

Review Article

The Extradition Law of Somalia (Current Problems)

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Abstract: Extradition supports criminal proceedings against fugitives as well as legal proceedings for execution of punishments imposed on such persons. However, extradition is not any part of them. Moreover, it is a specific procedure based on different principles. Extradition is both the most important and most difficult modality of international judicial cooperation in criminal matters. As a result, the legal framework for extradition proceedings has always been a serious challenge to lawmakers, especially in countries with outdated criminal legislation and weak criminal justice system, such as Somalia. This research paper describes the current situation and resorts to the comparative law approach, mainly. It aims at revealing the legal hurdles and gaps in the Somali extradition law for the purposes of creating a modern legal framework for extradition and eventually, turning Somalia into a reliable international partner in the common struggle of nations against crime.

Keywords: extradition, law, agreement, detention, refusal, speciality rule, sentenced persons transfer.

INTRODUCTION

Somalia has to overcome a lot of difficulties, nowadays. Fighting crime is one of them. Given the complexity and internationalization of criminal activities, such as organized crime, corruption and terrorism, Somali authorities cannot fight them alone. They need to efficiently cooperate with other countries, especially when it comes to finding, detaining and returning fugitive offenders to face justice and/or serve the punishments imposed on them. However, the measures against such persons shall be taken and enforced in compliance with the rule of law principle. Any wanted person enjoys certain rights. S/he is entitled to exercise them in extradition proceedings. In addition, the wanted person is protected *ex officio* by the judicial authorities of the country, requested for his/her extradition. No extradition shall be expected if the person might be exposed to any unacceptable danger in the requesting country. This requires from Somalia to create conditions of prosecution, trial and punishment of offenders in line with the international human rights standards. The compliance with them includes also respect for the rights of the persons who are wanted from Somalia. Their surrender shall be granted in modern extradition proceedings which are carried out in accordance with the rule of law principle.

I. The Essence of Extradition

A. Historically, extradition is the oldest form of international collaboration between countries, involving cooperation in the matters pertaining to crime control by exchanging fugitive offenders. Extradition involves a request by the competent authorities of one country to respective authorities of another for the surrender of a fugitive, found in their country, who is either a prosecuted person (accused) or has been convicted (sentenced) of a criminal offence in the requesting country [Bassiouni, 2014; Hedges, 2014; Shearer, I. A., 1970, and Бойцов, 2004].

By granting and executing the extradition request, the requested country surrenders the wanted foreign person who is, usually, not welcome there. In this regard, extradition resembles the domestic (unilateral) administrative procedure of *expulsion* of a foreigner. However, in contrast to expulsion, extradition benefits a specific foreign country. This is the requesting country which wants the surrender of the fugitive. Therefore, the extradition procedure is designed to ensure the carriage of efficient justice in the requesting country. If the extradition concludes successfully, the person is brought from to the judicial actors who shall prosecute and try him/her, and/or to the prison where s/he shall serve this punishment.

Quick Response Code



Journal homepage:

<http://www.easpublisher.com/easjehl/>

Article History

Received: 25.06.2018

Accepted: 14.06.2019

Published: 29.07.2019

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The requested country also benefits from the extradition if it concludes successfully. This country gets rid of someone who could be a potential source of future problems in its territory. Often, though, the requested country has nothing specific against the wanted person; this made him stay, for a longer or a shorter period of time, in its territory. Technically, that country has no legal grounds to deport or expel the person and therefore, has no need to get rid of him/her on the basis of the information obtained from the extradition request.

However, even if the requesting country has some grounds to deport or expel the person from its territory, including grounds from the information in the extradition request, the requesting country shall expect to directly obtain the surrender of the person through expulsion. Such a result may be achieved only if the other country carries out the so-called **disguised (contrived or fraud) extradition**. This sort of “extradition” is generally not encouraged and should not be granted and respectively, be expected by interested countries.

Disguised extradition always constitutes a gross violation of human rights standards. It deprives wanted persons of regular extradition proceedings and their possibility to exercise their specific procedural rights of defence, which may result in a decision for refusal of extradition. The wanted person's rights in extradition proceedings are, in any case, more efficient and useful than the rights in any deportation or expulsion procedure. The compliance with the rights of persons wanted for extradition necessitates priority of extradition procedures over other procedures. These other procedures shall give way to extradition. This is why expulsion is strongly discouraged in case of existing extradition proceedings [LAW, 2018 and Girginov, 2019].

Therefore, extradition serves justice, not only by supporting criminal and/or execution proceedings but also by complying with human rights standards. It is designed to guarantee as well the rights of the wanted person. At the same time, extradition law is not too lenient. The need for efficiency is also under consideration. This is why the launching of the procedures does not require any **prior summoning and refusal** of the person sought to attend the criminal or execution proceedings against him/her. It is sufficient that s/he is out of the interested country.

B. Interested countries do not always resort to extradition procedures if the wanted person is out of their territories. Extradition is a matter of discretion.

Extradition shall be considered as an option, whenever a prosecuted person (accused) or a convicted (sentenced) person is at large: s/he has been located abroad, or, at least, s/he has been under national search

and was not found within a reasonable period of time. In any case, an alleged or proven crime of a fugitive shall constitute an extraditable offence – see further.

At the same time, it must be taken into account that extradition is neither mandatory nor always practically justified. Thus, if the fugitive is a foreigner, his/her criminal offence committed is not significant (e. g. use of forged identity papers) and the country of his/her nationality also applies its penal law to the crime [e.g. Articles 6-8 of the Somali Penal Code], the efforts to obtain his/her extradition is not likely to be the best option. Instead, it might be more practical and realistic to achieve justice by referring the case to the country of his/her nationality, especially if there is an international agreement (multilateral convention or bilateral treaty) with it for transfer of criminal proceedings. Yet, even if the transfer of criminal proceedings is modality which is not provided for in any international agreement with the other country, it is still the lesser evil compared to the two other possible options: to patiently wait for the wanted foreigner to come back some day or to try to extradite him/her from a third country if s/he shows up there and the interested country's authorities are informed in time.

