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EUROPEAN COMMITTEE ON CRIME PROBLEMS
(CDPC)

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

Possible Ways to Reduce the Double Criminality Requirement: From double criminality to double prohibition

Report
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Present discussions in the PC-TJ on double criminality can be summarized as follows:

1. In the long-term perspective, double criminality should be abolished as a whole.
2. As mid- or short term perspective intermediary solutions shall be explored.

This paper will deal only with the latter question.

The problem will be to find substantive criteria for such intermediary solutions (infra I). Then I will look for accompanying and complementary strategies with the concept of finding "the best place for prosecution" (infra II).

I) SUBSTANTIVE CRITERIA: FROM DOUBLE CRIMINALITY TO DOUBLE PROHIBITION

1. Starting- point

The starting-point of the double-criminality requirement was and is reciprocity as a result of a strict sovereignty thinking: especially extradition should only be granted to another state if the requesting state would grant extradition for a comparable request. This involves that the behaviour underlying the request would be punishable in the requested state as well, because only then a comparable request would be thinkable: only then there would be a behaviour which makes extradition necessary: no request without punishable behaviour.

This starting point is based on a concept of strict sovereignty of the 19th century. This is no longer valid in a Europe growing together. However, it seems to be wise, not to shift away too far as discussions in the committee have shown.

2. Double criminality in concreto/in abstracto

As a consequence of the traditional view one could argue that the behaviour has to be punishable in concreto, not only in abstracto. This means: the behaviour does not only have to fit the definitions of the requirements of a certain crime – this would be double criminality in abstracto. The behaviour has also to fit all other requirements: there may be no justification (e. g. self-defence) or no excuses (e. g. insanity) etc. This can be called: double criminality in concreto because the very behaviour of a certain person fulfils *all* requirements of punishment in the requested state. Just to clarify the point: it is not necessary to proof the facts for that behaviour; this has nothing to do with double criminality.

I want to illustrate this by a sketch:
Double criminality in concreto means that all requirements in the requested state have to be met:

Step 1. Definition of a crime
Step 2. Justification (e. g. Self-defence)
Step 3. Excuse (e.g. insanity)
Step 4. Other reasons excluding punishability, e. g. abandon of attempt

Double criminality in abstracto refers only to the definition of a crime (step 1), not to steps 2. – 4. (justification, excuse, etc).

This way of thinking is - of course – based on German and Austrian theory: in order to determine whether a given behaviour fullfils all requirements of punishability, one has to check along the line indicated in the sketch supra. They are named with terms that can roughly be translated into English:

Step 1: "Tatbestandsmäßigkeit"
Step 2: "Rechtswidrigkeit"
Step 3: "Schuld"
Step 4: "Strafaufhebungsgründe".

If we analyse this order of requirements for punishment – which I would like to call for brevities's sake: "checklists" - we have to be aware that the order and the contents differs from state to state or from legal order to legal order. Thus, we could compare the French "élément materiel" to the "Tatbestandsmäßigkeit"; the English "mens rea" or the French "élément subjectif" to the "Vorsatz" etc pp. But, this is not necessary for the aims of this paper. Regardless of what the contents of the national checklists is, they all articulate *cumulative* requirements. If one of them is missing, there is no need to ask for the subsequent requirements. Just to give an example: if a certain behaviour is justified, it makes no sense to ask for reasons of excuse.

If we imagine a whole set of different national checklists as described supra, the problem of double criminality and its reduction becomes obvious. We have to find criteria which cut the different national checklist-cakes into slices which are comparable from their criminal law impact. This means that we have to find criteria and their substantive meaning which are understood more or less equal in the Council of Europe states. This is in my view nearly impossible. Just take the reasons of justification. In German practice and theory it is well established (albeit not convincing) that justification needs a subjective element: e. g. the person defending him/herself has to be aware of the self-defense-situation. If this is not the case, he/she would be punishable for attempt of the crime. In Italy or in Austria this is not the case. Here it is sufficient that the aggression of the other person is objectively done; the person defending him/herself must not be aware of that threat. Or take the question of knowledge/intent ("Vorsatz"): we can put it into Step 1 – like in Germany or in Austria, or we put it into step 3.

