

Declarations to Multilateral Conventions in the Penal Field – Role and Significance to Authorities in Bosnia And Herzegovina and Some Other East European Countries

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Abstract: This paper deals with a specific and rarely studied issue of Bosnia and Herzegovina in the field of international judicial cooperation in criminal matters. This is the common problem of successfully working with declarations to multilateral legal instruments. In view of this, the aim of my presentation is to find better solutions to this problem by identifying and correcting basic mistakes and unjustifiable omissions in making use of such declarations. For this purpose special attention is given, initially, to the hierarchy of legal instruments: domestic law and international agreements. It is well-known that in Civil Law (Continental-European, Latin) countries, international agreements are applicable directly, without any enabling legislation, and override domestic law which contradicts them. The priority of such agreements is indisputable in such countries. Belonging to this group of countries, Bosnia and Herzegovina makes no exception. As a result, where Bosnia and Herzegovina is a Party to some international agreement, it cannot unilaterally change anything in this agreement: either by means of its domestic law or in any other way. However, when the international agreement is a multilateral convention, Bosnia and Herzegovina is in the position to unilaterally modify it. The sole and irreplaceable means to reach this goal is a reservation or in some sense a declaration to the multilateral convention. Nevertheless, there are cases where the legislation of this country has not taken into consideration the inability of its own domestic law to change multilateral conventions. This makes it necessary to discuss those cases and explain the need of resorting to declarations, in particular, for the purpose of producing the desired result.

Keywords: Declaration, convention, communication channels, extradition, refugee, letter rogatory.

INTRODUCTION

Bosnia and Herzegovina is a complex country situated on the Balkan Peninsula. It consists of four components: the State level, the two entities (the Federation of Bosnia and Herzegovina and Republika Srpska) and the Brcko District. Each component has its own Criminal Code, Criminal Procedure Code and other own laws which are not applicable anywhere else. Yet, despite the structural complexity this country, in general, maintains centralized contacts with other countries in the area of international judicial cooperation in criminal matters. It has one central authority for international judicial cooperation. This is its State Ministry of Justice whose role is to facilitate the international judicial activities of all Bosnian judges and prosecutors.

Also, Bosnia and Herzegovina has a single legal framework for international judicial cooperation in criminal matters. It is valid for all four structural components of the country, namely: not only for the State level, but also for the two entities (the Federation, Republika Srpska) and the Brcko District as well.

However, the Bosnian framework for international judicial cooperation is quite complicated. It comprises a number of different international agreements (bilateral and multilateral), especially with other European countries, and domestic legislation, namely: The 2009 Amended 2013 Law of Bosnia and Herzegovina on Mutual Legal Assistance in Criminal Matters. Understandably, these legal instruments are not flawless. In some cases, Bosnian authorities make in

them mistakes and omissions endangering efficient carriage of criminal justice. A typical example of such weaknesses is noticeable in the work with declarations to Council of Europe multilateral conventions in the penal field, such as: the European Convention on Mutual Assistance in Criminal Matters, the European Convention on Extradition, the European Convention on the Transfer of Proceedings in Criminal Matters, the European Convention on the International Validity of Criminal Judgments, etc.

Irreplaceability of declarations by domestic legal provisions

PACTA SUNT SERVANDA (Latin: “*agreements are to be kept*”) is a globally recognized principle of international law - see Article 26 of the Vienna Convention on the Law of Treaties. This principle implies that international agreements (bilateral treaties and multilateral conventions) are binding to their Parties and unchangeable by any of them, individually.

However, when it comes to multilateral conventions Parties may unilaterally modify them on an exceptional basis. There are only two means to reach this goal, namely: a reservation and a declaration to the respective convention submitted by the interested Party to it [1].

In theory, multilateral conventions are unilaterally modifiable by reservations only [2] – Articles 2.1 “d” and 21 of the Vienna Convention on the Law of Treaties [3]. In reality, though, this goal is reachable to some extent also by declarations as their

function is to unilaterally interpret one or more provisions of a given convention. In this way, declarations adapt multilateral treaties to the individual views of declaring Parties. Thus, to the extent declaring Parties interpret some convention, they actually modify it. Even in cases when some Party submits a declaration which directly and indisputably modifies a convention, the name of this declaration is not changed to any “reservation” [4]. It stays under the name “declaration”. Such declarations, however, are not excluded from the present study. On the contrary, they are an important part of it. This is the pragmatic reason why it has been accepted, for practical purposes in this presentation, that multilateral conventions are unilaterally modifiable also by declarations.

