

The Extradition Procedure between Romania and the U.S.A Critical Remarks

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Abstract: Currently, the extradition procedure between the European Union member states and the United States of America proceeds in accordance with the stipulations of extradition Agreement signed at Washington DC on June the 25th 2003. The agreement came into force in Romania together with its adhesion to the European Union on January the 1st 2007. From the beginning of the last century until the adhesion to European Union, the extradition between Romania and the United States of America proceeded in accordance with the 1924 extradition Convention. The signing of the extradition Treaty between Romania and United States of America represents a very important document which certifies the direct implication of Romania in the judicial collaboration in criminal matter by preventing and combating the transnational delinquency and punishing the persons who committed various crimes. According to the stipulations of the Agreement with the European Union, the extradition is given for the most part of the crimes provisioned in the legislation of the two states, on condition that the privative of liberty penalty stated in the two countries legislations is at least one year or bigger, and in case of execution of a penalty, the privative of liberty penalty left should be at least 4 months. Also, the extradition should also be provided for when the crime is committed outside the territory of the solicitant state, if other conditions are accomplished and the legislation of the solicitant state allows the application of a penalty for a crime that is committed outside its territory or in similar circumstances. The Treaty allows the extradition of its own citizens, and also of the persons who live on the territory of the solicited state. In the extradition procedure, temporary imprisonment, temporary delivery and postponed delivery, simplified procedure etc., are mentioned as well. Similar to other international judicial instruments, the Treaty also states the situations in which the extradition cannot be given, when the solicited state must inform the solicitant state about the reasons of this decision. The treaty also provides a series of provisions which do not do justice for the Romanian state, so they have been modified and examined, being objectionable, in our opinion, and the proper solution is modifying and completing the concerned normative international act.

Keywords: extradition, extradition procedure, critical remarks, prescription and capital punishment, military and political crimes

1. Introductory considerations

The positive effects mentioned in the international cooperation plan in all the fields at an international level have inevitably led to increased transnational criminality. The growing danger towards public order, state security, determined by

the unprecedented growth of transnational crime, the necessity to prevent and combat this scourge more efficiently at a better organized international level, has determined the adoption of regional and global international instruments, meant to unify the states' efforts in this direction. In this context, the international judicial cooperation in criminal matters has a mandatory character, as it represents the only solution that can fully contribute to the diminution of criminality at an international level.

In literature it has been stated that at a general level, the international judicial cooperation in criminal matter represents the form of cooperation that aims at complex activities through which the world states' governments act together, with the purpose of reducing criminality and increasing the citizens' safety, offering mutual help for specific activities such as: extradition, delivery based on an European arrest warrant, procedure transfer, recognition and execution of judicial decisions, transfer of convicted persons, judicial assistance or other similar forms or norms established through internal laws, agreements, conventions or reciprocity.¹

The extradition is the most important form of international judicial cooperation in criminal matters, known and applied in different ways since ancient times. In the past century's doctrine it is mentioned that "the oldest extradition law is the Belgian law in 1833. The Belgian model inspired successive extradition laws in the United States, in 1848, England in 1870, Holland in 1875, Luxemburg in 1875, Argentina in 1885, Congo in 1886, Japan in 1887, Switzerland in 1892, Peru 1906, Norway in 1907, Canada in 1907, Brazil in 1911, Sweden in 1913, Finland in 1927, Germany in 1929".²

Consequent to its European aspirations and according to the model of the above mentioned states, Romania has ratified the first extradition conventions in the second part of the 19th century and the beginning of the last century with the following states: Serbia in 1863, Belgium and Italy in 1880, England in 1893, Luxemburg in 1910, United States, Hungary and Bulgaria in 1924, Czechoslovakia in 1925, Austria in 1926, Poland in 1930, Yugoslavia in 1933 and numerous reciprocity agreements with France. Now Romania has signed numerous extradition conventions with several states from all the continents, ratifying other specific international instruments as well, for international judicial cooperation in criminal matters.

Along the years, specialists have stated that the extradition "as a form of international judicial assistance, is the act through which on the territory of a state there is a refugee represented by a prosecuted or convicted person, and that state resends that specific person to be trialed or to execute the conviction at the request of the interested state"³ or it is "one of the international judicial cooperation in

¹ Boroi, Al., Rusu, I., *International judicial cooperation in criminal matters*, Bucharest, Ed. C.H. Beck, 2008, p. 6.

