



SOUTH-WEST  
UNIVERSITY  
·NEOFIT RILSKY·  
BLAGOEVGRAD, BULGARIA

VOLUME 7  
2009

# SCIENTIFIC Research

ISSN 1312-7535

ELECTRONIC  
ISSUE

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**OUTGOING REQUESTS  
BY REPUBLIKA SRPSKA  
FOR INTERNATIONAL LEGAL ASSISTANCE  
IN CRIMINAL MATTERS – EXTRADITION  
REQUESTS AND LETTERS ROGATORY  
(LAW, PRACTICE, RECOMMENDATIONS)**

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## ***I. Requests for Extradition to Republika Srpska [RS] (Active Extradition)***

### **A. The Essence of Active Extradition**

Active extradition to Bosnia and Herzegovina [BiH] and RS, in particular, involves a request by the competent authorities of RS and BiH to the appropriate authorities of another country to surrender to RS a fugitive found in that country, who is either a defendant (suspect or accused – Article 20, “a” and “b” Criminal Procedure Code [CPC] of RS) or has been convicted (sentenced) of a criminal offence in RS. If the other country does not reject the request of RS and BiH for extradition but grants the requested extradition, that country, by executing the extradition, gets rid of the wanted person who, usually a foreigner (generally, own nationals are not subject to extradition), is not welcome there being related to criminal activities as a possible or actual criminal offender.

In this regard, extradition resembles *expulsion (deportation)* of foreigner. However, in contrast to expulsion, extradition is for the benefit of the requesting country. Generally, the requesting country wants the person for trial or for execution of an imposed punishment. It follows that extradition of the person is not usually for the benefit of the surrendering country (where the person has been found) since that country has often nothing specific against him/her.

For that reason no one in RS shall expect and/or plan to obtain the surrender of the wanted fugitive through his/her expulsion by another country. Such a final result may be achieved only if the other country carries out disguised extradition in favour of RS. But this sort of “extradition” shall not be encouraged or/and expected. It is in gross violation of human rights standards because it deprives the wanted person of normal extradition proceedings within which s/he might exercise his/her procedural rights to get a decision for refusal of his/her extradition.

### **B. Extradition and Transfer Compared**

In some laws, e. g. under the Provisional CPC of Kosovo, extradition is called “transfer”. However, extradition and real transfer are different methods of international legal assistance (aid) in criminal matters.

Extradition, in particular of a sentenced (or convicted) person, does resemble *transfer* of sentenced person (prisoner). These two methods of international legal assistance both involve the surrender of a sentenced offender to another country where his/her punishment will be executed.

However, there are some important differences between “extradition” of such a person and his/her “transfer”. Transfer involves the repatriation of a convicted criminal to the country of his/her nationality (citizenship), which will execute the punishment on that person. [See on p. 42-43 about transfer of detained witnesses, criminal proceedings.] Thus, the receiving country is effectively taking care of its own national (citizen). It follows that the transfer is generally for the benefit of the person and usually requires his/her consent. Hence, whenever a wanted person agrees on his/her transfer to his/her own country, it would never be necessary for this country to seek his/her extradition as well and be restricted by the Rule of Speciality: the surrendered person may be prosecuted, tried and/or punished in the requesting country only with respect to the subject criminal offence for which s/he has been extradited by the requested country – Article 430 (1) CPC of BiH in conjunction with Article 418 (ii) CPC of RS, Article 14 of the European Convention on Extradition [ratified by BiH on 24/07/2005].

By contrast, in case of extradition, the country which receives the person is the one that has imposed the punishment on him/her. Extradition is for the benefit of that country and the consent of the person is never required, nor, if obtained, can rule out extradition – it can only substantiate simplification of extradition procedures in the requested country. Besides, wherever extradition is granted, the requesting (and receiving) country is restricted by the Speciality Rule with respect to the prosecution, trial and/or punishment of the extraditee. [See more on p. 21-22.]

It follows that if a national of BiH punished in another country agrees to be transferred to BiH and his/her transfer could really take place, it, though theoretically possible, does not make any sense from practical point of view to parallelly request his/her extradition for any other criminal offence. Such a request is pointless and redundant. By agreeing to serve his/her sentence in BiH, the national of BiH punished abroad has accepted all the risks of being prosecuted, tried and/or punished in BiH for other offences without (free of) any legal restrictions in respect of them. Such situations might usually occur where the person mistakenly believes that his/her crime (s), to which the criminal law of RS is applicable, are not and will not be discovered.

Moreover, the combination of transfer in respect of a given criminal offence and extradition in respect of another might create unexpected and unjustified difficulties. It is likely to raise a dispute over the validity of the Speciality Rule which emanates from any granted extradition and might be applicable to any third criminal offence. The prosecuting/punishing authority should prove that the status of transferee is stronger than the status of extraditee and overrides it to exclude the applicability of the Speciality Rule with regard to any third criminal offence of the surrendered person. If not, the prosecuting authority is blocked until authorized by the requested (surrendering) country. That is why the transfer of the wanted person shall be considered not only sufficient but also tactically impeding the extradition of the same person for any reasons whatsoever.