It is noteworthy that, on the one hand, a reservation or a declaration to a given convention becomes a part of it and thereby assumes its legal force. Domestic laws can never acquire any similar force given their subsidiary significance to conventions. Hence, no national law has the legal powers to modify any convention. If such a law differs in content from what some multilateral convention prescribes, the differing provisions of this law shall not be applied. On the other hand, any declaration or reservation concerns solely the issuing Party, including Bosnia and Herzegovina (BiH) when it turns out to be such a Party. The submitted declaration or reservation does not affect any other Party to the convention: it cannot impose any obligation on another Party.

It follows that, in turn, when a declaration or a reservation is issued by another Party, it cannot impose any obligation on BiH. Hence, if a given foreign declaration contains any binding directive to other Parties the competent Bosnian authorities should disregard it. Finally, if some mistaken text in a foreign declaration endangers the interests of Bosnian justice, BiH should negotiate with the issuing Party the correction of its mistake.

¹ Also, Andre Klip ‘*Facilitating Mutual Legal Assistance in the Western Balkans. Towards removing obstacles in international cooperation in criminal matters*’ (Maastricht, 2014) 34, available online at: http://prosecutorsnetwork.org/uimages/publications-pdf/140424_Facilitating_Mutual_Legal_Assistance_in_the_Western_Balkan_-_Final_Report_Prof_Klip.pdf, accessed on 13 June 2017.

² It is worth noting that a given multilateral convention may prohibit making reservations. Thus, according to Article 69 [Inadmissibility of reservations contrary to the provisions of the Agreement] of the **1983 Riyadh Arab Agreement for Judicial Cooperation (the Riyadh Convention)**, “*None of the Parties may make any reservation involving an explicit or implicit contravention of the provisions of this Agreement or departure from its objectives*”.

³ See Jean Koh Peters, ‘*Reservations to Multilateral Treaties: How International Legal Doctrine Reflects World Vision*’ (1982). Faculty Scholarship Series. Paper 2185. Available online at: http://digitalcommons.law.yale.edu/fss_papers/2185, accessed on 2 June 2017.

⁴Such were, for example, the declaration made by the former Yugoslavia in respect of the 1971 Seabed Treaty and the declaration made by Egypt regarding the Basel Convention on the control of transboundary movements of hazardous wastes and their disposal. In these two cases, the “declarations” elicited protests on the part of the other contracting parties, who were motivated by the fact that the declarations were actually reservations. See RESERVATIONS TO TREATIES, DOCUMENT A/CN.4/491 and Add.1–6. Third report on reservations to treaties, by Mr. Alain Pellet, Special Rapporteur, 1998, p. 275; at: http://legal.un.org/ilc/documentation/english/a_cn4_491.pdf, accessed on 05 August 2017.

There are examples in BiH legislation where the inability of national laws to change multilateral conventions has not been understood. This is why Bosnian authorities have not resorted to any reservation or declaration in order to actually obtain the results which they wanted. A couple of such examples will be discussed. They concern: (1.1) the channels of communication and (1.2) the extradability of fugitives and asylum seekers.

The communication channels in urgent cases

A. Letters rogatory are the main devices for requesting valid evidence from judicial authorities of foreign countries. Given the importance of letters rogatory, the channels of their transmission should be clarified. Since BiH exchanges a lot of evidence with EU countries, the reliability of the EUROJUST channel should be identified properly. Usually, this channel is used in situations of urgency.

According to Article 4 (4) of the BiH Law on Mutual Legal Assistance in Criminal Matters (MLA Law), *“In urgent cases, requests for mutual legal assistance may be forwarded and received through Eurojust – the European Union Agency for police [5] and judicial cooperation in criminal matters”*. This domestic provision, however, does not produce the desired result; this makes it misleading. BiH authorities should resort to means that can actually produce the result in question.

Eurojust (The European Union's Judicial Cooperation Unit in the Hague) serves EU Member States. They, together with BiH, are all Parties to the European Convention on Mutual Assistance in Criminal Matters (the ECMACM) and most of them – also to the Second Additional Protocol thereto, as well. Hence, when it comes to the transmission of any request, incl. requests in urgent cases and using Eurojust for this purpose if possible at all, these two Council of Europe (CoE) instruments are applicable, namely: their texts (Article 15 of the Convention, Article 4 of the Second Additional Protocol) together with the declarations to them made by interested Parties. The transmission of requests in urgent cases is within their subject-matter, exclusively.