² Dongoroz, V., *Criminal law*, Bucharest, 1939, p. 165.

³ Boroi, A., *Criminal law, General Part*, Bucharest, Ed. C. H. Beck, 2006, p. 56.

criminal matter that can be defined as the procedure through which a sovereign state (the solicited state) accepts to deliver to another state (the solicitor state) a person located on its territory, who is prosecuted or convicted for a certain crime or is being searched for the execution of a conviction in the solicitor state”.¹

Considering the points of view comprised in the doctrine, as well as the provisions stated in the international instruments and internal normative acts, we can assess that the extradition is the most important form of international judicial cooperation in criminal matter and consists in the procedure through which a state accepts to deliver to another state (at its request) a person located in its territory, who is prosecuted for committing a crime or execution of a punishment, by the solicitor state.

2. The extradition Convention between Romania and the United States of America²

The first bilateral documents through which Romania and the United States have established judicial cooperation relation in extradition matters is the Extradition Convention between Romania and the United States of America signed in Bucharest on July 23 1924.

According to the provision in article 1, the Romanian government and the U.S government “commit themselves to mutually resend the persons who, accused or that have been proven guilty of one of the crimes mentioned in article II of the present treaty, committed in the jurisdiction of one of the High Contracting Parties, will search for asylum or will be found on the territory of the other Party”.

The same article states that “the extradition will be possible only when if the crime, according to the laws of the state in which the person will be found, would be justified in case the deed would have been committed there”. We state that this condition actually aims at the need for a double incrimination for a crime committed by the person for whom the extradition is solicited.

In article 2 of the convention the crimes and groups of crimes for which the extradition is solicited are stated, among which we mention: crime, attempted crime, rape, kidnapping or detention of women of minors, for immoral purposes, destruction or illegal blocking of railways, endangering the life of a person, sea crimes, defalcation or fraudulent evasion, public documents forgery, minor kidnapping etc.

Extradition procedure

According to the convention’s provisions, the extradition request will be prepared by the diplomatic agents of the two countries. The diplomatic agents can

¹ Radu, F. R., *From extradition to the European arrest warrant. Historical and judicial preview*, Law no. 2/2006, p. 199.

² Papadopolu, M. I., *Romanian criminal law code*, Bucharest, Tipografiile romane unite, 1932, p. 509-511. The convention was published in the Official Monitor no. 79/1925.

mention in the request the release of a preliminary arrest warrant or a preventive one against the solicited person. The prosecuted person will be facing a magistrate or a judge who will examine the evidence and they will be able to issue an arrest warrant. If the evidence that have been examined is considered to be sufficient to be a basis for a conviction, the magistrate or the judge will communicate to the competent executive authority that the necessary warrant for the extradition of the person can be issued. In case of emergency, the arrest and detention request can be directed straight to the competent magistrate. If in two month time after the arrest the solicitor state will not issue the extradition forms, as well as the guilt evidence, the arrested person will be set free.

Extremely important in the bilateral relations between the two states is the Related Note of the United States of America, no.78 of July 23rd 1924, in which is stated the assurance that the death penalty “will not be applied to criminals delivered by Romania to the United States, based on none of the crimes listed in the mentioned document and that this assurance has effectively be part and be mentioned in the documents ratifications”.¹

Conclusions

The extradition convention between Romania and the United States of America represents a normative international bilateral act of great importance and it summarizes, on one hand the evolution in time of Romanian criminal law, and on the other side, the recognition by the United States of America of the entire Romanian judicial system from the beginning of the last century.

The conventions provisions are similar to the ones signed by Romania with different European states at the end of the 19th century and the beginning of the last century. At a closer examination of the norms comprised in the convention we can see that they present some similar elements with the provisions of other conventions of this kind, signed in the past years. We can also see that, similar to the general line adopted by the bilateral convention from that time, the extradition of its own citizens is not allowed, regardless of the nature or the gravity of the crime for which it is

¹ In the final part of the Convention, The Related Note of the United States of America, no.78 of July 23rd 1924 stipulated the following: “signing today, together with His Excellency Sir I.G. Duca, Minister of External Affairs of His Majesty King of Romania, the extradition contract, that has been negotiated between the United States’ Government and the King government of Romania, the subscriber, Plenipotentiary Minister of the United States in Bucharest, invested with full powers by its government, has the honor to confirm thorough this note addressed to the legal Romanian government, the assurance that the capital punishment will not be applied to defendants taken over from Romania and rendered to the United States, based on none of the crimes listed in this document and this assurance is an effective part and will be mentioned in the ratifications of this Treaty.

