh, A. M., & Al-Rawashdeh, S. H. (2010). Theoretical approaches to admitting scientific evidence in the adversarial legal system. *European Journal of Scientific Research, 41*, 182-193.
Heads of Prosecutions Committee Working Group. (2004). *Report on the prevention of miscarriages of justice*: http://www.justice.gc.ca/en/dept/pub/hop/PreventionOfMiscarriagesOfJustice.pdf.
Honess, T., & Charman, E. (2002). Members of the jury - guilty of incompetence? *The Psychologist, 15*, 72-75.
House of Commons Science and Technology Committee. (2005). Forensic science on trial, seventh report of session 2004–05. http://www.publications.parliament.uk/pa/cm200405/cmselect/cmsctech/cmsctech.htm.
Huber, B. (2008). The German system. In R. Vogler & B. Huber (Eds.), *Criminal procedure in Europe* (pp. 269-372). Berlin: Duncker & Humblot.
Huber, P. (1991a). Medical experts and the ghost of Galileo. *Law and Contemporary Problems, 54*, 119-169.
Huber, P. W. (1990). Pathological science in court. *Daedalus, 119*, 97-118.
Huber, P. W. (1991b). *Galileo's revenge - junk science in the courtroom*. New York: Basic Books.
Imwinkelried, E. J. (1991). The debate in the DNA cases over the foundation for the admission of scientific evidence: The importance of human error as a cause of forensic misanalysis. *Washington University Law Quaterly, 69*, 19-47.

Imwinkelried, E. J. (1992). *The methods of attacking scientific evidence* (Second ed.). Charlottesville, Virginia: The Michie Company.
Imwinkelried, E. J. (2002). Fingerprint science. *The National Law Journal, 26*, 18-19.
Imwinkelried, E. J. (Ed.). (1981). *Scientific and expert evidence* (Second Edition ed.). New York: Practising Law Institute.
Imwinkelried, E. J., & Tobin, W. A. (2003). Comparative bullet lead analysis (CBLA) evidence: Valid inference or ipse dixit. *Oklahoma City University Law Review, 28*, 43-72.
Ivkovic, S., & Hans, V. (2003). Jurors' evaluations of expert testimony: Judging the messenger and the message. *Law & Social Inquiry, 28*, 441-482.
Jakobs, L. E. M. P., & Sprangers, W. J. J. M. (2000). A European view on forensic expertise and counter-expertise. *Criminal Law Forum, 11*, 375-392.
Johnson, P. (2004). The Sally Clark case: Another collision between science and the criminal law. *Australian Journal of Forensic Sciences, 36*, 11-33.
Jonakait, R. N. (1991). Forensic science: The need for regulation. *Harvard Journal of Law and Technology, 4*, 109-191.
Jonakait, R. N. (1993-1994). The meaning of *Daubert* and what that means for forensic science. *Cardozo Law Review, 15*, 2103–2117.
Juy-Birmann, R. (2002). The German system. In M. Delmas-Marty & J. R. Spencer (Eds.), *European criminal procedures* (pp. 292-347). Cambridge: Cambridge University Press.
Kaasa, S., Peterson, T., Morris, E., & Thompson, W. (2007). Statistical inference and forensic evidence: Evaluating a bullet lead match. *Law and Human Behavior, 31*, 433-447.
Kaufman, F. (1998). *Report of the Kaufman commission on proceedings involving Guy Paul Morin*. Toronto: Ministry of the Attorney General, Ontario.
Kaye, D. (2009a). Identification, individualization and uniqueness: What's the difference. *Law Probability and Risk, 8*, 85-94.
Kaye, D. H. (2003). The nonscience of fingerprinting: United States v. Llera-Plaza. *Quinnipiac Law Review, 21*, 1073-1088.
Kaye, D. H. (2006). The current state of bullet-lead evidence. *Jurimetrics Journal, 46*, 99-114.
Kaye, D. H. (2009b). "False, but highly persuasive": How wrong were the probability estimates in *McDaniel v. Brown*? *Michigan Law Review, 108*, 1-7.
Kaye, D. H. (2009c). Probability, individualization, and uniqueness in forensic science evidence: Listening to the academies. *Brooklyn Law Review, to appear*.
Kennedy, D. (2003). Forensic science: Oxymoron? *Science, 302*, 1625.
Kieser, J. A. (2005). Weighing bitemark evidence. *Forensic Science, Medicine and Pathology, 1-2*, 75-78.
Koehler, J. J. (1997). Why DNA likelihood ratios should account for error (even when a National Research Council report says they should not). *Jurimetrics Journal, 37*.
Koehler, J. J. (2008). Fingerprint error rates and proficiency tests: What they are and why they matter. *Hasting Law Journal, 59*, 1077-1098.
Koehler, J. J., & Saks, M. (1991). What DNA 'fingerprinting' can teach the law about the rest of forensic science. *Cardozo Law Review, 13*, 361-372.
Krane, D. E., Ford, S., Gilder, J. R., Inman, K., Jamieson, A., Koppl, R., et al. (2008). Sequential unmasking: A means of minimizing observer effects in forensic DNA interpretation. *Journal of Forensic Sciences, 53*, 1006-1007.
Langbein, J. H. (1977). *Comparative criminal procedure: Germany*. St-Paul, Minn.: West Publishing Co.
Lawson, T. F. (2003). Can fingerprint lie?: Re-weighing fingerprint evidence in criminal jury trials. *American Journal of Criminal Law, 31*, 1-66.
Leung, W. C. (2002). The prosecutor's fallacy – a pitfall in interpreting probabilities in forensic evidence. *Medicine Science and the Law, 42*, 44-50.
Lucas, D. M. (1989). The ethical responsibilities of the forensic scientist: Exploring the limits. *Journal of Forensic Sciences, 34*, 719-729.
Lynch, M. (2003). God's signature: DNA profiling, the new gold standard in forensic science. *Endeavour, 27*, 93-97.
MacFarlane, B. A. (2006). Convicting the innocent: A triple failure of the justice system. *Manotiba Law Journal, 31*, 403-485.

Malkoc, E., & Neuteboom, W. (2007). The current status of forensic science laboratory accreditation in Europe. *Forensic Science International, 167*, 121-126.
McLachlan, H. V. (1995). No two sets the same? Applying philosophy to the theory of fingerprints. *The Philosopher: Journal of the Philosophical Society of England, 83*, 12-18.
Meintjes-van der Walt, L. (2001). *Expert evidence in the criminal justice process - a comparative perspective*. Amsterdam: Rozenberg.
Meintjes-van der Walt, L. (2003). The proof of the pudding: The presentation and proof of expert evidence in South Africa. *Journal of African Law, 47*, 88-106.
Meintjes-van der Walt, L. (2006). Fingerprinting: Probing myth and reliability. *South African Journal of Criminal Justice (SACJ), 19*, 152-172.
Michaelis, R. C., Flanders, R. G., Jr, & Wulff, P. H. (2008). *A litigator's guide to DNA, from the laboratory to the courtroom*. Burlington, San Diego, London: Academic Press.
Mnookin, J. L. (2001a). Fingerprint evidence in an age of DNA profiling. *Brooklyn Law Review, 67*, 14-71.
Mnookin, J. L. (2001b). Scripting expertise: The history of handwriting identification evidence and the judicial construction of reliability. *Virginia Law Review, 87*, 102-226.
Mnookin, J. L. (2003). Fingerprints: Not a gold standard. *Issues in Science and Technology Online*, http://www.issues.org/issues/20.21/mnookin.html.
Mnookin, J. L. (2008). The validity of latent fingerprint identification: Confessions of a fingerprinting moderate *Law Probability and Risk, 7*, 127-141.
Morling, N., Bastisch, I., Gill, P., & Schneider, P. M. (2007). Interpretation of DNA mixtures--European consensus on principles. *Forensic Science International: Genetics, 1*, 291-292.
Morling, T. R. (1987). *Royal commission of inquiry into Chamberlain conviction*. Canberra: The Parliament of the Commonwealth of Australia -- no. 192/1987. (Government Printer.)
Müller, J. (1992). *Der grundsatz der freien beweiswürdigung im strafprozess.* Zürich.
Murphy, E. (forthcoming). The new forensics: Criminal justice, false certainty, and the second generation of scientific evidence. *California Law Review*.
National Institute of Justice. (1996). *Convicted by juries, exonerated by science: Case studies in the use of DNA evidence to establish innocence after trial* Washington DC: NIJ, http://www.ncjrs.gov/pdffiles/dnaevid.pdf.
National Research Council. (2009). *Strengthening forensic science in the United States: A path forward*. Washington, D.C.: The National Academies Press.
National Research Council - Committee on DNA Technology in Forensic Science. (1992). *DNA technology in forensic science*. Washington, D.C.: National Academy Press.
National Research Council - Committee on DNA Technology in Forensic Science. (1996). *The evaluation of forensic DNA evidence*. Washington, D.C.: National Academy Press.
National Research Council - Committee on Scientific Assessment of Bullet Lead Elemental Composition Comparison. (2004). *Forensic analysis: Weighing bullet lead evidence* Washington DC: The National Academies Press.
Neufeld, P. J., & Scheck, B. (2010). Making forensic science more scientific. *Nature, 364*, 351.
Nichols, R. G. (2007). Defending the scientific foundations of the firearms and tool mark identification discipline: Responding to recent challenges. *Journal of Forensic Sciences, 52*, 586-594.
Nobles, R., & Schiff, D. (2001). Criminal cases review commission: Reporting success? *Modern Law Review, 64*, 280-299.
Nobles, R., & Schiff, D. (2005). Misleading statistics within criminal trials - the Sally Clark case. *Significance, 2*, 17-19.
Patenaude, P. (2003). *L'expertise en preuve pénale: Les sciences et techniques modernes d'enquête, de surveillance et d'identification*. Cowansville (Québec): Les Editions Yvon Blais Inc.
Pretty, I. A., & Sweet, D. (2001). The scientific basis for human bitemark analyses – a critical review. *Science and Justice, 41*, 85-92.
Redmayne, M. (1997). Expert evidence and scientific disagreement. *UC Davis Law Review, 30*, 1027-1080.
Redmayne, M. (2001). *Expert evidence and criminal justice*: Oxford University Press.

Risinger, D. M., Benbeaux, M. P., & Saks, M. J. (1989). Exorcism of ignorance as a proxy for rational knowledge: The lessons of handwriting identification "Expertise". *University of Pennsylvania Law Review, 137*, 731-792.
Risinger, D. M., & Saks, M. J. (2003). Flaws in forensic science. *Issues in Science and Technology*, http://www.issues.org/issues/20.21/risinger.html.
Roberts, P. (1994). Science in the criminal process. *Oxford Journal of Legal Studies, 14*, 469-506.
Roberts, P., & Willmore, C. (1993). *The role of forensic evidence in criminal proceedings, Royal commission on criminal justice research study no. 11*. London: HMSO.
Robertson, B., & Vignaux, G. A. (1995). *Interpreting evidence – evaluating forensic science in the courtroom*. Chichester: John Wiley & Sons Inc.
Saks, M. J. (1989). Prevalence and impact of ethical problems in forensic science. *Journal of Forensic Sciences, 34*, 772-793.
Saks, M. J. (1998). Merlin and Solomon: Lessons from the law's formative encounters with forensic identification science. *Hastings Law Journal, 49*, 1069-1141.
Saks, M. J. (2003). The legal and scientific evaluation of forensic science (especially fingerprint expert testimony). *Seton Hall Law Review, 33*, 1167-1187.
Saks, M. J., & Koehler, J. J. (1991). What DNA "Fingerprinting" Can teach the law about the rest of forensic science? *Cardozo Law Review, 13*, 361-372.
Saks, M. J., & Koehler, J. J. (2005). The coming paradigm shift in forensic identification science. *Science, 309*, 892-895.
Saks, M. J., & Koehler, J. J. (2008). The individualization fallacy in forensic science evidence. *Vanderbilt Law Review, 61*, 199-219.
Saks, M. J., & Risinger, D. M. (1996). Science and nonscience in the courts: Daubert meets handwriting identification expertise. *Iowa Law Review, 82*, 21-74.
Sanders, J., Diamond, S., & Vidmar, N. (2002). Legal perceptions of science and expert knowledge. *Psychology, Public Policy and Law, 8*, 139.
Schiffer, B. (2009). *The relationship between forensic science and judicial error: A study covering error sources, bias and remedies.* Université de Lausanne, Lausanne.
Schiffer, B., & Champod, C. (2008). Judicial error and forensic science: Pondering the contribution of DNA evidence. In R. Huff & K. M. (Eds.), *Wrongful conviction international perspectives on miscarriages of justice* (pp. 33-55). Philadelphia: Temple University Press.
Schurr, B. (1993). *Expert witness and the duties of disclosure & impartiality: The lessons of the IRA cases in England*. Paper presented at the Australian Institute of Criminology: Law, medicine and criminal justice.
Schwartz, A. (2004). A challenge to the admissibility of firearms and toolmark identifications: *Amicus* brief prepared on behalf of the defendant in United States v. Kain, crim. 03-573-1 (e.D. Pa. 2004). *The Journal of Philosophy, Science and Law, 4*, http://www.psljournal.com/archives/all/kain.cfm.
Schwartz, A. (2005). A systemic challenge to the reliability and admissibility of firearms and toolmark identification. *The Columbia Science and Technology Law Review, 6*, 1-42.
Schwartz, A. (2007). Commentary on. *Journal of Forensic Sciences, 52*, 1414-1415.
Schwinghammer, K. (2005). Fingerprint identification: How "The gold standard of evidence" Could be worth its weight. *American Journal of Criminal Law, 32*, 265-289.
Shannon, C. R. (1984). *Royal commission of inquiry in respect to the case of Edward Charles Splatt* Adelaide, Australia: Government Printer.
Smrz, M. A., Burmeister, S. G., Einseln, A., Fisher, C. L., Fram, R., Stacey, R. B., et al. (2006). Review of FBI latent print unit processes and recommendations to improve practices and quality. *Journal of Forensic Identification, 56*, 402-434.
Sombat, J. M. (2002). Latent justice: Daubert's impact on the evaluation of fingerprint identification testimony. *Fordham Law Review, 70*, 2819-2868.
Sommer, P. (2009). Meeting between experts: A route to simpler, fairer trials? *Digital Investigation, 5* 146-152.
Spencer, J. R. (1992). Court experts and expert witnesses, have we a lesson to learn from the French? *Current Legal Problems, Part 2: Collected Papers, 45*, 213-236.

Spencer, J. R. (2002a). Evidence. In M. Delmas-Marty & J. R. Spencer (Eds.), *European criminal procedures* (pp. 594-640). Cambridge: Cambridge University Press.
Spencer, J. R. (2002b). The English system. In M. Delmas-Marty & J. R. Spencer (Eds.), *European criminal procedures* (pp. 142-217). Cambridge: Cambridge University Press.
Spinney, L. (2010). The fine print. *Nature, 464*, 344-346.
Stacey, R. B. (2004). A report on the erroneous fingerprint individualization in the Madrid train bombing case. *Journal of Forensic Identification, 54*, 706-718.
Steele, L. J. (2002). "All we want you to do is confirm what we already know", Daubert challenge to firearms identification. *Criminal Law Bulletin, 38*, 466.
Steele, L. J. (2004). The defense challenge to fingerprints. *Criminal Law Bulletin, 40*, 213-240.
Stefani, G., Levasseur, G., & Bouloc, B. (2006). *Procédure pénale* (20ème ed.). Paris: Dalloz.
Stringer, P., Scheffer, J. W., Scott, P., Lee, J., Goetz, R., Lentile, V., et al. (2009). Interpretation of DNA mixtures--Australian and New Zealand consensus on principles. *Forensic Science International: Genetics, 3*, 144-145.
Summers, S. J. (2006). *Fair trials, the European criminal procedural tradition and the European court of human rights.* Zürich, Zürich.
The Law Commission. (2009). *The admissibility of expert evidence in criminal proceedings in England and Wales - a new approach to the determination of evidentiary reliability - a consultation paper* (No. Consultation Paper No 190): http://www.lawcom.gov.uk/expert_evidence.htm.)
The Right Honourable Lord Justice Auld. (1991). *Review of the criminal courts of England and Wales*: http://www.criminal-courts-review.org.uk/auldconts.htm.
Thompson, W. C. (1993). Evaluating the admissibility of new genetic identification tests: Lessons from the "DNA war". *The Journal of Criminal Law and Criminology, 84*, 22-104.
Thompson, W. C. (1995). Subjective interpretation, laboratory error and the value of forensic DNA evidence: Three case studies. In B. S. Weir (Ed.), *Human identification: The use of DNA markers* (Vol. 4, pp. 153-168). Dordrecht: Kluwer Academic Publishers.
Thompson, W. C. (1997). A sociological perspective on the science of forensic DNA testing. *UC Davis Law Review, 30*, 1113-1136.
Thompson, W. C. (2005). Analyzing the relevance and admissibility of bullet-lead evidence: Did the NRC report miss the target? *Jurimetrics Journal, 46*, 65-89.
Thompson, W. C. (2006). Tarnish on the 'gold standard:' understanding recent problems in forensic DNA testing. *The Champion*, 10-16.
Thompson, W. C. (2008). Beyond bad apples: Analyzing the role of forensic science in wrongful convictions. *Southwestern University Law Review, 37*, 971-994.
Thompson, W. C. (2009a). Interpretation: Observer effects. In A. Moenssens & A. Jamieson (Eds.), *Encyclopedia of forensic sciences* (pp. 1575-1579). London: John Wiley & Sons.
Thompson, W. C. (2009b). Painting the target around the matching profile: The Texas sharpshooter fallacy in forensic DNA interpretation. *Law Probability and Risk, 8*, 257-276.
Thompson, W. C., & Ford, S. (1990). Is DNA fingerprinting ready for the courts? *New Scientist, March 31st*, 38-43.
Thompson, W. C., Taroni, F., & Aitken, C. G. (2003). How the probability of a false positive affects the value of DNA evidence. *Journal of Forensic Sciences, 48*, 47-54.
Tobin, W. A. (2004). Comparative bullet lead analysis: A case study in flawed forensics. *The Champion*, 12.
Trechsel, S. (2005). *Human rights in criminal proceedings*. Oxford Oxford University Press.
United States Department of Justice, & Office of the Inspector General - Oversight and Review Division. (2006). *A review of the FBI's handling of the Brandon Mayfield case (unclassified and redacted)*. Washington DC.
Verhaegen, M.-N. (1997). L'identification par l'analyse génétique dans la système de preuve pénale belge. In C. Hennau-Hublet & B. M. Knoppers (Eds.), *L'analyse génétique à des fins de preuve et les droits de l'homme - aspect médico-scientifique, éthique et juridique* (pp. 147-226). Bruxelles: Bruylant.
Verniory, J.-M. (2000). La libre appréciation de la preuve pénale et ses limites. *Revue pénale suisse, 118*, 378-413.
Viscount Runciman. (1993). *The Royal commission on criminal justice, report 144*. London: HMSO.

