

PC-ES

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THE COMMITTEE OF EXPERTS  
ON THE PROTECTION OF CHILDREN  
AGAINST SEXUAL EXPLOITATION AND SEXUAL  
ABUSE

(PC-ES)

**DRAFT CONVENTION  
ON THE PROTECTION OF CHILDREN  
AGAINST SEXUAL EXPLOITATION AND SEXUAL  
ABUSE**

**DRAFT EXPLANATORY REPORT**

## DRAFT EXPLANATORY REPORT

### I. Introduction

#### a. Sexual exploitation and abuse of children and authoritative international instruments

1. Sexual exploitation and sexual abuse are some of the worst forms of violence against children. According to UNICEF, approximately two million children are used in the “sex industry” each year. There are more than one million images of some ten to twenty thousand sexually abused children posted on the Internet.
2. Of these ten to twenty thousand children, only a few hundred are identified. The rest are anonymous, abandoned, and most likely still abused.
3. There are no statistics on the total amount of sexual abuse of children in Europe, but it is well known that there is a considerable discrepancy between the number of reported cases of sexual abuse of children to the police and social services and actual cases. It is also recognised that children usually experience extreme difficulties in telling anyone about being sexually abused, because very often they are violated by a person in their close social or family circle or because they are threatened. Thus, the available data shows that, in Council of Europe countries, the majority of sexual abuse against children is committed within the family framework, by persons close to the child or by those in the child’s social environment.
4. The main international existing instrument in the field of protection of children’s rights, including against sexual exploitation, is the **United Nations Convention on the Rights of the Child** (hereafter CRC, United Nations, 1989). It protects children from all forms of sexual exploitation and abuse, abduction, sale and trafficking, any other form of exploitation and from cruel or inhuman treatment. The pertinent provisions of the CRC, like those in Articles 1, 11, 21 and 32-37, are formulated in general and broad terms.
5. Article 34 the CRC requires States Parties to protect children against "all forms of sexual exploitation and sexual abuse", including the inducement or coercion of a child to engage in any unlawful sexual activity, the exploitative use of children in prostitution or other unlawful sexual practices, and the exploitative use of children in pornographic performances and materials.
6. As to the sexual exploitation of children, the only universal treaty specifically addressing this topic is the **Optional Protocol to the CRC on the Sale of Children, Child Pornography and Child Prostitution** (United Nations, 2000). The Protocol criminalises certain acts in relation to the sale of children, child prostitution and child pornography, including attempt, complicity and participation. It does not cover comprehensively and in detail issues such as child-friendly judicial procedures, although it lays down minimum standards on the protection of the child victim in criminal justice processes. The Protocol

provides for the right of victims to seek compensation. It encourages the strengthening of international cooperation and assistance and the adoption of extra-territorial legislation, but it does not provide for exemption from the dual criminality principle.

7. Compliance with the CRC and its Protocols is monitored by the Committee on the Rights of the Child, which has come to the conclusion that children in Europe are not sufficiently protected against sexual exploitation and abuse. In particular the Committee underlines the lack of exhaustive national criminal legislation in this field in the State Parties, especially as concerns trafficking of children, “sex tourism” and child pornography, the lack of a clearly defined minimum age for consenting sexual relations and lack of protection for children against abuse on the Internet. It has, for example, recommended that States develop an effective system of reporting and investigation, within a child-sensitive inquiry and judicial procedure, avoiding repeated interviews of child victims, in order to ensure better protection of child victims, including the protection of their right to privacy.
8. The **European Social Charter** (ETS 035, Council of Europe, 1961 and revised in 1996) provides in Article 7 that children and young persons have the right to special protection against physical and moral danger to which they are exposed. Article 17 of the Revised Social Charter (ETS 163) contains the right for children and young persons to appropriate social, legal and economic protection. Sub-paragraph 1 b of Article 17 states that Governments shall take all appropriate and necessary measures designed to protect children and young persons against negligence, violence or exploitation.
9. The European Committee of Social Rights has interpreted the provisions of the Charter as the right of children to protection against all forms of sexual exploitation, in particular from involvement in the “sex industry”. The Committee has set up definitions for child prostitution, child pornography and trafficking of children for sexual purposes. All these forms of exploitation should be criminalised if the child is below 18 years of age. The Committee has also taken into account the evolution of technology, wanting Internet service providers to be responsible for controlling the material they host, securing the best monitoring system for activities on the Internet and logging procedures.
10. The **Convention on Cybercrime** (ETS 185, Council of Europe, 2001) has a specific provision, in Article 9, criminalising child pornography when use has been made of a computer system. It contains a definition of child pornography and calls on the States Parties to criminalise the production, offering/making available, distribution/transmitting, procuring and possession of child pornography. The scope of the Convention is limited to offences committed through a computer system.
11. In May 2005 the **Council of Europe Convention on Action against Trafficking in Human Beings** (CETS 197) was adopted. The Convention contains a definition of trafficking in human beings, in Article 4, giving special attention to victims below the age of 18. It includes several protection mechanisms for victims of trafficking, such as the right to a recovery and

reflection period and the right to residence permits. It contains specific provisions as regards child victims of trafficking, for example the right to access to education. Also, during and after investigation as well as during court proceedings victims shall receive special protection. With regard to children, the best interests of the child shall be taken into account.

12. In 2001, the Committee of Ministers of the Council of Europe adopted **Recommendation (2001) 16 on the Protection of Children against Sexual Exploitation**. It calls for criminalisation of acts amounting to the sexual exploitation of children, in particular child prostitution, child pornography and trafficking of children for sexual purposes. It also provides that States should provide for special measures for child victims of sexual exploitation during court proceedings and for ensuring that the child's rights are safeguarded throughout proceedings, that judicial authorities should give these cases priority, and that the limitation period for criminal proceedings should begin when the child reaches majority. Also, it calls for improved international cooperation and the adoption and implementation of extra-territorial jurisdiction, without the requirement for dual criminality.
13. The Council of the European Union adopted, in 2003, the **Framework Decision on combating the sexual exploitation of children and child pornography (2004/68/JHA)** according to which the Member States are obliged to criminalise certain behaviours and provide for a minimum level of maximum penalties incurred for these offences. The offences linked to sexual exploitation relate to prostitution and use of force/threats or a position of trust/authority for sexual relations. Offences related to child pornography are criminalised whether or not they involve the use of a computer system. Also, instigation, aiding, abetting and attempts relating to the above-mentioned offences should be criminalised. The Framework Decision states that extra-territorial jurisdiction shall be put in place by virtue of the principle of "aut dedere aut judicare", and that the victims shall be considered particularly vulnerable in the criminal proceedings (with reference to the EU Framework Decision on the standing of victims in criminal proceedings).
14. In 2001 the Council of the European Union adopted a **Framework Decision on the standing of victims in criminal proceedings (2001/220/JHA)** where special protective measures for victims of crimes are set up. When there is a need to protect a victim from giving evidence in open court, the court may decide that the victim can testify in a manner which enables this objective. States shall encourage personnel involved in proceedings or working with victims to receive special training, in particular regarding the most vulnerable groups.
15. Furthermore, the Council of the European Union adopted a **Framework Decision on combating trafficking in human beings (2002/629/JHA)** which provides in particular for a harmonisation of criminal offences in this field.
16. Article 3 of the **International Labour Organisation Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (1999)** includes "the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances" in the definition of the worst forms of child labour.

17. Special mention should be made of the two World Congresses on the commercial sexual exploitation of children, held in Stockholm in 1996 and in Yokohama in 2001, since progress in the implementation of their conclusions has been monitored by the Council of Europe. These congresses adopted the Stockholm Declaration and Agenda for Action and the Yokohama Global Commitment.
18. The Stockholm Declaration and Agenda for Action promotes cooperation between States and all sectors of society and includes recommendations to criminalise the commercial sexual exploitation of children and other forms of sexual exploitation of children, as well as to penalise offenders. Perpetrators shall not only be subject to legal sanctions, but should also be offered rehabilitation possibilities. The Declaration and Agenda for Action also recommends that States put in place extra-territorial legislation. It develops standards for child-friendly judicial procedures and strengthens victims' rights to legal aid and judicial remedies. It calls for the development and implementation of national plans of action and national focal points. Furthermore, it provides for victims to have access to child-friendly personnel and support services in all sectors, particularly in the legal, social and health fields.
19. The Yokohama Global Commitment, adopted at the 2<sup>nd</sup> World Congress, reaffirmed the Stockholm Declaration and Agenda for Action. It also states that all actors shall take adequate measures to address the negative aspects of new technologies, in particular child pornography on the Internet.
20. Prior to the 2<sup>nd</sup> World Congress, the Council of Europe organised a preparatory meeting for Europe and Central Asia that adopted the Budapest Commitment and Plan of Action. This document seeks to strengthen networks of cooperation between national and international law enforcement agencies and to promote the development of international arrest warrants for traffickers. The Council of Europe was appointed to monitor the progress of the implementation of these commitments and to support States in this task.
21. A follow-up meeting to Yokohama was held in Ljubljana in 2005. In the conclusions of this Yokohama Review Conference, good practices in the implementation of the commitments made in Stockholm and Yokohama were highlighted and focus was placed on new and emerging issues. One working group focused on child-friendly judicial proceedings, recommending the drafting of a new convention to specifically address this issue.

**b. Action of the Council of Europe**

22. The Council of Europe has been working hard for more than 15 years to help its member States fight the destructive phenomenon of sexual exploitation and sexual abuse of children. It has developed a number of texts dealing specifically with these issues. The Council of Europe has been actively involved in the two World Congresses against commercial sexual exploitation of children, held in Stockholm in 1996 and in Yokohama in 2001. On 27 September 2002 the Parliamentary Assembly of the Council of Europe adopted Resolution 1307

(2002) on the sexual exploitation of children: zero tolerance. The Assembly called for Council of Europe member States to adopt a dynamic policy on impunity, together with procedures giving priority to the rights of child victims and their views and aiming at arresting criminals without giving them the slightest opportunity to elude justice.

23. The political commitment by the member States of the Council of Europe to fight sexual exploitation of children was affirmed at the second Summit of Heads of State and Governments (Strasbourg, November 1997). The Action Plan adopted at this Summit called upon the member States to review national legislation with the aim of ensuring common standards for the protection of children suffering from or at risk of inhuman treatment to extend their co-operation, within the Council of Europe, with a view to preventing all forms of exploitation of children, including through the production, sale, marketing and possession of pornographic material involving children.
24. The Heads of State and Governments of the Council of Europe member States reaffirmed this commitment at their third Summit in Warsaw in May 2005. At this Summit the protection of children against all forms of violence was declared a top priority within the Organisation. The Action Plan reads:

*We will take specific action to eradicate all forms of violence against children. We therefore decide to launch a three year programme of action to address social, legal, health and educational dimensions of the various forms of violence against children. We shall also elaborate measures to stop sexual exploitation of children, including legal instruments if appropriate, and involve civil society in this process. Coordination with the United Nations in this field is essential, particularly in connection with follow-up to the Optional Protocol to the Convention on the Rights of the Child, on the sale of children, child prostitution and child pornography.*

25. Following this Action Plan, the Council of Europe launched a programme entitled "Building a Europe for and with children". This is a response to the Organisation's mandate to guarantee an integrated approach to promoting children's rights covering the social, legal, educational and health dimensions relevant to protecting children from various forms of violence. It comprises two closely related stands: the promotion of children's rights and the protection of children from violence. The programme's main objective is to help all decision makers and players concerned to design and implement national strategies for the protection of children's rights and the prevention of violence against children.

**c. The Council of Europe Convention on the Protection of Children against Sexual Exploitation and Abuse**

26. In 2002, the Committee of Ministers of the Council of Europe appointed a Group of Specialists on the Protection of Children against Sexual Exploitation (PC-S-ES). The PC-S-ES drafted model terms of reference for national focal points on the protection of children against sexual exploitation. It also produced an assessment of the member States' legislation in this field. However, due to the

difficulties in producing an exhaustive and satisfactory assessment, the PC-S-ES decided to develop a log frame which would be sent to States to fill in.

27. A tool enabling States to implement the various undertakings they subscribed to in the field of the fight against sexual exploitation and abuse of children, “REACT on sexual exploitation and abuse of children”, was drafted and sent to member States in 2004. The document listed all commitments made by States in the above mentioned instruments and also provided the possibility for States to submit additional information.
28. At the end of 2004, 23 States had replied, and the replies were analysed by an independent expert at the beginning of 2005. The analysis showed that, in numerous ways, implementation of the commitments made by member States had not been fully achieved. A set of recommendations was submitted to the member States through the European Committee on Crime Problems (CDPC).
29. Based on the analysis of REACT, the PC-S-ES organised a follow-up conference to the 2<sup>nd</sup> World Congress against Commercial Sexual Exploitation of Children. The conference, “Yokohama Review for Europe and Central Asia – Combating sexual exploitation of children”, was held in Ljubljana in July 2005. Some of the recommendations from the working groups and seminars were directed to the Council of Europe for further action. The recommendation that the Council of Europe should draft a binding instrument regarding child-friendly judicial procedures in cases of sexual exploitation and abuse was particularly highlighted.
30. Following the conclusions of the Third Summit of Heads of State and Governments of the Council of Europe, held in Warsaw in May 2005, which call for the elaboration of measures to stop sexual exploitation of children, including legal instruments if appropriate, the Committee of Ministers adopted, on 22 March 2006, the specific terms of reference setting up the Committee of Experts on the Protection of Children against Sexual Exploitation and Sexual Abuse (PC-ES) which had the task of conducting “a review of the implementation of the existing international instruments on the protection of children against sexual exploitation and, if necessary, instruments on legal co-operation, with a view to evaluate the need for an additional international legally binding instrument, containing a follow-up mechanism, or a non-binding instrument, and/or amendments to the existing instruments” and “if the need for an additional instrument is established, subject to the approval of the CDPC, prepare such an instrument.”
31. In May 2006, the PC-ES started its work by reviewing the provisions and implementation of the commitments and international instruments dealing with sexual exploitation of children:
  - The United Nations Convention on the Rights of the Child
  - The Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography
  - International Labour Organisation Convention 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour

- The European Social Charter (revised)
  - The Convention on Cybercrime
  - The Council of Europe Convention on Action against Trafficking in Human Beings
  - The Council of the European Union Framework Decision on combating the sexual exploitation of children and child pornography
  - The Council of the European Union Framework Decision on the standing of victims in criminal procedures
  - The Stockholm Declaration and Agenda for Action
  - The Yokohama Global Commitment
  - The Budapest Commitment and Plan of Action
  - Recommendation Rec (2001) 16 on the protection of children against sexual exploitation.
32. It concluded that there was a need for a new binding instrument to protect children against sexual exploitation and sexual abuse. The drafting procedure of the new instrument began in September 2006. Meetings of the Committee were held, in May, September, October, December 2006, February and March 2007, to draw up the text.

