THE PRINCIPLES AND GENERAL RULES OF THE INTERNATIONAL JUDICIAL COOPERATION IN CRIMINAL MATTERS

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Abstract:

The globalization and, especially the expansion of transnational organized crime have raised a series of new problems for the international criminal systems. The opening of national borders, the freedom of movement, the freedom of merchandise and services trade as well as the continuous development of communication methods have brought a new dimension to these threats, hence a tight international cooperation in criminal matters between the member states, along with the police cooperation has become an efficient means to react to the aforementioned phenomenon.

The continuous and sustained efforts undertaken at international level by the United Nations Organization (the UN) in order to promote the international judicial cooperation have culminated, during the Eight UN Congress in a series of principles and guiding lines for the prevention and fight against organized crime and terrorism, establishing the necessity for several basic treaties in the field of international cooperation in criminal matters. These principles were adopted by the Romanian legislator within the dispositions of the Law no. 302/2004 as modified and amended by the Law no. 224/2006.

Key words: rules, judicial cooperation, criminal matters.

1.1. The preeminence of the international law

The principle of the preeminence of the international law is incident in several branches of the law, and is best represented in the field of international public law. Related to the report between the national and international law – the subject of the matter – the theory of the preeminence of international law appeared after the 1st World War and expresses the idea that the international law establishes in fact the limits of the national legal system competence. There are, of course, several arguments to this point. The recognition of the superiority of conventional legal norms over the national ones is a fact consecrated by practice through arbitral decisions as well as international jurisprudence. Also, the nonconformity between the internal legislation of a state and its international obligations engages its international liability.

The legislator has regulated a special case of applicability of the principle according to the provisions of the 4th art., par. 2 of the Law no. 302/2004 as

modified and amended by the Law no. 224/2006 concerning the international cooperation in criminal matters, stating that along with the international treaties, the statutes of international criminal courts may be considered as a fundament of the international cooperation in criminal matters, granting them with judicial strength of particular international instruments. We must state that these international instruments may be used as means of international cooperation only in the case where an international criminal court or a international organization have competence, following a special procedure. We must emphasize that according to this legal provision, in the place of a state – either soliciting or solicited – we may find international criminal courts or another international organization. In conclusion, we discover several new subjects involved in the international criminal cooperation, other than the states or the judicial authorities, as they are defined by the 2nd article of the law.

Moreover, art. 24^1 of the aforementioned law prescribes as a mandatory reason for the refusal of a extradition the situation where: "*the request is filed in a case found on the role of extraordinary courts, other than those constituted through pertinent international instruments, or concerning the execution of a sanction decided by such a court*". The general rule of the preeminence of the international law is still in force, through the provisions of the following paragraph of the legal text, that states: "*…the provisions of the present law can be enforced accordingly, in case it will prove necessary*", respective in non regulated situations.

Unlike the internal legal system, whose main source is the law, considered as an act issued by a single state, the sources of the international law reflect the willpower of more subjects of international law, respective states, concerning the creation of mandatory international obligations. In order to determine the sources of the international law we must accept that the international law is the mean by which the states, based on their common agreement create new international norms and develop, clarify or confirm the already existing norms in order to regulate their cooperation.

1.2. International courtesy and reciprocity

Regulated by our legislator as principles of the international cooperation in criminal matters, the international courtesy and reciprocity become veritable international cooperation instruments as described in the 5thart. of the Law no. 302/2004 as modified and amended by the Law no. 224/2006. As a consequence, as long as the Romanian government as the solicited state and the soliciting state are not contracting parties to a international convention, or such a convention was not ratified by the two states according to the international legal principles, the judicial cooperation can take place in virtue of the international. Certain procedures must be fulfilled in order to find the applicability of the international courtesy. Hence, it is necessary for the soliciting state to transmit a request through the diplomatic channels to the solicited state's authorities concerning the reciprocity, and in case the reciprocity is confirmed in writing, the international cooperation in

criminal matters may be initiated. The Romanian legislation, establishes the competence of the Ministry of Justice whenever Romania is the soliciting state, according to the provisions of art. 6 of Law no. 302/2004 that states: "*for each case, whenever it is deemed necessary, upon motivated request from the competent Romanian authority*."