Vuille, J. (2010). Art. 182-191. In A. Kuhn & Y. Jeanneret (Eds.), *Commentaire romand du code de procédure pénale*. Bâle: Helbing Lichtenhahn.
Walker, C., & Stockdale, R. (1999). Forensic evidence. In C. Walker & K. Starmer (Eds.), *Miscarriage of justice - a review of justice in error* (pp. 119-150). Oxford: Oxford University Press.
Willis, S. M. (2009). Forensic science, ethics and criminal justice. In J. Fraser & R. Williams (Eds.), *Handbook of forensic science* (pp. 523-545). Cullompton, UK: Willan Publishing.
Zabell, S. L. (2005). Fingerprint evidence. *Journal of Law and Policy, 13*, 143-179.

APPENDIX VII

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 19 May 2010
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EUROPEAN COMMITTEE ON CRIME PROBLEMS
(CDPC)

Bureau
(CDPC-BU)

REPORT ON THE STANDING AND RIGHTS OF VICTIMS IN CRIMINAL PROCEEDINGS

prepared by
Mr. Brano Bohacik

Report on the standing and rights of victims in criminal proceedings[1]

Introduction

1. The position of victims in criminal proceedings has been one of the priority issues for the Council of Europe (CoE) for a long period of time. In recent years, standard-setting activities in this area were enhanced in the CoE as well as in other fora, in particular in the European Union (EU) and the United Nations (UN) leading to important developments in the legislation and practive of CoE Member States. However, the position of victims in criminal proceedings still calls for the attention of legislators in Europe and worldwide. The rights of victims should be enhanced and fully recognised, by establishing or reinforcing notably measures for their protection, assistance and respect. The standing and rights of victims of crime concern in particular human rights and criminal law aspects as well as measures for assistance, support and monitoring which should be established and implemented in all European countries. It is fundamental to take into account existing and relevant CoE recommendations and treaties, as well as legal instruments from other international organisations when drafting new legal standards in this field to establish common rules related to the status and rights of victims in criminal proceedings. For this purpose, it is important to consider fully the specific position of the victim including in relation to the perpetrator and taking into account the negative consequences of the committed offence on the victim.. Although existing standards may seem sufficient, the CoE should examine the possibility of drafting common rules, which could also serve as a strong basis for setting up new standards in the future to enhance the standing and rights of victims in criminal proceedings.

2. Recent activities within the CoE show the strong will of Member States to improve the status and rights of victims in criminal proceedings. The theme: “Victims, place, rights and assistance” was chosen as the main topic of the 27th Conference of the Ministers of Justice of CoE Member States in Yerevan in 2006. Three years later, on the occasion of their 29th conference (18-19 June 2009, Tromso), Ministers of Justice put the issue of victims at the top of their agenda once more. Although discussions mainly focused on victims of domestic violence, including violence against women, they also addressed the position of victims in criminal proceedings in general leading to the adoption of Resolution No. 1 on preventing and responding to domestic violence specifically referring to victims’ rights.

3. In point 22 of Resolution No. 1, Ministers of Justice of the CoE invited the Committee of Ministers (CM) to entrust the European Committee on Crime Problems (CDPC), in cooperation with the European Committee on Legal Co-operation (CDCJ) and the Steering Committee for Human Rights (CDDH), to examine the following decisions which should be taken into account when drafting common rules related to the status and rights of victims in criminal proceedings:

a. Ensuring, throughout the criminal justice process, respect for the personal situation, rights and dignity of victims and protection against any intimidation, harassment or abuse;
b. Recognising and improving the status of victims in the investigation and the criminal proceedings;
c. Ensuring effective access to justice by the provision of information, legal advice and, where appropriate, legal aid;
d. Ensuring specific assistance and protection to the most vulnerable victims;
e. In cases where it is decided not to prosecute an alleged offender, considering ways for victims to have the decision re-examined;
f. Providing for compensation schemes, including expenses incurred in relation to criminal proceedings.

1 This document does not specifically refer to the issue of victims of domestic violence and violence against women, since this particular topic is under consideration of a specific committee of the Council of Europe known under the title CAHVIO

4. As a result, the CDPC examined this specific topic at its 58th plenary meeting (12-16 November 2009, Strasbourg) and invited the Committee of Ministers to note that the CDPC instructed the Secretariat to engage an expert to carry out a preliminary study report/study on the subject of victims as a follow up to Resolution No. 1.[2] On their 1073rd meeting the Deputies decided to accept the invitation of Ministers of Justice and the CDPC.

I. Relevant sources of the Council of Europe and other international bodies

5. The importance of the standing and rights of victims has been fully recognized by the Council of Europe and other international bodies, in particular the European Union and the United Nations. A number of international legal instruments have been established and implemented. However, existing means to regulate the standing and rights of victims are still lacking a comprehensive approach.The Council of Europe is in a good position to remove the loopholes in the system and to improve the current situation. In doing so the existing international standars and in particular those listed futher below, should be duly considered.

A. Instruments of the Council of Europe

6. The CoE has been addressing the position of victims of crime for many years. In 1977 the Committee of Ministers adopted Resolution (77) 27 on the compensation of victims of crime which recommends to States to compensate victims or dependants of victims and served as basis for the adoption of the European Convention on Compensation of Victims of Violent Crimes (Strasbourg 24 November 1983). This Convention, which was the first comprehensive binding instrument in Europe regulating issues related to the compensation of victims, establishes minimum standards in this field. Although it was a significant step forward, it only applies to specific circumstances and it does not define expressly the notion of "victim". In addition, where compensation is not fully available from other sources, on the basis of the principle of territoriality[3], the Convention states that a State should contribute to compensate victims of serious bodily injury or damages to health or dependants of the deceased person but only in cases of violent and intentional crimes. Victims are entitled to receive compensation at least for loss of earnings, medical and hospitalisation expenses as well as for funeral expenses, and dependants are entitled to claim damages for loss of maintenance.

7. Two years after the adoption of the Convention, the Committee of Ministers adopted Recommendation Rec. R (85)11 on the victim's position in the framework of criminal law and procedure. It should be noted that this instrument, which is still valid, contains a list of procedural rights and measures for victims of crimes in general. Indeed, the Recommendation tackles a variety of rights which should be recognised and applied throughout all stages of criminal proceedings, from pre-trial to post-trial stage. It stresses further that criminal justice should take into account to a greater extent the specific needs of victims, including in relation to the physical, psychological, material and social harm which was caused. For this purpose, governments are invited to take specific measures to ensure that the needs of victims are addressed including through the training of the relevant stakeholders working with and for the rights of victims including police officers.

8. Recommendation R(87)21 (1987) on assistance to victims and the prevention of victimisation contains a number of issues related to assistance and support services (in general and concerning specific categories of victims), public awareness, monitoring, research and mediation, as well as to the prevention of disclosure of information on the victim to third parties without the victim's consent. It is also important to note that the recommendation stresses that the

2 See point 3.n of the list of decisions of the 58th plenary session of the CDPC.

3 Non-criminal field the standards of the rights of victims were examined in the Report on non criminal remedies for crime victims prepared by the Group of Specialists on remedies for crime victims (CJ-S-VICT), which was further examined by the CDCJ and the Committee of Ministers (1037th meeting on 8 October 2008).

criminal justice system is not sufficient to meet fully the needs of victims. Therefore, it also provides for other forms of assistance including assistance programmes and structures, awareness-raising measures on the needs of victims, and specific measures for vulnerable victims.

9. A number of other legal instruments were adopted to regulate the rights of victims but using a sectorial approach based on the nature of the crime such as terrorism, sexual exploitation, violence against women and other forms of serious crimes.

10. It is important to mention, for example, that the CoE Convention on the Prevention of Terrorism of 16 May 2005 contains a general provision on compensation and support of victims as well as their close family members. In addition, according to point 31 of its Explanatory Report the Convention also contains 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).[4] Such statement underlines the human rights aspect of the issues and it should not be, in principle, limited to terrorism related scope.

11. In addition, the CoE Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism of 16 May 2005 contains important provisions related to confiscation. As a novelty to the recent system it imposes an obligation on the Parties to give priority consideration to returning the confiscated property to the requesting Party, to the extent permitted by domestic law and if so requested, to ensure that victims are compensated or that the confiscated property is returned to their legitimate owners. A broader application of this principle should be further considered in future activities.

12. Both the CoE Convention on the Prevention of Terrorism and the CoE Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism of 16 May 2005 represent a restrictive approach of drafters regarding the victim issues (based either on the scope of the Convention or specifically the issue of confiscation).

13. The CoE Convention on Action against Trafficking in Human Beings of 16 May 2005 marked the opening of a new chapter in the history CoE regulations of issues related to victims. Its purpose and scope could serve as strong basis for future legal developments in this area since it uses a comprehensive approach to protect victims and witnesses of trafficking, including respect of their human rights and gender equality. In particular by ensuring an effective investigation and prosecution. Furthermore, the Convention regulates various needs and rights of victims at different levels through substantive and procedural criminal laws and measures to prevent such crime, and to protect or assist victims. In addition, the principle of non-discrimination was introduced in this field.[5] Concerning substantive criminal law, the consent of the victim of trafficking is no longer relevant and the use of services carried out by a victim of trafficking in human beings is expressly sanctioned. Furthermore, where the offence endangered the life of the victim deliberately or by gross negligence, such conditions are considered as aggravating circumstances. It is important to note the simple nature of the definition of "victim" contained in the Convention covers all individuals who may be affected by the criminal offence: "a victim is any natural person who is subject to trafficking in human beings". The Convention provides a legal framework assist victims taking into account the specific needs of certain groups of victims, in particular children. The Convention also regulates the role of civil society in the prevention of and protection or assistance to victims. Governments are also encouraged to take measures, for

4 This study focuses on victim issues in general. Nevertheless it has to be pointed out that the CoE is active also in the field of victims of terrorism. For instance the Guidelines on Human Rights and the Fight Against Terrorism were adopted by the Committee of Ministers in July 2002, the Guidelines on the Protection of Victims of Terrorist Acts were adopted by the Committee of Ministers on 2 March 2005.

5 Article 3 of the Convention states: 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".

example, to identify victims, to protect the private life and identity of victims, to assist victims in their physical, psychological and social recovery, to provide special assistance to child victims, as well as ensuring access to information, to legal aid and compensation. Repatriation and redress are also regulated. Furthermore, in a chapter on international cooperation, an obligation is imposed on Parties to cooperate in order to provide assistance to and protect victims. It should be noted that monitoring mechanisms are fundamental and activities of the GRETA should be taken into account. As described above, the Convention addresses various aspects regarding the rights of victims of trafficking using a comprehensive approach (providing a broad scale of rights and assistance to victims). However, a restrictive scope of the Convention (limitation in scope to victims of particular crime) must be stressed. .

14. Although it is restricted to the specific crimes of sexual abuse and sexual exploitation of children, the CoE Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse addresses the rights of such victims through a comprehensive approach. The Convention, which will enter into force on 1 July 2010 contains the principle of non-discrimination, including for victims, a definition of the notion "victim"[6], a victim-related provision on jurisdiction[7], general measures of the protection of rights and interests of victims, including their special needs as witnesses, at all stages of investigations and criminal proceedings.[8] Inititation of proceedings does not depend on the reporting by the victim. Furthermore, a specific provision concerns lapse of time to allow the victim to report the crime after it has reached the age of his or her majority. Interviews with children and in particular child victims are also regulated. Although the Convention regulates rights restricted to a certain type of crime, most of these rights should be taken into account in future activities in this field.

6 Article 3 lit. c) of the Convention states: "for the purpose of this Convention 'victim' shall mean any child subject to sexual exploitation or sexual abuse"

7 Article 25 para 6 of the Convention states: "for the prosecution of the offences...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".

8 (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.

15. Recommendation Rec (2006) 8 on assistance to crime victims of the Committee of Ministers is another fundamental and recent legal instrument in this area since it contains, in particular, a definition of "victim" which is consistent with the definition given in the EU Framework Decision (see chapter on the EU). [9] Moreover, the Recommendation recalls basic and fundamental principles since it stresses the importance of recognising and respecting effectively the rights of victims with regard to their human rights in particular their security, dignity, private and family life, as well as the principle of non-discrimination while taking into account the negative effects of the crime on the victim. In addition, it also encourages States to establish measures in particular to avoid secondary victimisation and which would not depend on the identification, arrest, prosecution or conviction of the perpetrator of criminal act. Such measures include assisting victims in all aspects of rehabilitation and as so far as possible, in a language understood by the victim, in the community, at home and in the workplace and should include the provision of medical care, material support and psychological health services as well as social care and counselling. These services should be provided free of charge at least in the immediate aftermath of the crime. Another important provision concerns vulnerable victims, including children and elderly people, whose particular needs should be taken into account through the establishment and application of adequate measures of assistance at all stages of the proceedings. The Recommendation pays particular attention to the role of public services, victim support services for which minimum standards are defined, as well as criminal justice agencies, and agencies in the community. It also deals with the creation of specialised centres for victims of certain types of crimes. Access to information and the content of information are also regulated. Right to effective access to other remedies, insurance, State compensation, confidentiality, training issues related to agencies involved, coordination and cooperation, mediation, research issues are also covered by the Recommendation. The Recommendation has a great added value, since it covers natural persons who are victims of all types of crimes, including non-violent crimes and crimes committed through negligence. Its content provides a valid basis for future activities. It should be noted, however, that the rules on compensation establish that compensation should be provided by States only to victims of serious, intentional, violent crimes and the immediate family and dependants of victims who have died as a result of such crime.

B. Instruments of the United Nations

16. On 29 November 1985, the General Assembly of the United Nations adopted the Declaration of Basis Principles of Justice for Victims of Crime and Abuse of Power (A/RES/40/34, 96th Plenary meeting) which defines the notion of "victim" [10] to recall certain rights of victims in criminal proceedings, including regarding access to justice and fair treatment, restitution and compensation. It further invites all UN Member States to establish national and international measures in this area such as training all individuals who work with victims of crimes including police officers and to promote progress made by States in their efforts without prejudice to the rights of offenders.

17. The Rome Statute of the International Criminal Court contains provisions on the compensation of victims, but also procedural rights such as the right to make representations before the Pre-trial Chamber or the right to submit observations concerning questions of jurisdiction and admissibility. The Court should take appropriate measures to protect the safety,

9 'Victim' means a natural person who has suffered harm, including physical or mental injury, emotional suffering or economic loss, caused by acts or omissions that are in violation of the criminal law of a member state. The term victim also includes, where appropriate, the immediate family or dependants of the direct victim.

10 (1). "Victims" means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power; (2). A person may be considered a victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim. The term "victim" also includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.

physical and psychological well-being, dignity and privacy of victims. In addition, an exception to the principle of public hearing was introduced to protect, notably, victims since proceedings may be conducted in camera and evidence can be presented electronically or through other special means.

18. The UN Convention on Transnational Organized Crime (2000) offers a more comprehensive set of regulations. For instance, it establishes the possibility to physically protect an individual who is both a "victim" and "witness" while providing further assistance to and protection of all victims. [11] The Convention proposes also legal basis for mutual legal assistance, if a victim is located in the territory of the requested state, provided that specific conditions are met. Some of the important measures in the area of mutual legal assistance can also be found in the United Nations Convention against Corruption as well as in the 2003 Protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the United Nations Convention against transnational organized crime. One of the purposes of the Protocol is to protect and assist victims of such trafficking with full respect of their human rights. It extends the catalogue of means of assistance to and protection of victims of trafficking in person. [12]

19. In the field of non-binding instruments the United Nations played a very active role. An important number of guidelines related to victims have been adopted in recent years focusing for example on victims who are women, children, and victims of terrorism etc ..

C. Instruments of the European Union

20. Various important legal instruments were adopted in the EU and in particular the Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings[13] and the Council Directive 2004/80/EC of 29 April 2004 relating to compensation to

11 Article 25 - Assistance to and protection of victims (1). Each State Party shall take appropriate measures within its means to provide assistance and protection to victims of offences covered by this Convention, in particular in cases of threat of retaliation or intimidation. (2). Each State Party shall establish appropriate procedures to provide access to compensation and restitution for victims of offences covered by this Convention. (3). Each State Party shall, subject to its domestic law, enable views and concerns of victims to be presented and considered at appropriate stages of criminal proceedings against offenders in a manner not prejudicial to the rights of the defence.

12 Article 6 Assistance to and protection of victims of trafficking in persons (1). In appropriate cases and to the extent possible under its domestic law, each State Party shall protect the privacy and identity of victims of trafficking in persons, including, inter alia, by making legal proceedings relating to such trafficking confidential. (2). Each State Party shall ensure that its domestic legal or administrative system contains measures that provide to victims of trafficking in persons, in appropriate cases: (a) Information on relevant court and administrative proceedings; (b) Assistance to enable their views and concerns to be presented and considered at appropriate stages of criminal proceedings against offenders, in a manner not prejudicial to the rights of the defence. 3. Each State Party shall consider implementing measures to provide for the physical, psychological and social recovery of victims of trafficking in persons, including, in appropriate cases, in cooperation with non-governmental organizations, other relevant organizations and other elements of civil society, and, in particular, the provision of: (a) Appropriate housing; (b) Counselling and information, in particular as regards their legal rights, in a language that the victims of trafficking in persons can understand; (c) Medical, psychological and material assistance; and (d) Employment, educational and training opportunities. 4. Each State Party shall take into account, in applying the provisions of this article, the age, gender and special needs of victims of trafficking in persons, in particular the special needs of children, including appropriate housing, education and care. 5. Each State Party shall endeavour to provide for the physical safety of victims of trafficking in persons while they are within its territory. 6. Each State Party shall ensure that its domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered. Article 7Status of victims of trafficking in persons in receiving States. 1. In addition to taking measures pursuant to article 6 of this Protocol, each State Party shall consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases. 2. In implementing the provision contained in paragraph 1 of this article, each State Party shall give appropriate consideration to humanitarian and compassionate factors.

13 Point 9 of the Preamble to the Framework Decision states: „The provisions of this Framework Decision do not, however, impose an obligation on Member States to ensure that victims will be treated in a manner equivalent to that of a party to proceedings. It means that the

crime victims. Both instruments provide minimum and basic standards within the EU. These had an impact not only on the national legislation of EU Member States, but also on the development of standards in other fora, including the CoE.

