INTERNATIONAL LETTER ROGATORY IN THE ROMANIAN CRIMINAL LAW

PhD Bogdan MICU∗

Abstract:
The present study deals with the international judicial cooperation in criminal matters, particularly with the letter rogatory as a form of mutual assistance between the states. The study indicates that the cooperation instrument named “letter rogatory” observes the basic principles of judicial cooperation but also includes particularities derived from its specifics. Particularly, the international letter rogatory is regulated differently depending on the legal instruments ratified by the respective state.

Keywords: letter rogatory; international letter rogatory; international judicial cooperation in criminal matters; international judicial assistance in criminal matters

1. International letter rogatory

In nowadays reality, the steps to prevent and fight against the phenomenon of very high crime can no longer be confined within the territorial boundaries of one state. Confronted with the internationalization of crime, states find themselves forced to provide mutual assistance in order to provide an effective response and avoid the situations of circumvention of criminal consequences of committed crimes. With regard to this challenge, Romania could not remain outside the international efforts, particularly given that Romania is a Member State of the European Union, therefore it adopted Law no. 302/2004 on international judicial cooperation in criminal matters.1 According to article 1 of Law no. 302/2004, the regulated forms of international cooperation in criminal matters are the following: a) extradition; b) transfer based on an European Arrest Warrant; c) transfer of procedures in criminal matters; d) recognition and enforcement of decisions; e) transfer of sentenced persons; f) judicial assistance in criminal matters; g) other forms of international judicial cooperation in criminal matters. These other forms of international cooperation include: a) international letter rogatory; b) hearings performed by videoconference; c) appearances in court in the requesting state of

∗ E-mail: bogdan.micu@mnpartners.ro, Associated professor, Law Faculty, Nicolae Titulescu University, Bucharest Romania.

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witnesses, experts and persons being prosecuted; d) notification of judicial documents prepared or submitted in a criminal trial; e) criminal records; f) other forms of judicial assistance.2

The present study shall focus on the international letter rogatory which, according to provisions of article 173 of Law no. 302/2004, is that form of judicial assistance that consists in the authorization granted by one judicial authority in one state to another authority in another state, authorized to perform, in its place and behalf, some judicial activities related to a particular criminal trial”.

International judicial assistance in criminal matters has a broad sense and a restricted sense.3 If the broad sense it is considered synonymous with the international judicial cooperation in criminal matters, including all of its forms4, the restricted sense defines the international judicial assistance as that form of international judicial cooperation with which judicial authorities in two or more states grant mutual assistance within criminal procedures.5

Being a form of judicial cooperation, the letter rogatory is subject to the general principles of cooperation as basic ideas that govern the matter of interest. Such principles are as follows:6

a. The principle of moderate exercise of international judicial cooperation stated under article 3 of Law no. 302/2004. According to this legal text, international cooperation is subordinated to the protection of interests of sovereignty, security, public order and other constitutional interests of Romania. Therefore, each request for international judicial assistance in criminal matters, as defined under art. 2 of the Law,7 and also when the Romanian state submits such a request by means of competent authorities, the said interests must be considered with priority.

b. The principle of pre-eminence of international law stated under article 4 of Law no. 302/2004 which considers the fact that the internal law is only applied based on and for the execution of regulations included in international legal instruments with incidence upon the said matter where Romania is a participant and filled out only for regulated situations.

c. The principle of reciprocity defined under article 5 of Law no. 302/2004. In agreement with this text of the law, when there is no international agreement on international cooperation, it can be performed in the virtue of international

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2 As stated under article 171 of Law no. 302/2004.
4 Ditto.
7 The request for international judicial assistance in criminal matters is the request for cooperation in a criminal case, in any of the legally stipulated forms.
courtesy, upon a request submitted on diplomatic channels, with written assurances regarding the reciprocity submitted by the competent authority of the said state. Under such circumstances, the general law regarding the observance of operating conditions for the requested form of legal assistance is represented by Law no. 302/2004. However, the law admits that the request for assistance must be approved even in lack of reciprocity if it proves to be necessary due to the nature of the fact or of the need to fight against particular severe forms of criminality; if this can contribute to the betterment of the defendant or of the sentenced person or to their social reintegration; may contribute to the clarification of a Romanian citizen’s legal situation.

