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Judicial Cooperation of Somalia with Other Countries in the Penal Field – Legal Hurdles and Gaps

Anton Girginov

Abstract

International judicial cooperation in criminal matters becomes more and more important for each country in the world. Somalia is no exception. In increasing number of cases, its authorities would need to turn to foreign judicial authorities to obtain necessary evidence or/and extradition of fugitives for trial or execution of a punishment imposed on them by Somali court. Nowadays, more and more criminal judges, prosecutors and investigating police officers must deal, in their daily work, with different modalities of international judicial cooperation in criminal matters. However, they face significant difficulties. The existing Somali legal framework for this cooperation is badly in need of improvement.

This article attempts to make some proposals for improvement of the Criminal Procedure Code and, particularly, the provisions of its Book V which governs the international judicial cooperation.

Key Words: Somalia, judicial cooperation, extradition, letter rogatory, transfer of criminal proceedings, criminal procedure code.

Introduction

The Somali situation emphasizes the need for international judicial cooperation. In the last years, a number of young people were returned from other countries by the Somali government; some of them were suspects or sentenced for maritime piracy, illegal immigration, or other crimes. A number of countries are interested in bringing piracy criminals back for execution of the punishments which have been imposed on them, or may be even for trial. In turn, Somalia is also interested in rendering justice by obtaining the extradition of fugitives or by obtaining from abroad valid evidence of criminal activities of accused when such evidence is collectable or has already been collected in foreign countries.

The existing Somali legal framework for this cooperation is badly in need of improvement. Otherwise, the efficiency of this cooperation would remain low. This situation, among others, necessitates significant enhancement of the Somali capacity to participate in international judicial cooperation and requires, first, improvement of the legal framework for this critical and challenging activity.

This article represents a critical review of the Somali national legal framework for international judicial cooperation in criminal matters. Basically, the national legal framework for this cooperation comprises Book V of the Criminal Procedure Code [CPC] (Articles 275 - 286), which regulates the procedures for international letters rogatory, extradition and recognition and enforcement of foreign judgments, and Articles 10 - 11 of the 1962 Penal Code [PC], which outline the prerequisites for two of these three modalities of international judicial cooperation, namely: the recognition and enforcement of foreign judgments and for extradition, respectively.

Apart from the practical inconvenience to work with two Codes, the Somali national legal framework for international judicial cooperation in criminal matters contains substantive deficiencies which should be removed. Extradition from Somalia is treaty-based only at a time when this country has only one reliable extradition agreement: the 1983 Riyadh Arab Agreement for Judicial Cooperation (Articles 38-57). There are no provisions on the transfer of foreign criminal proceedings (together with the admissible evidence collected) to Somalia and vice versa. No rule exists for the presence of foreign representatives at the execution of their letters rogatory either. If such rules are not created, the ability of Somalia to cooperate with other countries in the penal area would be very limited.

I. Extradition

1. Extradition is the formal process by which a person found in one country is surrendered to another country, in the execution of its request, for trial or punishment[1].

According to Article 275 (1) of the CPC, *Extradition may only be granted subject to prior international convention.* Article 36 (2) of the provisional Constitution and Article 11.1 (b) of the PC impose the same restriction. They 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*".

Thus, Somali law allows treaty-based extradition only. It is not possible to extradite a fugitive from Somalia under any other (extra-treaty) condition, including reciprocity. This, in turn, considerably narrows the possibilities of obtaining extradition from another country.

Somalia does not contemplate reciprocity relations although it belongs to the Civil Law (Latin) legal family and even the Muslim countries from

this family extradite under reciprocity – Article 1 of the Iranian Law on Extradition, Article 52 of the Iraqi CPC, Article 365 (1) (3) (ii) of the CPC of Kazakhstan, Article 2 of the UAE Law on International Judicial Co-operation in Criminal Matters, etc. It is to be clarified that the reciprocity relations are the typical extra-treaty condition for rendering international judicial cooperation.

Such relations are invoked if the interested country has already considered (not necessarily granted) an extradition request from the other country; the interested country has just to mention this in the request to the other country. This is how ***reciprocity by action*** is invoked. Subsidiarily, if the interested country has not considered in the past any extradition request from the country which it approaches now, this interested country should promise/declare to it readiness to consider, in turn, its future requests. This is the way to invoke ***reciprocity by words*****.**

The previous consideration by the requesting country of an extradition request from the country which is being approached now, or the promised future consideration by the requesting country of extradition requests from the country which is being approached now, is sufficient to establish reciprocity relations. The requesting country shall not necessarily have executed the request, or respectively, shall not necessarily promise to execute all future requests from the country which it approaches. Even if there is an agreement, the requested Party would not be obliged to execute all requests coming from the other Party or other Parties. It would be obliged to execute only those incoming requests which meet the applicable legal requirements. The actual obligation of the other country under any possible agreement is to read the request rather than ignore it stating that they do not have any legal obligations to the requesting county in the field of extradition.