21. The Council Framework Decision establishes a legal basis for the harmonisation of rules and practices concerning the standing and main rights of victims in Member States of the EU. "Victims" are legally defined[14] and the following issues are particularly addressed:

a. Rights of victims in criminal proceedings and corresponding obligations of states: a right to respect and recognition at all stages of criminal proceedings, right to be heard[15], a right to receive information and information about the progress of the case (the minimum list of information is contained in a particular provision), reimbursement of expenses, a right to have legal advice available, a right to protection, right for compensation during criminal proceedings, the obligation of state to promote mediation, a right to notify in its home country the commission of a criminal act in another Member State,
b. Support to victims
c. Prevention and training of personnel
d. Monitoring mechanisms.

22. The Council Directive 2004/80/EC of 29 April 2004 relating to compensation of crime victims provides for a scheme of compensation measures for victims of violent crimes on the basis of international cooperation in cross-border cases throughout the European Union. Such measures ensure that victims can turn easily to the competent authority in their Member State for a crime committed in another including by overcoming practical and linguistic difficulties.

23. In addition to these standards the 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 subjects of an action to facilitate illegal immigration, who cooperate with the competent authorities should also be mentioned.[16]

II. Recent and ongoing activities related to victims

A. Recent and ongoing activities of the Council of Europe

24. The most recent development of CoE standards in this field is the Convention of the Council of Europe on counterfeiting of medical products and similar crimes involving threats to public health (the Medicrime Convention)[17], which is a comprehensive international instrument in the field of medicrime focusing notably on the prevention of such crime and the protection of its victims. It underlines the principle of non - discrimination.[18] The legal definition of "victim" is

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Member States are not under obligation to provide the rights regulated by the Framework Decision if a victim does not have a status of a party to criminal proceedings or a status of a wittness.

14 'victim' shall mean a natural person who has suffered harm, including physical or mental injury, emotional suffering or economic loss, directly caused by acts or omissions that are in violation of the criminal law of a Member State

15 According to Report from the Commission pursuant to Article 18 of the Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA) the victims are not considered parties to criminal proceedings in common law countries, but the right to be heard is recognised in the UK and Ireland.

16 The scope of application of the Directive is related to victims from non-EU Member States, who are or have been victims of trafficking, even if they came to the EU Member State without legal permit.

17 The draft Convention has been approved by the CDPC, however, it has not been formally adopted by the Committee of Ministers so far.

18 Article 2 of the Medicrime Convention states: „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 any other opinion, national or social origin, association with a national minority, property, birth, sexual orientation, state of health, disability or other status.

provided.[19] In addition, if an offence caused the death of, or damage to the physical or mental health of the victim, such circumstances should be considered as aggravating circumstances.

25. The Medicrime Convention also establishes the obligation of States to ensure that victims of an offence, which is committed on the territory of a Party other that the one where they reside, can make a complaint before the competent authorities of their State of residence. Furthermore, the Medicrime Convention includes measures to protect victims, in particular by:

1. Ensuring that victims have access to information relevant to their case and necessary for the protection of their health;
2. Assisting victims in their physical, psychological and social recovery;
3. Providing in domestic law the right of victims to compensation from perpetrators.

26. The Convention also contains a catalogue of rights for victims at all stages of criminal investigations and proceedings, namely:

1. The right to be informed about rights and services at their disposal and, unless the 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 the their cases;
2. the right to be heard, to supply evidence and to choose the means of having their views, needs and concerns presented and considered – in a manner consistent with the procedural rules of domestic law;
3. the right to be provided with appropriate support services;
4. the right to be provided with effective measures for their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation;
5. the right to have access, as from their first contact with the competent authorities, to information on relevant judicial and administrative proceedings;
6. The right to 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.

27. In accordance with conditions provided by domestic laws, the Medicrime Convention addresses the obligation of States to ensure access of victims to assistance and/or support by relevant groups, foundations, associations or governmental or non-governmental organisations during criminal proceedings.

28. It is important to note that ongoing discussions regarding the draft Convention on preventing and combating violence against women including domestic violence show that there is a strong need to establish and enhance rights and measures for victims of violence against women and domestic violence. The results of the work of the CAHVIO should be further examined in the process of formulating common rules in this field.

29. The appropriate Council of Europe bodies are currently considering the need for a new binding instrument on trafficking in organs, tissues and cells. If a Convention is drafted, provisions concerning the rights of victims should be included. However, if it is agreed that a Convention should be drafted in this field, it is presumed that it would not go beyond the selective and restrictive approach described above. In any case, possible future work in this field should be considered in future activities outlined in the recommendations and conclusions.

30. In addition, the group of specialists on child-friendly justice (CJ-S-CH) is currently working on the Draft Council of Europe Guidelines on child friendly justice. Specific needs of children who

19 'victim' shall mean any natural person having suffered 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.

are victims are included. Although these Guidelines will not be legally binding, they will provide important standards which may have an impact on future activities in this field.

B. Recent and on-going activities of the European Union

31. Furthermore the issues related to victims are considered as a priority also by the EU. On 23 October 2009 the Council of Ministers adopted Council Conclusions on the European Financial Coalition and national financial coalitions against child pornography. One of the aims of the European Financial Coalition is to help identify, locate and safeguard victims. On the same occasion, the Council Conclusions presented a strategy to ensure the fulfilment of the rights of victims and improve the support of the latters, and stressed that victims' issues should be given higher priority through a common strategy in the EU, based on the following principles:

- To be able to exercise their fundamental human rights, appropriate assistance and protection should be offered, in connection with criminal proceedings, to persons who are victims of crimes;
- The need to respect the rights of both the victim and the accused;
- Respect for and non-discrimination of persons who fall victims of crimes;
- Persons who are victims of crimes should be given the possibility to request and obtain compensation, in order to relieve them from the harm caused;
- The importance for persons who fall as victims of crimes to be treated properly and professionally in their contacts with representatives of the judicial and law enforcement system;
- Such persons should have appropriate access to any relevant information regarding their case which is necessary for the protection of their interests and the exercise of their rights, as far as possible in a language that they understand;
- Such persons should be protected, as far as possible, from secondary and repeat victimisation;
- Such persons who are in a particularly vulnerable situation or state should be given special attention and treatment;
- Where appropriate, close family members of such persons should also benefit from the assistance and protection offered to persons who fall victims of crimes;
- New or amended legislation and policies should aim at ensuring fulfilment of the rights of and improving support to victims in connection with criminal proceedings;
- New or amended legislation and policies should be based on good practices, evaluation of existing legislation and policy and empirical knowledge.

32. The Council Conclusions took into account the "Stockholm programme" adopted by the European Council on 10-11 December 2009, which also underlined the need to make more efforts in the field of victims. The Council Conclusions also invite the European Commission to co-ordinate its activities in the area of victims of crime with the work carried out by Member States and within the CoE, on the basis of the Memorandum of Understanding between the EU and the CoE.

33. Moreover, the Spanish Presidency of the EU initiated discussions on a draft European Protection Order, which aims at protecting women who are victims of gender-based violence across national borders.Internal discussions between the EU Member States and various EU bodies are on-going.

34. In addition, the Framework Decision of 2001 mentioned above is currently being examined within the European Commission following a report revealing the lack of implementation in Member States. The EU is therefore evaluating the possibility of either drafting new legislation which would merge both the Framework Decision and the Directive regarding compensation or developing specific practical measures to ensure that the Framework Decision is implemented effectively. The decision resulting from such evaluation should be disclosed in 2011.

35. Actions at the EU level may have an impact on the interests and needs of the CoE in the field of victims, in particular, where the EU made a clear signal to cooperate with the CoE. Legal systems and victims of crime may very much benefit from such activities.

36. The legislative work needs to be supported by practical measures. For instance the European Commission Decision of 30 November 2009 amending Decision 2007/116/EC on the introduction of additional reserved numbers beginning with "116" ensures that from 15 April 2010 the competent National Regulatory Authority in EU Member States include the number: 116006 as a unique number to help victims of crime by informing them of their rights and how to use these, offer emotional support, while also referring such victims to relevant organisations. Information concerning compensation and insurance matters may also be provided. [20]

37. To conclude on the brief overview of existing standards and ongoing activities in the field of the standing and rights of victims it should be noted that there is a clear positive international trend in providing victims with more rights and support to avoid in particular secondary victimisation. To date, the current system of international legal instruments, which regulates the standing and rights of victims in crminal proceedings, does not provide for a comprehensive approach applicable to any victim of any type of crime. The short description of the international instruments and activities clearly shows that the leading concepts regarding victims issues is based on a selective and restrictive approach focusing mostly on the victims of specific types of crime and addressing mostly intentional violent crimes . Whether such trend will continue depends on results of discussions of criminal policy actors on future directions which should be taken in this field. In such discussions it may be important to consider that more rights of victims may improve their situation.It may also imply the need of additional resources and expenses. The recognition and implementation of the rights of victims may also have an impact on the length of proceedings and consequently on the appropriate implementation of fundamental rights in criminal proceedings (such as right to a fair trial). Therefore it is obvious that any additional rights of victims cannot be separated from other related issues, such as impact on effectivness and lengthy of criminal proceedings, rights of defence etc.

38. Amendments to national and/or international legislation do not automatically mean a better situation for victims. The implementation of international standards should cover additional measures, such as best practices, guidance, training and other practical measures.

III. Legal position and rights of victims

A. The principle of non-discrimination

39. The principle of non-discrimination is widely visible and highly important for the regulation of victims' rights and the establishment of relevant measures in this field. It became a standard for the latest CoE Conventions dealing with victims and is one of the key principles which should be taken into account when drafting common rules in the area of victims.

B. Definition of victim and/or vulnerable victim

40. Many older legal instruments do not contain a definition of the notion "victim". Recent trends, however, show that such definition is regularly included in CoE Conventions regulating issues related to victims. However, while no standard definition of the term has been agreed upon so far, the current discussions and actictivities in this field are encouraging since it appears that existing definitions may provide sufficient basis for futher activities. The existence of such

20 In some states the practical measures include having an Ombudsman for Victims of Crime. This may inspire national systems while considering improvements in the area of victims.

definitions in sectorial Conventions may signal that an agreement on a standard definition of a victim is not unrealistic.

41. A question which may also be raised concerns the need to define "vulnerable victim." As a matter of principle the rights of victims should be regulated in general – as rights for any victims of crime. However, there are certain needs related only to particular categories of victims which may require the establishment of measures to protect their specific rights and needs. It is clear that a definition of "vulnerable victims", if proved necessary and feasible, should take into account at least two concepts of vulnerability – 1 based on nature/type of a crime (sexual, terrorist offences etc.), 2 based on the personal circumstances (age,sex, origin,disability, nationality, status-e.g. asylum seeker etc.).

42. Furthermore, children constitute one category of victims, which requires special attention.[21] Common procedural rules may require to address the specific rights and needs of children victims in criminal proceedings, taking into account the CoE draft Guidelines on child – friendly justice.

C. Substantive criminal law

43. The substantive criminal law is one of the factors which determine the scope of standing and rights of victims. The CoE and the UN Conventions provide minimum common standards related to specific offences. Conventions describe elements of behaviour, which should be prohibited. Such Conventions are based on a selective approach (usually the focus is on particular serious criminality – terrorism, trafficking in human beings,sexual exploitation, drug related offences etc.) which determine the scope of regulations of the standing and rights of victims criminal proceedings .
There is only one binding CoE instrument, which provides for a general regulation of rights of victims. The right to compensation is provided for all the victims of violent intentional crimes.[22]

D. Procedural law – rights of victims in the criminal proceedings

General issues:

44. It should be noted that issues of procedural criminal law are central to legal regulations of the status and position of the victim. Binding standards of a non-selective nature may be found only in the EU legislation. Partially binding standards can be found both in the CoE and UN binding instruments, however, these are mostly related to selected crimes and not to crimes in general. Even the EU legislation is not comprehensive since it does not guarantee all the rights contained if a victim is not a Party to criminal proceedings.. The CoE formulated broad non-binding standards in its Recommendation Rec (2006) 8 on assistance to crime victims.

45. In a broader context of general issues consideration may also be given to the following factors:

1. A moment when a person is considered a victim[23];
2. Status and rights of dependants[24];
3. Differences between the position of a victim, who is a witness and a victim, who does not benefit from such a position (differences may also exist in cases, where procedural rights

21 Various international instruments take into account specific position of children victims. For instance the Lanzarote Convention already provides some procedural rules, which may serve as basis for future activities.

22 I tis not the case for victims of non-violent intentional crimes and victims of non-intentional crimes. It should be noted that consequences of certain non-intentional crimes may be equally or even more serious than consequences of some intentional crimes.

23 Legislation may regulate a decisive moment from which a person is considered a victim (within the legal meaning of the notion – including rights, which are recognized by legislation for a victim).

24 Different rights, as well as support and assistance measures for dependants should be further examined.

include rights for compensations of a original victim and where the rights of compensation belong to another person)[25].

46. It may also be feasible to examine, whether there might be any practical difficulties related to the fact that a person may be considered as a victim of a crime in one State, but under equivalent circumstances a person would not be considered as a victim of crime in another state.

E. Rights to be considered for common standards

47. Various rights of victims are already included in existing instruments.The following rights could provide a basis for common rules[2627]:

Rights and principles of a general nature i. Recognition and respect of rights, including the enjoyment of measures to protect the rights of victims shall be secured without discrimination (principle of non discrimination); ii. The right to be protected, as far as possible, from secondary or repeated victimisation iii. The right for respect and appropriate treatment from police and judicial authorities
Procedural rights in the context of criminal proceedings iv. The right to access relevant information (it covers, in particular such information which allow victims to protect their rights and interests); the information should be provided as from their first contact with law enforcement authorities and as far as possible in the language understandable to victim [28]
v. The right to be heard and to provide evidence (these rights could be restricted to certain stage of criminal proceedings and/or should be related to particular needs and rights of a victim)
vi. The right to be notified (notification rights) about important decisions or facts related to the case, which can influence their interests and rights (e.g. that a person has been accused of an offence, that charges have been brought before the court, a judgment has been issued etc.) as well as the safety of a victim, where applicable (it seems that the safety issues are mostly linked to

25 In most cases, a direct victim of a crime or its dependant will be considered as a victim in criminal proceedings with a full range of procedural rights (taking into account that a right tfor compensation may be applied either in criminal or in civil proceedings – depending on the legal system). There are situations, where, for instance compensation was paid by an insurance company or by any other person during the criminal proceedings. In such cases, it is considered that the rights of the original victim are fully recognised and enforced. However, such company or person will also be considered as a victim as well. This issue is mainly related to victims who are parties to criminal proceedings. It is usually left to the national legislation.

26 Also see the case-law of the European Court of Human Rights in Appendix 1

27 THe structure applied in this Chapter was selected in order to underline differencies between variety of rights. It does not to be followed in the future activities.

28 Measures and means to implement this right may be left to the national legislation. It would be, however, feasible to agree on minimum information to be provided (Article 4 of the EU FD defines a following content of the infirmation, which may be relevant for future activities):
(a)the type of services or organisations to which they can turn for support; (b)the type of support which they can obtain; (c)where and how they can report an offence; (d)procedures following such a report and their role in connection with such procedures; (e)how and under what conditions they can obtain protection; (f)to what extent and on what terms they have access to: (i)legal advice or (ii)legal aid, or (iii)any other sort of advice,
if, in the cases envisaged in point (i)and (ii), they are entitled to receive it; (g)requirements for them to be entitled to compensation; (h)if they are resident in another State, any special arrangements available to them in order to protect their interests.

intentional crimes – the notification for such purpose should contain the information on a release of an alleged offender from custody or prison as well as escape of an offender from prison)[29]; vii. The right to legal aid, where necessary;[30] viii. The right to participate in criminal proceedings, where applicable[31] ix. In cases where a victim of crime is a child, the right to apply child-friendly procedural rules[32] x. The right for mediation, where applicable[33]
Rights related to protection and assistance xi. The right to be protected, where applicable (this right may contain various measures of protection of victims and their families – for the safety and protection of their privacy, identity etc.)[34]
xii. The right for medical, psychological or material assistance, where applicable
xiii. The right to special assistance, including assistance and support provided to close relatives /in case of vulnerable victims/ depending on the nature of a crime. Rights related to expenses, property and compensation xiv. The right to have legal costs refunded,where applicable, if a victim is a party to criminal proceedings[35]
xv. The right to request and obtain compensation[36]

29 A victim may decide not to apply this right as a whole or in part (in any case a restriction of application should be based on explicit request of a victim that he or she does not wish to receive such information). Restriction may apply, in exceptional cases, where providing the information could affect the proper and succesful handling of the case. As regards the language regime of such a notification, the extent to which the notification should be provided in the language understood to the vicitm requires further consideration. At the same time the costs and time of translation and the purpose of notification should be duly taken into account. The issue may be subject to step by step approach – the agreement on minimum notification rights should be the first step.

30 Right to legal aid may be applicable, in principle, to victims –who are parties to criminal proceedings. However, the circumstances of a case and a person should be considered and futher restrictions may be justified.

31 Thi importance of this right is obvious. However, there are differences in particular between common law and civil law countries concerning the standing of a victim in criminal proceedings.

32 Examples of such rules exist in various international documents such as Article 31 of the Lanzarote Convention, , however, it would be appropriate not to set up any specific wording before the work of the Council of Europe on child-friendly justice is finalised. The rules, in particular pay attention to specific situation and needs of children victims and are mostly related to the right not to be subject to secondary or repeated victimisation; For example: 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. However, it would be appropriate not to set up any specific wording before the work of the Council of Europe on child-friendly justice is finalised;

33 THe concept of mediatioin may have a positive consequences for handling of the case. However, opinions exist that mediation, while providing an important alternative to formal proceedings, may not serve the purpose in all cases.

34 It should be noted that different kinds of orders exist in legislation of member states to provide for protection. The legal systems differ, such measure may be provided by the criminal measures or by the measures of administrative or civil laws.

35 Further analysis is needed in order to determine the cases for which such right should be applicable.

xvi. The right to return the property seized to the extent possible and unless it is necessary for conducting criminal proceedings Rights related to measures of international cooperation The application of the instruments of international cooperation has an impact on the rights of victims. If in purely national case a victim should be notified about the release or escape of the perpetrator from custody or prison, a corresponding situation should exist if the measures of international cooperation apply. The standing of a victim should also be improved in cases, where an offence has been committed abroad. Therefore the following rights of victims should be considered as general rights: xvii. the right to be notified of the application of instruments of international cooperation, which may influence the interests and in particular the safety of a victim (notification of extradition, surrender or surrender of an offender to another country, notification of release or escape of a person surrendered, extradited or transferred[37] xviii the right to notify about the criminal offence committed in another state in a home state of a victim with a corresponding obligation of the authorities to send such notification to another country.
It seems appropriate to give a further consideration to a question, whether victims should be provided with any additional rights in cases of transfer of criminal proceedings or in cases transferred on the basis of Article 21 of the European Convention on Mutual Legal Assistance.[38]

48. The list of rights provided in this Chapter is not exhaustive. Some of the rights listed here may be subject to certain conditions. Any further activity in the field of victims right should take into consideration the need for a balanced approach between the rights of victims and in particular rights of defence and right for a fair trial.

