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

**Committee of Experts on the Operation**
**of European Conventions in the Penal Field**
**(PC-OC)**

# Expert Opinion for the Council of Europe on Questions concerning double criminality

**submitted by**

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*Preliminary remark:*
*The work on the above mentioned questions of the PC-OC Working Party was agreed upon to be a short, concise and topical outline of arguments rather than an academic analysis. I therefore confine footnotes etc. to a minimum. For additional information see annex I, O. L.*

## A1
## Examine the concept of double criminality with regard to all relevant European Conventions

The concept of double criminality still plays an important role in all relevant European Conventions which will be dealt with infra. It does not make sense to describe them here in detail. Art. 2 para. 1 European Convention on Extradition (and others in the field of extradition) stipulate the requirement of double criminality clearly, whereas Art. 5 lit. a of the European Convention on Mutual Assistance in Criminal Matters leaves it to the member states to make a reservation concerning double criminality.

However, double criminality is of importance not only in the field of extradition or mutual assistance. One could draw a line between extradition and (classical) mutual assistance on the one side and different types of transfers, on the other. The discussion as well as my following considerations concern changes in the first field, e. g. extradition and classical mutual assistance, whereas the second seems to be out of question.[1] Except from one specific situation one can discuss both in the same context because the transfer of enforcement is a kind of assistance as well. This situation has arisen in the last years when it comes to extradition of nationals. Like in the Netherlands, the extradition of nationals can be dependant on the transfer of the execution of a possible sentence and the re-transfer of the individual. In this case, double criminality plays a different role than in all other cases of transfer of execution as only– roughly speaking – the trial-stage takes place in another state. All other parts of the criminal proceedings concern the extraditing state. Double criminality here has to be a prerequisite of extradition because of the re-transfer: In this special situation, only the trial takes place in another state. Therefore, the extraditing state is the punishing state – at least on a factual basis. As this situation is rather the exception, I will leave it aside in my further deliberations.

**A2**
**Expand, in particular, on the punishability *in concreto* (where, e. g. two jurisdictions apply a different statute of limitations)**

In order to avoid misunderstandings about the meaning of "*in abstracto / in concreto*", I understand that double criminality *in concreto* means that the concrete behaviour has to be fully punishable under the law of the requested state. It has not only to fulfil the requirements of a crime as such. There may not be any reasons excluding punishability like exculpatory factors. This means: the behaviour has to meet all positive and negative requirements of a crime.

The example of different statutes of limitations in the field of extradition is, in my opinion, illustrating the problems very well: The European Convention on Extradition of 1957 says in its article 10 that both laws are relevant: the law of the requesting as well as the requested state. Bilateral treaties for the facilitation of the European Convention on Extradition, like the treaty between Germany and the Netherlands (of 30 August 1979), provide that for the interruption of prescription only the provisions of the requesting state shall apply. The same is valid under art. 62 para. 1 the Schengen-II-Agreement. And Art. 8 of the Dublin 1996 Convention provides that extradition may not be refused on the ground that the prosecution or punishment of the person would be statute-barred according to the law of the requested member state.

This seems, at first glance, to be an example of "fine-tuning", because in a sensible field (statute of limitations) one started with the question of interruption of prescription and ended up with the general handling of prescription in the requested state which may not play a role. In my opinion, this example shows that there may be distinctions which may differ from state to state, be it on the level of prescription periods or be it on the level of prosecutorial acts eligible for interruption of prescription. In my opinion, this has nothing to do with the underlying ideas of double criminality.

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[1] The concept of New Start does not differentiate between those two types of cooperation (see: PC-S-NS [2002] 7, 18 September 2002, page 12).

**A3**
**What was the rationale behind introducing the double criminality concept at the time of drafting the treaties which refer to the concept?**

It can clearly be shown that the concept of double criminality emerged in the 19th century as a consequence of the principle of reciprocity.[2] In the 19th century reciprocity was conceived in a very strict sense because the underlying rationale was a very narrow concept of sovereignty: If the human behaviour which is basis for an extradition request is not punishable in the requested state, this state would not be in a position to make a request in a comparable situation. The basis for an extradition request would be lacking: a crime. And if a strict reciprocity is not possible, this is contrary to the then existing concept of sovereignty: it is against the dignity of a state to grant more than he could receive. This concept first was shaped by a positive list of extraditable offences (the principle of enumeration); the 1957 convention, however, was one of the first instruments to change to a negative approach by only excluding crimes which are not that much important as defined by their maximum penalty.

The 19th century approach to extradition and cooperation in general may be characterized as being "two-dimensional": only the two states concerned have legal interests which have to be balanced. The individual does not play a role. Thus, one could characterize the principle of double criminality of being in its origin only for the benefit of the states and their understanding of sovereignty. Since the 19th century, the concept of double criminality was not really put in question, it rather was upheld. Changes were confined to internal changes, as the example of the statute of limitations has shown.

