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EXTRADITION AS A TOOL FOR INTER-STATE COOPERATION: RESOLVING ISSUES ABOUT THE OBLIGATION TO EXTRADITE

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Abstract

Extradition as an act of international cooperation for the repression of criminal activities of the criminal offenders is one of the various models whereby one sovereign state delivers up the alleged accused criminals found within its jurisdiction, on demand, to another sovereign state, so that they might be dealt with according to the penal laws. Extradition has evolved among states because they are vitally interested in the repression of crimes and punishment of criminals who violate their national laws and thus disturb the general peace of the society. This article aims to describe the problems with which extradition is faced, especially with the obligation to extradite and with the obligation to take care of her own citizens in situations when the Constitution does not allow extradition of own nationals and in the absence of an extradition treaty.

Key words: extradition; nationals; extradition treaty; criminal offenders

INTRODUCTION

With the increase of globalization we are witnesses that the criminality, even common crime, has lost its primarily territorial nature and we are faced with the problem of international or transnational crime. With criminals acting and moving across borders, a need and a common practice for exercise of extraterritorial criminal jurisdiction have arisen. Due to the increased mobility of individuals including criminals, extradition is often indispensable to bringing the accused to justice in a foreign jurisdiction.

Extradition presents an act of international legal cooperation for suppressing criminal activities and consists of handing over individual who is accused or convicted of a criminal offence by one state to another which intends to prosecute or punish him in accordance with its laws (Aust 2007). The law of extradition, which is a branch of international criminal law, is based on the assumption that the requesting state is acting in good faith and that the fugitive will receive a fair trial in the courts of the requesting state. In the absence of any supranational authority over the states, however, they, like individuals, have to work among themselves through mutual support and assistance for the protection of the person and property of the subjects.

It is evident that the concept of extradition it is not a new idea, it is one of the oldest institutions whose origin can be traced to the bygone civilizations, however it is arduous to discover when it did come up as such in the course of history. The historical evolution of the practice of extradition explicitly demonstrates that in earlier centuries, it was not ordinarily a tool of international cooperation for the preservation of world societal interests but to preserve the political and religious interests of states (Blakesley 1981). It gradually developed, however passing through various stages of feudalism, absolute monarchism, and the growth of parliamentary institutions through which the political organization of the state itself has passed. Finally it evolved in an institution of genuine public criminal law for the suppression of common criminality of subjects.

Hence, it must be admitted that extradition proceedings face with crucial problems concerned, first of all with extradition of citizens and then with the duty to extradite under international law which may not be exercised in all circumstances. Because of that reason, in this article will be explained some of the major issues concerning the procedure of extradition and the obligations by the states taken from the ratified international conventions and signed bilateral extradition treaties.

GENERAL FRAMEWORK OF EXTRADITION

The principal rules and practices of international extradition constitute a significant body of international law. It is noteworthy that this body of international law was derived almost wholly from treaty sources and grew to recognize stature before treaties had overtaken custom as the most important source of international law (Shearer 1971,18). As a result, in certain important matters there is a considerable uniformity in bilateral treaties and municipal extradition statutes. In many other respects, however, extradition treaties and legislation present a complex and varying picture throughout the world, and there is a great need for further development and harmonization.

Extradition treaties and legislation not only supply the broad principles and the detailed rules of extradition but also dictate the very existence of the obligation to surrender fugitive criminals. It is clear that states do not extradite criminals in the absence of a treaty or a municipal law which empowers them to do so (Bassiouni 2008). Hence the existence of a treaty commitment to extradition in the United States, United Kingdom and the countries of the Commonwealth whose extradition laws are modeled on those of the United Kingdom. In some other countries, extradition may take place in the absence of a treaty but as an act of grace rather than of obligation, and in accordance with the provisions of municipal statutes operating in the absence of a treaty. In many countries extradition by statute is dependent upon an ad hoc guarantee of reciprocity which is tantamount to a treaty. In addition to bilateral extradition arrangements, whether by way of treaty or of reciprocal application of laws, there is a growing number of multilateral extradition arrangements among groups of states having some geographical or political links (Shearer 1971, 18).

The framework of international co-operation in the suppression of crime thus consists very largely of binding international commitments, whether of a bilateral or a multilateral nature. Extradition is one element in those systems, designed to stop fugitives using borders as a means of escaping justice. The object of extradition is to ensure that

those accused or convicted of serious crime do not escape from justice by crossing international boundaries (Bradley 2007, 466).

