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The participation of non-member States in Council of Europe conventions

Report¹

Committee on Legal Affairs and Human Rights

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Summary

Capitalising on the Council of Europe's *acquis* of conventions and promoting them to non-member States has the potential of boosting the profile of the Organisation, its political dimension and its ability to secure its place as guardian of human rights and democracy, not only in Europe, but also in the new sphere of freedoms currently expanding around its borders.

Only 41 of the 213 Council of Europe conventions are effectively closed to non-member States, but very few of these States have in fact ratified the Organisation's instruments which are open to them.

Globalisation has had an effect on the Council of Europe's normative work as many of its conventions deal with issues which concern not only the territory of its member States, but potentially have a global reach. These issues include the fight against terrorism, money laundering and the financing of terrorism, human trafficking, the sexual exploitation of children and cybercrime. That is why, subject to some conditions, some conventions should be open to participation by non-member States.

Bearing the above in mind, it is important that the Council of Europe maintains its high standards and that these are not compromised by States which do not share them as regards existing conventions which are open or to be opened to accession by non-member States and with regard to future conventions.

1. Reference to committee: [Doc. 12667](#), Reference 3793 of 3 October 2011.



Contents	Page
A. Draft resolution	3
B. Draft recommendation	4
C. Explanatory memorandum by Mr Huseynov, rapporteur	5
1. Introduction	5
1.1. Procedure	5
1.2. Scope of the report	5
2. Overview of the present situation	5
2.1. The level of accession by non-member States to Council of Europe conventions	5
3. Issues which merit consideration	6
3.1. Reasons for opening certain conventions to non-member States	6
3.2. Conventions which could be opened to non-member States	6
3.3. The areas in which Council of Europe conventions could be opened to non-member States	7
3.4. The manner in which Council of Europe conventions could be opened to non-member States	7
3.5. The promotion of conventions which are open to non-member States	8
3.6. The promotion of future conventions	9
3.7. Making conventions which are open to non-member States work within the Council of Europe's institutional framework (monitoring, amendments, etc.)	9
4. Conclusions	10

A. Draft resolution²

1. The Council of Europe has taken a leading role in adopting conventions aimed at ensuring respect for human rights, democracy and the rule of law in its member States. Some Council of Europe conventions deal with subjects which also concern non-member States, such as the fight against terrorism, money laundering, human trafficking and the protection of personal data.
2. The majority of Council of Europe conventions are open to non-member States, but few of them have availed themselves of this opportunity.
3. Bearing in mind the need to preserve and consolidate its standards and values, the Council of Europe should promote the accession of relevant conventions by non-member States.
4. The Council of Europe should focus on States which have already been invited to accede to Council of Europe instruments, but have not yet done so. The following measures could be envisaged:
 - 4.1. organising conferences, seminars and training workshops on themes covered by relevant Council of Europe instruments;
 - 4.2. organising a ceremony in the context of ministerial sessions or conferences at which Council of Europe instruments are signed and/or ratified;
 - 4.3. raising the subject of accession to Council of Europe conventions during high-level visits to relevant States, especially those States which have observer status with the Council of Europe and those whose parliaments have observer or partner for democracy status with the Parliamentary Assembly;
 - 4.4. providing information on relevant conventions through the Council of Europe's offices in charge of liaison with international organisations;
 - 4.5. establishing contacts at the political and technical levels within the framework of the Neighbourhood Policy and the new Council of Europe co-operation programmes with countries in the Mediterranean region and Central Asia.
5. With regard to future Council of Europe instruments, the Organisation's offices in charge of liaison with international organisations should establish an "early warning procedure" aimed at informing relevant international organisations and non-member States about the opening of negotiations for new Council of Europe conventions likely to provide for non-member States' accession.

2. Draft resolution adopted unanimously by the committee on 23 April 2013.

B. Draft recommendation³

1. The Parliamentary Assembly refers to its Resolution ... (2013) on the participation of non-member States in Council of Europe conventions, and reiterates its position that focus should be placed on States which have already been invited to accede to the Organisation's instruments, but which have not yet done so.
2. In addition to the measures referred to in Resolution ... (2013), the Assembly invites the Committee of Ministers to:
 - 2.1. consider granting observer status to non-member States in intergovernmental committees which are responsible for the implementation/supervision of conventions to which these States can accede;
 - 2.2. envisage, as a step to be taken prior to accession, the negotiation of bilateral arrangements or memoranda of understanding with non-member States in which the latter's financial contributions towards the implementation of conventions is specified;
 - 2.3. permit non-member States which have been invited to accede to a convention but which have not yet done so, to be permitted – with the agreement of all Parties to the convention – to participate in intergovernmental work relating to the amendment of any such instrument.

