



## APPLICABLE RULES ON EXTRADITION AND INTERNATIONAL LEGAL ASSISTANCE

*(Suçluların İadesinde Uygulanabilir Kurallar ve Uluslararası Adli Yardım)*

**(Problems of their Hierarchy in Bosnia and Herzegovina)**

*(Bosna Hersek'te Uluslararası Adli Yardım Kaynaklarının Hiyerarşi Sorunları)*

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### ABSTRACT

The article deals with the legal force of domestic law and international agreements on international judicial cooperation in cases of conflict between them. Domestic law is subsidiary; nevertheless, it plays an irreplaceable role as a regulator of international judicial cooperation in support of international agreements by interpreting and complementing their provisions. In the international law system, hierarchy of the agreements (multilateral conventions, bilateral treaties) is recognized and accepted. Their hierarchy is established by statutory provisions (formal hierarchy) or may come as a result of some appropriate choice (factual hierarchy). The present article focuses on problems pertaining to international judicial cooperation in criminal matters. However, its findings and conclusions are applicable accordingly to international judicial cooperation in civil and other legal matters as well.

**Keywords:** hierarchy, international agreement, treaties, conventions.

### ÖZ

Makale, uluslararası yargısal işbirliği konusunda iç hukuk kuralları ve uluslararası anlaşmalar arasında çatışma olması durumunda hangisinin uygulanma kabiliyeti olduğuna değinmektedir.

İç hukuk, tamamlayıcı olup uluslararası sözleşmelerin hükümlerinin yorumlanması ve tamamlanmasında uluslararası hukuki işbirliğinin düzenleyicisi olarak yeri doldurulamaz bir rol oynamaktadır. Uluslararası

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hukuk sisteminde, anlaşmaların hiyerarşisi (çok taraflı sözleşmeler, ikili anlaşmalar) tanınmakta ve kabul edilmektedir. Bunların hiyerarşileri yasal hükümler (şekli hiyerarşi) tarafından belirlenir veya bazı uygun seçimler (esas ilişkin hiyerarşi) sonucunda ortaya çıkabilir.

**Anahtar Kelimeler:** Hiyerarşi, uluslararası anlaşma, antlaşmalar, sözleşmeler.

## INTRODUCTION

Bosnia and Herzegovina [BiH] and other European countries as well have at their disposal more than one legal instrument (international and domestic) governing the different forms of international judicial cooperation in criminal matters, such as: Extradition, letter rogatory, service of procedural documents abroad, international transfer of sentenced persons (prisoners, actually)<sup>2</sup>, recognition and enforcement of foreign criminal judgments, etc. In some situations, the rules of these legal instruments are contradictory and cannot be applied with simultaneously. This makes it necessary to legally determine the instrument that takes precedence or at least, to select *ad hoc*, in the process of judicial work done by the competent prosecutor or court, the right instrument regulating the issue of international judicial cooperation that must be solved. The task of finding the applicable legal framework shall not be underestimated. If the selection is wrong, this may endanger the validity of the product obtained through international judicial cooperation and eventually, make it inadmissible in court.

### I. INTERNATIONAL AGREEMENTS AND DOMESTIC LAW ON INTERNATIONAL JUDICIAL COOPERATION IN CRIMINAL MATTERS

A. Pursuant to the first provision of the BiH Law on International Judicial Cooperation in Criminal Matters [the BiH Law on IJC], Article 1 (1) in particular, “*This Law shall govern the manner and procedure of mutual legal assistance in criminal matters (hereinafter: mutual legal assistance), unless otherwise provided by an international treaty or if no international treaty exist*”<sup>3</sup>. Thus, following the Civil Law tradition, the BiH Law on IJC

2 Unlike any extradited person, the transferee has already begun to serve his/her punishment; s/he is already a prisoner by the time his/her transfer procedure commences. See GIRGINOV A, *Outgoing Requests by Bosnia and Herzegovina for International Judicial Cooperation in Criminal Matters*, Sarajevo, 2016, p 23.

3 See also “INTERNATIONAL COOPERATION IN CRIMINAL MATTERS (Practical approach to certain issues which are not regulated by law and international treaties)”, p. 6-8, BOSNIA



postulates the direct application of international agreements (bilateral and multilateral) in BiH<sup>4</sup> and its subsidiarity to them. Therefore, in case of conflict any applicable international treaty in the area of international judicial cooperation in criminal matters takes precedence over the BiH Law on IJC.

However, not only this law but also any other law in BiH (in force or future laws especially), that might regulate any element of international judicial cooperation in criminal matters, should be subsidiary to international instruments in this area. Besides, it must be recognized that such other laws are not always identifiable when drafted. The drafters may not always notice or guess that a given law whose preparation is under way contains one or more rules that influence international judicial cooperation in some way. As a result, the drafters, and lawmakers as well, may miss to include in the law a provision, such as Article 1 (1) of the BiH Law on IJC, even though they would never doubt that its rules influencing international judicial cooperation should also be subsidiary to the respective international instruments. Obviously, some codified provision on this issue envisaging all laws in BiH on international judicial cooperation in criminal matters is necessary.

At the same time, such a common provision is fully possible as well. It may easily result from the expansion of Article II. 2 of the BiH Constitution that, presently, envisages only international human rights instruments: *“The rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina. These shall have priority over all other law”*. This text might envisage all laws of BiH. Their full inclusion would be in line with the tradition to govern in the Constitution the issues relating to the regime of national laws. Examples of the proposed constitutional codification might be seen in the Constitutions of other European Union countries, namely: Article 5

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AND HERZEGOVINA - REPUBLIKA SRPSKA Judicial and prosecutorial training center team, <http://www.ejtn.eu/Documents/Themis/ THEMIS%20written%20paper%20%20%20Bosnia%20Herzegovina%201.pdf>, accessed on 10 April 2016.

4 Most of the Common Law countries follow the opposite policy: they need *“enabling legislation”* to make international conventions and treaties part of their laws. Thus, in England international agreements are implemented, if only Parliament has passed an Act to that effect. See BROWNLIE Ian, **Principles of Public International Law** (7th edn), Oxford, 2008, p. 45.



(4) of the Bulgarian Constitution<sup>5</sup>, Article 25 of the German Constitution<sup>6</sup> and Article 7 (5) of the Slovak Constitution<sup>7</sup>.

**B.** According to Article 4 (4, 5) of the BiH Law on IJC, in urgent cases requests may also be transmitted and received via Eurojust. However, Eurojust serves EU Member States and they, plus BiH as well, are all Parties to the European Convention on Mutual Assistance in Criminal Matters; most of them are also Parties to the Second Additional Protocol to this Convention as well. Hence, when it comes to mutual legal assistance in criminal matters, in general, and transmission of requests in urgent cases, including through Eurojust, in particular, these two Council of Europe legal instruments are inevitably applicable: their texts and the declarations to them made by interested Parties.

Moreover these texts and declarations as well, take precedence over any domestic law being, actually, the rules which govern the issue of communications. As the domestic law is of lower (subsidiary) legal force, it cannot be any substitute of such declarations. This is the reason why e.g. France, in order to safely use Eurojust for the transmission of certain requests, has submitted a Declaration [contained in the instrument of ratification deposited on 6/02/2012] that the requests in question *“may also ... be forwarded through the intermediary of the French national member of the Eurojust judicial co-operation unit”*.

