

Articles**Extradition - A Form of International Judicial Cooperation****Mădălina Cocoşatu¹**

Abstract: Judicial cooperation in criminal matters is an open system of principles and rules whose functionality is strongly influenced by the conduct of two participating actors who are willing to implement the international legal order in accordance with the conventions and constitutive treaties. We believe that extradition is an attribute of the sovereignty of the state that grants it, states being entitled to judge whether such an act is necessary or to refuse otherwise. The international nature of the institution of extradition makes the rules under which this legal assistance operation is the result of the will of the States in which it intervenes.

Keywords: judicial cooperation; passive extradition; active extradition

1. Introduction

The institution of extradition is governed by extradition or legal assistance agreements concluded by States for this purpose for the application of the principle of reciprocity and, in their absence, by bilateral conventions that criminalize serious crimes such as crimes against peace and humanity; through the national legislation of each state.²

Extradition is one of the forms of international judicial cooperation in criminal matters, and can be defined as such: “Extradition is the act by which a state surrenders, at the request of another state, a person in its territory, presumed to be the offender, to be tried or to execute a sentence to which he was previously convicted”. (Cocoşatu, 2013, p. 69) “Extradition is a bilateral act between two states

¹ Associate Professor, PhD, National University of Political Studies and Public Administration, Romania, Address: 6 Povernei Street, Sector 1, Bucharest, Romania, Tel.:+4021.318.08.97, fax: +4021.312.25.35, Corresponding author: madacosatu@yahoo.com.

² Romania has concluded several international conventions on international legal assistance with extradition regulations, namely with Algeria, Belgium, Bulgaria, the Democratic People’s Republic of Korea, Cuba, France, Albania, Greece, Morocco, Mongolia, Tunisia, Turkey, Syria and Hungary.

on the basis of which a state whose territory a refugee or a convicted refugee has been handed over to another state for the purpose of being tried or punished by the sentence to which he has been convicted”. (Mitrache, 2002, p. 65)

It follows from these two definitions that extradition is regarded as a procedure always carried out by and between two states whereby a person is surrendered for trial for a criminal offense or is sought “for the execution of a security measure, a punishment or other judgment of the criminal court in the requesting state”.¹

On the one hand, we have the sovereign state (the requested state), that is, the state on whose territory the person who is prosecuted or convicted for committing an offense or is believed to have committed an offense on the territory of the state requesting extradition, being the second state involved, known as the requesting state.

2. Legal Instruments on Extradition

Extradition is an international criminal justice institution with a dual legal nature: (Drăghici, 2005)

- ❖ internationally, is a way to achieve legal assistance in criminal matters, to assist states in the form of conventions they sign or accede to, extradition being one of the basic concepts of international criminal law. In the same plan, extradition is an act of sovereignty and an expression of international solidarity in the fight against crime;
- ❖ internally, extradition is a governmental, administrative and/or judicial act, depending on the authority competent to decide on its admissibility.

The general framework and conditions for extradition are governed by a whole series of provisions of international documents, including in particular the UN Convention against Transnational Organized Crime adopted in New York on 16 November 2000 and the United Nations Convention against Corruption, adopted in New York on October 31, 2003.

In accordance with these international regulations ratified by our country, the extradition provisions apply to offenses provided for in conventions or in cases where an organized criminal group is involved in an offense under these regulations

¹ Art. 18, Law no. 302 of 28 June 2004 on International Judicial Cooperation in Criminal Matters.

and the person subject to the extradition request is in the requested state party, subject to double criminality. (Hurdubaie, 2006, pp. 49, 51, 52)

In accordance with art. 1 of the UN Convention against Transnational Organized Crime, adopted in New York on 16 November 2000, the object of this Convention is to promote cooperation in order to prevent and combat organized transnational crime more effectively.

The Convention is the main international mechanism for combating organized crime adopted by the United Nations. The Convention is a legally binding instrument that obliges signatory states to adopt a series of cross-border organized crime measures but each state party takes the necessary measures, including legislative and administrative, in accordance with the fundamental principles of its domestic law to ensure the fulfillment of its obligations under this Convention¹. It should also be noted that each state party may adopt more stringent or more stringent measures than those provided for in this Convention for the purpose of preventing and combating transnational organized crime².

