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# VOIR
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**EUROPEAN COMMITTEE ON CRIME PROBLEMS**
**(CDPC)**

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

**Second meeting**
**Strasbourg, 31 January - 2 February 2005**

## Comments on the draft summary report of the first PC-TJ meeting

**by**
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According to the terms of reference our ask was to find concrete solutions which could make possible creation of transnational justice and fulfill the common area of shared justice in Europe. At the same time we should try to find such solutions which could allow to protect individuals involved.

Both of the mentioned tasks shouldn't be realized separately. This is not our matter to propose solutions which lead (only) to better protection of persons involved into the existing instruments of international cooperation in criminal matters. In another words our activity shouldn't cover work of other committees of CD PC.

The first step we have to make is to find the answer on the question what the transnational justice really means. Especially there is need to say very clearly whether or not the transnational justice should replace the national justice in criminal matters. Unfortunately such a point of view in Europe of the 21st century can be described as a visionary one. It has to be mentioned, that common criminal justice is obviously the best solution for Europe in the future. At least it should be the best answer on the internationalization of criminality.

It is obvious that the main obstacle for such step is traditionally understood sovereignty of states. Even if states accept the new formula of shared sovereignty developed in the New Start report of 2002 it seems to be not realistic to discuss the concept of the real common European justice in criminal matters today. Therefore we must leave this area of deliberation but we have to accept that the winner will be... the criminality, of course.

However, there is also another possibility to understand the term of 'transnational justice', as an international justice which can allow to remove obstacles which make international cooperation in criminal matters so difficult and so complicated as it is today.

Trying to find the appropriate way one firstly has to ask which obstacles have to be removed.

As the New Start report shows, the first one is the multiplicity of conventions relating to the international cooperation in criminal matters in Europe. The exclusive way to repair this situation is to replace all of the existing conventions on this field with one compact convention, which will cover whole of the area of international cooperation in criminal matters in Europe. It means the return to the idea of Comprehensive Convention of 1996 (in limited scope, of course).

What advantages does this solution have?

Firstly, it can and should solve problems connected with many reservations to the existing instruments of international cooperation in criminal matters. As we know very well the multiplicity of such reservations makes usage of these conventions almost impossible, especially if more then two states are involved. Of course, the Council of Europe can ask member states to review their reservations, but such a way seems to be extremely counterproductive. Replacing all existing instruments with one compact international act CoE should use the possibility and exclude admissibility of any reservations. This is a crucial point of the idea of comprehensive convention. It is obvious that in this way member states will possibly have to give up a part of their sovereignty. It has to be said very clearly that every gap in the proposed system will mean the possibility which will be undoubtedly used by criminals, though.

Preparing the new convention we should take into account that there is a clear need to reduce as much as possible the rule of dual criminality. As far as this rule allows to refuse the cooperation it should be unacceptable. In extreme cases the refusal of extradition could be acceptable if it would be contradictory to the constitutional principles of requested state (or public order).

Another very important issue which must be taken into account is the problem of conflicts of jurisdiction which extremely impedes the international cooperation in criminal matters. National rules related to this problem are based on the idea that the jurisdiction has to be as expanded as possible. The result is that in many cases we have to deal with positive conflicts of jurisdiction, while negative conflicts are very seldom.

The importance of this problem is very clearly seen when we have in mind a link between the conflicts of jurisdiction and the principle *ne bis in idem*, because if more that one state would like to exercise his jurisdiction the person, who is concerned, is threatened with possible double punishment for the same crime. If we introduce the principle of *ne bis in idem* on the European level we achieve two very important goals on the same time. Firstly, such a rule should extort solving the problem of positive conflicts of jurisdiction. Secondly it would be extremely important for the protection of accused, because the right to be punished by one state doubtless belongs to the fundamental right of the individual.

There is of course a danger that introducing the rule of *ne bis in idem* on the European level can cause disadvantageous situation in which every state will try to exercise their own jurisdiction before the other state will. Such a race would be of course very disadvantageous. For this reason, trying to guarantee the accused a right to be punished only once, we have to find clear method of solving jurisdiction conflicts. Analyzing possibilities shown in the New Start report of 2002 the PC TJ considers that there is a need to create in Strasbourg a judicial body which will be competent to decide cases of jurisdiction conflicts. Such a body which will be the form of transnational jurisdiction has to be competent to find the 'best jurisdiction' in each particular case based on the clear rules written down in general provisions of the convention which has to be drafted. The task of this judicial body should be also to find appropriate jurisdiction in case of negative conflicts according to the requirement that the justice in each case has to be done.

To ensure rights of the accused involved in the positive conflict of jurisdiction it is necessary to create a rule that every person has a right to be punished only once for the same crime. Such a rule must be written down into the general rules of the new convention . Nevertheless, it has to be pointed out that it seems to be necessary to surrender this rule under the jurisdiction of the European Court of Human Rights. For this reason it should be recommended to draft the additional protocol to the European Convention of HR of 1950. According to the Art. 32 of this Convention the jurisdiction of the Court shall extend only to matters concerning the interpretation and application of the Convention and the protocols thereto. It is also not possible to surrender the rights guaranteed by another treaties of the Council of Europe under the jurisdiction of the Court.

The suggested additional protocol to the ECHR should also contain other rights of persons involved in the mechanisms of international cooperation in criminal matters mentioned in the report of scientific expert