In order to present this assurance in a more effective manner, the United States’ government consents that no person accused of a crime that could receive a capital punishment in virtue of the laws of the state where the trial is to be held, will not be extradited from Romania into the United States. This agreement form the United States’ part will be mentioned in the ratifications of this treaty and will be an integrated part of it.”

solicited.

Death penalty is stated in the United States' legislation in that period of time, and the convention states that it will not be applied to citizens handed over by Romania to the contractor part. It is very important to remember the great number of crimes that can act as an object for extradition between the two states, being the most serious as well.

3. Extradition based on the Extradition Treaty signed in 2007

Currently, the extradition between Romania and the United States is completed based on the Extradition Treaty between Romania and the United States, signed in Bucharest on September 10, 2007, ratified through law no.111/2008.¹

We have to mention the fact that until the ratification of this international instrument between the two states was made based on the extradition convention completed and signed in Bucharest on July 23rd 1924 and the additional Convention signed in Bucharest on November 10th 1936.

3.1.1. Crimes that cause the extradition

Extradition between the two states will be made only if the crime for which the delivery of the person is solicited is stated in the legislation of both states, with a freedom privative penalty bigger than one year. In case the extradition request has as its object the execution by the convicted person of a liberty privative punishment applied for a crime that offers room for the extradition, the remained punishment has to be at least 4 months. The extradition between the two states will be given in case of attempt, association or participation in committing one of the above mentioned crimes.

Taking into account the above mentioned considerations, the extradition will be conferred:

- a) Regardless of the fact that the solicitor and the solicited state frame or not the actions or the omissions that represent a crime in the same crime category or describe the crime using the same terms;
- b) Regardless of the fact that the crime is or is not one the crimes for which the federal legislation of the United States of America provision proving some aspects such as using interstate transport or using post services or other facilities that affect interstate or external commerce, these aspects only being able to establish the competence for a federal judicial instance in the United States; and
- c) Regardless of the fact that the criminal causes concerning taxes and fees, import or export, the legislation of the solicitor and solicitant state

¹ Published in the Official Monitor of Romania, Part I, no.387, May 21st 2008.

provision or not the same taxes and fees, custom obligations or currency operation control, import or export of the same type of goods.¹

In case the crime for which the extradition is solicited was committed outside the solicitor state's territory, it will be conferred if the other conditions for the extradition are fulfilled, in case the legislation of the solicited state allows the application of a punishment for a crime that has been committed outside its territory or in similar circumstances. If the solicited state's legislation does not allow applying a punishment for a crime committed outside its territory or in similar circumstances, the executive authority of the solicitor state can be, and this depends on each individual state, to proceed with the extradition, if all the other conditions for the extradition are fulfilled.

We have to mention the fact that in case the solicited state is Romania, out legislation provisions the investigation and punishment competence of crimes committed outside its territory, based on the principles of personality, reality and universality of the Romanian criminal law, mentioned in article 4, 5 and 6, al.(2) in the Criminal Code. When the extradition is conferred for a crime that leaves room for extradition, it will be conferred for any other crime mentioned in the extradition request (even if for that crime a liberty privative crime if conferred, for a period of time of 1 year or less than that) if all the other provisioned conditions are fulfilled.

Applying the extradition treaty between the two countries, the extradition cannot be rejected due to the person's citizenship. In this context, we have to mention that, based on the treaty's provisions, the United States will extradite in Romania American citizens as well as the citizens of any other state and Romania will extradite in the United States Romanian citizens or any other citizens residing or situated on its territory.

3.1.2. The extradition procedure

The extradition requests between the two states and the documents that sustain them have to be transmitted through a diplomatic procedure. These documents can be received as well by the embassy of the solicited state in the solicitor one.

According to the treaty's provisions, the extradition request will be accompanied by:

- a) Documents, declarations or any other information related to the identity and the probable location of the searched person;
- b) Information that describe facts on which the crime is based and a short history of the case from a procedural point of view;
- c) The relevant texts that regulate the constitutive elements of the crime for which the extradition is solicited;

¹ Extradition Treaty between Romania and the United States of America, art. 2, al. (3).

d) The relevant texts that provision a punishment for the crime based on which the extradition is solicited;

e) The legal relevant texts regarding the prescription of the criminal liability or the execution of a punishment and the information regarding applying them in the specific case in which the extradition is solicited; and

f) The documents, declarations and other information provisioned in al. (3) and (4), in each specific case.¹

In case the person for whom the extradition is solicited is guilty for committing a crime, along with the documents mentioned above, the extradition request will be accompanied by:

- a copy of the mandate or the arrest or detention order issued by a judge, instance or any other authority;
- a copy of the accusation act;
- information offering reasonable reasons to believe that the investigated person committed the crime for which the extradition is solicited.

