

Procedure and Basic Essentials for Extradition Requests Coming to the Turkish Republic

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Traditional criminal law is strongly imbued with the principle of the territorial sovereignty of the State. Combating crimes with an international character can only be achieved by removing strict barriers of traditional principles with regard to competence. Extradition is one of prominent procedures used to attain global justice. The following essay is particularly aimed at informing foreigners that the Republic of Turkey is not a haven for criminals.

Criminality in modern society, particularly in the form of terrorism, illicit drugs and weapon trafficking, sexual exploitation of children and women, organized crime, money laundering and corruption, has reached an alarming rate recently and besides, the breaking of boundaries caused by new concepts of understanding, technological developments in the methods and means of transport, communications and transfer of money, have created the conditions for the internationalization of crime. Many of these crimes employ such sophisticated methods that they cannot be dealt with merely as local or even national problems. Now, it is more difficult for the State to impose its authority on persons and entities that fall under its jurisdiction. These reasons have caused and compelled States to develop international co-operation in criminal matters.

Extradition, which may simply be defined as surrendering a fugitive

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(suspect or convicted person) to the State which seeks him, has always been the gem of international co-operation and apparently this situation is not about to change in the near future.

I. TURKISH LEGISLATION ON EXTRADITION

Even though the first written and formal extradition treaty was signed between the Ottoman Government and the United States of America in Istanbul on August 11, 1874, the descendants of the Ottoman's had not been eager to enact a specific law on extradition in Turkey. Nevertheless they put into effect some principles of international law governing extradition in the form of scattered provisions in domestic legislation, such as Article 38 of the Turkish Constitution (no citizen shall be extradited to a foreign country on account of an offense) and Article 18 of the Turkish Penal Code (limits extradition rules).

These provisions are rather brief and do not address all the problems that might arise from extradition. Therefore, one may say that there is a gap in this respect. The legislators might quite possibly have thought to fill this gap with the provisions of international instruments (bilateral treaties/multilateral conventions) made/acceded by the Republic of Turkey in the light of Article 90 of the Constitution (international agreements duly put into effect carry the force of law). A great majority of jurists and politicians are of the opinion that this is a logical solution to meet the requirements of rapid developments in international law and co-operation. Briefly, the rules of international law serve as a complement to domestic legislation.

Article 18 of the Turkish Penal Code is the most prominent provision with regard to extradition. According to this article:

A foreign suspect or convict may be extradited to a requesting foreign State. However extradition is not granted in the following cases:

If the act for which extradition is requested is not considered to be a felony (offense) under Turkish laws, i.e. all the constituent elements of the offense allegedly committed in the requesting State must be encompassed by a specific provision of the criminal law of the Turkish Republic (so-called double criminality principle) or; is regarded to be an act of freedom of thought or to be of a political or purely military offence character;

If the alleged act is committed against the security of the Turkish State or, the Turkish State or national or, legal entity founded according to Turkish laws;

If the prosecution of the felony falls under Turkish jurisdiction; if the person becomes immune by reason of lapse of time from prosecution or punishment for the offense for which extradition is requested, if

the person sought is a Turkish national (person-having more than one citizenship, one of which is Turkish nationality is considered to be a Turkish national) with the exception of obligations stemming from being a party to the International Criminal Court; if there are reasons of strong suspicion for believing that in the case of surrender, the person sought shall be prosecuted or punished because of his/her race, religion, nationality, political opinion or for being a member of a social group.

II. STAGES OF EXTRADITION PROCEDURE

a) Judicial Proceedings

In the primary stage of an incoming extradition request, in urgent cases the provisional arrest requests for extradition are received by the Ministry of Justice (General Directorate of International Law and Foreign Relations) (central authority to receive and forward extradition requests) via the National Central Bureau of Interpol attached to the Ministry of Interior. On some occasions the person sought is apprehended upon red notices/diffusions issued and circulated by Interpol Headquarters. Interpol's red notices/diffusions enable each of its member countries to learn that a national warrant has been issued for a person whose arrest is requested with a view to subsequent extradition. International arrest warrants issued by international criminal tribunals such as the tribunals established for the Former Yugoslavia and Rwanda are also circulated by Interpol as an exception. Interpol has no power to issue red bulletins on its own initiative. Red notices are designed to be of use, both to the police in that they provide detailed and accurate particulars of the fugitives' identity, a photograph and fingerprints, and also to the judiciary. However the above mentioned method does not exclude receiving an extradition request through diplomatic channels.