When it comes to Somalia, in particular, this country cannot rely on any reciprocity with countries that it has no agreement with. As Somalia does not consider their extradition requests, it cannot expect, in turn, any cooperation from them either. Even if Somalia promises to the country which it approaches to consider its future extradition requests, no relation of reciprocity with that foreign country would be invoked. The problem is that the Somali promise would not be accepted as its own laws prevent it from being kept. Therefore, it would be an invalid promise producing no legal consequences.

In theory, Somalia may expect non-treaty based extradition from Common Law (Anglo-Saxon) countries. Usually, they do not work with reciprocity. Their extra-treaty condition is based on the so-called "designated countries list". Such lists are produced unilaterally by the central state authorities of those countries. If the requesting country, including Somalia, is on this list, the judicial authorities there would consider its request. Otherwise, if it is not, then most probably no consideration will be given to the request.

Actually, Somalia may expect effective non-treaty based cooperation from the few countries which do not restrict themselves to the above mentioned extra-treaty conditions for judicial cooperation. These countries are more flexible and render cooperation also under other extra-treaty conditions. Such, for example, are the following Civil Law countries: Hungary (Section 6, are para. 2 of the Hungarian Law on International Legal Assistance in Criminal Matters), Portugal (Article 6.1, "f" of the Portuguese Law on International Judicial Cooperation in Criminal Matters) and Romania (Article 5, para. 3 of the Romanian Law on International Legal Assistance in Criminal Matters). The absence of reciprocity is not an impediment to the judicial authorities of these countries if the cooperation: (a) is seen to be advisable in view of the nature of the facts, or in view of the need to combat certain serious forms

of criminality;(b) may benefit the person concerned; or/and (c) may serve to shed light on facts related to own nationals. Finally, Article 2 (2) of the Indonesian Law No. 1/1979 on Extradition is in the same sense. It reads: "*In the event that no treaty as mentioned in para (1) above has been drawn, extradition may be initiated based on good relations and if the interests of the Rep. of Indonesia requires it"*.

In view of the findings, so far the Somali legislation might be advised to accept reciprocity as the typical extra-treaty condition for extradition. 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.

2. According to Article 278 (2) of the CPC, export (passive) "*extradition shall always be made subject to the condition that the person to be extradited shall not be tried for a different offence, nor be subject to different punishment, other than those for which extradition was offered or granted*". This is the undisputable 'speciality principle' of extradition law[2].

The problem is that the only reliable and acceptable in practice guarantee that this principle will be complied with by the requesting country is its law. The law of the requesting country must postulate the immunity of extraditee from prosecution, restriction of his/her liberty, trial or/and punishment for a crime different from the one(s) in respect of which s/he was surrendered. This applies to Somalia as well. Whenever it is a

requesting country, the foreign country, it has turned to, would look for applicable rules materializing the speciality principle. If such rules are missing in the international agreement (bilateral treaty or multilateral convention) between Somalia and the requested foreign country, the competent judicial authorities of that country will look for them in the domestic extradition law of Somalia: Articles 278-281 of the CPC and 11 of the PC. Because the competent judicial authorities of the requested country cannot find any such rules, they will most likely reject the Somali extradition request.

Such important agreements with provisions on extradition, which do not contain any Speciality Rule, are the UN Convention against Transnational Organized Crime (see Article 16.5) and the UN Convention against Corruption (see Article 44.6). This rule must be in the law of the requesting country. Sooner or later, Somalia will become a Party to them but will not be able to make use of them for obtaining extradition of fugitives from other Parties until it inserts the Speciality Rule in its CPC.

The Speciality Rule text might be borrowed from Article 17 of the Angolan Law on International Judicial Cooperation in Penal Matters or Article 721 of the Italian CPC, or Article 39 of the Kosovar Law on International Judicial Cooperation in Criminal Matters, or Article 16 of the Portuguese Law on International Judicial Cooperation in Criminal Matters, or Section 496 of the Slovak CPC.

3. Somalia applies the death penalty. This punishment exists in the Somali penal system by virtue of Articles 90.1(a) and 94 of the PC.

The existence of this punishment might be an impediment to extradition requested by Somalia. The problem would occur when Somalia requests extradition in respect of a crime which carries the death penalty only under Somali law. The requested country's law may not provide for the

death penalty either because it has been abolished there, in total, or because its law prescribes it only for the commission of other crimes. As the crime does not carry the same punishment as in Somalia the requested country is expected to require assurances that the death penalty shall not be imposed or, if already imposed (and the extradition is for its execution), that this punishment shall not be executed.