49. Common rules should also contain a general provision on the training of representatives of competent authorities dealing with victims, such as police officer, magistrates, prosecutors and judges.

IV. Conclusions and recommendations

50. No state is immune to crime. No citizen is immune from becoming a victim of a crime. More and more people travel, migrate from one country to another. However, risks of crimes still exist and are everywhere, and crimes of foreign nationals have increased in the last 20 years. Rights of victims require our special attention. Minimum standards regarding the rights of victims should be established in all CoE Member States, promoted to ensure that victims are aware of their existence and effectively implemented, regarding notably the fundamental human rights and freedom of victims. This is an important issue for the CoE Criminal Law's policy to which a high consideration should be given.

36 This right is currently limited any any extention of such right would require further financial means.

37 The list of rights is not exhaustive. It provides basis for minimum standard provisions.

38 Transfer of criminal proceedings (or a procedure under Article 21 of the MLA Convention) is more oriented on alleged offender, evidence and other factors, but a position of a victim is not considered in any particular way. The idea is to consider a feasibility of formulated conditions, under which a victim could influence teh application or not of such procedures.

51. Existing standards in the field of substantive and procedural criminal laws should also be taken into account. Procedural criminal law provisions primarily focus on investigative measures, prosecution, and international cooperation. Actions were taken concerning offenders or prisoners. The application of fundamental principles such as fair trial or equality of arms were and still are fully promoted and protected by the European Court for Human Rights.

52. Although the CoE has been working on issues related to the rights of victims for a long time, no comprehensive binding instrument regarding such rights exists, except concerning the compensation of victims of violent crimes. Victims of certain types of crimes may solely benefit from the rights enshrined in the sectoral conventions. The list of areas of regulation is slowly extending. However, the unified approach of CoE Member States is not visible. Recommendation of 2006 signalled the way to go.

53. As mentioned previously, EU's biding standards in this field stem from the 2001 Framework Decision. However, to respond to the observed lack of implementation of the Framework Decision in most of EU Member States, action will be taken through the establishment of a new legislation or practical measure.

54. On the basis of this analysis, it is clear that there are loopholes in the system of protection of victims at the international level. No minimum standards currently exist on the rights of victims of crime (not even for victims of intentional crimes). The sectorial approach taken by the CoE aims at covering victims of certain types of crimes which are relevant at the international level. In this context, the added value of drafting common rules could be in establishing equivalent rights to victims of crimes of similar nature.

55. There are other crimes which are committed daily, such as thefts, robberies, frauds, murders, computer crimes to name just a few which are currently not addressed by international instruments. Everybody may be a victim of such criminal behaviour. Is there any reason why the victims of such crimes should not be protected by at least minimum standards and should not be in a position to apply certain minimum rights in every Council of Europe Member State? Should any victim of such crime be without a right to be heard, to provide evidence, to be informed about the progress of a case, to receive an assistance and support etc.? Is justice done if a victim of such crimes would not be in a position to benefit from at least minimum standards? Would such trial be really fair? The minimum standards of victims' rights should be recognized and established in all the Member States of the Council of Europe. In addition to all arguments already provided the minimum standards for rules on victims rights will also contribute to an increase of a mutual trust between Member States.

56. As people are moving from one country to another, they should have a right to report in their home country a crime committed abroad, despite the possible absence in their country of a jurisdiction to initiate criminal proceedings.

57. From a practical point of view, there are no legal or practical reasons to modify certain rights from one Convention to another. Therefore there should be a catalogue of common rules negotiated, which would not be modified. Of course, some victims /in particular vulnerable victims/ would require more than the minimum standard rules applicable to all victims of crimes and where necessary specific rules may be added. Such approach would provide victims of crimes with the same/similar rights and it would also speed up negotiations (or allow more time for other issues).

58. For the reasons outlined in a document following conclusions and recommendations should be considered:

1. Short – term perspective

Conclusion and recommendation No. 1:

It would be feasible to set up common rules on victims based on the catalogue of rights described in point IV and to the extent necessary to analyse issues dealt with in a present document; in formulating common rules an inspiration may be taken from the newest conventions of the CoE; wording of the EU Framework Decision should be also included. This approach may include further activities

a) If more information on national legislation of Member States concerning issues and rights outlined in point IV is needed before common rules could be set up, a questionnaire could be elaborated in order to provide for a more focused approach.

b) Issues related to international cooperation and victims should be examined. An appropriate body of the CoE such as the PC-OC could be consulted in order to receive well-grounded responses whether or not (or to what extent) to cover rights on information about the extradition, surrender, transfer of an offender and/or release/escape from prison in abroad or at least whether there is any particular reason to oppose such idea. The possibility of a victim to influence the transfer of proceedings may be further considered as well.

c) Results of the CoE work concerning child-friendly justice should be particularly examined.

2. Middle – term perspective

Conclusion and recommendation No. 2

As mentioned previously, there is no binding instrument providing minimum standards on this issue in the 47 Member States. Such standards exist only in the EU and proposals are even currently being made to reinforce the existing mechanism. The progress and experience of the EU shows that the status of victims in criminal proceedings can be and should be improved also in Member States of the CoE. A unified catalogue of common rules for victims of all crimes should be established to reflect the needs of victims in the modern criminal justice system. The following measures should be examined:

a) The feasibility of drafting a new comprehensive binding and/or where appropriate a non – binding instrument addressing all crimes. Evaluating the implementation of CoE Recommendation of 2006 as well as the implementation of the newly adopted conventions, which regulate rights of victims of certain crimes

b) The experience and development in the European Union
.
c) If it is agreed that a new binding instrument should be drafted, it should include a definition of "victim". Including issues related to compensation may not be necessary at this stage.

V. Case law of the European Court on Human Rights

59. A few examples of the recent case-law of the European Court on Human Rights can be found in **Appendix 1**. These cases specifically focus on the procedural rights of victims at the trial stage.

APPENDIX 1

1. Right to a fair hearing

Access to Court / Joining the proceedings as a civil party

- *Perez v. France* [GC], 47287/99, 12 February 2004

This case concerned the clarification **of the Court regarding the applicability of Article 6§1[39] of the European Convention on Human Rights (the Convention) to civil-party proceedings**. On the basis of Article 6 of the Convention, the applicant sought to establish the unfairness of the investigation concerning her allegations of having been assaulted by her two children. During the investigations, the applicant lodged a civil-party complaint to claim reparation for the damage caused by the offence.

The French Government argued firstly that concerning the general applicability of Article 6, Article 6§1 could only apply to the right to claim for compensation arising from a civil wrong committed by the offender which constitutes a civil right where the victim seeks to punish the offender and/or to obtain compensation. Secondly, the Government considered that the sole purpose of exercising the victim's civil right was to trigger or be joined in a prosecution. Therefore, Mrs Perez was not exercising a civil right and a civil-party complaint was not sufficient to bring the related proceedings "a priori within the ambit of Article 6§1"[40].

The European Court of Human Rights (the Court) sought to end existing uncertainties arising from its past case-law[41] regarding the applicability of Article 6§1 of the Convention to civil-party proceedings and adopted a new approach to ensure, notably, consistency concerning the rights and proper place of victims in criminal proceedings. The Court recalled that a criminal complaint accompanied by an application to join the proceedings as a civil party came within the scope of Article 6 § 1 of the Convention, except in certain specific cases ("private revenge" and actio popularis; the right to have third parties prosecuted or sentenced for a criminal offence could not be asserted independently: it had to be indissociable from the victim's exercise of the right under domestic law to bring proceedings which were civil by their nature, even if only to secure symbolic reparation or to protect a civil right)[42]. The Court considered that the applicant's claim came within the scope of Article 6§1 of the Convention since Mrs Perez had lodged a civil-party complaint during the criminal investigation, claimed her right to damage caused by the offence and had not waived that right.

However, the Court stated in its judgment that the French Cour de Cassation could not be critised for not mentioning all domestic provisions, in particular inapplicable ones while it took due account of and effectively addressed all of the applicant's claims. No violation of Article 6§1 was thus found.

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39 In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly by the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

40 Perez v. France, [GC], 47287/99, judgment of 12 February 2004, para. 36

41 see for example Tomasi v. France, judgment of 27 August 1992 where the Commission that the right to compensation depended on whether there was a dispute over a civil right and on whether the outcome of the complaint was decisive for such a right. This approach tends to over-complicate the analysis of Article 6's applicability to civil proceedings.

42 Perez v. France [GC], 47287/99, judgment of 12 February 2004, para. 70.

- *Gorou v. Greece* (N°2) [GC], 12686/03, 20 March 2009

In 1998, the applicant a civil servant in the Ministry of National Education filed a criminal complaint against her immediate superior, S.M., for perjury and defamation without claiming compensation since the latter stated that the applicant "did not observe working hours and did not get on well with her colleagues"[43]. During the first hearing, in 2001, the applicant reiterated her civil-party application claiming 3 Euros for the damages caused to her reputation but the defendant was acquitted. In 2002, the applicant requested to the public prosecutor of the "Court of Cassation" under the relevant provision of the Code of Criminal Procedure to lodge an appeal on point of law against the Criminal Court's judgment alleging that it did not contain sufficient reasoning[44].

The applicant in this case complained of a violation of Article 6§1 of the Convention when her request to the public prosecutor was dismissed with no sufficient reasoning since her 6 pages request containing detailed arguments which were allegedly "completely disregarded"[45] was returned to her with a handwritten comment stating that "there are no legal or well-founded grounds of appeal to the Court of the Cassation"[46]. She further alleged that the absence of justification prevented from verifying that the decision was improper or arbitrary. The applicant further recalled the Court's relevant case-law against Greece which established that the "public prosecutor was obliged to give reasons for his decisions, such obligation implying that the injured party could expect his or her principal claims to be dealt with attentively"[47].

The reasoning of the Court concerning the applicability of Article 6§1 of the Convention to the proceedings stems from the principle of *Perez v France*[48] which the Court recalled to conclude that the applicant did apply for civil-party status in criminal proceedings primarily because the aim of the applicant was to protect her civil right to a "good reputation" and secondly, although symbolic, the proceedings had an economic aspect on the basis of the applicant's claim. Furthermore, the Court considered that Article 6§1 applied to the request of the applicant to the public prosecutor, on the basis of the continuous presence of the "dispute" when the applicant appealed. The Court held that the request was made in the same context and pursued the same aim as her previous application and therefore formed an integral part of the proceedings joined by the applicant as a civil-party.[49]

It is important to note that Article 6§1 imposes an obligation on courts to provide reasons for their decisions. However, depending on the circumstances of the case[50], the level of details required will vary. In the present case,although domestic law did not entitle in principle the civil party to appeal on points of law once an acquittal has been decided, the Court stressed that "the existence of an established judicial practice cannot be disregarded and that, in view of the specific features of the applicant's request to the public prosecutor of the Court of Cassation,

43 Gorou v. Greece (N°2) [GC], 12686/03, 20 March 2 009, para. 10

44 Op. Cit. para. 11: "The defendant's acquittal was justified by the fact that the offending remarks had been truthful and that it was not his intention to defame or insult the applicant".

45 Op.Cit., para 20

46 Op. Cit,para. 14

47 Op. Cit.,para 20

48 Application of Perez v France, para 66: " Article 6§1 applies to proceedings involving civil party complaints from the moment the complainant is joined as a civil party unless he or she has waived the right to reparation in an equivocal manner" and para. 70 in Perez applied in Gorou v Greece, para 24: "to fall within the scope of the Convention such right must be indissociable from the victim's exercise of a right to bring civil proceedings in domestic law, even if only to secure symbolic reparation or to protect a civil right such as the right to a "good reputation".

49 Gorou v Greece, op.cit., Para 35

50 See for example, Van de Hurk v. the Netherlands, 19 April 1994, § 61

Article 6§1 of the Convention is applicable.The same practice should be taken into account in assessing the extent of the reasoning to be given by the public prosecutor in his reply"[51] . However, the Court recalled that appelate courts are not obliged to justify dismissals of appeals on points of law on the basis of a specific legal provision[52] . Therefore, the Court concluded that the duty of the public prosecutor at the Court of Cassation stemming from Article 6§1 of the Convention is restricted to giving a response rather than a detailed justification to the civil party and stated that " to demande more detailed reasoning would place on the public prosecutor an additional burden that is not imposed by the nature of the civil party's request for him to appeal on points of law against an acquittal." No violation of Article 6§1 could be found.

It is important to note the partly dissenting opinion of Judge Casadevall which underlined that the Court addressed the same issue in *Alija v Greece (no1)*[53]*, Greece v. Gorou (no 4)*[54]and *Markoulaki v. Greece(no1)* [55]but found a violation of Article 6§1 of the Convention. Judge Casadevall considers the Court in Gorou took a step backwards: " once it has decided to extend individuals' rights in a particular aspect of the right to a fair hearing, it should not – unless there has been a manifest mistake – reverse its decision. Acquired rights in the cause of human rights are at least as precious as acquired rights in other branches of the law and therefore the principle of non-regression must prevail."

Joining the proceedings as a civil party and access to items of documentary evidence[56]

-Ernst and Others v. Belgium**,** 33400/96, 15 July 2003 (only available in French)

The applicants, four Belgium journalists, relied on **Article 6§1 of the Convention to complain that they were denied the right to join a prosecution as civil parties on the grounds that the defendant was a judge entitled to immunity from jurisdiction. The applicants further complained that documentary evidence had not been disclosed or communicated to them and that the hearing had not been in public.**

The facts concern search and seizure procedures ordered by the investigating judge within the applicants' homes and newspapers' offices in connection with the prosecution of members of the State legal service for breach of confidence following leaks in highly sensitive criminal cases.

The decision of the Court was based on the assessment of whether the immunity of the judge was compatible with the Convention. For this purpose, the Court examined whether other remedies were made available to the applicants to protect their rights under the Convention effectively. Therefore, the Court considered that the applicants were not deprived of an action to seek reparation and the restrictions imposed by the judge's immunity were not disproportionate since they did bring a civil action in damages against the State for the same matter and they could have brought a civil action against other persons referred to in their complaint.

Regarding the domestic Court's failure to communicate documentary evidence concerning the searches and violation therefore the principle of "equality of arms", the Court underlined firstly that such procedure was performed on the basis of the principles governing adversarial process when deciding on the admissibility of the application to join the proceedings as civil parties. The Belgium Court only refered to documentary evidence which were made know to the applicants in order to reach its decision. The Court considered therefore that the fact that the public prosecutor

51 Op. Cit, para.38

52 See in particular Salé v. France, no. 39765/04, 21 March 2006, para. 17.

53 Alija v Greece (no1), no 73717/01, 7 April 2005

54 Greece v. Gorou (no 4), no 9747/04, 11 January 2007

55 Markoulaki v. Greece(no1), no. 44858/045, 26 July 2007.

56 See also Menet c. France, 39553/02, judgment of 14 June 2005 (only available in French).

held items of evidence which were not revealed to the applicants was of little consequence and accordingly that there was no violation of Convention of Article 6.

On the issue of the lack of public hearing, although the Court recalled that the publicity of a hearing or a judgment is a fundamental principle of Article 6§1 of the Convention to ensure the transparency of the administration of justice and therefore fair trial, it further underlined that restrictions to Article 6§1 of the Convention may appear as necessary[57] and national courts should take into account the specificities of the procedures in questions and the nature of issues to be examined to reach a decision. The Belgian Constitution requires that hearings and judgements should be delivered in public, except investigation procedures which concern this specific case. The Court stressed that while the applicant did not request a public hearing nore did they make any reservations on the hearing being held in private, the Court found that there had been no violation of Article 6§1 of the Convention.

Positive obligations of the State regarding Article 2 and excessive delays of proceedings

- *Calvelli and Ciglio v. Italy*, 32967/96, 17 January 2002

The applicants alleged a violation of Articles 2 and 6§1 on the ground that procedural delays had prevented the prosecution of the doctor responsible for the delivery of their child who had died shortly after birth.

The principles concerning the applicability of Article 2 and the positive obligations of the State in this respect were recalled by the Court which underlined that the State should refrain from the intentional taking of life as well as taking appropriate steps to safeguard the lives of those within its jurisdiction[58]. It further stressed that such principles apply in the public-health sphere where measure should be taken to protect the patients' lives including establishing an effective independant system to determine the cause of death of patients both in the private and public sector and ensure that those responsible are made accountable. The case-law of the Court established that "even if the Convention does not as such guarantee to have criminal proceedings instituted against third parties, the effective judicial system required by Article 2 may and in certain cricumstances must, include recourse to criminal law"[59]. Where the violation of the right to life was not intentional, the provision of criminal law remedy will not be necessarily required since in cases of medical negligence for example, the obligation of the State will be fulfilled if a civil remedy is afforded to the victim, alone or in conjunction with a remedy in the criminal courts which was the case in Italy in the present case. The Court stressed that the existence of such remedies is not sufficient to satisfy the provision which will be met if the protection afforded "operates effectively in practice within a time-span such that the court can complete their examination of the merits of each individual case"[60]

However the Court concluded on the absence of violation of Article 2 since the applicants had waived their civil right to pursue proceedings by agreeing with the defendant to receive compensation for the damages sustained and stated that " where a relative of a deceased person

57 Article 6§1 of the Convention: "Judgement shall be pronounced publicly by the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice"

See also B. and P. v. United Kingdom, 36337/97 and 35974/97, para. 37, judgment of 05 September 2001

58 LCB v the United Kingdom, judgment of 9 June 1998

59Calvelli and Ciglio v. Italy, 32967/96, 17 January 2002, para. 51 and see also Kiliç v. Turkey 22492/93,§ 62

60 Op.cit, para. 53

accepts compensation in settlement of a civil claim based on medical negligence he or she is in principle no longer able to claim to be a victim"[61].

Concerning the applicant's claim under Article 6§1 of the Convention of unreasonable length of proceedings, the Court considered that such issue should be considered in the light of the circumstances of the case, in particular the complexity of the case and the conduct of the applicant[62]. On this basis, the Court found no violation of Article 6§1 since the case was complex and there was no periods of inactivity attributable to the authorities.

Participation in the investigation

- ***Sottani v. Italy***, 26775/02, 24 February 2005

A hospital autopsy revealed that the applicant's wife, who had been suffering from leukemia, was caused by acute bronchopneumonia. The applicant relied, notably, on Article 6§1 and Article 13 of the Convention to complain of the public prosecutor's failure to order a judicial autopsy and further relied on the principle of equality of arms in the application of the domestic criminal code which only allows the public prosecutor to apply directly to the investigating judge to perform such an autopsy.