### C. The Legal Framework for Extradition to RS

Article 418 CPC of RS determines the legal framework for any international legal assistance (aid), both rendered to and received from another country, including extradition as its main method. The Article reads:

*“International assistance in criminal matters shall be rendered under the provisions of this Code, unless otherwise prescribed by the legislation of Bosnia and Herzegovina or an international agreement”.*

It follows, first of all, that the relevant state law is applicable not only at the state level but also at the entity level of RS. The relevant state law provisions for active extradition are: Article 428 (Filing Request for Extradition), Article 429 (Request for a Temporary Detention) and Article 430 (Guarantees as Regards the Person who Has Been Extradited) CPC of BiH. However, these Articles do not significantly enrich the legal framework for active extradition. Basically, this legal framework is provided for in international treaties/agreements where the most important of them is the European Convention on Extradition of 1957. The international treaties are directly applicable and, in case of conflict, have priority: not only over the law of RS but also the relevant state law of BiH as state law gives way to international treaties by itself. Article 407 CPC of BiH in conjunction with Article 418 RS CPC establishes priority of international treaties over any domestic law, including that of BiH, as it expressly postulates that “international aid in criminal matters shall be rendered under the provisions of this Code, unless otherwise prescribed by ... an international agreement”.

The European Convention on Extradition (ECE) is the most important of all international treaties on, or governing together with other issues, extradition. On the one hand, if BiH has a bilateral treaty on extradition with the other country, it cannot derogate/override the ECE because the treaty is only subsidiary rather than special to it. Pursuant to Article 28 [Relations between this Convention and bilateral agreements], Paragraph 2 of the ECE, “*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*”. Furthermore, it is very important to remember that, in contrast to bilateral treaties, the ECE contains as a multilateral convention a lot of Declarations and Reservations of the Participating Countries/Contracting Parties to it. They are no less important than the basic texts of the ECE. That is why, prior to requesting a specific Party to this Convention, the Declarations and Reservations which this Party has made to the Convention should be read and taken into account. On the other hand, where BiH is also a Party to global (UN) International Instruments governing extradition, such as the UN Convention on the Fight against Transnational Organized Crime [ratified by BiH on 24/04/2002], they should be resorted to only if the ECE does not apply. Otherwise, if the ECE can provide for the necessary legal framework, it is to be used as the most popular and understandable international instrument.

Lastly, it is noteworthy that all these legal rules, whilst necessary, are never sufficient. The efficient and successful implementation of any law on active extradition is not only a legal issue but a tactical and strategic issue as well. That is why, unlike domestic criminal proceedings, which are governed exclusively by the principle of legality, extradition proceedings (because of the involvement of another country) are governed also by the principle of opportunity. In turn, this makes it necessary to predict and clarify in advance possible problems and solutions to them by establishing, maintaining and developing good relations with counterparts from other interested countries. Definitely, this is much better than blindly resorting to the trial and error approach only.

#### D. Prerequisites to obtain extradition from another country

The prerequisites for extradition from another country form two groups: conditions for extradition (which must be met) and impediments to extradition or grounds for refusal (which must not occur).

##### 1. There are three general conditions for extradition.

- The first one concerns the relations of the requested country with BiH/RS as the requesting country. Normally, the two countries must have an extradition treaty (bi- or multilateral, such as the ECE). If not, there might be three other subsidiary (extra-treaty) conditions for consideration of extradition requests of BiH/RS and eventually granting extradition to it. [a] The first such condition is *Reciprocity* with BiH/RS as requesting country (this is usually the case with the Civil Law countries when requested for extradition). [b] The second extra-treaty condition is normative and does not require any specific behaviour or statement from BiH/RS. It occurs where the requested country maintains a list of so-called “Designated Countries” (e. g. New Zealand) and BiH/RS is in it. [c] The third extra-treaty condition also does not require any specific behaviour or statement from BiH/RS but is individual. It occurs where the requested country’s Head of State or another senior official is authorized by law to allow for institution of extradition

proceedings in favour of countries with which they have no extradition treaty, and this official has issued such an order (ruling) in favour of BiH/RS.

It is worth mentioning that the CPC of RS and the CPC of BiH recognize only one condition for extradition: an international treaty. BiH does not extradite under the conditions of reciprocity<sup>1</sup>, let alone to “Designated Countries”. It follows that BiH and RS, in particular, can not rely on the typical for civil law countries extra-treaty condition for extradition, namely: reciprocity. BiH/RS is not able to invoke **reciprocity by action**, that is to say by having already considered an extradition request from the country which is now being requested. Since this has never been possible at all under the law of BiH/RS, it could not have happened to that particular country as well. Furthermore, BiH/RS is unable to also invoke **reciprocity by words**, that is to say, by promising (declaring) that it will do so in turn, that is, proceed in good faith with extradition requests from the requested country. First of all, such a promise will not be acceptable as, being contradictory to the law of BiH/RS, it is not likely to be kept. Besides, even if the requested country does not check with the legislation of BiH/RS and believes to the promise, this is a step that shall be strongly and clearly recommended against as international legal assistance is based mainly on mutual trust and respect. This consideration is especially important to BiH/RS which as a small new country should prove its reliability by being a most positive example in this regard.