3. Draft recommendation adopted unanimously by the committee on 23 April 2013.

C. Explanatory memorandum by Mr Huseynov, rapporteur

1. Introduction

1.1. Procedure

1. On 3 October 2011, the Parliamentary Assembly decided to refer to the Committee on Legal Affairs and Human Rights, for report, the motion for a resolution “The accession of non-member States to Council of Europe conventions”.⁴ At its meeting on 16 November 2011, the committee appointed me as rapporteur. On 11 December 2012, the committee held a hearing in Paris with the following experts:

- Mr Guy De Vel, former Director General of Legal Affairs, Council of Europe
- Mr Rolf Fife Einar, Director General of the Department for Legal Affairs, Ministry of Foreign Affairs, Norway

1.2. Scope of the report

2. The purpose of this report is to examine the modalities by which the Council of Europe opens its conventions to non-member States. Opening more Council of Europe conventions to non-member States could assist them in raising their human rights standards and respect for the rule of law, but a balance should be struck between this premise and ensuring that the Organisation’s standards are not compromised by States which do not share its values.

3. The preparatory work on this report has demonstrated that the participation of non-member States is seldom the subject of comprehensive debate and analysis and that very few of these States have acceded to Council of Europe conventions.

4. When the Council of Europe draws up and then adopts a convention, it may decide to open it up to participation by States which are not members of the Organisation. If non-member States have been involved in negotiations on the instrument in question, they are usually automatically entitled to ratify and become Party to it. Other States which are not members of the Council of Europe and have not participated in the negotiations may request to be invited to accede to the convention if the instrument so provides. It would appear that the existing title of the motion does not take this difference into account. Hence why I proposed that the title of the report be changed to: “The participation of non-member States in Council of Europe conventions”. The committee accepted my proposal on 11 December 2012.

5. I have not dealt with the accession of the European Union to Council of Europe conventions as I consider this issue to be beyond the scope of the present report because the matter of broadening the conventions’ scope beyond the common European legal space should be separate from that of European Union accession to these conventions. The latter requires further reflection on the division of competences between the European Union and its own member States and the legal obligations based on treaties of the Council of Europe.

2. Overview of the present situation

2.1. The level of accession by non-member States to Council of Europe conventions

6. Only 41 of the 213 Council of Europe conventions are effectively closed to non-member States, primarily due to the fact that they deal with institutional questions which do not concern them (for example the Statute of the Council of Europe (ETS No. 1) and the General Agreement on Privileges and Immunities of the Council of Europe (ETS No. 2) and its six protocols). All other conventions allow non-member States to participate either as of right (this possibility is open to States with observer status with the Council of Europe, those which took part in the drafting of the conventions or States which are Party to related conventions) or upon invitation by the Committee of Ministers, upon their request. Virtually all substantive conventions, except the European Convention on Human Rights (ETS No. 5) and the European Social Charter (revised) (ETS No. 139) and their respective protocols are open to non-member States. However, very few non-member States

4. [Doc. 12667](#).

have in fact ratified Council of Europe instruments⁵ and the conventions they participated in were mostly opened for signature before 1990, namely before the Organisation opened up to central and eastern European countries.

7. The main reason why so few non-member States have acceded to Council of Europe conventions could simply be that they are unaware of their existence. That is why I concur with the Secretary General of the Council of Europe when he states in his Report on the review of Council of Europe conventions that: "A first necessary step would be to improve the visibility and knowledge of Council of Europe conventions which are ... by their characteristics particularly suitable for participation by non-member States".⁶ The specific measures which could be taken to increase this visibility will be dealt with in more depth below.