Given the priority of international agreements (see Article 1.1 of MLA Law), the provisions of CoE instruments and the declarations to them are the sole means to determine communication channels, in general, and those to be used in urgent cases, in

particular. Pursuant to Article 15 (5/7) [6] of the ECMACM, INTERPOL is as a general rule this channel for all Parties. BiH is no exception since this country has not made any declaration for a different channel, incl. for using Eurojust. As a result, the quoted Article 4 (4) of the Law mentioning the Eurojust channel is not applicable at all; its applicability is excluded by the aforementioned CoE instruments.

The texts of CoE instruments and declarations thereto must be clearly distinguished from any domestic law on international legal assistance. They take precedence over any such law – Article 1 (1) of MLA Law [7]. As the domestic law is of subsidiary legal force, it cannot serve as any substitute of such declarations. Domestic law can never produce what is achievable solely through declarations.

This is fully valid when it comes to transmission of requests for international legal assistance, in particular. Declarations represent an irreplaceable means to establish a new/different regulation of their transmission. Domestic law can neither add new rules to CoE legal instruments nor derogate their existing provisions. Only declarations and reservations to CoE instruments have such powers and can produce the desired effect: to establish a different channel of communication.

This is the reason why e.g. France, in order to recognize Eurojust as a channel through which it may be approached with requests, has submitted a Declaration [contained in the instrument of ratification deposited on 6/02/2012] to the Second Additional Protocol to the ECMACM that requests for international legal assistance *„may also... be forwarded through the intermediary of the French national member of the Eurojust judicial co-operation unit“*.

A similar declaration by BiH to the ECMACM is necessary. Otherwise, BiH authorities cannot safely accept Eurojust as a communication channel through which to be approached by other Parties to the ECMACM with requests for international legal assistance. Such way of communicating, which is not governed by the ECMACM, cannot be accepted as no

⁵The word “police” is redundant, the Agency is solely for judicial cooperation. Here is its correct name: „The European Union's Judicial Cooperation Unit“.

⁶Para 5 is applicable to Parties to the Convention only, while Para 7 is applicable to those countries which are Parties to the Second Additional Protocol as well.

⁷In many other Civil Law countries in Europe the priority of international law, together with its direct applicability, is established in Constitutions. See, for example: Article 5 (4) of the Bulgarian Constitution, Article 55 of the French Constitution, Article 25 of the German Constitution, Article 28 of the Greek Constitution, Article 91 (2) of the Polish Constitution and Article 7 (5) of the Slovak Constitution.

domestic law in BiH, incl. Article 4 (4) of MLA Law, has the legal power to regulate issues that fall within the subject-matter of CoE instruments.

It is worth clarifying that the text of Article 4 (4) of MLA Law cannot be fully transformed into the necessary Bosnian declaration to the ECMACM. The first part of this text, in particular, is not transformable. It postulates that BiH judicial authorities may forward requests to other Parties to the Convention through Eurojust. Yet, BiH is not in the position to impose obligations on foreign countries regarding the communication channels through which they should receive requests [⁸]. Hence, BiH cannot make other Parties accept Eurojust, in particular, as a channel through which to receive Bosnian requests. It is up to each Party to decide individually as to whether it may be approached through Eurojust with any request. Until a given Party recognizes Eurojust as such a channel, BiH is not authorized to turn to this Party through Eurojust. Bosnian authorities cannot change anything unilaterally: by its MLA Law or even by a declaration to the ECMACM. If a prosecutor or a judge from BiH disregards the lack of such authorization to approach another Party through Eurojust with a letter rogatory, then even if that Party executes it, the judicial validity of the evidence obtained in this way would, nevertheless, be highly disputable. Imprecise executions

⁸This is a general rule. For example, when in Europe it comes to transfer of criminal proceedings on the grounds that the suspect is a national of the requested Party (Article 8.1 "b" of the European Convention on the Transfer of Proceedings in Criminal Matters), each Party may, by means of a declaration, define the term "national" to make use of it whenever requested to take charge of such proceedings. For this purpose, as per Appendix II to the Convention, Albania defines the term as "*Albanian nationals as well as stateless persons permanently residing in Albania and persons with double nationality, in case either of them is Albanian*". Armenia defines the term "national" as "*A person who is a national of the Republic of Armenia, as well as a person who has a status of refugee of the Republic of Armenia*". According to Cyprus, a "national" is "*A citizen of the Republic of Cyprus or a person who would be entitled, under the laws relating to citizenship in force for the time being, to become a citizen of the Republic*". Lithuania defines the same term as "*A person who is a citizen of the Republic of Lithuania in accordance with its laws*". Certainly, these Parties can resort to their definitions only when approached with a request to take charge of some foreign criminal proceedings on the grounds that the suspect is their national. However, definitions are inapplicable in the opposite situation: when these Parties request others. In such cases, the requested Party's understanding would count.

inspired by requesting countries are not uncommon; they are carried out by requested countries as, in general, such countries are not interested in the result.

