

Some Obstacles to the Extradition of the Persons Wanted for Committing a Criminal Offence

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Abstract

Extradition is a form of international cooperation between states that involves the surrender of a person to a foreign state for the purpose of serving a prison sentence or conducting criminal proceedings for a criminal offence committed in that state. In order to allow extradition from one state to another, the content of the extradition request must first be examined, and it must be verified whether a bilateral agreement has been signed with the requesting state. The conditions for extradition are provided for in the criminal legislation of the states, specifically in the Code of Criminal Procedure. However, the European Convention on Extradition and the state's criminal-procedural legislation require the handing over of the requested person to outline several conditions that must be met beforehand for the requesting state's extradition request to be fulfilled. The extradition of a person from one state to another will not be allowed if there are several legal obstacles. The legal obstacles to extradition, as provided for in the extradition convention and in the criminal procedural legislation of the states, refer to the criminal offence committed and the person who must be extradited.

Keywords: extradition, obstacles, criminal offence, criminal procedure.

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1. Introduction

The topic of the paper on obstacles related to extradition aims to identify some of the obstacles to the extradition of persons committing criminal offences, requested by one state from another state. According to the European Convention on Extradition and the criminal legislation of national states, extradition is applied in several directions, including the execution of a final criminal decision, a sentence issued by the court of the requesting state, and the transfer of persons for the purpose of conducting criminal proceedings. Extradition will not be allowed when the requested person is a citizen of the requested state, if there is no agreement between the two states that provides otherwise extradition will not be allowed when the criminal offence for which the person is requested to be extradited is not provided for as a criminal offence in the legislation of the requested state; for criminal offences considered as political criminal offences, i.e., if the person is requested for political motives; for criminal offences considered as military criminal offences; when it is assessed that the requested person will be subject to discrimination on grounds of race, religion, nationality, etc.² Extradition shall not be permitted even in cases where the person has been tried in the requesting state for the criminal offence for which he is requested, regardless of

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² Jenny Huangfu Day. "The Enigma of a Taiping Fugitive: The Illusion of Justice and the 'Political Offence Exception' in Extradition from Hong Kong." *Law and History Review* 39, no. 3, 2021: 415–50. <https://doi.org/10.1017/S0738248021000109>.

whether the offence was committed outside its territory. Additionally, extradition shall not be permitted if the criminal offence has been included in the amnesty act or in cases where the criminal prosecution or punishment for the offence committed in the requesting state is time-barred.

2. Meaning of extradition

Extradition is the main form of legal assistance between states in the field of criminal law and helps in combating crime on an international scale. Extradition enables the perpetrator of a criminal offence to be punished even in cases where he flees from one state to another in order to avoid punishment.

Extradition is a traditional instrument of international cooperation for the surrender of a person from the state in which he is found to the other state that must judge him (known as 'cognisant extradition') or for the execution of a sentence imposed (known as 'executive extradition').³

According to the European Convention on Extradition, extradition means the mutual surrender, under certain conditions and rules, of persons prosecuted for a criminal offence or sought for the purpose of executing a judicial decision.⁴

Extradition is considered one of the oldest forms of international cooperation and consists of the surrender of perpetrators of criminal offences from one country to another under the legally established conditions and in predetermined legal procedures for the purpose of conducting criminal proceedings or serving a sentence.⁵

According to Zlatarić, extradition means the surrender of foreign persons or stateless persons to another state for the purpose of conducting criminal proceedings or serving a sentence for committing a criminal offence in the other state.⁶

While, according to Tupurkovski, the term 'extradition' refers to the process in which a state sends to another state, at its request, a person accused or convicted of committing a criminal offence against the laws of the requesting state, through which the requesting state has the authority to punish the requested person.⁷

According to Article 29 of the Constitution of the Republic of North Macedonia the extradition of aliens can be carried out only on the basis of a ratified international agreement and on the principle of reciprocity.

The transfer of a person to a foreign country to execute an imprisonment decision or the delivery of an act, which proves his proceedings for a criminal offence, can be made only by means of extradition, Article 488 of the Criminal Procedure Code of the Republic of Albania. From this definition, we distinguish two notions of extradition:⁸

- *The first* – when a person is surrendered due to the existence of a decision with imprisonment, it is called executive extradition.

- *The second* – when a person is surrendered based on an act that certifies his

³ Halim Islami, *Procedura Penale: komentar*, Botimet Morava, Tiranë, 2003, p. 655.

⁴ Ibid, p. 656.

⁵ Vlado Kambovski, *Kazneno pravo: poseben del*, Prosvetno delo AD, Skopje, 2004, p. 169.

⁶ Zoran Sulejmanov, *Megunarodna krivicnopravna pomos*, Skopje, 1999, p. 45.

⁷ Ibid.

⁸ Dorina Hoxha, Skënder Kaçupi, Maksim Haxhia, *E drejta penale: Pjesa e përgjithshme*, Jozef, Tirane, 2018, p. 127.

prosecution for a criminal offence, it is called procedural extradition.