3. Issues which merit consideration

3.1. Reasons for opening certain conventions to non-member States

8. Globalisation has had an effect on the Council of Europe's normative work, as many of its conventions deal with issues which concern not only the territory of its member States, but potentially have a global reach. These issues include the fight against terrorism, money laundering and the financing of terrorism, human trafficking, the sexual exploitation of children, cybercrime, counterfeiting medical products, the protection of personal data and the transfer of sentenced persons. Furthermore, non-member States may have an interest in acceding to Council of Europe conventions as some of them replace numerous bilateral agreements, for example on judicial and criminal co-operation. Moreover, some Council of Europe conventions may enable emerging democracies to improve the rule of law in their countries, for example in the areas of the fight against corruption and human trafficking. At our hearing on 11 December 2011, one of our experts, Mr Einar stated that when establishing the conditions for non-member States to accede to Council of Europe conventions, a thorough and credible vetting procedure is needed to ensure that uniform and high standards are maintained in order to avoid compromising the Council of Europe's standards. I agree with him.

3.2. Conventions which could be opened to non-member States

9. Regarding existing conventions, the majority are in principle open for participation by non-member States. However, some are open only to European States, but as all but one European countries are members of the Council of Europe, this restriction is almost obsolete. These conventions could be opened on a case-by-case basis: 1) to non-European States which express a genuine interest; 2) if it becomes difficult to deal with a given problem in a strictly European context; or 3) if the Council of Europe has an interest of its own in extending the application of some norms beyond Europe. This is, for example, the case with the European Convention on the Suppression of Terrorism (ETS No. 90) which will be opened to non-member States once its amending protocol enters into force.

10. As concerns future conventions, the same criteria should be applied as with existing conventions, with the additional condition that new conventions should be drafted bearing systematically in mind their potential applicability to non-member States. In cases where a convention would be open to non-member States, it would be useful to define the procedure by which it would enter into force (for example, automatic entry into force after a certain period of time in the absence of any objections by the Parties).

5. As concerns States with observer status, Canada has ratified two of the 27 conventions to which it is entitled to become a Party, Japan one out of 20, the Holy See six out of 34, Mexico three out of 18 and the United States of America three out of 26. 33 other States have the full right to participate or have been invited by the Committee of Ministers to become Party to one or more Council of Europe conventions. This figure includes States Parties to conventions concluded in co-operation with other international organisations such as the Convention on the Recognition of Qualifications concerning Higher Education in the European Region (ETS No. 165) which is open to member States of the United Nations Educational, Scientific and Cultural Organization (UNESCO) Europe Region and to the States Parties to other Council of Europe or UNESCO conventions. There are only a few conventions to which more than 10 non-member States have the full right to participate or have been invited by the Committee of Ministers to become Party, the most well known being the Convention on the Transfer of Sentenced Persons (ETS No. 112), which has been ratified by 18 non-member States, and the Convention on Cybercrime (ETS No. 185), to which 12 non-member States have the full right to participate or have been invited by the Committee of Ministers to become Party.

6. Information document SG/Inf(2012)12, Report by the Secretary General on the review of Council of Europe conventions, paragraph 68, [www.coe.int/t/dghl/standardsetting/pc-oc/PCOC_documents/Documents%202013/SG_Inf\(2012\)12%20e%20Review%20of%20CoE%20Conventions.pdf](http://www.coe.int/t/dghl/standardsetting/pc-oc/PCOC_documents/Documents%202013/SG_Inf(2012)12%20e%20Review%20of%20CoE%20Conventions.pdf).

3.3. The areas in which Council of Europe conventions could be opened to non-member States

11. There are areas in which it is becoming increasingly difficult to limit co-operation solely within Europe if they are to be dealt with efficiently. These include the fight against organised crime and judicial co-operation. Because of increasing globalisation, it is likely that opening future Council of Europe conventions will be more and more necessary. Moreover, one should not exclude opening future conventions in areas of fundamental rights to non-member States even if some should contain a reference to the European Convention on Human Rights and/or the case law of the European Court of Human Rights. There is already a precedent for this in that the European Convention for the Prevention of Terrorism (CETS No. 196), which is open to non-member States, contains two references⁷ to the European Convention on Human Rights. However, one should ensure that the Council of Europe's conventions which are open to non-member States do not cover areas already covered by other treaties, such as United Nations conventions, as it is likely that non-member States will not feel the need to accede to them. For instance, Protocol No. 1 to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment (ETS No. 126) opened this convention to non-member States, but so far none have acceded to it. This may well be linked to the fact that they are already Party to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment.⁸ By contrast, the Council of Europe's Convention on Preventing and Combating Violence against Women and Domestic Violence (ETS No. 210) should generate considerable interest from non-member States as this area is not yet covered by another convention.

