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IMPROVING EUROPEAN CO-OPERATION IN THE CRIMINAL JUSTICE FIELD

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THE NEED TO MODERNISE THE EUROPEAN MECHANISMS ON EXTRADITION AND ON MUTUAL ASSISTANCE

I. States need a strong and effective international judicial co-operation in order to fight against criminality and pursue the ends of justice.

Why (and what is) international co-operation? In pursuing the ends of justice States are limited by their national borders. Hence they need assistance and co-operation by other jurisdictions; that is the case where an evidence is located in one other State than the one where investigations or trials are being carried out (MLA); that is the case where an individual escaped from justice and fled to one other country (extradition).

In the last 15 years or so requests for JC have increased considerably. What was the reason for that?

1. The world has become a global village. Individuals, goods and capitals do move very quickly and freely, much more than they did before. Criminals and dirty money also move likewise;

2. Transnational character of crime has increased too, due to: a. links among organised crime organisations (*modus operandi*); b. profit of crime is located in countries other than the ones where the crime has been committed (in order to maximise illegal profits); c. many forms of criminality are trans-national in character (drug trafficking, terrorism, trafficking in human beings, cybercrime).

As a consequence, also international judicial co-operation has changed. Because the most dangerous forms of crime are transnational and because they affect societies, financial markets and individuals despite the existence of borders, States are now aware of the fact that judicial co-operation is not to be looked at as mere assistance granted by one State to one other State which is limited by national borders in the exercise of its jurisdiction. States are now conscious that while granting assistance they contribute to the fight against crime. Hence: judicial co-operation as a part of the common effort to combat crime. Just an example: in corruption cases money (the proceed of crime) is brought out of the country where the corruption took place in order to make more difficult investigations (by money laundering) or to make more difficult the confiscation of such proceed.

States are also interested in ensuring effective co-operation worldwide in view to avoiding their countries becoming safe havens for criminal. In fact experience has demonstrated that organized criminal associations look at geographical areas and at States where a) is there a lack of effective means against O.C. because a1) there is no appropriate legislation (both substantive and procedural law), a2) law enforcement agencies are not experienced in that field; b) there are no international instruments for co-operation or where international co-operation is not as effective as it should be (for instance because of excessive use of grounds for refusal by the means of reservations –for instance the requirement of double incrimination in MLA when a search or a seizure is requested-; because of the existence at a national level of bank secrecy, etc.).

One might question whether such a fight can be accomplished using 46 different codes. The Council of Europe had recalled some ten years ago that "the effectiveness of responses to crime depends greatly on their being harmonised within a coherent and concerted European crime policy" (Preamble, Recommendation R(1996)8 on Crime Policy in Europe in a Time of Change[1].

[1] Which is true for crime in general. That is particularly true in relation to certain crimes: "Globalisation will continue to facilitate transnational organised crime, and in particular economic crime at transnational levels, if no adequate safeguards are put in place. The capacity of national governments to respond to transnational and rapidly changing challenges is limited. The international regulatory framework is only slowly taking shape; and even where instruments exist they are not always efficiently implemented (see *Organised crime in Europe: the threat of cybercrime*, Situation report 2004, Octopus Programme, Council of Europe Publishing, page 220).

How has international co-operation changed? As I pointed out before JC has changed because of the awareness of States and Governments that international co-operation is crucial in the fight against criminality; the reasons for such a change are the following:

A. because criminality has become transnational, also the struggle against had to be shaped likewise (here are the great novelties of joint cross-border investigations, undercover operations, controlled deliveries, asset sharing).

B. peculiar forms of crime were also relevant to that effect and specific conventions in different areas have been envisaged (cybercrime, trafficking in human beings etc.): cybercrime and cyberworld in particular required ad hoc provisions on JC (see in cybercrime convention the 24hours/7days task force and provisions on freezing data).

C. new technologies also had an impact on JC: videoconference is a good example as to changes in JC due to technology.

D. technology did have an influence also in the practical implementation of JC (ways of transmission of requests and other documentation: fax; e-mail).

