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on Transnational Criminal Justice
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Report
"RENEWAL OF THE START PROGRAMME"

by

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Renewal of the START Programme

Most of the thoughts and ideas which I want to contribute to the START-programme are already mentioned in the "Renewal" chapter of the NEW START report of 18 September 2002 (PC-S-NS (2002) 7), pages 13-22. I refer to this document as "Report 2002".

I want to focus on three points which – in my view – are possible keys to a new start. First, we have to reconsider the notion and impacts of sovereignty in relation to human rights (infra A). This approach will be illustrated by two ways of developments: a comparison of the present picture of international co-operation with the scheme in the NATO-Forces Agreement (infra B) and a proposal to mould the thoughts of the Report 2002 into an additional protocol of the European Human Rights Convention (ECHR) which should deal with general problems of transnational co-operation in criminal matters (infra C).

A New starting point : the individual, not sovereignty

General

As already pointed out in the Report 2002, pp. 14 et seq., the problem of a really "new" start is to redefine sovereignty. The formula of the Report 2002 (pp. 20 et seq.) is: "Shared interest plus shared responsibility means shared exercise of sovereignty". In this context, the Report 2002 contains a lot of important ideas and thoughts. In this paper, I will try to reshape them in a new context: Until now, the idea of basic rights of the defendant or the victim is considered as an obstacle to State action, e. g. to transnational prosecution. Thus at first instance we have the State and its interests which are – in second instance – hindered by human rights. The philosophy behind this order is that the law seems not to be made for the sake of the individual – be it the offender or the victim – but rather for the sake of a State as an institution which is "more" than or "different" to the individual and his/her interests.

However, law is made for the benefit of human beings, not for the benefit of an abstract State. The adequate way of arguing is to start from the individual – be it an offender or an victim – and ask whether there are reasons which justify any State action which touches upon the individual's interests.

This order of arguing is used in the reasoning for solving basic rights issues. It is commonly accepted that: If we want to justify a certain State action, we have to look for any basic rights which affected or encroached upon. If a right is affected, we have to seek for justifications for this act in the light of the principle of proportionality.

This involves:

- identifying a possible purpose of the action
- examining the effectiveness of the State's act(ion) with regard to this purpose and then
- its necessity (i. e.: is there a milder means which is effective to the same extent as the State's act[ion]) and finally
- its proportionality

Without going into the details of this model, we can draw the conclusion that there has always to be a constitutional control which is founded on basic rights, for every State act(ion). This means: basic rights are not impediments to the State; the State rather acts legitimately only if its actions are in accordance with basic rights. Legitimacy is developed through basic rights. If there are additional aspects to be regulated concerning sovereignty this must not be detrimental to basic rights. If this is the case, it is a mere question of sovereignty to regulate it or not. This, however, does not make it superfluous to give specific reasons for this assertion of sovereignty.

Triangle: State A – State B – individual

We have to apply this idea to the problems of transnational criminal co-operation. The basic situation is that there are two States involved: the requesting and the requested State. In addition, there is the individual. If the latter's interests have to be safeguarded in the way described supra, this means that the individual has to play a role in questions of legitimacy and legal justification. Therefore, we can say that in the basic situation there are three parties involved, not only two.
The classical traditional model, however was one with only two parties, the requesting and the requested State. Only by chance – if at all – the individual might benefit from the balancing of the interests between both. The new model – which is already reflected by the Report 2002 - is a three parties' model:

Requesting State **Requested State**

Individual

Especially the relation between the requested State and the individual is governed by the justification model described supra. But this justification model also gverns the relation between the requesting State and the individual.

The following considerations will show the concrete implications. Just to give a first example: Extraditing a person without the requirement of double criminality is justified under this scheme, as I have shown in my paper delivered in February this year: We have to ask for basic rights that are juxtaposed to extradition *without* the double criminality requirement (which is the State action mentioned supra, not extradition as such). We do not even find a basic right that contravenes. If we had one, extradition would be justified by the legal interests of the requesting State, unless there are extraordinary cases as shown in my paper in detail.

