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EUROPEAN COMMITTEE ON CRIME PROBLEMS
(CDPC)

COMMITTEE OF EXPERTS
ON THE OPERATION OF EUROPEAN CONVENTIONS
ON CO-OPERATION IN CRIMINAL MATTERS
(PC-OC)

Legal Opinion

on the Convention on the Transfer of Sentenced Persons and the principle of the reciprocity of reservations

Introduction

At its 63rd plenary session (13-15 November 2012), the PC-OC had a discussion on a question addressed to it by the CDPC Bureau and raised by two member states concerning the application of Article 12 of the Council of Europe Convention on the Transfer of Sentenced Persons.

The PC-OC concluded that it is their common understanding that Article 12 allows both the sentencing state and the administering state to grant pardon, amnesty or commutation of the sentence. Several experts underlined that the aim of the Convention is to allow sentenced persons to serve the remainder of their sentence in their own society so as to facilitate their rehabilitation and that the successful application of this Convention requires a climate of mutual trust between parties. A legal question was raised about the possible application of the reciprocity principle to reservations and declarations under this Convention.
The majority of the PC-OC members present decided:
- that expertise on international public law was needed to address this question;
- to instruct the PC-OC Mod to take into account the discussion on the issue raised in the general context of further consideration of problems related to the implementation of the Convention on the Transfer of Sentenced Persons.

The PC-OC Mod considered at its 15th meeting (6-8 March 2013) the question raised in the plenary whether the reciprocity principle can apply to reservations and declarations of Council of Europe conventions, such as the Convention on the Transfer of Sentenced Persons, that have no specific provision in this regard.

The PC-OC Mod took note of the information provided by the Secretariat on the legal opinion received on this question by the Legal Advice Department and Treaty Office and decided to ask the Secretariat to provide the plenary with the full text of the legal opinion in order to decide on further steps.

The full text of the legal opinion is reproduced below.

"Re: Convention on the Transfer of Sentenced Persons and the principle of the reciprocity of reservations

On 20 November 2012 you referred to the Legal Advice Department a request from the Committee of Experts on the operation of European conventions on co-operation in criminal matters (PC-OC) for an opinion on whether the principle of the reciprocity of reservations and declarations can be applied to treaties which contain no explicit provisions on this subject, for example the Convention on the Transfer of Sentenced Persons (ETS No.112).

The first point that should be made is that the problem of reservations to multilateral treaties is highly complex. Successive Special Rapporteurs of the United Nations International Law Commission have noted that the question of reservations has always been a topical issue giving rise to both doctrinal and political controversy and to differences of opinion, which often can be overcome only by compromises between the States concerned.[1] The legality of reservations and the effects of an unlawful reservation as well as the system of objections to reservations are among the main problems identified in treaty law. The present opinion is not therefore intended to be a further theoretical study in this field but to provide the PC-OC with a basis for its discussions on the specific case it is considering.

I. The reservation regime in international law and the principle of reciprocity

The Vienna Convention on the Law of Treaties gives the following definition of a reservation:

> " "Reservation" means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State" (Article 2, paragraph 1.d)".

[1] See the series of reports by Mr Alain Pellet, Special Rapporteur of the International Law Commission on reservations to treaties: http://www.un.org/law/ilc/

A reservation therefore allows a State to become party to a treaty while excluding from its commitments one or more of the treaty's provisions which do not meet with its approval. From this point of view, the possibility of making reservations facilitates States' participation in treaties. However, too many or too broadly worded reservations may weaken the impact of a treaty.