Concerning the applicability of Article 6§1 of the Convention, the Court recalled the principle applied in *Perez* concerning the need to safeguard victims' rights and their proper place in criminal proceedings by pointing out that " simply because the requirements inherent in the concept of fair trial are not necessarily the same in disputes about civil rights and obligations as they are in cases involving criminal trials, as evidenced by the fact that for civil disputes there are not detailed provisions similar to those in Article 6 §§ 2 and 3... does not mean that the Court can ignore the plight of victims and downgrade their rights"[63]. Furthermore, the Court stressed that Article 6 may apply despite the absence of a claim for financial reparation, on the basis of the relevance of the outcome of the proceedings with the civil right claim.

Although, the Italian legislation prevents a civil party from joining the proceedings until the preliminary hearing, it can however exercise its right to participate effectively in proceedings from the preliminary investigation stage, including by requesting that the prosecutor applies to the investigating judge for immediate production of evidence. The Court considered that such rights are fundamental to ensure the effective participation in the proceedings of civil parties, in particular in cases where evidence may deteriorate over time and need to be collected at an early stage of the proceedings. In addition, the injured party is entitled to submit pleadings at all stages of the proceedings and may request the inclusion of evidence. Article 6§1 therefore applies to the facts of this case.

However, the complaint was not made admissible since the applicant did not request for an immediate judicial autopsy and therefore failed to make use of all remedies available to him under domestic law.

2. Right to respect of private and family life

Sandra Jankovic v. Croatia, 38478/05, judgment of 14 September 2009

61 Op. Cit para 55

62 See notably Torri v Italy, judgment of 1 July 1997, para. 24.

63 Sottani v. Italy, 26775/02, 24 February 2005 and Perez v. France, para 72

This case concerned a **violation of the applicant's right to respect for her physical integrity (Article 8 the Convention[64]) due to the inefficiency of the Croatian judicial authorities** in dealing with a complaint concerning an alleged physical and verbal assault by individuals and their failure in their **positive obligation to protect her adequately from aggression**. The violation of Article 8 was also due to the defective manner in which the domestic criminal-law mechanisms had been implemented in this case.

The applicant, a female Croatian national who was unemployed and unwaged, brought a civil action in 1999 to seek protection against 2 individuals who allegedly changed the locks of her privately owned flat and removed all her belongings. In 2003, the day after the applicant had regained possession of her flat, she was attacked by 3 individuals upon arrival in front of the flat. The police drew up a report during the incident stating that the applicant was verbally and physically attacked when she attempted to enter her flat and was threatened to be killed if she came back. Domestic jurisdictions rejected allegations of physical violence on the ground of lack of evidence.
The Croatian Criminal Code distinguishes between criminal offences to be prosecuted by the State Attorney's Office, either of its own motion or upon a private application, and criminal offences of a lesser nature to be prosecuted by means of a private prosecution. Domestic jurisdictions considered that the alleged acts of violents and threats against the applicant qualified as of a lesser nature and prosecution had to be brought privately by the victim.

It is interesting to note that concerning the alleged violation of Article 8 of the Convention, the Government considered the Article as inapplicable to this case on the ground that the relationship between the acts of violence in question and the applicant's private and family life was too remote to fall within its scope[65]. Furthermore, it argued firstly that the applicant did not fall within the category of vulnerable victims requiring special protection, secondly that the attack did not last for a long periode of time and that the authorities could not have been aware of the existence of such acts. Finally, the Government stressed that facts could not be established since national courts only found that the applicant had been subjected to verbal violence.

The Court stated, however, that the physical and moral integrity of an individual is covered by the concept of private life which extends to the sphere of the relations of individuals between themselves. The Court found therefore that the **notion of private life includes attacks on one's physical integrity**[66] which implies, notably, **the State's positive obligation to adopt specific protective measures**. On the grounds, notably, of the medical documentation proving the violence of the physical attack which firstly occurred in connection with the applicant's attempt to enter a flat in respect of which she had obtained a court decision allowing her to occupy, the Court considered that such acts required "the State to adopt adequate positive measures in the sphere of criminal-law protection"[67].

As regards to the criminal-law mechanisms, the Court rejected the applicant's claim that her Convention rights could be secured only if the attackers were prosecuted by the State and that the Convention requires State-assisted prosecution. The Court underlined that **State-assisted prosecution does not apply in all cases**. The applicant had the possibility of prosecuting her attackers either as a private prosecutor or as the injured party in the role of a subsidiary prosecutor which satisfied the Court.

64 Article 8 : 1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

65 Sandra Jankovic v. Croatia, 38478/05, judgment of 14 September 2009, para 29

66 see X and Y v. The Netherlands, 8978/80, judgment of 26 March 1985, para 23

67 Sandra Jankovic v. Croatia, 38478/05, judgment of 14 September 2009, para 47; see also Opuz v. Turkey, no 33401/02, judgment of 9 June 2009 concerning the positive obligation on national authorities to take all reasonable steps to protect the lives of individuals against violence between private persons.

Concerning the issue related to **the effective implementation criminal-law mechanisms and the compliance of domestic authorities with the relevant domestic rules**, the Court noted that the violent nature of the aggression and serious threats which were considered by domestic courts as of a lesser in nature could have been classified differently under domestic law on the basis of a detailed description of the attack found in her initial criminal complaint, the police report as well as medical records and her subsequent request for investigation. Therefore, the Court agreed with the applicant's decision not to prosecute on the charges of injuries of a lesser nature but to request an investigation instead on charges of violent behaviour. Furthermore, the Court stressed that although the applicant's request did not strictly follow the exact form required, she gave clear and relevant indications concerning the attack, while not being legally represented and without having the right to legal aid. In accordance to the relevant domestic provisions, the Court confirmed that the applicant's submissions were sufficient to allow an investigation. The decision of domestic courts to dismiss the request of the applicant on the ground that it was incomprehensible and incomplete was therefore unjustified. In addition, the Court considered as ill-founded the government's assertion that the applicant had failed to bring a private prosecution since Mrs Jankovic did proceed but the competent authorities had completely ignored her criminal complaint and did not allow the applicant's attempts at a private prosecution.

On such grounds, "the Court notes that those proceedings were terminated owing to statutory limitations and thus concluded without any final decision on the attackers guilt […] the decisions of the national authorities in this case reval inefficiency and a failure to act on the part of the Croatian judicial authorities […] the impugned practices in the circumstances of the case did not provide adequate protection to the applicant against an attack on her physical integrity and showed that the manner in which the criminal-law mechanisms were implemented in the instant case were defective to the point of constituting a violation of the respondent State's positive obligation under Article 8 of the Convention"[68]

68 ibid, para 57-58

APPENDIX VIII

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 9 June 2010
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EUROPEAN COMMITTEE ON CRIME PROBLEMS
(CDPC)

Bureau
(CDPC-BU)

30th COUNCIL OF EUROPE CONFERENCE OF MINISTERS OF JUSTICE

(Istanbul, Turkey, 24-26 November 2010)

Elements for RESOLUTION No. 2 on prisons in today's Europe

prepared by
the Directorate General of Human Rights and Legal Affairs (DG-HL)

CDPC website: www.coe.int/cdpc
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THE MINISTERS participating in the 30th Conference of the Council of Europe Ministers of Justice (Istanbul, Turkey, 24-26 November 2010),

1. Welcoming the report of the Minister of Justice of Turkey "……." and the contributions made by the delegations attending the Conference;

2. Recalling the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 05) and its Protocols and the case-law of the European Court of Human Rights related to prison conditions and to the treatment of prisoners;

3. Recalling furthermore the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ETS no.126) and the ensuing notable work of the Committee for the Prevention of Torture in monitoring the treatment of detained persons ;

4. Recalling also the Convention on the Transfer of Sentenced Persons (ETS no. 112) and its protocols;

5. Endorsing the standards contained in the European Prison Rules (Recommendation Rec (2006) 2 of the Committee of Ministers to the member states) and the other relevant Committee of Ministers recommendations adopted in the course of the years;

6. Noting the pertinent findings and recommendations issued by the Council of Europe Commissioner for Human Rights following his country monitoring visits;

7. Bearing in mind the United Nations Standard Minimum Rules for the Treatment of Prisoners;

8. Noting the relevant work and in particular the existing Framework Decisions of the European Union in the field;

9. Recognising that prison conditions in general and treatment of prisoners in particular are an important indicator of the level of protection of human rights and fundamental freedoms in a country;

10. Underlining that public confidence as well as international cooperation in criminal matters depend on the quality of national justice systems including the enforcement of sentences;

11. Noting that a number of Council of Europe member states struggle currently with rising prison overcrowding, demeaning prison environment and debasing working conditions for prison staff;

12. Recalling that deprivation of liberty is to be executed in full respect of personal dignity and integrity and that preparation for release and reintegration of each offender is to begin from its outset ;

13. Recalling moreover that in line with Recommendation no. R(92)16 on the European Rules on community sanctions and measures and with

Recommendation CM/Rec (2010)1 on the Council of Europe Probation Rules, alternatives to custody are to be developed and widely used in order to reduce the use of imprisonment, to improve public safety and to better assist offenders in maintaining a crime-free life;

14. Mindful of the need to enhance international cooperation in order to transfer the execution of sanctions involving deprivation of liberty with a view to more successful social reintegration and resettlement of offenders who are foreign nationals;

15. Mindful of the need to ensure equal minimum standards of treatment of prisoners and comparable status and working conditions for prison staff in all Council of Europe member states;

* * *

16. AGREE that it is necessary to guarantee efficient and humane execution of sanctions involving deprivation of liberty in the member states;

17. INVITE the Committee of Ministers to entrust the European Committee on Crime Problems (CDPC), in cooperation with the Steering Committee for Human Rights (CDDH) and the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), to:

    - evaluate the measures taken by the member states to implement the European Prison Rules, the European Rules for juvenile offenders subject to sanctions and measures, the Council of Europe Probation Rules and the other relevant Council of Europe standards in the area;
    - identify problems faced by prison administrations, more particularly prison overcrowding, remand in custody, treatment of foreign nationals in prison as well as other topics which may require additional guidance through standard-setting;
    - consider in the light of the outcome of such an assessment the necessity to reinforce the legal framework in that field, including the feasibility and advisability of a legally binding instrument regulating certain aspects of conditions of detention, prison management and the treatment of prisoners or taking other measures to achieve this aim.

* * *

18. WELCOME the collection, for more than 25 years already, of the Council of Europe Annual Penal Statistics (SPACE).

19. CALL ON in this respect national authorities to continue to provide accurate and timely data and to support by all means SPACE as a valuable tool in guiding the member States' penal policies.

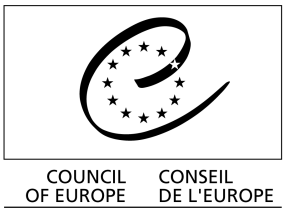
20. WELCOME the Council of Europe Conferences of Directors of Prison Administration (CDAP) which should meet annually as an important forum bringing together Directors General of national prison administrations, prison professionals, internationally renowned experts international governmental and

non-governmental organisations in order to discuss priority issues of common interest and to agree on future activities in the penitentiary field.

21. INVITE the Committee of Ministers to entrust the European Committee on Crime Problems (CDPC), in the light of the conclusions of the 15th CDAP (Edinburgh, 9-11 September 2009), to consider ways of involving judges, prosecutors, prison and probation services in a joint discussion regarding the best way of using imprisonment as well as community sanctions and measures with a view of avoiding prison overcrowding and of improving social reintegration of offenders while protecting public safety.

22. ASK the Secretary General of the Council of Europe to present a report on the steps taken to give effect to this Resolution on the occasion of their next Conference.

APPENDIX IX



Strasbourg, 29 April 2010 DG-HL (2010) 6

PROJECT VC 2248

ON EFFECTIVE PRACTICAL TOOLS TO FACILITATE

JUDICIAL COOPERATION IN CRIMINAL MATTERS

FINAL REPORT

Report prepared by the Criminal Law Division
Directorate General of Human Rights and Legal Affairs (DG-HL)

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EXECUTIVE SUMMARY

Results achieved

1. A standard model request form for mutual legal assistance was drafted

A structure for a standard model request form for mutual legal assistance containing all the necessary elements required for such assistance to be executed successfully and speedily was developed.

The standard model request form can now be individualised to the legal requirements and procedural or practical needs of each Council of Europe member state.

2. Mutual legal assistance practice in the United Kingdom and the Russian Federation was reviewed

The two country visits - to the United Kingdom and to the Russian Federation - served to "test" the structure for a standard model request form for mutual legal assistance. The particularities of the common law legal tradition in the United Kingdom and mutual legal assistance with the Russian Federation were examined with a view to completing and refining the standard model request form with all the necessary elements relating to the legislative, procedural and practical requirements for a mutual legal assistance request to be duly executed.

3. Guidelines were drawn up

Two sets of guidelines assisting practitioners with the drafting of a mutual legal assistance request were drawn up. One set of guidelines defines the convention basis for the various types of mutual legal assistance request. The other set of guidelines provides general practical information and tips to practitioners on how best to fill in the form in order for the request to be successfully and speedily executed by the requested state.

Introductory Report

I. Purpose and scope of the project

A. Purpose

Judicial cooperation in criminal matters between European states is governed by a legal framework comprising multilateral agreements, especially Council of Europe (CoE) Conventions, bilateral agreements, European Union (EU) law and national legislation. The CoE Conventions, such as the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959 (ETS No. 30; MLA, herein after MLA Convention), are important legal acts especially in the area of cooperation between non-EU member states. However, many member States have made reservations to certain provisions contained therein, e.g. the reservation to apply the condition of double criminality in case a search of seizure. In addition, the CoE legal acts, in principle, do not govern the manner of execution of requests for judicial assistance (see art. 3 para. 1 MLA providing for the requested state to determine the manner of execution; see, however, art. 8 MLA-II).

The aim of the project is to create standard model request forms for requests for judicial cooperation in criminal matters for each CoE member state. The forms shall reflect the requirements deriving from the CoE legal framework on judicial assistance, the reservations made by the member state to be requested and the national legislation and practice of the respective member state. Such models are in no way mandatory but they should provide assistance and practical guidance assisting the relevant judicial authorities of a member State to ensure effective requests which should contain all the necessary and relevant information. The implementation of this project would increase the chances of executing the request properly and within reasonable time and thereby improving the application of CoE legal acts in the area of judicial cooperation in criminal matters. It would also reduce delays in criminal proceedings, thus fostering compliance of member States with their obligations under the European Convention on Human Rights.

It is important to note that forms shall be hosted by a database on the website of the CoE accessible to the competent judicial authorities of the member states.

B. Scope

The project shall cover relationships between CoE member states that are not covered by EU legal instruments on judicial cooperation.

Experts and the Secretariat agreed that the model request forms should be limited to first stage mutual assistance in criminal matters (see for the definition of mutual assistance below). The cooperation mechanisms regarding the transfer of sentenced persons and of proceedings are excluded. It was further decided that a second and separate standard model request form for the laying of information should be developed on the basis of the relevant conventions for mutual legal assistance. This second form is based on a separate logic since it does not focus on obtaining evidence from the requested State. Instead, the aim here is to “incite” the relevant authority of the requested State to prosecute the alleged suspects by sending the collected evidence.

Within the frame of mutual assistance, the project shall also take into account legal standards covering specific types of economic crimes, in particular the Convention on Laundering, Search,

Seizure and Confiscation of the Proceeds from Crime of 8 November 1990 (ETS No. 141) and the Convention on Cybercrime of 23 November 2001 (ETS No. 185).

It was agreed that only a limited number of the new instruments provided by the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters of 8 November 2001 (ETS No. 182; MLA-II) shall be reflected in the forms, since some very specific instruments, e.g. controlled delivery (art. 18 MLA-II), covert investigations (art. 19 MLA-II) require bilateral agreements.

In addition to the forms, guidelines – referred to as information sheets in the project proposal (annexe x) – describe each section of the forms, e.g. containing indications on the relevant provisions or the practice of the requested state. The guidelines shall be integrated into the database hosting the forms in order to ensure easy access by the competent judicial authorities.

II. Definitions of used terms:

A) Judicial cooperation

Judicial cooperation in criminal matters can be defined as assistance for pending criminal proceedings. It must be distinguished from cooperation between administrative authorities, such as police or tax authorities (see Explanatory Report re. art. 1 MLA). The following types of cooperation are covered:

- Extradition: this type of judicial assistance is governed by specific conventions (see Convention on Extradition of 1957) and subject to particular conditions which, in principle, do not govern mutual legal assistance, such as the condition for double criminality and the condition for an extraditable offence (see art. 2);
- Mutual assistance in criminal matters: this type of cooperation aims at granting assistance to another State concerning pending criminal proceedings either through the procurement and transmission of evidence and/or the service of writs, e.g. summons to appear as a witness and of judicial verdicts;
- Transfer of sentenced persons;
- Transfer of proceedings.

B) Conditions and exceptions:

Extradition and mutual assistance in criminal matters are subject to conditions and exceptions. Conditions qualify as minimum prerequisites which must be met by a request in order to be admissible. In principle, any member State which has joined the CoE Conventions on judicial assistance is obliged to comply with an admissible request (see art. 1 para. 1 MLA). Exceptions give grounds on the basis of which the requesting State may refuse to cooperate even if all conditions are fulfilled (see Explanatory Report MLA re. art. 2). The CoE legal acts on judicial cooperation contain a variety of exceptions. Such standards enable a requested State to refuse to execute a request especially in case (1) it considers its national *ordre public* to be at risk, i.e. its national interests (art. 2 letter b MLA) or (2) it considers the request to be motivated by a fiscal offence (art. 2 letter a MLA; art. 5 EA) It considers the offence at stake a political offence or an offence connected with a political offence (art. 2 letter a MLA).

MEANS DEPLOYED - SUMMARY REPORT OF ACTIVITIES

Activity 1 – First consultation meeting, Brussels, 9 September 2009

This first activity brought together the Secretariat members of the Council of Europe, representatives of the European Commission, the European Judicial Network, and one of the experts selected to take part in the project.

The objective of the one-day meeting was to discuss how best to proceed with the preparatory stages of the project, from September to December 2009, financed by the voluntary contribution from Germany. The scope of the project was discussed and agreed, in particular the Council of Europe instruments and the types of request to be covered, and the general framework of the mutual legal assistance request forms.

The organisation of on-site visits to member states was discussed, with the aim of collecting information related to mutual legal assistance requests and having as representative a sample as possible of different legal systems and requirements. It was agreed that the country visits should take place in November and December 2009.

Both the European Commission and the European Judicial Network representatives expressed strong support for the project.

Activity 2 - Second consultation meeting, Strasbourg, 20-21 October 2009

The objective of the meeting was to define the activities to be completed in the preparatory phase of the project until the end of 2009 and to prepare the country-visits.