12. The Council of Europe could put a greater emphasis on observer states, as this status has been conferred on States which respect democracy, human rights and the rule of law. When a decision is made to draft a convention that will be open to non-member States, countries which have expressed a real interest should be involved already at the drafting stage.

3.4. The manner in which Council of Europe conventions could be opened to non-member States

13. Once again, a pragmatic approach should be taken when deciding on the manner in which Council of Europe treaties could be opened to non-member States. I agree with the Secretary General's proposal that "it should be borne in mind that an equilibrium should be sought between the need to preserve, at least for some conventions, a possibility for existing Parties to decide on the admission of a non-member State, and the opportunity to ensure a wider diffusion of some Council of Europe conventions".⁹ The Secretary General has proposed different levels of scrutiny by the Committee of Ministers in relation to a given convention. These are: i) opening a convention for accession by any non-member State without any scrutiny; ii) applying some degree of scrutiny once a State has requested to accede to a convention, it being understood that the request would be granted unless a State Party objects to the request within a certain period of time; or iii) granting permission to the requesting State at the end of a period of "observation" of its ability to participate meaningfully in co-operation under the convention in question and to fulfil the obligations set out therein. There may also be iv) cases in which the Committee of Ministers wishes to ensure that only those States which fully share the values of the Council of Europe accede to a given convention.¹⁰ The latter three options seem to be the best suited in order to ensure that the Organisation stays true to its values and standards and does not allow States which do not share them to accede to its conventions.

14. There are also cases where invitations already extended to non-member States to accede to a Council of Europe convention have not been followed up. There could be several reasons for this, including a change in government or in the parliamentary majority or delays at the administrative level. In this regard, the Secretary General's proposal to envisage changes in the procedure before the Committee of Ministers in order to ensure that requests for accession to Council of Europe instruments are based on genuine interest, by strengthening the preparatory dialogue with the State in question or by requesting that it commits to acceding to the convention within a limited time (for example, five years), after which the invitation would no longer be valid, is worthy of consideration.¹¹

7. Articles 3.1 and 12.1.

8. Regarding the interaction between the Council of Europe and United Nations Anti-Torture conventions, see the report by Jean-Charles Gardetto on "Strengthening torture prevention mechanisms in Europe", [Doc. 12551](#).

9. Information document SG/Inf(2012)12, op. cit.

10. *Ibid.*, paragraphs 87-89.

11. *Ibid.*, paragraph 91.

3.5. The promotion of conventions which are open to non-member States

15. As previously indicated, the participation of non-member States in Council of Europe conventions is rather low and is concentrated almost exclusively on instruments which were opened for signature before 1990, that is before the Organisation opened up to central and eastern European countries. This is mainly due to the fact that after the fall of the Berlin Wall, the Council of Europe concentrated on inciting new member and candidate States to accede to a number of conventions to enable them to become member States or to fulfil commitments made when they joined the Organisation.

16. At our hearing on 11 December 2011, one of our experts, Mr de Vel, stated that accession to treaties which are particularly adapted, in view of their characteristics and content, to participation by non-member States should be promoted more actively, and I agree. This promotion could take the form of conferences, seminars and training workshops on one or more major themes (such as the protection of children) covered by a number of Council of Europe instruments. In order to give more visibility to accessions, treaty ceremonies such as those organised by the United Nations could also be held at the Council of Europe. In the United Nations, every year the Secretary General invites Heads of State and Government to participate in a ceremony organised by the Treaty Section at which treaties are signed or ratified, in order to encourage both wider participation in the multilateral treaties of which he is the depositary and more rapid entry into force of those treaties. The proposal of the Secretary General of the Council of Europe to organise events of this kind in the context of ministerial sessions or specialised conferences of Ministers of Justice¹² is worth considering.

17. The Parliamentary Assembly could also play a role, as it did on 15 June 2011¹³ when its representatives and those of the United Nations jointly called on the 27 European Union member States and the European Union itself to accede to the new Council of Europe Convention on Violence against Women and Domestic Violence.