d. The principle of observing human rights arises out of the provisions of articles 8 and 9 of Law 302/2004. In agreement with the first quoted text, judicial cooperation shall not operate if:

- the criminal procedure in the requesting state fails to meet or observe the conditions of the European Convention for the Protection of Human Rights and Fundamental Freedoms concluded in Rome on 4 November 1950, or of any pertinent international instrument in this field, ratified by Romania;

- there are serious reasons to believe that judicial assistance is requested in order to prosecute or punish a person on grounds of race, religion, nationality or political opinion;

- there is a risk of aggravation of the said person’s situation on one or another of these reasons;

- the request is submitted in a case pending with extraordinary courts, other than those established by pertinent international instruments, or in the view of executing a sentence applied by such court;

- the related crime it is requested for is considered by the requesting state as political crime or an act related to such crime. In order to avoid any difficulties that may occur in the way of international cooperation for the punishment of those who have committed crimes against the international rule of law, however the law states that the following are not considered as political crimes:

  • Attempt on the life of a chief of state or of one of their family members;

  • Crimes against humanity stated in the Convention on the Prevention and Punishment of the Crime of Genocide, adopted on 9 December 1948 by the General Assembly of the United Nations;

  • Crimes specified under article 50 of the Geneva Convention of 1949 for the amelioration of the condition of the wounded and sick in armed forces in the field, art. 51 of the Geneva Convention of 1949 for the amelioration of the condition of the wounded, sick and shipwrecked members of armed forces at sea, art. 129 of the Geneva Convention of 1949 relative to the treatment of prisoners of war and art. 147 of the Geneva Convention of 1949 relative to the protection of civilian persons in time of war;
- Any similar violations of the laws of war, not stipulated by the dispositions in the said Geneva Conventions;
- Crimes stipulated under art. 1 of the European Convention on the Suppression of Terrorism, adopted in Strasbourg on 27 January 1997, and in other pertinent international instruments;
- Actions stipulated in the Convention against torture and other cruel, inhuman or degrading treatment or punishment, adopted on 17 December 1984 by the General Assembly of the United Nations;
- Any other crime with political characteristic eliminated by the treaties, conventions or international agreements ratified by Romania.

  - the crime mentioned in the request for extradition is a military crime that does not represent a crime of general law;

  However, according to stipulations under art. 9, para. (2) of Law no. 302/2004: judicial cooperation can be denied when, considering the circumstances of the crime, the acceptance of the request may involve severe consequence for the respective person due to their age, health condition or any other personal reasons.

e. The principle of non bis in idem is defined under the name of ne bis in idem and art. 6 of the Criminal Procedure Code with incidence in the entire matter of criminal proceedings law. In its general understanding, the principle stipulates that no person can be prosecuted or put to trial for the perpetration of a crime when the same person had been previously awarded a final criminal decision with regard to the same crime, even under another legal classification. The international judicial cooperation in criminal matters considers the fact that the cooperation is not permissible if Romania or any other state already performed a criminal lawsuit for the same crime and if: a final decision ordered the acquittal or termination of the criminal lawsuit or if the punishment applied in the respective case, by a final sentence resolution, had been served or was subject to pardon or amnesty, in its entirety or upon the non-served portion.

  The only exception from this principle is when the cooperation is requested in order to review the final decision, for one of the reasons that justify the promotion of an extraordinary legal remedy according to the Romanian Criminal Procedure Code.

  f. The principle of specialty is reflected in art. 11 of Law no. 302/2004 and it states that the person that is in Romania as a result of a request for judicial assistance in criminal matters, is brought to court in Romania, is transferred or handed over in Romania cannot be prosecuted, arrested, judged, or subject to a liberty restriction measure for another act prior to the hand over or transfer other than the one involved by the international judicial assistance.