**A4**
**Was double criminality designed to be a measure for the protection of States interests or for the protection of individual rights or both?**

From the starting point described in A3 it was clear that the double criminality requirement was – initially – only designed to be a measure for the protection of the states. In the 19th century, the individual did scarcely play a role in the reasonings concerning the law of extradition. It was only at the end of the 19th century that questions like arrest for purposes of extradition played a role. It became clear that at least for such measures like arrest, a legal basis would be necessary. And in the 20th century, I have the impression that one tried more or less to underpin a second rationale for double criminality: that of the individual's interest.

In fact, one could try to argue via the principle of legality (nulla poena sine lege): no extradition without a crime under the law of the requested state[3]. However, this approach is only convincing if one argues that extradition is equal to a "poena". This could be sustained by the "help"-argument: Extradition is not the same as a poena but it is assistance and help for another state's poena and therefore comes close to a poena.

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[2] For details see: Lagodny, in: Schomburg/Lagodny, Internationale Rechtshilfe in Strafsachen, 3rd edition Munich 1998, para. 3 IRG annotation 2 and subs. (pages 49/50).

[3] See the comparative analysis of Eser/Lagodny/Blakesley (see annex I).

This argument has another aspect: One could say that the principle of legality is observed because the facts are punishable according to the law of the requesting state. This is, in my opinion, sufficient: The requesting state's poena also legitimates the action of the requested state, just because it is mere help and assistance.[4] One could also argue that both, the procedure in the requesting as well as in the requested state are combined to a single transnational procedure of "transnational division of labour" wherein every state plays its specific role[5].

**A5**
**Consider the above also in terms of the aims of the cooperation conventions**

The aims of the twentieth centuries' European Conventions can be summed up to facilitate cooperation without neglecting interests of the individual. In terms of these aims, the concept of double criminality surely is not facilitating cooperation. To the contrary, it involves from case to case a thorough analysis of the criminal law of both states. However: The existing conventions do not deviate from the 19th centuries' concept.

**B6**
**Since the drafting of the earlier treaties, has the concept of double criminality changed, either at national, EU (see eg. Dublin 1996 EU Convention an European Arrest Warrant) or international law or in the practice of judicial cooperation?**

In my opinion, there is even no substantial change in the concept of double criminality to be observed in the last 10 years and its conventions and draft conventions[6]. The European Arrest Warrant – to take this prominent example - does not provide for a substantive change. For the crimes or groups of crimes contained in the list of article 2 the evaluation of double criminality is excluded because it is presumed that the relevant behaviour is punishable throughout the European Union.

The rationale of the Framework Decision seems to be that double criminality is fulfilled for the list-crimes in art. 2; therefore it is not necessary to check double criminality in every concrete case. But for all other crimes, double criminality still not only exists but also has to be checked in every case. A big problem is what to do with cases which have both categories of crimes as a basis, i. e. list-crimes and non-list-crimes.

The Dublin 1996-convention in fact abolishes the requirement according to its art. 3 for conspiracy and association to commit offences. But this seems more to be a tribute to modern trends rather than an effective means.

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4 As to these questions see also: Swart, Bert, Human Rights and the Abolition of Traditional Principles, in: Eser/Lagodny (eds.) Principles and Procedures for a New Transnational Criminal Law, Freiburg im Breisgau 1992, p. 505-534, 520: No Human rights requiring double criminality. This article, in my view, generally discusses the questions at stake here in a very intensive manner. I have not found a comparable contribution published since that time.

5 See Schomburg/Lagodny (note 3), introduction ann. 105 – 113.

6 See also the analysis of Gless, in: Eser/Blakesley/Lagodny (annex I)

**B7-10**

**B7 Examine the concept of double criminality in light of the New Start Report;**
**B8 Could this principle, in order to reduce the obstacles to international cooperation in criminal matters, be conceived differently, compared to its original meaning and purpose?**
**B9 Consider the above also in terms of the aims of the cooperation conventions;**
**B10 Consider possible changes to the concept also in terms of the issue of punishability *in concreto* (see item 2 above)**

*Preliminary remark: question B7 – B 10 are dealt with together in order to avoid repetitions as well as gaps.*

The idea of the New Start Report is to "fine-tune" the concept of double criminality and, in particular, to accommodate variations in the abstract legal definition of criminal behaviour, as much as differences in terminology (PC-S-NS [2002] 7, 18 September 2002, pages 12/13). "Fine-tuning" obviously means to maintain the concept as such but to avoid disadvantages which arise because of details which are detrimental.

The New Start programme, on the other side points out the idea of equal treatment: "[P]ersons should neither be less well treated nor better treated in the framework of an international procedure than they are in the framework of, for example, an inter-city procedure." (PC-S-NS [2002] 7, 18 September 2002, page 19). If we apply this to the question of double criminality, this would lead to a better treatment of the offender who flees from one country (A) to another (B) where the behaviour is not punishable; under the double criminality requirement he is not extraditable and thus not punished. Unlike in cases of non-extradition of e. g. nationals where non-extradition can be counter-balanced by criminal proceedings of the non-extraditing state (due to the maxim: *aut dedere aut iudicare*), the lack of punishability in state B leads to the result that the offender will not be punished as long as he is in state B. This would be contrary to the idea of equal treatment.

