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***FIRST PART***
**CONSIDERATIONS ON THE PLACE AND THE PROTECTION OF VICTIMS AND WITNESSES IN THE FIELD OF TRANSNATIONAL CRIMINAL JUSTICE**

***SECOND PART***
**CONSIDERATIONS ON THE CONCRETE WAYS TO ADDRESS SOME OF THE CURRENT OBSTACLES TO TRANSNATIONAL CRIMINAL JUSTICE**

# EXECUTIVE SUMMARY

**REPORT**
**by**
**Mr Giuliano TURONE (Italy),**
**Scientific Expert**

*FIRST PART*

## CONSIDERATIONS ON THE PLACE AND THE PROTECTION OF VICTIMS AND WITNESSES IN THE FIELD OF TRANSNATIONAL CRIMINAL JUSTICE

### A)- Main Elements

After a survey – in chapter 2-A – of the official documents concerning victims and witnesses in criminal proceedings, a definition is given – in chapter 2-B – of the expression "transnational criminal justice".

The definition is based on some specific considerations, such as:

- A surprising resemblance exists between the philosophy of the New Start Report, based on the *principle of shared responsibility*, and the philosophy of the Tampere European Council, which referred to the *principle of mutual recognition* as the new 'cornerstone' of international judicial co-operation in criminal matters;
- The traditional concept of "international co-operation in criminal matters" and, in particular, the traditional schemes of extradition and mutual legal assistance are based upon a rigid and severe notion of sovereignty, which admits only scanty mitigations ruled by the old principle of *reciprocity*;
- On the other hand, a new and more sophisticated system of co-operation may be envisaged (i.e. "transnational criminal justice") which is characterized by a deliberate *sharing* of common responsibilities among a number of States and by a deliberate *granting of confidence* to the criminal legislations of one another;
- This new system of international co-operation is strictly connected to a more flexible notion of sovereignty based on the acknowledgement of a *common responsibility* of the States among which the 'mutual recognition' is established as for their response to crime (the European Arrest Warrant may be considered as a significant step in this direction).

Based on these considerations, the following is a tentative definition of the expression *transnational criminal justice*: <u>any advanced level of international co-operation in criminal matters based on the new principles of *mutual recognition* and *shared responsibility*, so as to move beyond the traditional schemes of extradition and mutual legal assistance based on the old principle of *reciprocity*</u>.

Keeping in mind this definition of transnational justice, a specific analysis is carried on – in chapter 2-C – of six official international legal texts on victims and witnesses, which contain indications on the position of victims and witnesses <u>*in*</u> transnational justice ([1]). The six official documents are the following:

[1] Some more observations are contained in chapter 2-D of the written contribution about the place and protection of victims and witnesses in the Statutes of the International Criminal Court and the *ad hoc* Tribunals.

**1. Council of Europe Recommendation adopted in the year 1997 concerning the topic of *Intimidation of Witnesses*.**

This Recommendation deals with protection of intimidated witnesses in general and, in particular, with the need for witness protection programmes to be implemented across borders and the need for assistance in relocating protected witnesses abroad, a matter on which inter-State agreements imply some extent of mutual recognition, moving beyond the mere dimension of reciprocity.

**2. EU Framework Decision dated 15 March 2001 concerning *the Standing of Victims in Criminal Proceedings***

This Framework Decision pursues the objective of affording protection to victims of crime irrespective of the State in which they are present. Appropriate measures are devised to minimise the difficulties faced where the victim is a resident of a State other than the one where the offence has occurred. In particular, it is provided that the victim may make a complaint before the competent authorities of his State of residence, to be transmitted to the competent authority in the territory in which the offence was committed.

**3. EU Framework Decision dated 13 June 2002 concerning *Combating Terrorism***

This Framework Decision affirms (in 'whereas' n. 2) that terrorism constitutes "a threat [...] to the free exercise of human rights". The document provides *inter alia* that, when a terrorist offence falls within the jurisdiction of more than one Member State of the Union, the Member States concerned shall co-operate in order to decide which of them will prosecute the offenders with the aim, if possible, of centralising proceedings in a single Member State. To this end, the Member States may have recourse to any *body* or *mechanism* established in order to facilitate co-operation and co-ordination among judicial authorities. Jurisdiction should be determined according to objective factors, among which the State of origin of the victims, whose main interest is avoiding impunity.

**4. EU Directive dated 29 April 2004 concerning *Compensation to Crime Victims*.**

This Directive provides that crime victims in the European Union should be entitled to a compensation for the injuries they have suffered, regardless of where in the European Community the crime was committed. Each Member State shall establish an 'assisting authority', to be responsible for receiving the applications for compensation, and a 'deciding authority', to be responsible for deciding upon applications for compensation. The need for victims' compensation is considered as a *common interest* and a *common responsibility* of the member States, and is tackled in a way that implies a remarkable extent of mutual recognition.

**5. Council of Europe Recommendation adopted on 9 September 1991 concerning *Sexual Exploitation, Pornography and Prostitution of, and Trafficking in, Children and Young Adults.***

This Recommendation considers the necessity to "introduce rules on extraterritorial jurisdiction" for the criminal proceedings concerning trafficking in human beings, which is consistent with the spirit of the New Start Report.