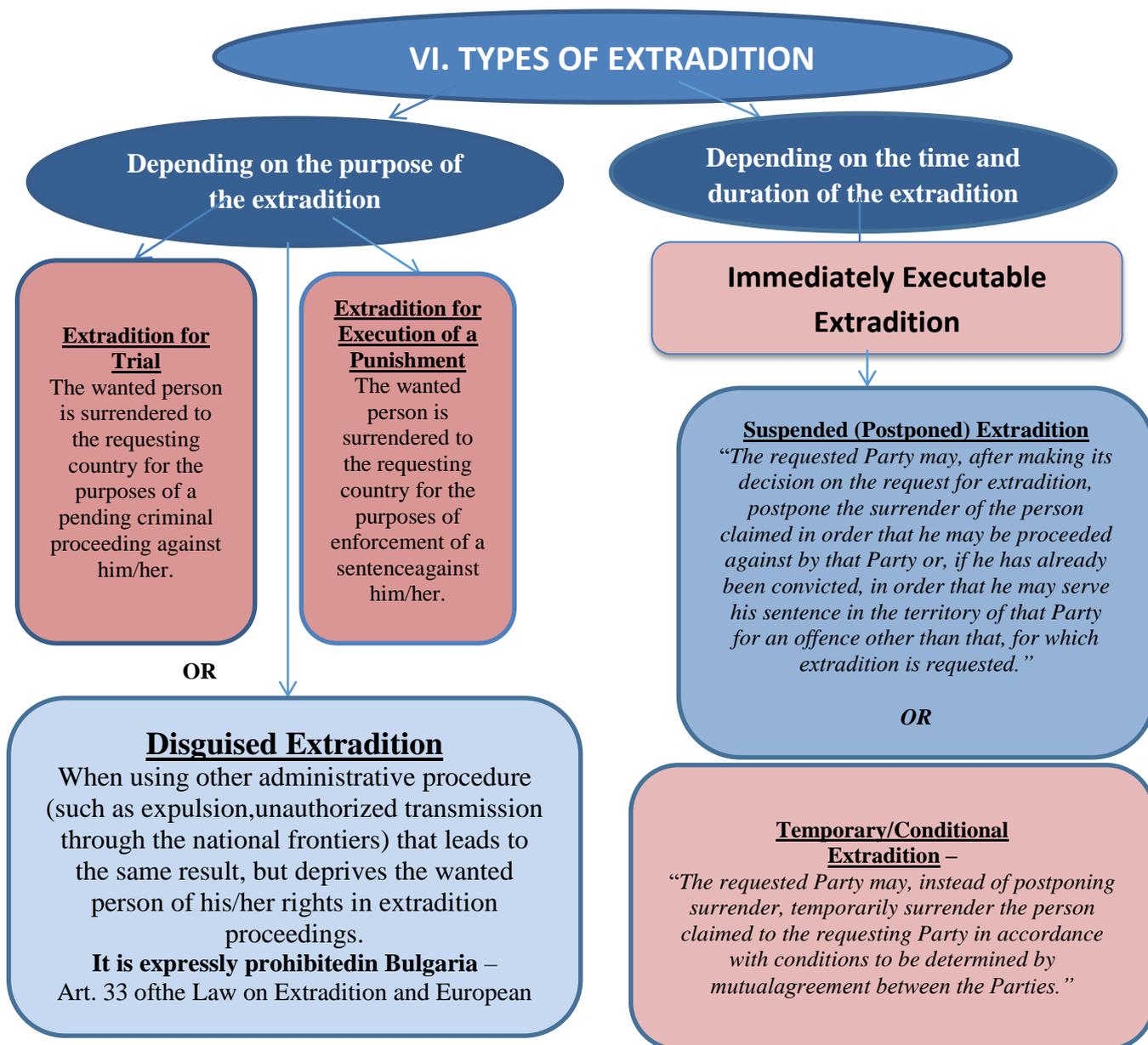
However, some countries may not be interested to transfer their criminal proceedings to another country because once the transfer is accomplished, they would be no longer competent to prosecute, try and punish the alleged offender for the same crime. Yet, there is a solution to this problem too. Thus, if a country desires to retain competence over the case, it should look for a bilateral treaty with the other country contemplating requests for the institution of criminal proceedings against the fugitive as a national of the requested country. If such a treaty exists, they can forward a request for the institution of criminal proceedings against the fugitive.

It follows that if a Somali national who has committed a crime to which a foreign country's penal law and the Penal Code of Somalia {PC} are applied simultaneously and this offender is hiding in the territory of Somalia from the judicial authorities of a foreign country, these authorities are not necessarily expected to request his/her extradition from Somalia. Instead, they are likely to request from their Somali counterparts to prosecute the person for the crime in question by taking over their already instituted criminal proceedings or by launching own Somali criminal proceedings.

Likewise, if the Somali national who is hiding in the territory of Somalia has already been sentenced to imprisonment abroad, the sentencing country is not necessarily expected to seek his/her extradition for the execution of the punishment imposed. Instead, the judicial authorities of a foreign country are likely to

request from their Somali counterparts to recognize and

enforce their criminal judgment against the person.



