



# Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems

(ETS No. 189)

Français

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## Explanatory Report

The text of this Explanatory Report does not constitute an instrument providing an authoritative interpretation of the Protocol, although it might be of such a nature as to facilitate the application of the provisions contained therein. This Protocol will be opened for signature in Strasbourg, on 28 January 2003, on the occasion of the First Part or the 2003 Session of the Parliamentary Assembly.

### Introduction

1. Since the adoption in 1948 of the Universal Declaration of Human Rights, the international community has made important progress in the fight against racism, racial discrimination, xenophobia and related intolerance. National and international laws have been enacted and a number of international human rights instruments have been adopted, in particular, the International Convention of New York of 1966 on the Elimination of All Forms of Racial Discrimination, concluded in the framework of the United Nations needs to be mentioned (CERD). Although progress has been made, yet, the desire for a world free of racial hatred and bias remains only partly fulfilled.

2. As technological, commercial and economic developments bring the peoples of the world closer together, racial discrimination, xenophobia and other forms of intolerance continue to exist in our societies. Globalisation carries risks that can lead to exclusion and increased inequality, very often along racial and ethnic lines.

3. In particular, the emergence of international communication networks like the Internet provide certain persons with modern and powerful means to support racism and xenophobia and enables them to disseminate easily and widely expressions containing such ideas. In order to investigate and prosecute such persons, international co-operation is vital. The Convention on Cybercrime (ETS 185) hereinafter referred to as “the Convention”, was drafted to enable mutual assistance concerning computer related crimes in the broadest sense in a flexible and modern way. The purpose of this Protocol is twofold: firstly, harmonising substantive criminal law in the fight against racism and xenophobia on the Internet and, secondly, improving international co-operation in this area. This kind of harmonisation alleviates the fight against such crimes on the national and on the international level. Corresponding offences in domestic laws may prevent misuse of computer systems for a racist purpose by Parties whose laws in this area are less well defined. As a consequence, the exchange of useful common experiences in the practical handling of cases may be enhanced too. International co-operation (especially extradition and mutual legal assistance) is facilitated, e.g. regarding requirements of double criminality.

4. The committee drafting the Convention discussed the possibility of including other content-related offences, such as the distribution of racist propaganda through computer systems.

However, the committee was not in a position to reach consensus on the criminalisation of such conduct. While there was significant support in favour of including this as a criminal offence, some delegations expressed strong concern about including such a provision on freedom of expression grounds. Noting the complexity of the issue, it was decided that the committee would refer to the European Committee on Crime Problems (CDPC) the issue of drawing up an additional Protocol to the Convention.

5. The Parliamentary Assembly, in its Opinion 226(2001) concerning the Convention, recommended immediately drawing up a protocol to the Convention under the title “Broadening the scope of the convention to include new forms of offence”, with the purpose of defining and criminalising, inter alia, the dissemination of racist propaganda.

6. The Committee of Ministers therefore entrusted the European Committee on Crime Problems (CDPC) and, in particular, its Committee of Experts on the Criminalisation of Acts of a Racist and xenophobic Nature committed through Computer Systems (PC-RX), with the task of preparing a draft additional Protocol, a binding legal instrument open to the signature and ratification of Contracting Parties to the Convention, dealing in particular with the following:

- i. the definition and scope of elements for the criminalisation of acts of a racist and xenophobic nature committed through computer networks, including the production, offering, dissemination or other forms of distribution of materials or messages with such content through computer networks;
- ii. the extent of the application of substantive, procedural and international co-operation provisions in the Convention on Cybercrime to the investigation and prosecution of the offences to be defined under the additional Protocol.

7. This Protocol entails an extension of the Convention’s scope, including its substantive, procedural and international cooperation provisions, so as to cover also offences of racist and xenophobic propaganda. Thus, apart from harmonising the substantive law elements of such behaviour, the Protocol aims at improving the ability of the Parties to make use of the means and avenues of international cooperation set out in the Convention in this area.

## Commentary on the articles of the Protocol

### Chapter I – Common provisions

#### Article 1 – Purpose

8. The purpose of this Protocol is to supplement, as between the Parties to the Protocol, the provisions of the Convention as regards the criminalisation of acts of a racist and xenophobic nature committed through computer systems.

9. The provisions of the Protocol are of a mandatory character. To satisfy these obligations, States Parties have not only to enact appropriate legislation but also to ensure that it is effectively enforced.