Like double criminality, all traditional requirements and bars to extradition and co-operation in general, like speciality (Report 2002, p. 19) or the political/military/fiscal offence exceptions, have to be reconsidered.

B NATO-Forces Agreement

As a first example, I want to focus on the NATO-Forces Agreement and its article VII. The NATO-Forces Agreement was developed in the early 1950s. It was meant to resolve the problems arising out of military needs: troops of the sending State are stationed and living within the territory of the receiving State. This involves a lot of problems in criminal prosecution: Which State has the power to punish? Which procedure shall be applied? To what extent has the other State to assist?

These problems have been settled in the agreement in a very generous way. This becomes obvious when looking at the provisions of article VII:

> *"Subject to the provisions of this Article,*
> *1. a) the military authorities of the sending State shall have the right to exercise within the receiving State all criminal and disciplinary jurisdiction conferred on them by the law of the sending State over all persons subject to the military law of that State;"*

This means that e.g. US authorities may conduct not only on-site prosecutions in a foreign country, the receiving State, e.g. Germany or Italy, but a US court martial may also try the accused within the German or Italian territory and apply US law without any collaboration of German or Italian authorities.

In the traditional context of international co-operation this seems to be impossible.

Paras. 2 and 3 contain a well-balanced solution to cover positive conflicts of jurisdiction. It is not the power to punish a person, it is the question which State may exercise this power, which must be ascertainable in every single case. However, there are some rules concerning the general solution ("primary right to exercise jurisdiction", c.f. sub-para 3) which may be deviated from in a concrete case:

> *"2. a) The military authorities of the sending State shall have the right to exercise exclusive jurisdiction over persons subject to the military law of that State with respect to offences, including offences relating to its security, punishable by the law of the sending State, but not by the law of the receiving State.*
>
> *b) The authorities of the receiving State shall have the right to exercise exclusive jurisdiction over members of a force or civilian component and their dependents with respect to offences, including offences relating to the security of that State, punishable by its law but not by the law of the sending State.*

c) For the purposes of this paragraph and of paragraph 3 of this Article a security offence against a State shall include

(i) treason against the State;

(ii) sabotage, espionage or violation of any law relating to official secrets of that State, or secrets relating to the national defence of that State.

3. In cases where the right to exercise jurisdiction is concurrent the following rules shall apply:

a) The military authorities of the sending State shall have the primary right to exercise jurisdiction over a member of a force or of a civilian component in relation to

(i) offences solely against the property or security of that State, or offences solely against the person or property of another member of the force or civilian component of that State or of a dependent;

(ii) offences arising out of any act or omission done in the performance of official duty.

b) In the case of any other offence the authorities of the receiving State shall have the primary right to exercise jurisdiction.

c) If the State having the primary right decides not to exercise jurisdiction, it shall notify the authorities of the other State as soon as practicable. The authorities of the State having the primary right shall give sympathetic consideration to a request from the authorities of the other State for a waiver of its right in cases where that other State considers such waiver to be of particular importance.

Para. 4 contains in substance also the abolition of the non-extradition of nationals:

4. The foregoing provisions of this Article shall not imply any right for the military authorities of the sending State to exercise jurisdiction over persons who are nationals of or ordinarily resident in the receiving State, unless they are members of the force of the sending State.

Para. 5 provides for a wide-ranging co-operation, including "handing over" which is nothing other than "extradition". This co-operation is very speedy – as practice shows. Above all: it is nearly without any of the classical requirements, such as double criminality or the political or military offence exception:

5. a) The authorities of the receiving and sending States shall assist each other in the arrest of members of a force or civilian component or their dependents in the territory of the receiving State and in handing them over to the authority which is to exercise jurisdiction in accordance with the above provisions.

b) The authorities of the receiving State shall notify promptly the military authorities of the sending State of the arrest of any member of a force or civilian component or a dependent.

c) The custody of an accused member of a force or civilian component over whom the receiving State is to exercise jurisdiction shall, if he is in the hands of the sending State, remain with that State until he is charged by the receiving State.