All the aforementioned lead us to the conclusion that the two rules are interdependent during enforcement. The Law no. 302/2004[237] prescribes in it's art. 5 par. 2 the legal framework where the two legal principles may be invoked, establishing that in these situations, the common law for the Romanian authorities as solicited state is the present law.

As previously argued, within the international cooperation in criminal matters, according to the Romanian legislation the international courtesy becomes applicable only when there exists "*written reciprocity insurance*" from the soliciting state. Nevertheless, exceptional situations may occur, prescribed by the law, when the reciprocity is no longer necessary. At a closer analysis of the legal text – respective the article 5 par. 3 of the Law no. 302/2004 as modified and amended – it is clear that the exceptional situations may occur only when it is dealt with a request for international assistance in criminal matters and not with a request for international cooperation. As a consequence, when upon such a request "*the international assistance in criminal matters proves to be necessary, due to the nature of the criminal act, or due to the need to fight against severe forms of criminality; or it may contribute to the improvement of the defendant's or convicted person situation or to its social reintegration or it may serve to clarify the judicial situation of a Romanian citizen*" the reciprocity an the insurance of reciprocity are not mandatory. The legislator restricts the applicability of these exceptional legal provisions, with its forms: international rogatory commissions; videoconference hearings; hearings in the soliciting state of the witnesses, experts and prosecuted persons; notification of procedural acts drafted or filed in a criminal case, criminal records and other forms of international judicial assistance prescribed by the law. Per a contrario, for the rest of the international judicial cooperation in criminal matters forms, except the international judicial assistance, respective: the extradition; the surrender upon an European arrest warrant; the transfer of proceedings in criminal matters; the recognition and execution of sentences and other documents; the surrender of the convicted persons; the judicial assistance in criminal matters; and other forms of international judicial cooperation in criminal matters, the international courtesy and reciprocity are two cumulative conditions.

On a closer analysis of the three exceptional situations where the reciprocity is not necessary in the event of a request for international judicial assistance, we bring forth an argument in favor of the current legislation, respective the fact that the three cases show the characteristics of emergency situations. In the first

[237] Modified and amended by the Law no. 224/2006 published in the Official Monitor part I, no. 534/21.06.2006 and the G.E.O. no. 103/2006, published in the Official Monitor part I, no. 1019/21.12.2006.

situation the law refers to the necessity of the request due to the:" *nature of the criminal act or the need to fight against certain severe forms of criminality*". It is noticeable that the legislator does not clarify the nature of the criminal act, but it prescribes it as an alternative to the need to fight certain "*severe forms of criminality*". We can deduct from the context the fact that the "*criminal acts*" that do not require reciprocity must belong to "*the severe forms of criminality*" like the organized crime, terrorism, drug traffic, etc. It is understandable that in the quest for a solution to prevent or to fight the severe forms of criminality, the mere international courtesy must suffice in order to compel with the specific procedures of the international assistance.

The following two exceptional situations, respective the request for international assistance only based on international courtesy in the cases where: "*it or it may contribute to the improvement of the defendant's or convicted person's situation or to its social reintegration*" and "*it may serve to clarify the judicial situation of a Romanian citizen*" are somewhat similar, in the sense that they focus on the person and not on the criminal act. Every time a defendant's or a convicted person's situation may be improved at a certain moment, its social reintegration may be easier to realize or the personal situation of a Romanian citizen may be clarified, the principle of reciprocity is no longer needed, the international courtesy being sufficient. We find that in regulating these exceptional situations the Romanian legislator has taken into consideration the social, humanitarian side of the prosecution, with its two functions, respective the sanction and the prevention.

All of the above exceptional cases represent a viable, logical alternative created by the legislator to the more complicated form of international cooperation that is the judicial assistance.

It must be noticed that at the European level, the community legislation has stipulated since October 1999, during the European Council meeting in Tampere – Finland – that the *reciprocity* represents *the corner stone* of the judicial cooperation between the member states of the European Union, including the international judicial assistance in all its forms. During a comparative analysis of the other forms of the international judicial cooperation which prove to be more complex and more difficult to realize from the perspective of the procedures involved, then those stipulated by the 5th article par. 3 of the present law, it is easy to understand why the starting point of the extradition forms and the European arrest warrant is the principle of reciprocity.