There are different such national "checklists". Due to the different approaches behind them, it is not possible to draw a line between, e. g. the four German/Austrian/Swiss categories listed supra. This would lead to confusion and to results which depend merely on chance. We could discuss to establish the borderline between steps 3 and 4, i. e. between excuse and other reasons excluding punishability. But here, irritations would even be more because it is already under controverse discussion within those national laws which know this distinction. We could also discuss that prescription in extradition cases has to be evaluated only according to the law of the requesting state (cf. Art. 62 of the Schengen-II-agreement). However, prescription is according to German and Austrian legal theory a merely procedural requirement which does not at all fall under the "checklist" discussed supra, but belongs to the precedural requirements which do not affect the substantive requirements.

An important observation, rather, has to be made from the German/Austrian/Swiss point of view. The "Tatbestandsmäßigkeit" and the "Rechtswidrigkeit" together are the "Unrecht". This could be roughly translated as the "wrongfulness" (or "wrong") of an act. The "Tatbestandsmäßigkeit" creates the wrongfulness; the "Rechtswidrigkeit" excludes wrongfulness in special cases like in self-defence cases. The very substance of this is: the act of self-defence is an *allowed* act. Even more, the person acting in self-defence has the subjective right to do so. The rationale behind it is that in self-defence situations there is no policeman or other representative of the state which would be able to act in favour of the person which is under menace in a self-defence case, thus maintaining the state's monopole

of the use of physical force. However, I do not want to transpose this linguistic/philosophical concept to other states. The decisive question behind it is: “Is a certain behaviour allowed or not?” If it is allowed, it would be a contradiction to all theories to punish a behaviour which is deemed “allowed”/”lawful” or howsoever.

3. Double prohibition

Thus, a solution could be to reduce double criminality to the concept of double prohibition. This means: the behaviour has to be prohibited in both states, but it is not necessary that it is a crime in the requested state.

a) My presumption is that most of the problems of double criminality have their source in the question: what behaviour is allowed/is not allowed. If we take the example of active euthanasia in the Netherlands or abortion in – e. g. Austria: This is not so much a question of punishing such acts than defining: what is allowed and what is not allowed. In this field, basic rights concerning inter alia freedom of expression, give good examples.
b) Here we see also that the borderline between double criminality in abstracto and in concreto runs along the wrong lines. Criminality “in abstracto” means that there must be an offence as such in the requested state. Reasons of – from a German/Austrian/Swiss-view – justification or excuse are irrelevant. This is not convincing. Just take the example of piercing. Piercing fulfils– at least according to German and Austrian law – the objective elements of a crime (physical assault according to section 223 German Criminal Code; sec. 83 Austrian Criminal Code). However there is a justification, if there is consent of the customer. Thus, in Germany and Austria it is allowed to pierce a person on the basis of this person’s consent. It would not only be illegal to punish a behaviour which is allowed; it would also be illegetimate: due to constitutional reasons the punishment in such cases would not be directed to serve any purpose of criminal (or other) punishment. If we would apply the double criminality requirement in abstracto, it would be met in the piercing case.

In a certain way, present practice already follows the idea of double prohibition: Double criminality does not require that the behaviour is punished in the requested state by the same offence or the same type of offence. It is sufficient that the behaviour is punishable by any offence at all. This means that the behaviour might be (aggravated) theft in the requesting state and robbery in the requested state; double criminality would be met anyhow. The underlying idea for me is that in both states there is a prohibition concerning the concrete behaviour at stake. How and by what type of offence is not relevant as long as there is any offence by which it is ruled that the behaviour is prohibited.
Here we have to be aware of a differentiation between:
- the prohibition as such
- and the criminalization of this prohibition

To give an example. The crimes of wilful killing and of negligent killing have the same underlying prohibition: it is prohibited to kill another human being. If this is done wilfully, then the crime of “wilful killing” (paragraph X of a certain legal order) provides for high sanctions; if it is done in a negligent way, the crime of negligent killing (paragraph Z of a certain legal order) provides for a lower sanction. In common law systems, the separation between the guilty-verdict and the sentencing becomes obvious already by procedural structure.

