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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)

Criteria to assess whether proceedings leading to a judgment in absentia or the additional guarantees provided by the requesting state satisfy the rights of defence (in connection with Article 3 of the Second Additional Protocol to the European Convention on Extradition)

Extradition requests, in absentia judgments and minimum rights of the defence in connection with Article 3 of the Second Additional Protocol to the European Convention on Extradition

Background

During the 61st meeting of the PC-OC (22-24 November 2011) a question was raised on the issue of "in absentia cases" in connection with Article 3 of the Second Additional Protocol to the European Convention on Extradition.

This article reads as follows:

"Judgments in absentia

1. When a Contracting Party requests from another Contracting Party the extradition of a person for the purpose of carrying out a sentence or detention order imposed by a decision rendered against him in absentia, the requested Party may refuse to extradite for this purpose 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 criminal offence. However, extradition shall 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. This decision will authorise the requesting Party either to enforce the judgment in question if the convicted person does not make an opposition or, if he does, to take proceedings against the person extradited.

2. When the requested Party informs the person whose extradition has been requested of the judgment rendered against him in absentia, the requesting Party shall not regard this communication as a formal notification for the purposes of the criminal procedure in that State".

As a follow up to this question, the PC-OC decided to develop a questionnaire concerning judgments in absentia and the possibility of retrial in connection with Article 3 of the Second Additional Protocol to the European Convention on Extradition. The PC-OC finalised the questionnaire during its 63rd meeting (13-15 November 2012) and decided to send it out to all PC-OC members and parties to the European Convention on Extradition to make a compilation and a summary of the answers received and to instruct its working group, the PC-OC Mod to make proposals for follow up.

During its 16th meeting (9-11 October 2013) the PC-OC Mod considered the replies to this questionnaire (**Doc PC-OC (2013) 01rev3**) and discussed the possibility of finding a practical solution to problems the divergence in the interpretation of this article might create, for example by proposing guidelines on the interpretation of the notion of "minimum rights of defence", "retrial" and "sufficient guarantees".

It considered that the purpose of this provision was to ensure that extradition of persons judged in absentia would not be denied if the requested state had sufficient guarantees that the extradition would not lead to a violation of their fundamental rights enshrined in the European Convention on Human Rights and in particular those specified in Article 6.3 concerning the minimum rights of defence. Ratification of the Second Additional Protocol should not lead to the creation of an additional obstacle to judicial co-operation.

Referring to the explanatory report (paragraphs 27 and 28) to the Second Additional Protocol, the PC-OC Mod underlined that it is the responsibility of each requested party to assess whether the proceedings leading to the judgment in absentia or the additional guarantees provided by the requesting state satisfy the rights of defence. It was underlined that this assessment should be made in the light of the ECHR and its case law. This is particularly relevant, for example, in cases where a person had chosen not to appear at his or her trial.

The PC-OC Mod concluded that, in this context, an attempt to reach a common opinion on the interpretation of Article 3 would not be helpful. It was underlined that parties, in examining a request for extradition of a person sentenced in absentia, would find sufficient guidance in assessing whether his or her fundamental rights of defence were guaranteed in the following sources:

- the explanatory report to the Second Additional Protocol;

- the case law of the European Court of Human Rights (see notably the case law of the ECtHR of relevance for the application of the European conventions on international co-operation in criminal matters as prepared by the PC-OC, under the keyword "in absentia");

- the information contained in the reply of the requesting state to the questionnaire on "in absentia cases" in connection with Article 3 of the Second Additional Protocol to the European Convention on Extradition (Doc PC-OC (2013) 01rev3);

- Resolution (75)11 of the Committee of Ministers on the criteria governing proceedings held in the absence of the accused.

During its 65th meeting on 26-28 November 2013, the PC-OC plenary agreed with the PC-OC Mod that it is the responsibility of each requested party to assess whether the proceedings leading to the judgment in absentia or the additional guarantees provided by the requesting state satisfy the rights of defence and that an attempt to reach a common opinion on the interpretation of Article 3 would not be helpful. Recognising the importance of assisting parties in assessing this situation it decided to:

- ask Ms Barbara Goeth-Flemmich (Austria) to assist the PC-OC Mod in preparing a summary of the criteria available, based on the sources identified by the PC-OC Mod, for consideration by the plenary and publication on the website as a useful tool.

