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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)

JUDGMENTS IN ABSENTIA

Secretariat Memorandum
prepared by the
Directorate of Legal Affairs

The question of presence at one's own trial is frequently regarded as a separate issue. In order to take a clearer view of the substance of the question, it should also be regarded both from the angle of human rights and from that of the interests of justice.

1. Judgments in absentia: a separate category

Comparative law

According to Jean Pradel[1], legal opinion conventionally makes a distinction between common law systems, where judgment in absentia is impossible, and Romano-Germanic legal systems, where it is possible, with exceptions as in Germany and Spain. This distinction is nevertheless described as artificial in the light of the exceptions under the common law system, for one thing, and of the limited value of convictions in absentia in Romano-Germanic legal systems, for another.

Exceptions under the common law system are those cases in which:

- the defendant, having been personally summoned, deliberately fails to appear or absconds;
- where allowed by the law, the defendant requests judgment in absentia;
- the defendant's conduct during the hearing justifies it.

The limited value convictions in absentia under Romano-Germanic legal systems derives from the significant restrictions ordinarily applied to the enforcement of such judgments.

It nevertheless has to be emphasised that, in a very large number of countries, whether the common law system is used or not, judgment in absentia for minor offences is not only possible, it has become the rule.

Council of Europe texts

At least two Council of Europe texts deal with judgment in absentia.

Firstly, the Committee of Ministers, in Resolution (75) 11, of 21 May 1975, made recommendations to the governments of member states relating to proceedings in the absence of the accused.

According to this text, no-one may be tried without having first been effectively served with a summons. It also states that this summons must have been served in time to enable the accused to prepare his or her defence and to appear at the hearing. The only exception for which provision is made is that of cases in which the accused has deliberately sought to evade justice.

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[1] Jean Pradel, Droit pénal comparé, Dalloz, Paris 1995, pages 525 and 526.

The emphasis is placed less on the presence of the accused at the hearing than on proof of the fact that he or she was informed of the trial in time.

Still according to the same text, even if the accused person has been served with a summons, the trial must not take place if the court considers that the personal appearance of the accused is indispensable or that there is reason to believe that he or she has been prevented from appearing.

Secondly, the European Convention on the International Validity of Criminal Judgments, of 28 May 1970, is intended to ensure that a penalty imposed in one state may be enforced in another.

The convention contains a definition of "judgment rendered in absentia" and lays down rules applicable to the enforcement of such judgments abroad.

Within the meaning of the convention, any judgment rendered by a court after criminal proceedings at the hearing of which the sentenced person was not personally present is a judgment in absentia, unless

- the judgment was confirmed or pronounced after opposition by the person sentenced, or

- the judgment was rendered on appeal, provided that the appeal was lodged by the person sentenced.

In this case, the emphasis is placed less on the serving of a summons on the accused than on his or her appearance at the trial.

Where the enforcement of such judgments abroad is concerned, the rule is that this is subject to the same regulations as the enforcement of other judgments, subject to specific provisions contained in the convention.

Briefly, these specific provisions require the requested state to notify the person sentenced personally:

- of the judgment rendered in absentia;

- that the only remedy available is an opposition;

- lastly, that, if no opposition is lodged within the prescribed period, the judgment will be considered as having been rendered after a hearing of the accused.

There is thus a utilitarian concern to limit the possibility of such sentences being enforced without their previously having been cleared.

The explanatory report on the convention tells us that "the decision must have been rendered in full observation of the fundamental principles of the Convention on Human Rights, notably Article 6 …". It follows that, from the point of view of the convention, the fact that a judgment was rendered in absentia does not preclude its enforcement in a third state.

II. Presence at one's own trial: a fundamental right

A separate right

Article 14 (3) (d) of the United Nations International Covenant on Civil and Political Rights provides that "Everyone charged with a criminal offence shall have the right … to be tried in his presence …".

Moreover, Professor Bassiouni has listed 25 national constitutions which also enshrine this right as a fundamental one[2]. Of the 25, only one, that of Malta, is the constitution of a Council of Europe member state.

Some of these texts provide for exceptions to the rule in cases where:

- the defendant absconds during the trial;

- the person concerned absconds after being notified of the charge;

- the conduct of the defendant makes it impossible for the trial to continue.