II. The Somali Legal Framework for Extradition

When it comes to extradition, the requested country's law is always applicable. There are no exceptions as in the case with other modalities of international judicial cooperation in criminal matters, e.g. the execution of letters rogatory which may be carried out, on mutual agreement, in accordance with the law of the requesting country. Hence, when Somalia is the country requested for extradition, the applicable law is the Somali extradition law: the domestic extradition law of Somalia (Articles 275.1 and 278-280 of the Somalia Criminal Procedure Code) and the international extradition law of Somalia consisting of the extradition agreements ratified by the competent Somali authorities. Such agreement is the 1983 Riyadh Arab Agreement for Judicial Cooperation {the Riyadh Convention}. Its Articles 38-57 directly govern

extradition. This basic legal instrument of the Arab world was ratified by the Democratic Republic of Somalia on the 21st of October 1985. The other Parties to the Riyadh Convention are as follows:

- 1- The State of Palestine (ratif. on the 28th of November 1983),
- 2- The Republic of Iraq (ratif. on the 16th of March 1984),
- 3- The Republic of Yemen:
 - The People's Democratic Republic of Yemen (on the 13th of April 1984) and
 - The Yemen Arab Republic (on the 11th of June 1984),
- 4- The Republic of Sudan (on the 26th of November 1984),
- 5- The Mauritanian Islamic Arab Republic (on the 17th of June 1985),
- 6- The Syrian Arab Republic (on the 30th of September

- 1985),
7- The Republic of Tunisia (on the 29th of October 1985),
8- The Hashemite Kingdom of Jordan on the 17th of January 1986,
9- The Kingdom of Morocco (on the 30th of March 1987),
10- The Great Socialist People's Libyan Arab Jamahiriya (the 6th of Jan 1988),
11- The United Arab Emirates (the 11th of May 1999),
12- The Sultanate of Oman (the 28th of July 1999),
13- Bahrain (the 23rd of July 2000),
14- The Kingdom of Saudi Arabia (the 11th of May 2000),
15- The Algerian People's Democratic Republic (the 20th of May 2001).

Somali law allows only treaty-based extradition from the country. Both Article 36 (2) of the provisional Constitution and Article 11.1 (b) of the PC stipulate that a fugitive “*may be extradited ... on the basis of an international treaty or convention which the Federal Republic of Somalia is a party to*”.

Such international agreement (multilateral or bilateral) between the requesting country and Somalia opens the way to the consideration of the extradition request and eventually, to the applicability of the domestic extradition law of Somalia. However, the rules of the agreement shall take precedence and thus, exclude the applicability of the domestic extradition law of Somalia. Only if no such rule exists for a specific issue, the respective provision(s) of the Criminal Procedure Code (Articles 278-280) shall apply—see Article 275.1 of the Criminal Procedure Code of Somalia {CPC}. As a result, the international extradition law of Somalia displays priority overrides domestic extradition law.

Often, hierarchy exists within the rules of the international extradition law as well. Such a hierarchy might be established when countries simultaneously have a multilateral extradition convention and a bilateral extradition agreement. Thus, Somalia may have also a bilateral extradition agreement with some party to the Riyadh Convention. This is why conflicts between the Convention and the bilateral treaty may occur. In such cases, if the Riyadh Convention precedes bilateral agreement, the provisions of the Convention shall take precedence. According to its Article 68, letter 'a', they „*shall be binding to all its contracting parties, and no two or more contracting parties may agree on whatsoever is in contravention of its provisions*”. Obviously, if the Parties deviate from the Riyadh Convention, the new agreement would violate them and be, therefore, invalid. However, pursuant to letter 'b' of the same Article, if the provisions of the Convention „*conflict with those of any previous special agreement, the text most effectual in extraditing persons facing charges or convicted shall apply*“. It means that the

rules which require less for granting the requested extradition are the applicable ones¹.

III. The Prerequisites to Grant Extradition to Another Country

The CPC of Somalia contains no rules on such prerequisites. It follows that even treaty-based extradition by Somalia would not be possible if the requesting country and Somalia are parties to a convention which allows extradition but refers on the issue of the prerequisites to the requested country's law. Such Conventions, for example, are the UN Convention against Transnational Organized Crime (see Article 16.7) and of the UN Convention against Corruption (see Article 44.8). To avoid situations, where an extradition agreement exists but Somalia can never extradite, the legal prerequisites for extradition should be expressly delineated in the Somali CPC.

In general, the prerequisites for extradition are divided into two groups: conditions for extradition (which must be fulfilled) and impediments to extradition or grounds for refusal (which must not occur).

1. There are three common conditions for extradition.

- The first one concerns the relations between the two countries: the requesting and the requested. Somalia would consider an incoming extradition request only if it has an extradition agreement with the requesting country; the agreement may regulate only extradition or covering other issues as well. Although a Civil Law (Latin) country, Somalia does not recognize any extra-agreement condition for extradition, incl. **reciprocity**.

Probably, the existing restriction to treaty-based extradition only comes from the reception of Article 26 (1) of the Italian Constitution. The provision reads: “*Extradition of a citizen may be granted only if it is expressly envisaged by international conventions*”. However, Italy is not an appropriate example for Somalia in this regard. This European country has a lot of extradition agreements with other countries and the position and capacity to negotiate, sign and ratify many more. Compared to Italy, Somalia has much fewer extradition agreements with other countries and is not likely to have many more soon. As a result, Somalia needs to rely on non-treaty based extradition for a long period of time.

¹Article 28 of the European Convention on Extradition is simpler. It reads: „*This Convention shall, in respect of those countries to which it applies, supersede the provisions of any bilateral treaties, conventions or agreements governing extradition between any two Contracting Parties. The Contracting Parties may conclude between themselves bilateral or multilateral agreements only in order to supplement the provisions of this Convention or to facilitate the application of the principles contained therein*“.

Now, Somalia, having almost no extradition agreements with other countries, can extradite only from those very few countries, such as Portugal and Romania, which do not require reciprocity as a condition to consider incoming extradition requests. Nevertheless, in turn, Somalia cannot extradite even to these countries as it has no treaty on extradition with any of them.

Unlike Portugal and Romania, most foreign countries do require reciprocity, at least, but Somalia cannot establish such relations with any of them. Reciprocity might have been invoked by a Somali action, if Somalia has already considered in the past, despite the absence of any international agreement, an extradition request of the country to which it turns now. However, Article 36 (1) of the provisional Constitution and Article 11 (1) of the PC prevent the Somali authorities from doing this. Subsidiarily, reciprocity is invocable by a declaration promising to the other country readiness to consider its future extradition requests, despite the absence of any international agreement. However, the promise of the Somali authorities would not be accepted by the other country as they cannot keep it. Article 36 (1) of the provisional Constitution and Article 11 (1) of the PC prohibits them from keeping their promise.