Para. 6 puts para. 5 in concrete terms as far as classical mutual co-operation (letters rogatory) is concerned. In this field, too, co-operation works nearly without conditions or requirements (with the exception of a minor point regarding the return of objects):

6. a) The authorities of the receiving and sending States shall assist each other in the carrying out of all necessary investigations into offences, and in the collection and production of evidence, including the seizure and, in proper cases, the handing over of objects connected with an offence. The handing over of such objects may, however, be made subject to their return within the time specified by the authority delivering them.

b) The authorities of the Contracting Parties shall notify one another of the disposition of all cases in which there are concurrent rights to exercise jurisdiction.

Para. 7 concerns the death sentence and the transfer of sentenced persons:

7. a) A death sentence shall not be carried out in the receiving State by the authorities of the sending State if the legislation of the receiving State does not provide for such punishment in a similar case.

b) The authorities of the receiving State shall give sympathetic consideration to a request from the authorities of the sending State for assistance in carrying out a sentence of imprisonment pronounced by the authorities of the sending State under the provision of this Article within the territory of the receiving State.

Para. 8 regulates transnational cases *ne bis in idem*. It has to be seen together with paras. 2 and 3. These provisions avoid a *ne-bis-in-idem* situation from the very beginning and reduce the relevance of para. 8:

8. Where an accused has been tried in accordance with the provisions of this Article by the authorities of one Contracting Party and has been acquitted, or has been convicted and is serving, or has served, his sentence or has been pardoned, he may not be tried again for the same offence within the same territory by the authorities of another Contracting Party. However, nothing in this paragraph shall prevent the military authorities of the sending State from trying a member of its force for any violation of rules of discipline arising from an act or omission which constituted an offence for which he was tried by the authorities of another Contracting Party.

Para. 9 provides for transnational standards for the procedure (cf. Art. 6 ECHR):

> *9. Whenever a member of a force or civilian component or a dependent is prosecuted under the jurisdiction of a receiving State he shall be entitled –*
>
> *a) to a prompt and speedy trial;*
>
> *b) to be informed, in advance of trial, of the specific charge or charges made against him;*
>
> *c) to be confronted with the witnesses against him;*
>
> *d) to have compulsory process for obtaining witnesses in his favour, if they are within the jurisdiction of the receiving State;*
>
> *e) to have legal representation of his own for his defence or to have free or assisted legal representation under the conditions prevailing for the time being in the receiving State;*
>
> *f) if he considers it necessary, to have the services of a competent interpreter; and*
>
> *g) to communicate with a representative of the Government of the sending State and, when the rules of the court permit to have such a representative present at this trial.*

Para. 10 regulates the police powers of military units:

> *10. a) Regularly constituted military units or formations of a force shall have the right to police any camps, establishments or other premises which they occupy as the result of an agreement with the receiving State. The military police of the force may take all appropriate measures to ensure the maintenance of order and security on such premises.*
>
> *b) Outside these premises, such military police shall be employed only subject to arrangements with the authorities of the receiving State and in liaison with those authorities, and in so far as such employment is necessary to maintain discipline and order among the members of the force.*

Para. 11 obliges the member States to provide certain legislation:

> *11. Each Contracting Party shall seek such legislation as it deems necessary to ensure the adequate security and protection within its territory of installations, equipment, property, records and official information of other Contracting Parties, and the punishment of persons who may contravene laws enacted for that purpose.*

In sum one can say:

- The agreement provides for a flexible mechanism concerning conflicts of jurisdiction;
- It establishes a speedy co-operation between the States, which is scarcely subject to conditions;
- It even allows for a trial on foreign soil according to foreign law;

If we apply the basic rights test described supra, we realize that these achievements do not collide with basic rights except in extraordinary situations; as far as the death penalty is concerned, see para. 7. The NATO-Forces Agreement and its article VII show what is feasible in the respect of law if the aspect of sovereignty is turned down to a minimum. In the NATO-Forces Agreement, traditional aspects of sovereignty play a minor role because there is another State-interest, the military defence, which requires, in respect of transnational co-operation in criminal matters, something which goes beyond traditional concepts of sovereignty.

