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EUROPEAN COMMITTEE ON CRIME PROBLEMS
(CDPC)

Committee of Experts
on Transnational Criminal Justice
(PC-TJ)

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REPORT

A TENTATIVE PLATFORM FOR THE DISCUSSION ON THE FOLLOW-UP OF THE "RENEWAL" SECTION OF THE "NEW START REPORT"

by

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1. Introduction on the assignment to the present Committee.

In view of the first meeting of the Committee of Experts on Transnational Criminal Justice (PC-TJ), convened for the days 20, 21 and 22 September 2004, the two scientific consultants to the Committee were asked to elaborate an input-document on developments in international co-operation in the penal field, for the purposes of a follow-up to the 'Renewal' section of the 'New Start Report' ([1]).

In the document named 'Specific Terms of Reference', dated 30 June 2004 ([2]), one can read that the Committee PC-TJ is expected to study the 'Renewal' section of the New Start Report "with a view to making proposals for follow-up action, in particular on the questions concerning the rights and guarantees of the individual".

We all know that the concern about Human Rights is crucial for the Council of Europe. However, the expression '*in particular*' used in the 'Terms of Reference' clearly shows that the Committee PC-TJ is not prevented, in its future work, from making proposals beyond the field of the 'rights and guarantees of the individual'. And indeed, should we limit the scope of the follow-up action to "the questions concerning the rights and guarantees of the individual", our approach would not be consistent with the general spirit of the 'Renewal' section of the New Start Report.

As a matter of fact, the New Start Report was drafted after a deep reflection on developments in international co-operation in criminal matters and contains the general outlines of an extremely ambitious and wide-scope project for "*a European area of shared justice*", in pursuance of a specific decision taken on 21 September 2001 by the Committee of Ministers of the Council of Europe. Furthermore, I believe that the leading idea of the New Start Report can be found in the opening chapter of the 'Renewal' section – whose title is *Reconsidering the role of governments and that of judicial authorities* – where a new approach is envisaged "to the relations between sovereignty and international co-operation": the Reflection Group pointed out that

> It is not a matter of doing away with or undermining sovereignty; it is a matter of redefining the notion of sovereignty when it comes to the exercise of a function – namely justice – that States can no longer exercise individually. Indeed no State alone is capable of effectively responding to crime. It is thus worth reflecting on whether States could not freely enter into agreements whereby they accept to share with other States their rights and duties in matters pertaining to their response to crime.

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[1] CDPC (2002) 1 / PC-S-NS (2002) 6 / APPENDIX II, Strasbourg, 30 April 2002.
The subtitle of the 'New Start Report' is *Transnational Justice: a European Area of Shared Justice*.

[2] PC-TJ (2004) 01.

If these words of the opening chapter (chapter *A*) may represent the general philosophy established in the 'Renewal' section, I think that *all* the other chapters of the 'Renewal' section should be duly investigated in order to devise proposals for follow-up action: not only chapter *B* (Upholding the rights of individuals), but also chapter *C* (Enhancing the trend towards shared responsibility) and chapter *D* (Establishing a common platform).

2. The final goal of the follow-up action entrusted to the present Committee.

So far, the traditional approach in the field of international co-operation in criminal matters considered and treated the various topics – such as corruption, organized crime, terrorism, etcetera – as if they were separate 'diseases' of human society, to be dealt with separately. The New Start reflects a quite different approach, namely that crime must be dealt with *as a whole* and *by the whole*. As a whole, because each variety of crime usually appears in the company of other varieties of crime. By the whole, because the universe of crime is the universe of communications and that of financial transactions, i.e. the world: no one town, no one province, no one country may efficiently respond to crime without the active support of other towns, other provinces, other countries.

This being the philosophy of the New Start, the Committee PC-TJ should move with a double awareness: the first one is that the legal basis for transnational criminal justice (TCJ) shall finally meet a radical change, in conformity with the new philosophy; the second one is that gradualness and a good amount of wisdom will help the Committee to finally overcome the resistance with which its proposals will probably meet.