In the theory of law, extradition is divided into two types according to the case:

- a) *active extradition* – extradition from abroad to the state that requests it, and
- b) *passive extradition* – extradition abroad to the other state from the place where the criminal offence was committed.⁹

3. Some of the obstacles to extradition

The Law on International Legal Cooperation regulates the procedures and conditions for cooperation in criminal matters between the Republic of Kosovo and other states. Various authors in the legal-criminal literature also refer to several obstacles to the extradition of persons wanted for committing criminal offences. Below, some of them will be addressed:

- Obstacles that refer to the perpetrator of the criminal offence
- Obstacles that refer to the type of criminal offence

3.1. Obstacles referring to the perpetrator of the criminal offence

According to Article 6 of the Law on International Cooperation of the Republic of Kosovo in personal issues, a person sought by another state for the purpose of criminal proceedings or for the enforcement of a sentence may be extradited from the Republic of Kosovo to that state under the conditions foreseen by the present law. According to this article, the following persons cannot be extradited against their will:

- Kosovo citizens, unless otherwise provided by an international agreement between the Republic of Kosovo and the requesting state or by international law, as per Article 35 paragraph 4 of the Constitution of the Republic of Kosovo. An international agreement may be concluded for the purpose of extraditing an individual;

- Persons who have been granted political asylum in the Republic of Kosovo;
- Foreigners who enjoy immunity of jurisdiction in the Republic of Kosovo, within the limits of international obligations assumed by the Republic of Kosovo.

In the Republic of North Macedonia, extradition of defendants and convicted persons is also requested and carried out in accordance with the provisions of the Law on International Cooperation in Criminal Matters, unless otherwise provided for by an international agreement ratified in accordance with the Constitution of the Republic of Macedonia or by a legal act regulating criminal proceedings in international courts whose jurisdiction has been accepted by the Republic of Macedonia. According to Article 66 of the Law on International Cooperation, the Minister of Justice issues a decision authorising or refusing extradition. He may decide to postpone the extradition because another criminal proceeding is being conducted against the foreigner or the foreigner is serving a sentence in the Republic of Macedonia.¹⁰

⁹ Ibid.

¹⁰ Ejup Sahiti, Ismail Zejneli, *E drejta e procedurës penale e Republikës së Maqedonisë*, South East European University, Tetove, 2017, p. 359.

3.2. Obstacles referring to the type of criminal offence

According to Article 8 of the Law on International Legal Cooperation in criminal cases extradition shall not be permitted for criminal offences fully committed in the territory of the Republic of Kosovo and may not be permitted for criminal offences partially committed in the territory of the Republic of Kosovo. If a criminal offence has been committed against a citizen of the Republic of Kosovo outside the territory of the Republic of Kosovo, extradition may be permitted on condition that national.

According to Article 66 of the Law on International Cooperation of the Republic of North Macedonia, the Minister of Justice shall not allow extradition of the person:¹¹

- when it comes to a political or military criminal offence;
- if there are serious reasons to doubt that he or she might be subjected to torture and other cruel, inhuman or degrading actions, including the death penalty.

3.2.1 Political criminal offence

Political criminal offenses are offenses directed *against the state and its organization* and functioning, as well as *against the political rights of citizens*.¹²

According to Article 14 of the Law on International Legal Cooperation of the Republic of Kosovo in criminal cases, extradition shall not be permitted:

- if the offence upon which the request is based is a political offence or an offence connected to a political offence;
- murder and attempted murder of the head of state or his or her family members;
- genocide, crimes against humanity, war crimes, and terrorism.

According to the Article 29 of the Constitution of the Republic of North Macedonia aliens cannot be extradited for political criminal offences. Acts of terrorism are not regarded as political criminal offences.

3.2.2. Military criminal offence

Military criminal offenses in some countries are incorporated into special laws. Thus, in the Republic of Albania, the Military Criminal Law defines military criminal offenses, as well as the penalties and other measures taken against the subjects who commit them. Military criminal offenses are divided into military crimes and military criminal offenses.¹³

According to Article 15 of the Law on International Legal Cooperation of the Republic of Kosovo extradition shall not be permitted for criminal offences under

¹¹ Ibid.

¹² Vlado Kambovski, Ismail Zejneli, *E drejta penale*, Universiteti i Evropës Juglindore, Skopje, 2018, p. 103. Also, see Sally Kennedy and Ian Warren. "Extraterritorial Offending, Extradition, and Australia's Case against Hew Griffiths." *International Journal of Comparative and Applied Criminal Justice* 47 (3), 2023: 299–315. Doi:10.1080/01924036.2021.2023026.

¹³ Article 1 of the Military Criminal Code of the Republic of Albania.

military law which are not criminal offences under ordinary criminal law. Also, according to Article 43, transfer of criminal proceedings shall not be accepted if there are circumstances that do not allow the initiation of criminal proceedings under national law.

3.2.4. Non-discrimination clause and human rights standards

The rule of law in terms of respecting and protecting human rights in accordance with international standards and domestic law is a concern of all democratic societies.¹⁴

International standards for the protection of human rights are directly applicable in Kosovo, with the most important international acts being incorporated into the Constitution.¹⁵

According to the Article 54 of the Constitution of the Republic of North Macedonia the restriction of freedoms and rights cannot discriminate on grounds of gender, race, colour of skin, language, religion, national or social origin, property or social status.