In my opinion, the approach of "fine-tuning" double criminality makes only sense as long as the Member States follow the principle of double criminality *in abstracto*. At least in Germany and some other states, this is not the case[7], as double criminality is dealt with *in concreto*. Second: Harmonization can start in some fields; however, it is an illusion to cover all or nearly all areas of criminal law and to harmonize them. The criminal law contained in the Criminal Law Codes of the different states is only a small part of the criminal law of that country in sum. Take Germany: The Criminal Law Code, the "Strafgesetzbuch", is only the top of the crop: 90 per cent of the criminal law provisions are not contained there but in special laws, be it administrative laws or other special laws.

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7 See annex I.

The "presumption"-approach of art. 2 of the European Arrest Warrant in my opinion shows the proper direction: in the Europe of the European Union – even after its enlargement as of 1st May 2004 – there should not be too many lacunae concerning the area of criminal law. Of course, there will be differences, but they will be of minor importance. Even between Germany and Austria which have an order of criminal law which is closely connected by common historical roots, there are differences. Just to take one example: The use of official grants contrary to the purposes which the official authority intended to foster with the grants is punishable according to Austrian law (sec. 153 b Austrian Criminal Code) with a penalty of maximum six months. This is the only special crime provided for in the area of grants. In Germany there are a lot more of special crimes like this. Section 264 of the German Criminal Code provides that already the making of false statements as such when applying for a public grant is punishable with a penalty of up to five years. In Austria, the simple making of a false statement in such a context would only be punishable as an attempt to fraud, which requires more than what requires section 264 of the German Criminal Code. This is one example for a difference between both legal orders. The reasons for that difference are due to different concepts of criminal policy which I would not consider as essential.

On the other hand, Dutch Criminal Law does not punish active euthanasia if committed under very narrow circumstances. Under German Criminal Law, active euthanasia is considered punishable without exceptions. Also this difference may be explained by different concepts of criminal policy which – to my mind – are essential.

I therefore would not draw the decisive line between what is punishable *in concreto* or *in abstracto* but – roughly speaking: what is contrary to the *ordre public* of a country[8]. The subsequent question is: what belongs to the "ordre public" of a country? First: what would be contrary to the basic rights of that country. This means: Extradition should be excluded for crimes which may not be crimes in that country because punishment would be unconstitutional. Two main reasons may exist here: First, the prohibition as such which underlies the crime would be unconstitutional; e. g. a crime based on a prohibition contrary to the freedom of expression. Second: The criminalization of a prohibition causes problems, for example as it is contrary to the principle: *nulla poena sine culpa*. If we analyse the existing criminal laws, I presume that there would be only a few areas where this would be the case. The consequence would be: extradition would be barred only in exceptional cases.

As mentioned above, the "ordre public" of a country also consists of essential features of its criminal policy. The law of abortion is such a sensitive area. If we compare the liberal Dutch approach to the strict Irish approach, one could say that due to the ordre public approach, extradition from the Netherlands to Ireland in an abortion case which would clearly be not punishable according to Dutch law but punishable according to Irish abortion law, would be contrary to the Dutch ordre public. The Austrian-German example given above concerning public grants – from my point of view – is not so much an expression of *essentially* different concepts of criminal policy as to render extradition contrary to the Austrian "ordre public".

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8 See Swart (supra note 3), at 524 referring also to Jescheck, Hans-Heinrich, Die internationale Rechtshilfe in Strafsachen in Europa, 66 Zeitschrift für die gesamte Strafrechtswissenschaft 531-532 (1954) who already in 1954 proposed such an ordre public clause.

There are arguments to maintain the principle of double criminality just because of the differences in criminal policy between the states. In my opinion, this legitimate concern may be satisfied by a clause as proposed infra because it would cover exactly these interests. One may oppose this idea by arguing that the "ordre public"-approach is too difficult to be met, that it is too vague or that it leaves too much discretion for the states[9]. However, this has to be compared to the present situation where the threshold of double criminality (*in concreto*) requires to check the detailed criteria for punishment of one state against those of another state. As every national criminal law makes a lot of distinctions which make sense within that countries' system, this may lead to irritations when comparing the punishability.

One may argue that this is in favour of understanding double criminality in an abstract sense which means that the behaviour as such is criminalized in both countries. This leads to a lot of problems, just to mention the question: is the behaviour still criminalized if it is justified, e. g. by consent?

The details of such a new approach certainly have to be discussed and need "fine-tuning". It rather seems to me that it is more adequate for Europe than maintaining the classical double criminality concept and trying to "fine-tune" the latter. In my view, the "fine"-tuning of this approach could be made by indicating examples of what could be part of the ordre public:

My proposal, therefore, would be for the field of extradition:

"1. Extradition is not subject to double criminality, unless the lack of double criminality infringes the ordre public of the requested state.

2. The ordre public is in this context[10] infringed if the incrimination of the human behaviour which is the basis of the request

   a) would be contrary to the human rights of the requested state
   b) would be inconsistent with essential concepts of the criminal policy of the requested state
   c) would be contrary to comparable legal concepts."

9 See Swart (supra note 3), at 524.

10 The proposal has to be adopted if the concept of ordre public will play a role in another context.