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EUROPEAN COMMITTEE ON CRIME PROBLEMS
(CDPC)

COMMITTEE OF EXPERTS ON THE CRIMINALISATION OF ACTS OF A RACIST
OR XENOPHOBIC NATURE COMMITTED THROUGH COMPUTER SYSTEMS
(PC-RX)

PRELIMINARY DRAFT²

of the

First Additional Protocol to the Convention on Cybercrime on
the criminalisation of acts of a racist or xenophobic nature
committed through computer systems

and its Explanatory Report

¹ The PC-RX decided, at its 2nd meeting (11-13 February 2002) to make public this version of the preliminary draft First Additional Protocol.

² This draft reflects the changes agreed to at the 2nd meeting of Committee PC-RX (11 - 13 February 2002). These changes appear **in bold**.

PRELIMINARY DRAFT

First Additional Protocol to the Convention on Cybercrime on the criminalisation of acts of a racist or xenophobic nature committed through computer systems

The member States of the Council of Europe and the other Parties to the Convention on Cybercrime, opened for signature in Budapest on 23 November 2001 (**hereinafter referred to as “the Convention”**), signatory hereto;

[The Preamble is in preparation]

Have agreed as follows:

Chapter I – Common provisions

Article 1 – Purpose

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

Article 2 - Definitions

1. For the purposes of this Protocol:
 - a. “Racist or xenophobic material” means any written material, any image or any other representation of thoughts or theories, which advocates, promotes³, incites [or is likely to incite] acts of violence, hatred or discrimination against any individual or group of individuals, based on race, colour, [religion, descent, nationality,] national or ethnic origin”;
 - b. “racist and xenophobic group” means a structured organisation established over a period of time, of **two or more** persons, acting in concert to commit offences referred to **in this Protocol**.
2. **The words and expressions used in this Protocol shall be interpreted within the meaning of the Convention [, unless defined otherwise in this Protocol].**

Chapter II – Measures to be taken at national level

Section 1 – Criminal offences

Article 3 – Racist or xenophobic material in a computer system

³ One delegation expressed concern on the terms “advocates” and “promotes” in relation to “discrimination”.

Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally and without right⁴, the following conduct:

- a. [offering or] making available racist or xenophobic material **[to the public]** through a computer system;
- b. distributing racist or xenophobic material **[to the public]** through a computer system;
- c. [producing racist or xenophobic material in a computer system for its distribution **[to the public].**]

Article 4 – Other racist or xenophobic offences

Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally and without right, the following conduct⁵:

- a. threatening with the commission of a serious criminal offence, through a computer system, (i) a person for the reason that he or she belongs to a group, distinguished by race, colour, [religion, descent, nationality], national or ethnic origin, or (ii) a group which is distinguished by any of these characteristics;
- b. [directing, [supporting] or participating in activities [with the intent of/for the purpose of facilitating] a racist or xenophobic group to commit the offences defined in this Protocol]⁶.

Article 5 – Attempt and aiding or abetting⁷

1. Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally and without right, aiding or abetting the commission of any of the offences established in accordance with this Protocol, with intent that such offence be committed.

[2. Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally and without right, an attempt to commit any of the offences established in accordance with this Protocol.]

[Article 6 – Denial or justification of racist or xenophobic crimes]⁸

[This provision is in preparation]

⁴ The term “without right” has to be explained in the Explanatory Report.

⁵ One delegation wishes that the Protocol provides for the criminalisation of “racist or xenophobic insult”.

⁶ Delegations are still discussing this provision. As an example, this provision aims at including such issues as financing. Certain delegations expressed the wish to delete this provision.

⁷ This provision is inspired by an almost identical provision in Article 11 of the Convention. It is kept in the text of this Protocol as a reminder, as discussions are still continuing on the notion of “attempt”.

⁸ Several delegations agreed on the idea of inserting such a provision, while other delegations have expressed reservations. However, the wording is still to be considered at the next meeting of the committee.

Section 2 – Other measures

Article 7 – Political offences⁹

Each Party shall ensure that the offences referred to in this Protocol are not regarded as political offences justifying refusal to comply with requests for mutual legal assistance or extradition.

Chapter III – Relations between the Convention and this Protocol

Article 8 – Relations between the Convention and this Protocol

Article [1], Articles [11 to 35], [Article 41] and Articles 44 to 46 of the Convention shall apply, *mutatis mutandis*, to this Protocol.

Chapter IV – Final provisions

Article 9 – Expression of consent to be bound

1. This Protocol shall be open for signature by the States which have signed the Convention, which may express their consent to be bound by either:
 - a. signature without reservation as to ratification, acceptance or approval; or
 - b. signature subject to ratification, acceptance or approval, followed by ratification, acceptance or approval.
2. A State may not sign this Protocol without reservation as to ratification, acceptance or approval, or deposit an instrument of ratification, acceptance or approval, unless it has already deposited or simultaneously deposits an instrument of ratification, acceptance or approval of the Convention.
3. The instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

Article 10 – Entry into force

1. This Protocol shall come into force on the first day of the month following the expiration of a period of three months after the date on which five member States of the Council of Europe have expressed their consent to be bound by the Protocol, in accordance with the provisions of Article 9.

⁹ Most delegations considered that this provision, which constitutes an exception to the principle which enables mutual assistance to be refused on the political exception ground, merits further examination at the next meeting of the committee.

2. In respect of any State which subsequently expresses its consent to be bound by it, the Protocol shall come into force on the first day of the month following the expiration of a period of three months after the date of its signature without reservation as to ratification, acceptance or approval or deposit of its instrument of ratification, acceptance or approval.

Article 11 – Accession

1. After the entry into force of this Protocol, any State which has acceded to the Convention may also accede to the Protocol.

2. Accession shall be effected by the deposit with the Secretary General of the Council of Europe of an instrument of accession which shall take effect on the first day of the month following the expiration of a period of three months after the date of its deposit.

Article 12 – Reservations

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

2. No other reservation may be made in respect of any provision of this Protocol.

Article 13 – Territorial application

1. Any State may at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession specify the territory or territories to which this Protocol shall apply.

2. Any State may, at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Protocol to any other territory specified in the declaration. In respect of such territory, the Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date of receipt of such declaration by the Secretary General of the Council of Europe.

3. Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declaration, be withdrawn by a notification addressed to the Secretary General. The withdrawal shall become effective on the first day of the month following the expiration of a period of three months after the date of receipt of such notification by the Secretary General.

Article 14 – Denunciation

1. Any Party may, at any time, denounce this Protocol by means of a notification addressed to the Secretary General of the Council of Europe.

2. Such denunciation shall become effective on the first day of the month following the expiration of a period of three months after the date of receipt of the notification by the Secretary General.

Article 15 – Notification

The Secretary General of the Council of Europe shall notify the member States of the Council of Europe, the non-member States which have participated in the elaboration of this Protocol as well as any State which has acceded to, or has been invited to accede to, this Protocol of:

- a. any signature;
- b. the deposit of any instrument of ratification, acceptance, approval or accession;
- c. any date of entry into force of this Protocol in accordance with Articles 9, 10 and 11;
- d. any other act, notification or communication relating to this Protocol.

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

Done at , this, in English and in French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe, to the non-member States which have participated in the elaboration of this Protocol, and to any State invited to accede to it.

DRAFT EXPLANATORY REPORT