4. Basic rights/ordre public

The principle of double prohibition comes close to what I had already proposed in an earlier paper, namely to replace double criminality by an ordre public clause or by a basic rights clause. What would be covered by a basic rights clause? Such a clause would cover cases where the behaviour
- (1) is not prohibited or
- (2) is not criminalised in the requested state and the reason therefore is
- (3) that this is due to basic rights.

We have to distinguish from these questions of whether or not to prohibit and to criminalize (the **"whether or not"**) the questions of **"how"** the behaviour is criminalized if the first two questions are answered in the affirmative. In other words, the question of the sanction then is a follow-up question, for example: if we use criminal law, then the follow-up question is: only fines or deprivation of liberty? second follow-up: the range of the fines or the deprivation of liberty?

My presumption is: as soon as a state knows the prohibition as such, there will also be at least an administrative fine. The consequence is that all the follow-up questions identified supra do not belong to the double criminality problem rather than to the problem of unproportionate reactions/sanctions which is existing independently from the double criminality question.

If the sanctions are excessive from the point of view of the requested state, this has nothing – or at least: little - to do with double criminality; it is a different question dealt with by human-rights-exceptions to extradition.

The decisive problem thus is the existence of the same prohibition in the two states. If this is the case, we can then reduce the problems to the following situations:

Situation 1 - The prohibition is sanctioned in both states (A and B) by criminal law (no problem as to double criminality; differing sanctions are a problem of human rights clauses)

Situation 2 – The prohibition is sanctioned in the requesting state (A) by criminal law, in the requested state (B) by administrative law (Ordnungswidrigkeiten): the constitutional question is: would it be unconstitutional according to the law of state B to sanction that behaviour also by criminal and not by administrative law? According to e. g. German law, there is a huge margin of appreciation of the legislator in this respect; unconstitutionality is far away. To give an example: driving a car after consumption of too much alcohol is forbidden in Germany as well as in Austria. However, in Germany it is sanctioned by criminal law, in Austria only by administrative law (Verwaltungsstraftat).

Situation 3 – The prohibition exists also in the requested state B, but there it is not at all sanctioned: In practice, this is nearly not the case.

A serious problem arises, if there is no comparable prohibition in state B. Then the behaviour is allowed in state B, forbidden in state A. As I mentioned already, this situation is well-known in the field of freedom of expression: its scope of protection is much larger in common law states than in continental law states. But then we have a clear example for a basic-rights-problem of double criminality.

My further presumption is that all the cases of double criminality and its abolition may be reduced to the cases as just discussed. Therefore: reducing double criminality to basic-rights-cases seems to be on the one side a very strong change. However, a solution which

seem to be less strong and which therefore might be transformed on a broader political basis, is not visible.

5. The merely procedural approach of the European Arrest Warrant (EAW)

The EAW provides for a list of offences (resp.: of categories of offences) for which double criminality needs not to be checked. This is a very different approach. It does not abolish double criminality, rather it eliminates the procedural need to check it. In practice this leads to the following approach: practitioners check a "list-crime" also in an additional way that double criminality is met "anyhow" in a given case. This does not save any time, rather it doubles the time.
The assumption of the EAW-list is that these crimes or this sort of crimes is punishable in all relevant states. Its problems are vague definitions of the fields of crimes. In addition: What is to be done when the crimes of a request do not clearly fall into one of the categories? The work then remains; it only is shifted to another level.

6. Bi- or more-lateral treaties

The PC-TJ could encourage member States to make use of bilateral exception clauses in the extradition and in the mutual legal assistance treaties, whereby States would abolish between them the double criminality condition. To do so and to start with substantive reductions on a bi- or trilateral basis is more or less a question of political opportunity. The Schengen-II-agreement is a good example of how such a mechanism can develop from a regional multilateral treaty to overall EU-law. From a legal point of view, such approaches tend to confusion because the number of law sources which have to be applied in a parallel way, are encreased.