Obviously, until BiH submits a similar declaration reproducing Article 4 (4) of the BiH Law on IJC, it would be too risky for the judicial validity of the evidence, both requested and obtained, to follow this domestic rule. To safely use Eurojust as a communication channel it is strongly recommendable to BiH authorities to submit a declaration similar to the French one rather than rely on the mentioned Article 4 (4) of the BiH Law on IJC.

Therefore, no domestic law in BiH has the sufficient legal power to regulate issues that fall within the subject-matter of Council of Europe

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5 It reads as follows: *“International treaties which have been ratified in accordance with the constitutional procedure, promulgated and having come into force with respect to the Republic of Bulgaria, shall be part of the legislation of the State. They shall have primacy over any conflicting provision of the domestic legislation.”*

6 It reads: *“The general rules of international law shall be an integral part of federal law. They shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory.”*

7 It reads: *“International treaties on human rights and fundamental freedoms and international treaties for whose exercise a law is not necessary, and international treaties which directly confer rights or impose duties on natural persons or legal persons and which were ratified and promulgated in the way laid down by a law shall have precedence over laws.”*



legal instruments. Domestic laws can neither successfully add new rules to them within this area, nor successfully derogate their provisions. Only declarations and reservations to Council of Europe legal instruments have such necessary powers for such results. Hence, declarations to the two Council of Europe instruments are the safe and reliable way to achieve the result aimed at in Article 4 (4, 5) of the BiH Law on IJC, in particular.

C. At the same time, the regulative value of national law shall not be underestimated. BiH may interpret by means of its national law key legal requirements provided for in international agreements.

An appropriate example of such a requirement in need of a national interpretation is the dual criminality of the extraditable offence – see Article 2 (1) of the European Convention on Extradition<sup>8</sup>. Extradition in Europe is granted only in respect of offences punishable under the laws of the requesting country and of the requested country<sup>9</sup>. This dual criminality requirement is determined in the same way by Article 33 (2) of the BiH Law on IJC. It reads that extradition “*shall be allowed only for the criminal offences punishable pursuant to the legislation of Bosnia and Herzegovina and the legislation of the requesting State.*” However, this law does not go any further to specify in any way the dual criminality requirement.

D. Obviously, the BiH Law on IJC may be used to determine, first of all, how BiH authorities construe the dual criminality requirement – *in concreto* (in the concrete sense) only or also *in abstracto* (in the abstract sense) as well. It would be important for other countries to know how BiH understands this essential requirement when they request this country for some extradition.

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8 Dual criminality may be required also for execution of letters rogatory when it involves coercive measures. In Europe, in particular, dual criminality is required through reservations to the European Convention on Mutual Assistance in Criminal Matters for search and seizure of property, lifting of bank secrecy and/or opening of bank accounts – see the reservations of Albania, Austria, Croatia, the Czech Republic, Germany, Hungary, Slovakia, Slovenia, Switzerland. Furthermore, according to Article 2 of the Additional Protocol to the said Convention, “*in the case where a Contracting Party has made the execution of letters rogatory for search or seizure of property dependent on the condition that the offence motivating the letters rogatory is punishable under both the law of the requesting Party and the law of the requested Party, this condition shall be fulfilled, as regards fiscal offences, if the offence is punishable under the law of the requesting Party and corresponds to an offence of the same nature under the law of the requested Party. The request may not be refused on the ground that the law of the requested Party does not impose the same kind of tax or duty or does not contain a tax, duty, customs and exchange regulation of the same kind as the law of the requesting Party.*”

9 See also HAFEN Jonathan O. International Extradition: Issues Arising Under the Dual Criminality Requirement, **Brigham Young University Law Review.**, Vol. 1992, Issue 1, Article 4, p. 191; Available at:

<http://digitalcommons.law.byu.edu/lawreview/vol1992/iss1/4>, accessed on 01 May 2016.



To find the better solution one should take into consideration that the extraditable offence always constitutes a crime both under the law of the requesting country and under the law of the requested country as well. In such cases, the offence meets the dual criminality requirement as it fulfills some legal description of a crime in the requesting country and also a legal description of a crime in the requested country as well.

1. Usually, a connection exists not only between the offence and each of the two legal descriptions which it fulfills to be an extraditable one. Also there is a connection between the two legal descriptions as well. This is, traditionally, a connection of a coincidence between the legal description of the crime in the requesting country and the legal description of the crime in the requested country. Such a coincidence may occur when the two descriptions are the same. Then, the coincidence is full. For example, the criminal offence is a theft or a murder and it is, expectedly, described in the same way in the Criminal Codes of the two countries.

The coincidence between the two legal descriptions may be a partial one only. In general, this is the coincidence between the whole and one of its parts. A typical example of such partial coincidence is the one between a consuming legal description and a consumed legal description as the former contains the latter. In such cases, to always have dual criminality, the offence shall satisfy a consuming legal description in the requesting country. This offence would inevitably fulfill the respective consumed legal description in the requested country as well: if the offence covers the whole, it would always cover any of its parts as well.

A good and understandable example of the partial coincidence in question might be the description of extortion in the Criminal Code of Macedonia and in the Criminal Code of Serbia where the former is the requesting country while the latter is the requested one. The Macedonian legal description of extortion is a consuming one because it requires damage as well - Article 258 (1) of the Criminal Code of Macedonia<sup>10</sup>, while the Serbian extortion description does not – Article 214 (1) of the Criminal Code of Serbia<sup>11</sup>, appearing, as a result, a consumed legal description. Hence, when Macedonia requests extradition from Serbia

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10 This Paragraph reads: *“A person who, intending to acquire unlawful property gain for himself or for another, by force or by serious threat, forces another to do or not to do something that damages his own or another’s property, shall be punished with imprisonment of at least one year”.*

11 This Paragraph reads: *“Whoever with intent to acquire unlawful property gain for himself or another, by force or threat causes another person to act to the prejudice of his or another’s property, shall be punished with imprisonment of one to eight years”.* It is noteworthy that Article 295 of the Criminal Code of the Federation of BiH contains the same legal description of extortion.



in respect of some extortion, it is expected that the offence fulfills, first of all, the Macedonian description which includes required damage. Then the offence would inevitably fulfill also the corresponding Serbian description as it is basically the same but without any requirement for damage. This is the reason why the offence which fulfills the consuming legal description in the law of the requesting country would always fulfill the corresponding consumed legal description in the law of the requested country<sup>12</sup>.

2. In all these situations, when a coincidence between the two fulfilled legal descriptions exists, the dual criminality is *in concreto*. However, the two descriptions may not coincide but overlap only. In such a situation the dual criminality is *in abstracto* only. This dual criminality has not yet been recognized by all countries in the world<sup>13</sup>.

The dual criminality in the abstract sense is subsidiary to the dual criminality in the concrete sense. Hence, this dual criminality is looked for when the legal description of the crime in the requesting country and the one of the crime in the requested country do not coincide. Most often, the two descriptions overlap when applied to the wanted person's conduct. In any case though, to have any dual criminality at all, it is always necessary that the conduct of the person in its totality satisfies both legal descriptions. For example, there is a crime in BiH called "Defiling a Grave or a Corpse"; it is in Article 379 of the Federation of BiH CC<sup>14</sup>. Many countries do not have any such a criminal offence but have criminalized the so-called "Hooliganism" [Bulgaria, Moldova, Ukraine, etc.] which is not a separate crime under Bosnian law. This is a crime of performing indecent acts, grossly violating the public order and expressing open disrespect for society<sup>15</sup>.