We therefore believe that when the person is accused, the extradition request will be also accompanied by the documents that certify this quality for that specific person. In what concerns the Romanian party, being a defendant represents that a criminal procedure has been started by against that person. When a person that should be extradited was found guilty or was convicted for the crime for which the extradition is solicited, together with the above mentioned documents, the extradition request will be accompanied by:

- a copy of the conviction decision or, in case the person was found guilty but the punishment has not been applied, a declaration made by the judicial authority that certifies the guilt;
- information that prove that the specific person is one whose guilt was determined;
- if the searched person was convicted, a declaration related to the stage of the execution of the punishment.

In case a person was found guilty or convicted in absence, the above mentioned documents will be sent, as well as the information regarding the circumstances the person missed the criminal procedures.

There is no doubt that, according to the Romanian criminal law, a person is convicted only when that person was found guilty. The existence of the two concepts in the text has a major importance for the extradition because these situations are different and the consequences are different. The solicited state can also require the solicitor state to offer additional information in due time, if they assert that the information that have been presented to them in supporting the extradition request are not sufficient to fulfil the conditions provisioned in the treaty.

¹ Extradition Treaty between Romania and the United States of America, art. 8, al. (2).

This information can be solicited and transmitted directly between the Ministry of Justice and Citizens' Liberties in Romania and the Justice Department of the United States of America. The documents that have been transmitted in order to execute an extradition, with the certification or the seal from the Ministry of Justice and Citizens' Liberties in Romania and the Justice Department of the United States or the ministry or responsible department for external affairs of the solicitor state will be acceptable in the extradition procedure in the solicited state, without any certification, authentication or validation.

All the documents transmitted by the solicitor state have to be translated in the solicited, if other convention is not established.

In case that require emergency, each of the two contracting states can ask the other one the temporary arrest of the searched person, until receiving the extradition request and the documents annexed to it. The temporary request for an arrest can be transmitted by one of the two contracting states in three ways, respectively:

- on a diplomatic way;
- directly between the Ministry of Justice and Citizens' Liberties in Romania and the Department of Justice in the United States of America;
- through the International Criminal Police Organization (Interpol).

The Romanian judicial organs will take into account the modifications in the structure of the Ministry of Administration and Internal Affairs, among which there is The International Police Cooperation Centre, which comprises the National Interpol Office, were integrated in the General Inspectorate of the Romanian Police, at a direction level.

The request for the arrest has to comprise the following:

- the description of the searched person;
- the localization of the searched person, in case it is known;
- a short presentation of the facts, including, if possible, the date and place of the crime;
- a description of the legal dispositions that have been violated;
- a declaration regarding the existence of a warrant or an arrest or detention order, or a declaration of guilt or conviction of the person being searched;
- a declaration according to which the extradition request of the person being searched and the documents supporting the extradition request will be transmitted in the time stated in the present treaty.

The solicited state will be informed regarding the way of solving the temporary request for the arrest. In case the request is not executed, the solicited state will communicate the reasons that have led to taking such a decision.

If in 60 days from the preliminary arrest the solicited state hasn't received the extradition request accompanied by the documents presented before, the state will set the person free.

When the extradition request and the relevant documents are delivered in 60 days to the solicited state's embassy in the solicitor state, the term is considered to

be respected.

The solicited state won't set the person free the person that has been temporarily arrested even if in 60 days it doesn't receive the official extradition request, only in case there are serious reasons to justify the arrest of the person being searched.

The treaty does not provision the situations in which the solicited state can maintain the state of arrest or a person being searched even if in the mentioned period of time the official extradition request and the relevant documents are not received. The lack of these provisions will determine the solicited state to take into account the opportunity of maintaining the state of arrest or not, according to some criteria considered as being necessary and that the criteria can be considered serious reasons to maintain this situation, provisioned in its internal legislation.

Even if the solicited state did not receive the extradition request and the relevant documents within 60 days from the temporary arrest of the person being searched and that person was set free, he/she can be arrested again after receiving those documents. The decision taken by the solicited state regarding the admission or rejection of the extradition request will be immediately communicated to the solicitor state.