## II. Commentary on the provisions of the Convention

### Preamble

33. The Preamble contains an enumeration of the most important international legal instruments, programmes and action plans which directly deal with sexual exploitation and sexual abuse of children in the framework of the Council of Europe, the European Union, the United Nations and the International Labour Organisation. In particular it should be underlined that, as mentioned above, the Council of Europe has prepared an important number of instruments to examine and combat sexual exploitation and abuse of children from different aspects. During the negotiation process of this Convention all these international legal instruments have been taken into account.
34. The Preamble sets out the basic aims of the Convention which include, in particular, protecting children against sexual exploitation and sexual abuse whoever the perpetrators, providing assistance to victims and promoting the fight against sexual exploitation and sexual abuse of children notably because of the increase in these phenomena.
35. Attention is drawn to the fact that the measures provided for in this Convention do not prejudice the development of preventive mechanisms, means of investigation and forms of co-operation under other international conventions, in particular the *Convention on Cybercrime*, which contains provisions designed to make it easier to prevent and punish child pornography disseminated through the use of computer systems.

36. These measures are without prejudice to the positive obligations on States to protect the rights recognised by the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (hereafter ECHR).

## **Chapter I – Purposes, non-discrimination principle and definitions**

### **Article 1 – Purposes**

37. Paragraph 1 deals with the purposes of the Convention, its two main aims being to prevent and combat sexual exploitation and sexual abuse of children (a), and to protect the rights of child victims (b).
38. Sub-paragraph c deals with national and international cooperation. Measures to be taken at the national level are contained in Chapter II (Preventive measures), Chapter III (Specialised authorities and coordinating bodies), Chapter IV (Protective measures and assistance to victims), Chapter V (Intervention programmes or measures), Chapter VI (Substantive criminal law), Chapter VII (Investigation, prosecution and procedural law) and Chapter VIII (Recording and storing of data). The national measures stress the importance of cooperation and collaboration between the various competent bodies and services which may be involved.
39. International cooperation as established by the Convention (Chapter IX) is not confined to criminal matters but also takes in preventing sexual exploitation and sexual abuse and assisting and protecting victims.
40. Paragraph 2 underlines that, in order to ensure the effective implementation of its provisions by the Parties, the Convention sets up a special monitoring mechanism. This is a means of ensuring Parties' compliance with the Convention and is a guarantee of the Convention's long-term effectiveness (see comments on Chapter X).

### **Article 2 – Non-discrimination principle**

41. This article prohibits discrimination in Parties' implementation of the Convention and in particular in enjoyment of measures to protect and promote victims' rights. The meaning of discrimination in Article 2 is identical to that given to it under Article 14 ECHR.
42. The concept of discrimination has been interpreted consistently by the European Court of Human Rights in its case-law concerning Article 14 ECHR. In particular this case-law has made clear that not every distinction or difference of treatment amounts to discrimination. As the Court has stated, for example in the *Abdulaziz, Cabales and Balkandali v. the United Kingdom* judgment, "a difference of treatment is discriminatory if it 'has no objective and reasonable justification', that is, if it does not pursue a 'legitimate aim' or if there is not a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised'".

43. The list of non-discrimination grounds in Article 2 is identical to that in Article 14 ECHR and the list contained in Protocol No.12 to the ECHR. However, the negotiators wished to include also the non-discrimination grounds of sexual orientation, state of health and disability. Taking the definition of “child” set out in the United Nations Convention on the Rights of the Child, therefore also covering teenagers experiencing their first affective relationships and discovering sex and their own sexual orientation, and considering that recent research has highlighted a specific risk of sexual violence against, and sexual abuse and exploitation of, minors of homosexual orientation, it was decided to include “sexual orientation” among the factors for non-discrimination set out in this article. “State of health” includes in particular HIV status. The list of non-discrimination grounds is not exhaustive but indicative. It is worth pointing out that the European Court of Human Rights has applied Article 14 to discrimination grounds not explicitly mentioned in that provision (see, for example, as concerns the ground of sexual orientation, the judgment of 21 December 1999 in *Salgueiro da Silva Mouta v. Portugal*). The reference to “or other status” could refer, for example, to children of refugee or immigrant populations or “street children” whose legal status is unclear.
44. Article 2 refers to “implementation of the provisions of this Convention by Parties”. These words seek to specify the extent of the prohibition on discrimination. In particular, Article 2 prohibits a victim’s being discriminated against in the enjoyment of measures – as provided for in Chapter IV of the Convention – to protect their rights.

### **Article 3 –Definitions**

45. Article 3 provides several definitions which are applicable throughout the Convention:

#### *Definition of “child”*

46. The definition of a “child” is the same as provided in the *Council of Europe Convention on Action against Trafficking in Human Beings*, i.e. any person under the age of 18 years. It should be noted that in certain articles of the Convention relating to offences a different age is specified. For example, the solicitation of children for sexual purposes is a criminal offence only in relation to children below the legal age before which it is prohibited to engage in sexual activities with them.

#### *Definition of “sexual exploitation and sexual abuse of children”*

47. Article 3 b contains a definition of sexual exploitation and sexual abuse of children which includes all the behaviour referred to in Articles 18 to 24 of this Convention.
48. International instruments have mainly had regard to facts committed for commercial aims in laying down rules for the protection of children (prostitution, child pornography, child trafficking). However, experience shows that this approach is too narrow for insuring protection of children against the

abuse that any adult can inflict on their physical and mental well-being. Children can just as easily be victims within the family as in their close social surroundings. Such cases, in which the commercial aspect is, in the majority of cases, absent are nevertheless the most frequent and statistics demonstrate that the perpetrators of child sexual abuse are usually persons close to the victim (parents, grandparents, neighbours, teachers etc).

49. Key existing international instruments refer in the main only to "sexual assault" as a general term for all sexual molestation of children. The negotiators felt it would be better to use the expression sexual abuse which is more appropriate in this context.
50. Sexual abuse may therefore be defined as engaging in sexual activities with a child who has not reached the legal age for sexual activities or where use is made of coercion, force or threats, or where abuse is made of a position of trust or of a particularly vulnerable situation of the child.

#### *Definition of "victim"*

51. There are many references to victims, in particular in Chapter IV (Protective measures and assistance to victims) which enumerates several measures for the benefit of children. The negotiators felt therefore it was essential to define this expression.
52. A victim is "any child subject to sexual exploitation or sexual abuse". It is important to note that the facts of the sexual exploitation or abuse do not have to be established before a child is to be considered a victim.

## **Chapter II – Preventive measures**

53. This chapter contains measures to be implemented at the national level. Policies or strategies to prevent the sexual exploitation and sexual abuse of children should include knowledge of the possible signals which could be given by children, as well as the provision of, and easy access to, information about sexual exploitation and sexual abuse, their effects, their consequences and how best to combat them.

### **Article 4 – Principles**

54. The main aim of the Convention - to prevent sexual exploitation and sexual abuse of children from taking place - is reflected in this article.

### **Article 5 – Recruitment, training and awareness raising of persons working in contact with children**

55. Paragraphs 1 and 2 are intended to ensure that persons who have regular contacts with children have sufficient awareness of the rights of children and their protection, and an adequate knowledge of sexual exploitation and sexual abuse of children. This provision lists the categories of persons involved: those who

work with children in education, health, social protection, judicial, and law enforcement sectors as well as those who deal with children in the fields of sport, culture and leisure activities. The provision does not refer to professional contacts with children, but is left open for anyone who deals with children in any capacity. This is particularly intended to cover persons who carry out voluntary activities with children.

56. The reference to the “rights of children” covers the rights as laid down in the *United Nations Convention on the Rights of the Child*, including for example, the right to life (Article 6), the right to be protected from economic exploitation (Article 32), the right to be protected from all forms of physical or mental violence, including sexual abuse (Article 19).
57. Paragraph 2 also requires persons having regular contacts with children to have adequate knowledge and awareness to recognise cases of sexual exploitation and sexual abuse and of the possibility of reporting to the services responsible for child protection any situation where they have reasonable grounds for believing that a child is the victim of sexual exploitation or sexual abuse, as provided in Article 12 paragraph 1. It should be noted that there is no specific training obligation in this provision. Having “adequate knowledge” could imply training or otherwise providing information for people who come in contact with children so that children who are victims of sexual exploitation or sexual abuse can be identified as early as possible, but it is left to Parties to decide how to achieve this.
58. Paragraph 3 sets an obligation for the Parties to ensure that candidates are screened prior to the exercise of professions involving regular contacts with children to ensure that they have not been convicted of acts of sexual exploitation or sexual abuse of children. In certain member States, this obligation can be applied also to voluntary activities. The addition of “in conformity with its internal law” permits States to implement the provision in a way which is compatible with internal rules, in particular the provisions on rehabilitation and reintegration of offenders. Moreover, this provision does not intend to interfere with specific legal provisions in those States which provide for the deletion of offenders’ criminal records after a certain period of time.

#### **Article 6 – Education for children**

59. The negotiators considered that it is primarily the responsibility of parents to educate children generally in questions of sexuality and on the risks of sexual exploitation or sexual abuse. However, there may be situations where the parents are not able or willing to do this, such as where a parent is involved in the abuse of the child or where the cultural traditions of the community do not allow such matters to be openly discussed. Moreover, children sometimes pay more attention to what is explained to them in other contexts than at home, and notably at school when professionals (such as, for example, teachers, doctors, psychologists) provide the relevant information. Therefore, Article 6 provides the obligation for States to ensure that children are educated at primary and secondary level on the risks of sexual exploitation and sexual abuse, and how to protect themselves and request help.

60. The purpose of this information is to enable children better to protect themselves against the risk of sexual exploitation and abuse. Such information must not, however, have the effect of relieving adults and State authorities of their duty to protect children against all forms of sexual exploitation and sexual abuse.
61. The article refers to the provision of this information “during primary and secondary education”. No reference is made to schools, since some children are educated at home and these children are also covered by the provision. The information referred to does not necessarily have to form part of a teaching programme, but could be provided in a non-formal educational context. School clearly has an important role to play in this respect, but the collaboration of parents is also required “where appropriate”. Situations where this may not be appropriate include where a child is an orphan, or where the parents are implicated in investigations or proceedings for sexual abuse of the child.
62. The negotiators felt it was important that children receive this information from as early in their lives as possible, with any information made available to them in a form which is “adapted to their evolving capacity”, in other words appropriate for their age and maturity.
63. Providing isolated information on sexual exploitation or sexual abuse outside the general context of normal sexuality could be disturbing to children. Therefore, the information to be provided on the risks of sexual exploitation and abuse should be given within the general context of sex education. Care should also be taken to ensure that this information does not undermine adults in the eyes of the child. It is important that children are also able to trust adults.
64. The last part of the article refers to situations of risk, especially those involving the use of new information and communication technologies. These are commonly regarded as a medium for the transmission of data, and are intended to refer in particular to the use of the Internet and third-generation technology (3G) which permits access to the Internet through mobile phones. Education and awareness programmes for all children on the safe use of the Internet are essential.

#### **Article 7 – Preventive intervention programmes or measures**

65. The negotiators wanted to provide for the possibility for people who are afraid that they might actually go ahead and behave in such a way that constitutes an offence of a sexual nature against children, as well as persons who have committed such offences but have not been brought to the attention of the authorities, to benefit, if they so wish, from an intervention programme or measure. The provision, which applies to people who are not being investigated or prosecuted or serving a sentence, and is preventive in purpose, is best included in the chapter on preventive measures. As in the case of the intervention programmes and measures provided for in Chapter V, the negotiators did not wish to impose specific models on States Parties, which must simply "ensure" that these programmes or measures are available to the people

referred to in Article 16, should they wish to take advantage of them, and assess, in each particular case, whether the person applying may benefit from them.

### **Article 8 – Awareness raising of the general public**

66. Article 8 requires Parties to promote or conduct awareness raising campaigns for the general public.
67. Paragraph 2 is intended to prevent or prohibit any advertisement of the offences described in the Convention. The implementation of this provision is left to Parties but they must obviously take into account the case-law of the European Court of Human Rights which, based on Article 10 ECHR, guarantees the right to freedom of expression the exercise of which may be subject to certain formalities, conditions, restrictions or penalties as prescribed by law and necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, or for the protection of health or morals.

### **Article 9 – Participation of children, the private sector, the media and civil society**

68. Paragraph 1 recognises that the development of policies and measures, including action plans, to combat the sexual exploitation and abuse of children must of necessity be informed by children’s own views and experiences in accordance with their evolving capacity.
69. Paragraph 2 requires Parties to encourage the information and communication technology sector, the tourism and travel industry and the banking and finance sectors to participate in the elaboration and implementation of policies to prevent sexual exploitation and sexual abuse of children.
70. The use of the broad term “information and communication technology” sector, which ensures that any future developments in this field will also be covered, targets in particular Internet service providers but also mobile phone network operators and search engines. There can be no doubt that the Internet is a medium much used for the purposes of the sexual exploitation and abuse of children. The use of the Internet in the production and dissemination of child pornography and in the trafficking of children for the purposes of sexual exploitation is well documented and receiving attention from a number of national and international bodies. For this reason it is important that Internet service providers themselves are involved in taking steps to raise awareness about sexual exploitation and that, as far as possible, policies are developed to regulate the use of the Internet through their systems.
71. The travel and tourism industry is included specifically to target the so-called “child sex tourism” phenomenon. In some member States, for example, airline companies and airports provide passengers with audiovisual preventive messages presenting the risks of prosecution to which perpetrators of sexual offences committed abroad are exposed.