18. Other measures which could be taken to promote Council of Europe conventions include using visits by high-ranking politicians or Council of Europe staff members to non-member States, for example to discuss accession to certain conventions to which they have been invited to accede without giving any follow-up or those which they have signed, but not yet ratified. Furthermore, meetings with the various bodies involved with the accession to Council of Europe instruments could be organised, starting with States which have observer status with the Council of Europe and those whose parliaments have observer or partner for democracy status with the Assembly, in order to examine the possibility of accession and to solve any problems in this regard. One argument which could be used to promote Council of Europe conventions is that they replace a great number of bilateral treaties, for instance in areas such as judicial co-operation and the fight against crime.

19. The Council of Europe's offices, especially those in charge of liaising with international organisations, could also promote Council of Europe conventions, as the office in Geneva did when it held meetings on open conventions, namely the Convention on Cybercrime (ETS No. 185), the Council of Europe Convention on the Counterfeiting of Medical Products and Similar Crimes involving Threats to the Public (CETS No. 211) and the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108).

20. Other avenues for promoting Council of Europe conventions which are open to non-member States include using contacts both at the political and technical levels within the framework of the Neighbourhood Policy and the new Council of Europe co-operation programmes with countries in the Mediterranean region and Central Asia.¹⁴ The Forum for Democracy could also be another platform where Council of Europe instruments could be promoted. The Secretary General's proposal to make accession to Council of Europe conventions more interesting for non-member States by facilitating their participation in the "life" of the convention by limiting as much as possible differences in the status between Parties which are members of the Council of Europe and Parties which are not¹⁵ is of particular relevance. I shall examine below the manner in which this could be done.

12. *Ibid.*, paragraph 56.

13. See press release of 15 June 2011, PACE 029(2011), http://assembly.coe.int/ASP/NewsManager/EMB_NewsManagerView.asp?ID=6737&L=2.

14. In 2011, the Secretary General recognised that many of the Organisation's priority activities, including most of its key recent conventions, aim to extend co-operation also beyond Europe's borders. See information document SG/Inf(2011)7 rev 2, 19 April 2011, Council of Europe Neighbourhood Policy, <https://wcd.coe.int/ViewDoc.jsp?id=1767825&Site=CM>.

15. Information document SG/Inf(2012)12, *op. cit.*

3.6. The promotion of future conventions

21. Non-member States which are genuinely interested in a future convention should be encouraged to participate more regularly in the negotiation and drafting. That is why I agree with the Secretary General's proposal to "introduce some sort of 'early warning' procedure to inform relevant international organisations and non-member States about the opening of negotiations of new Council of Europe conventions providing for non-member States' accession".¹⁶ Again, Council of Europe offices in charge of liaison with the United Nations and other international organisations based in Vienna and Geneva, as well as with the OSCE, could play an important role in this respect.¹⁷

3.7. Making conventions which are open to non-member States work within the Council of Europe's institutional framework (monitoring, amendments, etc.)

22. Measures should be taken to ensure that all Parties to a convention are, as much as possible, included in the main decisions concerning the instrument. This could be done, for example, by granting observer or participant status to Parties which are non-member States in the intergovernmental committees which are responsible for the implementation of an instrument (when there is not an ad hoc convention-based body which includes all the Parties). Such participation may even imply, in appropriate circumstances where the agreement of all Parties to the convention is required, granting a right to vote to non-member States when decisions are taken in these intergovernmental bodies.¹⁸

23. The full participation of non-member States becomes particularly important when financial issues and amendments to a convention are discussed.¹⁹ The question of participation of non-member States in the Committee of Ministers' decisions is more delicate, notably as regards financial questions, amendments to a convention and the monitoring of its implementation by Parties to it. With regard to financial questions, for the moment, non-member States are not obliged, in accordance with the conventions, to provide any financial contribution although they benefit from the Council of Europe's work (including, in some cases, reimbursement of their experts' participation in meetings). For existing conventions to which a non-member State is a Party, it will be difficult to require *ex post facto* that it agree to contribute financially to the implementation of a convention when the text of the instrument does not contain provisions to that effect, even where a follow-up mechanism entailing financial implications is set up.²⁰

24. For new conventions whose implementation has financial implications for the Council of Europe clauses ensuring the financial contribution of non-member States which are Parties to the instruments could be added. Specific conditions requiring a financial contribution when inviting non-member States to become Parties to existing conventions could also be envisaged.²¹ It may be necessary to find, according to the specific conventions and the States concerned, specific modalities to ensure some degree of participation in the decision-making process – notably on financial issues – while not necessarily requiring their systematic participation with the right to vote in the Committee of Ministers. The Secretary General in this regard proposes the signing of bilateral agreements or memoranda of understanding with the States concerned which set out a sort of a regular voluntary contribution to the financing of activities related to the implementation of the convention.²² However, in order not to deter some non-member States from acceding to open conventions for financial reasons, a reasonable system taking into account a country's resources could be envisaged.