1.3. Applicable law

The stipulations of the 7th article of the law no. 302/2004 as modified and amended by the Law no. 224/2006 are clear and they represent the natural consequence of the fact that at a national level any request addressed to the Romanian authorities in the areas regulated by the present law will be subject to the national criminal procedure rules. The present basic rule in the field of international cooperation in criminal matters may be assimilated to the principle of the

territoriality, since the criminal or criminal procedure rules from another state can never be applied on the Romanian territory according to the Romanian legislation. As a consequence, as long as the law does no dispose in an express manner that foreign criminal norms may be applied, according to article 7 of the present law, the Romanian authorities will only apply the Romanian criminal procedure laws during the analysis of any request submitted by foreign judicial authorities.

The content of article 146 of the law no. 302/2004 as modified and amended stipulate a practical situation, but from a mirror perspective of article 7 aforementioned, in the sense that the rules of international cooperation in criminal matters create the possibility for the Romanian authorities to apply the **rule of the conversion of the conviction** through a judicial sentence, in the specific situation where the nature of the sanction and its duration are compatible with the Romanian legislation. This judicial operation is realized through the **adaptation** of the sanction to the **Romanian legislation** following imperative legal provisions, characteristics in case of surrender of persons.

1.4. Non bis in idem

„Non bis in idem" is a **veritable law principle** found in most criminal or constitutional legislations and in the international jurisprudence and it signifies what the Romanian legislation calls "the authority of a previous sentence". It is a judicial concept that finds its origins in the Roman law system, and it is called in the common law systems *double jeopardy*. At a regional level all member states of the European Council, including the majority of the European states and all the members of the European Union are members of the European Convention for the Protection of Human Rights and Fundamental Freedoms which state in the 4th article of the Seventh Protocol the rule **non bis in idem**: „*No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State."*

The rule that states that no one may be convicted twice for the same crime is general and based on a humanitarian principle, with two basic effects. The positive effect implies that a criminal sentence may be executed and the negative effect prevents a new prosecution against the same person for the same criminal act. A second prosecution is still possible when it is based on new elements, adding to those from the first prosecution[238].

In the international cooperation in criminal matters, the principle *non bis in idem* is consecrated by article 54 of the Convention for the enforcement of the Schengen Agreement[239]. According to the respective article *no person may be prosecuted in a member state for the same criminal acts for which he was sentenced in another member state*. A sentence issued by a court of law after the

[238] Gheorghiţă Mateuţ, *Criminal procedure - treaty. General part. Volume I*, C.H. Beck Publishing, Bucharest, 2007, pages 719-720.
[239] Published in JO L 239 of 22.09.2000, page 13.

Public Ministry decided to initiate the criminal prosecution only based on the fact that the person is prosecuted in another member state for the same criminal acts, without analyzing the fond of the matter does not constitute a definitive sentence, according to the article 54 of the Convention. If such a sentence were considered definitive, any concrete possibility to inflict a punishment in any member state would be extremely difficult, coming against the finality of the dispositions of the 6th Title of the European Union Treaty[240].

Considering the disposition "*the same criminal act*", The European Court of Justice stated in the Van Esbroeck[241] affair that the only relevant criteria according to article 54 is the identity of the material acts, understood as a series of concrete circumstances found in inextricable relation[242].

The principle *non bis in idem*, as stipulated in article 10 of the law no. 302/2004 as modified and completed by the Law no. 224/2006 limits the forms of international cooperation in criminal matters to three situations, as it follows. As long as in the Romanian state or any other state a criminal case was tried for the same criminal act, and the respective trial ended through a final decision of acquittal or dismissal of charges, either by a definitive sentence of conviction to a punishment that has already been executed, of was subject to a exoneration or amnesty in whole or on the part that was not executed, the international judicial cooperation it is not admissible. It shows, that from the start no request concerning the extradition, the European arrest warrant, the transfer of proceedings in criminal matters; the recognition and execution of sentences and other documents; the surrender of the convicted persons; the judicial assistance in criminal matters; and other forms of international judicial cooperation in criminal matters will be admitted. These situations are understandable and predictable. It is understandable that as long as a person was acquitted or the charges were dismissed based on any legal grounds, or as long as the person has executed the punishment it can no longer be prosecuted or tried for the same criminal act. But the law only makes a distinction in what concerns the judgment and the execution of a criminal sentence and does not mention the criminal prosecution where, according to the criminal procedure rules a solution of acquittal or dismissal of charges may occur. In such circumstances we are bound by the provisions of article 11 paragraph2 corroborated with article10 of the Criminal procedure Code, which indicate expressly when the acquittal or the dismissal of charges is applicable[243].