This Convention is particularly important, it is the first UN treaty to fight organized crime and covers, from a legal point of view, areas of particular importance at international, European and national level, such as: participation in the activity of an organized crime group, money laundering, corruption, criminal liability of legal persons, international cooperation, judicial assistance, etc.

For a better understanding of the rules debated, from the outset, the Convention clearly makes clear the meaning of the transnational crime. Thus, an offense is considered transnational if:³

- a) is committed in more than one state;
- b) is committed in a state, but a substantial part of its preparation, planning, leadership or control takes place in another state;
- c) is committed in a state, but involves an organized criminal group carrying out criminal activities in more than one state; or

¹ Article 34, paragraph (1), Law no. 302 of 28 June 2004 on International Judicial Cooperation in Criminal Matters.

² Article 34, paragraph (2), Law no. 302 of 28 June 2004 on International Judicial Cooperation in Criminal Matters.

³ Article 3, paragraph (2), the UN Convention against Transnational Organized Crime, the text of the act published in the Official Gazette. no. 813/8 nov. 2002.

d) is committed in a state, but has substantial effects in another state.

At the same time, this international legal act defines the meaning of the expressions “organized crime group”, “serious crime”, “structured group”, “crime product”, “regional economic integration organization”, “supervised delivery”, etc.

This Convention was ratified by Romania through Law no. 565/2002, published in the Official Gazette, Part I, no. 813 of November 8, 2002.

The United Nations Convention Against Corruption, adopted in New York on October 31, 2003, is one of the most important documents in the fight against corruption. The main purposes¹ of this Convention are three and consist of:

- a) to promote and strengthen measures to prevent and combat corruption in order to increase their efficiency and effectiveness;
- b) to promote, facilitate and support international cooperation and assistance in preventing and combating corruption, including the recovery of goods;
- c) to promote the integrity, accountability, and proper management of public affairs and public affairs.

The Convention contains chapters dedicated to preventive anti-corruption measures, criminalization of corruption offenses and law enforcement institutions, international cooperation, goods recovery as well as technical assistance and information exchange. Its scope is dealt with in Article 3 of the first chapter of the Convention and consists in preventing investigations and prosecutions concerning corruption and the blocking, sequestration, confiscation and repossession of the proceeds of the offenses established in accordance with this Convention.

In order to promote international cooperation, states have agreed to cooperate with each other in all aspects of the fight against corruption, from the prevention of corruption to the prosecution of those guilty of committing them.

Article 4 of the Convention governs the protection of the sovereignty of states so that states parties fulfill their obligations under this Convention in a manner compatible

¹ Article 1, United Nations Convention against Corruption.

with the principles of sovereign equality¹ and territorial integrity of states and that of non-interference in the domestic affairs of other states.²

At present, the United Nations Convention against Corruption has been signed by 140 countries, ratified or accepted in a total of 161 countries.

The European Convention on Extradition by the Council of Europe, adopted in Paris on 13 December 1957, is still an important international legal instrument of extradition.

As stated in the preamble to the Convention, this document was adopted by the signatory governments, members of the Council of Europe, since it was considered that the aim of the Council is to achieve a closer union among its members and that the achievement of this objective can be achieved by concluding agreements or by adopting joint action in the legal field. Thus, the signatory states agreed that the adoption of uniform rules on extradition is likely to make progress on this unification process and have agreed, inter alia, that they undertake to surrender each other, in accordance with the rules and conditions laid down in articles of the Convention, persons who are prosecuted for a criminal offense or sought to execute a penalty or a security measure by the judicial authorities of the requesting party.³

Within the Convention, we also find information and clarifications on the extradition, political, military and tax offenses, or the extradition of nationalities, on grounds of universally valid rejection of extradition, such as “any contracting party has the right to refuse the extradition of his nationals”,⁴ “Extradition shall not be granted if the offense for which it is requested is considered by the requested party as a political offense or as an offense related to such an offense”.⁵ Also, under article 4 of the Convention, extradition justified by military offenses which do not constitute offenses under ordinary law is excluded from the scope of this Convention.