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12 The opposite relation of consumption between two legal descriptions (one in the requesting another in the requested country) is also possible. It is possible that the consumed legal description is in the requesting country while the consuming legal description is in the requested country. In this case, however, the conduct may not constitute any crime in the requested country. Since the legal description in that country is consuming and therefore, richer, it may not be always satisfied by the conduct (act or omission).

13 E.g. Bulgaria has not, seemingly, as its law requires **coincidence** between the two legal descriptions. According to Article 5 (3) of the Bulgarian Law on Extradition and European Arrest Warrant: "*The offence shall constitute a crime in both countries where, irrespective of the difference in the legal descriptions, there is a coincidence in the basic constituent elements thereof.*"

14 This crime is divided into two in some countries - see Articles 400 and 401 of the CC of Macedonia. However, the problem and the solution to it is the same.

15 For example, the Bulgarian text envisaging hooliganism is Article 325 of the CC. It reads:  
 "(1) A person who performs indecent acts, grossly violating the public order and expressing open disrespect for society, shall be punished for hooliganism by deprivation of liberty for up to two years or



In many cases the entire indecent conduct of the wanted person satisfies the legal descriptions of both crimes, namely: **Defiling a Grave or a Corpse** and **Hooliganism**. Certainly, the two legal descriptions cover different parts of the entire conduct. Nevertheless, and this is the relevant issue, both legal descriptions are satisfied. In such cases dual criminality in the abstract sense exists, if recognized by the requested country.

Given the two possible understandings of dual criminality, it is to be recommended to the BiH legislative authorities to specify what is acceptable to BiH. However, taking into account the latest developments of extradition law, it is recommendable that BiH lawmakers accept not only dual criminality in the concrete sense but also dual criminality in the abstract sense as well.

E. The BiH Law on IJC may also be used to officially specify on behalf of BiH the time with regard to which the existence of dual criminality is determined. It is undisputable that the deed (act or omission) in respect of which extradition is requested must be a crime in the requesting country all the time from the moment of its commission to the moment of the decision concerning the requested extradition. Otherwise, the requesting country can give no civilized justice<sup>16</sup> and extradition shall never be granted.

The situation with the requested country is more complicated. For countries such as Croatia, Germany and Sweden it is sufficient that the deed is a crime at the time of the decision on the incoming extradition request<sup>17</sup>. This is normal because extradition is a procedure mostly and for procedural laws relevant time is the one of the action or decision rather than the time of the occurrence of the fact that substantiates the respective legal proceedings. Such countries accept that dual criminality exists, even if they have criminalized the deed after its commission. It is sufficient for them that the criminalization takes place before the decision on the extradition request.

However, not all countries share the same understanding of dual criminality. For countries, such as the Czech Republic, Denmark and the

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*by probation, as well as by public censure.*

(2) *Where the act has occurred with resistance to a body of authority or a representative of the public, fulfilling their obligations of preserving the public order, or where by its content it has been distinguished for its extreme cynicism or arrogance, the punishment shall be deprivation of liberty for up to five years".*

16 See Article 15 (1) (i, iii) of the International Covenant on Civil and Political Rights.

17 See Compilation of replies to the questionnaire on the reference moment to be applied when considering double criminality as regards extradition requests, EUROPEAN COMMITTEE ON CRIME PROBLEMS, COMMITTEE OF EXPERTS ON THE OPERATION OF EUROPEAN CONVENTIONS ON CO-OPERATION IN CRIMINAL MATTERS, Council of Europe, Strasbourg, 5 March 2014 [PC-OC/Docs 2013/ PC-OC (2013)12Bil rev.3], p. 5 -20.





UK, it is also necessary that the deed for which extradition is requested was a crime at the time of its commission too<sup>18</sup>. Virtually, such countries require that the deed has been a crime all the time from its commission to the decision concerning the extradition and this shall be valid not only under the law of the requesting country but also under their own law as well. Otherwise, they would not accept that dual criminality exists.

It would be an appropriate step on behalf of BiH, if its legislative authorities clarify in the BiH Law on IJC the time with regard to which the existence of dual criminality is determined when BiH is the requested country. In any case, the first solution (of Croatia, Germany and Sweden) is recommendable as it takes into account the procedural nature of extradition while the second one is hardly compatible with it (of the Czech Republic, Denmark and the UK). In addition, the first of the two solutions is applicable easier. This makes it more pragmatic also.

F. There is also another issue that is solvable solely by the domestic law of the requested country. This is the problem whether it is sufficient that the offence, for which extradition is requested, simply corresponds to the legal descriptions of crimes in both countries, requesting and requested, or it is also necessary that none of the two legal descriptions is derogated by the legal description of some justification under the law of any of the two countries<sup>19</sup>. In practice, the problem occurs when the requesting country's authorities have not noticed an existing justification for the committed deed in respect of which they request extradition.

Such a justification may be envisaged even in the law of the requesting country, e.g. necessary defense. The typical situation though is when the justification, accompanying the committed deed, is envisaged only in the law of the requested country and the requesting country's authorities have not noticed it. Probably, the best example of such a justification is the so-called allowed (permissible, justified) risky act. Basically, any risk is a combination of danger and opportunity to achieve a serious positive

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18 See Compilation of replies to the questionnaire on the reference moment to be applied when considering double criminality as regards extradition requests, EUROPEAN COMMITTEE ON CRIME PROBLEMS, COMMITTEE OF EXPERTS ON THE OPERATION OF EUROPEAN CONVENTIONS ON CO-OPERATION IN CRIMINAL MATTERS, Council of Europe, Strasbourg, 5 March 2014 [PC-OC/Docs 2013/ PC-OC (2013)12Bil rev.3], p. 6 - 22.

19 Sometimes, this issue is also regarded as a criterion for the differentiation between dual criminality *in concreto* and dual criminality *in abstracto*. See Draft note on dual criminality, in concreto or in abstracto, EUROPEAN COMMITTEE ON CRIME PROBLEMS, COMMITTEE OF EXPERTS ON THE OPERATION OF EUROPEAN CONVENTIONS ON CO-OPERATION IN CRIMINAL MATTERS, Council of Europe, Strasbourg, 25 January 2012 [PC-OC/ Documents 2012/ PC-OC(2012) 02 ], p. 2-3.



result; the Chinese symbol (character) of risk best captures this duality: 危險. The existence of danger and possible harm to some values requires that the act targeting the positive result should be reasonable: The actor stands the possibility of being unsuccessful in the name of something really worth risking. When it comes to criminal law, in particular, the risky act becomes relevant when it not only causes some harm, like the one in the state of necessity, but is also unsuccessful<sup>20</sup>.

