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Draft European Convention on mutual assistance in criminal matters

Report
Committee on Legal Affairs and Human Rights
Rapporteur: Mr P.G.M. Van MEEUWEN, Netherlands

A. Draft Opinion

The Assembly,

Having been consulted by the Committee of Ministers with regard to the draft European Convention on mutual assistance in criminal matters (Doc. 869) which was prepared by a committee of experts set up by the Committee of Ministers;

Expressing its satisfaction with this achievement in the legal field;

Considering that under the terms of this Convention the Contracting Parties shall afford to each other the widest measure of mutual assistance in proceedings in respect of offences the punishment of which falls within the jurisdiction of the judicial authorities of the requesting Party; Considering that mutual assistance in regard to criminal matters is a question related to extradition, which has already formed the subject of a Convention; Considering that the new draft Convention will constitute the first multilateral treaty relating to mutual assistance in criminal matters and that it will have great practical value for judges in member countries by enabling them to afford each other mutual assistance in the interests both of the administration of justice and of persons appearing before the law,

Recommends to the Committee of Ministers that it should submit the draft Convention to the signature of Member Governments as soon as possible.

B. Explanatory Memorandum

1.

At its Session in October 1958 the Consultative Assembly instructed its Legal Committee to examine the draft European Convention on Mutual Assistance in Criminal Matters, which was transmitted by the Committee of Ministers to the Assembly for its opinion (Doc. 869).

As directed, the Committee now has the honour to submit the present report to the Assembly. It is not exhaustive, but is confined to setting forth the broad lines of the draft Convention.

2. Introduction

1. The draft European Convention on Mutual Assistance in Criminal Matters does not result from a recommendation of the Assembly, but has been prepared at the instance of the Committee of Experts on Extradition. That body, after drafting the European Convention on Extradition, signed on 13th December 1957, pointed out to the Committee of Ministers the advisability of drafting a special convention on mutual assistance in criminal matters, since this question is connected with the extradition problem and is not as yet governed by a multilateral agreement.

2. Having considered this suggestion, the Committee of Ministers widened the terms of reference of the Extradition Committee, by directing it to draft a convention on mutual assistance. This highly laudable decision cannot but be welcomed.

3. Scope of the Convention

3.1. Extent of Mutual Assistance:

3 . Under Article 1 of the Convention— which contains a general commitment—the Contracting Parties will undertake to afford each other the widest measure of mutual assistance in proceedings in respect of offences the punishment of which falls within the furisdiction of the judicial authorities of the requesting Party.

4. Thus—by reason of the word " offence " —mutual assistance applies equally to crimes and contraventions. This means that it has not been subjected to the same rules as extradition, for which there is no provision in respect of petty offences and contraventions. Furthermore, on account of the words " falls within the jurisdiction of the judicial authorities of the requesting Party ", the condition that the offence must be punishable in both the requesting and the requested country, which must be fulfilled in cases of extradition, is waived in principle as regards mutual assistance.

Both these rules are in fact justified since mutual assistance is more limited in scope and does not entail the same consequences as extradition.

5. Article 5, however, provides for a derogation from the two comprehensive provisions mentioned above, by allowing the Parties to reserve the right to make the search or seizure of property—measures that may be regarded as of some gravity by certain countries—dependent upon the condition that the offence is punishable under the laws of both Parties (Article 5, para. 1 (a)) or is extraditable Article 5, (para. 1 (b)).

3.2. Withholding of Mutual Assistance:

6. But there are certain cases where mutual assistance is withheld:

a. Article 1 stipulates that the Convention does not apply to offences under military law which are not offences under ordinary criminal law;

b. Article 2 allows any Contracting Party to refuse assistance in respect of offences which it considers to be political or fiscal offences, or again if it considers that compliance with the request would be likely to prejudice t h e sovereignty, security, " ordre public " or other essential interests of its country.

3.3. Nature of Assistance:

7. The mutual assistance envisaged may be divided into three types, viz:

letters rogatory (Chapter II);

service of writs and records of judicial verdicts (Chapter III); under this heading may be included personal appearance (Chapter IV);

communication of extracts (Chapter V) or of information (Chapter VIII) from judicial records.