Extradition has a role to play in enforcing international criminal law and in assisting states to prosecute violations of purely domestic legislation. Away from criminal law, extradition has another function and that function consists of protecting the fugitive rights. Part of the problem with extradition is in trying to achieve the correct balance between allowing the free flow of fugitive criminals to states where they may be prosecuted for their crimes, and in safeguarding the fugitive from oppressive punishment or from persecution on account of his personal characteristics, beliefs and opinions. (Gilbert 1998). Even where the system is being properly used to affect the return of a fugitive criminal, it is still guaranteeing the fugitive's rights, because extradition is the specific means designed by states for that purpose, alternative methods, such as exclusion, deportation or abduction, lack the built-in safeguards of extradition arrangements, thereby allowing the fugitive's rights to be ignored. The viability of these instruments is of the utmost importance in the present state of extradition law and practice. Just as divergent rules and confusing procedures resulting from such a large number of instruments have prompted a number of international bodies at various times to canvass the possibility of concluding a single convention or a model code of extradition, so too the need for a common obligation to extradite would be well served by a single instrument having world wide application (Shearer 1971,23). But from all this we can see that all such attempts, have so far met with no success. In the meantime the very existence of the present bases of obligation is being threatened.

PROBLEMS CONNECTED WITH THE ISSUE OF EXTRADITION OF NATIONALS

Broadly speaking when a state enters into an extradition treaty relationship with another state based on reciprocity, it seems to imply an understanding that the parties view as more or less equivalent their respective conceptions of the fundamentals of criminal justice. On this basis, is it in keeping this perceived mutual confidence and respect, for the requested state to refuse to extradite its own citizens and nationals, on one hand, but also to be amenable to surrender non-citizen permanent residents or other aliens on the other.

If the criminal law safeguards at trial and other guarantees for the fair trial of the fugitive, once extradited are more or less equivalent in both states, then should not extradition of all offenders be viewed in the same way or permitted (Shearer 1971, 107).

Many civil law states prefer to exercise criminal jurisdiction over their citizens whether an offence was committed on their own territory or abroad. The rationale for this exception is linked to sovereignty, and in some states it is considered to be a fundamental right. Indeed, in some states it is enshrined in national constitutions. In order to determine whether a person is citizen, reference should be made to the relevant national law on nationality. For example Nordic states consider all registered residents as citizens, raising concern that suspected terrorist seeking refuge in one of these states could avoid extradition on the grounds of residency (Bantecas and Nash 2007,308).

There is a big dilemma should a state allow extradition of their own citizens, or should it be avoided? For example Hungarian Criminal Code says "A citizen of Hungary cannot be extradited to another State except if otherwise provided for in an international

treaty or convention”. Ireland has a rule that “extradition shall not be granted where a person claimed is a citizen of Ireland, unless the relevant extradition provisions otherwise provided”. The Constitution of Italy says that “Extradition of citizens is permitted only in cases expressly provided for in international conventions” (Article 26 1948). Swiss law similarly prohibits the extradition of Swiss citizens and provides for their prosecution in Switzerland for crimes committed abroad (Article 25 1999). The Netherlands has a rule of non-extradition of Netherlands citizens. Italy declares that “the rule against extradition of citizens is required on the ground that Italy owes protection to its citizens, and cannot abandon them to their lot, if charged with crime, to the mercy of foreign law” (Shearer 1971, 108). The EU Member States have demonstrated a reluctance to let procedural differences restrict international co-operation. The optional clause in many extradition treaties which permits states to refuse a request for extradition of their own citizens is seen as a disincentive to cross-border law enforcement.

Even nowadays there are many states in the world that exercise the nationality exceptional rule i.e. the principle of non-extradition of nationals, although the “modern practice” which has been broadly accepted is to allow extradition of own nationals on the basis of international conventions and bilateral extradition treaties. Extradition of nationals under determined circumstances will allow not only concluding more bilateral extradition treaties among states, but also will affect the battle against terrorism, organized and transnational crime all around the world and will leave no space for the criminal offender to hide in order to avoid justice.

Non-extradition of nationals is a principle that is well known in the extradition practice all over the world and even thought dates from medieval times and considerable changes in the international legal system, in international criminal law and in non-extradition of nationals as one of extradition principles, also prescribing opportunity for the states to clarify the complicated status of certain number of their inhabitants, by attaching a declaration defining the meaning of the term “nationals” for the purposes of the application of the European Convention on Extradition (Elezi, Gjorgeva and Ristoska 2010, 4).

