

The Observance of Human Rights and Freedoms in the Extradition Proceedings at National and International Levels

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Abstract: The fundamental rights and freedoms contained in international documents may be the object of the denial of an extradition request as independent exceptions, even if they are not covered by extradition treaties. The right to life is a fundamental human right whose protection must be achieved in the extradition proceedings. By Law no. 30/1994, Romania ratified the Convention for the Protection of Human Rights and Fundamental Freedoms, adopted by the Council of Europe.

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1. General Considerations on Human Rights

Extradition is an institution of criminal law with direct influence on human rights and fundamental freedoms, given its repressive nature, of limiting the freedom of movement of a person according to his/her will, or even the total deprivation of liberty in the case of preventive arrest for the purpose of extradition.

As regards human fundamental rights, prerogatives recognized by national and international law to each individual in his/her relations with the collectivity and with the State, they are subject to numerous international documents: the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (and the optional Protocols thereto), the International Covenant on Economic, Social, Cultural Rights etc..

At the same time, in addition to those adopted on a regional plan, there are: the European Social Charter, the American Convention on Human Rights, the European Convention on Human Rights adopted on 4 November 1950 by the Council of Europe – the regional organization wherefrom there are States attached to the same political views, concerned with establishing the effective protection of

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human rights. From the perspective of its authors, this convention represents a considerable progress towards the 1948 Universal Declaration, through three essential aspects:

- the rights are guaranteed in conventional texts, whose signature and ratification by Member States have conferred them full legal value;
- there was agreed upon several international institutions to ensure the implementation of the Convention;
- it provides the establishment of a right of individual appeal that allows individuals to act addressing international courts with complaints against the State guilty of infringing the rights guaranteed, even if the State of the plaintiff itself is concerned.

The rights enshrined and guaranteed by the Convention refer to the protection of human physical integrity, the liberty and security of the individual, with the guarantee of fair criminal or civil proceedings, the right to private and family life, to those freedoms called intellectual, thinking, conscience, religion, training and education freedoms, public liberties, political freedoms, the right to secret ballot, the right to property, the prohibition of discrimination and the right to move freely across the borders of his/her State.

The fundamental rights and freedoms contained in international documents may be *the object of the denial of an extradition request* as independent exceptions, even if they are not covered by extradition treaties. By analyzing the jurisprudence of the European Court of Human Rights, it is emphasized the idea of the recognition of rights as possible grounds for the refusal of extradition requests, i.e. as *obstacles to extradition*. These concern, of course, only those fundamental rights which can lead to the refusal of such a request, since, as it is clear from the decisions of the European Court, a State Party is informed that, in the country of destination, conditions are not consistent with those established under the Convention (Moldovan, 2004, p. 175).

The category of the most important social values protected by criminal law includes all *human rights and freedoms*. The issue of human rights is not new and recently published; on the contrary, it has its genesis from ancient times, when man became aware of how important he/she is in the social life. Lately, however, we are witnessing an *explosion of legislative concerns* regarding guaranteeing and protecting human rights. Being of utmost importance in the ensemble of social values, human rights are not only guaranteed but also protected by the criminal rules, incriminating those facts that injure or restrict the exercise of these prerogatives which are indispensable to the human being.

It can rightly stated that the strict observance of human rights is a *limitation* to the discretionary grant of extradition at the national and European level.

2. The Observance of the Right to Life

The right to life is a fundamental human right whose protection must be achieved in the extradition proceedings. Human life is protected by the criminal law in a broader context, namely that of protecting the individual and its main attributes: life, physical integrity, health, liberty, inviolability of the sexual life, honor (Boroi, 1996, p. 13). Human life is protected by the criminal law since its inception until its termination.

Life, as a biological trait of the individual, is the synthetic and fundamental attribute without which there would be none of the other characteristics of the person. Life is the individual's good, his/her most precious value, the ultimate condition for the existence and for the affirmation of the roles within the social group (Boroi, 1996, p. 13). Also, the society also can be considered only due to the existence of living people, which means that individuals' lives are becoming a supreme condition for the existence of society itself. Without the observance of life, collectivity and social life are not possible.

It should be noted that the right to life is enshrined in the *Declaration of the Rights of Man and Citizen* of 1789 and in the *Universal Declaration of Human Rights* of 1948. Based on the latter, and considering that the purpose of the Council of Europe is to achieve greater unity between its members and that, for this purpose, it is necessary to first protect and develop human rights and fundamental freedoms, the European countries adopted, in Rome, in November 1950, the *Convention for the Protection of Human Rights and Fundamental Freedoms* (Lamasanu, 2004, p. 137).