72. The inclusion of the finance and banking sectors is very important because of the possibility for financial institutions, in cooperation with law enforcement, to disrupt the functioning of financial mechanisms supporting pay for view child abuse websites and to contribute to dismantling them.
73. The reference to the implementation of internal norms is intended to cover codes of conduct or enterprise charters aimed at protecting children from sexual exploitation and abuse. An example of good practice in this domain is the “Code of Conduct to Protect children from Sexual Exploitation in Travel and Tourism”, initiated in 1998 by ECPAT in collaboration with the World Tourism Organisation (WTO), which is currently implemented by over 45 companies, tour operators, travel agencies, tourism associations and hotel chains in over 16 countries worldwide. One of its measures is to provide information to travellers through catalogues, posters, brochures, in-flight films, ticket-slips, websites, etc, about the subject of sexual exploitation and sexual abuse of children.
74. “Self-regulation” is regulation by the private sector; “co-regulation” is regulation in the context of a partnership between the private sector and public authorities.
75. Paragraph 3 refers to the role of the media in providing appropriate information on all aspects of sexual exploitation and abuse of children. This function should be exercised with due respect for the fundamental principle of the independence of the media and freedom of the press, in particular concerning the evaluation of the “appropriate” nature of the information provided. There is no doubt that the media play a central role in the provision of information about children and images of childhood in general which significantly influence public stereotypes, assumptions and knowledge about children. Equally though they can play a very positive role in helping to raise awareness about children who are sexually exploited or abused and about the very nature of sexual exploitation and abuse and the scale of the problem. The provision is intended also to cover the important issue of the respect of privacy of child victims.
76. Paragraph 4 requires Parties to encourage the financing of projects and programmes carried out by civil society aiming at preventing and protecting children from sexual exploitation and sexual abuse. The negotiators wish here to recognise and highlight the important work of NGOs in this field.

### **Chapter III – Specialised authorities and co-ordinating bodies**

#### **Article 10 – National measures of co-ordination and collaboration**

77. The first paragraph is concerned to promote a multidisciplinary co-ordination approach by requiring that Parties take measures to ensure the co-ordination on a national or local level between the various agencies responsible for preventing and combating sexual exploitation and abuse of children, in particular the education and health sectors, social services, law enforcement and judicial authorities. The list is not exhaustive. As far as judicial authorities are concerned, the coordination of action by the sectors mentioned should operate

with full respect to their independence and to the principle of the separation of powers.

78. There is no doubt that the development of a multi-agency and multi-disciplinary approach to dealing with sexual exploitation and abuse of children is important, premised upon the fact that no single agency would be able to address a problem of such complexity.
79. The reference to “local” level means any level below the national level and is particularly relevant to federal States.
80. Paragraph 2 a requires Parties to set up or designate independent national or local institutions for the promotion and protection of the rights of the child. To ensure that children’s rights are being promoted and respected, States should appoint an independent individual or agency, one of whose tasks should be to promote public awareness of sexual exploitation and abuse of children and their long term negative effects, as well as to ensure the respect of the rights of children.
81. A number of countries have created such positions which are known by different names and involve different responsibilities and functions – Children’s Ombudsperson, Children’s Advocate, Child Rights Commissioner, Committee on Child Rights, etc. There are very few policies in social and public life which do not affect children and one of the functions of an Ombudsperson or Commissioner could be to ensure that all relevant policies and practices at central and local government level are child proofed or have been developed in reference to some form of child impact assessment.
82. Further, it is also important that the development of such an approach is resourced properly and given clear responsibilities.
83. It should also be borne in mind that, in addition to the designation of independent authorities at the level of the member States, the Parliamentary Assembly of the Council of Europe suggested that the appointment, at the European level, of a European Ombudsman for Children would be a powerful resource in promoting awareness about the situation of many children throughout Europe and in co-ordinating policies to better enhance their lives and life experiences (see *Recommendation N° 1460 (2000) of the Parliamentary Assembly*).
84. Paragraph 2 b requires Parties to set up or designate mechanisms for data collection or focal points at the national or local levels, in collaboration with civil society, for observing and evaluating the phenomenon of sexual exploitation and abuse of children. Although there can be no doubt that the sexual exploitation and abuse of children is a serious and increasing problem, there is a lack of accurate and reliable statistics on the nature of the phenomenon and on the numbers of children involved. Policies and measures may not be best developed and appropriately targeted if reliance is placed on inaccurate or misleading information. The obligation provided in paragraph 2 b aims at taking measures to address the lack of information.

85. The data referred to are not intended to cover personal data on individuals, but only statistical data on victims and offenders. Nevertheless, the negotiators wished to highlight the importance of respecting data protection rules in the collection of any data, by including the phrase “with due respect for the requirements of personal data protection”.
86. In paragraph 3, in respect of the necessity of a comprehensive and multidisciplinary approach, States are required to encourage co-operation between competent State authorities, civil society and the private sector in the prevention of and fight against sexual exploitation and abuse of children. The reference to civil society is a generic term covering non-governmental organisations and the voluntary sector. This paragraph, as in paragraph 2 b, recognises and supports the important role of civil society in preventing sexual exploitation and abuse of children. For many children and families, NGO’s are more acceptable to them in their search for support than formal State institutions and bodies. For that reason, while responsible for meeting the obligations laid down in Article 10, Parties must involve such bodies in the implementation of preventive measures.

#### **Chapter IV – Protective measures and assistance to victims**

87. While the ultimate aim in the fight against sexual abuse and sexual exploitation should be to prevent these actions from taking place, it is also essential to ensure that children who have already been victims of such offences receive the best possible support, protection and assistance, which is the aim of the articles in this chapter.

#### **Article 11 – Principles**

88. In paragraph 1, the negotiators wished to highlight the necessity for a multidisciplinary approach to assisting and protecting child victims of sexual offences as well as their close relatives, families or anyone in whose care they are placed. These protection and assistance measures are not meant to benefit all parents and family members in the broad sense but those who, because of their close relationship with the minor, may be directly affected.
89. The point of paragraph 2 is that, while children need special protection measures, it is sometimes difficult to determine whether someone is over or under 18. Paragraph 2 consequently requires Parties to presume that a victim is a child if there are reasons for believing that to be so and if there is uncertainty about their age. Until their age is verified, they must be given the special protection measures for children.

#### **Article 12 – Reporting suspicion of sexual exploitation or sexual abuse**

90. Under paragraph 1 Parties must ensure that professionals normally bound by rules of professional secrecy, (such as, for example, doctors and psychiatrists)

have the possibility to report to child protection services any situation where they have reasonable grounds to believe that a child is the victim of sexual exploitation or abuse. Although in many member States systems of mandatory reporting are already in place, and are considered to be crucial in detecting abuse and preventing further harm to children, the Convention does not impose an obligation for such professionals to report sexual exploitation or abuse of a child. It only grants these persons the possibility of doing so without risk of breach of confidence. It is important to note that the aim of this provision is to ensure the protection of children rather than the initiation of a criminal investigation. Therefore, paragraph 1 provides for the reporting possibility to child protection services. This does not exclude the possibility provided in certain States to report to other competent services.

91. Each Party is responsible for determining the categories of professionals to which this provision applies. The phrase “professionals who are called upon to work in contact with children” is intended to cover professionals whose functions involve regular contacts with children, as well as those who may only occasionally come into contact with a child in their work.
92. In paragraph 2, Parties are required to encourage any person who has knowledge or suspicion of sexual exploitation or abuse of a child to report to the competent services. It is the responsibility of each Party to determine the competent authorities to which such suspicions may be reported. These competent authorities are not limited to child protection services or relevant social services. The requirement of suspicion “in good faith” is aimed at preventing the provision being invoked to authorise the denunciation of purely imaginary or untruthful facts carried out with malicious intent.

### **Article 13 – Helplines**

93. This article is particularly intended to apply to persons who may be confronted with a situation of sexual exploitation or sexual abuse. It could happen that persons to whom the child is entrusted do not know how to react. Moreover, child victims may also seek to obtain support or advice without knowing who to turn to. This emphasises the importance of the development of means whereby persons can safely reveal that they know about or have been victims of sexual abuse or sexual exploitation, or simply talk to a person outside their usual environment. Therefore Parties must encourage and support the setting up of such information services as telephone or Internet helplines to provide advice to callers. The Convention leaves to Parties any follow up to be given to calls received. These assistance services should be as widely available as possible. In some States, for example, such services are available 24 hours a day, 7 days a week.

### **Article 14 – Assistance to victims**

94. Article 14 sets out the assistance measures which Parties must provide for victims of sexual exploitation and abuse. The aim of the assistance provided for in paragraph 1 is to “assist victims, in the short and long term, in their physical and psycho-social recovery”. The authorities must therefore make arrangements

for those assistance measures while bearing in mind the specific nature of that aim.

95. The paragraph states that victims should receive assistance “in the short and long term”. Any harm caused by the sexual exploitation or abuse of a child is significant and must be addressed. The nature of the harm done by sexual exploitation or abuse means that this aid should continue for as long as is necessary for the child’s complete physical and psychosocial recovery. Though this Convention relates primarily to children, the consequences of sexual exploitation or abuse of children may well last into adulthood. For this reason, it is important to establish measures which also provide those adults who were sexually exploited or sexually abused as children the opportunities to reveal these facts and to receive appropriate support and assistance if such assistance is still needed.
96. Assistance to victims in their “physical recovery” involves emergency or other medical treatment. The negotiators wished to draw particular attention to the fact that, given the nature of the offences established in this Convention, the obligation could include all forms of medical screening with special attention to sexually transmissible diseases and HIV infection and their subsequent treatment.
97. “Psycho-social” assistance is needed to help victims overcome the trauma they have been through and return to a normal life in society.
98. The provision stresses that the child’s views, needs and concerns must be taken into account when taking the measures pursuant to this paragraph.
99. NGOs often have a crucial role to play in victim assistance. For that reason paragraph 2 specifies that each Party is to take measures, under the conditions provided for by national law, to cooperate with non-governmental organisations, other relevant organisations or other elements of civil society engaged in victim assistance. In many states, NGOs work with the authorities on the basis of partnerships and agreements designed to regulate their co-operation.
100. Paragraph 3 provides for the possibility, where the parents or carers of the victim are involved in the case of sexual exploitation or abuse, of removing either the alleged perpetrator or the victim from the family environment. It is important to stress that this removal should be envisaged as a protection measure for the child and not as a sanction for the alleged perpetrator. The removal of a parent who is the alleged perpetrator of sexual abuse against his or her child could be a good solution when the other parent supports the child victim. The other option may be to remove the child from the family environment. In such case, the length of time of the removal should be determined in the best interests of the child.
101. The negotiators recognised that the application of paragraph 4 would be limited, but felt that in certain particularly serious cases it would be justified for those persons close to the victim, including for example family members, friends and classmates, to benefit from emergency psychological assistance. These assistance measures are not meant to benefit the alleged perpetrators of sexual

exploitation and abuse, who can instead benefit from the intervention programmes and measures in Chapter V.

## **Chapter V – Intervention programmes or measures**

### **Article 15 – General principles**

102. The provisions in this chapter are an important feature of added value in the Convention. In order to prevent the sexual exploitation and abuse of children, the negotiators considered it necessary to draw up provisions designed to prevent repeat offences against children by means of intervention programmes or measures targeting sex offenders. They agreed on the need for a broad, flexible approach focusing on the medical and psycho-social aspects of the intervention programmes or measures offered to sex offenders, and the non-obligatory character of the interventions or measures offered. Regarding the non-obligatory character of the care, this means that these programmes are not necessarily part of the penal system of sanctions and measures but can instead be part of the healthcare and welfare systems. The scheme set up under Chapter V should not interfere with national schemes set up to deal with the treatment of persons suffering from mental disorders.
103. Psychological intervention refers to several therapeutic methods, for example cognitive behavioural therapy or therapy applying a psycho-dynamic approach. Medical intervention principally refers to anti-hormone therapy (medical castration). Finally, social intervention concerns measures set up to regulate and stabilise the social behaviour of the offender (for example, a prohibition on going to certain places or meeting certain persons), as well as structures facilitating re-integration (such as assistance with administrative matters, job search).
104. In view of the wide range of measures that could be implemented and States' experiences in this area, the negotiators sought to ensure that this provision was highly flexible, particularly by means of frequent reference to the Parties' internal law. The provisions in Chapter V therefore merely set out some fundamental principles, without going into details of the measures or programmes to be introduced. On the other hand, it is up to the States Parties to assess, on a more or less regular basis, the effectiveness and results of the programmes and measures implemented and their scientific relevance.
105. The fundamental principles set out in the three articles of Chapter V are as follows:
- persons undergoing intervention programmes or measures must give their prior consent: no intervention programme or measure may be imposed on them;
  - the intervention programmes or measures should be available as soon as possible, to increase the chance of success;
  - there should be arrangements for assessing the dangerousness of the persons concerned and the risk of their re-offending;

- arrangements should be made for evaluating the intervention programmes and measures;
- special attention should be paid to the persons concerned who are themselves children;
- the various services responsible, in particular the healthcare and social services, the prison authorities and the judicial authorities, must be coordinated.

