

LEGAL REGULATION OF THE EXTRADITION IN ROMANIA

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Abstract

The extradition has as source of regulation the bilateral and multilateral conventions, reciprocity declarations and internal law, the main source of regulation being found primarily in conventions or reciprocity declarations.

The international conventions or the treaties represent international agreements concluded between states and governed by the international law; either they are cosigned in a single instrument, either in two or more annexes, irrespective of their particular denomination. These are bi or multilateral acts resulted from the agreement of the states and are governed by the principle „Pacta sunt servanda”, representing the law of the parties which must be executed in good faith.

Concretely in Romania, the extradition was regulated as a law institution, in art. 16-19 of the Criminal Code and in the art. 630-638 of the Procedure Criminal Code, Carol II of 1936, the texts mentioned above just consecrating the principles already known of the international penal law.

Nowadays, in our country the extradition is regulated by Law no. 302/2004 relating to international judicial cooperation in penal matters amended by Law no. 224/2006, GEO 103/2006 and Law no. 222/¹⁾, this special law clearly stipulating their substantive and formal issues, fixing also the legal framework in the limits of which can be solicited or admitted, its sources of regulation, as well as the order in which they can be used.

Keywords: *extradition; sources of extradition; fundamental principles*

I. Brief history

In the evolution of the extradition three essential phases are distinguished, namely a contractual phase exclusively of administrative, governmental competency, a mixed legislative phase of governmental and judicial competency in the same time, and an international phase of preponderant judicial competency.

Historically, the contractual phase of extradition extended until the middle of XVIIIth century, sporadically, the extradition was provided in the legislation of some state entities of antiquity, but disappeared after the Roman Empire crumbled,

¹⁾ Published in the Official Gazette no. 758 of 10/11/2008.

then its reappearance to coincide with the formation of modern states of the late Middle Ages²⁾.

The extradition was known in the Roman world towards the dependent states, the institution representing a manifestation of the Roman Empire supremacy. This constituted the required satisfaction for the offense brought to the state or to a Roman citizen, and in case of refusal they could reach to a state of war between the two states or „strongholds”.

Once with the conquests made by the Romans it was created an international law imposed by Rome and its allies, and the international relations begin to lose their hostile character.

Gradually, the courts of each state obtained the right to examine the complaints formulated by foreigners, which led to utilization of the extradition procedure only in case of delinquencies with public character, being excluded from the sphere of this procedure, the delinquencies committed against simple particular persons.

Before the institution of extradition take the legal form and function, this existed and practiced between states and strongholds, in the first centuries which followed the barbarian invasion under the form of asylum law³⁾.

For the first time the modern idea of extradition appears during the XIIIth century; in the doctrine of the natural law school and in practice, in the following centuries, the institution of extradition was depended of the sovereign' caprices.

The first international conventions were those of restitution and rendition of the criminals and they were concluded exclusively in the interest of the sovereign. The treaty of 1174 between Henric II of England and Guillaume, king of Scotland, was like that. All the subsequent treaties constitute more an abridgement on reciprocity way of the asylum law than an application of extradition in the relations between states. Almost always those treaties had as object crimes or serious political delinquencies which injured the sovereign's authority and these conventions usually avoided the judicial authorities.

Nevertheless, only in the XVIth century the doctrine begins to preoccupy by the extradition in common law matter and the extradition is regarded as veritable juridical institution, although in practice this continues to be dependent and to serve the sovereign' interests and consolidation of their political powers.

In this Age not too many ideas concerning the character and the extent of the magistrate obligation in the extradition procedure contoured in the doctrine, the authors' majority sustaining that this had the competency of verifying the proofs' validity and the accusations' verosimilarity, in other words to establish the legitimacy of the request.

²⁾ N. Lupulescu, Extradition, Ed. Luceafărul, Bucharest 2004, page 75.

³⁾ Review of penal law and penitentiary science, no. of 1940. Extradition's principles after Criminal Code Carol II.

The first modern convention of extradition having as object common law delinquencies is that concluded between France and the Netherlands on June 23 and August 17, 1736. Belgium was the first state and actually the only one at that time which assigned of a judicial authority the competency in extradition matter.

In XVIIth and XVIIIth centuries the right to dispose on extradition remained on the sovereign and his decision had a pronounced arbitrary and subjective character, same as all the possible decisions that he took, the competency assignment of a judicial authority being an exception in this period.

>From those exposed above results that to the contractual phase of extradition are characteristic three essential features: exclusively competency of the political, governmental or administrative power, political character of delinquencies which determined the extradition request and the arbitrary character of the sovereign' decisions. The extradition was an act of government, an act of the central administration which had exclusively competency in this matter, clearly expressed competency and only exceptionally was mentioned the intervention of the jurisdictional bodies, of whose attributions were generally of verification of the validity of the demand for surrender of the denounced person.

II. Concept

For the first time the extradition concept was used officially in France on 19.02.1791 when the constituent assembly decreed the drawing up of a law project related to this institution. However, the term is of Latin origin and results from the adverbial of place *ex* – outside, on the surface, followed by the verb „*tradiō*” – to surrender, to deliver.

According to French dictionary „*Le petit Larousse*” the extradition is regarded as a surrender action towards the foreign state which requests the author of the criminal offense, for this to be judged or to execute his punishment⁴⁾.

A similar definition appears also in the Romanian Explicative Dictionary where the extradition is definite as “surrender by a state towards another state of an offender which is found on its territory to be judged or to execute its punishment⁵⁾”.

In the juridical specialty literature various definitions were given to extradition the differences between these being due to the fact that in their formulation weren't taken into consideration the same elements, some authors including and others contrarily excluding some of its features.

In this sense we can exemplify the given definition to the extradition at the Xth International Congress of Penal Law held in Rome on 25.09.1969 which is regarded as an act of juridical interstate assistance in penal matters and which follows the transfer of an offender criminally pursued or convicted for a criminal offense belonging to judicial statehoods domain in the other state's domain.

⁴⁾ Dictionary „*Le petit Larousse*”, Paris 2000, page 415.

⁵⁾ Romanian explicative dictionary, Bucharest, 1996, page 362.

The coordinators of the project Criminal Code Carol II of 1936 regarded the extradition as a political judicial institution with character of international reciprocal security and which is necessary to the extension of the states' repression action to remove the inconveniences which result from the limited application of the penal laws. In their opinion the extradition consists generally of surrender by a state of a convicted or a fugitive criminal which refugee on its territory towards the state which requests it and whose territory committed the crime which is to be judged.

In the same sense also pronounced the penologist Traian Alexandrescu, in whose opinion the institution of extradition is based on the practical and moral interest for the countries not become an asylum for the foreign criminals, this offering also an international solidarity of the states to accomplish the principle of universal justice⁶⁾.

In the theoretical explanations of the Criminal code⁷⁾, the extradition is defined as "the act by which the state on the territory of which refugee a pursued or convicted person in other state renders at the request of the interested state that person in order to be judged or to execute a punishment to which he was convicted".