In his report on the review of Council of Europe Conventions, the Secretary General notes that Council of Europe conventions deal with the subject of reservations in various ways.[2] A number of them (such as the European Landscape Convention, CETS No. 176) contain no provisions on this subject, with the result that reservations formulated by States upon signature, ratification or accession are lawful unless they are incompatible with the object and purpose of the treaty (in accordance with Article 19.c of the Vienna Convention on the Law of Treaties). Other conventions expressly allow them (see the European Convention on Extradition, CETS No. 24, Article 26) or expressly forbid them (see the European Convention on the Exercise of Children's Rights, CETS No. 160, Article 24). Others impose restrictions or conditions on the formulation of reservations (see the European Convention on Human Rights, CETS No. 5, as amended by Protocols Nos. 11 and 14, Article 57). Yet others allow reservations only if they relate to certain expressly indicated provisions and to none of the others (see the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, CETS No. 210, Article 78). Lastly, there are those which, while providing for the possibility of reservations to certain provisions of the convention, allow them only for a limited period of time, after which they have to be renewed if they are to remain valid, with the Contracting Party, in the event that it upholds its reservation, being required to explain the reasons for its continuance (see the Criminal Law Convention on Corruption, CETS No. 173, Articles 37 and 38).

The possibility of making reservations to Council of Europe conventions therefore varies from one convention to the next.

Moreover, it would appear from observed practice that the general reservation regime, as deriving from Section 2 of the Vienna Convention on Treaty Law and the practice of the UN Secretary General, applies, in the absence of specific provisions, to the reservations made to Council of Europe conventions. This concerns the time when reservations are made, the functioning of objections, the role of the depository, etc. Particular mention should be made of the important role played by the Committee of Experts on Public International Law (CAHDI) since 1998 in its capacity as the "European Observatory of Reservations to international Treaties". The CAHDI is therefore responsible for examining the list of potentially problematic reservations and declarations to Council of Europe treaties.

The principle of reciprocity with regard to reservations derives from Article 21 of the Vienna Convention on Treaty Law concerning the legal effects of reservations and of objections to reservations, which reads as follows:

> "1. A reservation established with regard to another party (…):
> (a) modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and
> (b) modifies those provisions to the same extent for that other party in its relations with the reserving State.
> 22. The reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se.*
> 3. When a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation."

The principle of reciprocity works both ways: a State which has accepted a reservation can rely on it in its relations with the reserving State and the latter may not require other parties to the treaty to implement a provision which it has excluded from its own obligations.[3]

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[2] SG/Inf(2012)12 of 16 May 2012, paragraphs 135-142

[3] See in this respect: the Case of Certain Norwegian Loans, Judgment of 6 July 1957: I.C.J. Reports 1957, p.24.

The reservation clause set out in the "Model Final Clauses for Conventions and Agreements concluded within the Council of Europe", adopted by the Committee of Ministers in 1962, and amended in 1980, which refers to the principle or reciprocity, is very clear on this point:

> "Article e
> (…) 3. A Party which has made a reservation in respect of a provision of (this Agreement) (this Convention) may not claim the application of that provision by any other Party; it may, however, if its reservation is partial or conditional, claim the application of that provision in so far as it has itself accepted it."

However, very few Council of Europe conventions contain the above provision.[4] At the same time, the absence of a reciprocity clause in most Council of Europe conventions does not necessarily mean that the principle of reciprocity is ruled out. Indeed, we have seen that, in the absence of specific provisions, the general reservation regime applies to Council of Europe treaties.

A significant clarification must nonetheless be added. The principle of reciprocity is subject to limits, which mainly pertain to the nature and object of the treaty or the very content of the reservation.

The applicability of the principle of reciprocity can be directly related to the reciprocal or non-reciprocal nature of the obligations entered into under a treaty. The explanatory report to the European Agreement on "Au Pair" Placement (ETS No.68) for instance states, with regard to Article 18 concerning reservations, that: "(it) does not contain the usual reciprocity clause as it would be incompatible with the general character of the Agreement, which is not of the type to create reciprocal undertakings; moreover, it would have been in contradiction with the field of application ratione personae of the Agreement since it is not limited solely to nationals of the Contracting States." Generally speaking, human rights conventions do not create reciprocal obligations between States Parties, but simply impose obligations on States in respect of persons within their jurisdiction. According to legal specialists, in this case the principle of reciprocity does not apply as there is no reason for it to apply: The fact that the government of one State has accepted the reservation of another State which restricts the political rights of the latter's citizens has no consequences for the citizens of the former.[5]

Similarly, the principle of reciprocity cannot be applied if the circumstances which led a State to make a reservation are specific to that State (in view, for example, of its national legislation) or if the other States had the possibility of making the same reservation.[6]

It follows from the above that the principle of the reciprocity of reservations can be relied on in the absence of explicit provisions in a treaty but that there are limits which must be assessed on a case-by-case basis.