The basic conclusion is that for the time being BiH/RS can practically rely on international treaties and the ECE, in particular, to obtain extradition from other countries. Thus far, it can rely in theory only to obtain extradition from other countries as a designated country or on the basis of an exceptional authorization.

- The second general condition for extradition is the so-called *Dual Criminality*. It means that the offence for which extradition is being requested shall be a crime both under the law of the requesting country and the requested country. This condition reflects the basic idea of extradition, namely that countries unite their efforts in the fight against crime because and to the extent they face same criminal offences. This condition is considered by the time of the decision on the extradition request. Hence, even if by the time of its commission the offence constitutes a crime only under the law of RS and not under the law of the other country, extradition may though be granted, provided that meanwhile the requested country criminalizes the same conduct (act or omission).

In determining whether an offence is a criminal offence punishable under the laws of the two countries, it shall not matter whether the laws of both the requesting country and the requested country place the acts or omissions constituting the offence within the same category of offences or denominate the offence by the same terminology or define or characterize it in the same way.

Additionally, it should be taken into account that pursuant to Article 2 [Extraditable offences] ECE extradition shall be granted in respect of criminal offences punishable under the laws of the requesting Party and of the requested Party by deprivation of liberty or under a detention order for a maximum period of at least one year or by a more severe penalty. Where a conviction and prison sentence have occurred or a detention order has been made in the territory

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<sup>1</sup> By contrast to international legal assistance in civil matters as it may be rendered under reciprocity too. Thus, pursuant to Article 415 of the RS Civil Procedure Code, “Courts shall render legal aid to foreign courts in cases envisaged by international treaty or when reciprocity on rendering legal aid exists. In case of doubt regarding the existence of reciprocity, the RS Ministry of Justice shall produce an explanation”.

of the requesting Party, the punishment awarded must have been for a period of at least four months. However, if the request for extradition includes several separate offences each of which is punishable under the laws of the requesting Party and the requested Party by deprivation of liberty or under a detention order, but of which some do not fulfil the condition with regard to the amount of punishment which may be awarded, the requested Party shall also have the right to grant extradition for the latter offences.

- The third general condition for extradition is related to the jurisdictions of the two countries. This condition is two-fold. It requires, on the one hand, that the criminal law of BiH/RS as requesting country is applicable to the offence for which the extradition is requested. Otherwise, the extradition shall be rejected because RS can not do anything legal to the wanted person. On the other hand, the condition that the criminal law of the requested country is applicable to the offence for which the extradition is requested. Otherwise, the extradition is: either mandatory rejected, if the other country's judiciary has already decided the case by rendering a final judgement (mandatory ground for refusal), or expectedly rejected as by necessarily applying its own law the other country's judiciary would take the responsibility for the resolution of the case and prosecute and try on its own, and/or punish on its own the wanted person (optional ground for refusal).

Thus, under Article 9 [*Non bis in idem*] ECE, **extradition shall not be granted** if final judgment has been passed by the competent authorities of the requested Party upon the person claimed in respect of the criminal offence or offences for which extradition is requested. **Extradition may be refused** if the competent authorities of the requested Party have decided either not to institute or to terminate proceedings in respect of the same offence or offences. Besides, pursuant to Article 8 [Pending proceedings for the same offences] ECE, extradition **may be refused** if the competent authorities of the requested Party are proceeding against the wanted person in respect of the same criminal offence or offences. In any case, regardless of whether there have been or are criminal proceedings in respect of the same criminal offence or offences, the requested Party **may refuse** to extradite a person claimed for an offence which is regarded by its law as having been committed in whole or in part in its territory or in a place treated as its territory – Article 7.1 [Place of commission] ECE.

2. There are also some other grounds to refuse extradition.

a/ The other *mandatory grounds* for refusal are:

- Mandatory grounds related to the nature of the offence for which the extradition is requested; if the requested country considers this offence political, military or fiscal, it shall refuse extradition. Its worth remembering that terrorist acts though committed with political purpose and considered political crimes under domestic criminal law are never considered such offences under extradition law; likewise, the war crimes are never considered military offences under extradition law.

In accordance with Article 3 [Political Offences] ECE extradition shall not be granted if the criminal offence in respect of which it is requested is regarded by the requested Party as a political offence or as an offence connected with a political offence. The taking or attempted taking of the life of a Head of State or a member of his family shall not be deemed to be a political offence for the purposes of this Convention. Besides, pursuant to Article 1 of the Additional Protocol to the ECE, 1975 [ratified by BiH on 24.07.2005], political offences shall not be considered to include the following: (a) the crimes against humanity specified in the



Convention on the Prevention and Punishment of the Crime of Genocide adopted on 9 December 1948 by the General Assembly of the United Nations; (b) the violations specified in Article 50 of the 1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Article 51 of the 1949 Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked members of Armed Forces at Sea, Article 130 of the 1949 Geneva Convention relative to the Treatment of Prisoners of War and Article 147 of the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War; (c) any comparable violations of the laws of war having effect at the time when this Protocol enters into force and of customs of war existing at that time, which are not already provided for in the above-mentioned provisions of the Geneva Conventions. Finally, pursuant to Article 2 [Fiscal offences] of the Second Additional Protocol to the ECE, 1978 [ratified by BiH on 24.07.2005], for offences in connection with taxes, duties, customs and exchange extradition shall take place between the Contracting Parties in accordance with the provisions of the Convention if the offence, under the law of the requested Party, corresponds to an offence of the same nature. Extradition 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, custom or exchange regulation of the same kind as the law of the requesting Party.