Immediately upon the receipt of a request for a provisional arrest, the Ministry of Justice makes a preliminary examination (eligibility test) to determine if the fugitive may be subject to provisional arrest and subsequent extradition in light of Turkish legislation and international law. Then, if the request is believed to have well-founded reasons for extradition which are liable to be accepted, the Ministry transmits the request to the Chief Public Prosecutor to be submitted to the local Criminal Court of First Instance where the fugitive is found. During the hearing, the Court first examines the identity of the fugitive who has been apprehended by police, as well as evaluates if there are grounds for arrest according to Article 100 of the Turkish Criminal Procedure Code or to put the fugitive under judicial control due to Article 109 of the same code. The court has the sole authority to evaluate the circumstances for arrest or judicial control. There is no specific and

detailed rule in Turkish legal system with regard to the duration of provisional arrest for extradition, therefore the provisions of international conventions are applied. Provisional arrest has a duration of eighteen days to await supporting documents for extradition from the requesting foreign State. In some occasions this period may be prolonged up to forty days upon the explicit request of the requesting State stemming from force majeure situations. These periods are provided by the European Convention on Extradition but actual periods vary from treaty to treaty. Within the provisional arrest period, if the Ministry of Justice has not received supporting documents for extradition from the requesting State, the fugitive is released.

After the receipt of the supporting documents for extradition, with translations if needed (Turkey generally accepts documents in Turkish, English, and French, depending upon the convention) by the Ministry of Justice, these documents are again forwarded to the same Chief Public Prosecutor to be submitted to the competent Heavy Penal Court to render a decision for acceptability of extradition request in light of Article 18 of the Turkish Penal Code and concerned international treaty (bilateral/multilateral). This decision may be appealed. During extradition procedures, provisional arrest is evaluated as to whether the continuation of the status of arrest is necessary or not, either upon the request of the fugitive (Article 104 of the Turkish Criminal Procedure Code) or ex officio based on the time limits not exceeding thirty days (Article 108 of the Turkish Criminal Procedure Code). While a Criminal Court of First Instance is competent to make such evaluation before the receipt of supporting documents for extradition, only a Heavy Penal Court is competent to do so after the receipt thereof.

Sometimes the request for extradition and provisional arrest is communicated simultaneously through diplomatic channels, e.g.. without the interference of Interpol. In such a case, the Ministry of Justice forwards the request for extradition and supporting documents to the Chief Public Prosecutor where the fugitive is found. Upon receipt of the request, if the fugitive has not already been taken into police custody, the Public Prosecutor shall issue an arrest warrant. In this respect, it is important that the believed whereabouts or place of residence of the fugitive is given as precisely as possible in the request for extradition. Following apprehension, the Public Prosecutor must submit written application to the competent Heavy Penal Court asking for provisional arrest of the fugitive and also to render a decision for acceptance of the extradition request. The decision of the Court may be appealed by the fugitive and/or Public Prosecutor within seven days following pronouncement of the decision (Article 291 of the Turkish Criminal Procedure Code).

If the Heavy Penal Court rejects the request, the fugitive should be

released without awaiting finalization. However, this should not prevent judicial authorities taking measures such as putting restriction on the fugitive leaving Turkey until finalization of the judgment.

b) Administrative Proceedings

When the Heavy Penal Court accepts the extradition request, the request is presented to the Council of Ministers by the Ministry of Justice to give political and final decision thereof according to Article 18 of the Turkish Penal Code. This decision may be appealed to the High Administrative Court (Danıştay). If the request for extradition is granted, either wholly or partly, the Ministry of Justice informs the requesting State through diplomatic and Interpol channels simultaneously to take the fugitive. The fugitive should be accepted on the appointed date (usually agreed upon by both States). If not, after the expiration of the time periods provided in international conventions, the fugitive should be released. The Turkish Ministry of Justice alone decides on any further request by the requesting State to reapprehend and surrender the fugitive after this situation. If reapprehension is approved, a decision for provisional arrest should be obtained again from the competent court.