The PC-OC Mod, during its 17th meeting on 18-20 March 2014, considered the criteria set out in the present document and decided to instruct the Secretariat to further elaborate this paper, in co-operation with Ms Barbara Goeth-Flemmich (Austria), by appending a draft note for the attention of practitioners.

Criteria to assess whether proceedings leading to a judgment in absentia or the additional guarantees provided by the requesting state satisfy the rights of defence

Source 1. Explanatory report to Article 3 of the Second Additional Protocol to the European Convention on Extradition

"Chapter III – Judgments in absentia

21. Chapter III complements the European Convention on Extradition with regard to judgments in absentia, i.e. judgments rendered after a hearing at which the sentenced person was not personally present.

(cf. the definition in Article 21.2 of the European Convention on the International Validity of Criminal Judgments). The expression "judgments in absentia" means judgments properly so-called and does not include for instance, ordonnances pénales.

22. The sub-committee had first considered whether the text of the Protocol might not be based on Articles 21 et seq. of the European Convention on the International Validity of Criminal Judgments, since it might be illogical to treat some judgments in absentia as contentious for the purpose of that Convention and not for the purpose of the Extradition Convention. It was, however, considered that it was not possible to transfer the machinery of that Convention to a different context: that Convention concerns in particular execution of a judgment in the requested and not in the requesting State and the special procedure of notification followed by opposition would not really be appropriate as the individual claimed would, ex hypothesis, have to make an opposition in a State from which he was absent.

23. For these reasons the sub-committee decided to provide for a procedure proper to the Extradition Convention. Paragraph 1 of Chapter III allows the requested Party to refuse extradition if the proceedings leading to the judgment did not satisfy the rights of defence recognised as due to everyone charged with a criminal offence. An exception to this principle is made if the requesting Party gives an assurance considered sufficient to guarantee to the person concerned the right to a retrial which safeguards his rights of defence: in that case extradition shall be granted.

24. At the origin of this amendment is the Netherlands reservation to the Extradition Convention to the effect that extradition would not be granted if the individual claimed had not been enabled to exercise the rights specified in Article 6.3.c of the Human Rights Convention. The sub-committee was, however, of the opinion that any exemption from the obligation to extradite should apply if there had been a violation of any of the generally acknowledged rights of defence, in particular those specified in the whole of Article 6.3 of the Human Rights Convention and not merely those mentioned in sub-paragraph c thereof. Moreover, the Netherlands reservation refers only to extradition to enforce a judgment in absentia; it is essential to specify that, if there is no longer an obligation to extradite for this purpose, it will, under certain conditions, remain obligatory to extradite to permit the requesting State to take proceedings.

25. As regards the reference to the "rights of defence recognised as due to everyone charged with a criminal offence", it should be noted that on 21 May 1975, the Committee of Ministers of the Council of Europe adopted Resolution (75) 11 on the criteria governing proceedings held in the absence of the accused. This resolution recommends the governments of member States to apply a number of minimum rules when a trial is held in the absence of the accused. These minimum rules are aimed at guaranteeing the accused's rights as laid down in the European Convention for the Protection of Human Rights and Fundamental Freedoms and may serve for the purpose of determining the scope of the phrase "rights of defence" used in Chapter III. The reference to the rights of defence due to "everyone charged with a criminal offence" is indeed drawn from the Human Rights Convention and is intended to cover in particular the rights specified therein.

26. Reference is made to the purpose of the extradition request because Article 1 of the Convention makes a distinction between requests for the purpose of enforcing a judgment and requests for the purpose of taking proceedings.

27. The phrase "in its opinion" is intended to underline that it is for the requested Party to assess whether the proceedings leading to the judgment (and not the judgment itself) satisfied the rights of defence. If the requested Party has doubts on that point, the requesting Party must try to dissipate them, but otherwise it is incumbent on the requested Party to say why it considers the proceedings unsatisfactory.

28. If the requested Party finds difficulties in extraditing, to enable the requesting Party to enforce the judgment, new contacts will be necessary between the States. The requested Party is obliged to extradite if it receives an assurance of the kind indicated; such an assurance must cover not merely the availability of a remedy by way of retrial but also the effectiveness of that remedy.

Once surrendered in pursuance of the requested Party's obligations to extradite upon receipt of sufficient assurances, the person concerned may, of course, accept the judgment rendered against him in his absence or demand a retrial. This is made clear in the last sentence of Chapter III.

