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

INTERIM REPORT
TO THE
EUROPEAN COMMITTEE ON CRIME PROBLEMS
(CDPC)

following the 2nd meeting
Strasbourg, 31 January - 2 February 2005

Secretariat Memorandum
prepared by
the Directorate General I - Legal Affairs

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INTRODUCTION

Presentation of the Committee

1. *Terms of references:* adopted by CDPC in June 2002
2. *Main objectives:*
 - take into account the “New Start” report submitted to the CDPC by the “Reflection Group on developments in international co-operation in criminal matters” (PC-S-NS);
 - study the chapter “Renewal” of the above-mentioned report, with a view to making proposals for follow-up action, in particular on the questions concerning the rights and guarantees of the individual and
 - report back to the CDPC by 31 May 2005.
3. *Composition:* the Committee is composed of representatives appointed by the Member States; the Council of Europe bears the travelling and subsistence expenses of one expert from 17 countries listed in the terms of reference.

The list of participants is appended as annex I.

General remarks on the PC-TJ meetings

4. PC-TJ held two meetings in Strasbourg, Council of Europe Headquarters, from 20 to 22 September 2004 and from 31 January to 2 February 2005.
5. *Chairmanship:*
 - Ms Maria GAVOUNELI (Greece) was elected to the Chair;
 - Mr Branislav BOHACIK (Slovakia) was elected Vice-Chair of the Committee.
6. *Scientific experts:*
 - The work and discussions of the Committee were supported by the reports prepared by the two scientific experts: Messrs Otto LAGODNY and Giuliano TURONE.

General objectives and working methodology

7. In its discussion, the Committee:
 - Aims to reach concrete, useful and practical results;
 - Keeps in mind the importance given by the Council of Europe to the fight against terrorism;
 - Ensures co-ordination and synergies with works in other Committees;
 - builds on the existing Council of Europe instruments and achievements and promote implementation.

The Committee also constructs its work in taking due consideration of the work carried out within the European Union.

8. PC-TJ is tasked to produce a document with firm foundations in the present with a view to further development. The general idea is to adopt a holistic approach to the issue. On the other hand, the Committee needs to get inspiration from the solutions offered – and avoid the problems encountered – in the Union *acquis*.

9. The Committee agreed to work on the basis of the structure of the “Renewal” chapter of the “New Start” report:
- Reconsidering the role of governments and that of judicial authorities;
 - Upholding the rights of individuals (suspects, defendants, extraditees, victims, witnesses, right of appeal);
 - Enhancing the trend towards shared responsibility;
 - Establishing a common platform.

A. RECONSIDERING THE ROLE OF GOVERNMENTS AND THAT OF JUDICIAL AUTHORITIES

Presentation and general discussion

10. The Committee discussed different aspects of the States’ sovereignty and the balance to be found between the principle of sovereignty, the efficiency of transnational criminal justice and the protection of the rights of individuals.
11. The Committee agreed that sovereignty remains the main principle on which the co-operation in criminal matters is based.

It also agreed that considering the evolution of the nature of crime towards transnational crime, this principle, or rather several of its expressions has to be redefined and that some limits have to be agreed upon.

Exercise of sovereignty in the case of extradition

12. As a concrete example of the expression of sovereignty, the Committee discussed the various ways in which the extradition requests are dealt with in member States, by judicial and by administrative bodies (regardless of the novelties brought by the European Arrest Warrant among the European Union member States).
13. The majority of States follow a judicial procedure, which culminates to a (political) decision taken by the Minister. In other States, the sequence may be reversed with the ministerial decision preceding the judicial phase (e.g. Portugal). In other cases, the administrative/political phase is totally dispensed with.

Committee’s findings

14. The Committee considered the interest of a judicialisation of the procedures, as a way to improve the transnational criminal justice and to enhance the protection of the rights of the individual.
15. Even if there is a general tendency towards reinforcing the judicialisation of the procedures¹, the possibility for the administrative authorities to intervene in extradition requests still shows advantages, such as the possibility to consider political factors (or humanitarian ones in some States).