In turn, no foreign requesting country can rely on reciprocity with Somalia to obtain extradition from its authorities. Even if the foreign country has extradited to Somalia in the past or now promises to consider future extradition requests of Somalia, the Somali authorities have no legal grounds to consider its non-treaty based extradition request.

Obviously, it would be the lesser evil if the law of Somalia allows also not-treaty based extradition as it would open the way to cooperation with many foreign countries. This is why such a modification in Article 36 (1) of the provisional Constitution and Article 11 (1) of the PC is strongly recommended.

- The second common condition for extradition is the so-called *Dual Criminality* – see Article 40, letter “a” of the Riyadh Convention. It means that the offence for which extradition is being requested shall be a crime both under the law of Somalia as the requesting country and the requested country [Williams, 1991]. Somali domestic law requires the same; otherwise, no extradition is possible. As per Article 11.2 (b) of the PC, “*Extradition shall not be granted unless the act ... is a criminal offence under Somali law and the foreign law*”. It means that the offence, for which extradition is requested, constitutes a crime in both countries. Dual criminality is not, however, to be understood as necessarily requiring the equivalence of legal elements (indications) defining the criminal offence. Usually, it is sufficient if the conduct of

the prosecuted/punished person can be sanctioned with a criminal punishment in each of the two countries.

This is the key condition for extradition. It reflects the basic idea of extradition, namely: countries unite their efforts in the fight against crime because they experience common problems having to face the same criminal offences.

More often[as in Croatia, Germany, Sweden, etc.], the dual criminality condition is considered by the time of the decision on the extradition request. Hence, even if at the time of its perpetration the offence constituted a crime solely under the law of the requesting country, extradition may, nevertheless, be granted if until passing the decision the requested country also criminalizes the perpetrated conduct. This is logical, but there are also countries [as the Czech Republic, Denmark and the UK] which require that the conduct is a crime also under their laws all the time between its commission of the offence and the decision on the extradition request. In such countries, the understanding of the legality principle overwhelms the procedural nature of extradition. Yet, when another country needs to turn to them, it must take into account their view on the time of the dual criminality.

Dual criminality *per se* is not sufficient. Extradition shall be granted only in respect of criminal offences which are punishable under the laws of the requesting country and of the requested one by a punishment exceeding a specific threshold. Thus, Article 40, letter “a” of the Riyadh Convention requires that the crime in respect of which extradition is requested should carry a maximum imprisonment punishment of one year, at least, or more severe punishment. Where a conviction has occurred, the imprisonment punishment awarded must have been for a period of, at least, a year, according to Article 40, letter “c” of the aforementioned Convention.

- The third common condition for extradition relates to the jurisdictions of the two countries. This condition is two-folded. It requires, on the one hand, that the national criminal law of the requesting country is applicable to the offence for which extradition is being requested. Otherwise, extradition is pointless and shall be rejected because the requesting country's authorities cannot legally prosecute, try or/and punish the wanted person. On the other hand, the condition requires that the criminal law of the requested country is, basically, not applicable to the offence for which the extradition is requested. Otherwise, the extradition has to be: (i) either mandatorily rejected, if the other country's judiciary has already decided the case: (a) by rendering a final judgement (*ne bis in idem* principle) or (b) by discontinuing the criminal proceedings for the offence [both are mandatory grounds for refusal],

(ii) or expectedly rejected as by necessarily applying its own law the other country's judiciary would take over the responsibility to resolve the case [a mandatory or, at least, an optional ground for refusal].

Thus, everywhere there is a rule, such as Article 41, letter "d" of the Riyadh Convention, prescribing that **extradition shall not be granted** if any final judgment (incl. acquittal) has been passed by the competent authorities of the requested country upon the person claimed in respect of the criminal offence or offences for which extradition is requested. It is also noteworthy that, in addition, Article 41, letter "h". ii of the Riyadh Convention recognizes the same legal effect also for any judgment that "*had been passed in respect of such crime in the territory of a third contracting party*". In view of thereof, no new judgment for the same crime shall be passed upon the wanted person, even in the requesting country.

When it comes to pending criminal proceedings (suspended temporarily or active) against the same person over the same criminal offence(s), then different options might be faced. Thus, where there is an applicable rule (either in an international agreement or in the domestic extradition law of the requested country) like that of Article 41, letter "h". I of the Riyadh Convention or Article 358.3. I of the Iraqi CPC, **extradition is also mandatorily refused** if the competent authorities of the requested country are proceeding against the wanted person in respect of the same criminal offence or offences.

Finally, if the crime in respect of which extradition is being sought has been committed in the requested country's territory (soil) against the same person for the same criminal offence(s) **extradition shall or may not be granted** even without any criminal proceedings, pending or concluded, at all. Under Article 41, letter "c". I of the Riyadh Convention, this is a mandatory ground to refuse extradition.

2. There are also some other typical grounds to refuse extradition; they are *mandatory*, in general.

- Mandatory grounds related to the nature of the offence for which the extradition is requested: if the requested country considers this offence political, military or fiscal, it shall refuse extradition. It's worth remembering that terrorist acts, though committed with a political purpose and considered political crimes under domestic criminal law, are never regarded as such offences under extradition law; likewise, the war crimes are never regarded as military offences under extradition law.

Thus, in accordance with Article 41.1 [Crimes not subject to extradition], letters "a" and "b" of the Riyadh Convention, "*No extradition is carried out in the following cases: (a) if the crime for which*

extradition is requested is considered by the laws of the requested party as a crime of political nature, (b) if the crime for which extradition is requested is limited to breach of military duties...". According to Article 8.3 of the Somali PC political is "any crime actuated, in whole or in part, by political motives".

At the same time, Article 41.2 of the Riyadh Convention stipulates that "*In the application of the provisions of this Agreement, the following crimes, even when they have a political purpose, shall not be considered crimes of a political nature in accordance with Paragraph (a) of this Article:(1) Assault on kings and presidents of the contracting parties or their wives or their ascendants or descendants;(2) Assault on heirs apparent or vice-presidents of the contracting parties;(3) Murder and robbery committed against individuals, authorities, or means of transport and communications*".