Having in mind the fact that extradition of own citizens in many occasions is causing a serious problems on international level, it must be mentioned that we cannot detect any international instrument which allows extradition unconditionally without any limitations to its application. Regarding the issue about extradition of nationals, the European Convention on Extradition in its Article 6 prescribes:

- a) Contracting Party shall have the right to refuse extradition of its nationals.
- b) Each Contracting Party may, by a declaration made at the time of signature or of deposit of its instrument of ratification or accession, define as far as it is concerned the term "nationals" within the meaning of this Convention.
- c) Nationality shall be determined as at the time of the decision concerning extradition. If, however, the person claimed is first recognized as a national of the requested Party during the period between the time of the decision and the time contemplated for the surrender, the requested Party may avail itself of the provision contained in subparagraph a of this article.

According to the above mentioned, If the requested Party does not extradite its national, it shall at the request of the requesting Party submit the case to its competent authorities in order that proceedings may be taken if they are considered appropriate.

For this purpose, the files, information and exhibits relating to the offence shall be transmitted without charge by the means provided for in Article 12, paragraph 1. The requesting Party shall be informed of the result of its request (Article 6 1957).

The Convention relating to Extradition between Member States of the European Union contains a provision where nationality as a refusal ground only applies for those Member States which have made a declaration to that effect to be renewed every five years (Article 7 1996). Subsequently Austria, Germany, Greece and Luxembourg have declared that they will not extradite nationals. Denmark has declared that extradition of national may be refused. Belgium, Finland, the Netherlands, Portugal, Spain and Sweden will grant the extradition of nationals only under certain conditions (Kapferer 2003,39). As indicated earlier, there is not general obligation to prosecute in such cases, although the possibility of refusing to extradite citizens may be coupled with a duty to prosecute them in the courts of the requested state. For example, the Western Balkan countries before several years were applying the principle of non-extradition of nationals. The Constitution of the Republic of Macedonia previously did not allow extradition of Macedonian citizens on any basis (Article 4 1991). Because of that reason, the Assembly of the Republic of Macedonia on 12 April 2011 adopted the Amendment XXXII from the Constitution of the Republic of Macedonia, which provides concluding agreements for transfer of own nationals to other countries, for conducting criminal proceedings for committing crimes in the area of organized crime and corruption. With the adopted amendment, the full text of the provision states: “A citizen of the Republic of Macedonia may neither be deprived of citizenship, nor expelled or extradited to another state, except on the basis of ratified international agreements or with a court decision” (Article 4 para.2 2011).

Amendments to the Constitution in this area are conducted in order to create preconditions for dealing with organized crime and corruption and to comply with international agreements. Main instrument for successful dealing with trans-national organized crime is an effective legal and judicial cooperation. The activities to be undertaken in the forthcoming period will be focused on signing bilateral agreements on extradition of own nationals and nationals of other states in the Republic of Macedonia for acts of organized crime and corruption (see: www.justice.gov.mk). In relation to the above mentioned, there is a considerable willingness by the states to grant extradition of nationals under specific conditions, namely under ratified bilateral extradition treaties.

OBLIGATION TO EXTRADITE UNDER INTERNATIONAL LAW

Whether international law imposed a duty on states to extradite common criminals was once a highly controversial issue. The fathers of international law did not dispute the efficacy of the practice of extradition but differed as to whether a legal or merely a moral obligation to surrender criminals existed (Boister 2012).

Admittedly, there is no justification in causing the apprehension or detention of any person upon the application of a foreign power or, upon such application, for causing any person to be carried from the country to be delivered over to any foreign power in the absence of an express stipulation in a specific treaty between the two states to his being proceeded against in a foreign country for any crime alleged to have been there committed. It need not be taken to mean that a state is not at liberty to request such surrender, because the extradition of criminals or alleged criminals is founded upon the comity of nations.

Furthermore, it must be acknowledged that extradition is not an obligation created by treaty. It is true that it has been regulated and molded in certain countries through the medium of treaties but, properly speaking, it is founded upon the comity of nations (Bedi 2002, 15). The general practice of states confirms the observation that extradition is not looked upon as an absolute international duty, and if a state wishes to ensure that it secures the return of its own criminals it must enter into treaties with other states.

There is no general obligation to extradite in international law but the duty to extradite may arise from bilateral and multilateral extradition treaties which also enshrine exception to this duty. The constitutions of many states, including some European states, prohibit the extradition of their own nationals, but their laws enable them to prosecute their nationals for serious crimes committed abroad. Other states, including United Kingdom, can extradite their own nationals and therefore their laws enable prosecution of their nationals only for a few categories of serious crimes committed abroad (Przeczniak 1983, 138).

