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International Judicial Cooperation in Criminal Matters- General Aspects -

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Abstract: In the current development of contemporary society, international collaboration in various fields between sovereign and equal rights states becomes an indisputable reality, imposed by objective needs. The principle of cooperation is today unanimously accepted in relations between states, contributing to mutual knowledge between nations, to ensuring progress and development, to consolidating a lasting peace and achieving legal harmonization. Along with the expansion of the legal foundation on the basis of which cooperation in the field of international legal assistance is carried out, the spectrum and volume of assistance that can be claimed to be provided has inevitably been broadened. In addition, the possibilities for international cooperation in the field of international legal assistance have diversified: new initiatives have appeared to coordinate cross-border issues at the European level, and the community building has been enriched with new institutions such as, for example, Eurojust, which contributes to the improvement of cooperation between the competent authorities of the member states, in particular by facilitating the examination of requests for mutual legal assistance at the European level and of extradition requests.

Keywords: cooperation; extradition; assistance; recognition of decisions

1. Introduction

International legal assistance represents a system of organizational-legal methods that emerged within international relations, through which collaboration between states is carried out in the field of mutual legal assistance in civil, family, work, social or criminal relations, likely to affect the interests of natural persons or legal - citizens of a contracting state on the territory of another, the institution calls for qualified professionals, because the successful implementation of requests for assistance will ultimately determine the performance, image and degree of legal culture in our state.

The notion of international legal assistance takes on two meanings: a narrower meaning, the so-called legal assistance of a judicial nature, which means the assistance that the judicial bodies of different states grant to each other during the judicial process and which usually manifests itself by making or sending the procedural documents that have become necessary within that process; and a wider meaning, which means any legal assistance offered. Hence, most often a different terminology: legal assistance for the first meaning and legal assistance for the second.

The Treaty of Lisbon was and is considered to be a treaty that simplifies the structure of the European Union and allows a better guarantee of the protection of the rights of the citizens of the European Union. However, in an area that interests practitioners in the field of criminal law, these improvements are also accompanied by an increase in the complexity of their obligations. Thus, in the field of judicial cooperation in criminal matters, practitioners have worked in parallel, starting from December 1, 2009

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and until now, with two types of European legislation and different rules for its application. On the one hand, the conventions, decisions and framework decisions specific to the former III pillar of the EU are in force, and on the other hand, regulations, directives, decisions specific to the former EU pillar I will be in force.

A first explanation lies in the fact that member states consider criminal law and criminal policies to be part of the essence of national sovereignty, and therefore have been reluctant to advance on the path of criminal cooperation. This reluctance was influenced, on the one hand, by the practical necessity to solve certain problems at the EU level, and, on the other hand, by the resistance to this solution. As a consequence, most EU criminal law is drafted in a way that encourages cooperation between Member States' judicial systems and does not impose uniform rules of substantive criminal law or criminal procedure. A second explanation stems from the way the European Union was built.

From the point of view of decision-making and the adoption of legislation at the level of the European Union, this accession means that, for most of the provisions of the treaty, decisions at the level of the Council will be adopted by qualified majority and together with the European Parliament (ordinary legislative procedure). For practitioners, this means that in the field of criminal judicial cooperation, the usual legislative acts defined by art. 288 TFEU: regulations, directives, decisions. After their adoption, these acts presuppose compliance with the principle of the supremacy of European Union law over national law, the principle of the direct effect of the provisions of EU acts (under the conditions stipulated by the Court's jurisprudence), the responsibility of the member state for the damages caused to the litigant by violating EU law.

Moreover, in their implementation or transposition, the general principles of EU law will be applicable: the principle of non-discrimination, the principle of proportionality.

Therefore, the EU institutions have full powers, which will lead, in particular, to the increase of the control powers of the European Commission and the Court of Justice regarding the implementation by the member states of the legislative acts.

2. Legal Assistance

The construction of the European criminal justice space and its realization implies on the part of the European Union and the member states the respect of fundamental human rights and freedoms and, in particular, of the procedural guarantees proclaimed in criminal matters by the European Convention on Human Rights (respect that is ensured both by the European Court of Human Rights in Strasbourg, as well as by the Court of Justice of the European Communities in Luxembourg) (Kerchove, 2000, pp. 3-19). Within the common judicial area of the European Union, judicial cooperation in criminal matters takes place on the basis of community instruments based on the principles of mutual recognition and trust (Radu, 2008).

Legal assistance of a classic nature is based on certain principles, such as reciprocity, double criminality, specialization, public order. In addition, a central authority (or several), for example the Ministry of Justice, handles the transmission of requests for legal assistance.

The recently adopted European legislation has modified or canceled the application of some of these principles and has greatly restricted the role of central authorities in terms of submitting requests for assistance.

The complexity of the legal assistance that a practitioner feels is a consequence of the accumulation of international and national regulations that must be applied at the same time: the requesting authorities must establish in each situation which is the applicable instrument, check if there are more favorable provisions and, as far as regarding multilateral conventions, to identify the parties, as well as possible declarations or communications regarding the methods of transmission and accepted languages.