Obviously, a requested country is hardly expected to surrender a person for prosecution, or/and execution of a punishment in respect of a conduct which is not only non-criminal but also lawful as well, as it is the case with justified deeds (as necessary defense, extreme necessity, etc.) given the “permissive” legal descriptions provided for them<sup>21</sup>. At the same time, it would be appropriate to send a clear message to all requesting countries’ authorities that it is their sole duty to fully study and consider the law of BiH when it is the requested country. This is achievable by expressly specifying in the BiH domestic law on international judicial cooperation in criminal matters that, when determining dual criminality, existing justifications are also taken into account. Such a specification may be made in Article 33 [Extradition Allowed] of the BiH Law on IJC.

G. The problem with the priority of international instruments over national law appears within some bilateral treaties as well. Article 21.1, “B” of the Agreement between the former Yugoslavia (BiH is its successor) and Iraq is an appropriate example. This provision expressly postulates that extradition may be granted, if it does not contradict the internal national law of the requested country<sup>22</sup>. Thus, national law is given the opportunity to additionally provide an own ground for the prohibition

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20 In contrast to the action undertaken in the state of necessity which must always be a successful rescue operation, the risky action in criminal law is an unsuccessful action, even though it was worth undertaking to gain something serious (experimental action) or to avoid some serious loss when no unriskey way existed to achieve the desired positive result. The legal description of allowed risk is subsidiary to the legal description of necessity.

Usually, this unsuccessful but acceptable risk is regarded as a justification of general significance. However, the idea of risk is so closely related to economic domain that some national criminal laws contemplate it only in the sphere of economy, e. g. Article 13a of the Bulgarian CC and Article 34 of the Lithuanian CC. Other national laws, e. g. Article 27 of the Polish CC, Article 41 of the Russian CC and Section 27 of the Slovak CC, codify risk in all spheres of social life (military activities, medical operations, pollution protection, sport, international relations, etc.).

21 See BERMAN M. N, Lesser Evils and Justification: A Less Close Look. **Law and Philosophy**, Vol. 24, p. 681, 2005; **Univ of Texas Law, Public Law Research Paper No. 84** and ESER A, “Justification and Excuse”, in **American Journal of Comparative Law**, 1976, No. 24, p. 629.

22 It reads: “Extradition shall be refused in the following cases: ... (b) if the extradition is not permissible under the law of one of the Parties.”



to extradite, which to, eventually, override the general international obligation to extradite established by the same Agreement. As a result, the applicable national law of any requested country has acquired the legal force of the international agreement in prescribing grounds for refusal, at least. Obviously, this is unacceptable being contrary to the established and undisputable idea that national law is subsidiary to any international agreement.

It follows that blanket provisions shall not be used in international agreements to provide the same legal power to any national law as the rules of the international agreement itself. The legal technique materialized in blanket provisions is much more appropriate for domestic legislations. Any blanket provision of a given national law envisages specific by-law(s) to attribute it/them equal legal power as the one of the other provisions of the same national law. For example, Article 166 (1) of the BiH Criminal Code [Importing Hazardous Material into Bosnia and Herzegovina] contains a blanket provision which raises the level of the administrative rules governing the import of the said material to the level of the Code. The provision reads: *“Whoever, contrary to regulations of Bosnia and Herzegovina, imports into Bosnia and Herzegovina radioactive material or other material or waste harmful to the life or health of people, shall be punished by a fine or imprisonment for a term not exceeding three years.”*<sup>23</sup>

## II. COUNCIL OF EUROPE CONVENTIONS AND OTHER INTERNATIONAL AGREEMENTS IN EUROPE

A. The Council of Europe legal instruments that govern international judicial cooperation in criminal matters take precedence not only over domestic laws. Some of them also take precedence over bilateral treaties between Parties to the instruments. The most important such Council of Europe legal instruments are: the European Convention on Extradition and the European Convention on Mutual Assistance in Criminal Matters. They contain texts imposing formal hierarchy in cases of conflicts with bilateral treaties.

Thus, according to Article 28 (1, 2) of the European Convention on Extradition, *“This Convention shall, in respect of those countries to which it applies, supersede the provisions of any bilateral treaties, conventions or*

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<sup>23</sup> Article 24 (1) of the Turkish Criminal Code is another good example of a blanket provision. It reads as follows: *“No punishment is imposed for a person who complies with the mandatory provisions”*. The latter provisions are given the necessary legal power to become equal to respective provisions in the same Code and, as special to them, exclude their application.



*agreements governing extradition between any two Contracting Parties. The Contracting Parties may conclude between themselves bilateral or multilateral agreements only in order to supplement the provisions of this Convention or to facilitate the application of the principles contained therein”.*

The European Convention on Mutual Assistance in Criminal Matters contains a similar text. Pursuant to its Article 26 (1-3), *“this Convention shall, in respect of those countries to which it applies, supersede the provisions of any treaties, conventions or bilateral agreements governing mutual assistance in criminal matters between any two Contracting Parties. This Convention shall not affect obligations incurred under the terms of any other bilateral or multilateral international convention which contains or may contain clauses governing specific aspects of mutual assistance in a given field. The Contracting Parties may conclude between themselves bilateral or multilateral agreements on mutual assistance in criminal matters only in order to supplement the provisions”*<sup>24</sup>.

Therefore, bilateral treaties, even though concerning only two Parties, do not exclude the applicability of any of the two multilateral Conventions, pursuant to the legal maxim *“lex specialis derogat legi generali”*<sup>25</sup>. Actually, bilateral treaties are subsidiary to the two Conventions rather than special to them. Hence, the position of any of the two Conventions is of a primary legal instrument.

**B.** Multilateral conventions of regional significance signed by Parties of the aforementioned Council of Europe instruments are also in the same position of subsidiarity. Moreover, the subsidiary position of some of them comes not only from the three quoted texts of Article 28 (1, 2) of the European Convention on Extradition, Article 26 (1-3) of the European Convention on Mutual Assistance in Criminal Matters and Article 43 (2) of the European Convention on the Transfer of Proceedings in Criminal Matters expressly declaring their primacy. The subsidiary position of regional conventions, with less Parties to them, is also prescribable by own correlative provisions that they contain to announce, in turn, their own the subsidiarity.

Virtually, any such a correlative provision supports “from inside” the three aforementioned Articles of the Council of Europe conventions. For

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24 Similarly, Article 43 (2) of the European Convention on the Transfer of Proceedings in Criminal Matters postulates that *“The Contracting States may not conclude bilateral or multilateral agreements with one another on the matters dealt with in this Convention, except in order to supplement its provisions or facilitate application of the principles embodied in it”*.

25 See also AKEHURST Michael, “The Hierarchy of the Sources of International Law”, in **British Yearbook of International Law**, Vol. 47.1, 1975, p. 273.



example, Article 118 of the 2002 Chisinau Convention of the Commonwealth of Independent States [most of the former Soviet Union countries] on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters recognizes the priority of Council of Europe legal instruments by postulating that *“the Contracting Parties which are also parties to one or several Council of Europe conventions in the penal field, containing provisions affecting the subject matter of this Convention, shall apply only those provisions which complement these Council of Europe Convention or facilitate the application of the principles contained therein.”*

C. However, the hierarchy of international legal instruments does not necessarily depend on the number of their Parties. The matter of hierarchy is resolved instrument by instrument, depending on its specific objectives and selected means to achieve them. Conventions with more Parties, such as UN conventions, may be subsidiary and their subsidiarity may also be expressly postulated by some provision that they contain.