#### **Article 16 – Recipients of intervention programmes or measures**

106. Article 16 identifies three categories of persons to whom intervention programmes or measures should be offered:
- persons prosecuted for any of the offences established in accordance with the Convention;
  - persons convicted of any of the offences established in accordance with the Convention;
  - children (persons under the age of 18) who sexually offend.
107. It should be remembered that Article 7 also provides for access to intervention programmes and measures for people referred to in paragraph 64 of this report.
108. In the case of persons prosecuted but not yet convicted, the negotiators considered that it should be possible to offer them the benefit of (but not impose) intervention programmes or measures at any time during the investigation or trial. Taking into account the principle of the presumption of innocence, the negotiators took the view that no link should be established between acceptance of an intervention measure and the decisions taken in the course of the proceedings, and that it was up to the persons concerned to decide freely whether or not they wished to benefit from such a measure. Article 16, paragraph 1, refers to the safeguards guaranteed by the rights of the defence, the requirements of a fair trial and the need to observe the rules relating to the principle of the presumption of innocence. In implementing these provisions, Parties are asked to ensure that the prospect of a reduced sentence does not constitute undue pressure to undergo intervention programmes and measures.
109. "Convicted" persons are persons who have received a final judgment of guilt from a judge or court.
110. Article 16, paragraph 3, contains a provision specifically concerning intervention programmes or measures that could be offered to children who have committed sexual offences, to respond to needs linked to their development and treat their sexual behavioural problems. The intervention programmes and measures must be adapted for minors.

## Article 17 – Information and consent

111. Article 17 lays particular emphasis on the need to obtain the full consent of persons to whom intervention programmes or measures are offered, for it appears that the success of these depend, in most if not all cases, on the adherence of the person concerned to the measures or programmes implemented. Paragraph 1 emphasises that full consent implies free and informed consent, which presupposes that the person concerned has been informed of the reasons for his or her being offered an intervention programme or measure.
112. The consent requirement means that the persons concerned must be free to refuse the programme or measure proposed, as stated in paragraph 2. In the case of convicted persons, however, the States' domestic law may stipulate that certain measures to suspend or alleviate sentences (e.g. suspended sentence or conditional release) are conditional upon participation in an intervention programme. Conditional release is defined in the Appendix to the Committee of Ministers' *Recommendation Rec(2003)22 on conditional release (parole)* as "the early release of sentenced prisoners under individualised post-release conditions". In the circumstances, the persons concerned must be fully informed of the consequences of their refusing, such as the inapplicability, by law, of the measure alleviating the sentence.

## Chapter VI – Substantive criminal law

113. Articles 18 to 23 are concerned with making certain acts criminal offences. This kind of harmonisation facilitates action against crime at national and international level, for several reasons. Firstly, harmonisation of States' domestic law is a way of avoiding a criminal preference for committing acts in a Party which previously had more lenient rules. Secondly, it becomes possible to promote the exchange of useful common data and experience. Shared definitions can also assist research and promote comparability of data at national and regional level, thus making it easier to gain an overall picture of crime. Lastly, international cooperation (in particular extradition and mutual legal assistance) is facilitated.
114. The offences referred to in these articles represent a minimum consensus which does not preclude supplementing them or establishing higher standards in domestic law.
115. This chapter contains further provisions dealing with aiding or abetting and attempt (Article 24), jurisdiction (Article 25), corporate liability (Article 26), sanctions and measures (Article 27), aggravating circumstances (Article 28) and previous convictions (Article 29).
116. In view of the wide range of domestic legislation and case-law on this point, the negotiators did not consider it appropriate to introduce into the Convention provisions concerning awareness or ignorance, by the alleged perpetrator of the

offence, of the victim's age. This question is a matter for the legislation and case-law of each Party, therefore.

### **Article 18 – Sexual abuse**

117. Article 18 sets out the offence of sexual abuse of a child. This offence has to be committed intentionally for there to be criminal liability. The interpretation of the word “intentionally” is left to domestic law, but the requirement for intentional conduct relates to all the elements of the offence.
118. Article 18 distinguishes two types of sexual abuse of minors.
119. Firstly, paragraph 1 a criminalises the fact of a person engaging in sexual activities with a child who has not reached the age as defined in domestic law below which it is prohibited to engage in sexual activities with him or her.
120. Secondly, paragraph 1 b criminalises the fact of a person engaging in sexual activities with a child, regardless of the age of the child, where use is made of coercion, force or threats, or when this person abuses a recognised position of trust, authority or influence over the child, or where abuse is made of a particularly vulnerable situation of the child.
121. When assessing the constituent elements of offences, the Parties should have regard to the case-law of the European Court of Human Rights; in this respect, the negotiators wished to recall, subject to the interpretation that may be made thereof, the *M.C. v. Bulgaria* judgment of 4 December 2003, in which the European Court of Human Rights stated that it was “persuaded that any rigid approach to the prosecution of sexual offences, such as requiring proof of physical resistance in all circumstances, risks leaving certain types of rape unpunished and thus jeopardising the effective protection of the individual’s sexual autonomy. In accordance with contemporary standards and trends in that area, the member States’ positive obligations under Articles 3 and 8 of the Convention must be seen as requiring the penalisation and effective prosecution of any non-consensual sexual act, including in the absence of physical resistance by the victim” (§ 166). The Court also noted as follows: “Regardless of the specific wording chosen by the legislature, in a number of countries the prosecution of non-consensual sexual acts in all circumstances is sought in practice by means of interpretation of the relevant statutory terms (“coercion”, “violence”, “duress”, “threat”, “ruse”, “surprise” or others) and through a context-sensitive assessment of the evidence” (§ 161).
122. Under the first indent, where use is made of coercion, force or threats, lack of consent to the sexual activities can be inferred in cases where the child is over the age referred to in Article 18, paragraph 2.
123. The second indent relates to abuse of a recognised position of trust, authority or influence over the child. This can refer, for example, to situations where a relationship of trust has been established with the child, where the relationship occurs within the context of a professional activity (care providers in institutions,

teachers, doctors, etc) or to other relationships, such as where there is unequal physical, economic, religious or social power.

124. The second indent provides that children in certain relationships must be protected, even when they have already reached the legal age for sexual activities and the person involved does not use coercion, force or threat. These are situations where the persons involved abuse a relationship of trust with the child resulting from a natural, social or religious authority which enables them to control, punish or reward the child emotionally, economically, or even physically. Such relationships of trust normally exist between the child and his or her parents, family members, foster or adoptive parents, but they could also exist in relation to persons who :
- have parental or caretaking functions; or
  - educate the child; or
  - provide emotional, pastoral, therapeutic or medical care; or
  - employ or have financial control over the child; or
  - otherwise exercise control over the child.

Volunteers who look after children in their leisure-time or during voluntary activities, for example at holiday-camps or in youth organisations, can also be viewed as holding positions of trust. This list is not exhaustive, but aims at giving a description of the wide range of the recognised positions of trust, authority or influence.

125. The reference to “including within the family” clearly intends to highlight sexual abuse committed in the family. Research has demonstrated this to be one of the most frequent and most psychologically damaging form of child sexual violence with long-lasting consequences for the victim. Further, the term “family” refers to the extended family.
126. The third indent relates to abuse of a particularly vulnerable situation of the child, notably because of a mental or physical disability or a situation of dependence. Disability includes children with physical and sensory impairments, intellectual disabilities and autism, and mentally ill children. A “situation of dependence” refers not only to children with drug or alcohol addiction problems, but also to situations in which a child has become intoxicated by alcohol or drugs, whether through his or her own actions or by the perpetrator, and whose subsequent vulnerability is then abused. The term dependence also covers other situations in which the child has no other real and acceptable option than to submit to the abuse. The reasons for such situations may be physical, emotional, family-related, social or economic, such as, for example, an insecure or illegal administrative situation, a situation of economic dependence or a fragile state of health. In such a case the child may consent to the sexual relations, but his or her situation of vulnerability renders the capacity to consent invalid. Notions of particular vulnerability of a child and situations of dependence could also cover acts committed against children in the framework of activities within sects which are characterised by a physical and mental isolation of the child who is cut off from the outside world and very often subjected to various forms of

brainwashing. The situation of unaccompanied migrant minors could also fall within the situation of particular dependence or vulnerability.

127. The term “sexual activities” is not defined by the Convention. The negotiators preferred to leave to Parties the definition of the meaning and scope of this term.
128. Paragraph 2 reinforces for the purpose of legal certainty the requirement for all Parties to the Convention to define the age below which it is prohibited to engage in sexual activities with a child. The negotiators considered the possibility of harmonising criminal law in this area by establishing a legal age for sexual relations in the Convention, but as this age varies greatly in member States of the Council of Europe (from age 13 to 17) and even within each member State, depending on the relation which may exist between the perpetrator and the child victim. For these reasons it was decided to leave the definition to each Party.
129. It is not the intention of this Convention to criminalise sexual activities of young adolescents who are discovering their sexuality and engaging in sexual experiences with each other in the framework of sexual development. Nor is it intended to cover sexual activities between persons of similar ages and maturity. For this reason, paragraph 3 states that the Convention does not aim to govern consensual sexual activities between minors, even if they are below the legal age for sexual activities as provided in internal law.

#### **Article 19 – Offences concerning child prostitution**

130. This article makes certain conducts related to child prostitution criminal offences, including the recruitment or coercion of a child to participate in prostitution and the “recourse” to child prostitution, in other words the use of the “sexual services” of a child prostitute.
131. The demand for child prostitutes has increased markedly, and is often linked to organised crime and involves trafficking. To a greater extent than adult prostitution, the sex trade involving children depends on people who encourage, organise and profit from it. The article therefore establishes links between demand and supply of child prostitutes by requiring criminal sanctions for both the recruiters and the users of child prostitutes. Among those children who are recruited to prostitution, many are in difficult circumstances, for instance runaways, abandoned children and children without material or moral support. The recruiters make use of inducements and pressures to push children into prostitution, taking advantage of their psychological and emotional distress. Owing to the serious harm sustained by child prostitutes, the negotiators felt it was justified to impose penalties on the customers of child prostitutes.
132. A definition of “child prostitution” is provided in paragraph 2. The use of a child in prostitution can be occasional and any kind of remuneration or benefit, not only monetary payment (for example drugs, shelter, clothes, food, etc), whether given or promised, suffices in order to meet the legal requirements of the offence. In addition the remuneration or consideration, or promise of such, is not

necessarily to the child but could be to a third party, such as those who take financial profit from child prostitution.

### **Article 20 – Offences concerning child pornography**

133. Article 20 on child pornography is inspired by the Council of Europe’s *Convention on Cybercrime* (Article 9 - offences related to child pornography) which aims at strengthening protective measures for children by modernising criminal law provisions to prevent computer systems from being used to further the sexual abuse and exploitation of children.
134. In the present Convention, the offence is not restricted to child pornography committed by the use of a computer system. Nevertheless, with the ever-increasing use of the Internet this is the primary instrument for trading such material. It is widely believed that such material and on-line practices play a role in supporting, encouraging or facilitating sexual offences against children.
135. Paragraph 1 a criminalises the production of child pornography and is necessary to combat acts of sexual abuse and exploitation at their source.
136. Paragraph 1 b criminalises the “offering or making available” of child pornography. It implies that the person offering the material can actually provide it. ‘Making available’ is intended to cover, for instance, the placing of child pornography on line for the use of others by means of creating child pornography sites. This paragraph also intends to cover the creation or compilation of hyperlinks to child pornography sites in order to facilitate access to child pornography.
137. Paragraph 1 c criminalises the distribution or transmission of child pornography. “Distribution” is the active dissemination of the material. Sending child pornography through a computer system to another person, as well as the selling or giving of child pornographic materials such as photographs or magazines, is covered by the term 'transmitting'.
138. The term “procuring for oneself or for another” in paragraph 1 d means actively obtaining child pornography for personal use or for another person, e.g. by downloading computer data or by buying child pornographic materials, such as films or images.
139. The possession of child pornography, by whatever means, such as magazines, video cassettes, DVDs or portable phones, including stored in a computer system or on a data carrier, as well as a detachable storage device, a diskette or CD-Rom, is criminalised in paragraph 1 e. An effective way to curtail the production of child pornography is to attach criminal consequences to the conduct of each participant in the chain from production to possession.
140. Paragraph 1 f is a new element introduced in this Convention. It is intended to catch those who view child images on line by accessing child pornography sites but without downloading and who cannot therefore be caught under the offence of procuring or possession in some jurisdictions. To be liable the person must

both intend to enter a site where child pornography is available and know that such images can be found there. Sanctions must not be applied to persons accessing sites containing child pornography inadvertently. The intentional nature of the offence may notably be deduced from the fact that it is recurrent or that the offences were committed via a service in return for payment.

141. The term ‘without right’ allows a Party to provide a defence in respect of conduct related to "pornographic material" having an artistic, medical, scientific or similar merit. It also allows activities carried out under domestic legal powers such as the legitimate possession of child pornography by the authorities in order to institute criminal proceedings. Furthermore, it does not exclude legal defences or similar relevant principles that relieve a person of responsibility under specific circumstances.
142. Paragraph 2 is based on the *Optional Protocol to the United Nations Convention on the Rights of the Child*. It defines the term “child pornography” as any visual depiction of a child engaged in real or simulated sexually explicit conduct, or any representation of a child’s sexual organs “for primarily sexual purposes”. Such images are governed by national standards pertaining to bodily harm, or the classification of materials as obscene or inconsistent with public morals. Therefore, material having an artistic, medical, scientific or similar merit, i.e. where there is absence of sexual purposes, does not fall within the ambit of this provision. The visual depiction includes data stored on computer diskette or on other electronic means or other storage device which are capable of conversion into a visual image.
143. “Sexually explicit conduct” must be defined by Parties. It covers at least the following real or simulated acts: a) sexual intercourse, including genital-genital, oral-genital, anal-genital or oral-anal, between children, or between an adult and a child, of the same or opposite sex; b) bestiality; c) masturbation; d) sadistic or masochistic abuse in a sexual context; or e) lascivious exhibition of the genitals or the pubic area of a child. It is not relevant whether the conduct depicted is real or simulated.
144. Paragraph 3 allows Parties to make reservations in respect of paragraph 1 a and e, i.e. the right not to criminalise the production or possession of images which either consist entirely of simulated representations or realistic images of a child who does not exist in reality, or which involve children who have reached the legal age for sexual activities as prescribed in internal law, where the images are produced and possessed by them with their consent and solely for their own private use. The two reservation possibilities in paragraph 3 exist only in relation to production and possession of such pornographic material.
145. With regard to paragraph 4, the negotiators included a reservation possibility in whole or in part in relation to paragraph 1 f.