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[240] Case no. C-469/2003; *Criminal procedure v. Filomeno Mario Miraglia. Decision form 10.03.2005*, Judicial Courier magazine no. 5/2005, pages 50-51.

[241] Case no. C-436/2004 – www.curia.europa.eu.

[242] Corina Sabina Munteanu, *The European arrest warrant. A judicial instrument capable to replace the extradition.* Criminal law notebooks no. 1/2007, pg. 106.

[243] During judgment the court issues a sentence of acquittal when: - the criminal act does not exist; - the act does not fall under the incidence of the criminal law; - the act does not have the degree of peril of a criminal act; the criminal act was not perpetrated by the person which s on trial; - the act lacks one of the constitutive elements of a crime; - we are in the presence of a case where lacks the criminal character of the act.

The law concerning the international cooperation identifies some of the situations prescribed by article 10 of the Criminal Procedure Code as reasons of acquittal or dismissal of charges in case of a request for extradition or surrender based on a European arrest warrant. Article 32 stipulates that: "*the extradition will not be granted when, according to both the Romanian legislation and the legislation of the soliciting state, the criminal prosecution may be initiated upon prior criminal complaint from the victim, and the victim opposes to the extradition*"; article 35 stipulates that: "*the extradition will not be granted when the prescription of the criminal liability or the prescription of the execution of the punishment has come to term according to the Romanian legislation or according to the legislation of the soliciting state*"; article 36 stipulates that: "*the extradition will not be granted for crimes which were amnestied in Romania, if the Romanian authorities were competent to prosecute the respective crimes according to its criminal legislation"* and article 37 stipulates that: "*the exoneration granted by the soliciting state prevents the admissibility of a request for extradition, even if all other conditions are fulfilled."*

In the same order of business, article 88 par. 1 of the Law stipulates as mandatory refusal reasons for the execution of a European arrest warrant, amongst others, the situations where the Romanian authorities have relevant information that show that "*the person was tried for the same criminal acts by a member state, other then the emitting state, granted that, in case of conviction, the sanction was already executed, or was in course of execution, or the prescription of the punishment intervened, or the crime was exonerated or amnestied, or subject to another cause of non-execution; - when the crime for which the warrant was issued was amnestied according to the Romanian legislation, if the Romanian authorities are competent, according to the internal legislation, to prosecute the respective crime."*

The rule stipulated by the first paragraph of article 10 of the Law no. 302/2004 as modified and amended by the Law no. 224/2006 it is not general. The second paragraph of the 10 of the above mentioned law indicates that in case of a assistance request for the revision of a definitive sentence for one of the reasons justifying a extraordinary way of appeal against a sentence according to the provisions of the Criminal Procedure Code, the principle *non bis in idem* has no effect. One more time the law concerning the international cooperation in criminal matters regulates an exception only in case of an assistance request and not in case of cooperation, exactly like the dispositions of article 5 par. 3 of the same law. In this specific case the legislator stops at the term assistance, without any

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During judgment the court issues a sentence of dismissal of charges when: - it lacks the criminal complaint of the victim, the authorization or the seize from the competent organ or another condition stipulated by the law, necessary for the prosecution to take place; - the amnesty, prescription, the death of the defendant or the radiation of the commercial person intervened; - the complaint was withdrawn or the parties reconciled in case of crimes where these circumstances prevent criminal liability; - the criminal liability was replaced; - there is a reason which prevents punishment; - the rule of double jeopardy applies.

specification weather it concerns the international judicial assistance or the assistance in general. It is extremely important from the point of view that if we deal with assistance in general, according to the doctrine we must include the international judicial cooperation, but if we deal with the international judicial assistance we must exclude the other forms of international judicial cooperation in criminal matters.