#### Article 2 – Definition

##### *Paragraph 1 – “Racist and xenophobic material”*

10. Several legal instruments have been elaborated at an international and national level to combat racism or xenophobia. The drafters of this Protocol took account in particular of (i) the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), (ii) Protocol No. 12 (ETS 177) to the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), (iii) the Joint Action of 15 July 1996 of the European Union adopted by the Council on the basis of Article K.3 of the Treaty on the European Union, concerning action to combat racism and xenophobia, (iv) the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (Durban, 31 August-8 September 2001), (v) the conclusions of the European Conference against racism (Strasbourg, 13 October 2000) (vi) the comprehensive study published by the Council of Europe Commission against Racism and Xenophobia (ECRI) published in August 2000 (CRI(2000)27) and (vii) the November

2001 Proposal by the European Commission for a Council Framework Decision on combating racism and xenophobia (in the framework of the European Union).

11. Article 10 of the ECHR recognises the right to freedom of expression, which includes the freedom to hold opinions and to receive and impart information and ideas. “Article 10 of the ECHR is applicable not only to information and ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population <sup>(1)</sup>. However, the European Court of Human Rights held that the State’s actions to restrict the right to freedom of expression were properly justified under the restrictions of paragraph 2 of Article 10 of the ECHR, in particular when such ideas or expressions violated the rights of others. This Protocol, on the basis of national and international instruments, establishes the extent to which the dissemination of racist and xenophobic expressions and ideas violates the rights of others.

12. The definition contained in Article 2 refers to written material (e.g. texts, books, magazines, statements, messages, etc.), images (e.g. pictures, photos, drawings, etc.) or any other representation of thoughts or theories, of a racist and xenophobic nature, in such a format that it can be stored, processed and transmitted by means of a computer system.

13. The definition contained in Article 2 of this Protocol refers to certain conduct to which the content of the material may lead, rather than to the expression of feelings/belief/aversion as contained in the material concerned. The definition builds upon existing national and international (UN, EU) definitions and documents as far as possible.

14. The definition requires that such material advocates, promotes, incites hatred, discrimination or violence. “Advocates” refers to a plea in favour of hatred, discrimination or violence, “promotes” refers to an encouragement to or advancing hatred, discrimination or violence and “incites” refers to urging others to hatred, discrimination or violence.

15. The term “violence” refers to the unlawful use of force, while the term “hatred” refers to intense dislike or enmity.

16. When interpreting the term “discrimination”, account should be taken of the ECHR (Article 14 and Protocol 12), and of the relevant case-law, as well as of Article 1 of the CERD. The prohibition of discrimination contained in the ECHR guarantees to everyone within the jurisdiction of a State Party equality in the enjoyment of the rights and freedoms protected by the ECHR itself. Article 14 of the ECHR provides for a general obligation for States, accessory to the rights and freedoms provided for by the ECHR. In this context, the term “discrimination” used in the Protocol refers to a different unjustified treatment given to persons or to a group of persons on the basis of certain characteristics. In the several judgments (such as the Belgian Linguistic case, the Abdulaziz, Cabales and Balkandali judgment <sup>(2)</sup>) the European Court of Human Rights stated that “a difference of treatment is discriminatory if it ‘has no objective and reasonable justification’, that is, if it does not pursue a ‘legitimate aim’ or if there is not a ‘reasonable relationship of proportionality between the means employed and the aim sought to be realised’”. Whether the treatment is discriminatory or not has to be considered in the light of the specific circumstances of the case. Guidance for interpreting the term “discrimination” can also be found in Article 1 of the CERD, where the term “racial discrimination” means “any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life”.

17. Hatred, discrimination or violence, have to be directed against any individual or group of individuals, for the reason that they belong to a group distinguished by “race, colour, descent or national or ethnic origin, as well as religion, if used as a pretext for any of these factors”.

18. It should be noted that these grounds are not exactly the same as the grounds contained, for instance, in Article 1 of Protocol No. 12 to the ECHR, as some of those contained in the latter are alien to the concept of racism or xenophobia. The grounds contained in Article 2 of this Protocol are also not identical to those contained in the CERD, as the latter deals with “racial discrimination” in general and not “racism” as such. In general, these grounds are to be

interpreted within their meaning in established national and international law and practice. However, some of them require further explanation as to their specific meaning in the context of this Protocol.

18. “Descent” refers mainly to persons or groups of persons who descend from persons who could be identified by certain characteristics (such as race or colour), but not necessarily all of these characteristics still exist. In spite of that, because of their descent, such persons or groups of persons may be subject to hatred, discrimination or violence. “Descent” does not refer to social origin.