II. Convention on the Transfer of Sentenced Persons (ETS No.112)

As the PC-OC noted at its meeting in November 2012, contrary to other Council of Europe criminal law conventions, the Convention on the Transfer of Sentenced Persons does not contain any reference to the principle of reciprocity. The starting point for the discussions within the PC-OC, which led to the request for this opinion, was the application of Article 12 of the Convention and the declaration which one State had made in respect of this provision.[7]

It should also be borne in mind that Article 12, entitled "Pardon, amnesty, commutation", stipulates that:

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[4] The European Convention on Extradition (ETS No.24) provides an example of this in Article 26§3, as do the European Convention on Mutual Assistance in Criminal Matters (ETS No.30, Article 23§3), the European Agreement on the Transmission of Applications for Legal Aid (ETS No.92, Article 13§3) or, more recently, the Council of Europe Convention on the Prevention of Terrorism (CETS No.196, Article 20§4).

[5] P.-H. Imbert, "Les réserves aux traités multilatéraux : Evolution du droit et de la pratique depuis l'avis consultatif donné par la Cour Internationale de Justice le 28 mai 1951", Editions A. Pedone, 1979, p.255.

[6] See P.-H. Imbert, op. cit., pp.258-259.

[7] PC-OC(2012)13, List of decisions taken at the 63rd meeting of the PC-OC, 13-15 November 2012, item 5-e-1.

> "Each Party may grant pardon, amnesty or commutation of the sentence in accordance with its Constitution or other laws."

Two States, Germany and Azerbaijan, have made a declaration in respect of this article.

Azerbaijan's declaration, made in January 2001, reads as follows:

"In accordance with Article 12, of the Convention, the Republic of Azerbaijan declares that decisions regarding the pardons and amnesties of sentenced persons transferred by the Republic of Azerbaijan should be agreed with the relevant competent authorities of the Republic of Azerbaijan."

Germany's declaration, made in October 1991, reads as follows:

> "In view of the federal structure of the Federal Republic of Germany and the fact that the Länder have competence in respect of decisions regarding pardons, the Federal Republic of Germany reserves the right to transfer the enforcement of judgments to another member State in accordance with the Convention only on condition that, on the basis of a general or case-to-case declaration by the administering State, pardon will be granted in the administering State only in agreement with the German pardoning authority."

To decide whether or not the reservations regime described above applies to these declarations, it would first be necessary to determine whether they are unilateral "declarations" by these States, or whether, on the contrary, they are "reservations", notwithstanding the term used to designate them.

It should be pointed out that the possible requalification of a declaration as a reservation does not come within the remit of the Secretariat of the Council of Europe, whose role as depositary is confined to verifying the formal validity of the reservations and declarations it receives. It is indeed for each State Party to carry out such an analysis and determine its legal consequences. As regards the declarations concerning Article 12 of the Convention on the Transfer of Sentenced Persons, the Legal Advice Department can only note that there has been no reaction, and indeed no objection, by other Parties to the Convention.

If the declarations concerning Article 12 of the Convention on the Transfer of Sentenced Persons were to be considered as reservations within the meaning of Article 2 of the Vienna Convention on Treaty Law, the question whether such a reservation would be subject to reciprocal application would still have to be determined. As explained above, the application of the principle of reciprocity depends to a large extent on the content of each reservation. Similarly, if these declarations were reservations, the scope of the principle of reciprocity in their respect would have to be determined.

The Legal Advice Department trusts that these elements will be useful to the work of the PC-OC. Please do not hesitate to contact us if you have any further questions."