We find that the legislator should have been more specific, and should have used the term international judicial assistance. Nevertheless, we conclude that the interpretation of the exceptional cases stipulated by the second paragraph of article 10 of the law no. 302/2004 modified and amended by the law no 224/2006 leads exactly to the conclusion that the legislator referred to the international judicial assistance. In conclusion we refer to revision as an extraordinary way of appeal that can be submitted against a definitive sentence. The cases of revision are stipulated expressly by article 394 par. 1 of the Criminal Procedure Code and the situations where each case is applicable are provided by the paragraphs 2, 3 and 4 of the same article. In the present scenario, the only revision reason that can prevent the efficiency of the double jeopardy rule in case of a request for international judicial assistance, refers to the situation where: "*new facts or circumstances were discovered, facts or circumstances not known by the court during the trial of the case*" if it refers to "*facts or circumstances that can prove that the sentence of acquittal, dismissal of charges or conviction is unfounded.*" The proof that a sentence of acquittal, dismissal of charges or conviction is unfounded determines the admission of the revision, followed by the annulment of the definitive sentence and by a new sentence, contrary to the initial solution.

As a consequence a sentence of acquittal or dismissal of charges will be issued instead of conviction, or the vice versa a sentence of conviction instead of acquittal or dismissal of charges[244]. I the end the theory of double jeopardy cannot be applied in such circumstances.

A second exception from the rule non bis in idem is offered by the dispositions of the article 10 par. 3 of the law concerning the international judicial cooperation in criminal matters. In any situation where an international treaty – signed or adhered to by Romania – contains favorable dispositions in what concerns the principle *non bis in idem,* the dispositions of the present law will be replaced by the treaty. It is a natural conclusion, in light of the dispositions of the Romanian criminal law which stipulate the principle of the "applicability of the more favorable criminal law" – article 13 of the Criminal Code. But again, the law concerning the international judicial cooperation in criminal matters is lacunaria, in exemplifying situations that may prove favorable in rapport with the principle non bis in idem.

1.5. Confidentiality

[244] Grigore Theodoru, *Criminal procedure - treaty*, Hamangiu Publishing, Bucharest, 2007, page 87.

Another basic rule of the international judicial cooperation in criminal matters is the one of confidentiality of all requests and of the documents attached to the request. A simple reading of the legal text shows that the confidentiality is not mandatory and must be requested according to the traditional principle of international judicial cooperation by the soliciting state from the Romanian authorities as solicited state. We can find the areas where "*confidentiality is mandatory, as long as it is possible*", respective in the areas regulated by the present law together with the annexed documentation. In the end, the confidentiality is rather optional – mandatory as long as it is possible – for the Romanian authorities. Nevertheless, considering the area of application, specifically the prevention and the fight against severe forms of criminality, the confidentiality is not left at the disposition of the solicited state – in our case the Romanian state – the optional character being left at the disposition of the soliciting state. As long as the Romanian authorities finds that there are no sufficient resources in order to maintain the confidentiality of the requests for cooperation and of the annexed documentation, is compelled to notify this situation to the foreign state, which will decide weather it will accept or not the situation.

The rule also applies, in a certain measure, in the inverse situation, where the Romanian state is the soliciting state. For example, in case of international judicial assistance, according to article 173 of the law no. 302/2004 as modified and amended by the law no. 224/2006, in virtue of the principle of the "specialization of a rogatory commission" *the soliciting Romanian authorities will only use the documentation and information received from the solicited state with the object to fulfill the object of the rogatory commission*.

As a practical application of the principle[245], the law prescribes that in the event of international frauds, the banks are subject to the obligation of confidentiality in what concerns the information transmitted towards the soliciting authorities, as well as the ongoing criminal investigation, as a condition of the international judicial assistance, form of the international judicial cooperation in criminal matters. In parallel we find this feature in the Romanian legislation concerning the criminal procedure, which stipulates that the criminal prosecution is secret, in order to create optimal conditions for the criminal investigation, and to allow the criminal trial to reach its purposes.

[245] According to article 187^{14} section II, chapter II title VII *Other dispositions concerning the judicial assistance, applicable in relation with the member states of the European Union* of the Law no. 302/2004 as modified and completed by the Law no. 224/2006.