20. The notion of “national origin” is to be understood in a broad factual sense. It may refer to individuals’ histories, not only with regard to the nationality or origin of their ancestors but also to their own national belonging, irrespective of whether from a legal point of view they still possess it. When persons possess more than one nationality or are stateless, the broad interpretation of this notion intends to protect them if they are discriminated on any of these grounds. Moreover, the notion of “national origin” may not only refer to the belonging to one of the countries that is internationally recognised as such, but also to minorities or other groups of persons, with similar characteristics.

21. The notion of “religion” often occurs in international instruments and national legislation. The term refers to conviction and beliefs. The inclusion of this term as such in the definition would carry the risk of going beyond the ambit of this Protocol. However, religion may be used as a pretext, an alibi or a substitute for other factors, enumerated in the definition. “Religion” should therefore be interpreted in this restricted sense.

### *Paragraph 2*

22. By providing that the terms and expressions used in the Protocol shall be interpreted in the same manner as they are interpreted under the Convention, this Article ensures uniform interpretation of both. This means that the terms and expressions used in this Explanatory Report are to be interpreted in the same manner as such terms and expressions are interpreted in the Explanatory Report to the Convention.

## **Chapter II – Measures to be taken at national level**

### **General considerations**

23. The offences, as established in this Protocol, contain a number of common elements which were taken from the Convention. For the sake of clarity, the relating paragraphs of the Explanatory Report to the Convention are included hereafter.

24. A specificity of the offences included is the express requirement that the conduct involved is done “without right”. It reflects the insight that the conduct described is not always punishable *per se*, but may be legal or justified not only in cases where classical legal defences are applicable, like consent, self defence or necessity, but where other principles or interests lead to the exclusion of criminal liability (e.g. for law enforcement purposes, for academic or research purposes). The expression ‘without right’ derives its meaning from the context in which it is used. Thus, without restricting how Parties may implement the concept in their domestic law, it may refer to conduct undertaken without authority (whether legislative, executive, administrative, judicial, contractual or consensual) or conduct that is otherwise not covered by established legal defences, excuses, justifications or relevant principles under domestic law. The Protocol, therefore, leaves unaffected conduct undertaken pursuant to lawful government authority (for example, where the Party’s government acts to maintain public order, protect national security or investigate criminal offences). Furthermore, legitimate and common activities inherent in the design of networks, or legitimate and common operating or commercial practices should not be criminalized. It is left to the Parties to determine how such exemptions are implemented within their domestic legal systems (under criminal law or otherwise).

25. All the offences contained in the Protocol must be committed “intentionally” for criminal liability to apply. In certain cases an additional specific intentional element forms part of the offence. The drafters of the Protocol, as those of the Convention, agreed that the exact meaning of ‘intentionally’ should be left to national interpretation. Persons cannot be held criminally liable for

any of the offences in this Protocol, if they have not the required intent. It is not sufficient, for example, for a service provider to be held criminally liable under this provision, that such a service provider served as a conduit for, or hosted a website or newsroom containing such material, without the required intent under domestic law in the particular case. Moreover, a service provider is not required to monitor conduct to avoid criminal liability.

26. As regards the notion of “computer system”, this is the same as contained in the Convention and explained in paragraphs 23 and 24 of its Explanatory Report. This constitutes an application of Article 2 of this Protocol (see also the explanation of Article 2 above).

### **Article 3 – Dissemination of racist and xenophobic material in a computer system**

27. This article requires States Parties to criminalize distributing or otherwise making available racist and xenophobic material to the public through a computer system. The act of distributing or making available is only criminal if the intent is also directed to the racist and xenophobic character of the material.

28. “Distribution” refers to the active dissemination of racist and xenophobic material, as defined in Article 2 of the Protocol, to others, while “making available” refers to the placing on line of racist and xenophobic material for the use of others. This term also intends to cover the creation or compilation of hyperlinks in order to facilitate access to such material.

29. The term “to the public” used in Article 3 makes it clear that private communications or expressions communicated or transmitted through a computer system fall outside the scope of this provision. Indeed, such communications or expressions, like traditional forms of correspondence, are protected by Article 8 of the ECHR.

30. Whether a communication of racist and xenophobic material is considered as a private communication or as a dissemination to the public, has to be determined on the basis of the circumstances of the case. Primarily, what counts is the intent of the sender that the message concerned will only be received by the pre-determined receiver. The presence of this subjective intent can be established on the basis of a number of objective factors, such as the content of the message, the technology used, applied security measures, and the context in which the message is sent. Where such messages are sent at the same time to more than one recipient, the number of the receivers and the nature of the relationship between the sender and the receiver/s is a factor to determine whether such a communication may be considered as private.