During the meeting a draft model request form was developed for mutual legal assistance. It was agreed that the structure of the form would, in principle, be preserved while particular elements might still be subject to modification following the consultations with practitioners in member states.

It was also agreed that guidelines for practitioners on how to fill in the forms were required.

The organisation of country-visits to the United Kingdom, the Russian Federation and possibly also a Balkan country, such as Serbia, was discussed. The purpose would be to meet with the key actors involved in mutual legal assistance and present and “test” the draft model request form. With the input and assistance of the states visited, the draft model request form could be completed.

At a later stage of the project, the model request form, once endorsed by member states at a launching conference, would be individualised to the domestic requirements of each state.

Activity 3 - Consultants’ contracts

The three experts in the project were offered fees for their work to develop the project on effective practical tools to facilitate judicial cooperation in criminal matters by participating in visits to member states for the purpose of collecting information and drafting a comprehensive report related to the elaboration of model request forms for mutual legal assistance.

Activity 4 - Country-visit to United Kingdom, 7-8 December 2009

The aim of the country-visit to the UK was to “test” the draft structure for a standard model request form for mutual legal assistance with a view to refining and completing it with all the necessary elements relating to the legislative, procedural and practical requirements for a mutual legal assistance request to be executed speedily and successfully.
Meetings were held with officials of the Home Office (UK Central Authority), HM Revenue and Customs, the Serious Fraud Office and the Crown Prosecution Service.

During the discussions with the different UK authorities dealing with incoming and outgoing mutual legal assistance requests the suggestions for improvements to the form were noted. In addition, a number of important aspects particular to the common law adversarial legal system (such as the very specific rules of evidence) were highlighted for further explanation in the draft standard model request form (or in the accompanying guidelines).

The United Kingdom authorities supported the general objective of the project and found the Council of Europe’s standard model request form to be a very useful checklist for preparing a mutual legal assistance request.

Activity 5 - Country-visit to the Russian Federation, 10-11 December 2009

The country-visit to the Russian Federation involved meetings with officials of the Prosecutor General’s Office and of the Ministry of Justice.

During the discussions with the Prosecutor General’s Office, which is responsible for the vast majority of incoming and outgoing mutual legal assistance requests, a number of suggestions for improvements to the form were noted.

The Russian authorities also expressed their support for the project and found the Council of Europe’s standard model request form to be a very useful tool.

DRAFT MODEL STANDARD REQUEST FORM FOR MUTUAL ASSISTANCE IN CRIMINAL MATTERS[1]

TITLE OF THE REQUEST WITH MOST IMPORTANT ELEMENTS ***Indication of Urgency***
1. Requesting authority - Official Title - Address - Contact details: telephone numbers, e-mail addresses
2. Requested authority - Official Title - Address - Contact details
3. Object and reason - Type and purpose of request - Legal basis of the request - Brief description of the facts related to the offence and legal qualification of the offence - Description of the stage of criminal proceedings, including if possible the expected time-frame *Where applicable:* *- justification of urgency* *- indication of a requirement to be notified about the date/place of the execution of the request as well as on the presence of particular persons with their contact details* *- information on previous communications*
4. Persons concerned - Name - Nationality - Address - Position in Legal Proceedings *Where applicable:* *- ID Number* *- Alias (excluding experts)* *- Date of birth (excluding experts)*

[1] This model request form is intended as a guide and a reference only. The requirements may be modified as necessary to meet the requirements of domestic law and practice of Member States

Information on a Legal person

- Name
- Registration number
- Address of the seat
- Contact details of the person authorised to act on behalf of the company

Where applicable
- *Surname*
- *Address of different headquarters*

5. Measures requested

A. <u>Extracts from judicial records</u>

- Type of information requested

Where applicable:
- Indication in case the request is made in a non-criminal context

B. <u>Service of judicial documents</u> (writs and records; summons to appear as a witness/expert/ accused person):

i. Information common to all requests of service

- Type of service required
- Specification of documents to be served

Where applicable:
- *Information on witness protection*
- *Safe passage issues*
- *Requirements for confirmation of service*
- *Requirements if service fails*

ii. Specific modalities for summons to appear

- Date of appearance
- Time and place of hearing

Where applicable:
- *alternative date of appearance, time and place of hearing*
- *approximate allowances payable and the travelling and subsistence expenses refundable*

C. <u>Temporary transfer of a person in custody</u>

- Date and time-line of transfer
- Place of transfer
- Purpose of transfer (e.g. witness/confrontation)
- Confirmation of custody and return by the date specified

Where applicable:
- *Indication whether transit is required*
- *Contact person(s)*

D. <u>Letters rogatory</u>

i. Facts and legal information about the offence

- Time and place of commission of offence
- Legal qualification of the offence with relevant provisions
- Clear description of the links between the offence and the person and between the offence and the evidence sought
- Provisions regarding the maximum penalty applicable

Where applicable
- *Damage caused by the offence*
- *Information on victims*
- *Where necessary, provisions on lapse of time*

ii. Types of measures

a. Hearing of witnesses, experts or accused persons and expertise: specific modalities

Hearing performed by the requested authority

- Indication of the competent authority which should perform the hearing
- Information on rights and obligations to be notified to the person to be heard
- List of questions to be asked

Where applicable
- *Express request for hearing under oath*
- *Indication whether the witness to be heard requires protection (including details on possible existing agreements between both Parties on this issue)*

Alternative modalities for a hearing by the requesting authority

Hearing by video conference

- Indication of reasons why it is not desirable or possible to attend in person
- Name of the judicial authority or of the persons conducting the hearing
- Details concerning practical arrangements (technical information on available means, proposals concerning payment of costs, etc.)
- Notification of rights and obligations of the person to be heard

Where applicable
- *Indication of the necessity of an interpreter*
- *Indication of measures to protect the person to be heard*
- *Indication if the suspect or the accused person consents to the hearing*
- *List of questions to be asked*

Hearing by telephone conference

- Indication of the name of judicial authority or the persons who will be conducting the hearing
- Indication that the person is willing to take part in a hearing by telephone conference

b. Search and seizure, restitution

b1. Information for generally requested MLA measures:

- Clear indication of the applicable law and/or of the text of the relevant provisions justifying such measures
- Type of search: body searches/ house searches/ other premises
- As far as possible, precise identification of the person, or premises to be searched (location, interest for property, bank accounts) while giving details on the links between the person and place to be searched
- Identification of documents, records, data, property to be seized

Where applicable
- Information on the decision/order of a court or other competent authority of the requesting State
- Restitution: indication of articles obtained by criminal means which should be at the disposal of the requesting State to be returned to their rightful owners

b2. Information for specific measures provided by Conventions on Economic Crime:

- **Convention on Cybercrime**

➢ **<u>Stage 1:</u> Request for provisional measures regarding expedited preservation of data**
- Adequate information to identify the relevant data to be preserved including its location (custodian of the stored computer data; location of a computer system)
- Grounds to believe that risks of loss or modification
- Indication that MLA request will follow

➢ **<u>Stage 2</u>: Request for MLA on investigative powers: search or similar access, seizure or similar securing, or disclosure of data**
- Specific purpose
- Identification and location of data: time and place of communication in case of real time collection or interception, technical data necessary to perform such action
- As far as possible, precise identification of the person, or premises to be searched while giving details on the links between the person, data and place to be searched
- Contact point

- *Where applicable, information on a request for the preservation of data*

- **Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime**

- Reasons to believe that a property is located in the requested State
- Indication of the procedures the requesting State wishes to follow
- Indication that the measure sought or any other similar measures can be taken in the territory of the requesting State under its national law
- Attachments: true copy of confiscation order and statement of grounds for order ; attestation that confiscation is enforceable;,

Where applicable
- *Information on similar requests sent to other States*
- *Where confiscation takes the form of a requirement to pay a sum of money corresponding to the value of the property, inform on the maximum value of the property to be seized*
- *Attachment of documents proving that third parties had the opportunity to claim rights*

c. Banking evidence
- banking details,

- account number,
- indication of the period for which the information is requested

d. Telephone/IP data

Information concerning telephone data
- Indication of the telephone number
- Information concerning the holder of the telephone number
- Information on the period the telephone was used

Information concerning IP data (computer, website, IP addresses)
- Indication of website address/ e-mail address/ any relevant information including the provider

Where applicable
- for traffic data, information on the period for which the IP address was used

e. Expertise

Any relevant information in accordance with national requirements

f. Wire-tapping

Any relevant information in accordance with national requirements

g. Special techniques

Any relevant information in accordance with national requirements

iii. General modalities of execution

- Necessary formalities and procedures under the law of the requesting State and guidance
- Presence of officials and interested persons from the requesting State
- Timeframe for execution
- Coordination between relevant and competent authorities (contact persons)
- Costs
- Language to be used

Where applicable
- *indication of requirements to keep confidential the fact and substance of the request*
- *indication of rules to ensure data protection*

iv. Modalities for the transmission of evidence

- *Indication whether originals are needed*
- *Indicate means of transmission used by requested State (courier, liaison officer, diplomatic representative)*

6. Final information

- *Any other information which the requesting State considers important*
- *Seal, name, function of the official and signature*

* * *

GUIDELINES

Title of the request comprising the most important elements

a. Content

The title should be short and clear (e.g. “request for hearing of a witness” including the name of the , “request for service of documents”, “request for hearing and service of documents”, “request for hearing by videoconference” etc.). The right title will facilitate the execution of the request. It is very important to indicate clearly and precisely the purpose of the request at the beginning of the form to ensure that competent authorities within the requested State will know immediately what is expected from them. For this purpose, the title should indicate the nature and range of activities. If the operation name is used in a system of a requesting state, such name should be indicated in the title (e.g. Operation Rose – request for house search).

b. Reference numbers

This information should be included at all stages. It will ensure the immediate connection with previous requests and will facilitate the follow-up given to the request, in particular when communicating results.

c. Where applicable, indicate the urgency

This specific indication at the beginning of the request will underline the expectation of the requesting authority regarding rapid procedures in the requested State and its prompt response. The urgency of the request should be justified in “3. Object and reason”.

* * *

1. Requesting authority (Article 14 para. 1.a)

The official title of the requesting authority, its address and contact details (telephone, fax numbers, e-mail address) should be indicated. On the basis of the 2nd Additional Protocol which enables direct contacts, it is also crucial to provide contact details of the prosecutor or other officials making the request without restricting this type of information to heads of offices. There might be technical issues requiring clarification or further information before the execution of the request. This may be directly performed through e-mail, fax, or phone without formulating formal requests for additional information. Indicating a contact person may also be useful in this context, in particular in cases of missing information or documents

This information may be provided as such: name of case worker: ..., telephone number, e-mail.[2]

It is important to note that following internal conflicts regarding competence, UK authorities raised the question of the possibility of indicating that the targeted requesting authority is the authority which has competence in making such request. It should be noted, however, that authorities considered as judicial authorities are officially defined in declarations of Contracting Parties regarding the European Convention on MLA. In practice, issues related to competence are only raised and further clarified in cases of doubt. In most cases, such doubts do not occur since it is presumed automatically that the authority requesting assistance is authorised to do so under its national law.

2. Requested authority

The title, official address and contact details of the requested authority should be indicated in the request. Various practical examples show that it is also possible to simply state: "to the competent authority of the district of ..." including with its address. In the European Union, an Atlas for the identification of the requested authority exists and may be useful for the application of the 2nd Additional Protocol and in particular to identify direct contacts.

3. Object and reason (Article 14 para. 1.b)

Information on the following points should be clear and as precise as possible to fully describe the object and reason of the request for assistance.

- Legal basis of the request

Although this information is not a decisive factor for the execution of the request and as a general rule based on the MLA this information is not considered as being necessary and will depend on the decision of the requested State to decide which legal acts apply, many countries, however, have established the regular practice of indicating the legal basis at the beginning of the request. Such practice was also further encouraged during the country visits. It may take the following form: "Referring to Article .... of the European Convention on Mutual Assistance in Criminal Matters (Strasbourg, 20 April 1959)....". In addition to the Convention, an explicit reference of any relevant cooperation treaties based on reciprocity should be made, including relevant UN Conventions and/or bilateral treaties which were adopted to facilitate its application.

It is important to note that the general rule mentioned above is limited by two exceptions which were taken into account to justify the inclusion of this information on a regular basis:

(1) The request is based on a CoE legal act covering specific types of crimes, the corresponding legal basis shall be indicated

(a) When the Money Laundering Convention of 1990 applies, the text of the statutory provisions the requesting authority relies upon shall be indicated in so far as coercive action is requested (art. 27 para. 1 letter d of the Convention cited)

[2] This idea has been mentioned during the visits and its acceptance may help to facilitate the execution of a request

(2) This indication might contribute to the proper execution of the request and avoid misunderstandings by the requested authority.

- Brief information on the offence

This part of the form should clearly indicate the facts related to the offence to motivate the request for assistance and the relevant provisions which legally qualify the offence in the requesting State (e.g. in the case of murder under Article... of the Criminal Code).

- Describe criminal proceedings including pending proceedings in the requesting State

It is also important to indicate the stage of proceedings, including if possible its expected time frame. For example: pre-trial/trial stage, investigation led by: (insert the title of the competent authority), the criminal proceedings in rem (when the suspect is unknown or against a particular person) It should also be mentioned If the request is made for so – called quasi-criminal cases, in particular in the German system or in any other similar legal systems.

Where applicable:

- In urgent cases, indicate the justification of such urgency

The current practice shows that while many requests are marked as urgent, the urgency is not always justified. This leads to important delays based on the lack of attention by requested authorities to urgent or very urgent, but unmotivated requests. To respond adequately to the urgent nature of the demand, it seems fundamental to provide clear grounds for the urgency.

Furthermore, including this information may facilitate the system of assistance as a whole, since it could ensure that requests are effectively prioritised by preventing the automatic classification of requests as urgent without justification by requesting States which tend to use such method to ensure that requested authorities address their demand as quickly as possible even in cases where there is no reason for such urgency. In other words, a system requiring the motivation of the urgency may help the requested authority prioritise urgent requests on the basis of the facts justifying the urgency.

Reasons for urgency may be justified, in particular, by the fact that:

-The suspect/accused is in custody;

- Proceedings will take place shortly and it was not possible to request for MLA earlier;

- There is a risk of the evidence's imminent change of location or destruction;

As mentioned during the country visits, it is important to note that in cases where no measures were taken for a long period of time in the requesting State (for example 5-10 years), the latter may decide accelerate procedures by marking the request as urgent, for example to programme the search or seizure of a property. In such cases, it will be necessary for the requested authorities to understand why it should suddenly take immediate and urgent measures. The simple notification of the 'urgency' in this context cannot be regarded as sufficient, since there is a

strong risk that the requested State will not take immediate action otherwise.

- Indicate if there is a requirement to be notified about the date and place of the execution of the request as well as on the presence of particular persons with their contact details

The current practice reveals the increase of requests which contain a requirement made by the requesting authority to be notified of the date and place of the execution of the request or to accept the presence of some persons on the basis of the conditions set by the Convention on MLA and its 2nd Additional Protocol.

It is very useful for the requested State to obtain this type of information at an early stage within the request itself to ensure that the requested measures are implemented appropriately and as expected by the requesting State within the required time frame.

- Any information about previous communications

It is important to include at the beginning of the request any relevant and useful information which could facilitate the execution of the request. For example, it may be important to mention any available information on previous police cooperation within the case, communications with Eurojust (it is mostly applicable for the EU states, however, there are cooperation agreements also between Eurojust and non-EU member states), communications with the European Judicial Network's contact points or PC-OC contact points.

4. Persons concerned (art. 14 para. 1 letter c MLA)

The persons concerned may be: suspect(s), the person accused, witnesses, experts, victims.

It is important to indicate clearly and precisely any personal information on the person concerned mentioned above in particular: the name, alias, date of birth, nationality, address, last known address, if differs, ID number, and where appropriate, the position in legal proceedings which is particularly crucial. For experts, however, it is not required to indicate any alias and date of birth.

Where a request concerns a legal person, the following relevant information should be included: – **name and surname, registration number, address of the seat and contact details of the person authorised to act on behalf of the company**.

In a number of countries, it is difficult to provide surnames since they are used in electronic registers as a key search word. A date of birth may be substituted by the birth number if it is used in the requesting country. Concerning the address, the requesting State should provide any known addresses, including those differing from the official place of residence. Indications of any restrictions to the personal liberty of the person to be heard should also be highlighted in the request. Where applicable, it should be explicitly mentioned when the name of the legal person was registered and its registration number should be indicated. The address of the seat means the address commercially registered which is frequently a postal box and does not correspond to the place where the person carries out its business activities. The address of such place, including of headquarters and different branches should also be provided. Finally, although

contact details of persons authorised to act on behalf of a company may be found in a commercial register by a requested authority, it is still helpful to indicate such details in the request. In addition, it is important to note that such persons may change over time. Therefore, relevant documents or information concerning the company may be made available by either the former or current representative of the company which should be clearly identified in the request.

5. Measures requested

A. Extracts from judicial records (Article 13 MLA)

This part concerns solely communications of extracts from and information related to judicial records in accordance with Article 13 MLA. It does not cover measures for the exchange of information from judicial records described in Article 22 MLA as amended by the Additional Protocol. Therefore, it should be clearly stated whether the request concerns a criminal (para. 1) or non-criminal case (para.2) while describing the type of information required.

It is important to take into account the existence of the differing practical approaches between Member States concerning the information contained in judicial records, in particular between civil and common law systems, when drafting and filling in the request form which should be as precise as possible.

B. Service of judicial documents (Articles 7 – 12 MLA)

i) Common information requested and specific information for summons to appear.

Information mentioned above and appearing at the beginning of the form to identify persons concerned is very important in requests for the service of documents, in particular for summons to appear. It is particularly important to note that many countries restrict the service of documents when the person concerned is the accused. Time limits between the service and date for appearance are frequently set. Requirements concerning the content of summons to be served are also usually established, in particular regarding the clear identification of the position in the on-going case in the requesting State of a person invited to participate in proceedings. The authority which issued the summons should be clearly named and the summons should be duly signed by an official of the competent authority. For the purpose of establishing the authenticity of the request, it is important to identify precisely the competent judge or prosecutor or any other competent official, as well as the seal of a particular office.

For summons to appear, the approximate allowances payable and the travelling and subsistence expenses refundable should be included. Furthermore, the requirement to notify the person concerned of any particular rights should be clearly described.

As mentioned in the explanatory report of the European Convention on MLA, it should be specified if a personal appearance is requested or only recommended. Furthermore, it is

essential to give any accurate and exact information on the time and place of the hearing. As seen in practice in various States, it may be useful to provide an alternative date for the hearing.

Request for service of documents, in particular summons to appear as a witness or expert, should respect the wording of Article 8 MLA, which provides for guarantees for the immunity of these persons. Unfortunately the practice shows, that judicial authorities frequently use national forms which information on sanctions for non appearance.