- There are mandatory grounds for refusal related to the legal consequences of the offence for which the extradition is requested: if by the time of the decision they have been terminated due to a lapse of time (expiry of the statute of limitations period), amnesty or pardon, the requested country shall refuse extradition.

Thus, in accordance with Article 41.1, letter "e" of the Riyadh Convention, extradition shall not be granted when the person claimed has, according to the law of the requesting Party, become immune by reason of lapse of time from prosecution or punishment. Furthermore, pursuant to Article 41.1, letter "g" of the same Convention, extradition shall not be granted for an offence in respect of which amnesty has been passed in the requesting Party.

- There are also some mandatory grounds for refusal related to the possible treatment of the wanted person in the requesting country: if the requested country establishes that (a) the person may be denied fair trial or (b) may be subject to inhuman punishment or treatment outside the criminal proceedings there, it shall also refuse extradition.
- a. Somalia is a Party to the 1976 UN International Covenant on Civil and Political Rights (accession on 24 Jan 1990). As any other Party it is obliged by Article 14 of the Covenant to reject any extradition request (even in respect of an ordinary criminal offence) whenever their competent authorities find any substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that person's position may be prejudiced for any of these reasons. The obligation is applicable not only to relations with other Parties of the Covenant but also to third countries as well. The UN Human Rights Committee

also noted that ‘if a state party extradites a person ..., and if, as a result, there is a real risk that his or her rights under the Covenant will be violated in another jurisdiction, the State party may be in violation of the Covenant’ [Communication No. 469/1991, UN Doc: CCPR/C/49/D/469/1991, paragraph 14.2].

- b. Article 3 (1), Item 3 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (Somalia accessed it on 24 Jan 1990) expressly forbids authorities of requested Parties to the Convention from “extraditing a person to another state where there are substantial grounds for believing he would be in danger of being subjected to torture”, regardless of whether the requesting country is also a Party to this Convention. This is fully in line with Article 20 (ii) of the 1990 Cairo Declaration on Human Rights in Islam which expressly prohibits torture.

The death penalty is the most serious one among these grounds. The problem with it occurs when the extradition is requested for a crime which carries the death penalty only under the law of the requesting country. The requested country's law may not provide for the death penalty either because it has been abolished there, in total, or because, as it might be the case with Somalia, its law prescribes it only for the commission of other crimes. As the crime does not carry the same punishment (the death penalty), Somalia as the requested country should require assurances that the death penalty shall not be imposed or, if already imposed and the extradition is for its execution, that the death penalty shall not be executed.

The assurances are individual (diplomatic) and normative (legislative). The individual assurance is given on an *ad hoc* basis by an authorized body/official of the requesting country. Such assurance is provided for in Article 37 of the 2011 Legal Assistance Agreement on Civil and Criminal Matters between Bosnia and Herzegovina and Iran. This Article postulates that if the legislation of the requesting Party prescribes death penalty for the offence for which the extradition is requested, whereas the legislation of the requested Party does not prescribe such a penalty or in that Party the death penalty is not executed, the extradition shall be permitted provided solely that the requesting Party provides the assurances that the death penalty shall not be executed.

The normative assurance seems, in any case, more reliable. For example, there may be a provision in the law of the requesting country that capital punishment shall not be imposed, and if already imposed shall not be put into effect with regard to a person extradited by a foreign country under such condition. In such a case, the capital punishment stipulated in the law or imposed shall be replaced by 30 years imprisonment. Before the abolition of the death penalty, Bulgaria had such a provision – Article 38 (3) of the Bulgarian CC [repealed]. When requested in respect of a crime which carries the death penalty only in the requestion country, Somalia should make sure that the described mechanism of eliminating the death penalty really exists. Moreover, such a mechanism of eliminating the death penalty in extradition cases might be recommended to Somalia as well. Its elimination is the lesser evil compared to letting the person go free abroad and eventually, work against the Somali authorities.

Extradition – basic concepts (nationality of the wanted person) Common Law Countries –vs– Civil Law Countries

Criteria for comparison	Common Law	Civil Law
Extraterritorial applicability of substantive criminal law	No	Yes
Extradition of own nationals, especially those who have committed criminal offences abroad	Yes	No
Some evidence in support of the accusation	Yes	No
The regular necessity of court proceedings	Yes	No
Extra-treaty ground for consideration of an incoming extradition request	The requesting country is a designated one or receives case-by-case permission	Reciprocity with the requesting country

Thus, there are two alternative national approaches in respect of the issue of nationality. While traditionally Common Law countries do not restrict the extradition of their own nationals (partly on the grounds that they are not always prepared to exercise jurisdiction over such nationals for offences committed outside their respective territories), countries of the Civil Law tradition have adopted a different view by asserting extraterritorial jurisdiction over their own nationals, so if nationals are not extradited (because of constitutional or policy prohibitions) they may be tried for extraterritorial offences.

However, when it comes to the Somali nationality of the person wanted for extradition from Somalia, an interesting inversion between the Federation level and Somaliland exists. Although the Federation follows the civil law (Latin) tradition the Somali nationality does not constitute any impediment to the extradition of the person. At the same time, although Somaliland follows the common law tradition such a nationality impedes extradition of the person to another country. According to Article 35 (2) of the Somaliland Constitution, “*The extradition of a Somaliland citizen to another country is prohibited*”.

III. The First Step of Extradition

A. Usually, the whereabouts of the wanted person are not known. This is why the interested country starts with the issuance and circulation of a petition/application for international search and provisional detention (sometimes, called "INTERNATIONAL ARREST WARRANT") of the wanted person. Most often, the petition is circulated worldwide through 'Interpol' in the form of 'Red Notice'.

This petition is not directly enforceable abroad, i.e. it is not an order for arrest. It is a request for **provisional detention** of the wanted person if found anywhere. This specific request is only a prerequisite for the issuance of an order for the detention of the person in the country where s/he is located. Such a "warrant" is not comparable to the European Arrest Warrant (EAW) either. The EAW is used within the European Union [EU]. It is issuable in a given EU country and enforceable in other EU countries defined, in this context, as the "executing countries".