## **Article 21 – Offences concerning the participation of a child in pornographic performances**

146. The *United Nations Convention on the Rights of the Child*, in its Article 34, requires Parties to take all appropriate measures to prevent “the exploitative use of children in pornographic performances”. Similarly, the *Council of the European Union Framework Decision on combating sexual exploitation of children and child pornography* (2004/68/JHA) provides, in Article 2 (b), for the offence of recruiting a child into participating in pornographic performances. No definition is provided in these instruments on what constitutes pornographic performances involving children.
147. Similarly, the negotiators decided to leave any definition of pornographic performances to the Parties, for example taking into account the public or private, or commercial or non-commercial nature of the performance. However, the provision is intended to deal essentially with organised live performances of children engaged in sexually explicit conduct.
148. Article 21 incriminates certain conducts relating to the participation of children in pornographic performances. Paragraph 1 a and b are elements relating to the organisation of pornographic performances involving children while c relates to the spectator. As with child prostitution and child pornography, the provision establishes links between the supply and the demand by attaching criminal liability to the organiser of such pornographic performances as well as the customer. Depending on States, this provision may also cover the situation of persons who are spectators of pornographic performances involving the participation of children through such means of communication as webcams.
149. All the acts must be committed intentionally for criminal responsibility to attach. The term “knowingly” was introduced to emphasise the intentional nature of the offence which means that a person must not only intend to attend a pornographic performance but must also know that the pornographic performance will involve children.
150. Paragraph 2 permits Parties to reserve the right not to apply paragraph 1 c in whole or in part.

## **Article 22 – Corruption of children**

151. Article 22 provides for a new offence which is intended to address the conduct of making a child watch sexual acts, or performing such acts in the presence of children, which could result in harm to the psychological health of the victim, with the risk of serious damage to their personality, including a distorted vision of sex and of personal relationships.
152. This article criminalises the intentional causing of a child below the legal age for sexual activities to witness sexual abuse of other children or adults or sexual activities. It is not necessary for the child to participate in any way in the sexual activities.

153. The offence must be committed intentionally, and “for sexual purposes”.
154. The Convention leaves the interpretation of the term “causing” to Parties, but this could include any way in which the child is made to witness the acts, such as by force, coercion, inducement, promise, etc.

### **Article 23 – Solicitation of children for sexual purposes**

155. Article 23 introduces a new offence in the Convention which is not present in other existing international instruments in the field. The solicitation of children for sexual purposes is more commonly known as “grooming”. The negotiators felt it was essential for the Convention to reflect the recent but increasingly worrying phenomenon of children being sexually harmed in meetings with adults whom they had initially encountered in cyberspace, specifically in Internet chat rooms or game sites.
156. The term “grooming” refers to the preparation of a child for sexual abuse, motivated by the desire to use the child for sexual gratification. It may involve the befriending of a child, often through the adult pretending to be another young person, drawing the child into discussing intimate matters, and gradually exposing the child to sexually explicit materials in order to reduce resistance or inhibitions about sex. The child may also be drawn into producing child pornography by sending compromising personal photos using a digital camera, web-cam or phone-cam, which provides the groomer with a means of controlling the child through threats. Where a physical meeting is arranged the child may be sexually abused or otherwise harmed.
157. The negotiators felt that simply sexual chatting with a child, albeit as part of the preparation of the child for sexual abuse, was insufficient in itself to incur criminal responsibility. A further element was needed. Article 23, therefore, requires Parties to criminalise the intentional “proposal of an adult to meet a child who has not reached the age set in application of Article 18 paragraph 2” for the purpose of committing any of the offences established in accordance with Article 18 paragraph 1 a or Article 20 paragraph 1 a against him or her. Thus the relationship-forming contacts must be followed by a proposal to meet the child.
158. All the elements of the offence must be committed intentionally. In addition, the “purpose” of the proposal to meet the child for committing any of the specified offences needs to be established before criminal responsibility is incurred.
159. The offence can only be committed “through the use of information and communication technologies”. Other forms of grooming through real contacts or non-electronic communications are outside the scope of the provision. In view of the particular danger inherent in the use of such technologies due to the difficulty of monitoring them the negotiators wished to focus the provision exclusively on the most dangerous method of grooming children which is through the Internet and by using mobile phones to which even very young children increasingly now have access.

160. In addition to the elements specified above the offence is only complete if the proposal to meet “has been followed by material acts leading to such a meeting”. This requires concrete actions, such as, for example, the fact of the perpetrator arriving at the meeting place.

#### **Article 24 – Aiding or abetting and attempt**

161. The purpose of this article is to establish additional offences relating to aiding or abetting of the offences defined in the Convention and the attempted commission of some.
162. Paragraph 1 requires Parties to establish as criminal offences aiding or abetting the commission of any of the offences established in accordance with the Convention. Liability arises for aiding or abetting where the person who commits a crime is aided by another person who also intends the crime to be committed.
163. With regard to paragraph 2, on attempt, the negotiators felt that treating certain offences, or elements of offences, as attempt gave rise to conceptual difficulties. Moreover, some legal systems limit the offences for which the attempt is punished. For these reasons paragraph 3 permits parties to reserve the right not to criminalise attempt to commit the following offences: offering or making available of child pornography, procuring child pornography for oneself or for another person, possessing child pornography and knowingly obtaining access, through information and communication technologies, to child pornography (Article 20 paragraph 1 b, d, e and f; knowingly attending pornographic performances involving the participation of children (Article 21 paragraph 1 c; corruption of children (Article 22) and solicitation of children for sexual purposes (Article 23). This means that any Party making a reservation as to that provision will have no obligation to criminalise attempt at all, or may select the offences or parts of offences to which it will attach criminal sanctions in relation to attempt. The reservation aims at enabling the widest possible ratification of the Convention while permitting Parties to preserve some of their fundamental legal concepts.
164. As with all the offences established under the Convention, aiding or abetting and attempt must be intentional.

#### **Article 25 – Jurisdiction**

165. This article lays down various requirements whereby Parties must establish jurisdiction over the offences with which the Convention is concerned.
166. Paragraph 1 a is based on the territoriality principle. Each Party is required to punish the offences established under the Convention when they are committed on its territory.
167. Paragraph 1 b and c is based on a variant of the territoriality principle. These sub-paragraphs require each Party to establish jurisdiction over offences

committed on ships flying its flag or aircraft registered under its laws. This obligation is already in force in the law of many countries, ships and aircraft being frequently under the jurisdiction of the State in which they are registered. This type of jurisdiction is extremely useful when the ship or aircraft is not located in the country's territory at the time of commission of the crime, as a result of which paragraph 1 a would not be available as a basis for asserting jurisdiction. In the case of a crime committed on a ship or aircraft outside the territory of the flag or registry Party, it might be that without this rule there would not be any country able to exercise jurisdiction. In addition, if a crime is committed on board a ship or aircraft which is merely passing through the waters or airspace of another State, there may be significant practical impediments to the latter State's exercising its jurisdiction and it is therefore useful for the registry State to also have jurisdiction.

168. Paragraph 1 d is based on the nationality principle. The nationality theory is most frequently applied by countries with a civil-law tradition. Under it, nationals of a country are obliged to comply with its law even when they are outside its territory. Under sub-paragraph d, if one of its nationals commits an offence abroad, a Party is obliged to be able to prosecute him/her. The negotiators considered that this was a particularly important provision in the context of the fight against sex tourism. Indeed, certain States in which children are abused or exploited either do not have the will or the necessary resources to successfully carry out investigations or lack the appropriate legal framework. Paragraph 2 enables these cases to be tried even where they are not criminalised in the State in which the offence was committed.
169. Paragraph 1 e applies to persons having their habitual residence in the territory of the Party. It provides that Parties shall establish jurisdiction to investigate acts committed abroad by persons having their habitual residence in their territory, and thus contribute to the punishment of sex tourism. However, the criteria of attachment to the State of the person concerned being less strong than the criteria of nationality, paragraph 3 allows Parties not to implement this jurisdiction or only to do it in specific cases or conditions.
170. Paragraph 2 is linked to the nationality of the victim and identifies particular interests of national victims to the general interests of the State. Hence, according to paragraph 2, if a national or a person having habitual residence is a victim of an offence abroad, the Party shall endeavour to establish jurisdiction in order to start proceedings. However, there is no obligation imposed on Parties, as demonstrated by the use of the expression "endeavour".
171. Paragraph 4 represents an important element of added value in this Convention, and a major step forward in the protection of children from certain acts of sexual exploitation and abuse. The provision eliminates, in relation to the most serious offences in the Convention, the usual rule of dual criminality where acts must be criminal offences in the place where they are performed. Its aim is to combat the phenomenon of sex tourism, whereby persons are able to go abroad to commit acts which are classified as criminal offences in their country of nationality. Paragraph 4 enables these cases to be tried even where they are not criminalised in the State in which the offence was committed. This paragraph applies

exclusively to the offences defined in Articles 18 (sexual abuse), Article 19 (offences concerning child prostitution), Article 20 paragraph 1 a (production of child pornography) and Article 21 paragraph 1 a and b (offences concerning the participation of a child in pornographic performances) and committed by nationals of the State Party concerned.

172. Paragraph 5 prohibits the subordination of the initiation of proceedings in the State of nationality or of habitual residence to the conditions usually required of a complaint of the victim or a denunciation from the authorities of the State in which the offence took place. Indeed, certain States in which children are sexually abused or exploited do not always have the necessary will or resources to carry out investigations. In these conditions, the requirement of an official denunciation or of a complaint of the victim often constitutes an impediment to the prosecution. This paragraph applies exclusively to the offences defined in Articles 18 (sexual abuse), Article 19 (offences concerning child prostitution), Article 20 paragraph 1 a (production of child pornography) and Article 21 (offences concerning the participation of a child in pornographic performances).
173. Paragraph 6 concerns the principle of *aut dedere aut judicare* (extradite or prosecute). Jurisdiction established on the basis of paragraph 6 is necessary to ensure that Parties that refuse to extradite a national have the legal ability to undertake investigations and proceedings domestically instead, if asked to do so by the Party that requested extradition under the terms of the relevant international instruments.
174. In certain cases of sexual exploitation or abuse of children, it may happen that more than one Party has jurisdiction over some or all of the participants in an offence. For example, a child may be recruited into prostitution in one country, then transported and exploited in another. In order to avoid duplication of procedures and unnecessary inconvenience for witnesses or to otherwise facilitate the efficiency or fairness of proceedings, the affected Parties are required to consult in order to determine the proper venue for prosecution. In some cases it will be most effective for them to choose a single venue for prosecution; in others it may be best for one country to prosecute some alleged perpetrators, while one or more other countries prosecute others. Either method is permitted under this paragraph. Finally, the obligation to consult is not absolute; consultation is to take place “where appropriate”. Thus, for example, if one of the Parties knows that consultation is not necessary (e.g. it has received confirmation that the other Party is not planning to take action), or if a Party is of the view that consultation may impair its investigation or proceeding, it may delay or decline consultation.
175. The bases of jurisdiction set out in paragraph 1 are not exclusive. Paragraph 8 of this article permits Parties to establish other types of criminal jurisdiction according to their domestic law. Thus, in matters of the sexual exploitation and abuse of children, some States exercise criminal jurisdiction whatever the place of the offence or nationality of the perpetrator.

## Article 26 – Corporate liability

176. Article 26 is consistent with the current legal trend towards recognising corporate liability. The intention is to make commercial companies, associations and similar legal entities (“legal persons”) liable for criminal actions performed on their behalf by anyone in a leading position in them. Article 26 also contemplates liability where someone in a leading position fails to supervise or check on an employee or agent of the entity, thus enabling them to commit any of the offences established in the Convention.
177. Under paragraph 1 four conditions need to be met for liability to attach. First, one of the offences described in the Convention must have been committed. Second, the offence must have been committed for the entity’s benefit. Third, a person in a leading position must have committed the offence (including aiding and abetting). The term “person who has a leading position” refers to someone who is organisationally senior, such as a director. Fourth, the person in a leading position must have acted on the basis of one of his or her powers (whether to represent the entity or take decisions or perform supervision), demonstrating that that person acted under his or her authority to incur liability of the entity. In short, paragraph 1 requires Parties to be able to impose liability on legal entities solely for offences committed by such persons in leading positions.
178. In addition, paragraph 2 requires Parties to be able to impose liability on a legal entity (“legal person”) where the crime is committed not by the leading person described in paragraph 1 but by another person acting on the entity’s authority, i.e. one of its employees or agents acting within their powers. The conditions that must be fulfilled before liability can attach are: 1) the offence was committed by an employee or agent of the legal entity; 2) the offence was committed for the entity’s benefit; and 3) commission of the offence was made possible by the leading person’s failure to supervise the employee or agent. In this context failure to supervise should be interpreted to include not taking appropriate and reasonable steps to prevent employees or agents from engaging in criminal activities on the entity’s behalf. Such appropriate and reasonable steps could be determined by various factors, such as the type of business, its size, and the rules and good practices in force.
179. Liability under this article may be criminal, civil or administrative. It is open to each Party to provide, according to its legal principles, for any or all of these forms of liability as long as the requirements of Article 27 paragraph 2 are met, namely that the sanction or measure be “effective, proportionate and dissuasive” and include monetary sanctions.
180. Paragraph 4 makes it clear that corporate liability does not exclude individual liability. In a particular case there may be liability at several levels simultaneously – for example, liability of one of the legal entity’s organs, liability of the legal entity as a whole and individual liability in connection with one or other.