Besides, the requested foreign country would be specifically obliged to look for such assurances if it is a Party to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment [Somalia is also such a Party as it accessed the Convention on 24 Jan 1990]. Article 3 (1), Item 3 of this Convention expressly forbids authorities of requested Parties from "*extraditing a person to another state where there are substantial grounds for believing he would be in danger of being subjected to torture*". As the death penalty may be seen as the most serious type of torture extradition would be refused unless the foreign country gives sufficient assurance that this punishment is ruled out – see also Article 11.1 (d) of the Turkish Law on International Judicial Cooperation in Criminal Matters.

The assurances are individual (diplomatic) and normative. 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 stipulates 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 death penalty 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]. The 30-years imprisonment is preferable to the life imprisonment under Article 95 of the PC as some countries deny extradition even in cases where the crime, for which the extradition is sought from them, carries life imprisonment, e.g. Article 16 (2) of the Kosovar Law on International Judicial Cooperation in Criminal Matters and Article 6 (1) (f) of the Portuguese Law on International Judicial Cooperation in Criminal Matters[3].

Such a mechanism of eliminating the death penalty in active 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.

4. Along with the arrest for national criminal proceedings, the CPC contemplates also arrest for extradition. This is the arrest under Article 279 (2, 3) of the CPC:

> "*In the cases where the person to be extradited has to be arrested, the President of the Court of Appeal shall issue a warrant of arrest in accordance with normal procedure*.
>
> *Such warrant of arrest shall be revoked automatically and the arrested person released if:*
>
> a) *within 60 days from the date of the arrest, where the request for extradition was made by an African State; or*

b) *within 90 days from the date of the arrest, where the request for extradition was made by a State outside Africa*

The Minister of Grace and Justice has not received the documentation in support of the request for extradition…".

Obviously, the quoted Article envisages the provisional extradition arrest of the wanted person pending the official/formal request for his/her extradition. This is the arrest with such strict deadlines, determining the period within which the extradition request shall arrive. Hence, the incoming requests under letters "a" and "b" are actually for the provisional arrest (detention) of the wanted person – see also Articles 43 and 44 of the 1983 Riyadh Arab Agreement for Judicial Cooperation (Riyadh Convention), ratified by Somalia on the 21st of October 1985. The respective correction should be made.

If the official/formal request for the extradition of the detainee arrives within the deadline, s/he shall *per argumentum a contrario* stay in custody. This is the way to secure his/her appearance in court for the extradition proceedings against him/her. His/her new custody is called full extradition arrest (detention). Usually, it lasts until the end of the court proceedings. However, this full extradition arrest should be explicitly regulated rather than come as a conclusion from the provisions on the provisional arrest of the wanted person. Examples of explicit rules of the full extradition arrest are: Article 37 of the Bosnian Law on Mutual Legal Assistance in Criminal Matters, Article 16 of the Turkish International Judicial Cooperation in Criminal Matters and Article 16 (1) of the UAE Federal Law on International Judicial Cooperation in Criminal Matters.

If the extradition is denied, the person is released. However, if the request for his/her extradition is granted, this person shall *per argumentum a fortiori* stay in custody as s/he cannot rely on anything to prevent his/her surrender from taking place and his/her basis interest is to escape. Also,

there must be a provision stipulating the release of the person if the requesting country does not take him/her over on. The rule may be different. It may read that if no representative of the requesting country comes on the day agreed on the person is released immediately (e.g. Article 502.3 of the Belorussian CPC) or in 15 days extensible up to 30 days (e.g. Article 499.3 of the Albanian PC and Article 708.5 of the Italian CPC), or in 20 days extensible up to another period of 20 days (e.g. Article 61. 2,3 of the Portuguese Law on International Judicial Co-operation in Criminal Matters), or in 30 days (e.g. Article 26, para. 4 of the Bulgarian Law on Extradition and Article 48.3 of the 1983 Riyadh Arab Agreement for Judicial Cooperation, called also the Riyadh Convention) 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.

It is noteworthy that Somalia cannot always rely on international agreements for extradition as in the case with the Riyadh Convention. Some of them refer to the requested country's law on the detention issue and many other issues as well. There are multilateral Conventions, which solely declare themselves a legal basis for extradition. Thus, pursuant to Article 16.4 of the UN Convention against Transnational Organized Crime, "*If a State Party that makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention the legal basis for extradition in respect of any offence to which this article applies*." Therefore, even if Somalia becomes a Party to such a Convention, this country would need domestic rules on the full extradition detention. The rules would be used if the issue is not regulated by a respective extradition agreement with the requesting country.