Taking into consideration various opinions expressed in the specialty literature and which were mentioned above, *the extradition can be defined as a modality of international juridical assistance in criminal matters, as an act of sovereignty and jurisdictional, by which a state surrenders in certain conditions by conventions or declarations of reciprocity the criminals which refugee on its territory and which are pursued or convicted for committing some criminal offences on the state's territory which requests it to be judged or to execute the applied punishment.*

III. Legal nature of extradition

The extradition is a modality of international juridical assistance which is regulated by bilateral conventions and which the states grant it reciprocally concerning the fight against criminality. Being an institution of international criminal law, naturally the extradition has a double juridical nature, or rather a mixed juridical nature, one internationally and the other internally.

Internationally the extradition represents a modality of fulfillment of juridical assistance in criminal matters of states helping each other, which fulfill based on some conventions which these sign or accede, this representing also an act of sovereignty of that state, but also a manifestation of the international solidarity in the fight against criminality.

⁶⁾ T. Alexandrescu, *Extradition procedure*, Bucharest, 1915, page 2.

⁷⁾ V. Dongoroz and collective, *Theoretical explanations of the Romanian Criminal Code. General Part*, vol. III, Ed. Academiei Române, Bucharest, 1971.

Internally, the extradition is regarded as a governmental, administrative or jurisdictional act, depending on the authority which disposes on its admissibility.

The mixed system of extradition generalized in the first half of the XIXth century once with its transformation in an institution of criminal law, the treaties concluded in that period showing the cases and the situations which justified the extradition request, but also the procedure which followed to be applied in these situations.

The sustainers of the mixed system of extradition considered that both the governmental authority and the judicial bodies of a state must pronounce concerning the request, the governmental authority being the direct bearer of the state's sovereignty which must solely decide on the extradition. On the other hand also the judicial bodies of the state contribute to the fulfillment of the extradition decision, being necessary a solid knowledge of the situation in fact and of an establishment of fulfillment of the extradition substantive and formal issues. In other words, the judicial bodies examine the admissibility of the extradition request, and the notice they draw up is presented to the governmental authority, its decision being final.

In some states in case of a negative notice presented by the judicial bodies this becomes compulsory for the government, and the extradition request will be rejected with the reasons that this conclusion was reached after the verifications undertaken by the judicial bodies. If contrary, the judicial bodies appreciates that the extradition may be granted, their notice is not binding anymore for the government this having the possibility to reject the extradition request on opportunity reasons.

Unlike the extradition, the juridical institution of expulsion gives the refugee state the possibility to depart from its territory the persons whose extradition hasn't been requested and that committed crimes, as well as those persons who although didn't commit criminal offences by their behavior jeopardize the interests of that state. In other words, the expulsion is a measure that a state disposes it against a person foreign citizen or without citizenship who isn't domiciled in the country, to leave the territory if this breached the law by his behavior, or if he brought prejudices to that state⁸⁾.

Analyzing the reasons above it can be observed that by the purpose, conditions and their effects those two institutions have a juridical nature totally different.

The extradition consists of the help that states gives one to each other for the fight against the criminality on their territory as an attribute of their sovereignty being an act which comprises two stages and which involves a complex of activities both in the applicant stat and in the requested state. The extradition is regulated by conventions signed or ratified by the two states and by bilateral agreements.

⁸⁾ S. Ghimpu , *Juridical Dictionary*, Bucharest, 1985, page 187.

In return, the extradition is a unilateral act of sovereignty in the exercise of the sovereignty the state being limited internally by the recognition of some freedoms granted to foreigners, while internationally it must take account by the legal bound between foreigners and its origin state.

If the extradition is an institution of international criminal law and an act of states' helping one another in the criminality fight having a bilateral character, the expulsion is a an administrative or jurisdictional measure of security with unilateral character which is taken exclusively with the purpose of protecting the rule of law.

While in the extradition case are requested to be fulfilled the substantive and formal issues expressly stipulated in the international instrument which the states ratified in expulsion case, this measure is taken by the competent authorities of the state only if are fulfilled the conditions expressly showed in the internal law of that state.

The extradition is always occasioned by the commitment of a crime while the expulsion may be disposed also if the foreigner isn't a criminal.

By expulsion is prohibited the right of the person to come back in the country in which this measure was taken while the extradited person may come back in the state which extradited him, either after his judgment either after the execution of the punishment.

The common feature of those two institutions consists of that both proceed to removal of a foreigner from the territory of the state he is located.

IV. Sources of extradition.

The extradition has as source of regulation the bilateral and multilateral conventions, the declarations of reciprocity and the internal law, the main source of regulation finding primarily in conventions and declarations of reciprocity.

The international conventions or the treaties are international agreements concluded between states and governed by the international law either they are recorded in a solely instrument either in two or more annexes, irrespective of their particular denomination. These are bi and multilateral acts resulted from the agreement of states and governed by the principle „Pacta sunt servanda”, representing the law of the parties which must be executed in good faith.

It is mandatory the distinction between the treaties and conventions by which a state undertakes to repress some dangerous facts for the entire humanity and those of international juridical assistance. The treaties from the first category constitute indirectly sources of criminal law because the state adopts its own norms regarding the reprisal of some facts such as: genocide, slavery, traffic with narcotics, counterfeiting of banknotes, while the treaties and conventions concerning the international judicial assistance in criminal matters are direct sources of criminal law establishing the conditions in which can be granted or requested such an assistance.

In the event that don't exist conventions or treaties between states regarding the extradition and this form of legal assistance imposes due to the frequency of fraudulent common border crossing, shall recourse to another procedure namely, to the declarations of reciprocity. By these the states as sovereign and equal entities undertake mutually to surrender under the conditions agreed the pursued or convicted persons for committing some crime on the territory of a state and refugee on the territory of another state.

We can assert in this case that *de declarations of reciprocity* with the treaties and the international conventions represent one of the important sources of regulation of the extradition representing its origin because it broadens the scope of the treaties and conventions, and sometimes simplifies the procedure of extradition for certain facts and perpetrators.

Apart from the sources of regulation of extradition described above, undoubtedly, the internal law represents its subsidiary source in all the world's states the law being the main source of law because it comprises absolutely all the criminal norms with character of fundamental principles but also special criminal norms.

Whereas it exists an important number of norms with criminal character which can't be included in the Code which represents the common law it appealed to the procedure of their registration in the special laws, one with criminal character others with mixed character, but each also containing provisions in criminal law (internal law subsidiary source of extradition).

Concretely, in Romania the extradition was regulated as a law institute in art. 16-19 of the Criminal Code and in art. 630-638 of the Criminal Procedure Code Carol II of 1936, the texts mentioned above just consecrating the already known principles of the international criminal law.

Nowadays in Romania the extradition is regulated by Law no. 302/2004 amended by Law no. 222/2008 this special law clearly stipulating its substantive and formal issues fixing the legal framework in whose limits can be requested or admitted, its sources of regulation as well as the order in which can be used.