¹ The principle of sovereign equality implies the obligation of each state to respect the sovereign rights of other states, their international personality and their territorial integrity, their full, political, and economic independence.

² This principle refers to the right of states to exercise their powers of sovereignty without any interference from outside, as well as the correlated obligation to refrain from any act that might impede the sovereignty of another state.

³ Article 1, the European Extradition Convention, adopted in Paris on 13 December 1957.

⁴ Article 6, Letter. A, the European Extradition Convention, adopted in Paris on 13 December 1957.

⁵ Article 3, par. (1), the European Extradition Convention, adopted in Paris on 13 December 1957.

3. Active Extradition and Passive Extradition

The extradition or execution of criminal sentences handed down abroad are two of the institutions regulated by the Law no. 302/2004 on International Judicial Cooperation in Criminal Matters, which are directly related to the issue of competence in the case of crimes committed abroad.

Extradition is one of the forms of international judicial cooperation in criminal matters, which can be defined as an international legal procedure whereby a sovereign state (the requested state) accepts to surrender to another state (the requesting state) a person who is in its territory and who is prosecuted or sued for an offense or is being sought for the purpose of serving a sentence in the requesting state. (Văcaru, 2011, p. 50)

In Romania, according to the quality of the state, the extradition is of two kinds:

- passive extradition;
- active extradition.

As a whole, extradition can be seen as “an act of judicial assistance by which states cooperate to fight crime”. (Moldovan, 2009, p. 38)

Passive extradition is a form of international judicial cooperation in criminal matters whereby, at the request of a foreign state, the persons in Romania who are prosecuted or are brought to justice for the commission of an offense or are sought for the execution a penalty, a security measure or other judgment of the criminal court in the requesting state. In short, passive extradition is the extradition procedure in which Romania has the status of requested state.

As regards the citizens of Romania, according to par. 1), art. 20 of the Romanian Law on International Judicial Cooperation in Criminal Matters, “they may be extradited from Romania on the basis of international multilateral conventions to which it is a party and on the basis of reciprocity, if at least one of the following conditions is met:

- a) the extraditable person resides in the territory of the requesting state at the time of the request for extradition;
- b) the extraditable person shall also have the nationality of the requesting state;

c) the extraditable person committed the act in its territory against a citizen of a Member State of the European Union if the requesting state is a member of the European Union”.

According to art. 19 of Law no. 302 of 28 June 2004 on Judicial Cooperation in Criminal Matters, the following categories of persons can not be extradited from Romania:

- a) the Romanian citizens, if the conditions provided in art. 20, above mentioned;
- b) asylum seekers who are beneficiaries of refugee status or subsidiary protection in Romania in cases where extradition would take place in the country of origin or in any other state where their life or freedom would be endangered or in which they would be subjected to torture, inhuman and degrading treatment;
- c) foreign persons who enjoy in Romania immunity from jurisdiction, under the conditions and within the limits established by conventions or other international agreements;
- d) foreign persons quoted from abroad for hearing as suspects, injured parties, parties, witnesses or experts or interpreters before a requesting Romanian judicial authority, within the limits of the immunities conferred by the international convention.

There are also some mandatory grounds for refusing extradition. Thus, extradition can not take place unless certain conditions are met, namely:

- the act for which extradition is requested must be specified as a criminal offense in both legislation, in accordance with the principle of double criminality¹;
- the accused person is not prosecuted for a crime other than the one for which extradition was requested;
- the perpetrator must have a fair trial within the meaning of the European Convention for the Protection of Human Rights and Fundamental Freedoms, adopted in Rome on 4 November 1950, or any other relevant international instrument ratified by Romania;

¹ Extradition may be admitted only if the act for which the person whose extradition is requested is punishable as a criminal offense by the law of the requesting state and by the Romanian law is the offense for which he is suspected or accused or convicted.

- there must be no serious grounds for believing that extradition is sought for the purpose of prosecuting or punishing a person on grounds of race, religion, sex, nationality, language, political or ideological opinions or belonging to a particular social group;
- the person being prosecuted has not been convicted in the past for the same deed;
- the request should not be formulated in a case before extraordinary tribunals other than those constituted by the relevant international instruments or for the enforcement of a penalty imposed by such a court;
- the offense must not be a military offense;
- the offense must not be of a political nature or a crime related to a political offense.