If the domestic law of the requesting Party does not allow a retrial, there is no obligation for the requested Party to extradite.

29. Chapter III provides a further means of strengthening the legal interests of the person to be extradited by stating, in paragraph 2, that communication of the judgment rendered in absentia is not to be regarded by the requesting State as a formal notification. The chief object of this provision is to ensure that the person to be extradited will not find himself with only a very short time in which to make an opposition, whereas the formalities relating to his handing over may take several weeks or months.

Furthermore, in some States the opposition entered by the person sentenced nullifies the judgment rendered in absentia, with the result that those States will consider only the time limitation of the criminal proceedings. Others follow the principle that the time limitation of the sentence only should be taken into account. Since it is generally true that the time limitation is reached sooner in respect of the proceedings than in respect of the sentence, opposition by the person sentenced (in the case of formal notification in the requested State) might prevent extradition if the requesting and requested States do not follow the same principle in matters of time limitation.

It goes without saying that this provision applies only to a communication made subsequent to a request for extradition of a person referred to in a judgment rendered in absentia."

Source 2. Case law of the European Court of Human Rights

- Somogyi v. Italy No.: 67972/01
  Article 6 of the Convention imposes on every national court an obligation to check whether the defendant has had the opportunity to apprise himself of the proceedings against him where […] this is disputed on a ground that does not immediately appear to be manifestly devoid of merit. […] As regards the Government's assertion that the applicant had in any event learned of the proceedings through a journalist who had interviewed him or from the local press, the Court points out that to inform someone of a prosecution brought against him is a legal act of such importance that it must be carried out in accordance with procedural and substantive requirements capable of guaranteeing the effective exercise of the accused's rights, as is moreover clear from Article 6§3(a) of the Convention; vague and informal knowledge cannot suffice. [paras. 70, 72, 74 and 75]

- Einhorn v. France [No.: 71555/01]
  where extradition proceedings are concerned, an applicant is required to prove the "flagrant" nature of the denial of justice which he fears. In the instant case the applicant did not adduce any evidence to show that, having regard to the relevant American rules of procedure, there are "substantial grounds for believing" that his trial would take place in conditions that contravened Article 6 of the Convention. [para. 34]

- Labsi v. Slovakia [No: 33809/08]
  The Court usually assesses the quality of assurances given and whether, in the light of the receiving State's practices, they can be relied upon. In doing so, the Court will have regard, among other things, to such factors as (i) whether the assurances are specific or are general and vague; (ii) who has given the assurances; (iii) whether the assurances concern treatment which is legal or illegal in the receiving State; (iv) whether compliance with the assurances can be objectively verified through diplomatic or other monitoring mechanisms, including providing unfettered access to the applicant's lawyers; (v) whether there is an effective system of protection against torture in the receiving State, including whether it is willing to cooperate with international monitoring mechanisms (including international human rights NGOs), and whether it is willing to investigate allegations of torture and to punish those responsible; and (vi) whether the reliability of the assurances has been examined by the domestic courts of the sending/Contracting State.[para.120]

Source 3. Resolution (75)11 of the Committee of Ministers on the criteria governing proceedings held in the absence of the accused[1].

1. No one may be tried without having first been effectively served with a summons in time to enable him to appear and to prepare his defence, unless it is established that he has deliberately sought to evade justice.

2. The summons must state the consequences of any failure by the accused to appear at the trial.

3. Where the court finds that an accused person who fails to appear at the trial has been served (atteint) with a summons, it must order an adjournment if it considers personal appearance of the accused to be indispensable or if there is reason to believe that he has been prevented from appearing.

4. The accused must not be tried in his absence, if it is possible and desirable to transfer the proceedings to another state or to apply for extradition.

5. Where the accused is tried in his absence, evidence must be taken in the usual manner and the defence must have the right to intervene.

6. A judgement passed in the absence of the accused must be notified to him according to the rules governing the service of the summons to appear and the time-limit for lodging an appeal must not begin to run until the convicted person has had effective knowledge of the judgement so notified, unless it is established that he has deliberately sought to evade justice.

7. Any person tried in his absence must be able to appeal against the judgement by whatever means of recourse would have been open to him, had he been present.

8. A person tried in his absence on whom a summons has not been served in due and proper form shall have a remedy enabling him to have the judgement annulled.