There are situations in which the conventions of extradition may compete with the provisions of some internal laws but in this case arises the question of influence which the internal laws adopted may have after the conclusion of conventions, when these contain provisions contrary to the treaties⁹⁾.

Whereas the treaties and conventions were concluded based on the agreement of the signatory parties expressing their will, it is obvious that no derogation from their provisions can be unilaterally made by the will of one single party this principle being unanimously recognized in the international law.

On the assumption that the conventions or the treaties regarding the extradition enumerates a certain type of delinquencies and subsequently the

⁹⁾ N. Lupulescu, *Extradition*, Ed. Luceafărul, Bucharest, 2004, page 101-103.

internal law of one of the parties discriminates them, in such cases the requested state can't extradite the person suspected of having committed an act which is considered a crime under the law of the applicant state but that ceased to be a crime under the law of the requested state.

When the fact for which the extradition is requested isn't mentioned in the convention or in the treaty its decriminalization doesn't contravene to the convention of extradition so the refusal of extradition of the requested state fully corresponds to the convention.

By the conventions concluded between the states these establish concretely the rules and conditions of criminal law's application in case of the delinquencies committed by foreigners abroad, different from those provided in the national laws and for those regulations to be applied is necessary for them to have priority in relation to the internal law because otherwise it would appear undesirable effects between those countries.

The rule of international conventions' priority is stipulated both in the art. 7 and 9 of the Romanian Criminal Law which indicates that extradition may be granted or requested based on the international convention, based on reciprocity and in their absence under the law as well as in art. 11 paragraphs 1 of the Romanian Constitution, making here the indication that the Romanian state undertakes to carry out to the letter and in good faith the obligations which arise from the treaties is part of, by treaties meaning both the international conventions and their additional protocols¹⁰⁾.

In the same context art 20 from the Romanian constitution establishes that the constitutional provisions regarding the rights and freedoms of the citizens will be interpreted and applied according to the universal declaration of human's rights with the concords and treaties to which Romania is part of and in the hypothesis of discordances between these and the internal laws the international regulations have priority unless the Romanian state Constitution doesn't provide more favorable provisions.

In order to assure an appropriate legislative framework to the application of the constitutional provisions was adopted the Law no. 302/2004 amended by Law no. 222/2008 which repeals the old law of extradition no. 296/2001 and which assures fully integration of our country in the European judicial area.

V. Regulation of extradition in Europe.

Concerning the regulation of extradition institution in Europe it worth mentioning the fact that for the first time on 13.12.1957 was adopted in Paris the European Convention of extradition and this represented until 2004 the legal framework of all the countries which ratified it being a model with regard to the conclusion of bilateral agreements in this matter. Paris Convention was signed

¹⁰⁾ Romanian Constitution, Official Gazette no.758/29.10.2003.

until now by 39 European state and by Israel and it comprises the substantive and formal issues of the extradition, the institution principles, the procedure of extradition, provisional arrest, the transit of claimed persons, the request competition and the procedure of signing accession and denunciation.

It is noteworthy that in the content of the convention is reaffirmed the principle „Non bis in idem” and also the principles of specialty and humanism by excluding of the death penalty of the cases of extradition admissibility and of its refusal on the assumption that the extradited life would be threatened for reasons related to religion or political options.

The European convention of extradition was fulfilled on 15.10.1975 with an additional protocol signed at Strasbourg, this being intended to fulfill the provisions concerning political crimes and to strengthen the principle stated above.

Broadly the protocol established that aren't considered political crimes the crimes against humanity provided in the Convention adopted on 09.12.1948 by the UN General Assembly, the crimes provided by art. 50 of the Geneva Convention of 1949 to improve the fate of religions, sick and shipwreck of the armed forces in campaign, those provided by the art 51 and 130 and art. 147 of the same convention concerning the treatment of war prisoners and protection of civil persons and also any violations of the laws of war which are not provided in the provision of the Geneva conventions.

By that protocol the European convention of extradition was fulfilled and with the enumeration of other situations in which the extradition request is denied they aim the following circumstances:

- when it was acquitted the requested person;
- when the punishment deprivative of liberty or the security measure were integrally executed;
- when the judge ascertained the guilt of the crime's author but he didn't give any sanction.

Even so the extradition will be admitted if the crime was committed against a person, institution or good that has a public character in the applicant state if the person who committed the act holds public office in the applicant state or if the act was fully or partially committed on the territory of the applicant state.

The protocol was ratified by 27 European Council member states¹¹⁾.

Subsequently on 17.03.1978 at Strasbourg was signed the second additional Protocol to the European Convention of extradition which intended to facilitate the application of its provisions to the fiscal crimes but also to strengthen the rights of defense of the criminal which is judged in absentia.

This protocol was ratified by 32 member states of the European Council and together with the other two acts above mentioned constituted the general legal

¹¹⁾ Additional protocol concluded in Strasbourg at 15.10.1975.

framework of the extradition between the member countries of the European Council marking out the conclusion of bilateral agreements in matter between the European states.

Between the European Union member states the institution of extradition was governed by the following acts:

- The European Convention of extradition from Paris on 13.12.1957, together with those two additional protocols which were analyzed above;
- The Convention on 19.06.1990 of agreement application in Schengen of 14.06.1985 concerning the gradual abolition of checks at common borders;
- The Convention concerning the simplified procedure of extradition between the member states of E.U. established by the document of E.U. Council of 10.03.1995 in Bruxelles;
- The Convention concerning the extradition between the member states of the E.U. of 27.09.1996 in Bruxelles.

Schengen agreement on 14.06.1985 aims the abolition of checks at common borders of the signatory states, assuring public order and security, facilitating the transport of persons and goods movement, as well as establishing a common visa valid on the territories of the contracting states and which is required only to foreigners of Schengen area. Also by this agreements were regulated the admissibility conditions of the asylum requests as well as the police cooperation with the aim of preventing and discovering of criminal acts.

To increase efficiency in the fight against organized crime the Schengen agreement created the legal framework for organization of a common information system called the Schengen information system which is composed of a national section for each contracting party. Based on this system the contracting parties have access to all the necessary data concerning persons and objects subject to border controls and to information for the grant of visas, residence permits, supervision of foreigners and movement of people.

The conventions concerning the simplified procedure of extradition concluded in Bruxelles on 10.03.1995 clearly facilitated the extradition procedure the measure being determined by the necessity to reduce at maximum the time necessary to extradition and of period of detention for this purpose. The member states engaged to surrender after a simplified procedure the persons pursued for extradition which gave their consent to this and didn't opposed to extradition and which voluntarily accept the surrender to the applicant state.

The Convention on 27.09.1996 concerning the extradition between the European Union member states was signed also in Bruxelles and had as subject the facilitation of application between the states of the European Convention of extradition of 1957, of the European Convention for suppression of terrorism of 21.01.1977, of the Convention of 19.06.1990 of Schengen Agreement of application of 14.06.0985 and of the Benelux Treaty of 27.06.1962.