**6. Council of Europe Recommendation adopted on 19 May 2000 concerning *Action against Trafficking in Human Beings for the Purpose of Sexual Exploitation***

This Recommendation is the most recent and advanced legal instrument of the Council of Europe concerning the issue of trafficking in human beings and appears to outline a concrete possible scheme of "transnational justice" in the sense envisaged by the drafters of the New Start Report. This Recommendation considers that trafficking in human beings for the purpose of sexual exploitation "may result in slavery for the victims" and "constitutes a violation of human rights and an offence to the dignity and the integrity of the human being". Furthermore, trafficking in human beings "extends well beyond national borders", then requires "a pan-European strategy" to combat it and to protect its victims.

## B)- Concrete Proposals

The concluding chapter of the first part of the paper – chapter 2-E – deals with the possible future developments of transnational justice in favour of the victims of transnational crime.

As one can read in the New Start Report, the real *main* interest of any victim of crime is that of *avoiding impunity*. As a consequence, a fundamental right has to be recognized to the victims of grave facts of transnational criminality, especially when these crimes constitute violations of human rights (such as *terrorism* and *trafficking in human beings*: see above, Documents 3 and 6). Namely, victims have the right to receive satisfaction by an effective system of transnational criminal justice capable of discovering, prosecuting and punishing the transnational offenders.

The most advanced and suitable institution to reach such a goal would be an International Criminal Court having jurisdiction on the major phenomena of transnational criminality which constitute "a threat to the free exercise of human rights".

For the time being, we might envisage and propose – as a first step – a concrete improvement on the ground of the Council of Europe Recommendation adopted on 19 May 2000 concerning *Action against Trafficking in Human Beings for the Purpose of Sexual Exploitation*. The phenomenon considered in this Recommendation is particularly suitable to become the core of a new and advanced experiment in *transnational criminal justice*. The leading principles of such an experiment are already indicated in the Recommendation itself, as it affirms the need for

a) establishing rules governing extra-territorial jurisdiction to permit and facilitate the prosecution and conviction of the traffickers, irrespective of the country where the offences were committed, and including cases where the offences took place in more than one country (point 48);
b) establishing an international body charged to co-ordinate the fight against trafficking and responsible, *inter alia*, for keeping and updating a European file of missing persons (point 54);
c) improving the co-operation making use, *inter alia*, of international organisations involved in combating trafficking (point 55).

As a first step, a concrete and practical solution could be the creation – among all the countries of the Council of Europe – of an international body *similar* to Eurojust and entrusted with the co-ordination of investigations and prosecutions concerning international trafficking in human beings. To that effect, a specific joint programme might be set up between the European Commission and the Council of Europe. The following step could be the creation of an international judicial body having extraterritorial jurisdiction on the relevant trafficking offences.

## *SECOND PART*

## CONSIDERATIONS ON THE CONCRETE WAYS TO ADDRESS SOME OF THE CURRENT OBSTACLES TO TRANSNATIONAL CRIMINAL JUSTICE

### A)- Main Elements

Chapter 3-A of the written contribution explains the reason why only the 'obstacle' constituted by *dual criminality* is dealt with in the second part of the paper.

In Chapter 3-B the issues related to dual criminality are treated in connection with the European Arrest Warrant (EAW). The chapter deals with the possibility of making more effective and more operative the European Arrest Warrant not only within the limits of the European Union, but even beyond those limits.

The European Arrest Warrant (European Union Framework Decision dated 13 June 2002) is based upon the principle of "mutual recognition of judicial decisions and judgments", a principle which is now considered as belonging to the 25 States of the European Union. This *mutual recognition* is the reason why the 25 Member States accepted to *abolish the verification* of the requirement of dual criminality.

The considerations contained in New Start Report show that a certain (although minor) amount of 'mutual recognition' does exist also *beyond* the borders of the Union, i.e. among the member States of the *Council of Europe*. A possible improvement of this *lesser* mutual recognition – in order to make the European arrest warrant operative in the entire area of the Council of Europe – might be reached through a legal solution *indirectly* related to the issue of dual criminality. In particular, the idea is that the abolition of the *verification* of dual criminality could be more easily accepted – even beyond the borders of the EU – if the relevant crimes were *precisely defined* in a proper legal text, so as to better meet the principle

of legality (at present, Article 2 of the Framework Decision contains the list of the 32 crimes without any definition of them).

A remedy like this was devised and created in the year 2000 by the drafters of the Statute of the International Criminal Court. In the Statute of the ICC there is a list of offences for which the Court has jurisdiction. These offences were considered insufficiently defined. A supplementary legal text, named "Elements of Crimes", was also drafted, defining the elements of each one of the offences listed in the Statute.

**B)- Concrete Proposal**

A similar legal instrument of "Elements of Crimes" would be desirable also for the 32 offences listed in art 2.2 of the Framework Decision on the European Arrest Warrant. This work could be very useful, could improve the effectiveness of the European arrest warrant even beyond the limits of the European Union and could turn out to be an effective way to *indirectly* address one of the current obstacles to transnational justice: the one represented by the *dual criminality issue* or – more precisely – the one represented by the possible *resistance in accepting the abolition* of the verification of dual criminality. Again, such work could be carried out through the creation of a joint programme between the European Commission and the Council of Europe.