Understandably, Somalia is also in need of domestic legal basis for its outgoing requests for provisional extradition detention. It may be inserted in Article 281 [Extradition from a Foreign Country] of the CPC. Otherwise, the CPC would take care of such foreign requests (the quoted provisions of Article 279) but would not support the own ones. An exemple, which might be followed, is Article 71 [International Circulation of the Request for Provisional Arrest] of the Portuguese Law on International Judicial Co-operation in Criminal Matters. It reads:

> "*1. The judicial warrant for provisional arrest with a view to extradition must be forwarded by the public prosecutor attached to the competent court, to the Attorney-General's Office.*
>
> *2. The Attorney-General's Office must forward the warrant to the National Bureau of INTERPOL and inform the court accordingly*".

In practice, it is always necessary to obtain an order for such arrest of the fugitive, even if s/he is incarcerated in the requested country for some local criminal or related legal proceedings or for the execution of an imprisonment punishment there. His/her incarceration may be unexpectedly terminated prior to the arrival of the Somali extradition request. Then the only ground to keep him/her in custody would be the order for his/her extradition arrest.

5. The custody of the extraditee for his/her physical surrender is undoubtedly fair and justified if the extradition is for the execution of an imprisonment punishment imposed on the person in the requesting country. The same evaluation applies also to the custody in the mirror situation of putting the convicted person and the judgment against him/her together. This is the situation where the country where s/he resides has recognized and shall enforce some foreign criminal judgment with an imprisonment punishment against the person – rather than carrying him/her to the judgment as in extradition, the judgment is carried

to him/her. Thus, Somalia may be requested to process in accordance with Article 282 (1) of the CPC some "*foreign judgment convicting a Somali citizen in a foreign country or a foreign or stateless person residing the Somali Republic is received by the Minister of Grace and Justice*". If Somalia grants the request, its authorities may detain the convict to secure the enforcement of the recognized foreign criminal judgment against him/her. Article 285 (4) provides some legal basis for his/her detention after the court proceedings. The Paragraph in question reads: „*If no mention is made in the decision allowing recognition of the judgment with regard to anything that may be done as a result of such decision and if no mention is made regarding any security measures which may be applied, the President of the Court may order such provisions later, upon the request of the Attorney General, following the procedure for matters arising in execution*".

The problem is that no such measures against the person (including his/her detention) are foreseen during the court proceedings, let alone before them, although s/he often has the interest in running away during the court proceedings and even before them. This legislative gap may create serious difficulties, sometimes. In view of thereof, it is the introduction of such measures in the CPC is worth considering. The Council of Europe Conventions in the penal field might be used as examples.

Thus, according to Articles 32.2 and 33.2 (b) of the European Convention on the International Validity of Criminal Judgments, any Party may put the person, found in its territory, under provisional arrest for 18 days pending the official request of another Party for the recognition and enforcement of its criminal judgment, issued against him/her. To this end, the interested other Party shall forward a separate application for such arrest. "*The said application shall state the offence which led to the judgment and the time and place of its perpetration, and contain as*

accurate a description as possible of the person sentenced. It shall also contain a brief statement of the facts on which the judgment is based".

Thereafter, once the official request is received, the requested Party shall hold the person in full arrest (detention) in accordance with its law. The law of that Party "*shall also determine the conditions on which he may be released*" – Article 33.1 of the same European Convention.

II. International Letters Rogatory

1. The letter rogatory is the typical device for requesting evidence from another country which shall be admissible in court, later.

Outgoing letters rogatory are a priority for each country because they support with evidence its own criminal proceedings. Somalia is no exception. This makes the Somali national law on them of leading importance.

Somali national law on outgoing letters rogatory consists of the provisions of Article 276 [Letters Rogatory to foreign Judicial Authorities] of the CPC, mainly. Regretfully, its text establishes only the communication channels for such letters rogatory. It reads:

> *"1. Letters rogatory to foreign judicial authorities regarding evidence to be taken in a foreign country shall be transmitted through diplomatic channels.*
>
> *2. In urgent cases, the Court may transmit such a request directly to of the Diplomatic and Consular Agents of the Republic in a foreign country, informing the Ministry of Grace and Justice.*"

There is not a single word: (i) about the bodies in Somalia which are competent to issue letters rogatory, (ii) about the requirements for the contents of such letters,(iii) about the internal Somali procedure to be followed before a given letter rogatory reaches the Ministry of Foreign

Affairs or Diplomatic and Consular Agent of Somalia in the requested country, (iv) about the participation or non-participation of interested Somali official in the execution of the letters rogatory abroad or (v) about the legal value of the results of their execution.

Hopefully, there will be provisions regulating the abovementioned issues. Otherwise, the competent authorities of requested countries may argue that the Somali letters rogatory, which they receive, have no legal basis. Hence, these letters are invalid and shall not be executed.