States generally lack the capacity or will to prosecute or punish individuals for crimes that have occurred beyond their borders. Consequently, when a suspected or convicted criminal flees from one state to another, some form of inter-state cooperation is required to ensure that the fugitive is returned. The form generally favored on the international stage is extradition, a “procedure of request and consent” which generally reflects the willingness of states to engage in co-operative efforts aimed at the suppression of crime (Brownlie 1998). International law, however, does not oblige a state to afford such assistance and it imposes no legally binding duty on a state to extradite at the mere request of another state. States may, nonetheless, assume a binding obligation to extradite under international law by entering into a treaty, or other consent-based arrangements (Harrington 2012).

The European Convention on Extradition prescribes the obligation to extradite: “the Contracting Parties undertake to surrender to each other, subject to the provisions and conditions laid down in this Convention, all persons against whom the competent authorities of the requesting Party are proceeding for an offence or who are wanted by the said authorities for the carrying out of sentence or detention order” (Article 1 1957).

Obligation to extradite cannot be easily exercised especially if it is about extradition to states not party to the ECHR. Regarding this issue the Committee of Ministers recommends to Member States:

1. not to grant extradition where a request for extradition emanates from a state not party to the European Convention on Human Rights and where there are substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing the person concerned on account of his race, religion, nationality or political opinion, or that his position may be prejudiced for any of these reasons;
2. to comply with any interim measure which the European Convention on Human Rights might indicate under Rule 36 of its Rules of Procedure, as, for instance, a request to stay extradition proceedings pending a decision on the matter (Recommendation No. R (80) 9 concerning extradition to states not party to the European Convention on Human Rights).

The Vienna Convention on the Law of Treaties is silent on this subject, but, however, articles 53 and 64 relating to the issue of *jus cogens* could perhaps offer a possible and acceptable solution. The text of Article 53 is about treaties conflicting with the peremptory norm of general international law (*jus cogens*) as it follows:

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”.

Similar meaning has the provision from Article 64 stating that: “If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates” (Article 64 1969).

These two provisions from the Vienna Convention on the Law of Treaties can be used only in limited number of cases, especially in the cases where possible violations of human rights may be invoked, but not to all human rights – just those which are considered as inviolable human rights and can be put in the group of so called *jus cogens*.

The international obligation not to extradite a person in some circumstances may conflict with another international obligation and that is to extradite a person pursuant to the applicable extradition treaty. In order to establish the existence of a rule of customary international law there has to be widespread state practice and a belief that such practice is required as a matter of law (*opinio juris*). Although it can be argued that for the ‘core crimes’ of genocide, war crimes and crimes against humanity, there is a obligation to extradite only for grave breaches of the Geneva Conventions and Additional Protocol I (Zgonec-Rozej and Foakes, 2013). For the other core crimes it is questionable whether customary international law imposes such an obligation.

WHAT HAPPENS WITH THE EXTRADITION PROCEEDINGS IN THE ABSENCE OF A TREATY?

The traditional international law gives each state liberty to exercise absolute and exclusive legislative, administrative, and jurisdictional power irrespective of the will of the other states. This territorial supremacy in the absence of any supranational authority makes a state the most powerful organism in international law which invests it with a supreme and overriding authority over all things and persons falling within its territorial limitations. It generally is held that “the principles of international law recognize no right to extradition apart from treaty”. The legal right to demand his extradition and the correlative duty to surrender him to the demanding country exists only when created by treaty. The law of nations does not prohibit a state from surrendering a person accused of crime to another state under the very notion of sovereignty as the reception and expulsion or exclusion of aliens is a fundamental act of sovereignty (Bedi 2002, 19). Only a few countries in the world possess no extradition treaties whatsoever. However, several countries possess only a handful of such treaties, choosing not to practice extradition by treaty with certain countries for any one of several reasons to be discussed below. Evidence for extradition in the

absence of a treaty is found as early as 1880, in a resolution by the Institute of International Law. Furthermore, certain legal scholars recognize an obligation to extradite fugitive criminals regardless of the presence of a treaty. Today, most civil law states add support to this position and recognize final surrender absent a treaty as a valid form of extradition. Common law countries such as the United States and Great Britain show greater reluctance in granting extradition in the absence of a treaty. According to their view, no absolute duty to extradite exists absent a specific treaty obligation (Woods 1993, 46). However there are some exceptions. For example, the Constitution of the Netherlands requires the existence of a treaty before extradition may be conceded. The laws of the Congo, Ethiopia, Israel and Turkey also depend on the existence of treaty arrangements. Although there is no specific prohibition in Norwegian law, in practice a treaty is regarded as indispensable for the surrender of fugitive criminals from Norway to countries outside the Nordic Treaty (Shearer 1971, 30). Extradition in the absence of treaties in the nineteenth century has long been sanctioned by the practice of most civil law countries.