Various other documents may be served for witnesses, victims or prosecuted persons. Therefore it is important to specify clearly in the request the nature of the document to be served.

It should be noted that this form does not apply for requests of service by post. Article 16 of the 2nd Additional Protocol provides sufficient guidance concerning the conditions set for this specific service.

ii) Requirements regarding the execution of the request for the service of documents

It is important to indicate the required means to organise the service of documents which can be executed through simple service or personal service (excluding service by post). It should also be indicated, whether any follow-up is required if the service fails, or whether any specific requirements exist to confirm service. It was mentioned during the visit, that request for service of document could also, where applicable, contain a requirement to forbid the disclosure of the address of the victim. It is important to note that personal service is not common to all States. It could be useful therefore, to indicate what is meant by "personal service" in accordance with the law of the requesting State.

C. Temporary transfer (Articles 11-12 MLA, Article 3 of the 2nd Additional Protocol)

Before, and sometimes after, the request is sent to the requested State, the different competent authorities generally discuss issues regarding temporary transfer. The application of a temporary transfer requires a high level of coordination between police, prison and judicial authorities. In many cases, decisions on temporary transfer are made by judicial authorities and modalities are agreed between police authorities. Some countries, however, expect information on the chosen types of escort, as well as of secured accommodation or even details of proposed arrangements for collecting and returning the prisoner. Differences between countries on their levels of expected information may create practical difficulties. It is recommended, therefore, to establish minimum standards concerning information which should apply to all cases.

Concerning the content of the request form, the requesting State should indicate clearly the purpose of the transfer in part 3. In this specific part, however, it is important to specify the place of transfer and the period of time during which the person concerned should be present in the requesting State which should take into account the time needed for the transfer of the persons depending on his geographical situation. The requesting State should also expressly guarantee that the person concerned will be kept in custody in the requesting state while specifying the date

of his return. In addition, it is important to indicate if transit through the territory of a third State would be required and to give information on the progress of the pending request for transit.

D. Letters rogatory (Chapter II MLA)

i. Facts and legal information *(Article 14 para. 2 MLA)*
Information found in this part of the request completes the given information in part 3.

As a general rule, requests should be as detailed and comprehensive as possible to ensure that the requested authority has the necessary information for the effective execution of the request. However, information should be limited by its relevance and its impact on the execution of the request. This is also important for practical reasons to restrict the length of the request forms in particular where requests will have to be translated. This issue should be further discussed at the conference.

It is important to clearly and briefly describe any available and relevant information concerning the offence including the facts, its legal qualification, damages caused where applicable including the number of victims. In addition, it is crucial to describe clearly and precisely the facts of the case in connection with the person concerned and the measures requested.

Concerning details of legal provisions and the maximum penalty applicable for the offence, there is no need to provide the whole wording of a provision which should be limited to the specific type of the committed offence (murder, fraud etc). However, in certain circumstances, in particular when requiring coercive measure or if a request for MLA is sent after a long period of time for an old case), it may be necessary to include the precise wording of relevant provisions. For the mentioned "old" cases where assistance is requested after a long period of time, information on the lapse of time within which the requested State should take any action is important.

ii. Types of measures
This part of the form contains measures to obtain evidence. It is related to certain types of measures stemming from various Council of Europe Conventions. The first chapter focuses on the different types of hearings depending on the status of the person concerned in criminal proceedings, the means used for the execution of a hearing and the legal conditions for such a hearing. The issue of restitution is covered as well. The second chapter concentrates on traditional types of coercive measures, namely search and seizure, based on different legal basis. Finally the third chapter refers to newer forms of cooperation.

a. Hearing of witnesses, experts or accused persons and expertise

General observations on the modalities of a hearing:
This chapter concerns a very important and common way of obtaining evidence from another State. Information on the legal position or status of the person to be heard is crucial since it will

determine the rights and obligations of the latter as well as the use of the gathered evidence before a court of the requesting State.

Organising hearings on the basis of procedural rules of the requested State is the simplest modality for this specific type of assistance. A person will be notified of his or her rights and obligations in accordance with the law of the requested state and the hearing will organised by its competent authority.

However, it is important to note that the current trend reveals that hearings are more complex since the requesting State demands generally that the requested State follows specific formalities and procedures for the hearing under the law of the requesting State. If under the MLA Convention, requesting States may demand to follow their own procedures, the requested State may refuse.

It is important to note that legislation of certain States, such as the Russian Federation, prohibit the hearing of their nationals as suspects/accused and only allow their hearing as witnesses or victims. This may create serious difficulties for a requesting state, where the witness statement of a person cannot be used in proceedings against the same person, who is in a position of a suspect/accused. This issue should be further discussed during the conference.

In addition, differences were observed leading to practical problems between States which allow the taking of statements in particular at the pre-trial stage and countries which do not and will refuse therefore to execute the request. In some legal systems which allow the taking of statements, such statements are not accepted as evidence before the court.

However, such problematic situations of procedural conflicts between both States can be overcome for Parties to the Second Additional Protocol. Article 8 of the 2nd Additional Protocol responds notably to such possible problematic cases since requested States who are Parties are compelled to follow the requirements of the requesting State unless the action sought is contrary to its fundamental principles. In this context, to ensure that the requested State executes fully and effectively the request, it will be very important that the requesting State provides a requested State not only with extract of its procedural rules, but also with the necessary guidance on their application.

Hearings may be performed by the requesting State itself using specific technical means such as telephone and video conference. Such requests may sometimes lead to complicated issues, in particular where telephone hearings are not admitted by requested States which perceive this method as affecting the principle of fair trial. Furthermore, if the 2nd Additional Protocol provides a legal basis for this type of cooperation, it is however restricted to conditions provided in the national law of the requested state.

Regarding hearings by video conference a number of States recognised this type of modality for hearings even before the 2nd Additional Protocol was adopted. However, the added value of the

2nd AP relates to the fact that it provides a treaty basis for such hearings and therefore sets clear and explicit minimum requirements for hearings by video conference. It is evident from its wording that a hearing by video conference includes technical, legal, financial, as well as language/interpretation issues.

Hearings performed by the requested State

- **Indication of the competent authority which should perform the hearing**

Unless a specific request is made by the requesting State, a hearing is carried out in principle on the basis of the law and by the competent authority of the requested State which may be police officers, a prosecutor, magistrate or judge or any other authorised official. Where legislation of the requesting State contains specific requirements for a hearing, the latter should indicate clearly and precisely the formalities and procedures which should be followed in the requested State while specifying the relevant provisions, in particular where States are parties to the 2nd Additional Protocol and its Article 8.

- **Information on the rights and obligations to be notified to the person to be heard**

In many cases, the requesting State demands that the requested authority notifies a person to be heard of his or her rights and obligations depending, as mentioned above, on the status of the person concerned. Such requirement should be included in the request or attached to it. Furthermore, the requesting State may also request for specific formalities and procedures to be observed within the frame of execution: for example, it may request for the presence of the defence of the accused person, to notify the rights and obligations before a hearing, to request a person to sign each page etc. In such case, the request must indicate the necessity of following procedures of the requesting State in the requested State.

A request should clearly and expressly indicate whether the application of Article 8 of the 2nd Additional Protocol is expected. In this case, the requested state should apply the requested formalities and procedures which are not contrary to the fundamental principles of the requested state. However, the requested State may accepted to execute the request without being based on Article 8 of the 2nd AP.

It is very common, to see requests for both the service of documents and for a hearing. Procedures impose that documents should be firstly served, the person concerned should then be notified of his rights and obligations and finally the hearing should take place.

It should also be noted that in some countries witnesses do not have a right to remain silent when interrogated but their statements will not be used against them in proceedings. It is important therefore that requesting authorities indicate if such procedures are acceptable or alternatively specify that the results of the hearing will be used as evidence before a court.

- **List of questions to be asked**

Practical examples show that a hearing executed by competent authorities of a requested state is facilitated when the requesting authority provides a list of questions to be asked since the latter possesses the necessary knowledge and can make immediate connection between the collected pieces of evidence to ensure the success of the case. It is clear that this list should not be exhaustive and restrictive but should only be indicative. A person heard may provide information, which requires further questions or clarifications. The competent authority of the requested State usually has sufficient skills to initiate further questions which prevent additional hearings and the extension of proceedings in the requesting State. A list of questions assists to a competent authority of a requested state in a preparation of hearing. During the country visits, representatives of the UK and the Russian Federation have repeatedly highlighted the importance of providing this list in a request.

Where applicable

- ***Express request for hearing under oath (art. 3 para. 2 MLA)***

The procedure to give evidence under oath is followed in many but not all States. It should be noted that the Convention on MLA provides for hearing under oath if the law of the requested party does not prohibit it. Therefore this type of assistance should be made available on the basis of the EC on MLA. In addition, Article 8 of the 2nd Additional Protocol establishes flexibility since it will help its Parties solve possible conflicts where the requesting State makes this type of request which is not recognised in the requested State. If a requesting State wishes to hear a person under oath, it should be clearly indicated in the form itself. Where such measure is not recognised and used in the requested State but is not contrary to fundamental principles of the requested State (in particular if Article 3 para 2 MLA is applied) a requesting State should indicate the procedure to follow. It is also advisable to provide the wording of the oath where the requesting State is aware that the requested State does not regulate this issue.

It is important to take into account information provided by the UK authorities concerning the used terminology. For many countries words such as "to hear" or "to examine" have an important meaning, however these words do not have a precise meaning under the UK law. Therefore where evidence is required to be taken under oath, it should be expressly provided in the request.

- ***Temporary transfer to the requested state (art. 13 and 14 of 2nd Add. Prot.)***

Guidance provided by Articles 13 and 14 on Article 11 of the 2nd Additional Protocol concerning spontaneous information should be applied. However, restrictions concerning restitution (Article 12) do not apply for personal appearances of transferred sentenced persons. It is also important to note that Article 14 does not apply to extradition cases.

- ***Indication whether the witness to be heard requires protection (art. 23 2nd Add. Prot.)***

If the person concerned is a witness who requires protection, the requesting authority should indicate it in the request. Such measure is usually agreed between competent police authorities of both the requesting and requested Parties in accordance with their national law. It may also happen that an additional agreement of other competent authorities will be needed after the

reception of the requested State. If an agreement already exists to protect the witness, the reference of relevant documents or arrangements should be included in the request.

Alternative modalities for a hearing by the requesting authority

- **Hearing by video conference (art. 9 of the 2nd Add. Prot.)**

Hearings by video conference are provided in many States even those which are not Parties to the 2nd Additional Protocol to the extent that such measure is provided in the national law of the requested State. However, Article 9 is very helpful to ensure an effective and successful hearing through this method. Before a hearing by video conference is requested it is possible for requesting and requested States to initiate mutual discussions which may be carried out throughout the whole procedure.

The form should contain technical, practical and legal information. In addition to the information provided in the form in general, the following information should be provided:

a) If a hearing by video conference is requested, a requesting State should provide information on reasons why it is not desirable or possible for the witness or expert to attend in person and the name of persons who will be conducting the hearing (in case 2nd AP applies).
b) Technical information on the means available for video conference (such information may also be provided at a later stage), a proposed date and time for trial connection (it is advisable to check whether the connection works in advance),
c) Information on any particular measures which are necessary to protect the person to be heard,
d) Information whether any interpreter will be used by a requesting State (or a person to be heard) if available at the time of the request
e) If needed, the notification of rights and obligations of a person to be heard, including the right not to testify (according to the national law of the requesting state),
f) Time and date of hearing (a person is summoned on the basis of procedural rules of a requested state)
g) List of questions to be asked (it is recommended to indicate questions in advance – a competent authority of a requested state will be mainly active at the beginning of the hearing, but it also checks whether a hearing is arranged in compliance with its fundamental principles – if questions are indicated in advance a requesting state may for instance indicate that certain questions (or the way how questions are formulated) could raise some difficulties)
h) Proposals concerning the payment of costs of hearing by video conference,
i) If any personal appearance from a requesting state is requested, it should be stated in the request,
j) In case of a hearing of a suspect/accused a requesting state is encouraged first to consider declarations of a potential requested state concerning acceptance of such hearing.

As addressed in the 2nd Additional Protocol, it is also possible to request a hearing under oath by video conference.

It may be also underlined that due to practical reasons, certain countries demand a billing address in the requested State together with a confirmation that it accepts payment. Although a request to pay for the video conference may be justified, as a matter of principle, such requirement should not be included in the form.

Hearing by telephone conference (Article 10 of the 2nd AP)

Taking into account that in many States a hearing by telephone conference is not possible, this specific type of hearing is only applicable subject to the conditions of the national law of the requested State or the requirements set by Article 10 of the 2nd Additional Protocol, including the condition concerning the competence of the requesting State to conduct the hearing on the basis of its own laws . It is particularly important in the request to state expressly that the person concerned is willing to take part in the hearing.

b. Search and seizure (Article 5 of EC on MLA) + restitution

b1. Information for generally requested measures:

The most common legal basis for search and seizure may be found in Article 5 of the MLA Convention. It should be underlined that search and seizure are subject to stricter conditions than for other mutual assistance measures because they have a direct impact on individual fundamental rights. Therefore, in many countries a specific authorisation/order from a judge or, where applicable, a prosecutor is needed.

Article 5 of the MLA Convention sets conditions under which a Party may, by a declaration, reserve its rights to execute a letter rogatory for search or seizure if one or more of the following conditions are not satisfied:

1. the offence motivating the letters rogatory is punishable under both the law of the requesting and requested states (and it may even be more complicated if dual criminality is applied in concreto);
2. the offence motivating the letters rogatory is an extraditable offence in the requested State;
3. the execution of the letters rogatory is consistent with the law of the requested state.

The following information for search and seizure requests should be clearly and precisely included in the form:

- Justification of such measures

These coercive measures should be applied only in exceptional circumstances. For instance, to obtain banking information of the person concerned, some States may request the search of the

person's bank in accordance with their national law which may differ with the means of execution of such request used by the requested State. In this case, taking into account the interests and needs of the requesting State, the requested State will decide on the procedures to be followed to obtain the requested information. It is therefore crucial to describe precisely and clearly the reason and purpose of the requested measure.

- Type of search

Searches refer to various situations including body searches, house searches or of other premises. Each specific situation may require the application of various measures/orders to execute the request in the requested State. Therefore, it is essential to clearly specify in the form which type of search is being requested.

- As far as possible, precise identification of the person or premises to be searched and details on links between the person and place to be searched

Although body searches are not very common, a person to be searched should be duly identified. As regards searches of premises, it is very important to know whether premises to be search are used for housing, business or for other purposes. Car searches are also possible. Therefore it is very important to provide relevant, clear and precise information to allow a requested authority to perform a search (and to obtain an order/authorization from a competent authority). For houses/other premises the exact address will be required, as well as the name of the owner of such premises (a company may have rented certain premises). For car searches, the car should be identified by its known features (type, colour, name plate, registered number and any other relevant information).

- identification of documents, records, data, property to be seized

What should be seized should be clearly and, as far as possible, precisely described in the form. If a request is too general, it may prevent the requested authority to take any action, due to restrictions imposed by its national law. If seizure concerns computer data, it is important to indicate the type of data (e.g. accountancy documents of a firm X for a period from year A to year B). It is further important to note that if the offence is computer-related, the Convention on Cybercrime may apply, as well as the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime if the offence relates to money laundering.

***Where applicable**:*

- A decision/order of a court or other competent authority, if provided under the law of a requesting State

A requesting authority should take into account that a requested State may require that it attaches the relevant decision/order. For other States, a production order may be sufficient or it may not require any decision. Therefore, as a minimum requirement a requesting State should indicate if a decision/order has been issued in that State or if there are no specific requirements on that matter within its national law..

- Restitution (art. 12 2nd Add. Prot.)

This part of the form concerns the return of articles obtained by criminal means to their rightful owners without prejudice to the rights of bona fide third parties. Although there is no obligation imposed on a requesting State to make such request, it is useful to indicate which articles should be returned by the requested States. If the seized article will be used as evidence in a requested state, there is no obligation for this latter to execute this type of request.

Information for specific measures provided by Conventions on Economic Crime:

- **Convention on Cybercrime**

Although the Convention itself does not contain specific provisions on international cooperation, it does provide for specific measures to search and seize computer data which may be used by Parties for purposes of investigations or proceedings, in particular in the absence of applicable international agreements. As mentioned above, a competent authority can seek this type of assistance on the basis of a traditional request for MLA but the requested State may refuse to execute it.

In addition, it is important to note that for cases which concern computer data, the speed of procedures is crucial. Time is the enemy for investigating and prosecuting authorities. Therefore, the Convention provides a two fold/steps mechanism which is not mandatory but is more likely to be applied.

The Convention offers the possibility of requesting mutual assistance regarding provisional measures such as the expedited preservation of stored computer data which Parties are compelled to apply at national level. This measure aims at preventing any alteration, removal or deletion of data during the period of time of the preparation, transmission and execution of an MLA request to obtain such data. It should be noted that it is a limited provisional measure because it is less intrusive that traditional MLA on search and seizure. Requested States generally prefer procedures which ensure that the custodian (generally the service provider) preserve the targeted data, which should be transmitted at a later stage to the competent authorities executing the request for MLA.

There will be no major differences between the content for both requests for provisional measures (stage 1) and for measures regarding investigative powers (stage 2) and a traditional request for search and seizure, except concerning the following information:

- For stages 1 and 2 requests: a clear description which is sufficient enough to identify the targeted data (nature of data), the location of the computer system (a computer may be in one branch of a company while data is on servers in headquarters), and its custodian. The easiest situation is when data can be found on a hard disk or any portable storage of data, such as a mobile phone using computer programs, blackberry etc.

- For stage 1 requests: indication of the reasons to preserve such data and the grounds to believe that there are risks of loss or modification, as well as the indication that a request for search and seizure will follow.

Concerning stage 1 requests, in principle, dual criminality requirements will not be considered. Article 29 para 4 is the only provision which offers the possibility of making a limited reservation concerning dual criminality – if a Party demands the establishment of dual criminality as a condition for responding to any MLA request for the production of 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 that dual criminality is set as a precondition for the execution of measures for the preservation of data. This may only be applied to offences which are not covered by the Convention.

Furthermore, the Convention requires that the executed preservation should last more than 60 days and shall be continued pending the decision on the request for MLA for the search or similar access, seizure or similar securing , or disclosure of the preserved data.

It is important to underline that it is possible during the execution of the request to preserve date to discover the existence and involvement of a service-provider in a third State. In this case, the requesting State may initiate other requests addressed to other States.

Whether or not a requesting State requested provisional measures for the preservation of data (stage 1), the requested State is compelled to execute a stage 2 request to search or similarly access, seize or similarly secure, and disclose such data stored by means of computer system located within its territory.