It has been observed and agreed that this administrative power does not constitute an obstacle, in practice, to an efficient judicial cooperation. Nevertheless, the allocation of

¹ See the 1st PC-TJ report, §15 (PC-TJ(2004)4)

competence between the judicial authorities and the Minister merits further debate.

B. UPHOLDING THE RIGHTS OF INDIVIDUALS (SUSPECTS, DEFENDANTS, EXTRADITEES, VICTIMS, WITNESSES)

16. The Committee agrees to work on the basis of the “New Start” recommendation that the individuals’ protection should be strengthened in extradition and mutual legal assistance procedures and that minimum standards should be recognised and guaranteed.

i. Minimum standards for the protection of the person subject to an extradition request:

Presentation

17. Minimum standards for the protection of the person concerned should be defined. The existing standards should be identified and codified in a coherent manner so as to ensure a more efficient protection of individual rights and therefore to better meet the objectives of the ECHR.

Minimum standards

18. The following rights have been identified as minimum standards likely to be granted to the individual in the extradition procedure:
1. Right to access to information about the extradition procedure and about his rights, including at least
 - Access to the file of extradition *sensu stricto*;
 - Details about the application of the speciality rule;
 - Details about the possibility of a simplified extradition procedure and the importance of his/her consent.
 - Communication of the decision
 2. Right to be heard / to submit written statements
 3. Access to a qualified interpreter
 4. Right to access to a lawyer in the requested State
 5. Right not to be extradited, if the fundamental rights of the person concerned are at risk
 6. Right to have a final decision and to have it executed in a reasonable period of time
 7. Right to appeal a decision, as developed by para. 23 to 25 of the 1st meeting report of this Committee
 8. Right to compensation in the long term
19. It is understood that these rights apply to requests of extradition, examined in a requested State. They are therefore generally not intended to be applied to questions related to the guilt or responsibility of the person in the criminal act, for which he will be prosecuted in the requesting State. This will be dealt with in the criminal procedure in the requesting State.
20. The question of the duration of detention pending extradition will be discussed in the next meeting.

ii. Protection of the victims and of the witnesses

Witnesses

21. Considering the existing rights and duties of witnesses, as well as the protection mechanisms enshrined in various instruments, there do not seem to be major problems related to the protection of witnesses in the specific context of transnational criminal justice.
22. The position of the witness in the transnational criminal justice could be improved by
 - Facilitating the transmission of the information to be given by witnesses, notably by the use of new technologies (such as video conferences or phone conferences) and existing channels of communication;
 - Extending the protection regime available to cover transnational situations as well.
23. The possibility to compel witnesses to appear in court in foreign proceedings will be discussed at a later stage by the Committee.
24. Due consideration will be given to the work of the PC-PW on the matter.

Victims

25. The work of the European Union on victims is of high relevance. Council of Europe member States could take advantage of these initiatives in their work to develop the protection of victims (e.g. the PC-S-AV).
26. The following considerations will have to be further elaborated:
 - The right of the victim to benefit of the protection regime available regardless of her place of residence, notably by allowing the submission of the complaint in the country of residence to be transmitted without delay to the country where the trial takes place
 - The right of the victim, in principle, to be informed of the decision to release the offender
 - The right of the victim to compensation including the right to submit an application from her country of residence, to be transmitted without delay to the country where the trial takes place.

C. ENHANCING THE TREND TOWARDS SHARED RESPONSIBILITY

27. Dealt with together with D.

D. ESTABLISHING A COMMON PLATFORM

Presentation

28. The ideas and suggestions presented under these two headings of the “New Start” report have been discussed together.

29. Many references have been made to the difficulties encountered by the European Union in carrying out its work on procedural guarantees and concerns were expressed on the possibilities to reach concrete results within the Council of Europe at this stage.
30. The Committee resumed its discussion on some identified obstacles to an effective transnational criminal justice:
- delays in answering to co-operation requests;
 - reservations to the relevant Conventions;
 - issues related to double criminality;
 - nationality issues in extradition procedures and possibilities to refuse the extradition;
 - issues related to *ne bis in idem*.