Based on these conventions a more rapidly procedure of extradition between the member states of the European Union was achieved in its content providing that can motivate a request the acts punished by the law of the applicant state with a custodial sentence of at least 12 months and by the law of the requested state with a custodial sentence of at least 6 months.

Moreover the convention extends the sphere of the facts which can lead to extradition and on those sanctioned with pecuniary sanctions when extradition request aims more distinct facts and not all meet the condition regarding the duration of the punishment.

The novelty brought by the 1996 Convention refers to the conspiracy and association of criminals for the first time in the extradition matters renouncing to the principle of nationals non-extradition in the European Union expressly stipulating that “extradition can’t be refused on the grounds that the person which is subject to the extradition request is a citizen of the requested state member in the meaning of art. 6 of the European Convention of extradition¹²⁾).

But the extradition won’t be granted for an amnestied crime in the requested state if this had the competency to track the criminal offence according to its own laws.

VI. Current extradition regulation in Romania.

The extradition in Romania is regulated by the Constitution, treaties, agreements and international conventions concluded or ratified by the Romanian state and by the Criminal Code, Criminal Procedure Code and Law no. 302 of 28.06.2004 concerning the international judicial cooperation in penal matters¹³⁾, amended by Law no. 224/2006¹⁴⁾, by GEO no.103/2006¹⁵⁾ and Law no. 222/2008¹⁶⁾.

According to the Romanian Constitution of 08.12.1991 amended and supplemented by the Law of revision no. 429 of 23.10.2003 the extradition is decided only by the justice being excluded the implication or intervention of any power in the extradition matters. In this way was finally ended the mixed system of extradition.

Secondly it abandoned the non-extradition principle of nationals by the new revised Constitution establishing that the Romanian citizens can be extradited based on the international conventions to which Romania is a party, under the law’s conditions and based on reciprocity.

The foreign citizens and the stateless can be extradited only on the basis of international conventions or in reciprocity conditions the arbitrary being excluded in extradition matters.

¹²⁾ Art. 7 of Convention of 27.09.1996 from Bruxelles.

¹³⁾ Published in the Official Gazette Part I no. 594 of 01.07.2004.

¹⁴⁾ Published in the Official Gazette Part I no. 534 of 21.06.2006.

¹⁵⁾ Published in the Official Gazette Part I no. 1019 of 21.12.2006.

¹⁶⁾ Published in the Official Gazette Part I no. 758 of 10.11.2008.

Also the art. 20 of the country's fundamental law stipulates that the constitutional provisions concerning the rights and freedoms of the citizens will be interpreted and applied accordingly to the Universal Declaration of Human Rights, with the conventions and treaties to which Romania is a party and when there is inconsistency between these and the internal laws the international regulations have priority unless the Constitution or the internal laws contain more favorable provisions.

The international conventions ratified by the Romanian Parliament represent after Constitution an important source of regulation in extradition matters, art. 11 of fundamental law, stipulating that Romanian state undertakes to carry out to the letter and in good faith the incumbent duties from the conventions to which is a party, the conventions ratified by the Parliament, being part of the internal law and representing a source of law.

By Law no. 80 of 09.05.1997 Romania ratified the European Convention of extradition concluded in Paris on 13.12.1957 and its additional protocols concluded in Strasbourg on 15.10.1975 and on 17.03.1978 but it provided in art. 2, paragraph 1 a reserve in the meaning that extradition will be granted only for facts of whose commitment involve a custodial sentence of more than 2 years and regarding the punishment execution only if the custodial sentence is more than a year or more severe.

By the ratification law, Romania extended the sphere of non-extradible persons and on those who obtained asylum on the Romanian state's territory but in the same time introduced a new paragraph according to which also the Romanian citizens can be extradited based on international conventions or based on reciprocity so that they remain in force only the provisions of Law 80/1997 which don't contravene to the constitutional provisions.

Romania concluded in the last decades a series of treaties of legal assistance in civil, family and criminal matters with European countries or from other continents mentioning that in the reports with the states of the extra-European area apply in the extradition matters either bilateral treaties either declarations of reciprocity and the provision of Law no. 302/2004 amended by Law no. 224/2006 and Law no. 222/2008.

According to art. 24 of Law no. 302/2004 amended, the Romanian citizens can be extradited from Romania based on the international conventions to which is a party and based on reciprocity with the fulfillment of the following conditions:

- in view of performing criminal prosecution and judgment if the applicant state give sufficient assurances that in case of conviction to a custodial sentence by a judge's decision the extradited person will be transferred in order to execute the punishment in Romania;
- the extraditable person has the domicile on the territory of the applicant state on the date of drawing up the extradition request;

- the extraditable person also has the citizenship of the applicant state;
- the extraditable person committed the act on the territory or against a citizen of a European Union state member if the applicant state is its member.

The extradition is granted by Romania in view of prosecution or of judgment only for acts of whose commitment involves under the law of the applicant state and of the Romanian legislation a custodial sentence of more than 2 years and in view of execution of a criminal sanction only if this is less than 1 year.

If the act for which the extradition is requested is punishable by death by the law of the applicant state the extradition won't be granted unless that state gives assurances to the Romanian state that the capital punishment won't be executed.

Romania won't grant the extradition in the situations in which the extraditable person would be judged in the applicant state by a court which doesn't assure the fundamental guarantees of procedure and protection of the rights of defense or by a certain court constituted in view of judging that case.

Finally the extradition may not be granted for acts in which case intervened prescription of the criminal liability or of the execution of the punishment and for acts for which amnesty occurred in Romania.

VII. The fundamental principles of extradition.

In the specialty literature and in various authors' opinion¹⁷⁾, *the fundamental principles of extradition* represent the amount of some ideas, concepts and rules which guide the criminal law that shows the way and limits in which a battle against the international phenomenon is lead and which follow the social reaction against criminal offences taking into account the humanitarian principle and equality before the criminal law of any person.

Other authors appreciate that have a fundamental character the principle of incrimination and punishment legality, equality before the criminal law, humanism of the criminal law, prevention of criminal acts and the criminal offence as the only reason for criminal liability.

The regulation of extradition undoubtedly took place according to these principles of criminal politics which reflects the strategy of the states on combating crimes, the conception regarding the relationship between the state and offender and also the trust that states grant each other to achieve criminal justice.

Analyzing various opinions expressed in the juridical literature it can be concluded that extradition is governed by the following principles¹⁸⁾:

- the principle of reciprocity;
- the principle of non-extradition of own nationals;

¹⁷⁾ G. Antoniu, *Criminal reform and the fundamental principles of Romanian criminal law*, Criminal law review no. 3/1996; V. Dobrinouiu, *Criminal law*, Teaching and Pedagogical Publishing House, Bucharest 1992, page 13-15; C. Bulai, *Romanian criminal law*, vol. I, Bucharest 1992, page 40.