31. Exchanging racist and xenophobic material in chat rooms, posting similar messages in newsgroups or discussion fora, are examples of making such material available to the public. In these cases the material is accessible to any person. Even when access to the material would require authorisation by means of a password, the material is accessible to the public where such authorisation would be given to anyone or to any person who meets certain criteria. In order to determine whether the making available or distributing was to the public or not, the nature of the relationship between the persons concerned should be taken into account.

32. Paragraphs 2 and 3 are included to provide for a reservation possibility in very limited circumstances. They should be read in conjunction and in sequence. Therefore, a Party, firstly, has the possibility not to attach criminal liability to the conduct contained in this Article where the material advocates, promotes or incites discrimination that is not associated with hatred or violence, provided that other effective remedies are available. For instance, those remedies may be civil or administrative. Where a Party cannot, due to established principles of its legal system concerning freedom of expression, provide for such remedies, it may reserve the right not to implement the obligation under paragraph 1 of this Article, provided that it concerns only the advocating, promoting or inciting to discrimination, which is not associated to hatred or violence. A Party may further restrict the scope of the reservation by requiring that the discrimination is, for instance, insulting, degrading, or threatening a group of persons.

### **Article 4 – Racist and xenophobic motivated threat**

33. Most legislation provide for the criminalisation of threat in general. The drafters agreed to stress in the Protocol that, beyond any doubt, threats for racist and xenophobic motives are to be criminalized.

34. The notion of “threat” may refer to a menace which creates fear in the persons to whom the menace is directed, that they will suffer the commission of a serious criminal offence (e.g. affecting the life, personal security or integrity, serious damage to properties, etc., of the victim or their relatives). It is left to the States Parties to determine what is a serious criminal offence.

35. According to this article, the threat has to be addressed either to (i) a person for the reason that he or she belongs to a group, distinguished by race, colour, descent or national or ethnic origin, as well as religion, if used as a pretext for any of these factors, or to (ii) a group of persons which is distinguished by any of these characteristics. There is a no restriction that the threat should be public. This article also covers threats by private communications.

#### **Article 5 – Racist and xenophobic motivated insult**

36. Article 5 deals with the question of insulting publicly a person or a group of persons because they belong or are thought to belong to a group distinguished by specific characteristics. The notion of “insult” refers to any offensive, contemptuous or invective expression which prejudices the honour or the dignity of a person. It should be clear from the expression itself that the insult is directly connected with the insulted person’s belonging to the group. Unlike in the case of threat, an insult expressed in private communications is not covered by this provision.

37. Paragraph 2(i) allows Parties to require that the conduct must also have the effect that the person or group of persons, not only potentially, but are also actually exposed to hatred, contempt or ridicule.

38. Paragraph 2(ii) allows Parties to enter reservations which go further, even to the effect that paragraph 1 does not apply to them.

#### **Article 6 – Denial, gross minimisation, approval or justification of genocide or crimes against humanity**

39. In recent years, various cases have been dealt with by national courts where persons (in public, in the media, etc.) have expressed ideas or theories which aim at denying, grossly minimising, approving or justifying the serious crimes which occurred in particular during the second World War (in particular the Holocaust). The motivation for such behaviours is often presented with the pretext of scientific research, while they really aim at supporting and promoting the political motivation which gave rise to the Holocaust. Moreover, these behaviours have also inspired or, even, stimulated and encouraged, racist and xenophobic groups in their action, including through computer systems. The expression of such ideas insults (the memory of) those persons who have been victims of such evil, as well as their relatives. Finally, it threatens the dignity of the human community.

40. Article 6, which has a similar structure as Article 3, addresses this problem. The drafters agreed that it was important to criminalize expressions which deny, grossly minimise, approve or justify acts constituting genocide or crimes against humanity, as defined by international law and recognised as such by final and binding decisions of the International Military Tribunal, established by the London Agreement of 8 April 1945. This owing to the fact that the most important and established conducts, which had given rise to genocide and crimes against humanity, occurred during the period 1940-1945. However, the drafters recognised that, since then, other cases of genocide and crimes against humanity occurred, which were strongly motivated by theories and ideas of a racist and xenophobic nature. Therefore, the drafters considered it necessary not to limit the scope of this provision only to the crimes committed by the Nazi regime during the 2<sup>nd</sup> World War and established as such by the Nuremberg Tribunal, but also to genocides and crimes against humanity established by other international courts set up since 1945 by relevant international legal instruments (such as UN Security Council Resolutions, multilateral treaties, etc.). Such courts may be, for instance, the International Criminal Tribunals for the former Yugoslavia, for Rwanda, the Permanent International Criminal Court. This Article allows to refer to final and binding decisions of future international courts, to the extent that the jurisdiction of such a court is recognised by the Party signatory to this Protocol.