Of course, one could argue that these solutions are due only to the special military situation and the stationing of troops abroad. This argument, however, misses the point. One example is sufficient to show what is legally feasible even under the control of basic rights, on the one hand, and, on the other hand, to what extent traditional sovereignty-based requirements can be set aside if sovereignty in the form of military interests so requires. Thus these military interests are only one example for the traditional concept of sovereignty.

If we depart from such a traditional concept and ask, in general, what is legally feasible if sovereignty aspects are reduced to a minimum, then we have the Agreement as a striking example.

The consequence should be: Why and for what reason are States prevented from transposing the NATO example to transnational co-operation in general. The example has shown the range of possibilities. If we do not use them, it is not due to basic rights concerns of the individual, but to aspects of classical sovereignty.

The European arrest warrant already shows a trend in this direction: it obliges the EU-States to abolish the granting procedure, which is a remnant of classical sovereignty. This initiative should be considered in general terms.

The fact that service of procedural documents and judicial decisions by service of the post – and not via the time-consuming channels of traditional co-operation (see Report 2002, p. 15) – is considered a progress reflects an old conception of sovereignty. Such a remnant can only be justified as long as one considers it an intrusion into foreign sovereignty to use channels of communication which every private person may use. The background clearly is that especially the granting authorities, i.e. authorities of the executive and not of the judicial branch, want to exercise control. This has nothing to do at all with the protection of human rights.

Likewise, modern means of communication should be fostered (see Report 2002, p. 15). This should include the transnational use of – *inter alia* – email between judicial authorities of different States without the need to have the permission (or something alike) of a granting authority.

Generally speaking, the trend to "judicialisation" (Report 2002, p. 16) must be fostered.

There is also a trend to establish transnational cooperating teams. This is an appropriate solution for transnational cases. Traditional sovereignty has considerable problems with such developments because co-operation in criminal matters is not considered to be purely a matter for judicial authorities, but also for executive and government authorities.

On the other hand, aspects of sovereignty are overestimated when it comes to combating certain areas of crime such as organized crime or drug trafficking. The relevant documents establish national powers to punish or oblige member States to do so for many situations. This creates a conflict of national jurisdictions, but the legal instruments do not offer a solution to these conflicts.

The idea behind this is to create a world-wide "net" of national jurisdictions in order that a suspect may not escape justice. However, once a suspect has been apprehended, the need for that whole net is reduced in the given case. It is not "necessary" in the sense described supra. If States maintain their power to punish, this is also a remnant of classical sovereignty: we do not give away what we have.

On the other hand, one important area of crime is dealt with in a very strange way if we consider the problem from the perspective of the individual: I am thinking of unlawful arms trade. From the point of view of the individual and especially that of a possible victim it would be strongly necessary to control and punish transnational arms trade at least in the same way which already exists in the field of unlawful drugs. If it is possible (or deemed possible) to control drug-trafficking, why should it then be impossible to exercise or purport to exercise the same control with regard to unlawful arms trade? If the latter would be controlled as intensively as drug-trafficking, even many terrorist attacks could be prevented or at least prosecuted.

C Additional protocol to the ECHR concerning transnational co-operation in criminal matters

I General considerations

If we ask for the reasons why the above-mentioned scheme balancing the interests of three (and not only two) parties involved had not already been considered as self-evident, then we realize that this is also due to the wording of basic rights guarantees. They seem to be confined to national criminal proceedings. This becomes evident when looking at the practice concerning arts. 5 and 6 of the ECHR mentioned in the Report 2002 (pp. 17/18). However, in the late

eighties of the last century a decisive change could be observed starting with the Soering-decision of the European Court of Human Rights. Its basic consideration was that the protection under the ECHR is not confined to consequences happening within the territory of a member State but refers also to effects outside of its territory – even in non-member-States. This consideration is well-known as far as statutory law is concerned: e. g. penal law provisions apply to crimes committed abroad, their scope is enlarged.

