Judicial Assistance in Criminal Matters between Serbia and Romania

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Abstract: Within the paper there were briefly examined the provisions of the Treaty of judicial assistance between Romania and Serbia, of the European Convention on Judicial Assistance in Criminal Matters and the Romanian internal law. It has also been conducted a comparative examination of the Treaty provisions with the ones of the European Convention, as highlighted by the elements of similarity between the two international legal instruments. The novelty lies precisely in the carried out analyzes and in *de lege ferenda* proposal aimed at adopting a new bilateral legal instrument between the two countries, which would govern the institution of judicial assistance in criminal matters, in line with its development in at European level. The work can be useful both to academics and practitioners in the field.

Keywords: International rogatory commission; treaty; de lege ferenda

1. Introduction

The International judicial assistance in criminal matters has existed since ancient times, states in this way have tried to support each other in the complex task of preventing and combating cross-border crime.

Given neighborly relations between Romania and Serbia there have been developed many forms of cooperation, especially in economic domain.

Amid the increases in crime of all kinds, both countries have realized the need for further efforts to establish bilateral relations in this area as well.

Studying the bilateral relations between the two countries, leads to the conclusion that the first bilateral legal document was signed in 1863 under the name of the Extradition Convention between Romania and Serbia.

In the last century this bilateral legal instrument for judicial cooperation in criminal matters has been replaced by the Convention between Romania and Yugoslavia on

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the extradition of criminals and judicial assistance in criminal matters, signed at Belgrade on 30 January 1933.

We note that this time, the instrument of bilateral cooperation in its title refers also to judicial assistance in criminal matters.

Continuing the cooperation for the same joint purposes, on 18 October 1960 it was signed at Belgrade the Treaty between the People's Republic Romanian and Federal Republic of Yugoslavia on judicial assistance, a bilateral international instrument ratified by Romania by Decree no. 24/1961, published in the Official Monitor no. 6 of February 6, 1961.

Within the entry into force of this new bilateral legal instrument, the prior Convention terminates its effects.

This new regulation has been supplemented by the Additional Protocol to the Treaty between the Romanian People's Republic and the Federative People's Republic of Yugoslavia on Judicial Assistance, a bilateral international legal instrument ratified by Romania by Decree no. 142/1972 published in the Official Monitor no. 48 of 8 May 1972 (Protocol signed in Bucharest on 21 January 1972).

We specify that by the Protocol there have been replaced the provisions of art. 49 of the Treaty, something that allowed direct transmission, upon request, the study documents and years of service, as well as civil status certificates of citizens of each Contracting Party.

Increasing cross-border crime in South-eastern Europe in this area has led the states to intensify the efforts to prevent and combat it more vigorously by extending the bilateral agreements.

Thus it was signed in Bucharest on 26 May 1999, the Cooperation Agreement for preventing and combating the cross-border crime (SECI Agreement) agreement that, in addition to all states in the area they have joined Serbia and Romania.

Improving the way of combating and preventing the transnational crime has implicitly led to the amendment of the Agreement, which became SELEC Convention, the text of which was adopted in September 2009, the Convention entered into force on 7 October 2011.

Please note that in addition to these legal instruments for international cooperation in criminal matters, a special attention was paid to the littoral states and for the preservation and use of the Danube River.

We highlight in this segment, the Convention on Cooperation for the Protection and Sustainable Use of the Danube River, signed in Sofia on 29 June 1994 which entered into force on 22 October 1998, with the following States parties: Austria, Bosnia and Herzegovina, the Bulgaria Republic, Croatia, Czech Republic,

Germany, Republic of Moldova, Romania, Serbia, Slovak Republic, Slovenia, European Union, Ukraine and Hungary.

2. Brief Examination of the Institution of Judicial Assistance as Provided by the Treaty of 1960

The legal bilateral instrument of cooperation is structured in four parts, the first of which is intended for general provisions that regulate the cooperation between the two countries, the two regulate the judicial assistance in civil and family cases, the third deals with judicial assistance in criminal matters, and the last part contains the final provisions.

The Part III is structured into two sections, the first being for judicial assistance and the second one being extradition and transit.

Given the scope of the work, we proceed to examine the provisions governing the judicial assistance in criminal matters between the two Contracting States.

Under the depositions of the treaty, the legal assistance in criminal cases includes handing over the documents and the fulfillment of procedural activities, such as hearing the accused, the defendant, the hearing of witnesses and individuals interested in the trial, conducting surveys, local investigation, searches, handing in the documents, objects and other materials (The Treaty, 1960, art. 59).

At the same time, the judicial assistance may be refused by one of two states, under the following circumstances:

a) if the requested contracting party considers that granting the judicial assistance would prejudice or the social and economic order or the basic principles of the law;

b) if the offense for which it is required granting the judicial assistance is not an offense also according to the law of the requested State;

c) if the judicial assistance relates to an offense for which, according to art. 69 lit. a) and b) of the Treaty, extradition does not take place (The Treaty, 1960, art. 8).