- Mandatory grounds for refusal related to the legal consequences of the offence for which the extradition is requested: if by the time of the decision they have been terminated under the law of any of the two countries due to lapse of time (expiry of the time limitations period), amnesty or pardon, the requested country shall refuse extradition.

Thus, in accordance with Article 10 [Lapse of time] ECE extradition shall not be granted when the person claimed has, according to the law of either the requesting or the requested Party, become immune by reason of lapse of time from prosecution or punishment. Furthermore, pursuant to Article 4 of the Second Additional Protocol to the ECE, 1978, extradition shall not be granted for an offence in respect of which an amnesty has been declared in the requested Party and which that Party had competence to prosecute under its own criminal law.

- Mandatory grounds for refusal related to the possible treatment of the wanted person in the requesting country: if the requested country establishes that (a) the person may be denied fair trial or (b) may be subject to inhuman punishment or treatment outside the criminal proceedings there, it shall also refuse extradition.

In accordance with Article 3 ECE, if 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. Furthermore, Article 3 (1), Item 3 of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment to which European states are parties, forbids authorities of requested countries from "extraditing a person to another state where there are substantial grounds for believing he would be in danger of being subjected to torture".

b/ The non-mentioned so far *optional grounds* for refusal are:

- Optional grounds related to the place of commission of the offence for which the extradition is requested: if it is committed in the territory of a third country, the requested country may refuse extradition where it finds that the extraterritorial application of the RS/BiH law to the offence is substantiated by such a principle which is contrary to its legal concepts.

Thus, in accordance with Article 7.2 ECE, when the offence for which extradition is requested has been committed outside the territory of the requesting Party, extradition may only be refused if the law of the requested Party does not allow prosecution for the same category of offence when committed outside the latter Party's territory or does not allow extradition for the offence concerned.

- Optional grounds for refusal related to the nationality of the wanted person: if that person is a national (citizen) of the requested country by the time of the decision on the extradition request, it may refuse extradition regardless of whether s/he possesses any other nationality and in particular, of the requesting country. Civil Law countries, in particular, are obliged under their domestic law to refuse extradition of their nationals. This actually is a matter of legal tradition there rather than a matter of lack of democracy, solidarity, understanding or whatsoever. In contrast, Common Law countries generally extradite their nationals out of necessity. Because these countries normally do not provide for extraterritorial application of their criminal laws, they can not prosecute, try and punish even their nationals for criminal offences committed in another country. Hence, Common Law countries have no other option in such cases but to extradite even their nationals to the country where they have committed the offence, if that country, of course, requests their surrender. {See below}

Thus, in accordance with Article 6 [Extradition of nationals] ECE, any Contracting Party has **the right** to refuse extradition of its nationals. It may, by a declaration made at the time of signature or of deposit of its instrument of ratification or accession, define as far as it is concerned the term “nationals” within the meaning of the Convention. Nationality shall be determined as at the time of the decision concerning extradition. If, however, the person claimed is first recognised as a national of the requested Party during the period between the time of the decision and the time contemplated for the surrender, the requested Party may avail itself of the provision contained in sub-paragraph a of this article.

Finally, if the requested Party does not extradite its national, it shall at the request of the requesting Party submit the case to its competent authorities in order that proceedings may be taken if they are considered appropriate. For this purpose, the files, information and exhibits relating to the offence shall be transmitted without charge by the means provided for in Article 12, paragraph 1 (as an official request for extradition). The requesting Party shall be informed of the result of its second request.

### Extradition – basic concepts

#### *Common Law Countries –vs– Civil Law Countries*

<u>Criteria for comparison</u>	<u>Common Law</u>	<u>Civil Law</u>
Extra-territorial applicability of substantive criminal law	No	Yes
Extradition of nationals, especially those who have committed criminal offences abroad	Yes	No
Evidence in support of the accusation/conviction required	Yes	No
Are court proceedings always necessary?	Yes	No
Country will extradite only under international treaty (and not under the conditions of reciprocity only)	Yes	No

Obviously, there are two alternative national approaches on the issue of nationality. While traditionally it is common law countries that do not restrict the extradition of their nationals (in part on the grounds that they are not always prepared to exercise jurisdiction over such nationals for offences committed outside their respective territories), other countries of the civil law tradition have adopted a different view by asserting extraterritorial jurisdiction over nationals, so if nationals are not to be extradited (because of constitutional or policy prohibitions) they may be tried for extraterritorial offences.

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### E. Steps of Active Extradition

#### *1. When to consider active extradition?*

Active extradition shall be considered whenever a defendant (suspect or accused) or convicted (sentenced) person is at large: s/he has been located abroad {see Article 438 (2) CPC of RS}, or, at least, s/he has been on national search in RS/BiH and within a reasonable period of time (e. g. one year) was not found.