## Article 27 – Sanctions and measures

181. This article is closely linked to Articles 18 to 23, which define the various offences that should be made punishable under criminal law. In accordance with the obligations imposed by those articles, Article 27 requires Parties to match their action to the seriousness of the offences and lay down criminal penalties which are “effective, proportionate and dissuasive”. In the case of an individual committing the offence, Parties must provide for prison sentences that can give rise to extradition. It should be noted that, under Article 2 of the *European Convention on Extradition* (ETS No. 24), extradition is to be granted in respect of offences punishable under the laws of the requesting and requested Parties by deprivation of liberty or under a detention order for a maximum period of at least one year or by a more severe penalty.
182. Legal entities whose liability is to be established under Article 26 are also to be liable to sanctions that are “effective, proportionate and dissuasive”, which may be criminal, administrative or civil in character. Paragraph 2 requires Parties to provide for the possibility of imposing monetary sanctions on legal persons.
183. In addition, paragraph 2 provides for other measures which may be taken in respect of legal persons, with particular examples given: exclusion from entitlement to public benefits or aid; temporary or permanent disqualification from the practice of commercial activities; placing under judicial supervision; or a judicial winding-up order. The list of measures is not mandatory or exhaustive and Parties are free to envisage other measures.
184. Paragraph 3 requires Parties to ensure that measures concerning seizure and confiscation of certain documents, goods and the proceeds derived from offences can be taken. This paragraph has to be read in the light of the *Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime* (ETS No. 141), which is based on the idea that confiscating the proceeds of crime is an effective anti-crime weapon. As certain of the offences related to the sexual exploitation of children, in particular child prostitution, are often undertaken for financial profit, measures depriving offenders of assets linked to or resulting from the offence are clearly needed in this field as well.
185. The Convention does not contain definitions of the terms “confiscation”, “instrumentalities”, “proceeds” and “property”. However, Article 1 of the Laundering Convention provides definitions for these terms which may be used for the purposes of this Convention. By “confiscation” is meant a penalty or measure, ordered by a court following proceedings in relation to a criminal offence or criminal offences, resulting in final deprivation of property. “Instrumentalities” covers the whole range of things which may be used, or intended for use, in any manner, wholly or in part, to commit the criminal offences. “Proceeds” means any economic advantage or financial saving from a criminal offence. It may consist of any “property” (see the interpretation of that term below). The wording of the paragraph takes into account that there may be differences of national law as regards the type of property which can be confiscated after an offence. It can be possible to confiscate items which are

(direct) proceeds of the offence or other property of the offender which, though not directly acquired through the offence, is equivalent in value to its direct proceeds (“substitute assets”). “Property” must therefore be interpreted, in this context, as any property, corporeal or incorporeal, movable or immovable, and legal documents or instruments evidencing title to or interest in such property. It should be noted that Parties are not bound to provide for criminal-law confiscation of substitute assets since the words “or otherwise deprive” allow “civil” confiscation.

186. Paragraph 3 b of Article 27 provides for closure of any establishment used to carry out any of the offences established in the Convention. This measure is identical to Article 23 paragraph 4 of the *Council of Europe Convention on Action against Trafficking in Human Beings*. Alternatively, the provision also allows the perpetrator to be banned, temporarily or permanently, from carrying on the activity involving contact with children, whether professional or voluntary, in the course of which the offence was committed.
187. The Convention provides for such measures so that action can be taken against establishments which might be used as a cover for sexually exploiting or abusing children, such as matrimonial agencies, placement agencies, travel agencies, hotels or escort services. The measures are also intended to reduce the risk of further victims by closing premises on which victims are known to have been recruited or exploited (such as cabarets, bars, hotels or restaurants) and banning people from carrying on activities which they used to engage in acts of child sexual exploitation or abuse.
188. This provision does not require Parties to provide for closure of establishments or a ban on activity involving contacts with children as a criminal penalty. Parties may, for example, use administrative closure measures or a ban on activity involving contacts with children. “Establishment” means any place in which any aspect of sexual exploitation or abuse of children occurs. The provision applies to whoever has title to the establishment, be they a legal person or a natural person.
189. To avoid penalising persons not involved in sexual exploitation or abuse of children (for example, the owner of an establishment where sexual exploitation or abuse has been carried on without his or her knowledge), the provision specifies that closures of establishments are “without prejudice to the rights of *bona fide* third parties”.
190. The Convention provides also for the possibility for Parties to adopt other measures in relation to perpetrators, such as the withdrawal of parental rights. This measure could be taken, for instance, in relation to a person who was removed from the family environment as an assistance measure to the victim in accordance with Article 14 paragraph 3.
191. Other measures designed to make it possible to monitor and supervise convicted perpetrators of offences might be considered in order, for example, to facilitate assessment of the risk of re-offending or to ensure that intervention programmes and measures are effective. Such measures might include placing under

supervision convicted persons, persons subject to suspended sentences or conditional release, as well as persons who have served their sentences.

192. Paragraph 5 suggests that Parties could allocate the proceeds of crime or property confiscated to a special fund to finance prevention and assistance programmes for victims of any of the offences established in the Convention. This provision could be linked with that of Article 9 paragraph 4 which encourages the financing of projects and programmes carried out by civil society aiming at preventing and protecting children from sexual exploitation and abuse.

### **Article 28 – Aggravating circumstances**

193. Article 28 requires Parties to ensure that certain circumstances (mentioned in sub-paragraphs a to g) may be taken into consideration as aggravating circumstances in the determination of the penalty for offences established in this Convention. These circumstances must not already form part of the constituent elements of the offence. This principle applies to cases where the aggravating circumstances already form part of the constituent elements of the offence in the national law of the State Party. For example, the aggravating circumstance in c cannot be raised in relation to the offence of sexual abuse of a child where abuse is made of a particularly vulnerable situation of the child, in accordance with Article 18 paragraph 1 b, because the abuse of a particularly vulnerable situation of the child is a constitutive element of the offence itself.
194. By the use of the phrase “may be taken into consideration”, the negotiators highlight that the Convention places an obligation on Parties to ensure that these aggravating circumstances are available for judges to consider when sentencing offenders, although there is no obligation on judges to apply them. The reference to “in conformity with the relevant provisions of internal law” is intended to reflect the fact that the various legal systems in Europe have different approaches to aggravating circumstances and permits Parties to retain some of their fundamental legal concepts.
195. The first of the aggravating circumstances is where the offence seriously damaged the physical or mental health of the victim. Some of the offences in this Convention may not involve any “physical” harm to a child, such as the corruption of a child for sexual purposes or the solicitation of a child for sexual purposes, but the psychological impact may have profound and long-lasting consequences. In addition, for example, infection with HIV as a result of the offence should be considered as seriously damaging the physical or mental health of the victim.
196. The second aggravating circumstance is where the offence was preceded or accompanied by acts of torture or serious violence. Article 3 ECHR enshrines the freedom of all persons from torture or inhuman or degrading treatment or punishment. In the case of *Ireland v. the United Kingdom* (1978) the European Court of Human Rights defined torture as “deliberate inhuman treatment causing very serious and cruel suffering”. Inhuman treatment or punishment is described as “the infliction of intense physical and mental suffering”. The reference to torture in this paragraph therefore involves both physical as well as mental

anguish suffered by the victim before or during the commission of the offence. In a very young child, for example, certain acts involving kidnapping and sequestration could cause severe physical and mental suffering.

197. The third aggravating circumstance is where the offence was committed against a particularly vulnerable victim. Examples of vulnerability include where the child is physically or mentally disabled or socially handicapped; children without parental care, such as street children or unaccompanied immigrant minors; children of a very young age; children in a state of intoxication due to the influence of drugs or alcohol.
198. The fourth aggravating circumstance concerns where the offence was committed by a member of the family, a person cohabiting with the child or a person having abused his or her authority. This would cover various situations where the offence has been committed by a parent or other member of the child's family, including the extended family, or any person *in loco parentis*, such as a child-minder or other care provider. A person cohabiting with the child refers to partners of the child's parent or other persons living within the same household as the child. A person having authority refers to anyone who is in a position of superiority over the child, including, for instance, a teacher, employer, an older sibling or other older child.
199. The fifth aggravating circumstance is where the offence was committed by several people acting together. This indicates a collective act committed by more than one person.
200. The sixth aggravating circumstance is where the offence involved a criminal organisation. The Convention does not define "criminal organisation". In applying this provision, however, Parties may take their line from other international instruments which define the concept. For example, Article 2(a) of the *United Nations Convention against Transnational Organized Crime* defines "organised criminal group" as "a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit". *Recommendation Rec(2001)11 of the Committee of Ministers to member States concerning guiding principles on the fight against organised crime* and the *Joint Action of 21 December 1998 adopted by the Council of the European Union on the basis of Article K.3 of the Treaty on European Union, on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union* give very similar definitions of "organised criminal group" and "criminal organisation".
201. The seventh aggravating circumstance is where the perpetrator has previously been convicted of offences of the same nature. By including this the negotiators draw attention to the particular risk of recidivism for those who commit sexual offences against children.

## Article 29 – Previous convictions

202. Sexual exploitation or sexual abuse of children is sometimes carried on transnationally by criminal organisations or by individual persons who have been tried and convicted in more than one country. At domestic level, many legal systems provide for a different, often harsher, penalty where someone has previous convictions. In general, only conviction by a national court counts as a previous conviction. Traditionally, previous convictions by foreign courts were not taken into account on the grounds that criminal law is a national matter and that there can be differences of national law, and because of a degree of suspicion of decisions by foreign courts.
203. Such arguments have less force today in that internationalisation of criminal-law standards – as a pendant to internationalisation of crime – is tending to harmonise different countries' law. In addition, in the space of a few decades, countries have adopted instruments such as the ECHR whose implementation has helped build a solid foundation of common guarantees that inspire greater confidence in the justice systems of all the participating States.
204. The principle of international recidivism is established in a number of international legal instruments. Under Article 36(2)(iii) of the *New York Convention of 30 March 1961 on Narcotic Drugs*, for example, foreign convictions have to be taken into account for the purpose of establishing recidivism, subject to each Party's constitutional provisions, legal system and national law. Under Article 1 of the *Council Framework Decision of 6 December 2001 amending Framework Decision 2000/383/JHA on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro*, European Union member States must recognise as establishing habitual criminality final decisions handed down in another member State for counterfeiting of currency.
205. The fact remains that at international level there is no standard concept of recidivism and the law of some countries does not have the concept at all. The fact that foreign convictions are not always brought to the courts' notice for sentencing purposes is an additional practical difficulty. However Article 3 of the *Draft Council Framework Decision on taking account of convictions in the member States of the European Union in the course of new criminal proceedings*, which was politically agreed on 4 December 2006, firstly established in a general way – without limitation to specific offences – the obligation of taking into account a previous conviction handed down in another (member) State.
206. Therefore Article 29 provides for the possibility to take into account final sentences passed by another Party in assessing a sentence. To comply with the provision Parties may provide in their domestic law that previous convictions by foreign courts are to result in a harsher penalty. They may also provide that, under their general powers to assess the individual's circumstances in setting the sentence, courts should take those convictions into account. This possibility should also include the principle that the offender should not be treated less

favourably than he would have been treated if the previous conviction had been a national conviction.

207. This provision does not place any positive obligation on courts or prosecution services to take steps to find out whether persons being prosecuted have received final sentences from another Party's courts. It should nevertheless be noted that, under Article 13 of the *European Convention on Mutual Assistance in Criminal Matters* (ETS 30), a Party's judicial authorities may request from another Party extracts from and information relating to judicial records, if needed in a criminal matter.

## **Chapter VII – Investigation, prosecution and procedural law**

208. In this Chapter, which is devoted to aspects relating to the phases of investigation and prosecution of acts involving the sexual exploitation and sexual abuse of children, the negotiators wished to stress the vital importance of ensuring that the procedures take due account of the particular vulnerability of children facing such procedures as victims or witness.
209. Several issues which would provide an added value were identified in relation to:
- a. the adoption of specific investigation and criminal procedure measures ensuring that the needs of the child are taken into account (for example, in the field of the protection of privacy and hearings with children);
  - b. limitation periods for certain offences established in accordance with this Convention (confirmation of the principle according to which the limitation period should run beyond the age of majority of the child);
  - c. training for staff responsible for judicial procedures (specialisation in the services or individuals responsible for investigations and proceedings in the field of sexual exploitation and abuse of children);
  - d. the protection of children, ensuring that they are shielded from risks of reprisals and repeat victimisation.

### **Article 30 – Principles**

210. Existing international legal instruments on the protection of children give only an indication of the need for a special judicial procedure adapted to the child victim. *Recommendation Rec (2001) 16*, which is certainly the most detailed such instrument, recalls in particular the need to safeguard child victims' rights without violating the rights of suspects, the need to respect child victims' private life and to provide special conditions for hearings with children. The *Optional Protocol to the Convention on the Rights of the Child*, which deals exclusively with the sale of children, child prostitution and child pornography, provides in Article 8 for recognition of child victims' vulnerability, adaptation of procedures to their special needs, their right to be kept informed of the progress of proceedings and to be represented when their interests are at stake, protection of their privacy and, lastly, protection from intimidation and retaliation. In

Resolution 1307 (2002) the Parliamentary Assembly of the Council of Europe calls on member States to give priority attention to the rights of child victims unable to express their views.