For example, the UN Convention against Transnational Organized Crime, the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and the UN Convention against Corruption<sup>26</sup> contains a specific rule on the resolution of possible conflicts between them and other agreements. Thus, Article 18 (6) of the Convention against Transnational Organized Crime stipulates that *“the provisions of this article shall not affect the obligations under any other treaty, bilateral or multilateral, that governs or will govern, in whole or in part, mutual legal assistance”*. Article 7 (6) of the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and Article 46 (6) of the Convention against Corruption are similar. Obviously, these UN conventions resolve possible conflicts between them and other agreements by giving way to other international instruments they may fall into conflict with.

Thus, although the mentioned UN Conventions have more Parties than the European Convention on Extradition, the European Convention on Mutual Assistance in Criminal Matters and the European Convention on the Transfer of Proceedings in Criminal Matters, they, nevertheless, have not accepted their approach in solving conflicts with other international instruments between their Parties. The UN Conventions do not postulate own primacy over the other international instruments between their Parties but resort to contrary approach by announcing their own subsidiarity.

26 These Conventions are particularly important in the fight against interrelated terrorism and organized crime. See SARI İsmail, “The nexus between terrorism and Organized Crime: Growing Threat?”, in *Uyuşmazlık Mahkemesi Dergisi* - Turkey, Ankara, 2015, No. 6, p. 463.



D. At the same time, the mentioned Council of Europe Conventions leave room for bilateral treaties by mainly allowing Parties to specify channels of communications given the specific peculiarities of their judicial systems – see Article 12 (1) (ii) of the European Convention on Extradition and Article 15 (7) of the European Convention on Mutual Assistance in Criminal Matters. Most often, parties avoid the diplomatic channel by providing direct links between their Ministries of Justice. Where prosecutors are in charge of pre-trial activities and prosecution services are sufficiently strong, parties establish direct links between Head Prosecution Offices, in practice, between their Departments for international judicial cooperation in criminal matters<sup>27</sup>.

The reason to avoid the diplomatic channels is not only because they are slow and cannot serve well criminal proceedings with their strict deadlines. There is also another reason which is no less significant. Usually, such channels are not recognizable by judicial officers (magistrates): Judges, prosecutors, judicial investigators, etc. The diplomatic channel involves a verbal note by the embassy of the requesting country but the judicial officers of the requested country usually do not find this note sufficient. Depending on the situation, they additionally require a request from the Justice Ministry or the Head Prosecution Office of the requesting country. Because such requests, sufficient to trigger the respective procedure of international judicial cooperation alone, are almost always required, the additional actions for their provision result in factual depriving the diplomatic channel of own significance and practical justification, nowadays.

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<sup>27</sup> Such prosecutorial formations exist in Albania, Bulgaria and the former Soviet Union countries. When it comes to serving pre-trial criminal proceedings, these offices are a combination of central communication and central decision-making authority in the area of international judicial cooperation. The decision-making component is crucial. The work is done by specialized national level prosecutors. Such a model is found only in countries with prosecutorial investigation where the prosecutor, rather than an investigating judge, is the manager of all pre-trial activities.

On the one hand, the specialized prosecutors, possessing more knowledge on investigative methods than any Ministry official, are likely to achieve much better results at the international level in support of national investigations than the ordinary prosecutors in charge of the investigations who prepare the necessary requests to other countries now. On the other hand, the specialized prosecutors, being a part of the prosecution service, would be in a much better position than any Ministry official to provide advice, to give orders to and/or to control the work of ordinary prosecutors. In turn, instructions from the Unit/Department for International Judicial Cooperation are mostly very welcomed and executed by ordinary prosecutors in charge of such criminal proceedings because they are usually not familiar with international work. As a result, international judicial cooperation carried out under this mechanism is more flexible, adaptable and efficient than the one led by a Ministry of Justice.



### III. HIERARCHY BETWEEN MULTILATERAL INTERNATIONAL INSTRUMENTS

A. First of all, such a hierarchy may exist in Europe between two Council of Europe instruments where one of them declares its subsidiarity. The Convention on Cybercrime constitutes a good example. Its Article 27 regulates, in accordance with its own title, the “Procedures pertaining to mutual assistance requests in the absence of applicable international agreements”. *Per argumentum a contrario*, if an applicable international agreement exists, such as European Convention on Mutual Assistance in Criminal Matters and the Protocols thereto, the Convention on Cybercrime shall give way<sup>28</sup>.

As in the case with Article 28 of the European Convention on Extradition and Article 26 of the European Convention on Mutual Assistance in Criminal Matters, this is also a formally and expressly established hierarchy but by the subsidiary Convention. However, sometimes hierarchy between international instruments may not be clearly established but occurs as a result of interpretation of some legal rule, such as Article 1F and some other provisions of the 1951 Convention Relating to the Status of Refugees as well.

As per this Article, in particular, *“The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:*

1. *He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;*
2. *He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;*
3. *He has been guilty of acts contrary to the purposes and principles of the United Nations”.*

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28 Also conflicts are possible between agreements on international judicial cooperation and human rights. A requested country will be confronted with conflicting obligations stemming from extradition agreements and agreements on human rights, whenever the wanted person faces a real risk that his/her fundamental rights will be violated by the requesting country. These conflicts are not easily solved. With the exception of torture, international law does not acknowledge the general primacy of human rights over extradition. State authorities apply different avoidance techniques — rule of non-inquiry, reliance on assurances, and local remedies — to evade these conflicts. See DE WET Erika and JURE Vidmar, “Hierarchy in International Law”, **The Place of Human Rights**, Oxford, 2012; Available at: <http://www.unhcr.org/refugees/pdf/9780199647071.001.0001/acprof-9780199647071-chapter-6>, accessed on 01 March 2016. Also KAPFERER Sibylle, “The Interface between Extradition and Asylum”, in **LEGAL AND PROTECTION POLICY RESEARCH SERIES**, UNHCR, GENEVA, 2003, p. 11; Available at: <http://www.unhcr.org/refugees/pdf/3fe84fad4.html>, accessed on 06 March 2016.



Such a rule facilitates the general conclusion that in cases of conflict with the Convention Relating to the Status of Refugees is expected to give way any international extradition law, if there might be any conflict between them all. It is well known that the legal framework for the treatment of refugees and the one for extradition are related. In practice, asylum proceedings (for granting a refugee status to foreigners) and extradition proceedings interact as the former take into account the results of the latter. Findings in the extradition process may (not only in respect of crimes under Article 1F of the 1951 Convention but also for all other extraditable crimes as well) have a bearing not only on the eligibility for international refugee protection of an asylum-seeker. They are also likely to affect the already recognized asylum status. Information which comes to light during the extradition process may also set in motion proceedings leading to the revocation of the asylum status<sup>29</sup>.

Additionally, asylum and extradition may seem to overlap in some sense where the person, whose extradition is sought, is an asylum-seeker, or a refugee (with an already granted asylum status). However, asylum law does not as such stand in the way of criminal prosecution or the enforcement of a sentence, nor does it exempt refugees, asylum-seekers or persons with granted asylum from extradition. As the legal framework for asylum was never intended to shield fugitives from legitimate criminal justice, this legal institution is not seen as a restriction to application of extradition law<sup>30</sup>. Obviously, extradition results may exclude asylum but asylum results may not exclude extradition.