Additionally, it must be taken into account that extradition is neither mandatory, nor always practically justified. Thus, if the fugitive is a foreigner, his/her criminal offence is not significant (e. g. use of forged identity papers) and the country of his/her nationality recognizes the principle of personality to substantiate extraterritorial application of its criminal law, then to try to obtain his/her extradition (generally, from a third country) is not likely to be the best option. Instead, it would be probably much more realistic to achieve justice by referring the case to the country of his/her nationality: sending all the materials against the foreigner to it and requesting it for institution of criminal proceedings against him/her – Article 423 CPC of RS. Thus, another typical and more appropriate method of international legal assistance (aid) in criminal matters is used. Even if this method is not provided for in an international treaty with the other country, it is still the lesser evil compared to the other two possible options: to patiently wait for the wanted foreigner to come back to the territory of RS/BiH or to try to extradite him/her from somewhere.

#### *2. What to do in case of decision to look for the wanted person abroad and try to obtain his/her extradition from another country?*

If the public prosecutor in charge of a case under investigation, the respective entity and state officials responsible for international legal assistance are sure that the defendant (suspect or accused) is in the territory of a specific country and s/he will be there for a comparatively long period of time, at least, two months (e. g. serving a long term of imprisonment there – in such cases postponed extradition is most likely), then the two officials can consider the immediate preparation and sending of the official request for his/her extradition to the other country in accordance with Article 428 [Filing Request for Extradition] of the CPC of BiH in conjunction with Article 418 (ii) of RS CPC.

However, such a situation is very exceptional and risky as well {SEE BELOW ITEM 3.b}. Generally, the public prosecutor in charge of the case, should obtain from court an order for the issuance of an INTERNATIONAL ARREST WARRANT for the wanted person pursuant to Article 438 (2) RS CPC. Once the judge issues the order, s/he forwards it to the state Ministry of Security – Bureau for Cooperation with Interpol as the competent state Ministry of Bosnia and Herzegovina in accordance with Article 429 [Request for Temporary Detention] of the CPC of BiH in conjunction with Article 418 (ii) of RS CPC. Pursuant to Article 429 (2) CPC of BiH the State Minister of Security issues the INTERNATIONAL ARREST WARRANT and orders its circulation worldwide to the National Interpol Office (Bureau) in Sarajevo in the form of the so-called Red Notice. In this connection it is worth mentioning that Interpol is a highly specialized and very skilful international police organization but designed for communications only. It can't make any decisions on behalf of the public prosecutor in charge of the case or the state official of BiH responsible for international legal assistance, either on legal or on tactical issues. It must be

taken into particular consideration that, in contrast to local police arrests in BiH, the extradition arrests abroad (both, provisional and full) are a judicial matter and shall not be left in the hands of Interpol police officers only.

It is also noteworthy that the INTERNATIONAL ARREST WARRANT is not directly enforceable abroad; it is no order for arrest. Actually, this “warrant” is only a petition for international search and provisional arrest of the wanted person. It only serves as a prerequisite for the issuance of the order for the arrest of the person in the country where s/he is located.

It is important that the petition contains all the required information for a provisional arrest petitions because there may not be time for a second chance. Identification evidence will depend on what is available, but the following should be included: the wanted person's nationality, date of birth, place of birth, passport number, physical description (race, height, weight, identifying features, photographic evidence, fingerprints etc.). The information should be presented in as clear and concise a fashion as possible. The request will be read and executed by officials in a foreign country that may have a different language and an entirely different legal system. The information should be set out as simply as possible; a statement of the facts of the case should include only relevant facts, and not necessarily all of the facts concerning the case.

It is also not a bad idea to instruct Interpol to clearly mention the time and the place of the commission of the criminal offence. The other country is not likely to detain the person, if and until it hesitates over *the time* of its commission and for this reason can not determine that lapse of time has not occurred, at least, under its law. The other country is not likely to detain the person either, if it hesitates over *the place* of commission and for this reason can not determine that, at least, the offence has not been committed in its own territory. Hence, regardless of the text of Article 429 (2) CPC of BiH which does not require mentioning the time and the place of the commission of the offence, this should be done though in order to avoid unnecessary complications and risk. Moreover, this is expressly required by Article 16 (2) (ii) [Provisional arrest] ECE. It prescribes that the petition shall not only state for what criminal offence will be requested but also state “when and where such offence was committed”, and shall so far as possible give a description of the person sought.

The petition for international search and provisional arrest is not just a step towards the extradition of a wanted person. This petition necessarily contains a promise of the petitioning country that once the wanted person is arrested in another country within the Interpol's network, the petitioning country will send on time to it an official request for the extradition of the person. Otherwise, no country would respond to the petition and would never arrest the person. Hence, the petitioning country is likely to discredit itself if it does not send its extradition request in time. That is why as the state Ministry of Justice, being the designated Central Authority for extradition [Article 5 of the Second Additional Protocol to the ECE], issues and dispatches extradition requests, it should get a copy (information) of the petition without any undue delay.