In Europe, the communication channels between European countries are their Ministries of Justice, in general. However, in accordance with Article 15 (1 and 2) of the European Convention on Mutual Assistance in Criminal Matters, amended by Article 4 of the Second Additional Protocol thereto, "*requests… may be forwarded directly by the judicial authorities of the requesting Party to the judicial authorities of the requested Party and returned through the same channels*". The direct communication is performed through the ***Interpol channel***, usually. As per Article 15 (5) of the said European Convention "*in cases where direct transmission is permitted under this Convention, it may take place through the International Criminal Police Organisation (Interpol)"*. This is recommendable worldwide as well, including to Somalia, as Interpol is the most efficient global communication system for the support of anti-crime activities[4].

Finally, Article 4.4 of the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters stipulates that requests for controlled deliveries and covert investigations may also be forwarded directly by the competent authorities of the requesting Party to the competent authorities of the requested Party. Obviously, the execution shall be returned through the same channels.

2. Most often in such and similar urgent situations, the Interpol channel is used as faster and more efficient. However, this is not the case with Somalia. This country still prefers to use the system its Foreign Ministry avoiding its central office only. According to quoted Article 276 (2) of the CPC, in situations of urgency, the request may be transmitted directly to of the Diplomatic and Consular Agents of the Republic in a foreign country, informing the Ministry of Grace and Justice.

The diplomatic agents, though, cannot be efficiently involved as they do not have the necessary competence in international legal assistance matters. The consular agents have some but, as a general rule, they cannot be used either. The Vienna Convention on Consular Relations does not authorize consuls to officially deliver letters rogatory to the receiving country. In theory, such authorization might be provided by a bilateral Consular Convention of Somalia with the receiving country or by the domestic law of that country in conjunction with Article 36 (2) of the Vienna Convention on Consular Relations: the rights relating to own nationals "*shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this article are intended*".However, such bilateral Consular Conventions or foreign countries' domestic laws permitting consuls of sending countries to officially deliver letters rogatory are truly exceptional. So, Somalia should not rely on them at all. Yet, even if such a legal opportunity exists, the consul shall communicate with the authorities of the receiving country officially. Otherwise, s/he may compromise the validity of the evidence received from the execution of the letter rogatory and eventually make it inadmissible in court. In view of thereof, the consul shall submit the letter rogatory with a verbal note to the Foreign Ministry of the receiving country. This would take more time than making use of the Interpol channel.

Finally, consular officers work for their nationals in receiving countries – see Article 36 [Communication and contact with nationals of the sending State], Paragraph 1 of the Vienna Convention on Consular Relations. The consular officers are not authorized to undertake any official activities relating to other persons: nationals of the receiving country, nationals of third countries, stateless persons. Hence, if a Somali letter rogatory concerns any such person; it would, most probably, not accepted by the receiving country's authorities from the consul of Somalia. It goes without saying that no such restrictions (formal/technical or factual/traditional) exist for communications through Interpol.

This is why the Somali authorities are strongly recommended to use the channel of Interpol and modify the text of Article 276 (2) of the CPC, accordingly. However, they cannot unilaterally decide to use Interpol and similar organizations, e.g. Europol, for the transmission of its letters rogatory. This country should have in advance the requested country's consent to receive a letter rogatory from Somalia through the given channel. Otherwise, the evidence obtained may be compromised and eventually become inadmissible in court.

Somalia may have the requested country's individual consent on the basis of an *ad hoc* agreement. To this end, prior to sending the letter rogatory, the Somali authorities should ask and receive a positive answer from the future requested country that they can forward the letter to that country through the channel they propose.

3. Very close to the letters rogatory are the requests for service of summons of witnesses and other procedural documents abroad. Moreover, these requests are even named 'letters rogatory' by some foreign laws, e.g. Article 728 of the Italian CPC.

Basically, the Somali law resorts to the same approach to the requests for service of summons procedural documents abroad. Its outgoing requests are envisaged by Article 276 [Letters Rogatory to foreign Judicial Authorities], Paragraph 3 of the Somali CPC. It reads: "*Summons to a witness resident in a foreign country shall be transmitted in the same way*" as letters rogatory.

Regretfully, this is the only domestic provision on requests by Somalia for service of procedural documents abroad. There are no domestic rules on the consequences and specifically, on the legal status of the summoned witness (material or expert witness) who comes to Somalia to testify. In particular, no immunity is provided for him/her.