¹⁸⁾ N. Lupulescu, *Extradition*, Ed. Luceafărul, Bucharest 2004, page 138-139.

- the principle of non-extradition of own litigants;
- the principle of non-extradition of political asylum seekers;
- the principle of double incrimination;
- the principle of specialty;
- the principle of „Non bis in idem”;
- the principle of humanism.

Referring to the *principle of reciprocity* should be noted that on its basis whether it exists or not a convention or a treaty the admission of the extradition request is conditioned by reciprocity, by taking by the applicant state of the obligation to extradite on its turn a person in a similarly case. This principle functions particularly in the conventional law many states subordinating its extradition whether between them a treaty or a convention was signed¹⁹⁾.

According to the *principle of reciprocity* expressed itself in the art. 1 of the European Convention of extradition the contracting parties have the obligation to surrender each other the persons which are pursued for a criminal offence or wanted regarding the execution of a punishment or of a security measure by the judicial authorities of the applicant party. In other words, the extradition appears like an act with a bilateral display which implies the formulation of a request from a state addressed to other state and the remission of the requested person granted by the state the request was addressed.

The first moment is that of the extradition request which is called active extradition while the remission of the person of which extradition is requested is called passive extradition.

The lack of reciprocity doesn't hinder to carry forward the request of international judicial assistance in criminal matters if this is necessary because of the nature of the offence or the need to fight against some serious forms of criminality may contribute to the improvement of the accused or convicted or may clarify the legal situation of a Romanian citizen.

Concerning the *principle of non-extradition of nationals* in the international law was imposed the practice according to which the person whose extradition is requested must be a foreigner for the requested state being inadmissible the extradition of the requested party's citizens. It is the passive extradition unlike the active one which in most cases concerns the citizens of the applicant state.

In support of this principle was argued that the extradition of nationals would imply a default abandonment of the state over its sovereignty prerogatives on the person with who has a special legal relation and compared to that exercises its authority.

If in the last century this principle governed the institution of extradition and was provided in most of the national legislations, it is now applied in an increasingly smaller number by the states and could be said that it become mainly an exception and just in subsidiary may be a principle which governs the extradition.

¹⁹⁾ R. Stănoiu, *International legal assistance in criminal matters*, Bucharest 1975, page 101.

We assist to a reversal of this principle characteristic because of the fact that nowadays there is a strong ascent of the globalization phenomenon of the technical scientific progress and of communication means situation in which are necessary the means of cooperation more efficient for combating the criminality and for the uniformization of the states' legislations concerning the elimination of the barriers and for the efficiency of the collaboration.

In this context under the art. 19 of the Romanian Constitution "The Romanian citizens can be extradited based on the international conventions to which Romania is a party under the laws and based on reciprocity" thus renouncing to the principle of non-extradition of nationals, principle which as we have mentioned above governed this domain from its emergence and until now.

In applying the constitutional provisions we have referred above the Law no. 302/2004 amended established rigorous and restrictive rules concerning the extradition of Romanian citizens to assure them a real protection and for full exercise of their sovereignty over them.

Concretely, „in view of criminal prosecution and judgment if the applicant state assures that in case of conviction to a custodial sentence by final court decision the extradited person will be transferred to execute the punishment in Romania”, our state assures the extradition of the person in the applicant state. Also the extradition is possible if the extraditable person has the domicile on the territory of the applicant state, at the date of request formulation, if the extraditable person has also the citizenship of the applicant state or if this committed the act on the territory or against a citizen of a E.U. member state on condition that the applicant state be its member.

Concerning the foreign citizens and the stateless they can be extradited only based on international conventions or in conditions of reciprocity.

According to art 23 of Law no. 302/2004 amended the Romanian citizens can't be extradited from Romania if there aren't fulfilled the conditions of art. 24 that we have mentioned above as well as the persons to which asylum right was granted, foreigner persons which enjoy immunity from jurisdiction in our country and the summoned foreigner persons from abroad to examine them as parties, witnesses or experts in front of judicial authorities.

A second derogation from the principle that any person who committed a criminal offense on the territory of another state and then refugee on the territory of another state may be extradited to the request of the interested state aims *the non-extradition of litigants*. In this case the condition concerns the passive extradition and not the active one.

In this sense if the person of whose extradition requests committed a criminal offence also on the territory of the requested state where is to be judged according to the principle of criminal law territoriality will be extradited only after the final judgment and in case of conviction also after the execution of the punishment. In the same manner it will proceed in the case in which the criminal offense

committed on foreign territory was turned against the interests of the requested state and in this case the extradition taking place after the final judgment of the cause and the execution of the punishment. Only after the end of the trial and after the execution of the punishment the refugee may be extradited to the applicant state, only if the criminal action wasn't extinguished or if the request of extradition is still maintained.

If the postponement of extradition would lead to the fulfillment of the term of the criminal action for the criminal offense committed on the territory of the applicant state shall be admitted an exception from the principle above described, meaning that it will proceed to a temporary extradition. This exception is determined by a major interest for the applicant state, the refusal of extradition may absolve the offender from criminal liability and conviction for the committed act.

The asylum law represents the permission which a state grants it to the one who refugees on its territory to stay on it and to enjoy of that state protection refusing its surrender to the state which pursues him for political, religious activities etc.²⁰⁾

Non-extradition of political asylum seekers appears as a natural consequence of the right of asylum and it is a basic principle in the extradition matters being consecrated in the art. 23 of Law no. 302/2004 amended in which is stipulated that "can't be extradited the persons who were granted asylum in Romania".

It must be revealed that this principle is inserted also in the Romania Constitution of 1969 mentioning that our country grants asylum only to those foreign citizens which were pursued in the country of origin for their socialist and revolutionary actions. The persons who fought against the socialist system either didn't benefit from asylum either were extradited at the request of the state of origin.

The principle of double incrimination which underlies to the extradition request supposes that the act for which this thing is requested to be incriminated in both states, so both in the applicant state and in the requested state. In the authors' opinions who share this point of view is not enough the act to be incriminated in both legislations but it is necessary to be punished by those countries. It starts from the idea that the fact which is subject to the extradition request must be according to the laws of both states, susceptible of pursuance and judgment, fulfillment of this condition assuming the absence in both legislations of some causes which remove criminal liability.

This approach aiming double incrimination takes into consideration the possibility of punishment of the act or of execution of the punishment without implying the obligation of the state to examine the background of the cause which is subject to the request of extradition.

The principle of double incrimination may not be applied in case of so called accessory extradition this aiming the situation when the extradited person for an

²⁰⁾ N.Lupulescu, *Extradition*, Ed. Luceafărul, Bucharest, 2004, page 146.

act for which is possible the extradition committed in the applicant state and other acts for which the extradition requests aren't fulfilled. This extradition aims to simplify the procedures, the extradited person being judged together for all the facts and there is no fear for another trial after the expiry of the protection term which he enjoys according to the principle of specialty.