The problem of human rights conventions is that they lack provisions concerning transnational problems. It therefore is a useful deliberation to add such provisions. As we have to deal with the ECHR, I will focus on this instrument. In substance we have to ask: Which additional provisions are necessary to cover also transnational problems of criminal prosecution?

Of course, these problems are not confined to criminal proceedings. Also civil or administrative proceedings have transnational aspects. It is not possible to deal with them all together at the present stage. This could be reserved to a second stage.

II Proposed articles

Article A – Safeguard for Conventional human rights in transnational criminal prosecution

> *(I) Acts of transnational criminal prosecution are subject to shared human rights responsibility and sovereignty. This includes shared responsibility for the safeguard of the Convention.*
>
> *(II) Nothing in the Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms in the Convention when dealing with acts of transnational criminal prosecution for the only reason that authorities of another State have been or will be involved.*

The idea of **para 1** is that it may not be decisive whether a transnational prosecutorial act is confined to the territory of one State. The basis is contained in the *Soering* judgment. In concrete terms, it may not be of importance whether a suspect is apprehended within or outside the territory of the State in the interests of which the prosecution is established.

As the Report 2002 points out (p. 17 and 19):

> „Seen from the perspective of an alleged perpetrator, there is no difference whether he is tried in his present country of residence or abroad. There is no reason to justify the person not enjoying in transnational proceedings the same rights that he would have otherwise enjoyed in national proceedings. Therefore, translating Article 5, paragraph 3, into the context of extradition, a person arrested for the purposes of extradition should be brought promptly before a competent judge and be heard on all obstacles to, and prerequisites for, extradition applicable in the concrete case. Release may be conditioned by guarantees to appear for extradition or surrender."
>
> "In this context, the protection of the persons concerned means in particular that the international dimension of a procedure must neither remove nor add any rights relating to such persons' place in the procedure. 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."

Para 1 is necessary in order not to avoid responsibility, for example in the field of damages. It is not legitimate to argue the following: If a suspect has been illegally arrested in another State (State B) on the request of State A, the arrest falls totally in the responsibility of State B, even if the request has e.g. been based on wrong presumptions of State A. Such arguments, however, have been upheld in national practice. If State B trusts in the request of State A, State A is also responsible for the illegality of the arrest. State A may not argue that it does not care for the consequences.

Para. 2 has been formulated in the light and the language of art. 34 ECHR and has been adapted. The main relevance is the scope of guarantees. It may not be reduced just because a transnational element is involved. This has been done, e.g. in Germany with regard to the death penalty (art. 102 Basic Law) in 1964 or with regard to the *ne bis in idem* guarantee (art. 103 Basic Law).

Another example would be that the requirements for the gathering of evidence, e.g. telephone-tapping of mobile phones, are lowered by choosing a State where the requirements are lower than in the prosecuting State. This would be a clear and illegal circumvention.

Article B – Right to an effective remedy prior to rendering assistance

> *The right to an effective remedy as guaranteed by article 13 includes an effective remedy before acts of transnational criminal prosecution (extradition, hand-over of evidence, etc.) are carried out vis-à-vis another State.*

In transnational cases it is often very important to have acts of co-operation controlled by a judge before they are carried out. A prominent example would be imminent death penalty (cf. Art. 11 of the European Convention on Extradition). The assurances must be controlled *before* the person is extradited.

Article C – Right to be prosecuted by one State

> *If more than one State is competent to punish an act, the prosecuted person has the right to be prosecuted only by one State.*

This article is not meant to replace provisions like art. 54 of the Schengen II Agreement. Art. 54 represents a step forward, but is not at all sufficient to resolve the problem. Article C should reduce cases of *ne bis in idem* like art. VII paras. 2 and 3 of the NATO-Forces Agreement, because a transnational *ne bis in idem* leads to a principle of "first-come-first-service": the first State which is quick enough to produce a final decision blocks all other States. The criterion of time is, however, not appropriate to determine such matters as the appropriate legal order. A transnational *ne bis in idem* also leads to – or at least provides for the basis of – transnational forum shopping, be it by the police (without judicial control) or by the suspect.