Within this context, it is about *refusing to approve* those requests to States that apply the death penalty. Initially, the European Convention did not prohibit the capital punishment, but rather it was an exception to the protection of the right to life (Article 2, paragraph 1, second sentence refers to the fact that: No one shall be deprived of his life intentionally save in the execution of death sentences handed down by a court).

The death penalty, the most severe punishment that can be imposed on human beings, continues to exist and to be executed in the law of some States, so that, by regulating the substantive extradition conditions, it should be established the extent to which the provision or the possibility of its execution affect the admissibility of the extradition request.

The Additional Protocol no. 6 of the Convention¹ on the abolition of the death penalty bans the death sentence and its execution (article 1).

¹ Adopted in Strasbourg on 28 April 1983 and entered into force on 1 March 1985, signed by all the States Parties to the Convention except Belgium, Cyprus, Greece, Ireland, Turkey and the UK.

If, in practice, a request for extradition is made by a State which has not ratified the Protocol, the requested State may refuse the admission grounds under the Protocol disposition (such solution was accepted by the Court of Justice of the Netherlands, in March 1990, in the Short case, which opposed the extradition to the U.S., even if the person whose extradition was sought was accused of murder).

On the other hand, the European Convention on Extradition contains, in article 11, an express provision regarding the capital punishment: if the offense for which the extradition is requested is punishable by death by the law of the requesting Party or if it is not normally carried out, extradition may be refused unless the requesting party gives assurances considered sufficient by the requested Party that the death penalty will not be executed (Streteanu, 2003, p. 117).

Internally, this regulation is expressly provided for in article 22, paragraph 3 of the Romanian Constitution: “*the death penalty is forbidden*” and in article 29 of Law 302/2004¹, which establishes, without exception, a total refusal to extradite if the requesting State law provides for the death penalty, for the offense that represents the subject of the extradition. In this case, the applicant must give ample assurance that the penalty will not be applied to the extraditable person.

Therefore, whatever the nature of the offense committed by the person whose extradition is requested, his/her right to life shall be protected by the State on whose territory he/she is; this State is held to inform itself on the legislative provisions of the requesting State even if it is the nationality State of that person.

The justification for the existence of these absolute terms, from which there is no derogation, is that capital punishment does not respect the principle of criminal sanction humanism and, at the same time, it is considered barbaric, unnecessary and sometimes incorrectly applied, in which case nothing can be done anymore.

3. The Observance of the Right to not be subjected to Torture, to Inhuman or Degrading Sanctions

This right is provided for by article 3 of the European Convention on Human Rights and aims to the integrity and dignity of the individual: “no one shall be subjected to torture, to inhuman or degrading treatment”.

Torture was defined by the Convention institutions (Commission and Court) as “the inhuman treatment aimed to obtain information or confessions or to apply sanctions” or “the inhumane treatment applied intentionally and causing extremely serious and atrocious suffering”.

¹ Published in the Official Gazette no. 594/01.07.2004.

Within the same case, there was also defined the meaning of inhuman or degrading treatment or punishment: “that treatment likely to vulgarly cause serious physical or mental suffering that can not be justified”. Degrading treatment or punishment, on the other hand, is likely to seriously humble the individual, to produce feelings of fear, worry, to defeat his/her physical or moral resistance (Lamasanu, 2004, p. 146).

In practice, there are complaints made by certain individuals against the States that were willing to grant the extradition of the applicant States, although the risk of their subjection to such treatment was known (*Widmaier vs. Netherlands*, *Almekrane vs. the UK*) and were resolved in favor of the petitioners.

The landmark decision was rendered on 19 January 1989, within the European Court file no. 14038/1988; the Court found that the UK’s decision to extradite **Jens Soering** to the U.S., if it were implemented, would violate article 3 of the European Convention on Human Rights¹. The process in question was linked to a criminal business. Jens Soering, a German citizen, was in the U.S., Virginia, in March 1985, when, together with his girlfriend, Elizabeth Haysom, murdered the latter’s parents, William and Nancy Haysom aged 72 and 53 years, who were opposed to their marriage. The petitioner and Elizabeth Haysom were aged 18 and 20 years and were students at the University of Virginia.

