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EUROPEAN COMMITTEE ON CRIME PROBLEMS

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COMMITTEE OF EXPERTS

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Discussion paper on the application of the double criminality principle, Workshop 1

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Article 2(1) of the COE Extradition Convention provides that:

Extradition shall be granted in respect of offences punishable under the laws of the requesting Party and of the requested Party by deprivation of liberty or under a detention order for a maximum period of at least one year or by a more severe penalty.

The underscored language represents the principle that is usually termed "double criminality" or at times "dual criminality", although these terms do not themselves appear in the Convention. The Convention seems to consider that the meaning of the condition will be obviously understood and in fact no clarification regarding the requirement is to be found in the official explanatory reports.

Nevertheless the fact is that State Parties has interpreted the principle in divergent manners. Often in the literature, a dichotomy is made between double criminality in the *in concreto* and in the *in abstracto* senses. In fact, these two Latin terms actually represent aspects of a spectrum of possible ways of approaching the interpretation of the double criminality requirement. Roughly, double criminality *in abstracto* focusses on the type of crime involved – i.e. drug trafficking, money laundering, drunk driving – as long as that crime is illegal and punishable by at least a year imprisonment in both relevant jurisdictions, then double criminality, and the condition of Article 2(1), is satisfied. An *in concreto* interpretation focusses on the underlying conduct, i.e., if the acts committed by the wanted person, within their entire factual context, would form a basis for criminal liability under the laws of both jurisdictions then double criminality is satisfied.

Yet there may be wide variation within each of these types. Thus, one view of the *in concreto* interpretation would say that if you consider all the circumstances of the actions committed by the wanted person, these should include facts and circumstances that might constitute defenses to liability under an *in concreto* interpretation (i.e., self-defense, diminished capacity, even statute of limitations.) Others might consider that the issue of possible defenses to liability in the requested state is irrelevant even to an *in concreto* analysis. Some jurisdictions applying an *in abstracto* analysis might conceivably focus on the general type of offense, others might require a congruence of all essential elements of the crime.

Although it is often suggested that one or another of the interpretation allows for a more liberal application than the other, this is essentially a matter of perspective. As noted, a wholly *in abstracto* interpretation would usually not deny extradition on the basis of factors (e.g. defenses) extraneous to the definition of the crime under the requested state's legislation, while an *in concreto* analysis might. On the other hand, an *in concreto* interpretation can be more flexible in that it may depend less on the particular legal denomination of the criminal offense and more on the fact that the underlying conduct is considered criminal.

Because the underlying international instruments such as the Convention often provide little guidance as to the manner in which double criminality is to be applied, the issue of its interpretation and application becomes of crucial importance. If there is a wide divergence in the application of this basic concept, it forms an obstacle to the operation of a unified and effective framework for international law

enforcement. It also creates the possibility of misunderstanding and tension among state parties to the Convention when the state parties, viewing things through the prism of the standards and legal concepts of their own national systems, may consider that the other jurisdiction is wrongly and unjustifiably either demanding or denying extradition.

In seeking to determine if a more unified and efficient application of double criminality can be arrived it is important to first of all understand what the present differences are and where they derive from. In this context, it would be useful for the participants in the workshop to prepare themselves by considering the following matters:

A) How is double criminality applied in your jurisdiction? In examining this rather than consider simply whether it is an *in abstracto* or *in concreto* interpretation, the emphasis should be on what is actually required to satisfy double criminality (i.e., the requirements of Article 2(1)) and how the judicial authority conducts its analysis;

B) What are the purposes of double criminality in extradition? Is it to promote sovereignty concerns? Concerns of essential legality? Human Rights or Order Public considerations? Have the purposes it legitimately promotes remained static in the more than half century since the Convention was adopted or have they changed? In this context, consider Lagodny's view that international law enforcement, like so many other areas of international law has moved from a national focus to a focus on the individual? If this is the case, is there a conflation between the considerations of double criminality under Article 2(1) and considerations of order public and fundamental human rights?

C) Do the forms of national application referred to in (a) above actually further the purposes referred to in (b)? Are they, in fact, designed to promote policies and purposes or to conform to what are considered to be statutory or constitutional limitations? Would national laws actually have to be changed to achieve a more unified and flexible interpretation of double criminality? Would a change in the Convention be needed or helpful?

D) At what point should double criminality be judged from: time of offense; time of submission of the request; time when judgment is delivered or extradition takes place? Why?

E) Double criminality is relevant to areas on international law enforcement outside of extradition – e.g. mutual legal assistance (see Article 5 of the Mutual Legal Assistance Convention); transfer of sentenced persons (see Article 3(1) (e) of the Convention for the Transfer of Sentenced Persons. Is it necessary that the interpretation of double criminality be identical in these different contexts or do the variant purposes of these international mechanisms support differences in application?

F) Do the issues of relevant to double criminality also arise in the context of the rule of specialty? How can these be avoided?