211. Beyond these objectives, the definition and implementation of rules of procedure adapted to child victims are left to the discretion and initiative of each State. Recent analyses, including REACT, highlight the differences and discrepancies in the area.
212. The negotiators considered that a number of provisions should be made to implement a child-friendly and protective procedure for child victims in criminal proceedings. However, paragraph 4 underlines that these measures should not violate the rights of the defence and the principles of a fair trial as set out in Article 6 ECHR.
213. The central issue has to do with the child's testimony which constitutes a major challenge in the procedures of numerous States, as witnessed by a number of cases that have received intensive media coverage and the changes that criminal procedure systems have undergone in the last decades. In this context, it has become urgently important for States to adopt procedural rules guaranteeing and safeguarding children's testimony.
214. This is why paragraphs 1 and 2 establish two general principles to the effect that investigations and judicial proceedings concerning acts of sexual exploitation and sexual abuse of children must always be conducted in a manner which protects the best interests and rights of children, and must not exacerbate the trauma which they have already suffered.
215. Paragraph 3 recognises the principle according to which investigations and proceedings should be treated as priority and without unjustified delays, as the excessive length of proceedings may be understood by the child victim as a denial of his testimony or a refusal to be heard and could exacerbate the trauma which he or she has already suffered. The negotiators wished to emphasise that this provision reflects the principle established in Article 6 ECHR, which states that "everyone is entitled to a (...) hearing within a reasonable time" and that in proceedings involving children, this principle should be applied with particular care.
216. Under paragraph 5, the Parties must allow the use of appropriate methods of investigation, such as, where necessary, covert investigations, as a means of uncovering the offences provided for in the Convention. This provision is considered particularly useful in the case of offences committed by means of information and communication technologies, such as the solicitation of children for sexual purposes ("grooming").
217. The first indent states that the Parties shall take measures to enable units or services responsible for conducting investigations into some of the offences established in the Convention to use special means of investigation such as covert investigations in order to effectively prosecute the perpetrators of these offences. Such means should be used in accordance with the basic principles of

each Party's legal system such as stemming from the principle of proportionality in relation to the rules of evidence and regarding the nature and seriousness of the offences under investigation.

218. The second indent urges parties to develop techniques for examining material containing pornographic images in order to make it easier to identify victims. It is essential that every possible means be used to facilitate their identification, not least in the context of co-operation between States, as provided for additionally in Article 38 paragraph 1.

### **Article 31 – General measures of protection**

219. This article contains a non-exhaustive list of child-friendly procedures designed to protect children during proceedings.
220. These general measures of protection apply at all stages of the proceedings, both during the investigations (whether they are carried out by a police service or a judicial authority) and during trial proceedings.
221. First of all, the article sets out the right of children (and their families or legal representatives) to be informed of developments in the investigations and proceedings in which they are involved as victims. In this respect, the provision provides that victims should be informed of their rights and of the services at their disposal and, unless they do not wish to receive such information, the follow-up given to their complaint, the charges, the general progress of the investigations or proceedings, and their role as well as the outcome of their cases. The negotiators stressed the importance of the obligation to inform children and their families when a person prosecuted or convicted of sexual offences against the child concerned is released, at any rate where this seems necessary (for instance, in cases where there is a risk of retaliation or intimidation or when, because the victim and the perpetrator live near each other, they might accidentally find themselves face to face with each other). This information should be provided "in a manner adapted" to the age of the child.
222. The article goes on to list a number of procedural rules designed to implement the general principles set out in Article 31: the possibility, for victims, of being heard, of supplying evidence, of having their privacy, particularly their identity and image, protected, and of being protected against any risk of retaliation and repeat victimisation. The negotiators wished to stress that the protection of the victim's identity, image and privacy extends to the risk of "public" disclosure, and that these requirements should not prevent this information being revealed in the context of the actual proceedings, in order to respect the principles that both parties must be heard and the inherent rights of the defence during a criminal prosecution.
223. Paragraph 1, sub-paragraph g, is designed to protect children who are victims of sexual exploitation or sexual abuse, in particular by preventing their being further traumatised through contact, on the premises of the investigation services and in court, with the alleged perpetrator of the offence. This provision applies to all stages of the criminal proceedings (including the investigation), with

certain exceptions: the investigation services and the judicial authority must be able to waive this requirement in the best interests of the child (for example when the child wants to attend the hearing) or when contact between the child and the alleged perpetrator is necessary or useful for ensuring that the proceedings take place satisfactorily (for example, when a confrontation appears necessary).

224. Paragraph 2 also covers administrative proceedings, since procedures for compensating victims are of this type in some States. More generally, there are also situations in which protective measures, even in the context of criminal proceedings, may be delegated to the administrative authorities.
225. Paragraph 3 provides for access, free of charge, where warranted, to legal aid for victims of sexual exploitation and sexual abuse. The negotiators wanted to take account of conditions to which the granting of legal aid is subject under the Parties' domestic law, as these vary considerably from country to country. Judicial and administrative procedures are often highly complex and victims therefore need the assistance of legal counsel to be able to assert their rights satisfactorily. This provision does not afford victims an automatic right to free legal aid. The conditions under which such aid is granted must be determined by each Party to the Convention when the victim is entitled to be a party to the criminal proceedings.
226. In addition to Article 31 paragraph 3, the Parties must take account of Article 6 ECHR. Even though Article 6, paragraph 3.c. ECHR provides for the free assistance of an officially assigned defence counsel only in the case in persons charged with criminal offences, the case law of the European Court of Human Rights (*Airey v. Ireland* judgement, 9 October 1979) also, in certain circumstances, recognises the right to free assistance from an officially assigned defence counsel in civil proceedings, under Article 6, paragraph 1 ECHR, which is interpreted as enshrining the right of access to a court for the purposes of obtaining a decision concerning civil rights and obligations (*Golder v. United Kingdom* judgment, 21 February 1975). The Court took the view that effective access to a court might necessitate the free assistance of a lawyer. For instance, the Court considered that it was necessary to ascertain whether it would be effective for the person in question to appear in court without the assistance of counsel, i.e. whether he could argue his case adequately and satisfactorily. To this end, the Court took account of the complexity of the proceedings and the passions involved - which might be incompatible with the degree of objectivity needed in order to plead in court – so as to determine whether the person in question was in a position to argue his own case effectively and held that, if not, he should be able to obtain free assistance from an officially assigned defence counsel. Thus, even in the absence of legislation affording access to an officially assigned defence counsel in civil cases, it is up to the court to assess whether, in the interests of justice, a destitute party unable to afford a lawyer's fees must be provided with legal assistance.
227. Paragraph 4 makes provision for the situation in cases of sexual abuse within the family, in which the holders of parental responsibility, while responsible for defending the child's interests, are involved in some way in the proceedings in

which the child is a victim (where there is a "conflict of interest"). In such cases, this provision makes it possible for the child to be represented in judicial proceedings by a special representative appointed by the judicial authorities. This may be the case when, for example, the holders of parental responsibility are the perpetrators or joint perpetrators of the offence, or the nature of their relationship with the perpetrator is such that they cannot be expected to defend the interests of the child victim with impartiality.

228. Paragraph 5 provides for the possibility for various organisations to support victims. The reference to conditions provided for by internal law highlights the fact that it is up to the States to make provision for assistance or support, but that they are free to do so in accordance with the rules laid down in their national systems, for example by requiring certification or approval of the organisations, foundations, associations and other bodies concerned.
229. Paragraph 6 of this article refers to written or other materials that must be available in the languages most widely used in the country.

### **Article 32 – Initiation of proceedings**

230. Article 32 is designed to enable the public authorities to prosecute offences established in accordance with the Convention without the victim having to file a complaint. The purpose of this provision is to facilitate prosecution, in particular by ensuring that victims do not withdraw their complaints because of pressure or threats by the perpetrators of offences.

### **Article 33 – Statute of limitation**

231. This provision is considered to be an essential feature of added value in the Convention. It provides that the limitation period continues to run for a sufficient period of time to allow prosecutions to be effectively initiated after the child has reached the age of majority. Indeed, it is acknowledged that many child victims of sexual abuse are unable, for various reasons, to report the offences perpetrated against them before reaching the age of majority. The expression "a sufficient period of time to allow prosecutions to be effectively initiated after the child has reached the age of majority" means, firstly, that the child must have sufficient time to file a complaint and, secondly, that the prosecution authorities must be in a position to bring prosecutions for the offences concerned.
232. In order to meet the requirements of proportionality that apply to criminal proceedings, however, the negotiators restricted the application of this principle to the offences provided in Articles 18, 19 paragraph 1 a and b, and 21 paragraph 1 a and b, in respect of which there is justification for extending the limitation period.

### **Article 34 - Investigations**

233. Article 34 lays down the principle that professionals responsible for criminal proceedings concerning the sexual exploitation or sexual abuse of children should be trained in this area.

234. In view of the roles of the various agencies generally responsible for investigating child sexual exploitation and sexual abuse (police, prosecution services, child protection and health services), Parties could set up interdisciplinary services to carry out investigations, with the aim of enhancing professional competence and of preventing re-victimisation of the victim by repetitive procedures. Comprehensive and multi-agency child-friendly services for victims under one roof (often known as "Children's House") could, for example, be set up.
235. In order to take account of the diversity of States, resources available and systems for organising investigation services, the negotiators wanted to make this provision very flexible, the aim being that it should be possible to mobilise specialised personnel or services for investigations into the sexual exploitation and abuse of children. Thus, Article 34 provides for specialised units, services or, quite simply, persons, for example when the size of the State concerned is such that there is no need to set up a special service.

### **Article 35 – Interviews with the child**

236. This provision concerns interviews with the child both during investigations and during trial proceedings. During investigations, it applies regardless of the type of authority (police or judicial authority) conducting the interview. The main purpose of the provision is the same as that described more generally in connection with Article 30: to safeguard the interests of the child and ensure that he or she is not further traumatised by the interviews. To this end, as provided for in paragraph 3, it should be possible to implement the measures in question when there is doubt about the age of the victim and it cannot be established with certainty that he or she is under the age of majority.
237. In order to achieve these objectives, Article 35 lays down a set of rules designed to limit the number of successive interviews with children, which force them to relive the events they have suffered, and enable them to be interviewed by the same people, who have been trained for the purpose, in suitable premises and a setting that is reassuring, in particular because of the presence of the child's legal representative or, where appropriate, a person of his or her choice.
238. Paragraph 2, provides that interviews with a child victim or, where appropriate, those with a child witness, may be videotaped for use as evidence during the criminal proceedings. The main objective of this provision is to protect children against the risk of being further traumatised. The videotaped interview can serve multiple purposes, including medical examination and therapeutic services, thus facilitating the aim of limiting the number of interviews as far as possible. It reflects practices successfully developed over the last few years in numerous countries.
239. The negotiators agreed, however, that implementation of the provisions of this article required a degree of flexibility to take into account the age of the child, the availability of specialised personnel, requirements relating to criminal proceedings and all kinds of needs connected with the effectiveness of the

investigation. This flexibility is reflected in the use of such expressions as "where necessary", "if possible", "where appropriate" and "as appropriate". At the same time, the negotiators agreed that the competent authorities should be able to refuse to allow the legal representative or person chosen by the child to be present when the circumstances of the case are such that there is reason to believe that the presence of the person in question is undesirable, for example because that person has been involved in the offence or there is a conflict between his or her interests and those of the child.

### **Article 36 – Criminal court proceedings**

240. This article contains provisions specific to criminal court proceedings.
241. Paragraph 1, which echoes Article 34, paragraph 1, lays down the principle that those involved in judicial proceedings (in particular judges, prosecutors and lawyers) should be able to receive training in children's rights and in the area of sexual exploitation and sexual abuse of children. The obligations of the States Parties in this respect must naturally take account of requirements stemming from the independence of the judicial professions and the autonomy they enjoy in respect of the organisation of training for their members. It is for this reason that paragraph 1 does not require training to be provided, but states that it should be available to professionals wishing to receive it.
242. Paragraph 2 contains provisions adapting certain principles governing criminal proceedings in order to protect children and make it easier to interview them. These principles concern the presence of the public and arrangements for ensuring that both parties are represented. Thus, sub-paragraph a allows the judge to order the hearing to take place without the presence of the public, and sub-paragraph b enables the child to be heard without necessarily being confronted with the physical presence of the alleged perpetrator, in particular through the use of videoconferencing.

## **Chapter VIII – Recording and storing of data**

### **Article 37 – Recording and storing of national data on convicted sexual offenders**

243. The negotiators' objective was to ensure that certain data on perpetrators of the offences defined in the Convention are recorded and stored for the purposes of prevention and prosecution of such offences. This obligation applies only to data relating to the identity and the genetic profile (DNA number code) of convicted persons and not to the sample itself, which have been shown to be extremely useful in criminal investigations in the identification of recidivist perpetrators of crimes. Data revealing sexual preference, medical data and data relating to previous convictions are, according to Article 6 of the *Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data* (ETS 108), considered as sensitive data requiring special protection.

244. The negotiators agreed that the Convention should leave to Parties as much flexibility as possible in deciding the modalities of the implementation of this obligation.
245. Article 37 does not impose the establishment of a "database", still less a single database. The data in question and the past history of the persons concerned may therefore very well be included in separate databases. This means it is also possible for information about sex offenders to exist in databases that do not necessarily contain only information about such offenders.
246. Paragraph 1 of this provision lays down that data on persons convicted of the offences set out in the Convention must be recorded and stored “in accordance with the relevant provisions on the protection of personal data and other appropriate rules and guarantees as prescribed by domestic law” in each State. As far as the former aspect is concerned, reference should be made to Convention ETS 108.
247. Article 5 specifically stipulates that “personal data undergoing automatic processing shall be: a) obtained and processed fairly and lawfully; b) stored for specified and legitimate purposes and not used in a way incompatible with those purposes; c) adequate, relevant and not excessive in relation to the purposes for which they are stored; d) accurate and, where necessary, kept up to date; e) preserved in a form which permits identification of the data subjects for no longer than is required for the purpose for which those data are stored”. The explanatory report states that “the different provisions of this article aim at the fulfilment of two fundamental legal standards. On the one hand the information should be correct, relevant and not excessive in relation to its purpose. On the other hand its use (gathering, storage, dissemination) should likewise be correct”. Furthermore, “the reference to "purposes" in sub-paragraphs b and c indicates that it should not be allowed to store data for undefined purposes. The way in which the legitimate purpose is specified may vary in accordance with national legislation”. Lastly, “the requirement appearing under sub-paragraph e concerning the time-limits for the storage of data in their name-linked form does not mean that data should after some time be irrevocably separated from the name of the person to whom they relate, but only that it should not be possible to link readily the data and the identifiers”.
248. Where data security is concerned, the explanatory report to Convention ETS 108 specifies that “there should be specific security measures for every file, taking into account its degree of vulnerability, the need to restrict access to the information within the organisation, requirements concerning long-term storage, and so forth. The security measures must be appropriate, i.e. adapted to the specific function of the file and the risks involved. They should be based on the current state of the art of data security methods and techniques in the field of data processing”.
249. The reference to "appropriate rules and guarantees as prescribed by domestic law" of each State takes into account the different national rules on the collecting and storing of DNA. They contain, for example, precise criteria for the identification of "the natural or legal person, public authority, agency or any other

body who is competent according to the national law to decide what should be the purpose of the automated data file, which categories of personal data should be stored and which operations should be applied to them." (Article 2 of Convention ETS 108).