Double criminality

31. The Committee discussed mostly matters related to double criminality, taking due account of the works done by other committees, notably the PC-OC WP, which will submit its final report to the PC-OC in June 2006.
32. Double criminality could be restricted in some specific circumstances although a total abolition of that principle is not possible for the time being.
33. Such a restriction could be accomplished by a clause referring to the public order of the State receiving the request for judicial cooperation or when the fundamental rights of the individual concerned are at risk.
34. Another solution could be that a list be drawn with the most serious crimes which are presumably common to all Council of Europe member States. This would be assorted with a clear definition of these crimes. For these crimes, there would be a presumption that double criminality is fulfilled.
35. The Committee took into account that
- For many Member States, the principle of double criminality remains a fundamental principle, directly linked to the exercise of their sovereignty.
 - Any restriction to this principle requires a higher level of confidence among the States concerned, in terms of shared standards

The Committee therefore will have to further explore any possible evolution which could be concretely proposed in the longer term.

Common platform:

1. Network of States officials

36. The Committee supports the proposal from the PC-OC WP, to set up a **network of national officials** entrusted with the implementation of the Conventions in the States parties to these criminal conventions. For this purpose, the existing list of public

officials involved in the practical application of the criminal conventions could be upgraded.

37. This network should, in order to be efficient:
- gather the people directly involved in the cooperation procedures and
 - have its list of members regularly updated.

2. Office of specialists

38. In order to facilitate the use of the Council of Europe core instruments in the field of transnational criminal justice, the Committee also supports in principle and subject to the discussions in the PC-OC, the other idea from the PC-OC WP to set-up an **office of specialists**, within the Council of Europe Secretariat.
39. This Office could assist practitioners with any concrete difficulty they might have in using the cooperation mechanisms foreseen in these conventions. It is possible that the Office would develop *de facto* a role in facilitating the implementation of the Conventions, and, as such, in preventing possible disputes. By giving similar advices to similar questions, the Office would also ensure a harmonised implementation of the conventions. It could also, ultimately have coordinating roles in the efficient use of the cooperation mechanisms.

Outstanding questions

40. In addition to other outstanding issues, two matters remain to be discussed in subsequent meetings:
- The “*ne bis in idem*” issue will have to be further considered, especially as a positive conflict of jurisdictions. It might also be considered as a right of the individual.
 - the extradition of States’ nationals in conjunction with a broader application of the principle “*aut dedere aut judicare*”.

CONCLUSION:

41. Following its two first meetings, the Committee can report on some preliminary proposals on questions concerning the rights and guarantees of individuals, as a follow-up to the “renewal” Chapter of the “New Start” report.
42. Considering the fact that
- it has to report to the CDPC by 31 May 2005, according to its terms of reference
 - the CDPC meets in March 2005 instead of June as it used to do and that it will probably have its following meeting in March 2006
 - the Committee has still certain important outstanding questions to be discussed in order to come up with concrete follow-up proposals;

the committee asks the CDPC for an extension of its terms of reference until 31 March 2006.

43. The Committee also takes this opportunity to ask the CDPC whether it could consider the possibility that the travel costs and daily allowances of the Chair of the Committee be covered by the Council of Europe.
44. It would also appreciate that the number of States participating to the Committee's deliberations be raised. The Committee will debate at its next meeting(s) very substantial matters of transnational justice and would need to benefit, to the largest extend possible, from the contribution of representatives from the various legal traditions and legal practices present in the Council of Europe.

APPENDIX I / ANNEXE I**LIST OF PARTICIPANTS / LISTE DES PARTICIPANTS****MEMBER STATES / ETATS MEMBRES****ALBANIA / ALBANIE****ANDORRA / ANDORRE****ARMENIA / ARMENIE****AUSTRIA / AUTRICHE**

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