[1] The full text of the Resolution appears in Appendix 1 to this note.

9. A person tried in his absence, but on whom a summons has been properly served is entitled to a retrial, in the ordinary way, if that person can prove that his absence and the fact that he could not inform the judge thereof were due to reasons beyond his control.

Appendix1

COUNCIL OF EUROPE, COMMITTEE OF MINISTERS

RESOLUTION (75) 11

ON THE CRITERIA GOVERNING PROCEEDINGS HELD IN THE ABSENCE OF THE ACCUSED

(Adopted by the Committee of Ministers on 21 May 1975 at the 245th meeting of the Ministers' Deputies)[2]

The Committee of Ministers,

1. Recalling that one of the aims of the Council of Europe is to achieve greater unity among its Members;

2. Whereas the presence of the accused at his trial is of vital importance, from the point of view both of his right to be heard and of the need to establish the facts and, if need be, pass the appropriate sentence; and whereas exemptions should be granted only in exceptional cases;

3. Whereas ways and means should be found of securing the accused's right to a hearing as laid down in the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950, and his right to be present at his trial as recognised in the International Covenant on Civil and Political Rights signed in New York on 19 December 1966;

4. Whereas the possibility of simplified proceedings without a hearing for certain minor offences should nevertheless not be excluded;

5. Whereas the systems adopted by several member states to avoid judgements in the absence of the accused and their consequences do not always appear to be effective when, for example, the accused is resident abroad;

6. Whereas, during the preparation of the European Convention on the International Validity of Criminal Judgments, the question of judgements in absentia raised difficulties and it proved necessary to grant Contracting States the right to formulate reservations with regard to the enforcement of such judgements;

7. Believing that such reservations could be avoided if the procedures for trial in the absence of the accused as currently applied satisfied the requirements of the proper administration of justice;

8. Convinced that the growing mobility of the population has the effect of increasing the number of judgements rendered in the absence of the accused in those states where this procedure is used,

I. Recommends that the governments of the member states apply the following minimum rules:

1. No one may be tried without having first been effectively served with a summons in time to enable him to appear and to prepare his defence, unless it is established that he has deliberately sought to evade justice.

2. The summons must state the consequences of any failure by the accused to appear at the trial.

[2] When the resolution was adopted, the Representatives of Sweden and the United Kingdom reserved the right of their governments to comply or not with point 6 of its operative part, in accordance with Article 10, paragraph 2.c of the Rules of Procedure for meetings of the Ministers' Deputies.

3. Where the court finds that an accused person who fails to appear at the trial has been served (atteint) with a summons, it must order an adjournment if it considers personal appearance of the accused to be indispensable or if there is reason to believe that he has been prevented from appearing.

4. The accused must not be tried in his absence, if it is possible and desirable to transfer the proceedings to another state or to apply for extradition.

5. Where the accused is tried in his absence, evidence must be taken in the usual manner and the defence must have the right to intervene.

6. A judgement passed in the absence of the accused must be notified to him according to the rules governing the service of the summons to appear and the time-limit for lodging an appeal must not begin to run until the convicted person has had effective knowledge of the judgement so notified, unless it is established that he has deliberately sought to evade justice.

7. Any person tried in his absence must be able to appeal against the judgement by whatever means of recourse would have been open to him, had he been present.

8. A person tried in his absence on whom a summons has not been served in due and proper form shall have a remedy enabling him to have the judgement annulled.

9. A person tried in his absence, but on whom a summons has been properly served is entitled to a retrial, in the ordinary way, if that person can prove that his absence and the fact that he could not inform the judge thereof were due to reasons beyond his control.

II. Invites the governments of member states to report to the Secretary General of the Council of Europe every five years on the action taken by them in pursuance of the recommendations contained in this resolution.

Appendix 2

NOTE FOR PRACTITIONERS

Extradition of a person for carrying out a sentence or detention order rendered in absentia (in application of Article 3 of the Second Additional Protocol to the European Convention on Extradition)

The Second Additional Protocol to the European Convention on Extradition (ETS No. 98) supplements the convention with the following provisions related to Judgments in absentia (Chapter III, Article 3)

"Judgments in absentia

1. When a Contracting Party requests from another Contracting Party the extradition of a person for the purpose of carrying out a sentence or detention order imposed by a decision rendered against him in absentia, the requested Party may refuse to extradite for this purpose 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 criminal offence. However, extradition shall 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. This decision will authorise the requesting Party either to enforce the judgment in question if the convicted person does not make an opposition or, if he does, to take proceedings against the person extradited.

