HIERARCHY OF LEGAL INSTRUMENTS ON INTERNATIONAL JUDICIAL COOPERATION
(the case with Bosnia and Herzegovina)

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

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

1. Pursuant to the first provision of the BiH Law on International Judicial Cooperation in Criminal Matters [further: the Law], its 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“. Thus, following the Civil Law tradition, the Law declares the direct application of international treaties (bilateral and multilateral) in BiH¹ and its subsidiarity to them.

¹ Most 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.
Therefore, in case of conflict any applicable international treaty in the area of international judicial cooperation in criminal matters takes precedence over this Law.

However, not only this Law but also any other law in BiH (in force or future laws, especially) that might have anything to do with international judicial cooperation in criminal matters should be subsidiary to international instruments in this area as well. Besides, it must be recognized that such other laws are not always identifiable when drafted. The drafters may not always notice or guess that a given law whose preparation is under way contains one or more rules that influence international judicial cooperation as well. As a result, the drafters may miss to include in the law a provision, such as Article 1 (1) of the Law, even though they would not doubt that its rules influencing international judicial cooperation should also be subsidiary to the respective international instruments in this area. Obviously, some codified provision on this issue envisaging all laws in BiH on international judicial cooperation in criminal matters is necessary.

At the same time, such a common provision is fully possible. It may easily result from the expansion of Article II. 2 of the BiH Constitution that presently, envisages only international human rights instruments: „The rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina. These shall have priority over all other law“.

The text might include all laws of BiH. This would be in line with the tradition to govern in the Constitution the issues relating to the regime of laws. Examples of the proposed constitutional codification might be seen in the Constitutions of other European Union countries, namely: Article 5 (4) of the Bulgarian Constitution, Article 25 of the German Constitution and Article 7 (5) of the Slovak Constitution.

2. According to Article 4 (4, 5) of the Law, in urgent cases requests may also be transmitted and received via Eurojust. However, Eurojust serves EU Member States and they, plus BiH as well, all are 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 Assistance in Criminal Matters, in general, and transmission of requests in urgent cases, including through Eurojust, in particular, these two Council of Europe instruments are inevitably applicable: their texts and the declarations to them made by interested Parties. These texts and declarations as well are those rules which actually govern the issue as they take precedence over any domestic law. As the domestic law is of lower (subsidiary) legal force, it cannot be any substitute of such declarations, in particular. 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 ...

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

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

4 It reads: “International treaties on human rights and fundamental freedoms and international treaties for whose exercise a law is not necessary, and international treaties which directly confer rights or impose duties on natural persons or legal persons and which were ratified and promulgated in the way laid down by a law shall have precedence over laws.”
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 Law, it would be too risky for the judicial validity of the evidence, both requested and obtained, to follow this domestic rule. To safely use Eurojust as a communication channel it is strongly recommendable to BiH authorities to submit a declaration similar to the French one.

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. Hence, declarations to the two mentioned Council of Europe instruments are the safe and reliable way to achieve the result aimed at in Paragraphs 4 and 5 of Article 4 of the Law.

II. MULTILATERAL CONVENTIONS AND BILATERAL TREATIES IN EUROPE

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

Thus, according to Article 28 (1, 2) of the European Convention on Extradition, “This Convention shall, in respect of those countries to which it applies, supersede the provisions of any bilateral treaties, conventions or agreements governing extradition between any two Contracting Parties. The Contracting Parties may conclude between themselves bilateral or multilateral agreements only in order to supplement the provisions of this Convention or to facilitate the application of the principles contained therein”.

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

Therefore, bilateral treaties, even though concerning only two Parties, do not exclude the applicability of any of the two multilateral Conventions, pursuant to the legal maxim “lex specialis derogat legi generali”5. Actually, bilateral treaties are subsidiary to the two

5 See also Akehurst, Michael. The Hierarchy of the Sources of International Law, in “British Yearbook of International Law”, Vol. 47.1, 1975, p. 273.
Conventions rather than special to them. Hence, the position of any of the two Conventions is of a primary legal instrument.