Rules, providing immunity to witnesses summoned from abroad, exist only in the international agreements ratified by Somalia, e.g. Article 22 [Immunity of witnesses and experts] of the Riyadh Convention. The problem is that not every international agreement in the penal field contains such rules; some agreements, especially multilateral UN conventions (e.g. the Convention against Transnational Organized Crime and the Convention against Corruption), refer to the domestic law of the requested country on the issue. Also, the service of procedural documents may be carried out without any agreement at all. Obviously, in such situations, the domestic law of the requested country should provide some immunity to the witness (material or expert witness) who is ready to come to Somalia to testify. Otherwise, s/he will not come. Thus, all efforts are in vain. To prevent this result from occurring, the Somali legislation is strongly advised to produce, like in most other countries, domestic rules on the immunity of summoned witnesses who decide to come to Somalia.

Article 63 of the UAE Law on International Judicial Co-operation might be an appropriate example. It reads:

"*If the object of the judicial assistance is to request a witness, expert or defendant to attend before any of the judicial parties, it is not allowed to prosecute or detain him or limit his personal freedom regarding criminal acts or convictions previous to his departure from the territory of the requesting State.*

It is also not allowed to litigate, detain or penalize him for his testimony or the expertise report submitted by him.

It is not allowed to subject the witness or expert who failed to attend despite his notification of the obligation of attendance to any penalty or compulsory procedure even if this obligation includes a condition of penalty.

The immunity granted to the witness or expert provided for in the preceding two paragraphs shall terminate after the elapse of consecutive thirty days starting from the date of his notification in writing from the party which required his attendance of that his presence is no more required and he had the opportunity to leave the State territory, but remained therein or if he has returned to it voluntarily; the period in which the witness or expert was unable to depart from the State territory for reasons beyond his will shall not be included."

III. Transfer of Criminal Proceedings

1. A peculiar inversion characterizes the Somali CPC. This Code contains rules on recognition and enforcement of foreign criminal judgments, a modality of cooperation which constitutes a stronger intervention in the justice system of Somalia (Articles 282 - 286), whereas the same Code has no rules on transfer of criminal proceedings, although this modality of cooperation entails recognition and making use only of the results of the investigative actions which had been undertaken in the requesting (sending) foreign country within the proceedings, prior to forwarding them to Somalia[5].

As a result, Somalia misses serious opportunities. If it were possible that the Somali judicial authorities take charge of a foreign criminal case, then all evidence produced through investigative actions in the foreign country in accordance with its law would have the same legal force in Somalia as the requested country as well. As a result, the evidence would be admissible in court, without any verification and/or approval, as though it has been collected by the competent judicial authority of Somalia (see in this sense e.g. Article 448.4 of the Bulgarian CPC, Article 36 of the Moldovan Law on International Judicial Cooperation in Criminal Matters, Article 47.3 of the Serbian Law on Mutual Legal Assistance in Criminal Matters and Article 25.3 of the Turkish Law on International Judicial Cooperation in Criminal Matters). Thereafter, the Somali prosecutors and courts would be free in evaluating the significance of the received pieces of evidence. None of these pieces evidence can have any predetermined force for the judicial decisions in Somalia.

This is why, if the Somali CPC does not contain any legal rules on the transfer of criminal proceedings, no admissible evidence can be received from foreign countries even if their competent judicial bodies have gathered it in full compliance with the applicable law. In some cases, important evidence would irreversibly be missed. This would occur whenever the evidence is not collectable later by Somali judicial bodies or even by the respective foreign country in the execution of a letter rogatory from Somalia. This is most likely to happen in cases of terrorism, piracy or corruption. Obviously, such situations should be prevented from occurring by creating in the Somali CPC (Book Five) a domestic legal framework for the transfer of criminal proceedings. Otherwise, Somali judicial authorities would not be able to use as evidence, admissible in its courts, what has been forwarded to them even by the foreign countries with the biggest contribution in fighting piracy, terrorism and other crimes of major concern to Somalia. Sending a Somali letter rogatory for the collection of such evidence may turn out to be too late.

It is true that in some countries, e.g. Germany, information from abroad may become valid evidence on an exceptional basis. There, the principle of free evaluation of evidence covers the admissibility also. The law of such countries allows, at the discretion of the competent judge, admissibility into evidence of data, not collected through investigative actions (incl. execution of letters rogatory abroad), if the data satisfies some clear legal criteria.

Yet, even if such a way of producing admissible evidence is accepted, it should be an exceptional one. The general ways of accepting admissible evidence from other countries will always be: execution of Somali letters rogatory and transfer to Somalia of criminal proceedings instituted in foreign countries. Obviously, the second way is non-existent, especially with regard to the preservation of evidence validity, until a domestic legal framework for the modality of judicial cooperation is created.

2. Some further clarifications about the purpose of the transfer of criminal proceedings might be of help. It is designed to solve some practical problems of criminal justice.