In contrast, the European Convention on Human Rights (ECHR) does not identify any right to be present at one's trial.

Article 6 of the ECHR draws very heavily on the said Article 14 of the United Nations Covenant. A large part, including the paragraph concerned, actually follows it word for word. The significance of the fact that the authors of the convention did not include the passage relating to the right to be present at one's trial may give food for thought. It definitely indicates that they wished to remove such presence from the list of separate rights. It does not mean, for all that, that they wished to remove from the ECHR context all the legal value of the defendant's presence at his or her trial. Where the value of such presence is concerned, reference should be made to the case-law of the European Court of Human Rights.

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[2] Prof. Cherif Bassiouni, Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions, Duke Journal of Comparative and International Law, vol. 3:235.

One element of a broader right

Let us reiterate the wording of Article 6 of the ECHR, as well as the meaning of the Court's case-law in this respect.

Article 6 of the ECHR reads as follows:

1. In the determination of … any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law …

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

b. to have adequate time and facilities for the preparation of his defence;

c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

e. to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

This article:

- reflects the fundamental principle of the rule of law (Sunday Times case[3]);
- provides for the right to a fair and public hearing before an impartial tribunal for everyone charged with a criminal offence (paragraph 1);
- lays down mandatory rules of criminal procedure (paragraphs 2 and 3);
- illustrates a minimum number of rights of the accused (paragraph 3); the guarantees in this paragraph are so many aspects of the general concept of a fair trial (Goddi case[4]).

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3 Sunday Times case, judgment of 26.04.79, Series A, No. 30.

4 Goddi case, judgment of 09.04.84, Series A, No. 76, para. 28.

With more particular reference to the presence of the accused during his or her own trial, the Court took the view, in the Colozza case[5], that "although this is not expressly mentioned in paragraph 1 of Article 6, the object and purpose of the Article taken as a whole show that a person 'charged with a criminal offence' is entitled to take part in the hearing. Moreover, sub-paragraphs (c), (d) and (e) of paragraph 3 guarantee to 'everyone charged with a criminal offence' the right 'to defend himself in person', 'to examine or have examined witnesses' and 'to have the free assistance of an interpreter if he cannot understand or speak the language used in court', and it is difficult to see how he could exercise these rights without being present" (para. 27).

After confirming that the right concerned was not an absolute one, the Court pointed out (para. 28) that, according to its established case-law, "waiver of the exercise of a right guaranteed by the convention must be established in an unequivocal manner".

Consequently judgment in absentia is legitimate under the ECHR when the documents in the file reveal that the person concerned waived his or her right to appear and defend him or herself, or when they show that it was the person's intention to evade justice.

In this context, however, the care which Contracting States must take to ensure that the rights guaranteed by the ECHR are effectively enjoyed should be highlighted.

Furthermore, the Court has agreed that, when the circumstances so require, the right to take part in person in the hearing has to be reconciled, through the striking of a "reasonable balance", with the public interest and notably the interests of justice. This is the case, for instance, when the impossibility of holding a trial in absentia may paralyse the conduct of criminal proceedings, in that it may lead to dispersal of the evidence, expiry of the time-limit for prosecution or a miscarriage of justice.

Finally, the Court took the view that "when domestic law permits a trial to be held notwithstanding the absence of a person 'charged with a criminal offence' who is in Mr Colozza's position, that person should, once he becomes aware of the proceedings, be able to obtain, from a court which has heard him, a fresh determination of the merits of the charge" (para. 29).

This case-law is confirmed in several other judgments of the Court (see Brozicek case (Series A, No. 167), the FCB case (Series A, No. 208); the T case (Series A, No. 245-C), the Poitrimol case (Series A, No. 277-A), the Zana case (Series A, No. 274), the Lala case (Series A, No. 297-A) and the Pelladoah case (Series A, No. 297-B).

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5 Case of Colozza and Rubinat, judgment of 12.02.85, Series A, No. 89.

III. Presence at one's own trial: the interests of justice

Presence at one's own trial as a duty

Among the requirements of justice are one for all defendants, everywhere, except where the offences concerned are minor, to give a personal account to the court. This is why every defendant has a duty to be present at his or her own trial.