III. HUMAN RIGHTS DIMENSION OF EXTRADITION

Before the ruling of the European Court of Human Rights (ECHR) in the prominent “Soering Case” (Publication of ECHR, 07 July 1989, series A, vol. 161) there had been no discernable tendency to protect fundamental human rights during the extradition process. The explicit link between the extradition process and human rights was established in this case, as the Court stated:

“That the abhorrence of torture has such implications is recognized in Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which provides that ‘no State Party shall (...) extradite a person where there are substantial grounds for believing that he would be in danger of being subjected to torture’. The fact that a specialized treaty should spell out in detail a specific obligation attaching to the prohibition of torture does not mean that an essentially similar obligation is not already inherent in the general terms of Article 3 of the European Convention. It would hardly be compatible with the underlying values of the Convention that ‘common heritage of political traditions, ideals, freedom and the rule of law’ to which the Preamble refers, were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed. Extradition in such circumstances, while not explicitly referred to in the brief and general wording of Article 3, would plainly be contrary

to the spirit and intent of the Article, and in the Court's view this inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment prescribed by that Article." (*paragraphs 34 – 35 the judgment*).

This case was the first recognition of this concept by an international court. According to the interpretation of the author, the decision of ECHR gives fugitives the ability to raise infringements of every safeguard of the European Convention on Human Rights, especially in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting State, as a barrier against extradition. Since the Republic of Turkey has been a party to the European Convention on Human Rights and recognized the right of individual petition, there should be the possibility to bring such infringement allegations before the European Court of Human Rights.

IV. IMPLEMENTATION OF INTERNATIONAL CONVENTIONS ON EXTRADITION

Provisions of international bilateral and multilateral conventions on extradition are applied directly to the extent that there is no domestic law provision in the same regard because, according to Article 90 of the Constitution, provisions of such conventions duly ratified by Turkish Grand Assembly become part of national law automatically.

The most eminent and practiced international convention in Turkey is the European Convention on Extradition, which was opened for signature by member States of the Council of Europe on December 13, 1957. This multilateral Convention provides the general basis (principles) for extradition and procedures thereof.

V. REQUIREMENTS OF THE CONVENTION FOR EXTRADITION

Most States, like Turkey, volunteer to extradite fugitives in the absence of an extradition convention (*Bert Swart, analysis in "Human Rights and the Abolition of Traditional Principles", published in Principles and Procedures for a New Transnational Criminal Law, documentation of an International Workshop 1991 Freiburg im Breisgau, edited by Albin Eser/Otto Lagodny*). However a small number of States, mostly common law countries, refuse to do so.

Quite possibly the Turkish policy is logical and clear in this context for the following reasons:

- The requirement for a convention for extradition seriously hampers international co-operation and attainment of criminal justice
- Although conventions are important instruments of international co-operation, the provisions thereof do not always exhaust all mu-

tual obligations. These instruments are sometimes far from eliminating difficulties that might arise (i.e. the Extradition Treaty between Republic of Turkey and United States of America has an appendix listing extraditable offenses and offenses not listed in the appendix fall outside of the scope of extradition).

- The basic condition for genuine international co-operation is faith and confidence in other States criminal justice systems. Instead of an international instrument, sometimes a verbal note of the diplomatic mission of a foreign State ensuring reciprocity may be seen as an expression of trust and serve to the same purpose.
- The Turkish people are against giving an impression to fugitives that Turkey is a haven from justice.
- The Turkish people are of the opinion that no serious offense should remain unpunished regardless of where it has been committed.

Therefore in case of the non-existence of a extradition convention, if the diplomatic mission a foreign State presents a verbal note promising that it shall grant extradition to Turkish competent authorities when required and without numerical limitation, such an official letter shall suffice in lieu of a convention and the rules of Turkish legislation shall apply together with the principles of international law.

