COUNCIL OF EUROPE

CONSEIL DE L'EUROPE

Strasbourg,17/09/2014 PC-OC(2014)07
[PC-OC/DOCS2014/PC-OC(2014)07]

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EUROPEAN COMMITTEE ON CRIME PROBLEMS

(CDPC)

COMMITTEE OF EXPERTS

ON THE OPERATION OF EUROPEAN CONVENTIONS

ON CO-OPERATION IN CRIMINAL MATTERS

(PC-OC)

Special session on extradition - 66th plenary meeting of the PC-OC

Workshop reports

Workshop 1: How to apply the double criminality principle, in concreto or in abstracto?

Workshop 2: Refusal of extradition requests, grounds and possible solutions to avoid impunity

Workshop 1: How to apply the double criminality principle, in concreto or in abstracto?

Moderator: Mr Yitzchak Blum (Israel)

Rapporteur: Ms Cătălina Neagu (Romania)

The discussions were held on the basis of document PC-OC (2014(04)] prepared by the moderator, Mr. Yitzchak Blum.

In his introductory remarks, Mr. Blum underlined that the double criminality (hereafter the "DC") principle appears as a requirement in most modern extradition treaties. It is stipulated, as a general rule, by article 2 para 1 of the European Convention on Extradition from 13 December 1957. In discussions regarding how this principle should be interpreted, the distinction has often been drawn between an *in abstracto* and an *in concreto* interpretation of the principle. The exact meaning and aplication of these terms has been less clear. One of the earliest articles, drawing this distinction was written in 1973 by a noted Romanian-Israeli professor S.Z. Feller. Yet, while formulating this distinction, Feller himself was not entirely consistent in applying it. Thus, in his 1973 article, Professor Feller took the position that a proper application of the DC principle would require that DC exist at the time the offence was committed. However, the same professor wrote, in 1980, a comprehensive book on extradition, in which changed his approach, stating that the reference point to determine DC is the time when a request for extradition is received. It appears that the impetus for this change in outlook may have been the experience of an actual high profile case, during the intervening period between the writings, in which a suspect in a terror case was not extradited to Israel on DC grounds.

The moderator in soliciting the views of the delegations, therefore, raised the question whether the theoretical question of the in abstracto/in concreto distinction was as important as considering the purposes and policies that the DC requirement are meant to further.

The US, Switzerland, Georgia, Sweden, Ukraine, Cyprus, Israel, Germany, the Czech Republic and France stated their positions on these matters, regarding both the *in abstracto /in concreto* distinction as well as the issue of the reference moment for the application of the DC principle as regards extradition requests. On this last point there were three possibilities encountered in the practice of the states:

- when the offence was committed
- when the extradition request is received
- when the decision on the extradition request is made

The representative of United States considers that *in abstracto* interpretation is the correct one. Regarding the time, in the US the reference moment is when the request for extradition is received.
The representative of Switzerland mentioned that the DC should be considered *in abstracto*. As far as the reference moment to apply the DC principle, it was stated the case law in Switzerland is very clear, it is applied when the decision on extradition is made (and this is also valid for MLA requests, not just in extradition field).

Georgia was also in favor of an *in abstracto* interpretation of the DC principle, but mentioned that there is flexibility, depending on the practice it has with the other state involved in the extradition procedure (e.g. in relation with Russia Georgia applies an *in concreto* interpretation, because Russia applies this type of interpretation). Regarding the time taken into account to apply the DC principle, Georgia considers all the 3 moments listed above: when the offence was committed, when the extradition request is received and when the decision on the extradition request is made.

For Sweden the crucial point in applying the DC principle is the moment when the decision on extradition is rendered. Sweden doesn't have provisions that state if it's an *in abstracto* or *in concreto* interpretation, but, taking into account the courts' rulings it appears to be an *in abstracto* interpretation of the DC principle. However, when the Swedish authorities deny extradition and use the *aut dedere aut iudicare* principle they move to the *in concreto* interpretation.

Ukraine, just like Georgia, considers that the DC must be evaluated in all 3 moments above mentioned. For Ukraine, *in abstracto* or *in concreto* interpretation depends on the case, but it's generally interpreted *in abstracto*.