In short, the declaring Party cannot make other Parties assume any conduct. It can only explain its own mechanism of work to them [⁹]. It follows after all that BiH is in the position to solely declare that it is ready to receive requests from other Parties through Eurojust. Therefore, only the second part of Article 4 (4) of MLA Law is transformable into the necessary Bosnian declaration to the ECMACM.

Besides, if the example of France must be closely followed, the declaration is expected to specify the Bosnian addressee of requests forwarded to BiH through Eurojust. The likely choice is the BiH Ministry of Justice contact point for Eurojust. This is the feasible solution because the BiH Ministry of Justice is the only body not restricted to one of the four Criminal Codes operating in BiH. This Ministry serves proceedings for all crimes to which criminal laws in BiH are applicable and can, in turn, adequately process all incoming requests regardless of the nature of the crime in respect of which assistance is requested.

B. The authorities of BiH and Eurojust have been considering signing a bilateral agreement to regulate their joint work in the field of evidence exchange and other modalities of international judicial cooperation [¹⁰]. With such an agreement, both Parties are likely to face a similar problem. As in the case with the Law and its Article 4 (4), this agreement might be also of subsidiary legal nature only. Like MLA Law, it cannot become any part of the ECMACM and

⁹Another negative example in this respect is Ukraine with its declaration of 12 October 2015 to the ECMACM that this Party cannot execute requests in the territories occupied by Russia, namely: the Crimean peninsula and the regions and Donetsk and Lugansk. Further in the declaration, Ukraine states that any execution of incoming requests by occupying Russian authorities there can have no legal effect. Thus, the evidence produced is inadmissible in the requesting Parties, if it comes from Russian authorities. Obviously, this second part of the declaration oversteps the role of any declaration. No declaration can prescribe to any requesting Party how to evaluate evidence obtained from the territories of declaring Parties. Therefore, only the first part of the Ukrainian declaration, referring to own capacities, is acceptable and worth taking into consideration. See further in this presentation: Part 3.1.

¹⁰Available at: <http://www.mpr.gov.ba/aktuelnosti/vijesti/default.aspx?id=6055&langTag=en-US>, accessed on 13 April 2017.

therefore, cannot substitute the aforementioned declaration to this primary international instrument.

According to Article 26 (1-3) of the ECMACM, *“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”*.

Therefore, bilateral treaties, although 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”* [11]. Actually, bilateral treaties are subsidiary to the Convention rather than special to it. Hence, any Convention is a primary legal instrument.

Certainly, Article 26 of the ECMACM envisages expressly direct agreements (bi- or multilateral) between its Parties. It does not deal with any agreement between a given Party and some intermediary agency acting on behalf of several Parties to the Convention. Eurojust is such an agency: it would act, with regard to BiH, on behalf of the Parties to the Convention which belong to the European Union. In this sense, Eurojust appears as an extension of the competent central authorities of EU countries to work with third countries.

Such an intermediary hardly changes the situation with third European countries in such a way to undermine the priority of the ECMACM. It would be much clearer and safer for all evidence requested and transmitted through EUROJUST if this priority stays.

Moreover, it would be recommendable that the future agreement between BiH and Eurojust should contain a provision recognizing the priority of the Convention. Article 118 of the 2002 Chisinau Convention of the Commonwealth of Independent States [most of the former Soviet Union countries] for Legal Assistance and Legal Relations in Civil, Family and Criminal Matters might be an appropriate example to follow. This Article postulates 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 Conventions or facilitate the application of the principles contained therein.”

The non-extradition of refugees and asylum seekers

A. Article 33 of MLA Law enumerates the preconditions for extradition from BiH. One of them is the asylum (refugee) status and the asylum-seeking process as well. As per letter “B” of Article 33 of the Law, extradition shall be granted only if *“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”*. So asylum (making the foreigner a fugitive) and even asylum-seeking to become a fugitive are impediments to extradition.