Nevertheless it is worth to list the foreign states having mutual contractual obligations with regard extradition. The Turkish Republic has concluded bilateral extradition treaties/agreements with United States of America, Algeria, Morocco, Iraq, Iran, Kazakhstan, Kuwait, Turkish Republic of Northern Cyprus, Libya, Lebanon, Egypt, Mongolia, Uzbekistan, Pakistan, Syria, Tajikistan, Tunisia, and Jordan. Besides, the Turkish Republic has acceded to the multilateral European Convention on Extradition to which Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxemburg, Malta, Moldova, Monaco, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Russia, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, the former Yugoslav Republic of Macedonia, Ukraine, United Kingdom, Israel, and South Africa have also acceded.

VI. PROMINENT RULES OF EXTRADITION

Non bis in idem: The most clear meaning of this rule is given in the first paragraph of Article 35 of the European Convention on the Transfer of Proceedings in Criminal Matters:

“1. A person with respect to whom a final and enforceable criminal judgment has been rendered may for the same act neither be pros-

ecuted nor sentenced nor subjected to enforcement of a sanction in another Contracting State:

- If he was acquitted;
- If the sanction imposed:
 - has been completely enforced or is being enforced, or
 - has been wholly, or with respect to the part not enforced,
 - the subject of a pardon or an amnesty, or
 - can no longer be enforced because of lapse of time;
- If the court convicted the offender without imposing a sanction...”

The same wording appears in Article 2 of the Additional Protocol to the European Convention on Extradition.

Simply to say, whoever has been sentenced with final and binding effect in a State shall not be prosecuted in another State for the same offense; if in the event of a conviction the sanction has already been executed or is in the process of being executed according to the law of the sentencing State, extradition shall not be granted.

This universal principle of criminal law was enacted into domestic law by paragraph 7 of Article 223 of the Turkish Criminal Procedure as follows:

“In cases where there is a previously rendered judgment, or a pending case against the same accused because of the same conduct, the case will be declared inadmissible”.

Capital punishment (Death penalty):

Many modern extradition conventions provide for an exception with respect to death penalty. This exception cannot, however, be said to be generally accepted worldwide. The Republic of Turkey abolished the death penalty in 1984 de facto and in 2002 de jure. Therefore where there is a substantial risk of the death penalty or so-called death row phenomenon, extradition shall be refused on account of the torture/cruel and unusual treatment and punishment clause of Article 3 of the European Convention on Human Rights. The same rule is applied when there is a risk of penalties like cutting off a hand for theft, whipping for adultery or for other offenses, for this reason.

Rule of Speciality: This rule protects the fugitive from unexpected criminal charges once extradited and protects the requested State from abuse of its extradition processes and hence its sovereignty as well. The rule requires that once the fugitive has been surrendered following the extradition process, the requesting State may only prosecute him for his illegal act/acts for which extradition was/were granted unless the requested State consents for the extension of extradition for any

offense/offenses falling out of the scope of initial extradition request, unless the person extradited has not left, having had the opportunity to do so, the territory of the State to which he was surrendered within forty-five days (this period varies according to the provisions of the controlling treaty) after his final discharge or if he has returned to that territory after leaving it. In this context, it is necessary to mention that if the extension of extradition includes several separate offences, the requested State has the sole right to grant extradition wholly or partly in accordance with its domestic legislation and also provisions of international convention or international criminal law.

I am -personally- of the opinion that there are some gaps in Turkish domestic legislation with regard to the extradition process which should be filled as soon as possible. Serious problems and contradictory implementations arise especially when there is no international extradition treaty between Turkey and the foreign requesting State; in the absence of the international instrument, questions like “What is the period for provisional arrest?”, “Which authority is competent to receive and forward extradition request?”, “Which supporting documents are needed for extradition?”, “Which foreign authorities are considered as judicial authority to ask for extradition?”, and “Which commonly used language is mutually accepted for translation of extradition documents?” remain unanswered. International law does not mention explicit rules within this framework.