41. The provision is intended to make it clear that facts of which the historical correctness has been established may not be denied, grossly minimised, approved or justified in order to support

these detestable theories and ideas.

42. The European Court of Human Rights has made it clear that the denial or revision of “clearly established historical facts – such as the Holocaust – [...] would be removed from the protection of Article 10 by Article 17” of the ECHR (see in this context the *Lehideux and Isorni* judgment of 23 September 1998) <sup>(3)</sup>.

43. Paragraph 2 of Article 6 allows a Party either (i) to require, through a declaration, that the denial or the gross minimisation referred to in paragraph 1 of Article 6, is committed with the intent to incite hatred, discrimination or violence against any individual or group of individuals, based on race, colour, descent or national or ethnic origin, as well as religion if used as a pretext for any of these factors. or (ii) to make use of a reservation, by allowing a Party not to apply – in whole or in part – this provision.

### **Article 7 – Aiding and abetting**

44. The purpose of this article is to establish as criminal offences aiding or abetting the commission of any of the offences under Articles 3-6. Contrary to the Convention, the Protocol does not contain the criminalisation of the attempt to commit the offences contained in it, as many of the criminalized conducts have a preparatory nature.

45. Liability arises for aiding or abetting where the person who commits a crime established in the Protocol is aided by another person who also intends that the crime be committed. For example, although the transmission of racist and xenophobic material through the Internet requires the assistance of service providers as a conduit, a service provider that does not have the criminal intent cannot incur liability under this section. Thus, there is no duty on a service provider to actively monitor content to avoid criminal liability under this provision.

46. As with all the offences established in accordance with the Protocol, aiding or abetting must be committed intentionally.

## **Chapter III – Relations between the Convention and this Protocol**

### **Article 8 – Relations between the Convention and this Protocol**

47. Article 8 deals with the relationship between the Convention and this Protocol. This provision avoids the inclusion of a number of provisions of the Convention in this Protocol. It indicates that some of the provisions of the Convention apply, *mutatis mutandis*, to this Protocol (e.g. concerning ancillary liability and sanctions, jurisdictions and a part of the final provisions). Paragraph 2 reminds the Parties that the meaning as defined in the Convention should apply to the offences of the Protocol. For the sake of clarity, the relating articles are specified.

## **Chapter IV – Final provisions**

48. The provisions contained in this Chapter are, for the most part, based on the ‘Model final clauses for conventions and agreements concluded within the Council of Europe’ which were approved by the Committee of Ministers at the 315th meeting of the Deputies in February 1980. As most of the Articles 9 through 16 either use the standard language of the model clauses or are based on long-standing treaty-making practice at the Council of Europe, they do not call for specific comments. However, certain modifications of the standard model clauses or some new provisions require further explanation. It is noted in this context that the model clauses have been adopted as a non-binding set of provisions. As the introduction to the model clauses pointed out “these model final clauses are only intended to facilitate the task of committees of experts and avoid textual divergences which would not have any real justification. The model is in no way binding and different clauses may be adopted to fit particular cases” (see also in this context paragraphs 304-330 of the Explanatory Report to the Convention).

49. Paragraph 2 of Article 12 specifies that the Parties may make use of the reservation as defined in Articles 3, 5 and 6 of this Protocol. No other reservation may be made.

50. This Protocol is opened to signature only to the signatories to the Convention. The Protocol will enter into force three month after five Parties to the Convention have expressed their consent

to be bound by it (Articles 9-10).

51. The Convention allows reservations concerning certain provisions which, through the connecting clause of Article 8 of the Protocol, may have an effect on the obligations of a Party under the Protocol as well. Nevertheless, a Party may notify the Secretary General that it will not apply this reservation in respect of the content of the Protocol. This is expressed in paragraph 2 of Article 12 of the Protocol.

52. However, where a Party did not make use of such reservation possibility under the Convention, it may have a need to restrict its obligations in relation with the offences of the Protocol. Paragraph 2 of Article 12 enables Parties to do so in relation to Article 22, paragraph 2, and Article 41, paragraph 1, of the Convention.

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**Notes:**

- (1) See in this context, for instance, the Handyside judgment of 7 December 1976, Series A, no. 24, p. 23, para. 49.
- (2) Abulaziz, Cabales and Balkandali, judgment of 28 May 1985, Series A no. 94, p. 32, para. 62; Belgian Linguistic case, judgment of 23 July 1968, Series A no. 6, p. 34, para. 10.
- (3) Lehideux and Isorni judgment of 23 September 1998, Reports 1998-VII, para. 47.