E. direct transmission among judicial authorities and prosecutors of requests for JC (see 2d Protocol to the 1959 MLA European convention) and the possibility to have the rogatory commission executed in a manner that the evidence sought be admissible in the requesting State (i.e. according to the law of such State) were crucial provisions because they bring a change in attitude: judges, prosecutors and practitioners at large feel themselves closer each other and get acquainted with the systems of the others.

F. the major changes and novelties in the European Union (EU) (due to the achievement of the common judicial space) were important too, both because all EU member States are also members of the Council of Europe and because some of the new provisions which have been introduced in the EU have been taken into consideration in Council of Europe (see Second Protocol to 1959 MLA convention).

Existing International Instruments

Judicial co-operation is made possible by the means of international agreements[2]. The most important conventions are the Council of Europe conventions, namely: the Extradition convention of 1957 (ETS 24) and its Protocols; the Mutual Legal Assistance conventions of 1959 (ETS 30) and its Protocols; the Convention on transfer of sentenced persons of 1983 (ETS 112) and its Protocol; the Money Laundering Convention of 1990 (ETS 141); the Convention on the Suppression of Terrorism of 1977 (ETS 90). There are also the new ones like the Convention on Corruption, the Cybercrime Convention, the one on trafficking of human beings; these conventions also contain provisions on JC (some of them –see Cybercrime- are shaped in such a way as to cope with the specificity of the crime taken into consideration.

The word "*legal*" which qualifies mutual assistance means that the assistance sought and granted is the assistance which relates to a criminal proceeding (in general the pre-requisite would be that a criminal proceeding has started or is on the way to be commenced in the requesting State). The definition of "criminal proceeding" is left to the requesting State. Generally conventions contain a list of authorities deemed to be "judicial authorities" according to the requesting State which are empowered to make a request for assistance, either directly or by the channel of central authorities (or diplomatic channels).

[2] Although in some jurisdictions international co-operation in the absence of a convention is possible; reciprocity is a prerequisite in such a case.

***Police co-operation and judicial co-operation*. Having said that, it is quite clear that MLA does not include police co-operation**

This point deserves some clarification. The boundary between police and judicial co-operation is not determined nor accepted world-wide. That would depend mainly on the legal system one would refer to. For instance in some common law countries (*e.g.* United Kingdom) it will be to the police to play the role that in almost all civil law countries is played by public prosecutors or investigating magistrates. As a consequence it is hard to distinguish police to police co-operation from judicial co-operation on the basis of a specific act or activity performed or sought only, the sole discriminating aspect being the fact that the act or activity requested in asking mutual assistance does relate to a criminal proceeding. On the other hand a further point is to be taken into consideration: because of the progress made in the field of technology, some of the activity performed by the police, in that it impinges on individual fundamental rights (for instance electronic surveillance), usually is carried out either after a decision taken by a court (or a judicial authority in general) or under the supervision of a court or a judicial authority. That calls for a better and adjourned co-ordination between international police co-operation and international judicial co-operation.

It is also to be noticed that police co-operation in general is said to be much more effective than judicial co-operation and to work very well. There are a number of reasons for that. The first one is that policemen usually have the same *modus operandi* because criminals do act almost the same way everywhere, while criminal procedure laws are different according to the legal system, and provisions regarding criminal proceedings are not the same even among countries which belong to the same system (for instance the civil law countries). The second one is that policemen are very much accustomed to directly contact each other (very often simply picking up the phone). The third reason, and the more important one is that criminal justice systems –to which MLA is referred to- are an expression of sovereignty. And States are very jealous of their sovereignty and they are not easily prompt to give it up.

Terrorism made the issue police to police co-operation versus mutual legal co-operation raise up. The need to combat against terrorism pushed toward intelligence activity but often evidence gained during the said activity cannot be used at trial (some decisions rendered by German courts as to statements made abroad by suspected terrorist might be taken as examples). Hence: there is a good reason and room for further reflection on this issue.

II. This is where we come from. This conference will hopefully indicate where are we going to.

As I am just a practitioner (and after all I do not have a glass bowl with me) I will put only questions (some of them might appear provocative).