8. Chapter II, dealing with letters rogatory, enables a judicial authority of one country to request a judicial authority of another:

to procure evidence in its own territory, for example to hear a witness, an expert or an accused person, or to visit the scene of the crime in order to establish a fact or carry out search or seizure;

to transmit articles to be produced in evidence, records or documents, which it needs for the purposes of proceedings pending in its territory.

9 . Chapter III, concerning the service of writs and records of judicial verdicts, enables a judicial authority of one country to request a judicial authority of another to send, for instance, a court summons to a person against whom proceedings are pending, or summonses to witnesses or experts with a view to their being heard in the territory of the requesting country.

10. Should the requesting Party lay great store by the appearance of a witness or expert a t proceedings taking place in its territory, it must, in accordance with Chapter IV, mention the fact expressly in its request. The requested Party must then not only transmit the summons but also invite the witness or expert to appear. The invitation is, however, no more than a recommendation, for as is well known, international custom allows such persons complete freedom to refuse, and it is obvious that they will not go to the requesting country unless the travelling and subsistence allowances mentioned in Article 10 are sufficiently high to cover their actual expenditure.

11. Further, Article 11 enables a judicial authority of one country to request a judicial authority of another temporarily to transfer a person in custody so that he may be heard as a witness, or for purposes of confrontation. In such cases the person in custody must be sent back to the requested Party within the period stipulated by the latter. The transfer may be refused in certain circumstances, particularly if the person in custody does not consent to it.

12. In order to prevent the use of the Convention for purposes other than mutual assistance, Article 12 provides that the witness or expert (para. 1) or the person in custody (Article 11) or a person summoned to answer for acts forming the subject of proceedings against him (para. 2) may not be prosecuted or detained or subjected to any other restriction on his personal liberty for acts or convictions anterior to his departure from the territory of the requested Party.

13. Chapter V permits the communication of extracts from and information relating to judicial records requested from it by the judicial authorities of the Contracting Party and needed in a criminal matter. In this connection, Article 22 provides for the automatic communication of convictions entered in judicial records which concern nationals of the other Parties.

4. Procedure and other important provisions

14. Article 14 specifies how requests for assistance are to be framed, while Article 15 indicates possible channels of transmission.

Article 16 relates to the translation of requests and annexed documents, and it is also important to point out that under Article 17 no form of authentication is required.

15. Two further provisions are worthy of mention, namely Articles 21 and 26.

16. Article 21 introduces a special form of assistance whereby one Contracting Party may request another Party to bring proceedings against an individual, particularly in cases where, after committing an offence in the requesting country, the offender takes refuge in the territory of the requested country and is not extraditable, for instance because he has the nationality of the latter country.

17. Article 26 defines the effect of the present Convention in respect of existing or future bilateral or multilateral conventions. Paragraph 1 adopts a solution which marks a considerable step forward, since it states that, with certain reservations, existing bilateral conventions shall be superseded. There is a slight exception to this rule in paragraph 2, which states that the Convention shall not affect clauses governing specific aspects of mutual assistance which are or may be contained in any o.ther bilateral or multilateral international convention. This paragraph covers agreements which are not mutual assistance conventions as

such but contain certain clauses relating to mutual assistance, as for instance the Rhine Navigation Convention or the Convention of the International Over-fishing Conference. It is both natural and realistic that such arrangements for assistance should not be affected by the proposed new instrument, since they were drawn up with a view to the special character of the agreements in question.

18. The remaining clauses of the Convention call for no special comment; they either reproduce or are based on the corresponding provisions in the European Convention on Extradition.

5. Conclusion

19. This Convention is the first multilateral treaty concerning mutual assistance in criminal matters and may be regarded as a corollary to The Hague Convention on Civil Procedure. It is of great practical importance, since it will substantially facilitate the work of judges in every country by enabling them to afford each other mutual assistance in the interests both of justice and of the general public. Moreover, it is calculated to bring about a further " rapprochement " between the courts and by that very fact constitutes a fresh step towards the achievement of a greater unity.