In Europe, however, as regards the relations of BiH with other Parties to **the European Convention on Extradition (the ECE)**, asylum constitutes no impediment to any extradition requested from BiH. First of all, there is no provision in this Convention to qualify asylum as such an impediment. Besides, BiH, unlike Poland (Declaration of 15 June 1993) or Rumania (Declaration of 17 July 2006), has never submitted any declaration to the ECE that persons who enjoy asylum, let alone those who are asylum-seekers in BiH, shall not be extradited.

Their extradition to another Party to the ECE cannot be ruled out on this ground. Presently, Article 1 of the ECE expressly obliges BiH to extradite whenever the conditions for extradition are fulfilled. There is no exception in the ECE for aforementioned persons in BiH: neither in the text of the Convention nor, as clarified, in any declaration or reservation of BiH to the Convention. Because international provisions override domestic rules (see Article 1 of MLA Law), the international legal obligation to extradite based on Article 1 of ECE cannot be derogated by whatever national asylum protection, incl. by the one contemplated in Article 34 B of MLA Law, in particular.

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 the same mistake as the one in the criticized Article 34 B of MLA Law. The two countries have accepted through declarations that their authorities shall not extradite persons who enjoy asylum (refugees) regardless of whether discriminatory their ill-treatment in the requesting country is possible at all. Therefore, like Article 34 B of MLA Law, the

¹¹ See also Michael Akehurst, *‘The Hierarchy of the Sources of International Law’* (1975) 47 British Yearbook of International Law 273.

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, Parties to the ECE, such 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 who enjoy asylum), could reciprocate with an own declaration. Specifically, BiH may in a mirror-like way declare that it reserves the right to deny in the same way extradition to Poland and Romania of persons who are granted asylum.

However, a milder and a narrower option exists as well. It is to follow the example of Germany and Austria. A German declaration of 11 October 1993 and a similar Austrian declaration of 07 January 1994 were submitted 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, the state (the country: a Party or not to the ECE) 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 declaration makes sense only because and solely to the extent it reproduces the ground for denying extradition under Article 3 (2) of the ECE. This Paragraph 2 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"*. Thus, Germany, and Austria as well, explain that extradition of refugees (persons with asylum status) shall be refused only if they may suffer in the requesting Party from discriminatory ill-treatment. No declaration shall exceed the prohibition under Article 3 (2) of the ECE to eventually protect refugees from being extradited to Parties where discriminatory ill-treatment is unlikely.

The stance of Germany and Austria should be supported. It is noteworthy that the purpose of the asylum in any extradition law is to protect the foreigner who enjoys this status from being surrendered to the country in respect of which the asylum has been granted.

In turn, the idea of asylum law is to provide protection to refugees (persons with asylum status) and asylum-seekers from being extradited only to countries where they may be subjected to discriminatory ill-treatment. *Per argumentum a contrario*, it makes no sense to automatically protect such foreigners from other countries, especially from countries where their discriminatory ill-treatment is unlikely to occur. Actually, if a third country, different from the one in respect of which the asylum status has been granted, requests the extradition of any such foreigner, the requested country, incl. BiH, shall make sure that no discriminatory ill-treatment of person is possible there.

Then, if it is found that such a danger exists, extradition shall be denied, but not on the grounds of the asylum status of the wanted person. In Europe, his/her extradition shall be denied, pursuant to the aforementioned Article 3 (2) of the ECE. If the requesting country is from a different continent, then extradition shall be denied, pursuant to Article 33 (1) of the 1951 Convention Relating to the Status of Refugees. It prohibits the surrender of any person, including persons wanted for extradition, 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"* [12]. Similarly, Article 34I of MLA Law (applicable subsidiarily, namely: to non-treaty based extradition cases) 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"*. This ground is sufficient to reject the requested extradition and does not need any additional support from the asylum status of the wanted person.

Yet, if no danger of discriminatory ill-treatment exists in the requesting country, the extradition of the person shall be granted regardless of his/her asylum status. Therefore, no reference shall be made to this status, unless the country which wants the extradition of the person enjoying the status is the country in respect of which it has been granted. In such cases, obviously, it has already been established that this foreign country would treat the person unacceptably. Therefore, it would be redundant to establish this for the second time.

¹² 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.

B. When it comes to BiH, its authorities must decide as to whether they want to convert for any reason the asylum status into a general legal impediment to extradition. If the BiH authorities really do, they should, with regard to other Parties to the ECE, follow the example of Poland and Romania by submitting a declaration in this sense to this Convention. Otherwise, the criticized Article 34B of MLA Law would not produce the desired effect in Europe given the priority of any international legal instrument over domestic law - Article 1 of the same Law. In particular, BiH cannot refuse to implement its obligation under Article 1 of the ECE on an impediment, such as asylum status, which is envisaged only in its domestic law, namely: by Article 34B of MLA Law.