**B.** It is important to know that asylum law provides protection to refugees (persons with asylum status) and asylum-seekers from being extradited to countries where they may be subjected to discriminatory ill-treatment. Thus, Article 33 (1) of the 1951 Convention Relating to the Status of Refugees prohibits the surrender of any such person to a foreign country “*where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion*” [probability of discriminatory ill-treatment]<sup>31</sup>.

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29 See also KAPFERER Sibylle, op. cit., p. 99.

30 See KAPFERER Sibylle, “The Interface between Extradition and Asylum”, in **LEGAL AND PROTECTION POLICY RESEARCH SERIES**, UNHCR, GENEVA, 2003, p.74; available at: <http://www.unhcr.org/3fe84fad4.html>, accessed on 06 March 2016.

31 Likewise, Article 3 of the European Convention on Human Rights prohibits torture, and “inhuman or degrading treatment or punishment”. There are no exceptions or limitations on this right. It is exercisable also in extradition cases to outlaw surrender to countries where torture or inhuman or degrading treatment or punishment is probable. See *Soering vs UK*, (1989), ECHR (Series A) No. 161.





It is noteworthy that this is the only protection of asylum law to refugees (persons with asylum status) and to asylum-seekers, and this protection is reproduced in full in extradition law. Their surrender is prohibited by Article 3 (2) of the European Convention on Extradition. This Paragraph reads: “*Extradition shall not be granted, if ...the requested Party has substantial grounds for believing that a request for extradition for an ordinary criminal offence has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that that person’s position may be prejudiced for any of these reasons*” [again, probability of discriminatory ill-treatment]. Similarly, Article 34I of the BiH Law on IJC postulates that extradition shall be rejected, if requested “*for the following purposes: Criminal prosecution or punishment on the grounds of the person’s race, gender, national or ethnic origin, religious or political belief*”.

Further on, the protective rules of extradition law not only reproduce the protection of asylum law. Being special, they also derogate it excluding its applicability in accordance with the maxim that “**lex specialis derogat legi generali**”. It follows that the rules of asylum law, incl. the protective ones, are not applicable. *Per argumentum a fortiori*, applicability is ruled out also for Article 3 of the European Convention on Human Rights which prohibits torture, and “inhuman or degrading treatment or punishment”, in general.

Hence, if a wanted person is requested by a country where s/he is likely to be subjected to discriminatory ill-treatment, it is the extradition law which would protect him/her against any extradition to that country. There are no reasons to maintain the contrary, namely: That this person is protected only by asylum law<sup>32</sup> and that the asylum law protection [the quoted Article 33 (1) of the 1951 Convention, in particular] derogates obligations to extradite when the wanted person might be subjected to some discriminatory ill-treatment.

Actually, it is the other way around: The protective provisions of extradition law, being special rules, derogate protective rules of asylum law, being of the same content but general in scope. Specifically, the necessary protection against discriminatory ill treatment in the countries requesting extradition comes from Article 3 (2) of the European Convention on Extradition and Article 34I of the BiH Law on IJC. It does not and cannot come from provisions envisaging granted asylum or asylum-seeking, such as: The derogated Article 33 (1) of the 1951 Convention, in particular.

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32 See this unacceptable statement in “GUIDANCE NOTE ON EXTRADITION AND INTERNATIONAL REFUGEE PROTECTION”. UNHCR, Protection Policy and Legal Advice Section, Division of International Protection Services, Geneva, April 2008, p. 6.



C. Article 34B of the BiH Law on IJC is also designed and seen as a provision protecting persons with granted asylum (refugees) and asylum-seekers. It qualifies as a mandatory condition for extradition the fact that the requested person does not enjoy asylum in BiH or have not applied for it (s/he is not any asylum-seeker) in BiH at the moment the request for extradition is filed<sup>33</sup>. However, there is no such condition for extradition in the European Convention on Extradition. Extradition may be excluded only by granting nationality to the wanted person (e.g. Article 6 of the European Convention on Extradition) – in addition to his/her asylum status or without giving him/her any such a status. In any case, the European Convention on Extradition does not postulate that the asylum status or the asylum-seeking conduct of the wanted person is any impediment to his/her extradition.

By contrast, Article 34B of the BiH Law on IJC means that any of the two – the asylum status or even asylum-seeking - alone constitutes an impediment to extradition. This provision requires denial of extradition on the sole ground that the wanted person is a refugee (has an asylum status) or is an asylum-seeker, regardless of whether any plausible danger of his/her discriminatory ill treatment in the requesting country exists or does not exist at all.

Moreover, because Article 3 (2) of the European Convention on Extradition and Article 33E, letter “I” of the BiH Law on IJC have banned extradition to countries where danger of discriminatory ill-treatment exists, the prohibition of extradition under Article 34B of the BiH Law on IJC - on the ground that the wanted person who has an asylum status or is an asylum-seeker, is not applicable to such requesting countries. As a result, this prohibition to extradite refugees (with asylum status) and asylum-seekers is applied only to those requesting countries where no such danger exists.

Hence, if the BiH Law on IJC is applicable, in accordance with its Article 1 (1), then nothing can exclude the application of Article 34B of the BiH Law on IJC, in particular, prescribing to BiH authorities to reject any extradition of a refugee or an asylum-seeker to countries where s/he is not likely to be subjected to any discriminatory ill-treatment at all. Thus, the

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33 The Article reads: “Preconditions for extradition are as follows:

- a) the person whose extradition is requested is not a national of Bosnia and Herzegovina;
- b) the person whose extradition is requested does not enjoy asylum in Bosnia and Herzegovina, that is, that the asylum seeking process is not underway in Bosnia and Herzegovina at the moment the extradition request is filed...”.



sole function left to the legal ground under Article 34B of the BiH Law on IJC is to hinder acceptable extradition and prevent legitimate justice from being done. This is an obvious absurd though. It virtually means that legal provisions shall not only prevent injustice but may create it as well as in the case with Article 34B of the BiH Law on IJC.

This happens because, in contrast to Article 33E, letter "I" of the BiH Law on IJC, Article 34B of the same Law envisages not only situations of possible discriminatory ill-treatment in the requesting country. This Article also expands to opposite situations where discriminatory ill-treatment in the requesting country is not likely. Moreover, in practice, it is applicable to them only. In this way, the legal ground under Article 34B the BiH Law on IJC has turned into its undesired opposite to prohibit requested country from extraditing only to countries where no danger of discriminatory ill-treatment of the potential extraditee exists at all.

Obviously, when no danger of discriminatory ill-treatment exists, the asylum status, and asylum-seeking as well, shall be irrelevant since the values protected by it would not be threatened at all, when the person (refugee or asylum-seeker) is surrendered to the requesting country for the benefit of justice<sup>34</sup>. Therefore, no human rights justification to refuse extradition exists in such cases. Moreover, the person shall not only be extradited, if there is no other impediment to his/her extradition, but also deprived of his/her asylum status or respectively denied such a status, even though it alone did not and could not hinder the extradition.