In the absence of an agreement creating the obligation to surrender the fugitive criminals, no such obligation exists under international law. Under international law, the right of a requesting state to demand the surrender of a claimed person accused of a crime, and the correlative duty to surrender such a person, exists only when created by extradition treaty.

Accordingly in the absence of such a treaty, there is no obligation to surrender criminals to another country. Where, however, in the absence of an extradition treaty imposing such right and duty, surrender of a claimed person is made, it is on the principle of comity, founded on the principle that it is not in the interest of the international community that serious crimes of international significance should go unpunished. Under such circumstances the Government of the requested state may exercise its discretion and investigate the charge on which the surrender is demanded (Shearer 1971, 32).

For example United States belongs to the group of states which do not surrender fugitive criminals in the absence of an extradition treaty. Its practice is to decline to request extradition from the requested state with which there is no treaty providing for surrender, although there are isolated cases in which the Government of United States has requested of foreign Governments the surrender of fugitive criminals as an act of comity: in these cases, however, the request has always been accompanied by the statement that under the law of this country reciprocity cannot be granted (Przeczniak 1983, 137).

The practice of the civil law countries has demonstrated a greater willingness to grant extradition in the absence of treaties, but in few instances has the view been espoused that extradition in such circumstances was based on anything more than comity and an act of grace. For example in France there was no duty to extradite a person from one state to another, or this duty was not recognized, only that such cases could be regulated in individual circumstances by the respective governments. In 1872 year French Minister of Justice stated that “on the basis of reciprocity” extradition might take place in the absence of a treaty, in which case the rules applicable were within the province of international law. Only in parts of South America, it would seem, has a legal duty to extradite in the absence of treaty been accepted at times (de Than and Shorts 2003).

A request for the arrest and surrender of a fugitive criminal could not be made in the absence of a extradition treaty. But taking into consideration the gravity and seriousness of the crime and its detrimental effect upon a society, a state, in conformity with the public

law of nations or in accordance with the general principles of international law, in the absence of an extradition treaty invoking the principles of comity or morality between the states concerned, can extend an extradition request for the fugitive offender who has crossed its borders for escaping from trial or punishment awaiting him in the forum *delicti commissi*. This is because all states are interested in the preservation of peace, order and tranquility within their domains and in promotion of justice in cooperation with other states (Bedi 2002). Accordingly, the only obligation existing in the absence of a treaty is “imperfect”, creating a moral, but not legal duty to extradite. The only method to create an absolute duty to extradite is through the signing of a treaty. The dominance of this latter view has provided the necessary impetus for the increase in the formation of modern-day mutual extradition treaties. Extradition in the absence of a treaty always hinges on the principles of “courtesy, good will, and mutual convenience.” (Woods 1993, 49). Since the prevailing view fails to recognize an absolute duty or obligation in the absence of formal treaty relations, comity and common courtesy must serve as the sole basis for surrender where no treaty exists.

As a closure to this issue about possible extradition in the absence of a treaty, there are several reasons for choosing to extradite in absence of a treaty. First, some states simply prefer as a matter of principle or convenience to enter into treaties only with those countries that require such agreements before extradition can take place. Second, it seems unnecessary to enter into treaties with countries where extradition is a rarity. Third, states do not want to become a resting place for criminals and will often enact legislation permitting extradition in the absence of a treaty as a combatant to unsuspected entry (Wise 1969, 705).

CONCLUSION

Criminal offenders often misuse of the lack of extradition treaties with other states to decide which state to flee after committing crimes. The very nature of crime has been evolving, and the failure to bring fugitives to justice represents an acute problem to the party which has been wronged. However, there is no general rule of international law that requires a state to surrender fugitive offenders. The increase in the mobility of suspects has resulted in the increased willingness of states to use this form of mutual legal assistance to enforce their domestic criminal law. As it was elaborated before, the principle of non-extradition of citizens is a right of a state to refuse extradition of own nationals, but also this issue leaves a space for a very dangerous opportunity where fugitives are using this principle and also the fact that some states are not willing to grant extradition in absence of a treaty.

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