What we need are substantive criteria to decide on the question of which State has the "best" jurisdiction in a certain case. These criteria are not at all confined to the principles establishing jurisdiction (e.g. territoriality or personality). They have to be generalized and also cover State-orientated (e.g. where is the best evidence located?), as well as individual-orientated criteria (e.g. State of domicile of the suspect). In the annex to this paper, the guidelines published by Eurojust in its 2003-annual report are reprinted. They develop this idea in a more detailed way and amalgamise practice and theory (see: *Vander Beken, Tom/ Vermeulen, Gert/Lagodny, Otto,* Kriterien für die jeweils „beste" Strafgewalt in Europa, Zur Lösung von Strafgewaltskonflikten jenseits eines transnationalen *Ne-bis-in-idem*, NStZ 2002, 624 – 628; in this article we present two scientific studies carried out independently in Belgium and Germany; they had nearly the same results).

At the present stage, it is not necessary to insert a procedure into an article of the additional protocol. A possible solution in my view could be to transfer the decision on the "best" jurisdiction to Eurojust and have a judicial remedy for the person concerned for extraordinary cases, i. e. where the decision is not based on the facts and criteria mentioned.

Article D – Right to teams of lawyers from the States involved

> *In a case of article A, the person concerned has a right to the assistance of lawyers practising in the States involved. These lawyers must be allowed to work together on the case.*

The guarantee of a lawyer in human rights conventions seems to be confined to lawyers from one State. However, in transnational criminal proceedings it is often decisive to have not only lawyers from the different States but also the guarantee that they may work together. Without this, the necessary information and application of the other State's legal order may be illusionary for the suspect or the victim.

Conclusion

The proposals I have made in this paper have a clear starting point: the rights of the individual – be it as a suspect or as a victim. This is – in my view – an appropriate direction for further reflection. With this approach, one can identify many areas in which there are remnants of a traditional conception of sovereignty. From the point of view of individual rights, several of these areas are simply superfluous. It is a matter of in-depth analysis if a new (or an old) concept of sovereignty still requires them to be maintained. The example of the NATO-Forces Agreement shows how far-reaching the results may be even when one remains within the thinking of traditional concepts of sovereignty.

The proposal of an Additional Protocol to the ECHR for cases of transnational co-operation shows the need to develop the basis of human rights. At the same time, it summarizes the ideas and thoughts of the Report 2002 in the "renewal" section.

Annex:

Source:
Annual Report of Eurojust, 2003, Annex,
see: < http://www.eurojust.eu.int>

GUIDELINES FOR DECIDING WHICH JURISDICTION SHOULD PROSECUTE

"In November 2003 Eurojust organised a seminar to discuss and debate the question of which jurisdiction should prosecute in those cross border cases where there is a possibility of a prosecution being launched in two or more different jurisdictions. The objective of the seminar was to establish some guidance which would assist Eurojust when exercising its powers to ask one State to forgo prosecution in favour of another State which is better placed to do so.

The seminar delegates included practitioners from all EU Member States from most of the EU Accession Countries as well as representatives from the Commission, the Council Secretariat, Europol and OLAF. There were a series of presentations and four workshops with case studies to help discuss potential criteria. The debates were enriched by the presence, as speakers and participants in the workshops, of several delegates who were university professors and or academics with an interest in this area of law. We are grateful to all the seminar delegates for their contributions.

The Eurojust College offers the following guidance:

Generally

When reference is made to 'prosecutors' in this guidance it is intended to refer to not only to prosecutors but also to judges and other competent judicial authorities.

Each case is unique and consequently any decision made on which jurisdiction is best placed to prosecute must be based on the facts and merits of each individual case. All the factors which are thought to be relevant must be considered.