According to Article 17 of the Law on International Legal Cooperation of the Republic of Kosovo extradition shall not be permitted if:

- there are reasonable grounds to believe that the request for extradition has been made for the purpose of prosecuting or punishing the person because of his/her race, religion, gender, nationality, political opinions, ethnicity, language, disability, sexual orientation, association in any social group, or if the person's position in society may be prejudiced for any of these reasons.

- extradition shall not be permitted if there are reasonable grounds to believe that the person sought for extradition may be subjected to torture or to cruel, inhuman, or degrading treatment or punishment.

- extradition shall not be permitted if there are reasons to believe that the person will not be provided with the minimum guarantees for a fair trial as provided for by the Constitution of the Republic of Kosovo, in the requesting state.

- extradition sought for the enforcement of a sentence imposed by a judgment rendered in absentia shall be permitted only if the proceedings against the person respected the recognized minimum rights of defence of any person accused of committing a criminal offence. Extradition may also be permitted if the requesting state gives assurances considered sufficient to guarantee that the person sought has the right to a retrial in order to ensure the minimum rights of defence.

- extradition shall not be permitted if there are doubts that the person will be or has been tried or punished in the requesting state by an extraordinary or temporary court, unless the requesting state gives assurances considered sufficient to guarantee that the trial or a retrial will be carried out by a regular court in compliance with the law.

- extradition shall not be permitted for any other grounded reason which would account for a violation of the international law or other human rights standards.

¹⁴ Haxhi Gashi, *Komentar i Ligjit për barazi gjinore*, Prishtinë, 2017, p. 23.

¹⁵ Ibid, p. 24.

3.2.5. Death penalty

The death penalty is one of the oldest punishments.¹⁶ It appears in the first states and still exists today. Throughout its long history, this punishment has taken several forms and been executed in various ways.¹⁷ Its purpose has always been revenge against the perpetrator and the intimidation of the general public.

Many states in their legislation have provided for constitutional prohibitions which are focused precisely on harsh and brutal, unnecessary and inhuman punishments.¹⁸ Thus, *the Constitution* (Article 10) first proclaims the *inviolability of life*, and then provides for a *ban on the imposition* of the death penalty. It also (Article 11) proclaims the *inviolability of the physical and moral integrity* of a person and prohibits any form of torture, inhuman or cruel treatment or punishment. These constitutional principles are included in several provisions of the Criminal Code of Macedonia (such a system does not include the death penalty and corporal punishment, in the special part. In Article 142, torture is incriminated).

In the Constitution of the Republic of Kosovo also, Article 25 also states that every individual has the right to life and that the death penalty is prohibited. Extradition is not permitted for criminal offences punishable by death under the law of the requesting state, unless the requesting state provides guarantees that are considered sufficient that the death penalty will not be imposed or executed.¹⁹ Extradition may not be permitted if the offence on which the request is based is punishable under the law of the requesting state by life imprisonment or another lifelong penalty, or if the person sought has been sentenced to such a penalty and there is no review of the death penalty or sentence of imprisonment on application or *proprio motu* (on one's own initiative) after a period not exceeding twenty (20) years.

3.2.6. *Ne bis in idem* (not twice for the same)

No one shall be liable to be tried again for a criminal offence for which he has already been acquitted or convicted by a final judgement (*ne bis in idem – res judicata*) in accordance with the law and criminal procedure of a state. However, where there is evidence of new facts, the criminal proceedings may be reopened in accordance with the law. The Commission and the Court of Human Rights in Strasbourg interpret Article 6 broadly because it is of fundamental importance for the functioning of democracy.²⁰

Extradition shall not be permitted if a final judgment was passed by a national judicial authority against the person sought for the criminal offence or offences for which extradition is requested. Extradition may be permitted if national judicial authorities have decided not to commence or to terminate proceedings for the same criminal offence.²¹ Extradition shall not be permitted if a final judgment was passed by

¹⁶ Ragip Halili, *Penoilogjia*, Prishtinë, 2010, p. 84.

¹⁷ Ibid.

¹⁸ Vlado Kambovski, Ismail Zejneli, *op. cit.*, p. 45.

¹⁹ Article 16 of the Law on International Legal Cooperation of the Republic of Kosovo.

²⁰ Ejup Sahiti, Ismail Zejneli, *op. cit.*, 2017, p. 40.

²¹ Article 13 of the Law on International Legal Cooperation of the Republic of Kosovo.

the judicial authorities of a third state against the person sought for the criminal offence for which extradition is requested provided that an international agreement on mutual recognition and enforcement of criminal judgments between the Republic of Kosovo and that third state is in force.

4. Conclusion

Extradition from one state to another will not be permitted if there are legal obstacles related either to the nature of the criminal offence or to the circumstances of the case. However, when considering the conditions under which extradition may be granted or refused, it must be emphasised that extradition cannot be denied if the person — whether a foreign national or a citizen — is accused of genocide, war crimes, crimes against humanity, or other offences for which, under international law, the statute of limitations does not apply as established by the International Criminal Court.

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