The national legal framework regarding legal assistance is provided by Law no. 302/2004 regarding international judicial cooperation in criminal matters, as amended, as well as the Code of Criminal Procedure (in accordance with art. 7 of Law no. 302/2004, the requests sent to the Romanian authorities are fulfilled according to the rules of procedural criminal law, under the conditions in which Law No. 302/2004 does not provide otherwise).

According to the provisions of the Convention of May 29, 2000 on legal assistance in criminal matters between the member states of the European Union, the communication of judicial documents can be made directly by mail to the addressee, and other categories of requests for legal assistance are sent directly to the requested judicial authority, for the identification of which can use the European Judicial Atlas, published on the website of the European Judicial Network, created in 1998 in order to facilitate judicial cooperation between the member states of the European Union (Radu, 2008).

Article 171 of Law no. 302/2004 defines international legal assistance in criminal matters as being represented by the following activities:

- international rogatory commissions;
- hearings by videoconference;
- the appearance in the requesting state of witnesses, experts and persons prosecuted;
- transmission of procedural documents drawn up during criminal proceedings;
- criminal record; other forms of legal assistance.

International rogatory commissions in criminal matters are defined as a form of judicial assistance consisting of the authorization granted by a judicial authority of a state to an authority from another state, which has the responsibility to carry out, on behalf of the first, certain judicial activities related to a certain criminal procedure. The purpose of rogatory commissions is mainly to:

- locating and identifying people and objects;
- the hearing of defendants, injured parties and other parties, witnesses and experts;
- searches, seizure of objects and documents, seizure and special confiscation;
- research and on-site reconstructions;
- expertise, technical-scientific findings, as well as forensics;
- the transmission of information necessary in a certain procedure, the interception and recording of audio and video, the examination of documents from archives and specialized files, as well as other procedural documents;
- the transmission of objects to be used as evidence;
- the transmission of documents or files.

In conclusion, legal assistance in criminal matters can be understood in a broad sense, but also in a narrower sense: legal assistance in a broad sense includes extradition, and legal assistance in a narrow

sense refers to: the transfer of proceedings, the transfer of convicted persons, such as and the recognition and execution of decisions. Legal assistance, in the narrow sense (small or accessory legal assistance), refers to the support provided by the judicial authorities of one state, those of another state for carrying out investigations, communicating subpoenas or other procedural documents, or simply, for providing information.

The legal complexity of legal assistance is a consequence of the accumulation of international and national regulations, which must be applied at the same time: the requesting authorities must establish in each situation which is the applicable instrument, check if there are more favorable provisions and, as regards the conventions multilateral, to identify the parties, as well as the possible declarations or communications, regarding the methods of transmission and the accepted languages.

Romania promotes the principle of cooperation in its international relations, which thus became an integral part of its foreign policy. The states do not thus carry out their work of justice in a hermetic way, isolated from each other, but help each other by providing mutual assistance (Ferenc, 1966, p. 678).

3. Extradition - General Aspects

The development of human societies as a whole, of the states and nations of the world, was also possible as a result of the international relations that were established and settled over time. Within bilateral or multilateral international relations, states of the world have carried out cooperation activities in a variety of fields, emphasizing the economic, cultural, political, military and, last but not least, legal fields. The progress registered in all fields in the last century imposed structural transformations in the world architecture, an aspect that inevitably led to the creation of a new international order, against the background of the intensification of political dialogues that promoted peace, the need to respect fundamental human rights and freedoms, the principles of democracy and the rule of law (Boroi, 2008, pp. 59-60).

The term extradition is susceptible to two interpretations: as an institution of criminal law and as a form of international judicial cooperation. As an institution of criminal law, extradition includes all the legal norms that regulate the relations regarding the conditions under which Romania grants or requests extradition. In the other sense, as a form of international judicial cooperation, extradition is a manifestation of will between two states or a state and an international court, by which a state, on whose territory a criminal is located, hands him over to another state or a international courts, at their request (Hotea, 2007, pp. 116-117).

The extradition form of international cooperation in criminal matters, which has become particularly relevant in the period we are going through, could not be justified only by the desire to change the legislation, in order to better mark the opposition of today's criminal policy to the previous one. As such, the regulation of extradition is subject to internal pressure to change, as a result of the passage of time or the evolution of judicial practice or as a result of discussions in criminal doctrine, implicitly of the evolution of legal thinking, processes that, through their internal logic, can lead to solutions and new views on a determined regulation.

The guiding principle of traditional extradition law is: there is no obligation to extradite without the existence of a treaty. This is a basic principle in international law and results from the sovereignty of a state, in the sense that it has the "right of sovereignty" over all persons who are on its territory. Nor does common international law provide for an extradition obligation. They only stipulate how the state to which extradition is requested must react to this request. After the interstate exercise, the state to which

the request is addressed tries to explain the refusal or rejection of the request even in the absence of a treaty, for diplomatic reasons. This happens especially when a relationship of reciprocity is established that the states involved understand to respect.

In achieving the collaboration of states in the fight against the criminal phenomenon, extradition plays a special role, being the form of legal assistance that states most often resort to in the activity of crime prevention and repression.