Finally, if the wanted person has not been put on the national search list, this should be immediately done in accordance with Article 435 RS CPC as, meanwhile, the person might return/come voluntarily to BiH, or, if successfully extradited, his/her subsequent detention be executed easier.

### 3. *What must be avoided?*

**Two common mistakes** should be foreseen and avoided.

a. The first mistake is to assign Interpol or any other police/law enforcement unit to only find the location of the wanted person (as if s/he is a missing person). Where the whereabouts of a person sought for prosecution, trial or execution of punishment are unknown, the police are

usually eager to locate him/her abroad and request an international report of his/her location. However, the public prosecutor in charge of the criminal case and the state official of BiH responsible for international legal assistance must not allow the police to do this until the extradition file is completely ready and all supporting documents for the future request are prepared {SEE BELOW NEXT ITEM 4}. If this is done, a request for international location will not be necessary at all. Once the extradition file is ready with everything, which might serve as supporting documents to the future official request for extradition, the next step is usually the preparation of a petition for an international search and arrest of the fugitive.

Requests for international location are not only unnecessary but are also risky for two reasons.

- Police in other countries are not always careful with foreign cases. When checking the identity of the person sought, they may alert him/her that RS/BiH is interested in his/her extradition. This may cause the person to flee to another foreign country where his/her extradition to RS/BiH is less possible or impossible.
- Additionally, the request for international location only may be mistakenly understood as a petition for a provisional arrest. Such mistakes are not uncommon and may be made not only by the police but also a foreign court. If the person is put under provisional arrest pending the extradition request all supporting documentation must be compiled in a very limited period of time, almost never exceeding 40 days. RS/BiH authorities will most likely be unable to meet this deadline. Consequently, the term of detention will expire before the extradition request is received and the person will be released.

The released fugitive obviously has no interest in waiting patiently for BiH/RS authorities to prepare and send the fully documented request for extradition. Instead, it is more likely s/he will flee to a country more hostile to extradition. Besides, if this happens several times, with different persons sought, other countries are likely to reach the conclusion that BiH/RS authorities do not respect the right to liberty and human rights, in general, which constitutes a sufficient ground for rejecting any future BiH/RS request for extradition.

Hence, efforts to only locate the wanted person should be avoided. In this connection, it must be pointed out that the text of Article 428 (1) CPC of BiH is unjustified and a bit misleading requiring the contrary, namely to determine in advance that s/he resides somewhere abroad. Envisaging the situation where BiH/RS authorities may request extradition, it reads: “If criminal proceedings are conducted in BiH against a person who is situated in a foreign state or if a domestic Court has imposed a sentence on the person who is situated in a foreign state, the Minister of the competent Ministry of Bosnia and Herzegovina may submit the request for extradition.” Because, most fugitives are identified and apprehended while passing the international border control, it does not make any sense to require that they reside somewhere, let alone to discover if and, necessarily, where they do in order to trigger the whole procedure.

The aforementioned Article is instructive rather than procedural. It follows that the non-compliance with this Article, by not determining in advance the residence of the wanted person, may not entail invalidity of any next procedural action or decision and of the extradition request, in particular. But it is also worth remembering that a mistaken conclusion in the contrary sense by the authorities of the requested country may never be ruled out. That is why one has to be careful not to insert the text of Article 428 (1) CPC of BiH among the documents in support of the extradition request.

b. The second possible mistake consists of avoiding *the petition for the international search and provisional arrest* of the person and instead, sending official extradition request directly. It is true that the fugitive should, first of all, be arrested and his/her arrest may be ensured not only by way of a petition for his/her international search and provisional arrest (the so-called “emergency procedure”). This result might also be achieved by *a formal request for extradition*. Once received and accepted by the judicial authorities of the requested country, it *ex officio* necessitates the full arrest of the wanted person (in the so-called “normal procedure”).

The extradition process though shall begin with the issuance and circulation worldwide of a petition for the international search and provisional arrest of the fugitive as this arrest is much more efficient and safer than the full arrest. An international search is undertaken even where the country of his/her residence is known. Due to practical time constraints, this petition, unlike the formal extradition request, need not be in hard copy and through official channels (a formal written petition might otherwise take at least a week to reach the other country). Instead, the petition in question reaches the country where the fugitive resides in no more than 24 hours. This helps prevent his/her escape to a third country. When making such a petition it is important to clearly indicate that the BiH/RS authorities are also to consider extradition requests of the country where the fugitive is found.

4. *What shall the completed extradition file contain so that the international search may be triggered?*

If the situation is not exceptionally urgent, the international search of the wanted person shall not be triggered until the extradition file is completed. This file must contain 3 identical sets of documents, which go to the following parties: the first, or “main set” will be sent to the other country, the second, “reserve set” will remain in BiH with the state official of BiH (or the entity official, at least) responsible for international legal assistance, and the third, “own set” must remain with the public prosecutor in charge of the case. Each set must contain the following documents:

- a. The fullest possible description of the person sought by which s/he may be identified and later, his/her nationality established too. This includes name, age, date and place of birth, gender (sex), passport, profession, main habits, physical description, photographs, fingerprints, etc.
- b. The warrant of his/her arrest (the order for custody) where the person sought is a defendant – suspect or accused [or the final judgment with the punishment of imprisonment imposed where the person is sentenced]. If the warrant has been issued in his/her absence, it must clearly indicate that: (i) its time limit and validity would not have expired by the time of the surrender of the person, and (ii) the warrant is subject to judicial control once s/he appears in the territory of RS/BiH for any reason (including his/her surrender). To avoid any problems and risks, it is advisable to attach copies of: Article II, Paragraph 2 of the Constitution of BiH [“The rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms [ratified by BiH on 12/072002] and its Protocols shall apply directly in Bosnia and Herzegovina. These shall have priority over all other law”], and Article 5.3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms which reads: “Everyone arrested or detained ... shall be brought promptly before a

judge or other officer authorised by law to exercise judicial power”.