The petition in question must contain all the required information as there may be no time for a second chance. The following data should be included: the wanted person's nationality, date of birth, place of birth, passport number, physical description (race, height, weight, identifying features, photographic evidence, fingerprints etc.). The crime of the wanted person and his/her participation in it must be described together with the punishment which it carries or has been imposed for its commission.

The time and the place of the commission of the criminal offence should be clearly stated. The other country is not likely to detain the person if and until it hesitates over *the time* of the commission of the crime. That country needs the time of the commission to be able to determine that lapse of time (a mandatory ground for refusal) has not occurred under the requesting country's law. The other country is not likely to detain the person either, if and until it hesitates over *the place* of commission. That country needs the place of the commission to be able to determine that, at least, the offence has not been committed in its own territory (again, a mandatory ground for refusal). These two indications are expressly required by Article 43 (1) of the Riyadh Convention.

Finally, the petition shall indicate the existence of a detention order or criminal judgment in the interested country and contain an express statement that an extradition request will be forwarded on time to the country which arrests the wanted person.

B. If Somalia finds such a person in its territory, it is expected to provisionally detain him/her. Pursuant to Article 279 (2) of the CPC, the President of the Court of Appeal shall order the detention in accordance with normal procedure. The detention is

provisional, aiming solely at securing the presence of the person until the arrival of the request for his/her extradition. The detention lasts: [a] 60 days from the date of the arrest, where the request for extradition was made by an African State; or [b] 90 days from the date of the arrest, where the request for extradition was made by a State outside Africa. Thus, the last day of the 60/90 days period marks the deadline for the arrival of the extradition request. If the Minister of Grace and Justice has not received it until the expiry of the deadline this person shall be released.

However, the period of provisional detention may be extended, at the request of the interested country once and for a period not exceeding one month. Such extension may be granted by the Supreme Court of Somalia, upon proposal by the Minister of Grace and Justice.

C. Foreign countries are not expected to avoid resorting to *the petition (application) for the international search and provisional detention* of the person and instead, send the extradition request directly.

The extradition process is always expected to begin with the issuance and worldwide circulation of a petition for the international search and provisional detention of the fugitive as this detention is much more efficient and safer than the full detention. The petition in question is necessary even when the country of his/her residence is known. Due to practical time constraints, the petitions of this kind, unlike the extradition request, need not be in any hard copy and sent through official channels (a formal written petition might otherwise take at least a week to reach the other country). Instead, the petition in question reaches the country where the wanted fugitive resides within no more than 24 hours. This helps to prevent his/her escape to a third country.

VI. The Extradition Request

A. Neither the petition for international search and provisional detention nor the provisional detention order predetermines the subject of the official extradition request. Extradition may be requested and granted not only in respect of the crime(s) cited in the petition but also in respect of other crimes. Therefore, neither the petition nor the provisional detention order is binding.

Extradition from Somalia is treaty-based only. This is why the rules on incoming extradition requests should mainly be sought in the respective extradition agreement with the requesting country. The most important extradition agreement for Somalia is the Riyadh Convention, Part VI. Article 42 [Method of submitting extradition requests and enclosures] of the Convention prescribes that the extradition request shall be submitted in writing by the competent authority of the requesting party to the competent authority of the requested party. In Somalia, this is the President of the

Court of Appeal within whose jurisdiction such person is found - Article 379 (1) of the CPC.

Any extradition request shall be accompanied by the following:

(a) A detailed statement of the identity of the individual to be extradited, his description, nationality and photograph if possible.

(b) A writ of arrest for the individual to be extradited or any other document having the same force issued by the competent authorities, or the original conviction made in accordance with the modes laid down by the law of the requesting Party, or an official copy thereof duly certified by the competent authority of the requesting Party.

(c) A submission containing the date and place of the acts for which extradition is requested, their characterization and the legal provisions applicable thereto, as well as a certified copy of such provisions, and a statement from the investigating authority setting forth the actual evidence against the person whose extradition is requested².

After the delivery of the official request for extradition with all supporting documents, the wanted person is put under **full detention** which is not limited in time. Thereafter, some additional information may be required. As per Article 45 [Supplementary explanations] of the Riyadh Convention, if Somalia as the requested Party finds it necessary to obtain supplementary explanations to verify that the provisions of the Convention on extradition are complied with, it shall notify the requesting Party before it rejects its request. Somalia may set a deadline for receiving the explanations.

B. Pursuant to Articles 279.1 and 280 of the CPC, the extradition of an accused or convicted person to a foreign country may be granted by a favourable decision of the President of the Court of Appeal, having heard the Attorney General and the person to be extradited. An order of extradition may be appealed against to the Supreme Court both by the accused or convicted person and by the Attorney General.

If the President of the Court of Appeal decides that extradition shall not be granted, he shall order that the wanted (accused or convicted) person, if/ he is under arrest, be released immediately. Where, instead, the President of the Court of Appeal decides that extradition shall be granted, the wanted person, if

²Most of the Civil Law countries, however, do not require statement of any evidence (let alone, evidence itself) of the crime for which the extradition is sought. When further developing its domestic extradition law Somalia as a Civil Law country might be advised against requiring such statement of collected evidence. See also Article 12 of the European Convention on Extradition.

necessary, shall be placed at the disposal of the Authority which made the request for extradition.

Extradition shall be postponed (suspended) if the person to be extradited has to be tried in, or has to serve a sentence in the Somali Republic unless otherwise decided by the President of the Court of Appeal.

C. Lastly, according to Article 278 (2) of the CPC, the extradition shall always be made subject to the condition that the person to be extradited shall not be tried for a different criminal offence [the Rule of Speciality], nor be subject to different punishment, other than those for which extradition was offered or granted. The Minister of Grace and Justice may also make the offer or grant of extradition subject to any conditions which he shall deem fit and proper.