The treaty stipulates that in case of total or partial rejection of the request, the solicited state will communicate the solicitor state the reasons for the rejection. The solicited state will transmit, at request, the copies of the pertinent judicial decisions. We have to express some reserve towards the two concepts comprised in the treaty's text, respectively "partial rejection" and "total rejection", asserting that the rejection of an extradition request cannot be done unless it is a total one. When the extradition request is approved, the judicial authorities of the two states will convene on the date and place of delivering the person in question. When the person in question is not taken over from the solicited state's territory in the due time stated in that state's legislation, that person can be set free and the solicited state has the right to reject a subsequent extradition request for the same crime or the same crimes.

In what concerns Romania, the provisions of Law no.302/2004 are applicable, regarding international judicial cooperation in criminal matters, together with the subsequent modifications and completions.¹

We notice that the treaty does not refer to the judicial procedure that has to be followed in order to approve the extradition or the temporary arrest request, as the comprised norms are general ones. The specific examination procedure and the approval of an extradition request or a request for temporary arrest by the Romanian judicial authorities is mentioned in a special law that is applicable in executing the

¹ Law no. 302/2004 on international judicial cooperation in criminal matters (Of. M. no. 594 on July 1st 2004) was modified and completed through the following normative acts: Law no.224/2006 (Of. M. no.1019 on December 21st 2006), E.G.D. no.103/2006 on some measures for facilitating international police cooperation (Pf. M. no. 1019 on December 21st 2006), approved by Law no.302/2004 on judicial cooperation in criminal matters (Of. M. no.758 on November 10th 2008).

extradition provisions in the treaty between Romania and the United States of America.

Without proceeding to the examination of the extradition procedure in Romania, procedure that is expressly mentioned in the special law, we would like to point out some of its specific aspects.

Although the general rule regarding the procedure of transmitting the extradition request is to be made through the Ministry of Justice and Citizens' Liberties, in relation with the United States, the request will be transmitted through diplomatic way. Even in this situation, the extradition request will be subsequently sent to the Ministry of Justice and Citizens' Liberties that will analyze it through the special direction. Except for the situation in which the restitution is imposed, the extradition request and the annex documents will be transmitted by the special direction within the Ministry of Justice and Citizens' Liberties, within 48 hours at most, the general prosecutor from the parquet on the court of appeal in the jurisdiction the person who has to be extradited was found, or the general prosecutor of the parquet on the appeal court in Bucharest, when the location of that person is unknown.

Therefore, the judicial extradition procedure is in the competence of the appeal court in which circumscription the person was localized and the relevant parquet. The extradition request and the temporary arrest are solved by a full court comprising a judge of the criminal section of the competent appeal court.

After receiving the extradition request and the documents annexed to it, the competent general prosecutor or the assigned prosecutor proceed, within 48 hours from identifying the person who will be extradited, that has to be informed on the content of the documents transmitted by the solicitant state. We have to mention that the specific search, identification and detention activities for the person to be extradited will be effectuated by the police at the prosecutor's request.

After the identification, the general prosecutor refers to the competent appeal court to evaluate the measures that have to be taken for the preliminary arrest for the extradition and continuation of the judicial procedure to solve the extradition request. The temporary arrest for the extradition is disposed and is extended by the same full court invested with solving the extradition request, through completion, without the total duration of the preliminary arrest surpassing 180 days. After completing the decision that led to the arrest, the judge issues a preliminary arrest warrant in order to proceed with the extradition. The person that will be extradited will be held by the police.

The arrest measure for the extradition will be stopped if the extradited person is not taken over by the competent authorities of the United States on America, within 30 days from the delivery date, except for special situations, when a new delivery date will be established.

In case the extradition is conferred, the Ministry of Justice and Citizens' Liberties will immediately communicate to the Center of International Police

Cooperation within the General Inspectorate of the Romanian Police an extract of the permanent judicial decision. The delivery date will be established by this institution, together with the American authorities and will be communicated to the Ministry of Justice and Citizens' Liberties and the competent court of appeal within 15 days from transmitting the judicial decision. If the delivery date was not established in due time, the Center for International Police Cooperation will inform on the procedures and the reasons for which the delivery date hasn't been established.

The delivery place will be a frontier place of the Romanian state. The effective and physical delivery of the extradited person will be made by the National Interpol Office within the Center of International Police Cooperation, a direction unity located within the General Inspectorate or Romanian Police.