Question No. 1: Are we sure that the way JC has been shaped till now, *i.e.* as a matter of inter-State relationships, is still valid? That brings to a further question: is States' sovereignty a problem? One might believe that some of the new forms of judicial co-operation (for instance: direct transmission, joint investigation teams) are of a danger for States' sovereignty: if we look at the most dangerous forms of criminality -like O.C. and mafia type associations activities, terrorism, trafficking in human beings- as a threat to democratic societies, welfare and safety of individuals, and a danger for public institutions and financial markets, then the opposite is true: by ensuring judicial co-operation at its utmost level, even where apparently that could be seen as weakening sovereignty, we do protect and strengthen sovereignty of States. If I would go back to some years only I would have never imagined that any State would have been ready to give up pieces of sovereignty …which is what member States of the EU have done (it would be enough to think to the Eurocurrency, as printing money has been considered one of the most ancient expressions of sovereignty). As a matter of fact sovereignty has already given away worldwide in some aspects, for instance due to technological developments.

Question No. 2: if transnational crime exists, shouldn't we construct a transnational justice system? Which means that JC should not be, as an ordinary rule, a sector of international relationships but rather a part of such transnational justice system (once again the provisions on joint investigation teams are of a great significance as a step toward an integration of jurisdictions). It is evident that certain categories of transnational crime can only be tried in international solidarity.

It is also evident that questions No. 1 and No. 2 are different aspects of the same multifaceted issue in which also question no. 4 should be included. Both in the New Start Report[3] and in the final report of PC-TJ Committee the reconsideration of the role of governments and that of judicial authorities was considered, in particular the balance between the principle of sovereignty, the efficiency of transnational criminal justice and the protection of the rights of individuals. The PC-TJ committee, as to extradition, concluded with the following: while acknowledging that extradition remains an expression of sovereignty, "the judiciarisation of extradition procedures will improve transnational criminal justice, adding a much needed element of security and foresee ability; and will greatly enhance the protection of individual rights by bringing all actions related to extradition under judicial review".

The transnational perspective would also suggest a reflection on conflicts of jurisdiction to include *non bis in idem* and transfer of proceedings issues[4].

Question No. 3: hasn't the overall criminal justice system already started to change, should we look at the ICC and other International tribunals and at the way the co-operation between these judicial bodies and national jurisdictions are shaped?

Question No. 4: In such a context, shouldn't we look for a more attentive regulations for individual rights and human rights in the proceedings related to JC?

It is evident that the way judicial co-operation has been traditionally shaped reflects the inter-State relationships. Where some rights appear to be in favour of the individual concerned these rights are actually provided for in the interests of States. One might take the rule of speciality in extradition as an example. It results in a benefit for the extradited person, but it is clear that what is protected there is the interest of the State which surrendered the person (in relation to the grounds for refusal). In fact where the State that requested extradition wants to try the person the consent of the latter would not suffice as the consent of the sending State is necessary.

One might think at a set of minimum standards for protection of the person subject to extradition. *Inter alia* the following might be considered: a. the right to access to information about the extradition procedure, which would include: access to the file of extradition; information as to the application of rule of speciality; information as to the possibility of simplified extradition under consent of the person concerned (and legal consequences of such a consent); b. the right to be heard and to communicate with family members or consular officials; the right to an interpreter and to e legal counsel (including legal aid); c. the right to have a final decision given in a reasonable time; d. the right to appeal the extradition procedure; e. the right to compensation for unlawful detention (that would include also the case where the requesting State has withdrawn the request or where that State did not take the person in due time).

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[3] This document (PC-S-NS(2002)7) is the result of the work of the Reflection Group on developments in international co-operation in criminal matters which has been approved by the CDPC-European Committee on Crime Problems in June 2002. Following to that the Committee of Experts on Transnational Criminal Justice (PC-TJ) was constituted and its final report is contained in doc. PC-TJ(2005) 10.

[4] It goes without saying that transfer of proceedings would solve at a previous stage the problems arising as to *non bis in idem*. It has been noted that CoE's 1972 convention on transfer of criminal proceedings has only been signed or ratified by a small number of States. It is a very good convention that one might evaluate having been drafted too early when legal systems were not ready to accept it. Now the issue is also of a political nature: can States be invited to sign or ratify a convention that has been made more that thirty years ago?