However, it is not recommendable to follow the example of Poland and Romania as it would mean to refuse extradition of refugees also to countries where they will not be subjected to discriminatory ill-treatment. This would result in an unjustifiable prohibition from extraditing such persons to normal countries as well and, eventually, would prevent them from being brought to fair justice there. 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 in the interest of justice [¹³]. Therefore, no human rights

justification to refuse extradition exists in such cases. Refugees and asylum-seekers shall not only be extradited, if there is no other impediment to their extradition, but also deprived of their asylum status or respectively denied such a status, even though it alone did not and could not hinder the extradition.

If these evaluations and conclusions are accepted, BiH should stick to the idea that refugees shall be protected only from those countries where they are likely to be subjected discriminatory ill-treatment. As a result, the prohibitive rule of Article 34B of MLA Law on extradition of refugees and asylum-seekers might be construed restrictively for the purpose of avoiding its unjustified application to requesting countries in which no discriminatory ill-treatment is possible. In this situation, though, the text in question is useless. This text only repeats Article 33I of the same Law, which 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*”. Hence, this text of Article 33I makes Article 34B redundant. Yet, much bigger problem is that, along with its redundancy, Article 34B is also misleading as its expansive interpretation (at least, in non-treaty based extradition cases where the MLA Law would be applicable) may not be ruled out altogether. As already explained, such an expansive interpretation may actually mean that refugees shall not be extradited to countries where their discriminatory ill-treatment is not possible.

Moreover, since Article 33I of MLA Law bans anyone’s extradition to countries where danger of discriminatory ill-treatment exists, the prohibition of extradition under Article 34B of the same Law (on the specific ground that the wanted person has an asylum status or is an asylum-seeker) is not applicable to such requesting countries at all. This prohibition remains to be applied only to those requesting countries where no such danger exists. As a result, Article 34B of MLA Law is actually counterproductive as its real function is to solely hinder legitimate justice.

Such shielding from justice may often turn irrevocable. When a refusal to extradite is based on the own nationality of the wanted person, the requested country is obliged to prosecute him/her, if additionally petitioned by the requesting country, for the crime in respect of which his/her extradition was requested – see Article 6 (2) of the ECE. This is not difficult as almost in all cases the Criminal Code of the requested country

¹³ 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

(his/her own country) would be applicable to the crime: mostly, its application would be substantiated by the personality principle. However, this is not the case if the refusal to extradite is based on the circumstance that the wanted person has an asylum status or is an asylum-seeker. Then the requested country is not obliged to prosecute him/her. Hence, the principle "EXTRADITE OR PROSECUTE" (Latin: *aut dedere aut judicare*) [¹⁴] does not refer to any person who has an asylum status or is an asylum-seeker. Moreover, the requested country can apply in very few situations its Criminal Code to his/her crime as s/he is a foreigner and, usually, the crime is not committed in its territory, or against its interests or the interests of any of its nationals. Therefore, neither the territoriality principle nor the personality or reality (defensive, passive personality) principle can substantiate the applicability of the requested country's Criminal Code to the crime in respect of which the extradition was requested. Such a vacuum prevents justice from being given.

Significance of Foreign Declarations

Declarations are designed to describe the own capacity of the Party which has issued them: what this Party can do and when it can assist others. For example, Russia and Spain require translations in their own language. Besides, many Parties declare that they need dual criminality of the offence in respect of which assistance is requested, especially if the execution would involve coercive measures (such as searches and seizures), or lifting of bank secrecy, or undercover investigations. To identify those countries the interested official must look at the declarations to Article 3 of the ECMACM. In case that the offence is a crime under requesting country's law only, it is pointless to send any letter rogatory to such countries.

Foreign declarations may also create some problems to other Parties, incl. BiH. Two such problems will be discussed.

The Ukrainian declaration

As argued, no declaration of BiH has the legal force to oblige other Parties which Bosnian judicial authorities request. This peculiarity, however, is not limited to BiH declarations. The non-binding nature of the declarations of a given Party is valid for foreign declarations as well, incl. the declarations of Parties BiH may turn to for some legal assistance. It goes without saying that BiH authorities shall not accept foreign declarations which give orders to them.