In case the American authorities, after being informed on the place and the date of the delivery, do not present themselves to take over the person to be extradited, the term will be extended by 15 days, with the possibility or a further 15 days extending. If after the second term the American authorities do not take over the extradited person, he/she will be set free. As we mentioned above, in special cases, a new delivery date will be established.

4. Critical remarks on the Treaty's provisions

The examination of the treaty's provisions resulted in a series of objectionable aspects which in the future will cause difficulties in the effective extradition activity, especially for the Romanian party.

We will continue with the critical examination of these aspects, in the context of the relations in international judicial cooperation in criminal matters, of the actual position of Romania, a EU member with total rights, that imposes complying with certain community instruments of this type.

4.1. Political and military offences

In article 4, "Political and military offences" it is stipulated that "the extradition will not be conferred if the crime for which the extradition is solicited has a political nature". In the same article, al. (2) stipulates many categories of crimes that are not considered to have a political nature.

In al. (3) it is mentioned that "without prejudice to the dispositions of al. (2), the extradition will not be conferred if the competent authority of the solicited state asserts that the request has a political motivation". From the United States of America, the Executive Branch is assigned as being the competent authority.

In the light of some considerations that we will later mention, we assert the fact that these provisions are not only needless, but can cause difficulties for the extradition procedure, especially for the Romanian party. Therefore, we have to mention the fact that in the present as well as in the new Romanian Criminal Code,

as well as the special laws comprising criminal dispositions, the political offences are not mentioned. In other context, we have to mention the fact that Romania is a democratic state, this statute resulting from the dispositions comprised in article 1, al. (3) in the Constitution, “Romania is a lawful, democratic and social state, in which the human dignity, the citizens rights and liberties, the free development of the human personality, justice and political pluralism are supreme values, in the spirit of the democratic traditions of the Romanian people and the ideals of the December 1989 Revolution and are guaranteed”.

In the same context, we have to mention that starting with January 1st 2007, Romania is an EU member state with total rights, in which there never were and never will be a case of criminal prosecution or conviction for committing criminal offences. Another argument of the uselessness of these provisions is connected with the fact that, while the text stipulates the offences that cannot be considered to be political, no specification is made related to political infractions (what are those types of offences).

What is more serious is that, without a judicial norm that defines the infractions with a political nature, the competent authority in the solicited state has the possibility to assert if the request is politically motivated. Therefore, although in al. (1) it is stipulated that non-conferring the extradition if the crime for which it is required is a political one and al. (3) refers to the content of the extradition request that can be interpreted as having a political motivation.

These provisions lead to the conclusion that the extradition will not be conferred in two express situations provisioned in the treaty, when the offence is a political one and when the request is interpreted as being politically motivated. In these conditions we can find ourselves in the situation in which, although the offence for which the extradition is solicited by the competent Romanian authorities is not interpreted by the American authorities as having a political nature, and still the extradition will not be conferred because the competent American authorities establish the fact that the extradition request is politically motivated.

It is important to retain the fact that from the American side the determination of the political offence as well as the appreciation of the extradition request as being a politically motivated one, the competent authority is the Executive Branch and not the judicial one.

Because in this article the competent Romanian authority that can appreciate if an offence has a political nature or the extradition request is politically motivated is not mentioned, the Romanian state disclaimed these competences. In other words, while the Romanian state completely trusts the American judicial decisions, the American state does not do the same things. What’s more, according to the analyze of the extradition agreement signed between the EU and the United States of America, completed in Washington DC on June 25th 2003, there is no disposition referring to the political offences or political motivation of a extradition request.

We also mention the fact that according to art. 18, al. (1) from the above

mentioned normative, it is provisioned the possibility of completion of bilateral extradition agreements between any EU member state and the United States of America, “according to the present agreement”. In this context, concerning the fact that the mentioned normative act does not provision dispositions regarding the political offences, by mentioning this type of disposition in the bilateral treaty, Romania, as an EU member state, violated the provisions of article 18, al. (1) of the Extradition Agreement between the EU and the United States of America.

We assert that the critical observations made regarding the provisions of this article will prove to be pertinent because at this moment on the roll of the competent instances in the United States of America there is the trialing of the extradition request formulated by the Ministry of Justice and Citizens’ Liberties against the Romanian citizen M.N., former general director of the National Company C.F.R. S.A., that caused an immense prejudice to the Romanian state. In this context, in which the specific case caused an intense debate in the Romanian press, the representatives of two political parties accusing each other, it is possible that the Executive Branch of the United States of America to interpret the motivation of the extradition request as being a political one, although the offences that have been committed by the investigated person cannot have a political nature, and the request would not be approved.