The decision must always be fair, independent objective and it must be made applying the European Convention of Human Rights ensuring that the human rights of any defendant or potential defendant are protected.

Any decision should be reached as early as possible in the investigation or prosecution process and in full consultation with all the relevant authorities in each jurisdiction. The complex question of "forum shopping", which we would define as the arbitrary selection of the venue for prosecution, has different meanings in different legal systems and is not dealt with in this guidance. It is likely to be the subject to future discussion within Eurojust as our experience in handling this type of case develops.

As part of there discussion to resolve these cases prosecutors should explore all the possibilities provided by current international conventions and instruments for example to transfer proceedings and to centralize the prosecution in a single Member State. A number of conventions and other instruments, which have been signed but not yet ratified, could also provide assistance in the future when they have been fully implemented.

Ne bis in idem

A basic principle of international criminal law and the law of national criminal jurisdictions is that a defendant should not be prosecuted more than once for the same criminal conduct. This applies even if the defendant has been acquitted of that conduct in one jurisdiction. This guidance fully supports, adheres to and endorses that principle.

Initial Considerations

The first consideration should be: "Where can a prosecution take place?" This decision should be considered at as early a stage as possible and in any event as soon as it is realised a prosecution might take place in more than one jurisdiction.

Prosecutors must identify each jurisdiction where a prosecution is not only possible but also where there is a realistic prospect of successfully securing a conviction. Making this assessment will require expertise and knowledge, which can only be provided by experienced practitioners from the relevant jurisdictions.

Meeting to Discuss Action

If the criminality occurred in several jurisdictions whose competent authorities could each institute proceedings in their own courts, there should be a meeting between nominated senior prosecutors representing each jurisdiction involved to discuss and agree where the prosecution should be mounted.

Each of the prosecutors nominated to attend such a meeting must be fully competent to discuss the issues and make decisions on behalf of the prosecuting authorities in the jurisdiction they represent. The prosecutors should apply the following guidance criteria in reaching their decisions.

Reference to Eurojust

Eurojust would expect any cases of this type, particularly where the representatives of the respective jurisdictions cannot reach agreement on where the case should be prosecuted, to be referred to it for assistance.

Eurojust would to be happy to offer advice and to facilitate such meetings. If required the relevant national members of Eurojust would be pleased to be involved in these discussions. Eurojust would actively encourage all competent authorities to consider referring this type of case to it for assistance.

Making the Decision – "Which Jurisdiction should Prosecute?"

A Presumption

There should be a preliminary presumption that, if possible, a prosecution should take place in the jurisdiction where the majority of the criminality occurred or where the majority of the loss was sustained.

When reaching a decision, prosecutors should balance carefully and fairly all the factors both for and against commencing a prosecution in each jurisdiction where it is possible to do so.

There are a number of factors that should be considered and can affect the final decision. All these factors should be considered at the meeting of prosecutors from the relevant States affected by the criminality concerned. Making a decision will depend on the circumstances of each case and this guidance is intended to bring consistency to every decision making process.

Some of the factors which should be considered are:

The location of the accused

The possibility of a prosecution in that jurisdiction and whether extradition proceedings or transfer of proceedings are possible will all be factors that should be taken into consideration.

Extradition and surrender of persons

The capacity of the competent authorities in one jurisdiction to extradite or surrender a defendant from another jurisdiction to face prosecution in their jurisdiction will be a factor in deciding where that defendant may be prosecuted

Dividing the Prosecution into cases in Two or More Jurisdictions

The investigation and prosecution of complex cases of cross border crime will often lead to the possibility of a number of prosecutions in different jurisdictions.

In cases where the criminality occurred in several jurisdictions, provided it is practicable to do so, prosecutors should consider dealing with all the prosecutions in one jurisdiction. In such cases prosecutors should take into account the effect that prosecuting some defendants in one jurisdiction will have on any prosecution in a second or third jurisdiction. Every effort should be made to guard against one prosecution undermining another.

When several criminals are alleged to be involved in linked criminal conduct, whilst often it may not be practicable, if it is possible and efficient to do so, prosecutors should consider prosecuting all those involved together in one jurisdiction.