We specify that the invoked texts refer to situations where extradition will be refused for the following reasons:

- The person whose extradition is requested has committed an offense of political nature, a pure military offense (which consists solely in infringing the military obligations) or a press offense;
- The person concerned, on the receipt of the extradition request, was a citizen of the requested Contracting Party.

Regarding the procedure, we note that the Requesting State shall transmit a request for judicial assistance which will include:

- The name of the requesting authority;
- The name of the requesting body (if known);
- Subject to which the application relates;
- Name and surname of the parties;
- Occupation;
- Domicile or residence;
- Name and address of their representatives, if any.

Also, besides the above mentioned data, the application must contain the necessary data relating to the claim, such as the facts which need to be proved, if applicable, the questions to be addressed to the interviewed person. The demand of handing over the documents must contain the address of the consignee and an indication of the documents to be handed out.

The request for legal assistance shall be in the form prescribed by the law of the requesting Contracting Party. The application and the documents to be sent must be signed and provided with official seal.

The judicial body of the requested State Judiciary will execute the request in accordance with the law of its state, informing, upon request, the requesting authority on the date and place.

When it is required a hearing of a witness or expert residing in the territory of the other Contracting Party, whatever the nationality, in the request for the summons it should indicate the amount to be paid to cover the costs of travel and stay, and at the request of these persons, the requesting Party shall give them an advance to cover expenses.

In the case where a person is arrested in the territory of one of the states, it is needed to be heard as a witness in the other State, the request for temporary surrender is made through diplomatic channels. The request will be satisfied if the person agrees, that this turning in does not opposes to the special reasons and under the condition that the person would be kept in custody and that he will be returned as soon as possible after the hearing.

The witness or expert cannot be held criminally liable, arrested or subject to penalty on its territory for the offense that is the object of the trial for which it was cited or for another offense committed prior to his presentation before the judicial authorities (The Treaty, 1960 art. 62).

A provision with particular impact in terms of judicial cooperation between Romania and Serbia refers to the obligation of each of the two countries, to send on diplomatic channels at the beginning of each year, the data in the execution of the

proceedings in relation to nationals of the other State, sentenced by final decisions during the expired year.

Another provision with beneficial effects in terms of judicial cooperation in criminal matters between the two countries consists of the obligation to inform, through diplomatic channels about the offenses committed on the territory of one of them, and the perpetrators after committing the crime fled in the territory of the State of their nationality.

When the offense committed may lead to extradition, at the request of the State on which territory the offense was committed, the other state is obliged to start criminal proceedings against its citizens, whether the conditions are provided by its own law. About this decision it will be informed also the contracting party, which will receive a copy of the final judgment (if the trial is handled with a conviction).

A brief examination of the provisions regarding the international judicial assistance in criminal matters between Romania and Serbia shows the willingness of the two countries to make a major contribution to preventing and combating crime in south-eastern Europe.

The provisions of the Treaty are clearly very topical even today, which means that the two countries have acknowledged since that time the importance of this activity very complex and sensitive at the same time.

3. Judicial Assistance in the European Convention. Comparative Examination

The European Convention on Mutual Assistance in criminal matters adopted in Strasbourg on 20 April 1959 and the Additional Protocol of 17 March 1978 was ratified by Romania by Law no. 236/1998 ratifying the European Convention on Judicial Assistance in Criminal Matters, signed at Strasbourg on 20 April 1959, and the Additional Protocol to the European Convention on Judicial Assistance in Criminal Matters, adopted in Strasbourg on 17 March 1978.

The second Additional Protocol to the Convention was adopted in Strasbourg on 8 November 2001, it was ratified by Romania by Law no. 368/2004.

Subsequent to the enactment of ratifying the European Convention it has been supplemented several times, this change is necessary due to novelties in the European or internal laws, with direct reference to the procedure and modalities of international judicial assistance in criminal matters.

As far as Serbia is concerned, we specify that it has ratified the European Convention on judicial Assistance in Criminal Matters, together with other countries in Southeastern Europe, among which we mention: Croatia, Slovenia, Hungary, etc.

In order to highlight some elements of similarity between the bilateral treaty between the two states and the European Convention on Judicial Assistance in Criminal Matters, we will have some assessments only on the forms of assistance provided for in two international judicial instruments.

One aspect that we note regards the possibility of refusing the enforcement of a request for judicial assistance where it relates to the offenses considered by the requested Party as being political, related to them or to the fiscal ones, or, if the requested Party considers that the execution of the request is likely to bring prejudice to the sovereignty, security, public order or other essential interests of this country.

Regarding the judicial assistance forms, we note that in the European Convention they are expressly defined, namely: the rogatory commission, the pleadings and rulings, appearance of witnesses, experts and persons prosecuted and criminal record.

Under the Convention, any person in custody whose appearance in person as a witness or for confrontation is required by the requesting Party shall be temporarily transferred to the territory where the hearing will take place, under the condition of returning within the period stipulated by the requested Party, respecting the specialty rule.