In a short conclusion regarding the dispositions of this article we assert that the Romanian state, in virtue of the obligations established by the Extradition Agreement between the European Union and the United States of America, will have to solicit to the American party the removal of these provisions. In what concerns the military offences, we think that it is normal that the extradition of a person that committed such an offence remain at the discretion of the solicited state.

4.2. Justificatory documents that accompany the extradition request

In the Extradition Agreement between the European Union and the United States of America it is stipulated, in article 5, al. (1), that the extradition request will be accompanied by justificatory documents and article 8, al. (1) “the information offered in supporting the extradition request” is mentioned. In the Extradition Treaty between Romania and the United States of America, in article 8 are provisioned the justificatory documents in an exaggerated form, being able to assert that the extradition request is accompanied by almost all the file of the respective case. We have to mention the fact that these documents are not completely necessary to the solicited state, except for the situation in which the extradition of its own citizen is requested, or of a person residing on its territory.

4.3. Capital punishment

In the Extradition Agreement with the European Union as well as in the Extradition Treaty with Romania there are stipulations regarding the capital

punishment.

It is well known that the capital punishment is not stipulated in the EU member states' legislations or the Romanian one. In the same time, it is well known that in some of the states in the U.S, the capital punishment is not only provisioned but also applied sometimes.

In this context, the provisions regarding the capital punishment in the two international normative documents are pertinent, but are applicable only in the situation in which the solicitor state is the United States of America.

At a comparative analysis of the two texts (the one provisioned in article 13 of the Extradition Agreement between the EU and the United States of America and the one mentioned in article 7 of the Extradition Treaty between Romania and the United States of America) we observe the fact that they are very different. Thus, the treaty stipulates that in case the offence for which the extradition is solicited could be punished by capital punishment in the United States of America, Romania can agree with the extradition only if the capital punishment will not be applied for that specific person and if such a condition cannot be fulfilled for procedural procedure, the capital punishment will not be applied.

This provision is inapplicable because one cannot impose to an American instance not to impose the capital punishment in a cause and the competence to apply such a punishment belongs to the competent instance. In this context we assert that the treaty should have provisioned the condition of guarantee of non-executing the capital punishment, in case it was judged or the change of it in life in prison.

The same assertion can be made in what concerns the Extradition Agreement between the EU and the United States of America, where it is stipulated that in case the crime for which the extradition is requested implies the capital punishment in the solicitor state, the solicited state will confer the extradition of the specific person, provided that the capital punishment will not be pronounced or in case this is not possible due to procedural reasons, the death penalty would not be executed.

4.4. The transit

In the treaty as well as in the agreement it is stipulated that in case a state uses air transportation and a landing on the territory of the other state is not provisioned, the authorization is not necessary. Both the international normative acts provision that in case the landing is unforeseen, the state where the landing took place can solicit the state that transports the person to present the transit request.

The two international normative acts, although they present the same issue, contain different provisions. Thus, the Extradition Agreement between the EU and the United States stipulates that during the transit, all the necessary measures are taken to prevent the specific person from escaping, until the transit is completed, as long as the transit request is made in an interval of 96 hours from the unforeseen call. Although the text does not expressly stipulate this, we think that the prevention

measures for the escape for the escape should be taken by the state's authority where the unforeseen call has been made.

Trying to provision the same requests, the Extradition Treaty between Romania and the United States stipulates that the state where the unforeseen call has been made can hold the person until the transit request is received and the transit is completed, as long as the transit request is made within 96 hours from the unforeseen notice. This ambiguous formulation should have not been made.

The arguments that determined the appearance of this 96 hours term are not understood because the notice of the state where the unforeseen landing has been made has to be issued right after the landing as well as the transit request that has to be formulated in a very short period of time. The reasons for which the state where the forced call was made can retain the extradited person until the transit request is received and the transit is effectuated are not known. Although the transit is stipulated in the normative acts of this kind, we have to mention the fact that these provisions are useless, as the transit in this situation does not imply the state's responsibility, where the force call was made, but the responsibility of the state that transports the extradited person. These provisions would only create a useless bureaucracy.

