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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

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Special Session on Extradition, Workshop 2

Discussion paper on the refusal of extradition requests and possible solutions

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"The certainty of there being no part of the earth

where crimes are not punished,

may be a means of preventing them"

Cesare Beccaria

Should States, by making extradition more difficult than it need be, place obstacles in bringing criminals to justice?

* * *

Extradition is the oldest form of international judicial co-operation. Prof Bassiouni dates it back to the XIII century B.C. Extradition practice received a strong impetus in the XVI century after Ugo Grotius ideas, in particular to effectively combat maritime piracy via the practice to ensure the surrender of fugitives who committed crimes which injured another State.

Hence, and stemming from such an origin, it can be concluded that extradition tends to ensure security among the international community and to accomplish the ends of justice, i.e. maintaining criminal law systems and impeding that punishment is frustrated by permitting that criminals escape the punishment they deserve by obtaining asylum abroad.

AUT DEDERE AUT IUDICARE

Learned professors attribute the expression *aut dedere aut punire* (which became later on *aut dedere aut iudicare* and which is commonly used since the Seventies) to Ugo Grotius, although only recently (past century: see article 7 of the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft) the consequent obligation was inserted in treaties, while before it was intended to be a sort of natural right of the injured State to exact punishment[1].

The said principle is also considered to be a principle of customary international law, which would be applicable to international crimes[2].

However, the same principle appears in some modern treaties/conventions[3].

[1] Hugo Grotius, *De Iure Belli ac Pacis*.
[2] That idea is the rationale of the ICC Statute (principle of subsidiarity).
[3] See the TOC Palermo Convention on Transnational Organized Crime, article XVI.10.

The verb *iudicare* literally means "to judge" or "to try", but it is widely accepted the idea that in the context at stake it includes inquiry and prosecution, but not necessarily bringing someone to trial or to punish him/her.

QUESTIONS

A. One first question is: does that principle apply also in the absence of an express provision in a given treaty or convention?
And: does the principle apply to international offences only or it also applies to any offence that gives rise to an extraditable offence?
What would we mean by international offences? Are they limited to, for example, the crimes indicated in the ICC Rome Statute? What about those offences that clearly appear as damaging the sake of the international community at large, such as drug offences, organized crime and other offences that are (or can be) transnational in nature?

B. A second question could be the following: what if the requested State does not provide for extraterritorial jurisdiction (i.e. there is no domestic regulation that would allow the *"iudicare"*)?

GROUNDS FOR REFUSAL TO EXTRADITE

1. Citizenship. Nationality exception appears to be out-of-step with the current needs of international community to avoid safe havens for criminals. Possible solutions:
a. extradition on consent;
b. extradition and consequent obligation to repatriate after the sentence Dutch clause).

2. Lack of double incrimination (the item is being discussed in WG1).
"*Extradition shall be granted in respect of offences punishable under the laws of the requesting Party and of the requested Party…"* (article 2 of 1957 CoE's Convention): same *nomen iuris*, same facts or substantially similar offence?

3. Locus committed crime (place of commission": problems in case of drug offences, organized crime etc.

4. Political offence exception: does it need to be reflected upon? Would – at least with limitation to the Parties to the ECHR – the respect to human rights issue suffice?

5. Failure to meet the requirements deriving from ECHR. It is a quite accepted opinion that human rights have to be taken into consideration in the field of extradition. Article 6 (fair trial) does not apply to extradition procedure, according to ECoHR.
Human rights issues have become of a great importance after some decisions of the ECoHR, in particular: a. prison conditions in the requesting State; b. life imprisonment (Winter case); c.

possibility to impose very high sentences, not formally amounting to life imprisonment (i.d. 100 years prison penalty); d. death penalty; e. excessive delay beyond the reasonable delay stated in article 6, para. 1 of ECHR, or even other fundamental right, such as the right to the defence counsel). The requested State (which is bound to the obligations of the ECHR) is responsible for what happens to the individual in the requesting State. To that extent it does not matter if the requesting State is a Party to the ECHR or not[4].

Possible conclusion: human rights do establish new and further grounds for refusal of extradition?

DOES THE PRINCIPLE AUT DEDERE AUT IUDICARE APPLY TO CITIZEN EXCEPTION ONLY OR DOES IT APPLY ALSO TO OTHER GROUNDS FOR REFUSAL?

POSSIBLE SHORTCUTS TO EXTRADITION

See PC-OC documents on disguised extradition:

- PC-OC (2012)08rev2
- PC-OC (2011)09rev

OBLIGATION TO EXTRADITE

Is the requested State bound to the convention/treaty that the requesting State referred to in the extradition request? Could surrender be granted on the basis of other treaty than the one mentioned in the request?

[4] In my opinion that is the result of a decisive move from the old approach, which said that the requested State could not inquire as to the legality of the manner in which the fugitive will be treated by the requesting State, if surrendered. Now the scrutiny is made on the basis if the case law of the ECoHR, under the sanction of having violated the convention.