The problem is that, as in the case with the exclusion of the death penalty, such conditions do not produce the desired result unless guaranteed by the law of the requesting country. Thus, if the law of that country does not contain the rule of speciality, its judicial authorities can hardly be restricted against prosecuting, trying and/or punishing the extraditee for a crime which is different from the one for which the extradition was granted. Therefore, the President of the Court of Appeal and the Minister of Grace and Justice should make sure in advance that the rule of speciality is contemplated in the extradition law (domestic or international) of the requesting country.

VI. The End of the Extradition Proceedings

The requesting country's authorities are notified of the decision of their request for extradition. If the extradition is granted by the judiciary, usually, political approval for the finalization of the procedure is needed, e.g. by the Minister of Justice of the requested country. Without such approval, the wanted person is not surrendered.

A. If the execution of the granted extradition is not postponed for the completion of legal procedures against the person in the requested country for other offences³, the two countries shall agree on the time of

³ Also, as per Article 58 (2) of the Romanian Law on international judicial cooperation in criminal matters, the surrender may be postponed when: (a) it is found, based on a medical forensics appraisal, that the extradited person is suffering from a severe illness rendering impossible immediate surrender. In this case, surrender shall be postponed until the health of the extradited person improves; (b) the extradited person is pregnant or has an infant less than one year old. In this case, surrender is postponed until the case, having determined the postponement ceases, making surrender possible; (c) for special circumstances, immediate surrender would entail severe consequences for the extradited person or their family. In this case, surrender may be postponed for no more than 3 months and only once.

his/her surrender. Unlike most foreign countries, Somalia has no domestic rules on the surrender of extraditees to requesting countries. This is why it is good to know that according to the laws and practice of other countries, the act takes place in the territory of the requested country, usually. If no representative of the requesting country comes within on the day agreed on, the person is likely to be released immediately (e.g. Article 502, para. 3 of the Belorussian CPC), in 15 days extensible up to 30 days (e.g. Article 499.3 of the Albanian PC and Article 708, para. 5 of the Italian CPC) or in 30 days (e.g. Article 26, para. 4 of the Bulgarian Law on Extradition...) and never surrendered in relation to the same decision for his/her extradition. Certainly, in cases of *'force majeure'* that prevents the surrender or taking-over of the extraditee, the competent authorities of the two countries shall agree upon a new date of surrender, e.g. Article 57 (6) of the Romanian Law of International Judicial Cooperation in Criminal Matters.

Finally, according to Article 48.3 of the Riyadh Convention, the person must be taken over no later than 30 days after the appointed date. Otherwise, s/he must be released and cannot be surrendered later for the same offence. Yet, an individual agreement between the two countries on some extension of the period beyond 30 days is not ruled out.

B. After the escort and arrival of the extraditee in the requesting country, s/he shall be subject to the Rule of Speciality, regardless of whether the competent court in the requested country or its Ministry of Justice have required this [Bernacchi, 1992]. Thus, if prior to his/her surrender the extraditee had committed other criminal offences, for which extradition was not granted, s/he cannot be prosecuted, tried and/or punished. The extraditee obtains procedural immunity for all such offences. S/he may be prosecuted, tried and punished for his/her criminal offences committed only after his/her arrival.

Obviously, the extradition is not solely a physical surrender of a fugitive. It is also legal permission for penal repression against him in the country to which the fugitive was surrendered. It must be borne in mind that the violation of the Speciality Rule is not only a matter of disrespect to the requested country. Such a violation (proceeding against the extraditee for another alleged offence) is also likely to result in the production of **invalid evidence** which shall be rejected by the court, regardless of whether the evidence about other crimes is collected in the territory of the prosecuting authorities or obtained from abroad.

The Rule of Speciality, however, is the general rule only. There are exceptions to it. For example, by virtue of Article 52 of the Riyadh Convention, the Rule of Speciality does not apply in the following situations:

(a) If the person extradited had the freedom and the means to leave the territory of the requesting party/he was extradited to and did not do so within 30 days of his/her final release, or had departed and voluntarily returned to it.

(b) If the requested party which had extradited the person consents. To obtain its consent the requesting party shall send a new request to it with a judicial record containing the statements of the extradited person concerning the requested extension of his/her extradition.

In addition, another restriction benefiting the extraditee exists. According to Article 53 of the Riyadh Convention, the requesting party is prohibited from surrendering the extraditee to a third country unless in the exceptional situations under the previous Article of the Convention.

VII. The Conviction Extradition and the Transfer of Sentenced Persons Compared

Recently, the Iranian Islamic Republic News Agency announced that on 13 February 2019 Iran extradited ten Somalis to their homeland. They were defined as Somali nationals who had been convicted in Iranian courts for piracy [IRNA, 2019]. Actually, the 10 Somalis were transferred to Somalia. No extradition for the execution of the punishment imposed (conviction extradition) took place.

It is a common mistake to take the one modality of international judicial cooperation for the other. This is because both involve the transportation of sentenced detainees from one country to another.

However, unlike the conviction extradition, the transfer of a sentenced person does not bring him/her to the punishment imposed on him/her in another country. Therefore, the transfer is not carried out for the purpose of finalizing justice since, as in the Iranian case, the person was in the sentencing country, being available for the full execution of the punishment. Thereafter, s/he is repatriated to the country of his/her nationality together with the punishment imposed on him/her [Handbook, 2012]. By contrast, extradition law does require that the surrendered person is a national of the receiving country. Usually, it is sufficient that the person is not a person of the surrendering country.

The transportation of the sentenced person together with the transfer of punishment to his/her country of nationality is based on the presumption that it would be better if the person serves the punishment there rather than in the surrendering country, even though the court of the latter has imposed the punishment. Thus, the sentenced person and the punishment imposed on him/her are initially together. Moreover, the person has already begun to serve his/her punishment; s/he is already a prisoner by the time

his/her transfer procedure commences. That is why his/her transfer does not basically assist justice nor punishment execution, as the punishment is executable even without the transfer. The transfer is solely changing the venue of the execution, i.e. from the country, where the person was sentenced and imprisoned, to the country of his/her nationality. The basic result is that the country of nationality is effectively taking care of the transferred person.