2. The two Conventions of the Council of Europe leave room for bilateral treaties by mainly allowing Parties to specify channels of communications given the specific peculiarities of their judicial systems – see Article 12 (1) (ii) of the European Convention on Extradition and Article 15 (7) of the European Convention on Mutual Assistance in Criminal Matters. Most often, Parties avoid the diplomatic channel by providing direct links between their Ministries of Justice. Where prosecutors are in charge of pre-trial activities and prosecution services are sufficiently strong, Parties establish direct links between Head Prosecution Offices.

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

III. HIERARCHY BETWEEN INTERNATIONAL INSTRUMENTS

1. First of all, such a hierarchy may exist in Europe between two Council of Europe instruments where one of them declares its subsidiarity. The Convention on Cybercrime constitutes a good example. Its Article 27 regulates, in accordance with its own title, the “Procedures pertaining to mutual assistance requests in the absence of applicable international agreements”. Per argumentum a contrario, if an applicable international agreement exists, such as European Convention on Mutual Assistance in Criminal Matters and the Protocols thereto, the Convention on Cybercrime shall give way. As in the case with Article 28 of the European Convention on Extradition and Article 26 of European Convention on Mutual Assistance in Criminal Matters, this is also a formally

6 Also conflicts are possible between agreements on international judicial cooperation and human rights. A requested country will be confronted with conflicting obligations stemming from extradition agreements and agreements on human rights, whenever the wanted person faces a real risk that his/her fundamental rights will be violated by the requesting country. These conflicts are not easily solved. With the exception of torture, international law does not acknowledge the general primacy of human rights over extradition. State authorities apply different avoidance techniques — rule of non-inquiry, reliance on assurances, and local remedies — to evade these conflicts. See De Wet, Erika and Jure Vidmar. Hierarchy in International Law: The Place of Human Rights, Oxford, 2012, available at: http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199647071.001.0001/acprof-9780199647071-chapter-6 [accessed on 01 March 2016]. Also Kapferer, Sibylle. The Interface between Extradition and Asylum, in "LEGAL AND PROTECTION POLICY RESEARCH SERIES", UNHCR, GENEVA, 2003, p. 11, available at: http://www.unhcr.org/3fe84fad4.html [accessed on 06 March 2016].
and expressly established hierarchy. However, sometimes hierarchy between international instruments may not be clearly established but occur as a result of some interpretation of a legal rule.

As per Article 1F of the 1951 Convention Relating to the Status of Refugees, “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”.

Normally, such a rule leads to or facilitates, at least, the general conclusion that in cases of conflict with any international legal framework for extradition the Convention Relating to the Status of Refugees shall give way. In general, asylum proceedings shall take into account the results of extradition proceedings and when under extradition law the requested extradition of a given person shall be granted, asylum law is in no position to take precedence and eventually, prevent the surrender of the person.

On the contrary, findings in the extradition process may (not only in respect of crimes under Article 1F of the 1951 Convention but in respect of 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 status of a refugee who has already been recognized. Information which comes to light during the extradition process may also set in motion proceedings leading to the revocation of the status of a recognized refugee on the basis of Article 1F (a) or (c) of the 1951 Convention. Such information may also cast doubt on the correctness of the initial refugee recognition, which in turn may result in the cancellation of refugee status.

Obviously, extradition and asylum do overlap where the person, whose extradition is sought, is a refugee or asylum-seeker. However, international refugee law does not as such stand in the way of criminal prosecution or the enforcement of a sentence, nor does it generally exempt refugees and asylum-seekers from extradition. As the institution of asylum was never intended to shield fugitives from legitimate criminal justice, this institution shall not be seen as a restriction to application of extradition law.