They are not considered to be political offenses:¹

- a) the assassination of a head of state or a member of his family;
- b) the crimes against humanity under the Convention for the Prevention and Suppression of the Crime of Genocide, adopted on 9 December 1948 by the United Nations General Assembly;
- c) the offenses provided in art. 50 of the Geneva Convention to improve the number of wounded and sick in armed forces in the campaign, in art. 51 of the Geneva Convention for the Improvement of the Sickness of Wounded, Sick and Maimed Shipowners, at Art. 129 of the Geneva Convention (1949) on the Treatment of Prisoners of War and Art. 147 of the Geneva Convention on the Protection of Civilian Persons in Time of War;
- d) any similar violations of war laws not provided for by the provisions of the Geneva Conventions referred to letter c);
- e) the offenses provided in art. 1 of the European Convention for the Suppression of Terrorism, adopted in Strasbourg on 27 January 1997, and in other relevant international instruments;
- f) offenses under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted on 17 December 1984 by the United Nations General Assembly;

¹ Article 21, paragraph (2), Law no. 302 of 28 June 2004 on International Judicial Cooperation in Criminal Matters.

g) any other offense whose political character has been removed by international treaties, conventions or agreements to which Romania is a party.

Active extradition is a form of international judicial cooperation in criminal matters whereby the Romanian State requires the extradition of a person for the purposes of prosecution.

In order for Romania to be able to request the extradition of a person, for the purposes of conducting criminal proceedings, it is necessary:

- the deed or deeds for which extradition is sought to attract a custodial sentence of at least one year according to the law of the requesting state and the Romanian law, and only if it is for at least 4 months to serve a sentence;
- against the person or persons in question to bring the criminal proceedings under the conditions provided by the Code of Criminal Procedure.

As in the case of passive extradition, the competent institution to draw up and transmit requests for extradition on behalf of the Romanian state is the Ministry of Justice.

The first step in the judgment on our territory of the person for whom extradition is sought is represented by an international prosecution, this is requested when the person mentioned, in the preventive arrest warrant, as the case may be, the term of execution of the sentence of life imprisonment or the prison or the decision on the deprivation of liberty was not found and there is a reasonable assumption that he left the territory of Romania. For the purpose of this law, “international prosecution is understood to be prosecuted through the channels of the International Criminal Police Organization - Interpol or the insertion in the Schengen Information System of an alert on a person wanted to be arrested for extradition.”¹

The international search warrant for extradition must contain all the elements necessary to identify the person being prosecuted (including photographs, digital impressions, etc.), a summary of the factual situation and data on the legal classification of the facts.

¹ Art. 65, par. (1), Law on International Judicial Cooperation in Criminal Matters.

4. Conclusions

Judicial cooperation in criminal matters at European level is not only one of the fundamental pillars of the European Union, but it creates today, even outside the area of freedom, security and justice, the context of in-depth knowledge of the legal systems of the states involved. It also stresses that the trust and openness that states have to accord to others is not always fully demonstrated, based on the principle of loyal cooperation and the obligations assumed at EU and international level.

At European Union level, there has been a continuing development of judicial cooperation in criminal matters between EU Member States.

Among the cooperation measures between the Member States, I would first of all mention the conventions on judicial assistance, the European Convention on extradition issued by the Council of Europe, adopted in Paris on 13 December 1957, and the creation of specialized structures for the prevention and combating of cross-border crime, and for identifying, catching and prosecuting offenders of criminal offenses (the concrete example of this is the 1985 Schengen Agreement, followed by the 1990 Schengen Implementation Convention, which adopted important measures such as: strengthening judicial cooperation through a rapid system of extradition and implementation of judgments and the creation of the Schengen Information System).

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*** Law no. 302 of 28 June 2004 on International Judicial Cooperation in Criminal Matters.

*** The European Convention on Extradition, adopted in Paris on 13 December 1957, by its Additional Protocols of 15 October 1975 and 17 March 1978.