Ukraine, for example, has such a declaration to the ECMACM. This is the declaration of 12 October 2015, transmitted by a Note verbale from the Permanent Representation of Ukraine, dated 13 October 2015 and registered at the Council of Europe Secretariat General on 16 October 2015. In this declaration "*Ukraine states that... for the period of temporary occupation by the Russian Federation of a part of the territory of Ukraine – the Autonomous Republic of Crimea and the city of Sevastopol – ... until the complete restoration of the constitutional law and order and effective control by Ukraine over such occupied territory, as well as over certain districts of the Donetsk and Luhansk oblasts of Ukraine, which are temporarily not under control of Ukraine as a result of the aggression of the Russian Federation, the application and implementation by Ukraine of the obligations under the above Conventions, Protocols, Agreement, as applied to the aforementioned occupied and uncontrolled territory of Ukraine, is limited and is not guaranteed.*"

Documents or requests made or issued by the occupying authorities of the Russian Federation, its officials at any level in the Autonomous Republic of Crimea and the city of Sevastopol and by the illegal authorities in certain districts of the Donetsk and Luhansk oblasts of Ukraine, which are temporarily not under control of Ukraine, are null and void and have no legal effect regardless of whether they are presented directly or indirectly through the authorities of the Russian Federation" [¹⁵].

Thus, the declaration clarifies that Ukraine cannot execute requests in the territories occupied by Russia, namely: the Crimean peninsula and the regions and Donetsk and Lugansk. This is fully acceptable as in this way Ukraine describes its own capacity. However, further in the same declaration, Ukraine states that any execution of incoming requests by occupying Russian authorities there can have no legal effect. In short, the evidence produced is inadmissible in requesting Parties, if it comes from Russian authorities. Obviously, this part of the declaration oversteps the role of a declaration. As explained, the role of any declaration is to describe the own capacity of the declaring Party to execute incoming requests. Hence, declarations cannot oblige. They cannot prescribe to any requesting Party how to evaluate evidence obtained from the territories of declaring Parties. Ukraine as a declaring Party is no exception. So this second part of the Ukrainian declaration is not binding on BiH or on any other Party to the ECMACM. Therefore, BiH authorities are hardly obliged to treat as inadmissible all evidence obtained

¹⁴ See M. Cherif Bassiouni and Edward M. Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law* (Dordrecht/Boston/London, Martinus Nijhoff, 1995).

¹⁵ Available at: http://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/030/declarations?p_auth=eabfYOhd, accessed on 15 June 2017.

from Crimea, Donetsk and Lugansk on the sole ground that they, inevitably, are produced by the occupying Russian authorities rather than by the legitimate Ukrainian ones.

The Common Declaration of Serbia and Montenegro

It would be appropriate to raise the issue of the validity and admissibility of evidence obtained in Montenegro and Serbia for BiH or for any other Party to the ECMACM. The problem comes from a common declaration of the two Parties, deposited on 30 September 2002, when they were still one country. The declaration is relevant to Article 1 (1) of the Convention. This first Paragraph reads as follows: “*The Contracting Parties undertake to afford each other, in accordance with the provisions of this Convention, the widest measure of mutual assistance in proceedings in respect of offences the punishment of which, at the time of the request for assistance, falls within the jurisdiction of the judicial authorities of the requesting Party*” [16]. Obviously, the quoted Paragraph requires only applicability of the requesting Party's Criminal Code to the criminal offence in respect of which legal assistance is being requested.

At the same time, the aforementioned declaration of the two Parties reads: “*The Federal Republic of Yugoslavia shall grant legal assistance only in proceedings related to the criminal acts stipulated by the laws of the Federal Republic of Yugoslavia, whose criminal prosecution, at the moment legal assistance is requested, falls within the jurisdiction of the Yugoslav courts are competent*”. One can see two requirements for execution of any incoming letter rogatory by Montenegro or Serbia:

- Dual criminality as *the criminal acts* must be stipulated by the laws of the Federal Republic of Yugoslavia (which may be accepted as a normal requirement), and
- Applicability of the criminal law of the requested Party to the criminal act subject of investigation or trial as the act *falls within the jurisdiction of the Yugoslav courts are competent* [there must be some typo in this text but its correction is not likely to change the meaning of the text].

Thus, Article 1 (1) of the ECMACM requires jurisdiction of the requesting Party while the second requirement in the declaration necessitates also the jurisdiction of the requested Party when it is Montenegro or Serbia. As a result, in addition to dual

criminality, a unique dual jurisdiction (dual applicability of the criminal laws of both Parties: requesting and requested) is also required.