Furthermore, because the transfer in question is generally for the benefit of the imprisoned person, it usually requires his/her consent. However, if the person is transferred, s/he might be prosecuted, tried and/or punished without restrictions of any kind in his/her home country. Hence, whenever an imprisoned person agrees to be transferred, it would never be necessary for his/her home country to additionally seek his/her extradition as it would entail the Rule of Speciality.

It is noteworthy that in cases of transfer a restrictive rule in favour of the surrendered person applies as well. However, this is a rule of the opposite content. The transferee may be prosecuted, tried and punished for all crimes in the country, which has accepted him/her, but not for the one in respect of which s/he was surrendered. This is because the transferee has been punished in the surrendering country, the judgment against him/her was recognized and enforced by the accepting country, impeding in this way any criminal proceedings and judgment for the same crime in that country (the *ne bis in idem* principle).

Because the transferee is not protected against prosecution, trial and/or punishment for other crimes, it follows that if an imprisoned foreign national agrees to be transferred to this country and his/her transfer actually takes place, it is not reasonable (even if possible in theory) to file a parallel request for his/her extradition for any criminal offence: neither in respect of the one for which s/he has already been punished in the surrendering country, nor in respect of any other crime. Such a request could seem pointless and redundant. By agreeing to serve his/her sentence in the home country, its national imprisoned abroad has accepted all the risks of being prosecuted, tried and/or punished therefor other offences without any legal restrictions. Such a situation might usually occur when the person mistakenly estimates that the crime(s) that s/he has committed, is/are not and will not be discovered.

Moreover, the combination of transfer in respect of a given criminal offence and extradition in respect of another is unjustified as it might create unexpected difficulties to prosecuting the surrendered person in cases of newly discovered evidence for the crimes that s/he committed in the past, prior to the surrender. Such a combination of the two modalities of international judicial cooperation is likely to raise a dispute over the applicability of the Speciality Rule which emanates from each and every granted extradition. The prosecuting authority should prove that the legal status of the transferee (which does not contain the speciality rule) is stronger than the legal status of the extraditee (which contains that rule) to eventually exclude the applicability of the Speciality Rule with regard to any other criminal offence committed by the extraditee prior to his/her surrender. In this way, the prosecuting authority can open a way to initiate investigations and prosecutions against the surrendered person for other crimes that s/he might have committed.

Lastly, the transferees have not only the status of sentenced persons; they are already prisoners as well. There is no other ground to keep sentenced persons in detention. In contrast to transferees, who are surrendered to the countries of their nationalities to serve the rest of the imprisonment punishment imposed on them, the extraditees have not yet served any punishment at all. Each of them has only the capacity of a detainee for the extradition proceedings in the requested country which would surrender him/her to the requesting one in case of positive development of the proceedings. Therefore, the conviction extraditees, in particular, are sentenced persons and future prisoners only: they are extradited to become prisoners in the requesting country. This is why the conviction extradition implies the existence of sentenced persons while the transfer refers to prisoners.

In practice, the following situation may often occur: a detained person, who is a national of a given country, is transported to it from another country and put in prison. How to determine whether the person is extradited for the execution of punishment imposed on him/her or is being transferred as a sentenced person (prisoner)? The easiest and safest way to find the correct answer is to clarify which country's criminal judgment is being executed. Thus, if the accepting country has passed the judgment, then it is the conviction extradition; however, if the surrendering country's judgment is executed, then the transfer of a sentenced person (prisoner) has taken place.

Here is the full picture of different peculiarities of the two modalities of international judicial cooperation. This picture enables to clearly distinguish between them:

Extradition – vs – International Transfer of Sentenced Persons (Prisoners)

COMMON FEATURES	A detained person is surrendered from one country to another in respect of a crime that s/he has committed	
	Dual criminality required	
	Generally, the person is a foreigner in the surrendering country	
	The accepting country is able to enforce the legal consequences of the crime	
DIFFERENCES	Extradition	Transfer
	The surrendered person is not necessarily a convict	The surrendered person is always a convict
	When the person is a convict, s/he has not become a prisoner yet	The person has already become a prisoner
	The person is not necessarily surrendered to the country of his/her nationality	The person is surrendered to the country of his/her nationality (repatriated)
	Most often, the law of the surrendering country is not applicable to the crime committed by the person	The law of the surrendering country is always applicable to the crime committed by the person
	The law of the accepting country must be applicable to the crime committed by the person	The law of the accepting country is not necessarily applicable to the crime committed by the person
	No transfer of competence together with the surrendered person	Transfer of competence (over the punishment execution) together with the surrendered person
	The consent of the person is not needed	The consent of the person is needed
	No Recognition and Enforcement of any Foreign Judgment Takes Place	Recognition and Enforcement of a Foreign Judgment Takes Place
	The accepting country is bound (restricted) by the Speciality Rule	The accepting country is not bound by any Speciality Rule
	Justice may not be done without it, as it brings the person to the trial and/or punishment on him/her	Justice may be done without it, as the person has been available for both, trial and punishment

CONCLUSION

The Somali legal framework for extradition is outdated. It does not enable normal extradition relations with foreign countries. This is why, in practice, Somalia neither extradites nor obtains extradition from abroad. Apart from the skills required for successful extradition, this country is badly in need of good and understandable law regulating extradition proceedings. Such a law should, first of all, allow non-treaty based extradition. To this end, Article 36 (1) of the provisional Constitution of Somalia must be modified, accordingly.

Even if non-treaty based extradition is allowed, Somalia should not desist from becoming a party to bilateral and multilateral extradition agreements. Obviously, the Riyadh Convention is not sufficient. Probably, the most appropriate and recommendable such agreements, containing rules on extradition, are the UN Convention against Transnational Organized Crime and of the UN Convention against Corruption. The Somali authorities have already expressed the laudable intention to accede to them soon.

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