  The law accepts some exceptions from the principle of specialty:

  - the state that handed over the person agrees to the infringement of the principle. To this end, Romanian authorities shall submit a request accompanied
by supporting documentation and by a judicial report to include the statements of
the respective person;

- the person handed over or transferred does not leave the Romanian territory
within 45 days following their final dismissal, even if they had this possibility or if
they return to Romania after leaving the Romanian territory;

- the person that benefits from this principle waives it voluntarily and fully
aware by a statement given in front of the judge.

The requesting state shall take all necessary measures for a potential reception
of the said person on its territory but also the measures that refer to the
interruption of the prescription course according to its legislation, possibly even to
the procedure of judgment in absentia.

The principle also admits a possible change of classification of the act but only
in the extent that the constitutive elements of the reclassified crime would allow
the extradition or grant of another form of judicial assistance in criminal matters.

g. The principle of confidentiality is regulated by article 12 of Law no. 302/2004.
In agreement with this principle, the Romanian state must ensure, in the highest
extent possible, upon the demand of the requesting state, confidentiality of
requests for international judicial assistance and documents enclosed thereto.
Should it be impossible to observe the confidentiality clause, the Romanian state
shall notify the requesting state which should make a decision on the method to
proceed.

The international judicial assistance in criminal matters is granted differently
depending on the state with which judicial cooperation is performed. Therefore,
there are considerable differences between the assistance granted or received from
European Union Member States and non-EU states. Generally, judicial assistance
can be requested based on: a) bilateral treaties, in the extent they have not been
abrogated by multilateral treaties ratified by Romania and the requesting state;
b) multilateral agreements adopted at the level of the European Council and of the
Organization of the United States where both Romania and the requesting/
requested state participate, that regulate the judicial assistance in criminal matters or which include provisions in this respect, adopted for particular categories of
crimes; c) the rules of reciprocity.

In the relationship with the European Union Member States, the conventions
adopted at the level of the European Council that regulate judicial assistance in

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criminal matters and those adopted within the European Union,\textsuperscript{10} as well as the Framework Decisions\textsuperscript{11} adopted for particular fields. Generally, with regard to European Union Member States, direct cooperation between judicial entities is promoted particularly with regard to Member States of the Schengen Area.

Subject to these general principles, the letter rogatory as a form of international judicial assistance in criminal matters also features specific elements.

In the general regulation of article 200 of the Criminal Procedure Code, the cooperation method of the letter rogatory (regardless whether it is national or international) is used when a criminal prosecution authority or court of law has no possibility to hear a witness, perform an investigation on site, proceed with the seizure of items or perform any other procedural acts. Under such circumstances, such authority can contact another criminal prosecution authority or another court of equal rank, which has the possibility to perform activities. There are also certain limitations with regard to the object which a letter rogatory may have, in the extent that such forms of legal assistance cannot be represented by documents such as the initiation of criminal proceedings, adoption of preventative measures, approval of evidences, as well as the ordering of the other judicial orders and procedures or measures.

In particular, article 173 of Law no. 302/2004, defines the international letter rogatory as being the authorization granted by a judicial authority in one state to an authority in another state, authorized to perform in its stead and behalf, some judicial activities regarding a particular criminal lawsuit.

The subject of an international letter rogatory may consist basically in activities specified under art. 174 of Law no. 302/2004, regardless whether Romania is a requesting or requested state:

a) localization and identification of persons and objects; hearing of the suspect, defendant, claimant, plaintiff, party with civil liabilities, witnesses and experts, as well as the confrontation; search, seizure of items and documents, sequester and special or extended confiscation; on site research and reconstruction; examinations; submission of necessary information in a particular trial, tapping phone conversations, examination of archive documents and specialized files together with other such procedure documents;

b) transmission of material evidence;

c) communication of documents or files.