2. Hence, extradition excludes asylum but asylum may never exclude extradition. In Civil Law countries extradition may be excluded only by granting nationality to the person (e.g. Article 6 of the European Convention on Extradition) – in addition to his/her refugee status or without giving him/her such a status. Because asylum cannot prevent extradition from being granted, the asylum should never be any legal ground, mandatory or even optional, for rejection of extradition request, as it is the case with Article 34B of the Law. This Article stipulates as a mandatory condition for extradition that the requested person does not enjoy asylum in BiH or has not requested it at the moment the request for extradition is

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7 See also Kapferer, Sibylle. op. cit., p. 99.
filed. In this way not extradition takes precedence over asylum but it is the other way around, namely: asylum takes precedence over extradition.

Finally, it is noteworthy that the aforementioned Article 34B of the Law is not necessary at all. It is redundant as the legal framework for extradition is in any case sufficient to achieve the main goal of asylum and refugee protection under Article 33 (1) of the Convention Relating to the Status of Refugees, namely: not to surrender the refugee to a 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“. Such surrender of the person wanted for extradition, in particular, is prohibited by virtue of Article 34 E of the Law impeding extradition in respect of political and related offences and mostly, by letter „I“ of the same Article. The latter 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, there is no justification for having the given asylum as a separate ground for refusal. Moreover, if the text of letter „B“ stays in Article 34 of the Law, this would literally mean that once granted an asylum status a refugee shall not be extradited even to a normal country that has nothing to do with the country from which s/he has escaped from.

IV. FORMAL AND FACTUAL (RECOMMENDED) HIERARCHY

Sometimes, more than one international instrument may be applied to regulate a certain issue. More and more conventions that govern modern issues (such as: human trafficking, terrorism, piracy at sea) come into force. They seem more efficient to achieve desired results of international judicial cooperation than older and less fashionable international instruments.

However, the attractiveness of new multilateral conventions and bilateral treaties alone shall be no reason for their prioritization. On the contrary, if a desired result is achievable on the grounds of older instruments, it would be better to prefer them. Let us see an example with assets abroad liable to criminal confiscation. The process involves the following typical steps:

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

For the purpose of successfully finalizing this difficult process, laws on international cooperation provide for two types of cooperation: judicial cooperation for criminal cases and
purely administrative procedure for non-criminal cases designed to ensure the confiscation of criminal assets. The judicial assistance consists predominantly of execution of letters rogatory. There is no obstacle regarding their execution to collect evidence about the proceeds from the investigated crime and to use this evidence to substantiate their confiscation as well.

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

These 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 domestic 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 Drug Convention and Article 18 (8) of the UN Palermo Convention, “Parties shall not decline to render mutual legal assistance ... on the ground of bank secrecy”. Furthermore, all these conventions prescribe 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. Nothing of this sort has been provided for in favor of any administrative request relating to criminal assets and their confiscation.

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

There is also another important advantage of letters rogatory to administrative requests: letters rogatory can more often be granted without meeting the dual criminality requirement. To express and confirm this policy Article 46 of the UN Corruption Convention calls on State Parties to consider providing such international cooperation in the absence of dual criminality.

Lastly, in the process of obtaining evidence from abroad, one should always choose the convention which poses less risk to the validity of evidence. In any case, an international instrument on judicial cooperation is more reliable than any international instrument on police or other administrative cooperation. Hence, when it comes to joint investigation teams, the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (in particular, Articles 20-22 of the Protocol) must be preferred to the Police Cooperation Convention for Southeast Europe (in particular, Article 27).

BIBLIOGRAPHY


8 A joint investigation team is presentable as an advanced form of a letter rogatory. However, in contrast to it, this team works as follows:

1/ The team collects pieces of evidence not only for the country where it operates but for the other participating countries as well.

2/ Pieces of necessary evidence are not collected in one of the participating countries only but, usually, in the territories of all other countries.

3/ There is no letter rogatory and a granting decision. Instead, the interested countries sign an international agreement. In implementation of this agreement team members are able to directly request all necessary investigative actions, dispensing with the need for letters rogatory.

4/ Most often, the team works at a time in the territory of one country; its officials with investigative powers are tasked with the execution while other participating countries’ officials, esp. those with investigative powers are only present at the execution


