

HIERARCHY OF RULES ON INTERNATIONAL JUDICIAL COOPERATION (THE LAW OF BOSNIA AND HERZEGOVINA)

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Abstract

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This study is focused on the law of Bosnia and Herzegovina with its specific problems in international judicial cooperation in criminal matters. In the international law, hierarchy of interstate agreements is accepted and recognized, although, in practice, it is not always understood in the best way. Therefore, as in the case of Bosnia and Herzegovina, domestic law is subsidiary in cases of conflicts with interstate agreements. Nevertheless, it plays an irreplaceable role, as a regulator of international judicial cooperation in support of interstate agreements by interpreting their provisions. This power of national legal provisions must be properly used.

Keywords: *Bosnia and Herzegovina; International Law; International Judicial Cooperation; Domestic Law.*

Hierarchy in International Law

In Europe, a hierarchy may exist between international instruments when one of them postulates its own primacy over others, e.g. the European Convention on Extradition. Its Article 28 reads:

This Convention shall, in respect of those countries to which it applies, supersede the provisions of any bilateral treaties, conventions or agreements governing extradition between any two Contracting Parties. The Contracting Parties may conclude between themselves bilateral or multilateral agreements only in order to supplement the provisions of this Convention or to facilitate the application of the principles contained herein. (Article 26 of European Convention on Mutual Assistance in Criminal Matters and Article 43 of the European Convention on the Transfer of Proceedings in Criminal Matters contain similar rules).

At the same time, an international instrument may declare its subsidiary. The Council of Europe Convention on Cyber crime 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 (Sibylle, 2003, p. 11; Erika and Vidmar, 2012).

As in the case with Article 28 of the European Convention on Extradition, Article 26 of European Convention on Mutual Assistance in Criminal Matters and Article 43 of the European Convention on the Transfer of Proceedings 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 a rule is Article 1F of the 1951 Convention Relating to the Status of Refugees as well. It reads:

The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

(a) 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;

(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(c) *he has been guilty of acts contrary to the purposes and principles of the United Nations.*

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 (Sibylle, 2003, p. 99).

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 (Ibid., p. 74). Obviously, extradition results may exclude asylum but asylum results may not exclude extradition.

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 subject to discriminatory ill-treatment. Thus, Article 33 (1) of the 1951 Convention Relating to the Status of Refugees prohibits the surrender of such persons to foreign countries „*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].¹

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 Bosnia and Herzegovina Law on International Judicial Cooperation in Criminal Matters [the BiH Law on IJC] postulates that extradition shall be rejected, if requested „*for the*

1) 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.

*following purposes: criminal prosecution or punishment on the grounds of the person's race, gender, national or ethnic origin, religious or political belief*⁶.

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 law² 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.

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. 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

²See 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.

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 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 justice³. 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.

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 ground for refusal to extradite as this Article postulates (Andre, 2014, pp. 42-50). 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

3)This is the reason why in Germany no decision in asylum proceedings is 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

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, one 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.

Normally, if the extradition of some 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 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. 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 extradition 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.

International Law and Domestic Legal Provisions

Pursuant to the first provision of 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 exists*“ (*International Cooperation in Criminal Matters*, 2016). Thus, following the Civil Law tradition, the BiH Law on IJC postulates the direct application of international agreements (bilateral and multilateral) in BiH⁴ 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.

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

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 only implemented, if Parliament has passed an Act to that effect. See Brownlie, Ian. *Principles of Public International Law* (7th edn), Oxford, 2008, p. 45.

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 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.

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.⁵ Extradition in Europe is granted only in respect of offences punishable under the laws of the requesting country and of the requested country.⁶ 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*

5) 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*”.

6) 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.

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.

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.

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.

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, while the Serbian extortion description does not – Article 214 (1) of the Criminal Code of Serbia, appearing, as a result, a consumed legal description. Hence, when Macedonia requests extradition from Serbia 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 the 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.

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.

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 CC⁷. 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.⁸

7) 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.

8) 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 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".

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.

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 justice⁹ 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.¹⁰ 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 UK, it is also necessary that the deed for which extradition is requested

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

10) 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.

was a crime at the time of its commission too.¹¹ 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.

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 countries¹². 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 result;

11) 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.

12) 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.

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 unsuccessful¹³.

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 (Berman, 2005, p. 681 and Eser, 1976, p. 629). 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.

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.¹⁴ Thus, national

13) 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 unrisky 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.).

14) 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.*”

law is given the opportunity to additionally provide an own ground for the prohibition 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.*”¹⁵

Finally, a factual hierarchy between international instruments in the penal area is also possible. Confiscation of crime-related property is a good example. 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.

15) 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.

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, such as: 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.

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.

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.

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