If Romania is a requested state, witnesses or experts shall take an oath only when the state that prepares the request for letter rogatory shall request so in an express manner. Even under such circumstances, the Romanian state shall carry forward the request only in situations when the internal Romanian law does not stipulate against. Following the performance of letter rogatory, the Romanian state shall send the requesting state only copies or certified photocopies of the requested documents or files. In the extent possible, if the requesting state expressly requests the submission of original documents, such request shall be carried forward.

It is possible that, on the express request of the foreign state, Romanian authorities inform about the date and place of performance of letter rogatory. Within the limits set by the criminal law, authorities and persons mentioned by the requesting state may be allowed to witness and cooperate for the performance of letter rogatory. Based on the rule of reciprocity, Romanian authorities may benefit from the same rights.

With regard to the international letter rogatory, the Romanian state may request the seizure of items and documents, as well as the performance of searches.

1.1. Letter rogatory in relationship with states non-member of the Schengen Area

On the grounds of article 176, para. (1) of Law no. 302/2004, the competent Romanian judicial entity authorized to investigate a case may request foreign authorities to seize items and documents or to perform searches and submit the items or documents seized during the searches. The purpose of such request is to discover and gather evidence on territories of other states and is performed in agreement with the legislation of the respective states.

When Romania is a requested state, the request submitted by competent foreign authorities must include general information and additional mentions: a) name, surname and characteristics of the person under investigation by foreign authorities, indication of traces of committing the crime or of other items that allegedly exist in the place to be searched; b) the reason for the performance of such search; c) indication of judicial classification, description of state of facts, evidence or data to indicate that the place to be searched includes the person investigated by the foreign authorities or may reveal evidence regarding the committing of the crime; d) if applicable, indication of evidence or data to generate reasonable suspicion with regard to the perpetration of a crime or of items and documents subject to the crime; e) indication of the place where the search shall be performed.

The request submitted by a foreign state with regard to the seizure of items and performance of searches is approved provided that the following conditions are met, as stated under art. 176, para. (4) of Law no. 302/2004, if: “a) the act subject to the criminal procedure performed by the requesting state would have
represented, if committed on the Romanian territory, a crime and the author would have been punishable. Should the measure be applied for multiple crimes, the said conditions shall be checked for each separate crime; b) the punishment stated by the Romanian Law and that of the requesting state for the crime perpetrated by the person under investigation is of at least one year in prison.”

In case the submitted request is approved, the seizure of items and documents is ordered based on the order of the district attorney or the order of the judge, and the search of the place of residence, based on the authorization issued by the competent Romanian judge. The Romanian Law institutes the rule according to which the search of the place of residence is performed only following the commencement of the criminal prosecution (art. 158, para. 1 Criminal Procedure Code), but in the matter of letter rogatory art. 176, para. (6) of Law no. 302/2004 institutes an exception, indicating that it can be performed without the observance of the requirement set by the internal legislation.

1.2. Letter rogatory in relationship with Member States of the Schengen Area

In the relationship with Member States of the Schengen Area, cooperation is mainly performed by direct contact between judicial authorities. However, art. 206 of Law no. 302/2004 indicates that for the performance of requests for letter rogatory with the subject of searches or sequesters certain conditions can be imposed: “a) the Romanian Law, as well as that of the requested state, must provide for the act that determined the letter rogatory a custodial penalty or an imprisonment measure for at least 6 months, or the Law of one of the parties must provide for equivalent sanctions and the legislation of the other party the act shall be punished as an infringement of legal regulations, found by the administrative authorities with a decision that can be appealed against in front of competent criminal courts; b) the letter rogatory must be compatible with the Romanian Law”.

2. Conclusions

The criminal phenomenon is becoming increasingly extraneous, either with regard to the perpetrators or the crime. In order to avoid impunity situations generated by problems in the correlation of criminal laws of various states involved, it is necessary that such states are actively involved to enhance the efficiency of judicial cooperation. Thus, it is important that the provisions of national legislation are adapted to standards resulting from international conventions and from other legal instruments adopted on this purpose. In this respect, the Romanian criminal law adopted Law no. 302/2004 on international judicial cooperation on criminal matters that transposes international standards on such matters in the internal law.
References