250. Given that sex offenders may sometimes be itinerant and have committed offences in several States, it seems essential that States should be able to exchange data concerning their identity and genetic profile. Paragraph 3 creates the requirement that Parties should establish mechanisms which could allow relevant data to be supplied to other Parties in accordance with the rules applicable to international transfer of personal data for the purposes of crime prevention and prosecution.

### Chapter IX – International co-operation

251. Chapter IX sets out the provisions on international cooperation between Parties to the Convention. The provisions are not confined to judicial cooperation in criminal matters. They are also concerned with cooperation in preventing the sexual exploitation and abuse of children and in protecting and assisting victims.
252. As regards judicial cooperation in the criminal sphere, the Council of Europe already has a substantial body of standard-setting instruments. Mention should be made here of the *European Convention on Extradition* (ETS 24), the *European Convention on Mutual Assistance in Criminal Matters* (ETS 30), their Additional Protocols (ETS 86, 98, 99 and 182), and the *Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime* (ETS 141). These treaties are cross-sector instruments applying to a large number of offences, and can be implemented to permit judicial cooperation in criminal matters in the framework of procedures aiming at the offences established in the Convention.
253. For this reason, the negotiators opted not to reproduce, in this Convention, provisions similar to those included in cross-sectoral instruments such as those mentioned above. For instance, they did not want to introduce separate mutual assistance arrangements that would replace the other instruments and arrangements applicable, on the grounds that it would be more effective to rely, as a general rule, on the arrangements introduced by the mutual assistance and extradition treaties in force, with which practitioners were fully familiar. This Chapter therefore includes only provisions that add something over and above the existing conventions.
254. Moreover, the Parties may agree to co-operate on the basis of existing international instruments, in particular the above-mentioned Council of Europe conventions and, in the case of European Union member States, the instruments adopted in this connection, especially the *Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States*. They may also agree to co-operate by means of arrangements based on uniform or reciprocal legislation. This principle exists in

other Council of Europe conventions, in particular the *European Convention on Extradition* (ETS 24), in order to enable Parties with an extradition system based on uniform legislation, namely the Scandinavian countries, or Parties with a system based on the reciprocal application of their legislation, namely Ireland and the United Kingdom, to base their mutual relations solely on this system.

### **Article 38 - General principles and measures for international co-operation**

255. Article 38 sets out the general principles that should govern international co-operation.
256. First of all, it obliges the Parties to co-operate widely with one another and in particular to reduce, as far as possible, the obstacles to the rapid circulation of information and evidence. The monitoring mechanism provided for in the Convention (Chapter X) may, inter alia, cover the implementation of this principle and the way in which existing co-operation instruments are applied to the protection of children against sexual exploitation and sexual abuse.
257. Article 38 then makes it clear that the obligation to co-operate is general in scope: it covers preventing and combating sexual exploitation and sexual abuse of children (first indent), protecting and providing assistance to victims (second indent) and investigations or procedures concerning criminal offences established in accordance with the Convention (third indent).
258. Paragraph 2 is based on Article 11, paragraphs 2 and 3, of the *Council of the European Union Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings*. It is designed to make it easier for victims to file a complaint by enabling them to lodge it with the competent authorities of the State of residence.
259. These authorities may then either initiate proceedings if their law permits, or pass on the complaint to the authorities of the State in which the offence was committed, in accordance with the relevant provisions of the co-operation instruments applicable to the States in question.,
260. Paragraph 3 authorises a Party that makes mutual assistance in criminal matters or extradition conditional on the existence of a treaty to consider the Convention as the legal basis for judicial co-operation with a Party with which it has not concluded such a treaty. This provision, which serves no purpose between Council of Europe member States because of the existence of the *European Conventions on Extradition* and *on Mutual Assistance in Criminal Matters*, dating from 1957 and 1959 respectively, and the Protocols to them, is of interest because of the possibility provided to third States to accede to the Convention (cf Article 46).
261. Lastly, under paragraph 4, the Parties must endeavour to include preventing and combating the sexual exploitation and sexual abuse of children in development assistance programmes benefiting third States. Many Council of Europe member States carry out such programmes, which cover such varied areas as the restoration or consolidation of the rule of law, the development of judicial

institutions, combating crime, and technical assistance with the implementation of international conventions. Some of these programmes may be carried out in countries faced with substantial sexual exploitation and sexual abuse of children. It seems appropriate, in this context, that action programmes should take account of and duly incorporate issues relating to the prevention and punishment of this form of crime.

## **Chapter X - Monitoring mechanism**

262. Chapter X of the Convention contains provisions which aim at ensuring the effective implementation of the Convention by the Parties. The monitoring system foreseen by the Convention, is based essentially on a body, the Committee of the Parties, composed of representatives of the Parties to the Convention, including representatives of Parties that may accede to the Convention under Articles 45 and 46.

### **Article 39 - Committee of the Parties**

263. This article provides for the setting up of a committee under the Convention, the Committee of the Parties, which is a body with the composition described above, responsible for a number of Convention-based follow-up tasks.

264. The Committee of the Parties will be convened the first time by the Secretary General of the Council of Europe, within a year of the entry into force of the Convention by virtue of the 10<sup>th</sup> ratification. It will then meet at the request of a third of the Parties or of the Secretary General of the Council of Europe.

265. It should be stressed that the negotiators sought to allow the Convention to come into force quickly while deferring the introduction of the monitoring mechanism until such time as the Convention was ratified by a sufficient number of States for it to operate under satisfactory conditions, with a sufficient number of representative States Parties to ensure its credibility.

266. The setting up of this body will ensure equal participation of all the Parties in the decision-making process and in the Convention monitoring procedure and will also strengthen co-operation between the Parties to ensure proper and effective implementation of the Convention.

267. The Committee of the Parties must adopt rules of procedure establishing the way in which the monitoring system of the Convention operates, on the understanding that its rules of procedure must be drafted in such a way that the Parties to the Convention, including the European Community, are effectively monitored.

### **Article 40 - Other representatives**

268. When they drafted this article, the negotiators wanted to send out an important message concerning the participation of bodies other than the Parties themselves in the Convention monitoring mechanism. They therefore referred, firstly, to two

key institutions of the Council of Europe - the Parliamentary Assembly and the Commissioner for Human Rights - and, secondly, to a number of committees which, by virtue of their responsibilities, will definitely make a worthwhile contribution by taking part in monitoring work on the Convention.

269. The importance afforded to involving representatives of civil society in the work of the Committee of the Parties is undoubtedly one of the main strengths of the monitoring system provided for by the negotiators. The possibility of admitting representatives of non-governmental organisations and other bodies actively involved in preventing and combating sexual exploitation and abuse of children received strong support and was considered essential if monitoring of the application of the Convention was to be truly effective.

#### **Article 41 – Functions of the Committee of the Parties**

270. When drafting this provision, the negotiators wanted to devise as simple and flexible a mechanism as possible, centred on a Committee of the Parties with a broader role in the Council of Europe's legal work on combating the sexual exploitation and abuse of children. The Committee of the Parties is thus destined to serve as a centre for the collection, analysis and sharing of information, experiences and good practice between States to improve their policies for preventing and combating sexual exploitation and abuse of children.
271. With respect to the Convention, the Committee of the Parties has the traditional follow-up competencies and:
- a. plays a role in the effective implementation of the Convention, by making proposals to facilitate or improve the effective use and implementation of the Convention, including the identification of any problems and the effects of any declarations made under the Convention;
  - b. plays a role in the amendment of the Convention, by making proposals for amendments in accordance with Article 44, paragraph 1 and formulating its opinion on any proposal for an amendment to the Convention which is referred to it in accordance with Article 44, paragraph 2;
  - c. plays a general advisory role in respect of the Convention by expressing an opinion on any question concerning the application of the Convention;
  - d. 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.

## Chapter XI – Relationship with other international instruments

### **Article 42 – Relation to the *United Nations Convention on the Rights of the Child and its Optional Protocol on the sale of children, child prostitution and child pornography***

272. The purpose of Article 42 is to clarify the relationship between the Convention and the *United Nations Convention on the Rights of the Child and the Optional Protocol to it on the sale of children, child prostitution and child pornography*.
273. Article 42 has two main objectives: (i) to make sure that the Convention does not interfere with rights and obligations deriving from the provisions of the *United Nations Convention on the Rights of the Child* and the Protocol to it and (ii) to make clear that the Convention reinforces the protection afforded by these United Nations instruments and develops the standards they lay down.

### **Article 43 – Relation to other international instruments**

274. Article 43 deals with the relationship between the Convention and other international instruments.
275. In accordance with the 1969 *Vienna Convention on the Law of Treaties*, Article 43 seeks to ensure that the Convention harmoniously coexists with other treaties - whether multilateral or bilateral - or instruments dealing with matters which the Convention also covers. This is particularly important in the case of international instruments which ensure greater protection and assistance for child victims of sexual exploitation and abuse. Indeed, this Convention is designed to strengthen the protection of children against all forms of sexual exploitation and abuse. It is also designed to assure victims of sexual exploitation and abuse of assistance. For this reason, Article 43, paragraph 1 aims at ensuring that this Convention does not prejudice the rights and obligations derived from other international instruments to which the Parties to this Convention are also Parties or will become Parties, and which contain provisions on matters governed by this Convention. This provision clearly shows, once more, the overall aim of this Convention, which is to protect the rights of child victims of sexual exploitation and sexual abuse and to assure them of the highest level of protection.
276. Article 43, paragraph 2 states positively that Parties may conclude bilateral or multilateral agreements - or any other legal instrument - relating to the matters which the Convention governs. However, the wording makes clear that Parties are not allowed to conclude any agreement which derogates from this Convention.

## **Chapter XII – Amendments to the Convention**

### **Article 44 - Amendments**

277. Amendments to the provisions of the Convention may be proposed by the Parties. They must be communicated to all Council of Europe member States, to any signatory, to any Party, to the European Community and to any State invited to sign or accede to the Convention.
278. The Committee of the Parties, composed in accordance with Article 39, will prepare an opinion on the proposed amendment, which will be submitted to the Committee of Ministers. After considering the proposed amendment and the opinion submitted by the Committee of the Parties, the Committee of Ministers can adopt the amendment. Before deciding on the amendment, the Committee of Ministers shall consult and obtain the unanimous consent of all Parties. Such a requirement recognises that all Parties to the Convention should be able to participate in the decision-making process concerning amendments and are on an equal footing.

## **Chapter XIII - Final clauses**

279. With some exceptions, Articles 45 to 50 are essentially based on the Model Final Clauses for Conventions and Agreements concluded within the Council of Europe, which the Committee of Ministers approved at the Deputies' 315th meeting, in February 1980.

### **Article 45 - Signature and entry into force**

280. The Convention is open for signature by Council of Europe member States, the European Community and States not members of the Council of Europe which took part in drawing it up (Canada, the Holy See, Japan, Mexico and the United States). Once the Convention enters into force, in accordance with paragraph 3, other non-member States may be invited to accede to the Convention in accordance with Article 46, paragraph 1.
281. Article 45 paragraph 3 sets the number of ratifications, acceptances or approvals required for the Convention's entry into force at five. This number is not very high in order not to delay unnecessarily the entry into force of the Convention but reflects nevertheless the belief that a minimum group of States is needed to successfully set about addressing the major challenge of protecting children against sexual exploitation and sexual abuse. Of the five States which will make the Convention enter into force, at least three must be Council of Europe members.

### **Article 46 - Accession to the Convention**

282. After consulting the Parties and obtaining their unanimous consent, the Committee of Ministers may invite any State not a Council of Europe member

which did not participate in drawing up the Convention to accede to it. This decision requires the two-thirds majority provided for in Article 20.d of the Statute of the Council of Europe and the unanimous vote of the Parties to the Convention having the right to sit on the Committee of Ministers.

#### **Article 47 - Territorial application**

283. Article 47, paragraph 1 specifies the territories to which the Convention applies. Here it should be pointed out that it would be incompatible with the object and purpose of the Convention for States Parties to exclude parts of their territory from application of the Convention without valid reason (such as the existence of different legal systems applying in matters dealt with in the Convention).

284. Article 47, paragraph 2 is concerned with extension of application of the Convention to territories for whose international relations the Parties are responsible or on whose behalf they are authorised to give undertakings.

#### **Article 48 - Reservations**

285. Article 48 specifies that the Parties may make use of the reservations expressly authorised by the Convention. No other reservation may be made.

#### **Article 49 - Denunciation**

286. Article 49 allows any Party to denounce the Convention.

#### **Article 50 - Notifications**

287. Article 50 lists the notifications that, as the depositary of the Convention, the Secretary General of the Council of Europe is required to make, and designates the recipients of these notifications (States and the European Community).