It should nevertheless be emphasised that, where such a duty entails an obligation to "give oneself up", and the defendant might well subsequently be held in prison throughout his or her trial, it is legitimate to raise the question of whether this is compatible with the ECHR, particularly with Article 5. However much importance is attached to the presence of the defendant at his or her own trial, it is disproportionate to ensure that this is achieved through the imprisonment of the defendant.

Extradition

The interests of justice are also those of international co-operation in criminal matters, encompassing extradition.

We shall look first at the law on extradition before considering the specific subject of the relationship between extradition and human rights in this sphere.

The law governing extradition

In accordance with Article 1 of the European Convention on Extradition, the Contracting Parties undertake inter alia to surrender to each other all persons who are wanted by the competent authorities of the requesting Party for the carrying out of a sentence.

There is nothing in the convention indicating that the fact that a sentence was imposed following proceedings in absentia is a ground justifying refusal of the request.

Nevertheless, this situation was altered when the Second Additional Protocol to the Convention came into force. The Protocol in practice introduces a ground for refusal based on the absence of the defendant from the trial. Article 3 lays down that when a Contracting Party requests from another the extradition of a person for the purpose of carrying out a sentence imposed by a decision rendered against him *in absentia*, the requested Party may refuse to extradite if, in its opinion, the proceedings leading to the judgment did not satisfy the minimum rights of defence recognised as due to everyone charged with a criminal offence.

However, extradition has to be granted if the requesting Party gives an assurance considered sufficient to guarantee to the person claimed the right to a retrial which safeguards the rights of defence.

Once extradition has been granted, the requesting Party may either enforce the judgment in question, if the convicted person does not make an opposition, or, if he or she does, may take proceedings against the person extradited.

In short, in accordance with the Protocol, the fact that a trial was held in absentia does not constitute an automatic ground for refusal; it constitutes a ground for refusal only when, in the opinion of the requested Party, the proceedings leading to the judgment did not satisfy the minimum rights of defence recognised as due to everyone charged with a criminal offence.

By converse implication, the conclusion may be drawn that, for the purposes of extradition, proceedings leading to judgment in absentia may satisfy the minimum rights of defence.

Human rights in relation to extradition

We shall now refer again to the case-law of the European Court.

In the case of Drozd and Janousek[6], sentenced to imprisonment in Andorra - at a time when Andorra was not a member of the Council of Europe - the applicants considered that their detention in France for the purpose of enforcement of their sentences was unlawful.

The Court (para. 110) took the view that "As the convention does not require the … Parties to impose its standards on third States or territories, France was not obliged to verify whether the proceedings which resulted in the conviction were compatible with all the requirements of Article 6 of the convention. To require such a review of the manner in which a court not bound by the convention had applied the principles enshrined in Article 6 would also thwart the current trend towards strengthening international co-operation in the administration of justice, a trend which is in principle in the interests of the persons concerned. The Contracting States are, however, obliged to refuse their co-operation if it emerges that the conviction is the result of a flagrant denial of justice".

"The Court takes note of the declaration made by the French Government to the effect that they could and in fact would refuse their customary co-operation if it was a question of enforcing an Andorran judgment which was manifestly contrary to the provisions of Article 6 or the principles embodied therein. It finds confirmation of this assurance in the decisions of some French courts: certain indictments divisions refuse to allow extradition of a person who has been convicted in his absence in a country where it is not possible for him to be retried on surrendering to justice … and the *Conseil d'Etat* has declared the extradition of persons liable to the death penalty on the territory of the requesting State to be incompatible with French public policy".

The principle is clear: states must "refuse their co-operation if it emerges that the conviction is the result of a flagrant denial of justice". In more general terms, it might be said that states must refuse to give assistance with sentence enforcement if the sentences concerned appear to have been applied in circumstances which manifestly contravene the provisions of the ECHR.

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6 Judgment of 26.06.92, Series A, No. 240.

On several occasions, the Commission has had to decide on applications against states (requesting extradition) which had had a person handed over in a process involving irregularities at some point. The term often used in this context is abduction. None of these applications has been successful, the Commission taking the view on each occasion that the irregularities committed in the requested state did not render unlawful the detention in the requesting state, which had a basis in law and was in conformity with the ECHR.