Israel prefers the *in abstracto* interpretation. As far as reference time is concerned, the DC is evaluated in conjunction with the time when the offence was committed, but Israel is considering a change in its law on this point.

Cyprus applies the *in concreto* interpretation, because all the constitutive elements of the offence are evaluated. It was noted that, nevertheless, in relation to Commonwealth countries, Cyprus applies the *in abstracto* interpretation. The case law from Cyprus appears to be in favor of the application of the DC principle at the time when the offence was committed, but the representative expert considers that it should be evaluated when the decision on the extradition request is made.

In Germany, the DC principle has *in concreto* interpretation, in the German legislation. Regarding the time, there is no provision in the law, but, according to the decisions of the Supreme court, DC is necessary at the time of the decision on the extradition request.

Czech Republic applies *in concreto* interpretation, all the elements of the crime are being assessed. All 3 moments are taken into consideration for applying the DC principle.

Also France uses, in general, *in concreto* interpretation. According to its case law, the DC is evaluated when the offence was committed.

The moderator raised the issue of double criminality in MLA situations and whether, even if it is required, the same standards applicable to extradition should apply or whether a more liberal approach is warranted. This, it was suggested, might be a topic for future discussions regarding MLA.

Workshop 2: Refusal of extradition requests, grounds and possible solutions to avoid impunity (*aut dedere aut iudicare*)

Moderator: Mr Eugenio Selvaggi (Italy)

Rapporteur: Ms Anniken Barstad Waaler (Norway)

Workshop 2 had some fruitful discussions and exchange of views. The moderator held an introductory speech based on the discussion paper distributed before the meeting (PC-OC (2014) 05), and underlined that the discussions could be focused on the questions put forward there.

Firstly, the workshop had some discussions on whether the principle of aut dedere aut judicare (hereafter the Principle) only applied if the request for extradition was rejected on the ground of citizenship. The 1957-Convention Article 6 paragraph 2 only refers to situations where the request is rejected on the basis of nationality.

Some states informed the workshop that they applied the Principle only in this context. On the other hand, there were states that informed that in their national legislation, the scope of the Principle was broadened also to situations where other grounds for refusal applied. For example, Portugal had broadened the scope to situations where extradition could not be granted because of prison for life. France informed that in French law, the Principle could apply to situations where extradition was denied on the basis of l'ordre public, lack of fair trial (ECHR art. 6), offences considered as political offences or if extradition was likely to have consequences of an exceptional gravity for the person claimed, particularly by reason of his age or state of health, provided that the offence could be punished with at least 5 years imprisonment. Also the Netherlands informed that the Dutch legislation on this issue would change in 2014. When the new legislation enters into force, the NL will have jurisdiction to prosecute in every case where extradition requests are denied, provided that the punishment in the NL would be 8 years or more.

Some states also highlighted that the Principle could lead to practical difficulties in carrying out the proceedings domestically. An example was made in relation to cases where the person concerned had asylum-status in the requested state. According to national laws of many states, it is not possible to reveal to the requesting state the fact that the person concerned has asylum-status, and consequently it would be difficult to ask for the case file.

The workshop also had an exchange of views regarding the Dutch-clause, and that the said clause could be a possible solution instead of having an unconditional prohibition of extradition of own nationals. Maybe it would be better to give priority to the state where the offence was committed and conduct the proceedings there, provided that the person concerned could serve the sentence in his or her home country.

We also had a discussion concerning cases where there was total disproportionality with regard to the punishment that would have been imposed in the requesting state for the same offence. One state informed that a request for extradition had been refused on this ground. The workshop considered that this could be a topic for further discussions at a later stage.

We also discussed human rights as a ground for refusal, and whether the Principle should apply in these cases, provided that satisfying guarantees were not received.

The workshop further noted the clear link between the Principle and transfer of criminal proceedings. Some states, in cases where the person sought have been granted asylum, don't ask for a request for extradition from the state seeking the person concerned, but instead ask for a request for transfer of proceedings.

Finally, the workshop took note of the proposal by Mr. Vladimir Zimin from Russia on going back to his written proposal set forth some years ago on the political offence exception.