Subsequently to their commission of the crime, they disappeared in October 1985 but, in April 1986, the English police arrested them for committing scams related to some bad checks. While being investigated by the British police, the two finally admitted the deeds, but claimed that they had not intended to kill the Haysoms. On 11 August 1986, the U.S. government requested the extradition of Jens Soering and Elizabeth Haysom, under the Anglo-American extradition treaty concluded in 1972. On 29 December 1986, a German prosecutor interrogated Jens Soering and, on this occasion, the petitioner reiterated that he had no intention to kill. On 11 February 1987, the district court of Bonn released an arrest warrant on Soering’s name, and, on 11 March, the German government requested, in its turn, his extradition under the Treaty of 1872 between the two countries. Elizabeth Haysom was extradited to the United States on 8 May 1987 after being found guilty of complicity in the murder of her parents and was sentenced to 90 years in prison (45 years for each parent separately). On 20 May 1987, the British government informed Germany that the U.S. had submitted the first the extradition request. The Bow Street Court organized the hearings for the extradition proceedings.

On this occasion, a psychiatrist showed that Soering was suffering from mental disorders. The psychiatrist's opinion was that Soering can be found guilty of murder but not of assassination. On 29 June 1987, Soering requested a Corpus Habe order, which was refused. As the House of Lords refused the appeal, Soering

¹ The European Court of Human Rights, Decision of 19.01.1989.

asked the Minister of Interior not to order his remittance to the U.S. authorities. The minister refused this request and signed a decision on his remittance to the U.S. authorities, but Soering was not actually remitted. He was interned in a prison hospital, where he expressed his fear that if he would be remitted to the U.S. authorities, he would be subject to great physical violence and to sexual violence from other inmates on the “death row”, where there are held the prisoners sentenced to death in Virginia.

By an application to the European Court of Human Rights, Soering has reconfirmed his agreement to be extradited to Germany and not to the U.S. under the above mentioned grounds. The Court granted his application on the grounds that: “no prisoner sentenced to death could avoid the lapse of a period between the delivery and the execution of the sentence, and the strong tensions inherent to the rigorous regime of the necessary incarceration. The democratic nature of the legal system in Virginia, in general, and especially the positive elements of the trial proceedings, the trial and the appeal in Virginia do not raise any doubt”. However, the very long time to be spent on the “death row”, in extreme conditions, with the pervasive and growing fear of the death penalty execution, and the personal circumstances of the applicant, especially his age and mental state, in the era of crime, the extradition to the United States would expose him to a real treatment risk exceeding the threshold article 3.

The existence, in the case, of any other means of achieving the legitimate purpose of extradition, without causing so much suffering of an exceptional intensity and duration, is a relevant and supplementary consideration. Accordingly, the Court has acknowledged a violation of article 3 of the European Convention on Human Rights in the case of the extradition decision, but decided instead that there can be invoked the provisions of article 6, paragraphs 1 and 3 and article 13 of the Convention.

The prohibition of torture and of inhuman or degrading treatment or punishment is also part of the *jus cogens* rules recognized by the international law. Therefore, even if a particular treaty on extradition does not contain express provisions to this effect, such an existing and recognized peremptory norm will be invoked if there is data that on the territory of the State party requesting the extradition there are practices of this kind.

Moreover, in this case, *the Decision of 30 October 1991 on the case of Vilvarajah and Others vs. the United Kingdom* is also relevant (European Charter of Human Rights, 2000, p. 80).

Nadarajas Vilvarajah and four other Sri Lankan Tamil citizens arrived in the United Kingdom on various dates in 1987 and asked for political asylum under the 1951 United Nations Convention relating to the Status of Refugees. They feared they would be persecuted if they were sent to their countries where they and their

families had suffered from the excesses of the military on the Tamil community. The Ministry of the Interior examined and rejected their applications.

In this case, they required the judicial review of that decision, but the House of Lords rejected this request as a last resort in December 1987. They were sent to Sri Lanka in February 1988. Some of them claimed to have been arrested, detained, and abused by the members of the Indian Peacekeeping Forces. Another stated that he was arrested and beaten by the police. In March 1989, their appeal on the rejection decision was granted. Being thus authorized to return to the UK in October 1989, they obtained exceptional residence permits valid, at first, for 12 months, then extended until March 1992. In their complaint to the European Commission, they stated that, as young male Tamils, they had good reasons to fear that they *would suffer persecution, torture, arbitrary execution or inhuman or degrading treatment* contrary to article 3 of the Convention. In addition, they argued that the British law had no effective recourse for claiming the results in that text.

The Court concluded that there lacked the reasons likely to make them believe that sending the petitioners to Sri Lanka, in February 1988, would have exposed them to a real risk of suffering treatment incompatible with article 3 of the Convention.