4.5. Rendition of the extradited person

In what concerns the rendition procedure of the extradited person the Treaty provisions that the authorities of the contracting states will convene on the date and the place of the rendition. In the same time, it is stipulated that if the person being searched is not taken over from the solicited state in the period of time provisioned in the legislation of that state, the person can be set free and the solicited state has the right to reject a subsequent extradition for the same crime or the same crimes.

Taking into account the provisions above mentioned, in case the Romanian state is the solicitor state, it will take over from the United States of America the extradited person, and in case the Romanian state is a solicited state, the extradited person will be taken over from American territory by a team of Romanian police officers. We notice the fact that this time, in an inexplicable way, a dead line for taking over the extradited person is not mentioned, the term mentioned in article 12, al. (4) making a reference to the situation in which a temporary arrest has been made and the extradition request was not sent to the solicited state during the time of the arrest. The lack of a period of time in which the solicitor state has to take over the identified extradited person detained in the solicited state will determine the set of a period of time for each specific situation, according to the special laws between the two contracting parties.

4.6. Procedure in case of extradition refusal

Together with all the optional or mandatory reasons that can lead to the refusal of conferring an extradition by one of the two states, we have to mention that the general rule is to confer the extradition in favour of the solicitor state.

In perspective and taking into consideration in the first place the growth of the crime rate, there will definitely be cases in which one of the two states, as a solicited state, will refuse the extradition in favour of the solicitor state. This refusal by one of the two contracting parties will have to determine, in some cases, the continuation of the criminal liability of the specific person. What is negative is that the treaty does not stipulate in its content any specific judicial norm that would establish the criminal liability of the person. Thus, in article 13, al. (2) of the treaty there is stipulated that in case of total or partial rejection of the request, the solicited state will communicate the reasons for the refusal. In this case, the solicited state will send, at request, the copies of the pertinent judicial decisions.

We notice the fact that in case the extradition request is denied, the treaty does not mention a procedure that should be followed and that will end in criminal liability of the solicited person, which is an objectionable aspect. In this context determined by the absence of relevant judicial norms, we state that Romania will adopt different positions from the present situation that can be that of solicitor as well as solicited state. Thus, in a first situation, as a solicited state, Romania, without taking into consideration the attitude of the American party, will be able to refuse the extradition of a person solicited by the United States but, considering the special legal dispositions, in some specific situations, will have to take over the criminal procedure. As mentioned before, in absence of dispositions in this context, the only normative act that can regulate this situation is the special law.

According to the provisions comprised in article 114 of Law no.302/2004 on international judicial cooperation in criminal matters, with the subsequent modifications and completions, the request for taking over of the criminal procedure will be addressed to the Ministry of Justice and Citizens' Liberties or The Parquet on the High Court of Cassation and Justice. The request for taking over the criminal procedure will be solved by the parquet on the appeal court in the circumscription where the person resides or has been identified and the request for taking over the trial by the criminal section of the competent appeal court.

We notice that in this case the Romanian state has no initiative and a request to the American state is being required. In case the United States refuses to confer the extradition of a citizen, the Romanian judicial authorities will proceed according to article 110 of the special law.

Thus, in virtue of the mentioned provisions, the Romanian judicial authorities can solicit the competent American authorities the exertion of a criminal procedure or its continuation, if the transfer of the criminal procedure serves the interests of a

good administration of the justice or favours the social reintegration in case of conviction, in the following situations:

- The defendant is executing a punishment on the territory of another state of the United States of America, for a crime more serious than the one committed in Romania;
- The defendant lives on the territory of the United States and, according to the law of this state, the extradition or rendition was refused or would be refused if a request were to be formulated;
- The defendant lives in the United States and, according to the law of this state, the recognition of the final criminal conviction judgment pronounced by the Romanian judicial instance was rejected or it does not correspond with the internal judicial order of the American state, if the convicted person hasn't started executing the punishment and the execution is not possible irrespective of the extradition or rendition possibility.

Also, the transfer of the criminal procedure can be solicited even when the Romanian judicial authorities assert, according to the case, that the presence of the defendant to the criminal investigation cannot be assured and this can be done in the United States.

In conclusion, we assert that the lack of provisions of this kind from the treaty will lead to some difficulties that the Romanian judicial organs will have to face. We also have to state that the procedure transfer in relation to the United States cannot be solicited or approved in all the cases of extradition denial of one person, but only when this is possible, taking into account the provisions in the internal legislations of the two states, regarding the international judicial cooperation in criminal matters.

5. References

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