Also the right not to be extradited should be taken into account, if the fundamental rights of the person concerned are at risk. The question is: which human rights and how much of such rights? From the perspective of the procedure in the requested State no doubt that Article 5 applies; according to the ECHR case-law Article 6 (fair trial) does not apply because the extradition procedure *per se* does not rely to a criminal charge (which is the precondition for the applicability of Article 6) ; nevertheless a State which is a party to European Convention on Human Rights is responsible where the requesting State does not have a fair trial system (where also the requesting State is a party to the convention, then the breach to the convention is something the latter is responsible for). The requested State is also responsible, under the obligations of the European Convention on Human Rights, for what happens to the individual in the requesting State. To that extent Articles 2 and 3 of the Convention (right to life, and inhumane and degrading treatment) apply; to that regard the European Court has stated that the mere risk of violation would be relevant.

Also the capacity of the person sought to appear before the court in the extradition procedure (insanity, physical and mental incapacity) is a matter for possible discussion.

The problem of disguised extradition is not a minor issue either.

Question No. 5: the existing conventions on JC do not provide for any mechanism of settlement of disputes: shouldn't we look for such a mechanism?

Some of the Council of Europe conventions do provide for mechanisms of dispute settlement, which are different in nature: 1. friendly settlement of disputes, provided for by the transfer of sentenced persons convention (ETS 112); 2. recourse to an arbitral tribunal, provided for by the terrorism conventions (ETS 90 and 190); 3. recourse to an arbitral tribunal or to the International Court of Justice.ICJ, which appear in various conventions like the ones on cybercrime, corruption and money laundering. Extradition convention and mutual legal conventions, the oldest ones (1957 and 1959 respectively, named "mother conventions") do not provide for any dispute settlement mechanism. Which was quite acceptable by the time when those instruments were drafted: is that still valid nowdays?[5]

Question No. 6: Do existing conventions on JC need to be renewed? Question No. 6 is a non-question actually, in that nobody would really believe that after the major changes that occurred in the world legal instruments that go back to 50 years ago (the mother conventions) do not need to be at least updated[6].

III. Following to the New Start Report on transnational criminal justice, the Committee of Ministers of the Council of Europe and the competent CDPC committee have entrusted the PC-OC committee (which deals with the functioning of conventions in criminal matters, namely the JC ones) with the task to "modernise" the conventions on judicial co-operation. The PC-OC committee in its longstanding activity (over 25 years)[7] was in the advantageous position of taking note of major changes in crime and in JC. What is needed is a new

[5] The reading of the excellent document PC-OC(2005)02, Information Note on Friendly settlement of disputes relating to the interpretation or application of the Council of Europe conventions in the criminal-law field, is to be suggested. It contains useful reference to conventions that have dispute settlement mechanisms and conventions that have not; recommendations and resolutions of Council of Europe in that matter; reference to existing international bodies that have competence as to conciliation and arbitration (for instance a permanent Court of arbitration was set up under the 1899 Hague convention, as revised in 1907; about 30 States of Council of Europe have ratified at least one of the two conventions; an International Court of Conciliation and Arbitration was set up in the OSCE framework in the Nineties).

[6] An example for that would be the DNA sample issue, which seems to be crucial in the fight against terrorism and some specific forms of crime such as sexual abuses.

[7] The Committee held its first meeting in November 1981 under the name "PC-R-OC" where "R" stood for restricted as it was composed by five member States only (Austria, Germany, Italy, The Netherlands and Spain); actually before that Subcommittees XXX and XXXI (when acronyms were not yet used in the Council of Europe to designate committees) dealt more or less with the same issues, but in a very general way.

comprehensive perspective on JC taking into account the existing conventions, the old and new on specific areas ones, but also working on new mechanisms and new instruments.

On the basis of my practical experience in JC I can assess that courage and imagination (the courage of imagination) are crucial in this field.

This is why the PC-OC committee is looking forward to having valuable inputs from this important Conference.