25. On the issue of the financial contribution of non-member States, the Committee of Ministers has decided that they shall be invited to make a minimum of €10 000 financial contribution when they participate as of right in the follow-up mechanism of a convention to which they are a Party.²³

16. *Ibid.*, paragraph 70.

17. The Committee of Ministers has invited the Secretary General to provide for the publication of information on the launching of negotiations on new conventions, including on the Council of Europe website, Committee of Ministers – 1168th session, 10 April 2013, CM/Del/Dec(2013)1168, Item 10.2, paragraph 4, [https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Del/Dec\(2013\)1168&Language=lanEnglish](https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Del/Dec(2013)1168&Language=lanEnglish).

18. The Committee of Ministers has decided, where there is provision in a convention for accession by non-member States, to provide, in cases where there is no convention-based body including all the Parties, for participation with a right to vote by non-member States in steering committee or ad hoc committee meetings pertaining to the conventions to which those States are Parties, *ibid.*, paragraph 14.

19. *Ibid.*, paragraph 93.

20. Information document, SG/Inf(2012)12, *op. cit.*, paragraph 95.

21. *Ibid.*

22. *Ibid.*, paragraph 97.

26. Amendments of a convention raise the question of whether the Statute and practice of the Council of Europe relating to treaty law should apply (adoption by a majority of the Committee of Ministers as provided by Article 20.d of the Organisation's Statute) or whether it is Article 39 of the Vienna Convention on the Law of Treaties which provides that "a treaty may be amended by agreement between the parties" which prevails.²⁴ In practice, the extent to which Parties which are not member States of the Council of Europe are involved in the proposal, discussion and adoption of amendments to a convention varies significantly. In most cases, they are consulted either by the Committee of Ministers or in the context of a consultation by the Parties, but their agreement is not formally required for the adoption of amendments by the Committee of Ministers.²⁵ The Committee of Ministers may wish in this regard to examine the possibility of allowing the participation and agreement of all the Parties to a convention at the level of the intergovernmental committee responsible for the formulation of proposed amendments.

4. Conclusions

27. Capitalising on the Council of Europe's *acquis* of conventions and promoting them to non-member States has the potential of boosting the profile of the Organisation, its political dimension and its ability to secure its place as guardian of human rights and democracy, not only in Europe, but also in the new sphere of freedoms currently expanding around its borders. Furthermore, in an increasingly globalised world, a number of societal problems can no longer be dealt with in a strictly European context. The Council of Europe has already taken this fact into consideration, for instance as concerns its Convention on Cybercrime and its Convention on the Counterfeiting of Medical Products and Similar Crimes involving Threats to the Public Health.

28. Bearing this in mind, it is important that the Council of Europe maintains its high standards and that these are not compromised by States which do not share them, both as concerns existing conventions which are open or to be opened to accession by non-member States and with regard to future conventions.

29. In the draft resolution, I propose to sum up the manner in which conventions which are open to non-member States can be better promoted in view of the fact that very few of these States have so far acceded to these instruments. I further suggest indicating how future conventions can be made more attractive to non-member States.

30. In the draft recommendation, I suggest that the Assembly invite the Committee of Ministers to take specific measures to include non-member States in the life of the conventions they have acceded to, notably with regard to financial matters, amendments and taking part in implementation decisions.

23. See CM/Del/Dec(2013)1168, op. cit., Appendix 8, paragraphs 1 and 2, The Committee of Ministers has further decided that when participation in a convention by non-member States is envisaged during the drafting procedure, a provision on financial contribution from those States should be inserted. See paragraph 13.

24. http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

25. The only notable exception in this respect is the Council of Europe Convention on Action against Trafficking in Human Beings (CETS No. 197), which requires, for the adoption of amendments by the Committee of Ministers, the unanimous consent of the Parties to the convention.