According to art. 26 of Law no. 302/2004 amended, the law which is harmonized with the provisions of the European Convention of extradition, this measure can be admitted only if the act for which is accused or was convicted the person is provided as a criminal offence in the laws of both states. Notwithstanding this rule the extradition may be granted according to law and if that act isn't provided in the Romanian law, but if for this was excluded the request of double incrimination, by an international convention to which Romania is a party.

The political, fiscal and military delinquencies are exempted from the provisions of amended law 302/2004.

The principle of specialty consists that the extradited person can't be judged or convicted for other criminal offense than that expressly showed in the request addressed to the requested state without its consent. This principle represents a guarantee which assures the compliance with the substantive issues of extradition which might be easily eluded.

This principle doesn't oppose to the possibility of changing the legal framing, in this case being possible the judgment under a different framing than the one showed in the request of extradition.

Regarding the criminal offenses previous to extradition the principle of specialty ceases to function if the extradited person after being judged or after executing the punishment to which he was convicted doesn't leave in a certain term the territory of the applicant state, which is usually between 30 and 45 days starting to run from the moment the extradited person doesn't have the obligation to remain on the territory of the applicant state. If he doesn't leave the territory of the applicant state within the term considers as a renouncing at the effects of the extradition and therefore to the protection offered by the principle.

In this sense the amended Law no. 302/2004 expressly states that that person which following a request of extradition appears in Romania can't be pursued, arrested or judged for other act previous to surrender, excepting the cases when the state which surrendered it consents to this, when the surrendered person hasn't left the country within 45 days from the final release or when the person that benefits from the rule or specialty renounce to this benefit.

In the internal law the judgment authority of the criminal decisions represents a legal obstacle which hinders the prosecution or judgment of a person for the same act if concerning that there is a final criminal decision of conviction. This obstacle which arises from the power of the judged thing constitutes in *the principle „non bis in idem”*.

This principle is stipulated both in the European Convention of extradition in which is expressly stated that “extradition won’t be granted if the claimed person was finally judged by the authorities of the requested state” and in the art. 10 of the amended Law no. 302/2004 in which are mentioned the same circumstances, meaning that the “extradition won’t be granted when the claimed person was finally judged by the competent authorities of the Romanian state for the acts for which the extradition was requested or if the punishment applied in cause by a final decision of conviction was executed or made the subject of a pardon or amnesty”.

Finally the last principle which governs the institution of extradition is the principle of humanism according to which the judicial cooperation will be refused if the procedure of the applicant state doesn’t comply with the requests of the European Convention for protection of human rights and fundamental freedoms concluded in Rome on 1950 if there are reasons to believe that extradition was requested to pursue a person on grounds of race, religion, sex, nationality or political opinions or if the person’s situation risks to worsen of one of the reasons listed above.

It can be shown as an example the refusal to grant extradition for an offense punishable by death after the laws of the applicant state excepting the situations in which this state will give assurances that the death penalty won’t be executed this being then commuted.

VIII. The substantive and formal issues of the extradition.

For an extradition request to be admitted by the requested state it must necessarily be fulfilled a series of positive or negative conditions which are usually provided in the conventions and treaties concluded between the states. In the case in which some states adopted laws of extradition its provisions come to replace everything that wasn’t regulated by the conventions of extradition and in absence of some treaties or special laws in matters the conditions of extradition are those defined in the international law²¹⁾.

The extradition implies as premise elements, in the absence of which it can’t exist, the following:

- a criminal offence consumed or left in phase of punishable attempt;
- a criminal which can be liable for penal sanction;
- a final penal sanction applied to the criminal.

In scope of substantive issues of the extradition enter the elements which concern the offender, the criminal offense committed, the criminal pursuance, the severity of the punishment, as well as the condemnation suffered. If the laws and treaties of extradition represent the legal framework based on which this is

²¹⁾ V. Dongoroz and collective, *Theoretical explanations of the Romanian Criminal Code*, Ed. Academiei, Bucharest, 1969, page 162.

legitimated, the substantive issues represent the concrete essence of extradition and their absence leads undoubtedly to the refusal of the request.

In order to be extradited a person must fulfill a series of conditions, namely:

- a) The person in respect of which is requested the extradition should not have the quality of litigant in the requested state;
- b) The claimed person should not be finally judged by the legal authorities of the requested state for the act or acts for which the extradition is requested;
- c) The claimed person won't benefit by immunity from jurisdiction under the conditions and limits conferred by conventions or by international laws;
- d) The foreign person whose extradition is requested to not have the quality of a participant (party, witness or expert) to a trial in the requested state;
- e) The extradition of the claimed persons should not seriously affect their health.

Regarding the first condition it must be showed that the requested person is subject to criminal pursuance in the requested state or has the quality of defendant in a process pending with the courts or much it applied already a custodial sentence, the extradition is no longer possible until after the conclusion of the criminal process and after the execution of the punishment.

As an exception and to avoid the accomplishment of the prescription term of the criminal liability there is the possibility of temporary extradition of the offender and this only after the fulfillment of some procedural acts which can't be postponed. Immediately after their fulfillment the offender will return in the requested state.

Secondly it must be noted that the extradition may be refused by the requested state if their legal authorities ordered the decision not to take action or the removal of the criminal pursuance of the person for the same act with the one claimed by the applicant state.

Moreover, if the claimed person was finally judged, the extradition may no longer be granted according to the principle „non bis in idem” if this was acquitted, if the punishment was integrally executed, pardoned or amnestied, or if the court established the guilt of the offender without pronouncing any sanction.

A third condition related to the offender concerns the fact that this shall not benefit by immunity from jurisdiction conferred by conventions or international agreements because in this case the extradition can't take place dealing with an exception of procedure order from the principle of criminal law application in relation to the place of committing the offense.

The persons who are the beneficiary of such immunity are usually ambassadors, plenipotentiary ministers accredited in other states, councilors, secretaries and attaché of the embassies, members or the consular team, as well as members or the special diplomatic missions. Also the members of the foreign armies transiting the territory of a state are the beneficiaries of the immunity.

These exceptions from the principle of the territoriality of the criminal law have at their basis political, legal reasons and are practically claimed by the reciprocal interests between the states.

In other words it must be noted the fact that there are excepted from the extradition also those foreign persons summoned abroad for their hearing as injured party, civil parties, witnesses, experts or interpreters, as long as they keep this quality and are on the territory of the requested state for the purpose for which they were summoned. Of course that after the termination of the hearings by the competent authorities, these persons must go back in the applicant state and in case they refuse they will be extradited and will not be able to benefit from the immunity granted during the process.

The last condition requested for the performance of the extradition has a profound humanist character and refers to the health condition of the claimed persons, in certain situation this can be refuse in case it would produce serious consequences with respect to the life and health of the person, due to the age and affection this one suffers. In such situations when the extradition is refused due to health reasons, the claimed person can be investigated within a criminal file by the legal authorities of the requested state, but only in the limits established through conventions or bilateral agreements.