Thus, if a person, suspected of a crime, is a foreign citizen, who enjoys international immunity from prosecution, s/he cannot be prosecuted, trialled or punished. The same applies to foreigners who reside in their countries, if these countries do not extradite them on the grounds of their citizenship. In such situations, the general solution to the problem is to make the country of the suspect's citizenship launch criminal proceedings against him/her.

The extradition for trial and the transfer of criminal proceedings look alike. The two modalities of international judicial cooperation yield the same result, namely: in the name of justice, they bring together the proceedings and the prosecuted person. Therefore, both the extradition for trial and the transfer of criminal proceedings support justice by securing the presence of the suspect/prosecuted person during the proceedings. However, this result

is achieved in the opposite ways. In the case of extradition, the result is achieved by bringing *the person to the process* (in the country of the criminal proceedings) while in the case of transfer of criminal proceedings the result is achieved in the opposite way, namely: by carrying *the process to the person* (to the country of his/her residence). In both cases, the person is not necessarily guilty. S/he might be innocent and the charges against him/her dropped, or if indicted, acquitted of the alleged crime.

The transfer of criminal proceedings, however, is not only a means to secure the carriage of justice by substituting some practically impossible extradition. It may be a means of ensuring procedural economy and efficiency as well. In cases when a citizen of another country commits some petty criminal offence, the normal reaction is his/her expulsion and transfer of the proceedings against him/her to the country of his/her citizenship. Imposition and serving punishment in own country bring more benefit than if performed abroad as the social rehabilitation of the convicted offender in domestic conditions is more likely. A similar reaction is practised when a person under international legal protection (diplomat, consul, special envoy etc.) commits some crime. The criminal proceedings for his/her alleged crime, conducted against an unknown perpetrator, are forwarded to his/her sending country.

In many cases, when somebody commits a more serious crime in a foreign country, this country, as well as his/her own, launch parallel criminal proceedings against him/her. Basically, the two countries' judiciaries do the same job. To avoid unnecessary work, modern international instruments recommend merging the parallel proceedings. The merger may only be a result of the transfer of one of the cases to the foreign country where the other case has been open. Thereafter, that country would perform the merger of the two cases in its territory and, thus, concentrate the prosecution of the suspect(s). Usually, this should be the country where more evidence may be collected. It is expected to complete the combined proceedings successfully.

Thus, the similar texts of Article 21 of the UN Convention against Transnational Organized Crime and Article 47 of the UN Convention against Corruption read that „*States Parties shall consider the possibility of transferring to one another proceedings for the prosecution of an offence established in accordance with this Convention in cases where such transfer is considered to be in the interests of the proper administration of justice, in particular in cases where several jurisdictions are involved, with a view to concentrating the prosecution*". A number of other regional conventions encourage this concentration. According to Article 29 [Transfer of criminal proceedings] of the Cairo Convention on Organized Crime, "*State Parties shall consider the possibility of transferring to one another proceedings for the prosecution of an offense covered by this Convention in cases where such transfer is considered in the interest of proper administration of justice, especially when it comes to multiple jurisdictions with a view to concentrating the prosecution*". Articles 14-18 of the Cairo Convention on Terrorism give even a more detailed legal framework for the transfers of criminal proceedings between Arab countries. Article 32 of the West African Convention on Mutual Assistance in Criminal Matters also recommends concentrating the prosecution. It reads: "*When criminal proceedings are pending in two or more Member States against the same suspected person in respect of the same offence, the Member States concerned shall consult to decide which of them alone should continue proceedings. An agreement reached thereupon shall have the consequences of a request for transfer of proceedings"*.

Obviously, these are cases where two and, sometimes, more countries claim jurisdiction in respect of a criminal offence. In practice, however, their judiciaries may never be equally successful in prosecuting and punishing the offender(s). This is why the two countries are expected to arrive at an agreement as to which of them should take action against the offender(s). It makes sense that the adequate solution to the conflict of

jurisdiction comprises the possibility of transferring to this country any parallel criminal proceedings instituted for the same offence in another country. If the countries unite their efforts in such a way, a better result for justice is to be expected.