The Attendance of Witnesses

Securing a just and fair conviction is a priority for every prosecutor. Prosecutors will have to consider the willingness of witnesses both to give evidence and, if necessary, to travel to another jurisdiction to give that evidence. In the absence of an international witness warrant, or the possibility the court receiving their evidence in written form or by other means such remotely (by telephone or video-link) will have to be considered. The willingness of a witness to travel and give evidence in another jurisdiction should be considered carefully are likely to influence the decision as to where a prosecution is issued.

The Protection of Witnesses

Prosecutors should always seek to ensure that witnesses or those who are assisting the prosecution process are not endangered. When making a decision on the jurisdiction for prosecution factors for consideration may include, for example, the possibility of one jurisdiction being able to offer a witness protection program when another has no such possibility.

Delay

A maxim recognised in all jurisdictions is that "Justice delayed is justice denied". Whilst time should not be the leading factor in deciding which jurisdiction should prosecute, where other factors are balanced then prosecutors should consider the length of time which proceedings will take to be concluded in a jurisdiction. If several States have jurisdiction to prosecute should always consideration how long it will take for the proceedings to be concluded.

Interests of Victims

Prosecutors must take into account the interests of victims and whether they would be prejudiced if any prosecution were to take place in one jurisdiction rather than another. Such consideration would include the possibility of victims claiming compensation.

Evidential Problems

Prosecutors can only pursue cases using reliable, credible and admissible evidence. Evidence is collected in different ways and often in very different forms in different jurisdictions. Courts in different jurisdictions have different rules for the acceptance of evidence often gathered in very diverse formats. The availability of evidence in the proper form and its admissibility and acceptance by the court must be considered as these factors will affect and influence the decision on where a prosecution might be brought. These are factors which prosecutors must consider when reaching any decision on where a prosecution should be instituted.

Legal Requirements

Prosecutors must not decide to prosecute in one jurisdiction rather than another simply to avoid complying with the legal obligations that apply in one jurisdiction but not in another.

All the possible effects of a decision to prosecute in one jurisdiction rather than another and the potential outcome of each case should be considered. These matters include the liability of potential defendants and the availability appropriate offences and penalties.

Sentencing Powers

The relative sentencing powers of courts in the different potential prosecution jurisdictions must not be a primary factor in deciding in which jurisdiction a case should be prosecuted. Prosecutors should not seek to prosecute cases in a jurisdiction where the penalties are highest. Prosecutors should however ensure that the potential penalties available reflect the seriousness of the criminal conduct which is subject to the prosecution.

Proceeds of Crime

Prosecutors should not decide to prosecute in one jurisdiction rather than another only because it would result in the more effective recovery of the proceeds of crime. Prosecutors should always give consideration to the powers available to restrain, recover, seize and confiscate the proceeds of crime and make the most effective use of international co-operation agreements in such matters.

Resources and Costs of Prosecuting

The cost of prosecuting a case, or its impact on the resources of a prosecution office, should only be a factor in deciding whether a case should be prosecuted in one jurisdiction rather than in another when all other factors are equally balanced. Competent authorities should not refuse to accept a case for prosecution in their jurisdiction because the case does not interest them or is not a priority the senior prosecutors or the Ministries of Justice.

Where a competent authority has expressed a reluctance to prosecute a case for these reasons, Eurojust will be prepared to consider exercising its powers to persuade the authority to act.

Matrix

The factors which should be considered in making decisions on which jurisdiction should prosecute are set out in this guidance. The priority and weighting which should be given to each factor will be different in each case. The intention of this guidance is to provide reminders and to define the issues that are important when such decisions are made.

During the Eurojust seminar on this topic a number of delegates found it useful to apply a matrix. Whilst applying a matrix rigidly may be too prescriptive, some may find a more structured approach to resolving these conflicts of jurisdiction helpful. The matrix allows a direct comparison and weighting of the relevant factors which will apply in the different possible jurisdictions."

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