- c. Full, very clear and detailed description of all facts, which constitute the criminal offence (-s) of the person, including: (i) the time and place the offence was committed, (ii) the victims with their nationalities, (iii) possible accomplices with their nationalities. The aim of this description is twofold: firstly, to enable the country receiving the request to determine that its own criminal law is not applicable to the offence (while BiH/RS law is), and secondly, to establish the *dual criminality* of the offence.
- d. The description of facts must also include any other relevant facts, which would allow the other country to determine the existence of the *dual punishability* of the wanted person. Namely: that there is no lapse of time (due, inter alia, to facts which have interrupted and/or suspended the running of its period) and there are no other legal grounds under the law of neither of the two countries (specific forms of withdrawal from criminal activity, amnesty, pardon) which exempt from criminal liability and grant him/her immunity from prosecution and punishment. The lack of amnesty and pardon, in particular, should be established by any sort of declaration which might be a part of the text of the official extradition request as well.
- e. A copy of the applicable criminal law provision, which envisages the offence and provides for its punishment, and also all other relevant legal provisions governing the preclusion of its imposition (the termination of criminal responsibility), in particular, the relevant provisions on lapse of time.
- f. If the criminal offence in respect of which the extradition is sought has been committed in the territory of a third country, a copy of the criminal law provision of that country which envisages the offence so that, if necessary, it might be checked as to whether the conduct of the wanted person constitutes a crime there (under the law of the place of its commission) as well. This is necessary just in case that the future requested country is like BiH and would require such TRIPLE CRIMINALITY (see Article 416.3.d of the CPC of BiH).
- g. Some evidence of the criminal offence. This, above all, is necessary if the future requested country is like BiH and would require such evidence (see Article 416.3.c of the CPC of BiH). Certainly not all countries require it. However, all countries, even those, which do not require any evidence (such as the Civil Law countries, in general), examine the reliability of the judicial system of the requesting country, first of all, with respect of its capacity to conduct fair trials. Accordingly, by presenting the above evidence to the country receiving the request, this country is more likely to conclude that RS/BiH can conduct fair trials or, at least that the trial of the potential extraditee is and will be fair. As explained, the possibility of unfair trial constitutes a sufficient ground for rejecting any future BiH/RS request for extradition. That is why some evidence of the offence should in any case be prepared for presentation to the other country.
- h. Finally, a certificate or other data on the citizenship (nationality) of the wanted person. This is necessary just in case that the future requested country is like BiH and would require such a document (see Article 416.3.b of the CPC of



BiH). Its submission, however, is a matter of political politeness rather than a matter of legal precision as no requesting country can determine in advance what will be the nationality of the wanted person by the time of the decision on its extradition request and, in particular, whether s/he will not be by that time (the only relevant one) a national of the requested country, what might actually be of concern to it. Hence, in any case the nationality of the wanted person is necessarily checked on by the other country.

If the other country is a Party to the ECE, in particular, its authorities do not need: (i) any indication of the wanted person's nationality (citizenship), (ii) any evidence for suspicion, let alone his/her guilt his/her, unless the other country [e. g. Denmark] has made a Reservation that it would require such evidence, (iii) any third country's criminal code, even when the criminal offence in respect of which extradition is sought has been committed in the territory of that country. The delivery of such data/information is not foreseen in the ECE. In turn, BiH should not require any such data/information from Parties to the ECE and therefore, should not abide for their incoming extradition requests by Article 416 (3) (b)(c)(d) of its CPC; its rules are inapplicable as derogated (overridden) by the ECE, pursuant to Article 414 (1) of the same CPC. Otherwise, other Parties would reciprocate and BiH will find itself in a more difficult situation.

Actually, the domestic rules of the requested country on incoming extradition requests, such as these of Article 416 CPC of BiH, are applicable only to requests of Parties to such multilateral Conventions which only set up the obligation to extradite but do not determine any prerequisites for granting extradition. Thus, pursuant to Article 16.4 of the UN Convention against Transnational Organized Crime, "If a State Party that makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention the legal basis for extradition in respect of any offence to which this article applies." Obviously, the prerequisites for granting extradition are left to the domestic extradition laws of requested Parties.

Once the extradition file has been completed, the right time to trigger the international search of the wanted person shall be determined. This search shall not necessarily start immediately.