D. It follows that Article 34B of the BiH Law on IJC, which essentially postulates the contrary, should be deleted. There is no justification of having the granted asylum, and asylum-seeking either, as a separate legal

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34 This is the reason why in Germany decisions in asylum proceedings are not binding for an extradition proceeding. The Courts, responsible for decisions regarding the admissibility of extradition, decide independently whether serious grounds exist to believe that the person subject to extradition would be threatened with political persecution in the requesting country, and that his/her extradition is therefore, not admissible. A hindrance to extradition exists in cases where there is serious cause to believe that the person sought, if extradited, would be persecuted or punished because of his race, religion, citizenship, association with a certain social group or his political beliefs, or that his/her situation would be made more difficult for one of these reasons. With this, extradition law mentions those characteristics of persecution that form the basis of the principle of "non-refoulement" in Article 33 (1) of the Geneva Convention relating to the Status of Refugees and are therefore, determinative for the grant of asylum. See Information received from states on practical problems encountered and good practice as regards the interaction between extradition and asylum procedures, EUROPEAN COMMITTEE ON CRIME PROBLEMS, COMMITTEE OF EXPERTS ON THE OPERATION OF EUROPEAN CONVENTIONS ON CO-OPERATION IN CRIMINAL MATTERS, Council of Europe, Strasbourg, 5 March 2014 [PC-OC/PC-OCMod/2013/Docs PC-OC Mod 2013/ PC-OC Mod(2013) 06rev2], p. 14



ground for refusal to extradite as this Article postulates<sup>35</sup>. If this provision stays, it would literally mean that once a person has been granted an asylum status, or even is an asylum-seeker only, this person shall never be extradited to any country in the world. It goes without saying that such a protection is either redundant or unacceptable.

Where no danger of discriminatory ill-treatment in the requesting country exists, Article 34B of the BiH Law on IJC only repeats the text of Article 33E, letter "I" of the same law postulating that extradition shall be rejected, if requested *"for the following purposes: criminal prosecution or punishment on the grounds of the person's race, gender, national or ethnic origin, religious or political belief"*. Since in this situation of possible discriminatory ill-treatment Article 33E, letter "I" prescribes the same as Article 34B of the BiH Law on IJC, the former provision makes the latter redundant.

It is even worse in the situation where no discriminatory ill-treatment is expected to take place in the requesting country. Nevertheless, Article 34B of the BiH Law on IJC prohibits even the extradition of the wanted refugee or asylum-seeker to that normal country, that has nothing to do with the country from which s/he has escaped from.

Certainly, the prohibitive rule of Article 34B of the BiH Law to extradite refugees and asylum-seekers might be construed restrictively to avoid its unjustified application to requesting countries where no discriminatory ill-treatment is possible. However, this would mean that the prohibition would be applicable to requesting countries where discriminatory ill-treatment is possible. In this way, the prohibitive rule of Article 34B of the BiH Law would be nothing more than a replica of the prohibition under Article 3 (2) of the European Convention on Extradition and Article 33E, letter "I" of the BiH Law. Thus, even in the conditions of such, more or less, an artificial interpretation, Article 34B of the BiH Law stays without any justification.

E. Normally, if the extradition of a refugee or an asylum-seeker who is likely to have committed an extraditable offence (or has not already been found guilty of such an offence) is to take place from BiH, its competent authorities shall revoke his/her granted asylum or refuse granting it rather than reject his/her extradition and eventually protect him/her from legitimate justice. Justice must be ensured because, in contrast to refusals

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35 See also KLIP André, *Facilitating Mutual Legal Assistance in the Western Balkans. Towards removing obstacles in international cooperation in criminal matters*, Maastricht University, 2014, p. 42-50. Available at: <http://pn.datheca.com/publications.wbsp>, accessed on 8 February 2016.



on the grounds of own nationality – see Article 6 (2) of the European Convention on Extradition, a refusal on the grounds of asylum status (let alone on the ground of asylum-seeking), does not entail any international obligation on the requested country to prosecute and try the wanted person. It is not obliged to execute any additional request by the requested country to this effect. As a result, no justice would be done.

Undoubtedly, the fact of receiving an extradition request may not necessarily be regarded as sufficient for the revocation or not granting of the asylum status to the wanted person and for his/her surrender to the requesting country. When it comes to such persons (refugees and asylum-seekers), BiH is in the position to find an appropriate legal way to additionally require some evidence of their guilt. But if evidence of the person's guilt is provided to BiH judicial authorities, they must surrender him/her, if no other impediment to his/her extradition exists.

F. In the end, as regards relations of BiH with other Parties to the European Convention on Extradition, in particular, asylum may be no impediment to any extradition requested from BiH either. First of all, there is no provision in this Convention to qualify asylum as such impediment. Besides, BiH, unlike Poland (Declaration of 15 June 1993) or Rumania (Declaration of 17 July 2006), has never submitted any declaration to the Convention that persons granted asylum by its authorities shall not be extradited.

Presently, Article 1 of the Convention obliges BiH to extradite whenever the conditions for extradition are met and there is no exception for persons granted asylum in BiH – neither in the text, nor, as clarified, in any declaration or reservation of BiH to the Convention. Because international provisions override domestic rules (see Article 1 of the BiH Law on IJC), the international legal obligation to extradite based on Article 1 of the Convention cannot be derogated by whatever national asylum protection, incl. the one based on the criticized Article 34 "B" of the BiH Law on IJC.

However, the asylum issue should not be totally ignored either. On the contrary, there must be some adequate reaction to European countries, such as Poland and Romania, which make in their declarations concerning asylum the same mistake as the one of the criticized Article 34 "B" of the BiH Law on IJC. The two countries have accepted through their declarations that their authorities shall not extradite persons who have been granted asylum (refugees), regardless of whether discriminatory their ill-treatment in the requesting country is possible at all. Therefore, like Article 34 "B" of the BiH Law on IJC, the declarations of the two countries prevent their



authorities from extraditing even to requested countries where no danger of discriminatory ill-treatment of potential extraditees exists.

No doubt, such countries as Poland and Romania require a proper response. BiH, considering itself a country where no discriminatory ill-treatment is possible, including of extradited refugees (persons with asylum), could reciprocate with an own declaration. Specifically, BiH may mirror-like declare that it reserves its right to deny in the same way extradition to Poland and Romania of persons who are granted asylum, even though these two countries are not regarded as countries where discriminatory ill-treatment of anyone, incl. potential extraditees, is possible.

However, there is a milder and narrower option. It is to follow the example of Austria which with an own declaration of 07 January 1994 supported the German one of 11 October 1993 in response to the Polish. In its declaration Germany states that it: *“considers the placing of persons granted asylum in Poland on an equal standing with Polish nationals in Poland’s declaration with respect to Article 6, paragraph 1 (a) of the Convention to be compatible with the object and purpose of the Convention only with the provision that it does not exclude extradition of such persons to a state other than that in respect of which asylum has been granted.”*

Presumably, this state (country) in respect of which asylum has been granted, is a country where discriminatory ill-treatment of potential extraditees is possible. Hence, Germany maintains that the Polish reservation makes sense only because and solely to the extent it repeats the ground for denying extradition under Article 3 (2) of the European Convention on Extradition, namely: That extradition shall be refused if the potential extraditee may suffer in the requesting country *“on account of his race, religion, nationality or political opinion, or that that person’s position may be prejudiced for any of these reasons”*.