These provisions appear also in the content of the art. 25 of the Law no. 302/2004, as amended, the Romanian authorities binding themselves in case of refusal of the extradition due to reasons of health of the claimed person, to start the criminal proceeding and the trial of this person, based on the pieces of evidence sent to the Ministry of Justice by the applicant state.

Within the substantive issues of the extradition, *the criminal act* plays the main role which gives occasion to the extradition and this must fulfill a series of conditions with reference to the occurrence place, its nature and character, or the qualification as criminal offence in the legislation of both states, as follows:

a) the action should have been committed on the territory of the applicant state or against its interests and the law of the requested state should not be applicable;

b) the action should be provided as a criminal offence in the laws of both states (double incrimination);

c) the criminal offences should present a high social risk degree, gravity expressed in general within the special limits of the punishment provided by the law for the respective action;

d) the criminal offences motivating the extradition petition should not be of political nature;

e) the criminal offence should not be part of the category of these actions excluded from the extradition;

f) the criminal offence should not have been amnestied in the requested state.

The first condition requested in order to approve the extradition is the one that the action should have been committed on the territory of the applicant state on which this one is exercising the sovereignty, other than the one on which is the offender.

In case a criminal offence was committed in the extraterritorial waters, and the offender is escaping in a foreign harbor in which this is making a stopover, the state under which flag the ship is carrying, can request the extradition to the state where the offender escaped. The same is initiating when the action was committed within the air space, under this hypothesis the extradition being permitted when the petition was addressed to the state where the offender escaped.

In both situations above described, the essential condition requested for the approval of the extradition is the one that the person in case should not be a citizen of the state in which this one escaped.

With reference to the principle of the double incrimination, the condition that must be fulfilled in order to approve the extradition petition is the one that the action should be stipulated as criminal offence both in the applicant state and in the requested state. The extradition will not be able to be granted if an action is qualified in the internal law of a state as a criminal offence, while in the law of the other state is qualified as contravention.

This principle is also established under art. 26 of the Law no. 302/2004 amended, its provisions mentioning that the extradition can be approved only if the action for which it is charged or for which the person whose extradition is requested was punished is incriminated in the laws of t both states with the exception of the situation in which through agreements it is not otherwise stipulated.

The high social risk degree of the criminal offences expressed within the special limits of the punishment provided by the law for the respective action is another criterion imposed for the extradition, with the mention that this is treated in the internal law of the states and also in the international treaties in different ways.

In order to be able to request the extradition, the committed criminal offence must attract a minimal punishment, which in general is between 1 and 2 years.

But there is an exception from this principle of conditioning the extradition from the minimal limit of the punishment and this aims exactly the opposite to the first situation, referring to the maximum of punishment. It is the case when the action for which the extradition is requested is punished with the death in the law of the applicant state, and this punishment is not provided within the law of the requested state. In this situation the extradition will be refused, with the exception of the case in which the applicant state will give material insurances that the death penalty will not be executed.

This exception about which we talked above is provided also in the Treaty between Romania and the United States of America regarding the legal assistance in criminal law signed in Washington on May 26, 1999.

On February 1, 2010 there came into force the Protocol to this Treaty signed in Bucharest on September 10, 2007, protocol which was ratified by Romania in May 2008.

The new provisions of this treaty laid the foundation of a cooperation corresponding to the new standards in the area, containing provisions aimed to make the bilateral cooperation more efficient by simplifying especially the transferring procedure of the extradition documents and of the whole extradition procedure in general.

The document provides the extradition for each action which meets the conditions regarding the minimal duration of the punishment of at least one year, as well as for criminal offences committed outside the territory of the applicant state, mentioning also the fact that “the extradition will not be refused to the citizenship reason”.

The treaty makes also reference to the case in which a person is punishable with death within the applicant state, the extradition being not granted but just in case in which the respective state will insure that the death punishment will not be applied.

With respect to the protocol concluded for the appliance of the agreement of legal assistance between the United States of America and the European Union, which also came into force on February 1, 2010, we mention that this one regulated modern forms of legal assistance in criminal matters, as follows:

- *identification of the banking information with respect to the money laundry and terrorism* punished by the laws of both states, as well as with respect to any other criminal activities on which the parties will subsequently agree;

- *common teams of investigation* can be established and can function on the territories of Romania and of the United States of America with the purpose to facilitate the investigations of the criminal proceedings implying the United States of America and one or more of the member states of the European Union, when this fact is considered as convenient by Romania and by the United States of America;

- *using the video transmission technology – hearing through videoconference* – is allowed between Romania and the United States of America in order to obtain within procedures for which legal assistance can be granted the testimony of a *witness or expert* being in the requested state;

- *legal assistance granted to the administrative authorities* performing judicial inquiries in relation to certain activities for criminal proceeding or for informing the inquiry body or criminal proceeding about the respective actions. The assistance *is not permitted for issues in relation with which the administrative authority estimates that the proceeding will not take place, or, as the case may be, the research bodies or for criminal proceeding will not be informed.*

The conclusion that arises is the one that in respect of the extradition, only the criminal offences with a certain impunity regime of freedom deprivation can motivate a petition, the actions punished with penal fine being excluded from the extradition procedure. Even prior to the appearance of the European Convention for Extradition, it was unanimously accepted the regulation for the approval of the

extradition, only for serious criminal offences, the contraventions being excluded from this one.

In the European Convention of Extradition it is expressly mentioned that the extradition will take place only for the actions punished by the laws of both states with a with a punishment of freedom deprivation of at least 1 year or with a more severe punishment.

Along with the ratification of this convention, Romania worded a reserve with respect to the social gravity of the action, showing that the extradition will be requested and respectively granted, for criminal proceeding and sentencing only for actions whose performance brings about the punishment for freedom deprivation higher than 2 years and more severe, while for the execution of the punishment the extradition will be granted only if the punishment of freedom deprivation is higher than 1 year or more severe.

Another condition necessary for the motivation of the extradition petition is the one that the criminal offence for which this measure is requested should not be of political nature. This idea of for non-extradition of the political criminals appeared during the French revolution and was established even in the Constitution.

The evidence of this principle comes from the idea of the local character of the political criminal offence, considering that this prejudices only the state against which it was committed, and not representing a social danger also for the state where the offender escaped.

The European Convention of Extradition from 1957 excluded from the area of criminal offences which determine the extradition those of political nature and the deeds related to these criminal offences. The first additional protocol of the convention concluded in Strasbourg in 1975 excluded from the category of political criminal offences the crimes against humanity, the genocides and any violations of the war laws, this measure being logic in relation with the social gravity of these actions, as well as the disastrous consequences for the whole international community.

In this context art. 8 of the Law 302/2004 before its abrogation, was expressly enumerating the actions which could not be considered criminal offences of political nature, between these being: attempt upon the life of a head of state, the crimes against humanity, the terrorist offences, torture or cruel treatments etc.