In any case, since the legal basis for transnational criminal justice is supposed to radically change according to the New Start principles, the final goal of the follow-up action entrusted to the Committee PC-TJ will be (no matter how gradually) *a new legal text defining that basis*. And since a legal text in international matters is *a treaty*, then the final goal of the Committee PC-TJ will be, in my opinion, the outlining of a draft-treaty whereby States signatory:

- acknowledge that TCJ is a common responsibility of all signatory States: there is no difference between 'my interest' and 'your interest', there is only 'our common interest';
- define what is that common interest, which means identifying the outlines of their common purpose in pursuing TCJ;
- identify the place and role of victims within TCJ;
- introducing a common obligation to respect Human Rights (notably the principles of the Convention) in TCJ;
- design some basic procedural rules for determining jurisdiction (not inspired in outmoded inter-State habits, but rather inspired in usual national rules);
- recognize the rights of the persons concerned (accused, victims, etc.) when the procedure is unduly stopped or slowed down (delays);
- introduce rules avoiding the possibility for the persons concerned to appeal (or introduce other remedies) against the same facts in more than one State;

- accept the "judiciary" nature of the TCJ and therefore limit the scope of intervention of the executive power in these matters, although introducing some exception that in practice may allow national governments – at a first stage and where necessary – to keep some control on what is going on.

3. Some specific points for the discussion.

The idea of preparing the future Treaty on Transnational Criminal Justice might be considered too ambitious for a Committee which is requested to "make proposals for follow-up action", but – in any case – what the Committee PC-TJ is certainly asked to do is to lay some more bricks on the building whose foundations the New Start Report started to lay. In other words, the Committee PC-TJ is not really expected to *finish* the building (a claim which would probably turn out to be unrealistic), but is certainly expected to take the necessary *first steps* in order to *change the legal framework* of international co-operation in criminal matters by *tracing the outlines* of the new treaty in conformity with the New Start principles.

In order to make these *first steps* easier, I singled out five specific passages, taken from the 'Renewal' section of the New Start Report, whose issues may deserve – in my opinion – to be discussed within the Committee and developed in the form of some follow-up proposals. The first, second, third and fourth passages, which are quoted below in this paragraph, are taken from chapter *B* of the 'Renewal' section. The fifth passage is taken from chapter *C* of the same section and its content will be treated separately in the final paragraph of this paper, due to the particular emphasis given to it by the drafters of the New Start Report.

The issue of the first passage concerns the relationship which should be established between Transnational Criminal Justice and the provisions contained in the European Convention for the Protection of Human Rights, in particular Article 5 ('Right to liberty and security') and Article 6 ('Right to a fair trial'):

> A weakness in the present system is that ECHR provides insufficient protection to the individual in extradition proceedings as well as in proceedings regarding other mutual legal assistance. Art. 5 of the ECHR is only partly applicable to detention in extradition proceedings, since the important provision of Art. 5 paragraph 3, which provides that detention shall not last longer than a reasonable time, is not applicable to a person detained for the purpose of extradition. Moreover, Article 6 of the Convention is not, according to the case-law, applicable to extradition proceedings or to proceedings regarding mutual legal assistance in another country.

The issue of the second passage concerns the responsibility of a State for delays in cooperation, which is also connected to Article 6 of the ECHR, in particular paragraph 1, concerning the right to a fair and public hearing *within a reasonable time* by an independent and impartial tribunal established by law:

> Since delays in executing requests for co-operation are a frequent cause of delays in ongoing criminal proceedings in the requesting State and sometimes result in an unnecessary prolongation of the deprivation of liberty of the suspect/accused, it is highly desirable that the State that causes such delays should be ultimately held responsible for the delays according to the standards of Article 6, paragraph 1, of the ECHR.

The issue of the third passage concerns the need for a denial of 'excess remedies', which is strictly connected to the subject of the delays in the proceedings of international cooperation:

> Persons should neither be less well treated nor better treated in the framework of an international procedure than they are in the framework of, for example, an inter-city procedure. All must be equal before justice. It follows, for example, that persons should not be allowed remedies or appeals in matters pertaining to international co-operation that they would otherwise not enjoy in national procedures. In particular, the right to challenge the same decision twice, one in State A, the other in State B, cannot be admitted.