3. Finally, if the Somali legislation introduces in the CPC rules for the international transfer criminal cases (in particular, for taking charge of foreign criminal proceedings), the mirror modality to extradition for trial, Somalia might be advised that similar arrests (provisional and full) exist in Europe. Thus, any Party may put a suspect, found in its territory, under provisional arrest pending the request of another Party for the transfer of the criminal proceedings against him/her – Article 27 of the European Convention on the Transfer of Proceedings in Criminal Matters. Thereafter, once the official request for the transfer is received, the requested Party may put the person in full arrest – Article 28 of the same Convention. A good example of regulating both arrests is also Section 58 [Measures Safeguarding Enforcement] of the German Law on International Judicial Cooperation in Criminal Matters. Its first Paragraph reads as follows:

> "*If a request for enforcement… has been received, or if prior to its receipt it has been so requested by a competent authority of the requesting country with details of the criminal offence on which the sentence is based, the time and place when it was committed and as exact a description of the convicted person as possible, the detention of the convicted person for the purpose of ensuring enforcement of a sentence of imprisonment may be ordered provided that on the basis of ascertainable facts*
>
> *1. there is a reason to believe that he would abscond from the enforcement proceedings or from enforcement, or*
>
> *2. if there is a strong reason to believe that in the enforcement proceedings he would dishonestly obstruct the ascertainment of the truth*".

Conclusion

The proposals made so far are for urgent but relatively easy modifications to the CPC. At the same time, there are more general problems which should be solved in the future. A crucial problem to be solved is whether the legal framework for international judicial cooperation in criminal matters shall stay as part of the CPC, that is to say: should the proceedings for this cooperation continue to be governed in the same law as criminal proceedings despite the serious differences between them? Thus, in contrast to criminal proceedings, the proceedings for international judicial cooperation are not instituted on the principle of legality; they are not governed by the ideas of equality of arms or the presumption of innocence. Actually, international judicial cooperation is initiated by a requesting country on the principle of opportunity (discretion); the result is dependent on the principle of sovereignty of the requested country and, also, on the principles of reciprocity and speciality. All of them are foreign to criminal proceedings. In view of thereof, many countries have passed, along with their criminal procedure codes, special national laws on international judicial cooperation in criminal matters. Sooner or later, Somalia as well should decide on the place of the legal framework for international judicial cooperation in its legal system.

Notes

[1] See Bassiouni, M. Cherif and Wise, E.M. 1995. Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law, Dordrecht, Martinus Nijhoff Publishers; Blakesley, Ch. L. 1981, The Practice of Extradition from Antiquity to Modern France and the United States: A Brief History, Vol. 4, Iss. 1, Art. 3, Boston College Int'l & Comp. Law Rev., 39 p.; Edmonds-Poli, E. and Shirk, D., 2018, Extradition as a Tool for International Cooperation: Lessons from the U.S.-Mexico Relationship, Vol. 33, Iss. 1, Art. 10, Maryland Journal of Int'l Law, 215 p.; Hedges, R.J. 2014, International Extradition: A Guide for Judges, Federal Judicial Center, USA; Shearer, I.A. 1970. Extradition in International Law, Manchester, University of Manchester

Press; Бойцов, Александр И., 2004, Выдача преступников, "Юридический центр", Санкт-Петербург.

[2] See Bernacchi, M. B., 1992, *Standing for the Doctrine of Specialty in Extradition Treaties: A More Liberal Exposition of Private Rights*, Vol. 25, No. 4, LOY. L.A. INT'L & Comp. L. REV., p. 1377. Retrieved April 23, 2019 from https://digitalcommons.lmu.edu/llr/vol25/iss4/15/ and Hedges, R.J., 2014, *International Extradition: A Guide for Judges*, Federal Judicial Center, USA, p. 22.

[3] See also Maaskamp, V., 2003, *Extradition and Life Imprisonment*, Vol. 25, No. 3, LOY. L.A. INT'L & Comp. L. REV., p. 741.

[4] Also Girginov, A., 2016, Outgoing Requests by Bosnia and Herzegovina for International Judicial Cooperation in Criminal Matters, TDP, Sarajevo, 41 p. and Kersten, U., 2005, Enhancing International Law Enforcement Co-operation: a global overview by INTERPOL. In K. Aromaa & T. Viljanen, Enhancing International Law Enforcement Cooperation, including extradition measures, New York, Monsey, 4050 p.

[5] See also Schutte, J., 1999, Transfer of Criminal Proceedings: the European System. In M. Cherif Bassiouni (Ed.), International Criminal Law (Second edition), New York: International Publishers, p. 643.

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About the Author

Anton Girginov, PhD, Doctor of Sciences, DSc ['Great Doctor' as a second scientific degree] of criminal law in Bulgaria (2014, Plovdiv University, Bulgaria); full professor of penal law in Bulgaria (2004, The Bulgarian Higher Attestation Commission); PhD in penal law (1987, Sofia University, Bulgaria, and The Bulgarian Higher Attestation Commission). He has written over 130 academic publications in penal law and international judicial cooperation in criminal matters. A former national state prosecutor in Bulgaria and a former international prosecutor for the United Nations (East Timor and Kosovo) and the European Union (Bosnia and Herzegovina). He currently works as a prosecution adviser for the EUCAP-Somalia [European Union Capacity Building Mission in Somalia].

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