7. Summary

The most appropriate way for intermediary solutions with regard to the abolishment of the double criminality requirement is to shift from the double criminality principle to the principle of double prohibition. This has more or less the same effect as replacing the double criminality requirement by a basic rights clause or an ordre public clause. All other substantive solutions do not satisfy from a legal perspective. It will be a political solution to proceed only with these other possibilities and create another set of patchwork solutions.

II) ROLE AND IMPACT OF OTHER INSTRUMENTS: SEARCH FOR THE "BEST PLACE OF PROSECUTION"

It has been proposed to look for alternative or complementary approaches by – inter alia – making more use of transfer of proceedings and of the principle ne-bis-in-idem. The latter, however, presupposes that a certain act/behaviour is already punishable (in the very concrete sense) in more than one state. In such a situation, there is no need to abolish double criminality as it is fulfilled already.

The same is valid for transfer of proceedings: Double Criminality is also a requirement of the transfer of proceedings, as art. 7 of the European Convention on the Transfer of Criminal Proceedings of 15 May 1972, CETS No. 73, shows:

> "1. Proceedings may not be taken in the requested State unless the offence in respect of which the proceedings are requested would be an offence if committed in its territory and when, under these circumstances, the offender would be liable to sanction under its own law also.
>
> 2. If the offence was committed by a person of public status or against a person, an institution or any thing of public status in the requesting State, it shall be considered in the requested State as having been committed by a person of public status or against such a person, an institution or any thing corresponding, in the latter State, to that against which it was actually committed."

Both ways, however, show advantages. Transfer of proceedings avoids the necessity to recognise decisions rendered by judicial and administrative authorities in another state by simply moving the whole procedure to the state most appropriate to carry it through (*Gavouneli*). This is also true of the principle ne-bis-in-idem which should be complemented by a principle to search for the best place of prosecution which is - more or less – a combination of both (ne-bis-in-idem and transfer of proceedings). The principle of the best place of prosecution shows a way to reconcile legally protected interests of all parties involved: The States and the individuals – be it as suspect or as victims.

It is worthwhile to go more into details: A transnational ne-bis-in-idem like in art. 54 of the Schengen-II-agreement blocks a second decision in another state. It is decisive which state renders the first decision. This opens the door for unreasoned results (when the first state comes into play merely by chance) or misuse (in which place do the police apprehend a fugitive; in which state does a fugitive try to foster proceedings). On the other hand, the exterritorial scope of national criminal laws has been extended to the utmost: in order to prosecute a person, it is no longer necessary to have two or more states with the power/jurisdiction to prosecute ("Strafgewalt"). As soon as that person is apprehended and the "best state" for prosecution has been determined, additional states with the power to prosecute are superfluous. It is necessary to coordinate those states which have the power to punish one and the same behaviour.

The substantive criteria are not only

- the classical principles for establishing jurisdiction (territoriality, personality, protection, etc)

but also

- the place of residence of the suspect or the victim,
- the state in which the best evidence is located,
- the state whose language all parties speak
- the state where also other prosecutions against the suspect take place.

The "Freiburg Proposal on Concurrent Jurisdictions and the Prohibition of Multiple Prosecutions in the European Union"[1] makes a comprehensive proposal as follows:

"Section 1: Concurrent jurisdictions

§ 1 Determination of forum
§ 2 Right to judicial review
§ 3 Judicial decision
§ 4 Renunciation of proceedings
§ 5 Corresponding application

Section 2: *Ne bis in idem*

§ 6 Rule and definitions
§ 7 Enforcement conditions
§ 8 Request for information
§ 9 Exclusion of abuse
§ 10 Reopening

Section 3: Accounting principle

§ 11 Accounting principle

Section 1: Concurrent jurisdictions

§ 1 Determination of forum

(1) If the prosecuting authorities of a Member State have reason to believe that a prosecution has been or could be initiated in another Member State having concurrent jurisdiction, these authorities shall be notified by describing the evidence so far collected.

(2) If within three months the authority of that State declares its interest in prosecuting the same case, the Member States concerned shall, within another three months, agree in which State the case shall be prosecuted.