It is important to note that there are ongoing discussion regarding the application of Article 32.b) of the Cybercrime Convention concerning trans-border access to stored computer data with consent or where publicly available where a Party may, without the authorisation of another Party but with the consent of the responsible authority, access or receive electronically stored computer data located in the other Party. Some states do not consider that this provision relates to international co-operation, however other states expressed the opinion that in such cases requests for MLA should still be sent.

Finally mutual assistance may be provided on the basis of applicable treaties and/or national legislation concerning real time collection of traffic data or interception of content data. Similarities may be found with measures for the interception of telecommunication data. In general such cooperation requires important coordination as well as arrangements concerning technical support and costs.

- Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime of 1990

The scope of this Convention provides a broad legal basis for cooperation. Indications on the required information which should be in sections 1-3 of a request can be found in Article 27 of the Convention. In principle, the assistance sought on the basis of this Convention will be for evidentiary purposes and in view of confiscation. It means that assistance (reference here is made to coercive measures) may be requested when a decision on confiscation exists, but also in cases, where criminal proceedings have been instituted, but not finalised. The freezing of assets as well as seizure are frequently used for this purpose. In case of seizure in view of confiscation, the requesting state is encouraged to indicate the time-line of proceedings including the expected timing of the request for confiscation.

To justify a request for coercive measures, it is crucial that the requesting State always quotes the text of the relevant statutory provisions or where this is not possible, indicates at least the relevant law applicable. It should also indicate that the measure sought or any other measures having similar effects can be taken in the territory of the requesting state under its national law.

In addition to the general information mentioned above, the requesting State should indicate existing evidence leading to the belief that the property is located in the requested State including by establishing a clear connection between the property and the requested State. To ensure the expected execution of the request, the requesting authority should describe precisely any particular procedure the requesting Party wishes to be followed.

Furthermore, where appropriate, it is crucial to indicate the maximum amount for which recovery is sought. In cases of seizure in view of confiscation it should also be indicated, whether any similar request was sent to other countries and/or which were executed (it means only part of a total property of a person should be seized and consequently confiscated). The maximum value of property (including money) which will be confiscated should be included.

It should be noted that this Convention provides a separate chapter on the notification and protection of third parties' rights which, in the absence of specific provisions, provides a legal basis for international cooperation in the fulfilment of notification requirements, if states do not have other legal basis. Such notifications may contain court orders to seize property, the execution of the order, the seizure of property in which third party rights are vested, seizure of registered property etc. (for further details see explanatory report to the Convention). Direct service may be authorised on the basis of the law of the notifying State, in cases where it is important to act quickly or in respect of notification of judicial documents which are of a less important nature.

c. Banking evidence (bank details, account number, indication of a period for which the information is requested)

Information to be provided here can be found in the chapter on search and seizure.

d. Telephone/IP data (indication of period for which documents are required)

In addition to the general information described above, it is important to note that information concerning the holder of a telephone number is generally requested.

In such case, a requesting State should transmit to the requested State the telephone number and information on the period when the telephone was used.

Concerning computer data, on the basis of the MLA Convention, a request may concern data in a computer, on a website, IP addresses etc. In such cases the website address, e-mail and other relevant information (such as provider data) should be contained in the request where such data is available to the requesting state. If traffic data is needed, information on the period for which the IP address was used, should be indicated.

It would be interesting to know whether the MLA Convention is considered as a sufficient legal basis for all Parties to cooperate.

e. Expertise

The nature of the necessary information for this specific area of high technicality will depend on national requirements.

f. Wire-tapping

The nature of the necessary information for this specific area of high technicality will depend on national requirements.

g. Special techniques

Articles 17-20 of the 2nd Additional Protocol concern special techniques for judicial cooperation, including to obtain evidence to be used before a court but they do not refer to police cooperation.

In addition Article 20 of Joint Investigation Teams is very accurate and detailed. There are different authorities empowered under national laws to set up such teams. This issue may be further studied by the PC-OC.

Article 4 of the Money Laundering Convention covers special investigation powers and techniques, such as order to seize or make available bank, financial or commercial records to carry out actions referred to in Articles 2 and 3. It also covers monitoring orders, observations, interception of telecommunications, access to computer systems and orders to produce specific documents.

iii. General modalities of execution

- Necessary formalities and procedures under the law of the requesting State and guidance

It should be specifically stated in the form if a requesting State wishes that the requested State follows specific procedures and requirements to execute the request. In addition, in accordance with the 2nd Additional Protocol, the wording of applicable provisions should be included as well as guidance on their application which may be restricted if such procedures and requirements are contrary to the fundamental principles of the legal system of the requested State This is one of

the most important achievements of the 2nd Add. Prot. It allows for the application of procedures and requirements of a requesting state and it thus enhances the chances of acceptance of obtained evidence before courts of a requesting State.

- Presence of officials and interested persons (art. 4 MLA)

While Article 4 of the MLA Convention enables the requested State to refuse the presence of officials and interested persons if such presence is prohibited by its law, the 2nd Add. Prot. limits this possibility.

Presence of officials of a requesting state during the execution of its request becomes more and more frequent. Restrictions are being removed and this has a very positive impact on proceedings in a requesting state. However there are still States, which, for instance do not allow the presence of a defence lawyer.

In any case, as a rule, a requesting State should indicate whether the presence of officials and interested persons is required and indicate the reasons and purpose. It should also provide contact details of such persons and their legal position in the case. Further details may be given at a later stage.

- Time-frame for execution

It may be useful to add specific deadlines are set by the requesting State to ensure that the requested State will respond adequately to its needs, in particular when the request is urgent. Furthermore, it should specify if any dates should be avoided (e.g. there is no flight, or a prosecutor has another duties etc.) when the requested states considers dates for execution of a request.

- Coordination

The execution of complex requests for MLA frequently requires the coordination of the different competent authorities involved which will be made possible if contact details of the relevant persons are included appropriately in part 3 of the form. In some cases, it is also recommended to send the particular request informally to have it checked by representatives of the requested state before it is sent officially. During the visit to London, UK representatives stressed that this practice is seen as very useful.

On the ground that representatives of the UK CPS mentioned that there is no sufficient knowledge about the PC-OC points of contact, a leaflet could be distributed among judicial authorities as well.

- Costs (see art. 20 MLA Convention and art. 5 2nd Add. Prot.)

Article 20 of the MLA Convention solely allows the refunding of the expenses which were necessary for the attendance of experts in the territory of the requested Party or for the transfer of a person in custody. Details of such expenses should be included in the request form and should be as precise as possible.

In addition to costs mentioned above, Parties to the 2nd AP may request the reimbursement of costs of a substantial or extraordinary nature. In addition, the costs incurred by the requested State shall be reimbursed by the requesting State for the use of video or telephone conference, including interpretation, allowances to witnesses and their travelling expenses, unless the Parties agree otherwise.

- Languages to be used

Article 16 of the MLA Convention and Article 15 of the 2nd Additional Protocol, as well as bilateral treaties regulate issues related to the translation of the request and its annexed documents, including procedural and judicial documents to be served. It is always advisable to check also bilateral agreements before a translation of a request is made. Where translation is required and/or where the services of an interpreter will or will not be arranged by the requesting authority, all relevant details should be included, in particular, the language required.

MLA templates may be helpful, but the relationship between the draft form, guidelines, templates, PC-OC contact points and possible MLA atlas should be discussed.

Where applicable

- Confidentiality and data protection (see art. 25 and 26 2nd Add. Prot.)

The requesting State should specifically indicate if the requested State should keep confidential the fact and substance of the request, except to the extent necessary to execute the request.

To obtain the consent of the requested State, the requesting State should specify if the transferred data will be used for any other purposes than those authorised by Article 26.1) on the basis of the principle of data protection which includes the purpose of proceedings, or for preventing an immediate or serious threat to public security. It is important to describe as precisely as possible the purpose and reasons of this request in part 3.

iv. Transmission of evidence

The evidence concerned here relates to property, copies or records or documents requested for pending criminal proceedings or to execute letters rogatory. If originals are needed, it should be expressly stated in the request form in accordance with Article 3 and Article 6 of the MLA Convention.

A requesting state may prefer to have the evidence transmitted through a particular channel (courier, liaison officers, and diplomatic representative). This information should also be included in the form.

6. Final information

This part of the form should contain the seal of the competent authority with its contact person' name, position/function and his or her signature. This information should be mandatory.

International cooperation is based on the presumption that a request is made by the competent authority of the requesting state, unless any doubts occur. The indication of the competent judge or prosecutor or any other official and the seal of a particular office helps the requested authority to establish the authenticity of the request. As indicated above, the same applies to any documents attached.

Moreover, any other useful information may be provided in this part of the form, if the requesting State considers that it will contribute to the effective execution of its request by the requested authority.

DRAFT STANDARD REQUEST FORM FOR THE LAYING OF INFORMATION

Title – Request for the laying of information
1. Requesting authority
2. Requested authority
3. Person(s) and offence(s) concerned - Personal information on the person concerned (identity, nationality, etc.) - Offence(s)
4. Indication of attachments (copies of documents/files)
5. Offence - Legal qualification must be indicated - Legal provisions and maximum penalty applicable should be indicated
6. Summary of facts
7. Evidence - Indication of the evidence to prove the offence (i.e. witness statements, documents)
8. Reason for the request - Existence of proceedings pending in the requesting state - Motivation for the request shall be indicated (i.e. suspect is national of and living in the requested state) - The legal basis for the request

10. Measure requested - Initiation of proceedings in the requested state and feedback.
11. Additional information - Contact person of the requesting authority - Request for information on initiation of proceedings and result of proceedings - Seal and signature

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GUIDELINES

1. Introduction: purpose and reasons for the laying of information

The laying of information is a type of mutual legal assistance as found in Article 21 of the MLA Convention.

Contrary to the 'classic' form of MLA, the purpose of the laying of information is not to obtain evidence from the requested State. In fact, by laying information to the requested State, the requesting State actually sends the gathered evidence to request the prosecution of the suspect(s) in the requested State. In essence, it is one party which transmits a case file (dossier) to another party in order to *allow* the prosecution of a suspect in the latter party.

The laying of information can be compared to a pre-emptive and totally *voluntary* form of transfer of proceedings under the 1972 Convention on the Transfer of Proceedings. It is essential to underline that the laying of information does not create any obligation on the requested party to prosecute. Where the 1972 Convention creates reciprocal obligations to transmit a proper request for the transfer of proceedings and the actual 'acceptance' to proceed if all conventional conditions are met, the laying of information relies merely on the 'goodwill' of the requested party. Its voluntary nature means that the laying of information does not even require a treaty basis. Article 21 of the MLA Convention just mentions this possibility, without regulating this type of MLA to any further extent. From the context of the 1959 MLA Convention it can be devised that all other general principles for MLA apply *mutatis mutandis* to a request for the laying of information. In that respect the model request aims at sending a request for the laying of information that contains a maximum of information and thus enhances the chances to obtain proper prosecution in the requested party. The latter will receive a file that is as complete as possible.

The lack of (extra-)territorial jurisdiction over the offence is the most important reason to lay information in order to – if possible – 'incite' the prosecution in the requested State to prosecute. Another reason which may be more political concerns the fact that the requesting State has no interest in prosecuting rather minor offences. In the interest of the suspect and / or the victims, such prosecution will be better conducted in the requested party.

A crucial motive to lay information to the requested State is the location of the suspect and / or the victim(s) on its territory. In that respect, the laying of information is the logical follow up to the application of the 'aut dedere, aut judicare' principle as laid down in article 6, para. 2 of the 1957 Extradition Convention.

Most parties to the 1957 Extradition Convention have declared that they would not extradite their nationals. As a general rule, only Common Law countries extradite their nationals without any condition. The Netherlands is one exception amongst Civil Law countries which extradite their nationals, albeit solely for prosecution purposes and under the condition that the extradited national will be returned upon eventual final conviction to a prison sentence in order to serve that prison term in the Netherlands. Since the nationality exception to extradition applies in most CoE member States, to compensate the non-extradition clause, the requested party should assess the possibility of prosecuting itself the person sought.

The laying of information is indeed the most appropriate tool to implement the 'aut judicare' principle since it enables the transmission of evidence which is normally only partially included in the extradition request. Physical evidence such as expert reports, police reports, and others are not normally attached to the extradition request. Where the requested party is able (competent – has jurisdiction) to prosecute the person sought, additional evidence is highly important to ensure a successful case.

The requested State requires (extra-)territorial jurisdiction to be able to prosecute the suspect on the basis of layed information. Not just *in abstracto*, but *in concreto* which means that the case would have been prosecuted if its facts had been committed on the territory or within the jurisdiction of the requested state. Mitigating circumstances should be taken into account or this may well lead to a decision not to prosecute in the requested State. Applying the double criminality principle in concreto to the facts of the case may lead to the re-qualification of the offence as of lesser nature which would thus become barred from prosecution because of the application of a much shorter period of time related to "lapse of time".

2. Specific guidance relating to items of the request form for the laying of information

As a general rule, practical examples of requests for the laying of information confirm that filling such requests as precisely and completely as possible, will enhance the chances of obtaining its effective and adequate execution. The term 'executed' is relatively appropriate for laying of information requests since the requested party is not obliged to follow suit. However, a request for the laying of information that contains a proper identification and

localisation of the suspects and the victims (if any), a clear outline of the facts of the matter, the applicable legal qualifications (the offences) and a good evidentiary basis, will more likely lead to the prosecution of the suspect.

One major difficulty with such requests concerns translation. If the case file in the requesting State concerns complex issues (e.g. elaborated or organised fraud / money laundering cases) and has reached an advanced state, it will take a considerable amount of effort, means and time to translate the collected evidence into the official language of the requested state.

When set goals are high and the 'information' to be laid is very substantial, it is of the utmost importance to prepare the request together with to-be-requested State. In such cases, the laying of information should never be done before consulting the-to-be requested state. Only when the latter is legally competent and willing to prosecute the suspect(s), the actual request should be send. In those cases, a formal request to transfer the proceedings is actually much more effective. The above mentioned advice is thus addressed to member States which have not (yet) ratify or accessed the 1972 Transfer of Proceeds Convention.

Title – Request for laying of information

The name of the request is important in order to qualify the request at first sight. It is important to apply a correct 'label' to the request.

1. Requesting authority

The requesting judicial authority should be fully identified. The official title of the requesting authority, its address and contact details (telephone, fax numbers, e-mail address) should be indicated. Such details are essential for any kind of consultation on the matter. Requests for clarification or additional information should be exchanged directly between the relevant authorities.

2. Requested authority

The official title and address, as well as contact details of the requested authority should be indicated. This information is necessary for preparation. If the matter was discussed between central authorities and the to-be-requested party at a preliminary stage, before the request was officially sent, and where the latter gave its 'green light' to proceed, the judicial authority of the requested party should be identified and notified. This authority should be then clearly and precisely identified in the request. Again, this will allow direct contacts for the purpose of follow-up.

3. Person(s) and offence(s) concerned

- Personal information on the person concerned (identity, date of birth, nationality, address, ID number etc.)
- Offence(s)

Suspects who may also be a legal persons and victims should be identified as precisely as possible. Where available, fingerprints, photos and / or DNA profiles of possible suspects should be included. In addition, such means of identification may be also useful where victims are missing or if the specific concerns violent and/or sexual crime.

4. Indication of attachment (copies of documents/files)

An inventory of the information and/or evidence available is crucial to carry out a first preliminary assessment of the facts of the case. If it appears that there are other issues which should be examined or if evidence seem to be lacking in order to properly proceed, such items should then be clearly identified and indicated. A good inventory list itemises all available case file documents and physical pieces of evidence. A short description of each item prevents lengthy searches and the need to actually dig into the evidence.

A complete and detailed inventory is probably the most important element of any preparatory bilateral consultation for a request for laying information (and a request for the transfer of proceedings for that matter) which involves very serious or complicated facts.

5. Offence

- Legal qualification must be indicated
- Legal provisions and maximum penalty applicable should be indicated

The legal basis or qualification of the offence should be given in the form, which includes the exact wording of the criminal law provisions applying in the requesting State. This particular type of request should always solely concern offences. The term ‘information’ not only refers to any ‘information’ but rather to evidence from a case file which may still be at an early stage of proceeding or, which may have reached a well advanced phase.

6. Summary of facts

Outlining the facts of the case is essential to asses the seriousness of the matter and in addition, to perform the double criminality test on the side of the requested party. The first step to verify procedural grounds for prosecution concerns the (re)qualification of the alleged criminal acts and omissions.

The facts should clearly and precisely indicate the existing link(s) with the requested State, such as the nationality or location of the suspect and / or the victim(s). On the basis of the

summary of the facts it should already be clear that it is impossible to prosecute in the requesting State and/ or should be therefore executed in the requested State.

Specifying the place and time of the offence(s) is the minimum type of information which should be provided which further helps establishing (extra)territorial jurisdiction *in concreto*.

7. Evidence

- Indication of the evidence to prove the offence (i.e. witness statements, documents)

This item follows logically from the previous item. The request should also indicate how, where and when the targeted facts came to the attention of the prosecuting authorities of the requesting State and means employed to reveal the truth and eventually to prosecute. This item immediately refers back to the inventory of attached evidentiary documents and items. Cross-references are very important, especially when the matter is a complicated one and contains a lot of evidence.

8. Reason for the request

- Existence of proceedings pending in the requesting State
- Motivation for the request shall be indicated (i.e. suspect is national of and living in the requested state)
- The legal basis for the request

At this point the request is justified. The very essence of the request concern the existence of proceedings and moreover the reason for which these proceedings cannot be continued and should be 'taken over' by the requested State.

Where the laying of information follows from the impossibility or the refusal to extradite a national, a reference should be made to the initial extradition request or at least the SIS (EU) or Interpol red notice or request for provisional arrest used to initiate the extradition process.

In such cases, the treaty basis is a combination of article 6, para. 2 of the 1957 Extradition Convention and article 21 of the MLA Convention.

This item should also provide clear indications on the statutes of limitation (lapse of time). In "older" cases, in particular, eventual further acts which have interrupted or suspended the application of "lapse of time" should be listed in detail.

9. Measure requested

Initiation of proceedings in the requested State and feedback.

The request itself is basically straightforward. Its purpose is that the requested party evaluates the matter and the evidence included in the request and informs the requesting party about its intentions.

Where the request was duly prepared in cooperation with the to-be-requested state at a preliminary stage before the request was officially sent, the outcome concerning the prosecution by the requested State should already be known and the request itself therefore stands as a mere formality.

10. Additional information

- Contact person of the requesting authority
- Seal and signature

Finally specific contact points, including at the level of police authorities which deal or dealt with the case and / or expert witnesses or defence lawyers, as well as contact points of victim(s) should be included. The latter are more specific contact persons which are of particular importance for future proceedings within the requested State.