However, in the mentioned situation, the transfer may be refused in the following situations:

- If the detained person does not consent it;
- If its presence is necessary at criminal proceedings pending in the requesting state;
- If the transfer is likely to prolong detention; and
- If other overriding grounds oppose to his transfer on the territory of the requesting state (the Convention 1959, art. 11).

Regarding the specialty rule, we specify that no witness or expert, regardless of his nationality, who, following a summons, will appear before the judicial authorities of the requesting Party shall not be prosecuted or detained, or subjected to any other restriction on his liberty in the territory of that Party for acts or convictions prior to his departure from the requested Party.

Also, no person, regardless of his nationality, summoned before the judicial authorities of the requesting Party will answer for acts for which they are prosecuted, will not be prosecuted or detained or subjected to any restriction of freedom of its individual acts or convictions prior to his departure from the requested Party and which are not specified in the summons (The Convention 1959, art. 12).

Regarding the conditions of substance and form, we specify that the requests for assistance must contain the following information:

- The authority making the request;
- The subject and reason for the request;
- To the possible extent, the identity and nationality of the person concerned; and
- Name and address, if applicable (Convention 1959, art. 14).

The rogatory commissions as the applications mentioned above will be addressed to the Ministry of Justice of the requested Party and they shall be returned through the same channels.

In urgent situations the rogatory commissions may be addressed directly by the judicial authority of the requesting Party, the judicial authority of the requested Party.

Regarding the criminal record, we specify that each contracting party shall give to the interested party information on criminal convictions and on the subsequent measures which relate to the citizens of this part and which have made the object of a claim in the criminal record. The Ministries of Justice shall communicate such information at least once a year. If the person concerned is considered as a national of two or more Contracting Parties, the information will be communicated to each interested party, unless that person has the nationality of the Party on the territory in which he was convicted (The Convention 1959, art. 22).

From the brief examination of the European Convention, we can conclude that some of them are taken from the bilateral Treaty.

We note in this regard as forms of judicial assistance assistance in criminal matters in the two international legal instruments, listening suspects, defendants, witnesses and hearing those concerned in the process.

At the same time, the Treaty provides for other forms of assistance that are not mentioned in the Convention, namely: conducting surveys, local investigation and searches.

We also noted that mutual information on persons who have committed crimes in the territory of a contracting party, and also the regular transmission of data from criminal records, there are regulated in a superior way to the Convention.

4. Judicial Assistance in Criminal Matters in the Romanian Law

In the Romanian law, the international legal assistance in criminal matters is specifically provided for in Law no. 302/2004 on international judicial cooperation in criminal matters, as amended and supplemented.

Given the importance and complexity of this form of international judicial cooperation in criminal matters, the Romanian legislator has devoted Title VII to it, in articles 171-268 of the special law.

Given the current position of Romania's membership of the European Union, the situation involving a number of obligations undertaken by the Romanian state, the legislator divided the procedure of providing assistance in two parts.

In the case if the first component it is envisaged the international judicial assistance which regards the relations of this kind with all the world's states, and the second one with the Member States of the European Union.

According to the Romanian law, the international judicial assistance covers in particular the main activities include:

- the International rogatory comissions;
- hearings by videoconference;
- Appearance in the requesting State of witnesses, experts and pursued persons;
- Notification of procedure acts are prepared or filed in a criminal trial;
- Criminal record;
- Other forms of judicial assistance.

The most complex form of judicial assistance is the international rogatory commission, because the object of such applications includes a variety of activities that take place in the first two phases of the criminal trial, namely:

a) locating and identifying the persons and objects; hearing the suspect, the defendant, injured party, the civil party, civilly responsible party, witnesses and experts and confrontation; searches, seizure of property and documents, sequestration and special confiscation or extended; site investigation and reconstitution; expertise; transmission of information required in a particular process, interception, examination of archive documents and files and other such specialized proceedings;

b) Transmission of the evidence materials means;

c) Communication of documents or files.

We do not insist upon the analysis of the institution, we only mention that in the bilateral relations between Romania and Serbia, the competent Romanian judicial authorities will apply the national law, with direct reference to the Treaty's depositions in force at that date.

No doubt that these situations will apply with priority the depositions of the bilateral act, but given that it is no longer current, in special circumstances the Romanian judiciary bodies will insist for the Romanian law enforcement.

Since many of the procedures and forms of assistance are not covered in the bilateral judicial act, the Romanian state will grant mutual assistance under the Romanian law, which is more lenient in relation to the Treaty, under the condition of insuring reciprocity.

5. Conclusions and Critical Opinions

It is indisputable the fact that between Romania and Serbia, over time, based on good neighborly relations, crystallized a series of actions and common positions in terms of preventing and combating cross-border crime.

The treaty between the two countries is an additional argument and the desire of the two countries to cooperate in this very complex and sensitive at the same time domain, given assistance for their citizens.

However, the examination highlights an irrefutable truth, namely that the Treaty provisions are no longer current, it is largely outdated.

Given this finding, *de lege ferenda*, we propose the adoption of a new treaty (convention) (Convention) by which it would be regulated the institution of judicial assistance in criminal matters, in line with the European and Romanian legal developments in the field.

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