2. When the requested Party informs the person whose extradition has been requested of the judgment rendered against him in absentia, the requesting Party shall not regard this communication as a formal notification for the purposes of the criminal procedure in that State".

According to the PC-OC, the purpose of this provision is to ensure that extradition of persons judged in absentia will not be denied if the requested state has sufficient guarantees that the extradition will not lead to a violation of their fundamental rights enshrined in the European Convention on Human Rights and in particular those specified in Article 6.3 concerning the minimum rights of defence. Ratification of the Second Additional Protocol should not lead to the creation of an additional obstacle to judicial co-operation.

The explanatory report (paragraph 21) defines judgments in absentia in the largest possible way, i.e. as " judgments rendered after a hearing at which the sentenced person was not personally present".

Referring to the explanatory report (paragraphs 27 and 28) to the Second Additional Protocol, the PC-OC underlines that it is the responsibility of each requested party to assess whether the proceedings leading to the judgment in absentia or the additional guarantees provided by the requesting state satisfy the rights of defence. It stresses that this assessment should be made in the light of the ECHR and its case law. This is particularly relevant, for example, in cases where a person had chosen not to appear at his or her trial.

In order to assess whether the "**minimum rights of defence**" were satisfied in the proceedings leading to the judgment in the requesting state, the PC-OC recommends consulting the following sources:

- the explanatory report to the Second Additional Protocol (§§21-29)
- the case law of the European Court of Human Rights, in particular as regards Article 6.3 ECHR and as regard in absentia judgments;

- the information contained in the reply of the requesting state to the questionnaire developed by the PC-OC on “in absentia cases” in connection with Article 3 of the Second Additional Protocol to the European Convention on Extradition (Doc PC-OC (2013) 01rev3);
- Resolution (75)11 of the Committee of Ministers on the criteria governing proceedings held in the absence of the accused.

In principle, a proceeding leading to a judgment in absentia, which satisfies the rights of defence and does not require an assurance, can be assumed if the person sought

- had waived his or her right to be present at the hearing after he or she was either summoned in person and thereby informed of the scheduled date and place of the trial or by other means actually received information of the scheduled date and place of that trial in such a manner that it was unequivocally established that he or she was aware of the scheduled trial and was informed that a decision may be handed down if he or she does not appear for the trial (s. Resolution [75]11 para 1 and 2) or

- being aware of the scheduled trial, had given a mandate to a legal counsellor, who was either appointed by the person concerned or by the State, to defend him or her at the trial, and was indeed defended by that counsellor at the trial (s. Resolution [75]11 para 5) or

- after being served with the decision and being expressly informed about the right to a retrial, or an appeal, in which the person has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed expressly stated that he or she does not contest the decision or did not request a retrial or appeal within the applicable time frame (s. Resolution [75]11 para 6 ff).

When the requested State is not convinced that the “minimum rights of defence” have been satisfied in the proceedings leading to the judgment in absentia, the requesting State should be informed about any difficulties and be given the opportunity to dissipate existing doubts.

When the requested State concludes that doubts subsist, extradition should nevertheless be granted when the requesting Party has given an **assurance considered sufficient** to guarantee to the person claimed the right to a retrial which safeguards the rights of defence. If the domestic law of the requesting Party does not allow a retrial, there is no obligation for the requested Party to extradite.

The assessment as regard the sufficient nature of the assurance can be based on the following sources:

- the explanatory report to the Second Additional Protocol (§§21-29)

- the case law of the European Court of Human Rights, in particular as regards Article 6.3 ECHR and as regard in absentia judgments;

- the information contained in the reply of the requesting state to the questionnaire developed by the PC-OC on “in absentia cases” in connection with Article 3 of the Second Additional Protocol to the European Convention on Extradition (Doc PC-OC (2013) 01rev3).

Accordingly an assurance is to be regarded as sufficient if it is made clear that there is an effective possibility of retrial, or rehearing, in the requesting State according to its applicable law. The person has to be expressly informed of his or her right to a retrial, or a rehearing, (including the applicable time frame), in which he or she has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed.