

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.