This second requirement is interpretable, *per argumentum a contrario*, as prohibition to the Montenegrin/Serbian judiciaries to execute foreign letters rogatory when the offence, although a crime under their domestic law, is beyond the criminal jurisdiction of their national courts, that is to say: when the Criminal Code of Serbia/Montenegro is not applicable to this criminal offence. In such cases, the judicial authorities of Montenegro or Serbia shall not execute any letter rogatory forwarded to them. If they do, no valid result would be produced: the data received in Montenegro or Serbia shall not be admissible into evidence as obtained in violation of the said prohibition.

No bilateral treaty with any of the two countries, whatever it is, has the judicial power to override the prohibition, given Article 26 of the Convention establishing priority of the Convention over such treaties. Therefore, bilateral treaties cannot change anything, let alone domestic laws.

It follows that if some criminal offense has been committed, e.g. in the territory of Moldova by and against its nationals, and a person who has seen the crime comes to live in Podgorica or Belgrade, the Montenegrin/Serbian authorities shall not execute any Moldovan letter rogatory for the interview of this person as a witness because the Criminal Code of Montenegro/Serbia is not applicable to this crime. Obviously, this does not make any sense. On the one hand, such requesting countries would reciprocate, if their requests are rejected on such a ground. On the other hand, if in the above-mentioned situation the request is granted and the minutes of the interview are sent to the requesting Party (in our example: to Moldova), any defence lawyer there shall object to the admittance of the testimony into evidence unless it is favourable to his/her client. The defence lawyer shall maintain that the letter rogatory is executed in violation of the prohibition deriving from the declaration of Montenegro/Serbia or, at least, that no legal grounds existed for execution of the letter rogatory. Either way, the evidence obtained may be declared inadmissible and eventually rejected. Hence, the common declaration of 2002 is basically a problem of the other Parties to the Convention (certainly, one can add: “initially”, given likely reciprocity by the requesting Party to Montenegro/Serbia).

It is noteworthy that no other Party to the Convention requires own jurisdiction over the crime to execute incoming requests for legal assistance. Actually, it is only the other way around: some Parties (such as: Finland, Georgia, Norway, UK, etc.) may

¹⁶ Available at: http://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/030/declarations?p_auth=eabfYOhd, accessed on 17 June 2017.

refuse to execute such incoming requests if they exercise own jurisdiction over the crime.

It is true that there is a declaration of Austria reminding of the common Montenegrin and Serbian declaration. The Austrian declaration reads: “*Austria will only grant assistance in proceedings in respect of offences also punishable under Austrian law and the punishment of which, at the time of the request for assistance, falls within the jurisdiction of the judicial authorities*”. However, Austria does not specify that these judicial authorities are its own. Therefore, one cannot conclude that the declaration adds anything regarding jurisdiction to Article 1 (1) of the Convention, which, as already explained, requires that the jurisdiction shall be of the requesting Party’s judicial authorities. In particular, the Austrian declaration does not demand that the jurisdiction over the crime shall also be of the judicial authorities of the requested Party as well. Actually, Austria says: “We will make sure that your Criminal Code is applicable to the criminal offence and if it is not, we are not going to execute your requests”.

In this situation, the safest solution to the problem is the modification of the Montenegrin and Serbian declarations by deleting the second requirement. Otherwise, regardless of whether they execute a letter rogatory of BiH or another Party to the Convention, the likelihood of creating difficulties in that Party is truly significant.

BiH alone cannot change anything directly. It can, however, insist on the correction of the declaration to Montenegro and Serbia, and also require this through the competent bodies of CoE. Obviously, BiH can rely on all other Parties to the ECMACM for understanding and support as they are equally interested in correcting the mistake in the declaration. These other Parties also turn to Montenegro and Serbia for evidence and face the same problem with the validity and admissibility of this evidence.

CONCLUSION

International judicial cooperation is the biggest ocean in criminal justice. Besides, the errors made while requesting or providing this cooperation are more difficult to prevent and more often incorrigible than those made in national criminal proceedings. These peculiarities of international judicial cooperation in criminal matters require very good knowledge, skills and experiences to draft and apply the legal framework (international and domestic) for these difficult to regulate intercountry activities.

Declarations to multilateral conventions in the penal field occupy an important place in the regulation of international judicial cooperation in criminal matters.

Understanding their role and significance would enable avoidance of many mistakes and unjustified omissions when necessary to make use of them. This is particularly valid for Europe, where overregulation and eventually confusion with rules on different modalities of this cooperation (extradition, exchange of evidence, transfer of criminal proceedings, etc.) is not rare.

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