In the category of the actions excepted from the extradition, certain international treaties provide also the press offences, military offences, and also the fiscal offences, the explanation of their exception from the extradition being determined by the local or particular conditions of each state, or that they do not represent a special interest in the area of the criminal phenomena.

Subsequently through art. 1 point 5 of the Law no. 224/2006, this legal text was abolished just like art. 9 of the Law no. 302/2004 which was referring to the optional reasons for refusal of the legal cooperation, so that those deeds excepted

from the extradition disappeared, hence the conclusion that in such situation the extradition operates of course with the fulfillment of the above mentioned conditions.

Also the extradition will not be able to be accepted in case of committing certain actions for which there interfere the amnesty in the requested state, as these eliminates the criminal liability of the offender, and in case this came after the conviction, removes the execution of the pronounced sentence.

In order to achieve the preventive and education aim of the criminal punishment and to avoid the putting of the extradited person to an inhuman, degrading treatment or to torture a series of conditions must be fulfilled with reference *to the nature and amount of the punishment*, these being stipulated expressly in the agreements and international conventions having as object the extradition.

The first of these conditions refers to the exclusion of the perspective for the execution of the death penalty in the applicant state, and it was mentioned for the first time under art. 11 of the European convention for extradition from 1957, which provided as an essential condition for the approval of the expulsion, the obligation of the applicant state not to execute the death penalty where the internal law provided this kind of punishment.

In our country, art. 22, par. 3 of the Constitution expressly stipulates that the death penalty is forbidden.

Likewise the amended Law 302/2004 establishes that it is forbidden the extradition of a person, if the deed for which it is requested is punished with the death by the law of the applicant state. Though it is possible the extradition if the applicant state guarantees the Romanian state that it will not execute the death penalty but it will switch it with the life punishment.

Another condition which governs the institution of the government is the one that the punishment to which the requested person was convicted, should not be liable of execution by applying certain inhuman, degrading treatments, or which should produce physical and psychical suffer in the applicant state.

For this purpose on December 10, 1984 the Convention against torture and other inhuman punishments and treatments was passed and signed at the ONU headquarters, this being ratified also from Romania through the Law no. 19 from October 9, 1990. According to the convention no state will be able to expel, reject or extradite a person towards another state, when there are serious reasons to believe that this one is likely to be the subject of the torture. Internally the provisions of the convention are found both under art. 22 par. 2 of the Romanian Constitution with reference to the prohibition of the inhuman or degrading treatment, and Romanian criminal code which under art. 267¹, incriminates the torture.

In a different approach it is absolutely obligatory that the punishment which is about to be executed by the extradited person to be deprived of the freedom, in

the absence of this modality, being unable to justify the provisional arrest or the forced surrender that is the restriction of certain rights on which the foreign legal bodies have not yet decided.

This principle is materialized under art. 28 of the Law no. 302/2004 amended through the Law no. 224/2006 in which it is expressly stated that the extradition is requested and respectively granted for the execution of a criminal penalty only if this is higher than 1 year, and for the execution of a punishment, only if it is less than 4 months.

The extradition will not be granted also if the prescription period for the execution of the punishment exceeded, this principle being written in the European Convention for Extradition, in which it is provided the alternative request that the prescription should be fulfilled for both states, thus both according to the legislation of the applicant state and of the requested state. This is particularly important because if in the applicant state the term has expired and in the requested state it did not expire, there is no legal basis for the extradition as the effects of the prescription were produced.

The principle is also reflected in the art. 35 of the Law 302/2004 as amended, in which it is expressly stipulated that the extradition is not granted in case in which the prescription of the criminal liability or the prescription for the execution of the punishment expired, either according to the Romanian legislation or according to the applicant state.

The prescription terms are those shown under art. 125-130 of the Criminal Code.

Finally it must be shown the fact that the extradition also cannot be excepted where the punishment applied to the offender was pardoned or in whole suspended in the applicant state. In this respect, under art. 37 of the Law no. 302/2004 as amended it is expressly shown that the act of pardoning passed by the applicant state makes the extradition petition inoperative, even though the other conditions are fulfilled. This is natural as the extradition aims only persons that are wanted for a criminal offence or the execution of a punishment.

If the non-fulfillment of the formal issues leads without doubt to the rejection of the extradition petition, the absence of certain substantive issues can be previously covered without the extradition mechanism to stop.

The substantive conditions of the extradition aim the existence and its regularity, the documents which should accompany the petition, the claims, the transmission way of the documents, the terms which must be fulfilled, the arresting of the extradited person, the transit and the delivery of this person. In other words the substantive issues are those which impose the prior formalities of the extradition and which stakes the criminal proceeding, establishing the way in which the procedural acts are drafted.

Logically the first substantive issues are about the petition through which it is requested the extradition this being an action through which the applicant state is

expressing the wish to obtain the extradition of a person and based on which the requested state is granting the extradition. As a rule, the petition refers to a single person, fact which does not exclude the possibility that through this petition to be requested the extradition of more persons who committed the same criminal deed or more deeds or were punished through the same decision or more decisions.

The extradition petition must be accompanied by an information containing data about the criminal offence for which it is requested and the legal qualification, to this being attached the acts, which justify the extradition petition or documents which certify the legal situation of the person. If the petition concerns a monitored person, the document, which certifies the legal situation of this one, is the certified copy of the warrant for arrest, and if the petition regards a condemned person, the necessary document is the certified copy of the definitive sentence.

Also the documents, which accompany the extradition petition, must speak about what kind of criminal offence we are talking about, the legal classification of the deed, and the necessary data for the identification of the person.

As it is known, the absence of the prior complaint in case of certain criminal offences is a reason which eliminates the criminal liability, and according to this principle in the Law 302/2004 as amended, it was expressly stipulated that the extradition is not granted in case in which according to the legislation of both states the criminal proceeding can be engaged only upon the prior complaint of the injured person, and this did not word a complaint.

Since the extradition presumes the physical delivery of a person towards the applicant state, it is obvious that in case of the offender's death, the extradition petition remains without object.

The amnesty of the action for which the extradition was requested, brings to the non-admission of the extradition petition, the petition made in this respect being rejected as the effect of the amnesty definitively removes the criminal liability.

* * *

The extradition is considered to be as the oldest expression and at the same time the most vivid of the international legal assistance in the criminal matters and an efficient instrument for the appliance of the criminal law of each state for the administration under the best condition of the own justice. Functioning directly in the interest of the state which request it, the extradition is an institution of criminal law which indirectly is liable also for the common interests of all states, for the ensure of the law order on international level.

Of course the extradition cannot cover all the needs of the international legal assistance in the fight against the criminal offences, but is the way of assistance with the most important effects.

The political, social and institutional movements after 1989, the Romanian integration in the European concern of values and the increase of the criminal phenomenon, imposed that also our country should be part to the multilateral convention in the criminal area, modern and flexible international legal instruments, along with bilateral conventions concluded with more than 40 states, comply to a great extent to the requests of the adequate international cooperation in the fight against the criminal phenomena.

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