The issue of the fourth passage concerns the rights of the victims and the need for them to be duly taken into consideration by the system:

> The last twenty years have witnessed in most European countries an important change in the place afforded to the victim in crime policy and therefore in the criminal procedure. Presently, "it must be one of the fundamental functions of criminal justice to safeguard the interests of the victims of crime. To this end it is necessary both to enhance the confidence of victims in criminal justice and to have adequate regard, within the criminal justice system, to the physical, psychological, material and social harm suffered by victims" ([3]). Criminal justice, within borders as much as across borders, must therefore have victims as a major concern. It is desirable to draw up a catalogue of the rights of the victims 'at international level'. In this respect, facilitation of the transmission of complaints was mentioned as a topic to be discussed. [...] The question [is...] that of avoiding impunity. It is linked to the rights of the victim.

[3] Recommendation N° R (96) 8 of the Committee of Ministers to member States on Crime Policy in Europe in a time of change.

4. In particular, the point concerning the settlement of disputes

The issue of the fifth passage concerns the settlement of disputes and is taken from the paragraph on "*positive conflicts*" contained in chapter *C* of the 'Renewal' section:

> Where more than one State has an interest in exercising jurisdiction, or a duty to exercise jurisdiction, a system could be envisaged for determining - preferably on objective grounds and at a very early stage - which State should be given priority. [...]
>
> The objective is to devise a practical way to determine, on the face of the concrete circumstances of the case, using objective criteria, how better to ensure that justice is done and that it is done in the best possible way.
>
> The first stage of the system could be an optional procedure (bilateral or multilateral, depending on how many States are involved). The provisions of Part IV of the European Convention on the Transfer of Proceedings in Criminal Matters might be seen as an example in this respect. The solution would be found by the States involved.
>
> Should such a procedure fail, the second stage could be a 'clearing house' procedure conducted within an intergovernmental context (in principle, the Council of Europe). The solution would be found by the clearing house in conjunction with the States concerned and proposed to them.
>
> Should the second stage also fail, one might envisage a procedure conducted by some independent body. The solution would be found by that body and 'imposed' upon the States concerned. This stage could be compared to the arbitration provisions that can be found in some CoE Conventions (namely, Terrorism, Money Laundering and Illicit Traffic by Sea, as well as the draft Comprehensive Convention).
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> A side-benefit of such a system would be to provide a legal framework which would prevent or reduce present practices of prosecutorial (or other) forum-shopping. Such a system supposes that objective criteria on jurisdiction (priority between conflicting jurisdictions) must be worked out.

As far as the '*first stage*' is concerned, the lines for a possible solution are pointed out in the quoted passage, where the provisions of Part IV of the European Convention on the Transfer of Proceedings in Criminal Matters (1972) are referred to. For greater convenience of the Committee, I quote the relevant articles of Part IV of this Convention:

> *Article 30*
> *1)* Any Contracting State which, before the institution or in the course of proceedings for an offence which it considers to be neither of a political nature nor a purely military one, is aware of proceedings pending in another Contracting State against the same person in respect of the same offence shall consider whether it can either waive or suspend its own proceedings, or transfer them to the other State.
>
> *2)* If it deems it advisable in the circumstances not to waive or suspend its own proceedings it shall so notify the other State in good time and in any event before judgment is given on the merits.

Article 31

1) In the eventuality referred to in Article 30, paragraph 2, the States concerned shall endeavour as far as possible to determine, after evaluation in each of the circumstances mentioned in Article 8, which of them alone shall continue to conduct proceedings. During this consultative procedure the States concerned shall postpone judgment on the merits without however being obliged to prolong such postponement beyond a period of 30 days as from the dispatch of the notification provided for in Article 30, paragraph 2.

2) The provisions of paragraph 1 shall not be binding:

a) on the State dispatching the notification provided for in Article 30, paragraph 2, if the main trial has been declared open there in the presence of the accused before dispatch of the notification;

b) on the State to which the notification is addressed, if the main trial has been declared open there in the presence of the accused before receipt of the notification.

Article 32

In the interests of arriving at the truth and with a view to the application of an appropriate sanction, the States concerned shall examine whether it is expedient that one of them alone shall conduct proceedings and, if so, endeavour to determine which one, when:

a) several offences which are materially distinct and which fall under the criminal law of each of those States are ascribed either to a single person or to several persons having acted in unison;

b) a single offence which falls under the criminal law of each of those States is ascribed to several persons having acted in unison.

Article 33

All decisions reached in accordance with Articles 31, paragraph 1, and 32 shall entail, as between the States concerned, all the consequences of a transfer of proceedings as provided for in this Convention. The State which waives its own proceedings shall be deemed to have transferred them to the other State.

Article 34

The transfer procedure provided for in Section 2 of Part III shall apply in so far as its provisions are compatible with those contained in the present Part.

When we read the above-quoted paragraph on '*positive conflicts*' of chapter *C* of the 'Renewal' section, our attention is particularly drawn to the issues of a 'clearing house' (the possible *second stage*) and of an 'independent body' (the possible *third stage*) entrusted with the task of settling disputes on jurisdiction. As for the hypothesis of an 'independent body', the lines for a possible solution are also pointed out by the drafters of the New Start, where the 'arbitration provisions' of some CoE Conventions are referred to. Again, for greater convenience of the Committee, I quote one of these *arbitration provisions*, namely the one contained in the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (1990):

> *Article 42 – Settlement of disputes*
>
> *1)* The European Committee on Crime Problems of the Council of Europe shall be kept informed regarding the interpretation and application of this Convention.
>
> *2)* In case of a dispute between Parties as to the interpretation or application of this Convention, they shall seek a settlement of the dispute through negotiation or any other peaceful means of their choice, including submission of the dispute to the European Committee on Crime Problems, to an arbitral tribunal whose decisions shall be binding upon the Parties, or to the International Court of Justice, as agreed upon by the Parties concerned.

I believe that the Committee PC-TJ should study in some depth this matter, which could be properly investigated, in my opinion, together with the more general issue of *making it easier to settle disputes*. In fact, this general issue, and the related subject of the task entrusted to the European Committee on Crime Problems (CDPC) on this general matter – in spite of being formally dealt with in chapter *E* of the 'Consistency' section of the New Start Report – encompasses the more specific issue of jurisdiction disputes which is dealt with in chapter *C* of the 'Renewal' section.

It seems to me that the drafters of the New Start Report gave great importance to these topics. And indeed, the Recommendation N° R (99) 20 concerning "the friendly settlement of any difficulty that may arise out of the application of the Council of Europe conventions in the penal field" (together with its procedural guidelines) is the only official document appended as an attachment to the Report (see *Addendum II*). It is fit to say that this Recommendation shows the same philosophy which characterizes the aforesaid *arbitration provisions*: see, for example, Article 42 of the Convention on Money Laundering, just quoted above (in particular as far as the role of the CDPC is concerned).

And indeed, we read in Recommendation N° R (99) 20 that the Committee of Ministers:

> Recommends the governments of member States:
>
> *a.* To continue to keep the European Committee on Crime Problems (CDPC) informed through the PC-OC ([4]) about the application of all the Conventions in the Penal Field and of any difficulty that may arise thereof;
>
> *b.* Pending the entry into force of provisions formally extending the CDPC's role in this area to the European Convention on Extradition and the European Convention on Mutual Assistance in Criminal Matters, to accept that the CDPC be called upon to do whatever is necessary to facilitate a friendly settlement of difficulties arising out of the application of those Conventions;
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> *c.* when experiencing difficulties that may be seen as concerning two or more Conventions simultaneously, to assign them jointly to the CDPC.

Of course, the Committee PC-TJ must keep in mind that other Committees are dealing with other specific chapters of the New Start Report. However, it certainly can decide on how best to cover its terms of reference and, eventually, if and where it sees fit, deal with matters bordering its terms of reference.

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[4] PC-OC is the Committee of Experts on the Operation of European Conventions in the Penal Field.