Examples to be noted in this context are:

- Application No. 10689/83, Klaus Barbie v. France[7], concerning a "disguised extradition" from Bolivia to France, rejected as being manifestly ill-founded;

- Application No. 8916/80, Freda v. Italy[8], concerning the handing over of the applicant, who had absconded following provisional release, by the Costa Rica authorities to Italian police officers who came to fetch him from Costa Rica and made him get into an Italian air force plane. The Commission took the view that the fact that the applicant had not been notified of the arrest warrant until his arrival in Italy did not deprive his detention of a basis in law;

- Application No. 28780/95, Illich Ramirez Sanchez (known as "Carlos") v. France[9], concerning the conditions in which the applicant was handed over by the Sudanese authorities, in Khartoum, to officials of the French secret services who took him to France, where he was notified of an arrest warrant. The Commission took the view that the co-operation between the Sudanese and French authorities was not such as to raise problems in the light of Article 5 of the ECHR, all the more so for the fact that combating terrorism frequently required co-operation among states;

- Application No. 30607/96, Luis Roldan v. Spain[10], concerning the "delivery" to the Spanish authorities by the Laotian authorities of the former chief of the Guardia Civil, who had absconded, having been charged with corruption. Although the fact that the documents which the applicant had been made to sign in Laos concerning his extradition were false was not disputed, the Commission considered that the applicant had been handed over to the Spanish authorities in pursuance of an international arrest warrant, so that his arrest in Laos and transfer to Spain were in conformity with Article 5 (1) (f).

On the other hand, the Court took the view that there had been a violation of Article 5 (1) (f) when the state expelled an individual, making use of the expulsion procedure in order to circumvent a regulative ruling on extradition delivered by a national court and thereby conducting a "disguised extradition", as established by the domestic courts themselves (Bolzano case)[11].

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7 Decision of 4 July 1984, DR 37, p. 230.
8 Decision of 7 October 1980, DR 21, p. 254.
9 Decision of 24 June 1996, not published.
10 Decision of 16 October 1996, not published.
11 Judgment of 18.12.86, Series A, No. 111.

Conclusion

Presence at one's own trial is one among all the elements of the right to a fair trial (Article 6 of the ECHR).

Consequently the right to a fair trial can be ensured without the accused being present.

This right is ensured without the accused being present only if the defendant has been summoned in person or has deliberately evaded the summons.

An assessment of this condition has to take account of two elements. Firstly, the care which states must take to ensure that the rights guaranteed by the ECHR, including the right to a fair trial, are effectively enjoyed, and secondly, the established case-law of the Court of Human Rights, according to which the waiver of the exercise of a right guaranteed by the ECHR must have been established in an unequivocal manner.

Further, the circumstances have to justify it. This is the case, for instance, when the defendant deliberately fails to appear.

Where the interests of justice are concerned, the court must be given the power to oppose judgment in absentia if it takes the view that the personal appearance of the accused is indispensable, and particularly when the effective presence of the accused is indispensable to the obtaining of the factual truth[12].

What is more (see the Colozza case referred to above), a reasonable balance has to be struck between, on the one hand, the right to take part in person in the hearing and, on the other hand, the public interest and notably the interests of justice. This is the case, for instance, when the impossibility of holding a trial in abstention may paralyse the conduct of criminal proceedings, in that it may lead to dispersal of the evidence, expiry of the time-limit for prosecution or a miscarriage of justice. It is also the case where the conduct of the accused person during the hearing justifies it.

Specific case

The question arises of how legally to interpret the specific case of the person charged with a criminal offence who is not physically present at the trial but who is following the hearing in real time, able both to speak and to be spoken to, thanks to the possibilities opened up by modern technology, using electronic audio and/or video methods. In this case, is the accused who is absent present or is the accused who is present absent? The upshot of the above is that the issue of the presence or absence of someone charged with a criminal offence has to be considered in the light of the requirement for the trial to be fair, particularly the fact that all accused persons must benefit from the effective opportunity to defend themselves.

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12 See German law (§ 230, para. 1, StPo), in particular.

Another outcome is that justice must be in a position to assert its interests in this field.

Hence the conclusion that an accused person who is absent is actually present if he or she can follow the hearing in real time, able both to speak and to be spoken to, provided that:

- he or she does not take the view that his or her physical presence at the hearing is necessary to his or her defence;

- the court does not consider that the appearance of the accused in person is indispensable to the interests of justice.