According to its finality, extradition is an act of mutual international legal assistance and can only be granted on the basis of international conventions or under conditions of reciprocity.

Extradition is an institution that works directly in the interest of the requesting state, but indirectly it serves the interests of all states, because the prevention and repression of crimes become a concern of collective interest on the criminal level. However, extradition cannot cover all the needs of international legal assistance in the fight against crimes, yet it is the form of assistance with the most important effects.

Without international legal assistance, the criminal law could not be enforced in cases where, after committing the crime, the perpetrator manages to leave the territory of the country. Likewise, it would not be possible to apply the law based on the principles of personality (“the criminal law applies to crimes committed outside the territory of the country if the perpetrator is a Romanian citizen or if, having no citizenship, he is domiciled in the country”, provided by art. 3 Criminal Code) and reality (“the criminal law applies to crimes committed outside the territory of the country, against the Romanian state or against the life of a Romanian citizen, or through which a serious injury has occurred to the bodily integrity or health of a Romanian citizen, when they are committed by a foreign citizen or a person without citizenship who is not domiciled in the territory of the country”, provided by art. 5, paragraph 1 of the Criminal Code).

If there is a convention on the extradition of criminals, the provisions and rules of the convention become binding and legally effective for the two signatory states; in case there is no extradition convention, the principle of reciprocity can be applied, which manifests itself in the form of reciprocity declarations that assume the commitment that the state that wants to extradite a person makes towards the requested state, as in the case the extradition will be admitted, to proceed in the same way in the event of a similar request being made in the future by the respective state.

So, in European, extradition is based on the treaties of the Council of Europe. In the last 15 years, a series of conventions have been adopted within the European Union, including the 1995 Convention on simplified extradition procedures between EU member states and the 1996 Convention on extradition between member states. However, due to the numerous backup possibilities and various declarations, their application has become more and more difficult against the background of more and more numerous requests. The main objective of the EU initiatives was to simplify and speed up the procedures and they contributed somewhat to a unitary application. Because of the many special regulations up until then between two or more states, it was difficult even for specialists in the field to precisely frame an extradition case and research the legal foundations. In this context, the European Commission’s efforts to develop a unitary and less complicated extradition instrument, for a common area of freedom, security and law, are understandable.

In conclusion, the international community has a rich experience of cooperation in the fight against organized crime, cooperation that includes various fields, in particular, the exchange of information, the formation of the appropriate legal basis, the provision of technical assistance at bi/multilateral level, the joint use of new achievements of technological progress, etc. However, the effectiveness of the fight against criminal phenomena can only be achieved through the effective use of various legal institutions,

a special role among them being assigned to extradition. Appeared as an instrument of the foreign policy of the states and only later transformed into one of the forms of international cooperation in the sphere of the fight against crime, extradition is an indispensable tool for ensuring the criminal prosecution of the accused or for the serving of the sentence by convicts hiding on the territories of foreign states (Shearer, 1971, p. 9).

Currently, the institution of extradition, which is becoming more and more current, has an important role in the consolidation and development of international cooperation between states. In modern conditions, extradition is beginning to take shape as a distinct and important legal institution. Its principles, norms, procedures and concepts exert an important influence on the development of international legal assistance and on cooperation between states, on the protection of the legitimate interests of society and the state, the rights and freedoms of the individual, on the consolidation of the international legal order and the fight against crime.

4. Conclusions

Extradition is an act of legal assistance by which a state in whose territory a criminal or convict has taken refuge, who is not a citizen of the requested state, is handed over, at the request of the state entitled to prosecute him, to judge or submit to the execution of the criminal conviction. As a rule, own citizens do not extradite themselves. Extradition is recognized as a legal institution by the Romanian Constitution in art. 19.

In the specialized doctrine, extradition is defined as “an act of interstate legal assistance in criminal matters that seeks the transfer of an individual prosecuted or criminally convicted from the domain of the legal sovereignty of one state to the domain of the other state”.

The main role of extradition is to provide each state with optimal conditions for the realization of justice, through the repression of crimes.

An exact definition of extradition is not found either in the Criminal Code or in the Constitution, so that Law 302/2004 on international judicial cooperation in criminal matters, serves only to establish the conditions of reciprocity and procedure.

Extradition is a legal institution of both domestic and international law by which persons guilty of committing international crimes are handed over to the states entitled to judge and sentence them or compel them to serve a sentence to which they have been sentenced.

Extradition is an act of cooperation between states against criminals of a certain level of danger, in order to prevent them from evading criminal liability by taking refuge on the territory of another state.

Extradition is a bilateral act that involves a requesting state, which requests extradition, and a requested state, which receives the extradition request.

Art. 9 of the Criminal Code provides “Extradition is granted or may be requested on the basis of an international convention, on the basis of reciprocity and, in their absence, on the basis of the law”. Romania ratified by Law 80/1997 the European Convention on Extradition, which constitutes the general framework regarding extradition between the signatory countries. Being a legal institution, extradition also has a pronounced political content, as it is carried out on the basis of the freely expressed will of the states, respecting their sovereignty and independence.

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