At that time, the situation in Sri Lanka had improved both in the North and the East of the island. In addition, a program of the UN High Commissioner for Refugees had already enabled the voluntary repatriation of numerous Tamils in Sri Lanka. The evidence provided on the petitioners' record and the general context of the island did not establish that the personal circumstances of those concerned would have been worse than that of the majority of the Tamil community or of other young male Tamils returning to their country. However, in such circumstances, a mere possibility of ill-treatment itself did not lead to a violation of article 3. As for those petitioners who actually suffered maltreatment when they returned to their country, their cases showed no distinct element that could or ought to allow the British Minister foresee that it would happen that way. The Court also gave the weight of knowledge and experience to the UK and to the fact that the British Minister studied each case of the asylum seekers. Thus, the Court found that article 3 was not infringed. In the same way, it also decided on article 13, as it was considered that the applicants had an effective remedy.

Thus, this regulation has its main source in article 3 of the Convention against torture and other cruel, inhuman or degrading treatment or punishment¹. No State may expel, reject, or extradite a person to another State where there are substantial grounds for believing that he/she risks being subjected to torture.

In order to determine the possibility of such acts in the requesting State, the competent authorities of the requested State shall consider all relevant

¹ Adopted and signed at the U.N. headquarters on 10.12.1984, ratified by Romania by Law no. 19/9.10.1990, published in the Official Gazette no. 112/10.10.1990.

circumstances, including the existence in the State concerned of serious systematic breaches characterized by gross, flagrant or mass violations of human rights.

Although this negative condition in granting extradition was not provided by the Law no. 296/2001 on extradition, nor in the bilateral and international conventions concluded by Romania in the field of extradition, it must be regarded as such, whereas the Romanian criminal law criminalizes torture and the Romanian State is party to the Convention against torture and other cruel, inhuman or degrading punishment or treatment, and, according to article 11 of the Constitution, the treaties ratified by Romania are part of the domestic law (Lupulescu, 2004, p. 186).

Another source of this specification is represented by article 22, paragraph 2 of the Constitution, which states that no one shall be subjected to torture or to any kind of punishment or inhuman or degrading treatment.

4. The Observance of the Right to a Fair Trial

A final aspect of the incidence of the Fundamental Rights provided by the European Convention on extradition regards the conduct of the observance of these rights within the extradition process. Under the legislation, extradition may be requested by the applicant for the prosecution, trial and /or conviction of any person for an offense or for the enforcement of penalties resulting from a conviction. Thus, article 6 of the European Convention on Human Rights refers to *the right to a fair trial* and seems to be one of the most important texts referring to procedural safeguards. It reads as follows (Streteanu, 2003, p. 180):

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:
 - (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
 - (b) to have adequate time and the facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Initially, the European Commission had reservations regarding the application of this Article in the case of extradition, considering that paragraphs 2 and 3 are not applicable because extradition would not constitute a criminal proceeding and its subject would not have the quality of the accused (quality to which the text makes reference). Later, however, the Commission's views have changed in that extradition was considered as part of a special criminal procedure that allows the invocation of the guarantees provided for in article 6 and the refusal of the extradition request. The provisions of article 6 cannot be applied automatically but differentiated according to whether we can speak of extradition in the criminal prosecution stage, in a judgment stage or in the execution of a sentence.

The content of the right to a fair trial was completed by the provisions of Protocol no. 7 to the Convention, adopted in Strasbourg, on 22 November 1984, and entered into force on 1 November 1988. Thus, according to this protocol, any person convicted of an offense by a tribunal shall have the right to seek review by a *higher tribunal* of the judgment of conviction or of the judgment that established the guilt itself. At the same time, one can not be prosecuted or punished in criminal proceedings under the jurisdiction of the same State for an offense for which he/she has already been acquitted or convicted by a final judgment under the law and the criminal procedure of that State. Invoking the right to a fair trial in the case of the extradition requests for judging the person guilty of an offense can constitute the grounds for refusing these requests unlike its invocation in the criminal prosecution or execution of the sentence.

Regarding Romania, it joined the human rights norms so that the original version of article 117 of the Criminal Code on expulsion was completed by Law no. 20/1990, by introducing paragraph 4, according to which the persons subject to expulsion shall not be expelled if there is reasonable cause to believe that there is the risk of being subjected to torture in the State to be expelled. These provisions were introduced in the Criminal Code following the ratification by Romania, by Law no. 19/1990, of the Convention against torture and other cruel, inhuman or degrading treatment or punishment, adopted in New York, on 10 December 1984.

By Law no. 30/1994, Romania ratified the Convention for the Protection of Human Rights and Fundamental Freedoms, adopted by the Council of Europe.

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