Germany has not found it necessary at all to mention any other requesting countries of the same sort, although discriminatory ill-treatment of potential extraditees is possible there as well, let alone to consider requesting countries where it is not possible at all. It is true that persons with asylum, and no one else either, shall be extradited to other countries either (along with the one in respect of which asylum has been granted), if discriminatory ill-treatment is possible there. However, the legal ground to reject extradition to them is in Article 3 (2) of the European Convention on Extradition. The ground has nothing to do with the asylum status of potential extraditees and does not need any “support” from it for



the denial of extradition. This is the reason why Germany has not paid any attention to such other countries where discriminatory ill-treatment is possible also.

Lastly, if BiH wants to do anything similar, it must submit a declaration with the respective rule to the European Convention on Extradition. Otherwise, if the rule is a part of the domestic law, as in the case with the criticized Article 34 "B" of the BiH Law on IJC, it would not produce the desired effect given the priority of the Convention.

#### **IV. FORMAL AND FACTUAL (RECOMMENDED) HIERARCHY**

**A.** More and more conventions that govern modern issues (such as: human trafficking, terrorism, piracy at sea) come into force. They seem more efficient to achieve desired results of international judicial cooperation than older and less fashionable international instruments.

However, the attractiveness of new multilateral conventions and bilateral treaties alone shall be no prioritization criterion. On the contrary, if a desired result is achievable on the grounds of older instruments, it would be better to prefer them. Assets abroad liable to criminal confiscation provide a good example in support of such a prioritization. The process with the assets involves the following typical steps:

1. Identification of assets – establishing the holder of a given item (physical or intangible) or bank account;
2. Detection of assets – locating the item(s) and/or finding the bank account(s) of a given person;
3. Preservation of assets – seizure of some movable physical item(s) and/or freezing the deposited money in some bank account(s) or/and immovable physical items of a given person;
4. Confiscation of assets - a judicial order for the final deprivation of property, namely: of some physical item(s) and/or of deposited money in some bank account(s) of a given person;
5. Enforcement of the order to actually confiscate the targeted asset(s);
6. Redistribution of confiscated assets, including their sharing and recovery.

For the purpose of successfully finalizing this difficult process, laws on international cooperation provide for two types of cooperation: judicial cooperation for criminal cases and purely administrative procedure for



non-criminal cases designed to ensure the confiscation of criminal assets. The judicial assistance consists predominantly of execution of letters rogatory. There is no obstacle regarding their execution to collect evidence about the proceeds from investigated crimes and to use this evidence to substantiate the confiscation of these proceeds as well.

The international administrative procedure is comparatively new. It is more common between administrative agencies rather than between judiciaries of different countries. Most often, the cooperating administrative agencies are Financial Investigation Units. This international procedure is mentioned in a number of foreign countries' national laws which govern criminal assets recovery through non-criminal legal proceedings, for example: The Serbian Law on Seizure and Confiscation of Proceeds from Crime (2008), the UK Proceeds of Crime Act (2002), etc. International assistance matters are also regulated in Articles 48-59 of the Republika Srpska Criminal Assets Recovery Act (2010).

These national laws regulate the administrative requests related to criminal assets. Such requests may be used to eventually obtain information about the assets for the purpose of their confiscation. However, it should always be remembered that these requests are novelties and many countries are hesitant and even reluctant to respond to them.

**B.** Moreover, some national laws on criminal assets recovery expressly postulate that this international cooperation is rendered solely on the basis of international agreements (e. g. Article 92 of the 2005 Bulgarian Law on the Forfeiture of Criminal Assets to the Exchequer). This makes the administrative requests even less reliable. Therefore, one should comply with the following recommendation: If the same information can be obtained through both requests: the letter rogatory and the administrative request, the former should be preferred to the latter.

Administrative requests are less reliable for another important reason as well. They do not guarantee that information can be obtained in case of bank secrecy. This does not apply to letters rogatory. On the contrary, they are the truly appropriate means to obtain such information. According to Article 7 (5) of the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Article 18 (8) of the UN Convention against Transnational Organized Crime and Article 46 (8) of the UN Convention against Corruption, "*Parties shall not decline to render mutual legal assistance ... on the ground of bank secrecy*". Furthermore, all these Conventions postulate that mutual legal assistance ... may be requested for any of the following purposes: ...Providing originals or certified copies of relevant





documents and records, including government, bank, financial, corporate or business records; identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes – Article 7 (2) of the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Article 18 (3) of the UN Convention against Transnational Organized Crime and Article 46 (3) of the UN Convention against Corruption. Nothing of this sort has yet been prescribed in favor of any administrative request relating to criminal assets and their confiscation.

However, letters rogatory open more doors but not necessarily all doors. Countries like Switzerland, for example, do not grant legal assistance in respect of fiscal offences that are subject of investigations by a foreign authority – Article 3 (3) of the Swiss Federal Law on International Mutual Assistance in Criminal Matters. The decision not to cooperate is not rooted in the rule of dual criminality; neither is it directly based on the banking secrecy standard which may be lifted in certain cases that are provided for in Article 47 (5) of the Swiss Banking Law. The main reason why Switzerland does not provide international assistance in fiscal matters is due to the fact that the bank secrecy represents a direct obstacle to tax-related investigations under Swiss law as well, and may only be suspended in cases of tax fraud, namely: Fraudulent evasion of taxes or duties by using false, forged or untrue information. Consequently, in the context of mutual assistance, Switzerland is unable to grant foreign prosecuting authorities broader privileges than those Swiss authorities are entitled to use in their own domestic investigations.

C. There is also another remarkable advantage of letters rogatory to administrative requests. It is that letters rogatory can more often be granted, even when the dual criminality requirement has not been met. To express and confirm this policy Article 46 (9) (B) of the UN Convention against Corruption expressly calls on its State Parties to consider providing such international cooperation in the absence of dual criminality, especially when the execution of the request does not involve coercive action.

Lastly, in the process of obtaining evidence from abroad, one should always choose the convention which poses less risk to the validity of evidence. In any case, an international instrument on judicial cooperation is more reliable than any international instrument on police or other administrative cooperation. Hence, when it comes to joint investigation teams, the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (in particular, Articles 20-22 of



the Protocol) must be preferred to the Police Cooperation Convention for Southeast Europe (in particular, Article 27) not only because of the general priority of the Council of Europe international instruments in the penal field. The Second Additional Protocol must also be preferred also because its immediate subject-matter is international judicial cooperation rather than police relations.

## CONCLUSION

International judicial cooperation in criminal matters is the biggest ocean of criminal justice. The domestic and international legal instruments regulating it increase both in number and complexity. Each of them contains its own regulation of the specific forms of international judicial cooperation: Extradition, execution of letters rogatory, etc. The different instruments (domestic and international) on this type of international cooperation consist of various substantive and procedural rules for the achievement of their own objectives. This multiplicity of existing instruments requires consistency between them. Most of all, it is necessary to identify the priority instruments governing international judicial cooperation.

International judicial cooperation in criminal matters is strongly in need of good rules and a clear picture of their applicability, functions and relations, an appropriate differentiation of their place and role. Otherwise, misunderstandings increase and the efficiency of this cooperation drops down.



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