(3) In determining the forum, preference shall be given to the Member State which will better guarantee the proper administration of justice, taking particular account of the following criteria:

(a) territory where the act has been committed or where the result has occurred
(b) nationality / residence or official capacity of the suspect / accused
(c) nationality of the victim
(d) location of evidence
(e) appropriate place for executing the sanction
(f) place of arrest and / or custody
(g) other fundamental interests of a Member State

§ 2 Right to judicial review

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1 See also the explanatory remarks in detail: Anke Biehler . Roland Kniebühler Juliette Lelieur-Fischer . Sibyl Stein (eds.), Freiburg Proposal on Concurrent Jurisdictions and the Prohibition of Multiple Prosecutions in the European Union With a Preface by Albin Eser Copyright: Max Planck Institute for Foreign and International Criminal Law, Freiburg i.Br. November 2003 <http://www.iuscrim.mpg.de/forsch/straf/projekte/nebisinidem.html>

The accused has the right to apply to the Court of Justice of the European Communities for review of the Member States' decision.

§ 3 Judicial decision

Where the Member States are unable to agree in which State the prosecution should take place, the matter shall be referred to the Court of Justice for determination.

§ 4 Renunciation of proceedings

If for any reason no final decision is delivered in the Member State whose forum was preferred, the competent authority of the latter shall without delay inform the competent authorities of the other Member States having jurisdiction.

§ 5 Corresponding application

§§ 1 to 4 apply as the context requires in cases of concurrent jurisdictions where a European organ as defined in § 6 (2) (e) is involved.

Section 2: *Ne bis in idem*

§ 6 Rule and definitions

(1) A person may not be prosecuted in the European Union for an act that has already been finally disposed of in a Member State or by a European organ.

(2) (a) "Person" may be any natural or legal person.
(b) "Prosecution" includes any proceeding with a repressive character. It is not necessary that the offence on which the prosecution is based is qualified as criminal by the legal system which ruled the first proceeding.
(c) "Act" is to be understood as substantially the same facts, irrespective of their legal character.
(d) "Finally disposed of" refers to a decision terminating the prosecution in a way that – according to the legal system which ruled the first proceeding – bars future prosecution and makes reopening subject to exceptional substantial circumstances.
(e) A "European organ" is any institution being part of the European Union which has competence to prosecute.

§ 7 Enforcement conditions

(1) If the first decision has not been fully enforced and enforcement is still legally permitted under the law of the legal system which ruled the first proceeding, a new prosecution is only allowed if enforcement is permanently impossible.

(2) For these purposes enforcement is impossible only if:
(a) the sentence cannot be enforced in the sentencing State, in particular where surrender of the sentenced person to this State for the purposes of execution cannot be performed, and
(b) enforcement in another State by means of recognition of the sentence cannot be performed.

(3) However, if subsequently the second prosecuting authority receives official certification that the decision has been or is being enforced, the second prosecution shall be terminated.

§ 8 Request for information

Where the prosecution authority of a Member State or of a European organ when initiating a prosecution has reason to believe that it relates to an act that has been finally disposed of in the European Union, this authority shall request without delay the relevant information from the competent authority which has delivered the decision.

§ 9 Exclusion of abuse

(1) § 6 (1) will not apply if the first proceeding was held for the purpose of shielding the person concerned from criminal responsibility.

(2) This paragraph may only be given effect by the European Court of Justice following an application by the Member States seeking to initiate criminal proceedings.

§ 10 Reopening

The reopening of a case as referred to in § 6 (2) (d) is only permissible in the jurisdiction in which the case was first disposed of.

Section 3: Accounting principle

§ 11 Accounting principle

(1) If despite the above provisions, the same act is prosecuted in different jurisdictions, the sanctions imposed in one jurisdiction that have been already enforced must be taken into account in the other jurisdictions during both the sentencing
and the enforcement process.

(2) This principle also applies in cases where sanctioning of a legal person and a natural person would essentially amount to the same effect."

Summary

1. Double criminality should be replaced by the principle of double prohibition.
2. Additionally multiple prosecutions should be avoided by determining "the best place of prosecution".