*5. When should Interpol be requested to circulate the petition for international search and provisional arrest of a person?*

It will be very important and helpful if the Prosecution Service (avoiding in any case the mistakes specified in ITEM 3) can know or predict the country where the wanted person might be found and apprehended so that the public prosecutor in charge of the case and the state official of BiH responsible for international legal assistance, can decide whether to trigger his/her international search or not. Since RS/BiH extradites only under treaty, the sending of a petition for international search and provisional arrest should be avoided, if the person is likely to be found in a foreign country with which BiH has no extradition treaty or, in case it works with "designated countries", RS/BiH is not among them. Otherwise, it is highly probable that the fugitive will not be arrested, but instead warned that RS/BiH is seeking his/her return. [Nevertheless, if for some reasons the other country is ready to extradite the person to BiH, it should be approached by the petition in question.]

The situation would be similar if the wanted person is likely to be found in a territory of a country with which BiH has an extradition treaty, that country extradites also under the conditions of reciprocity (both foreigners and nationals) and the person is its national. Regardless of whether such a country is a Party to the ECE or another multilateral convention which

prescribes extradition, it will probably require that RS/BiH authorities promise to consider any extradition of their nationals to that country if requested, before it makes any provisional arrest of the person. Obviously, it is advisable that RS/BiH authorities do not make such a promise since in any event it cannot be kept. Pursuant to Article 415 (1) (a) CPC of BiH, its nationals are not subject to extradition to another country; this is in no contradiction to the ECE, in particular, as its Article 6.1 (a) grants its Parties “the right to refuse extradition of its nationals”. Therefore, if the situation arises where a country requires that RS/BiH make such a promise, the official in charge of the case should not try to inspire such a step, and instead wait for the person to appear in another country where his/her extradition is possible.

However, if the objective is not necessarily to bring the defendant to RS/BiH but simply to bring this person to trial regardless of the location (even in his/her country of nationality), then you can send the petition or even the formal request for his/her extradition to the defendant’s country. In most cases such a country of wanted person’s nationality which refuses his/her extradition on the grounds that the person is its national (citizen), will also indicate in a legally binding way that it is prepared to *institute (commence) criminal proceedings against its own national* at additional request of RS/BiH. In particular, pursuant to Article 6 (2) ECE, “*If the requested Party does not extradite its national, it shall at the request of the requesting Party submit the case to its competent authorities in order that proceedings may be taken if they are considered appropriate. For this purpose, the files, information and exhibits relating to the offence shall be transmitted without charge by the means provided for in Article 12, paragraph 1. The requesting Party shall be informed of the result of its request*”. In this way the other country will follow the basic extradition principle of “Either You Punish or You Surrender” (“*Aut punire aut dedere*”). This approach to creating obligation to institute criminal proceedings against the wanted person is particularly useful where prosecution of suspects in the requested country is governed by the principle of opportunity only rather than the principle of legality.

As a result of this “ping-pong” involvement of the other country, however, RS/BiH might fall into its own trap. Such an approach would mean, above all, that RS/BiH authorities have to fully trust the other country by handing over the case to its judicial authorities with all the evidence and thus, give up the idea of trying him/her. If RS/BiH authorities do not do this after the other country has expressed its readiness to deal with the case, the risk is they will need to answer sensitive questions from the other country, such as: why BiH/RS do not want justice for the wanted person (?); do RS/BiH authorities actually have any evidence against him/her (?), do they act in good faith (?) and so on. Therefore, if the public prosecutor in charge of the case or the state official of BiH responsible for international legal assistance is too eager in his/her efforts to secure the arrest abroad and the extradition of the person whose location is customarily in the territory of that person’s country, then the actions of the two officials might be even counterproductive. Not only might such efforts work in favour of the specific fugitive offender, but they might also encourage other individuals to commit offences as they would see that is possible to escape from justice.

Additionally, it must also be borne in mind that the country of the wanted person’s nationality might not always be able to apply at all its substantive criminal law (Criminal Code) to the criminal offence for which extradition has been sought. It is not ruled out that the person might have been granted nationality there after s/he had committed the offence, the place of its commission is outside the territory of the other country, and neither that country, nor any of its nationals had been an injured party to the criminal offence in question. In such a case very few

countries (e. g. Sweden, Indonesia) provide for retroactive extension of the personality principle to substantiate the application of their Criminal Codes. Thus, the other country would refuse extradition because now, by the time of the decision on the extradition request, the wanted person is its national; and at the same time that country would normally not be able to apply its own criminal law and try the person for the offence because by the time of its commission this person was not yet national of the other country. Where this is the case, actually, there is no point (justification) in requesting the other country for the extradition of its new national.

6. *What aspects of other's country law and practice are worth being learned before making an extradition request?*

In all cases, additional information from the country of interest must also be obtained [e. g. through Internet search or direct contacts]. Such information includes:

- a. If the other country is a Party, together with BiH, to the ECE or such a Convention which similarly allows for refusal to extradite own nationals, can it nevertheless extradite them to BiH and under what conditions? In particular, does it extradite its own nationals under the conditions of reciprocity only (a requirement that can't be met by BiH due to Article 415.1.a of its CPC in conjunction with Article 6 of the ECE)?

Does the other country have a Reservation to the applicable convention that it does not extradite certain foreigners, such as permanent residents, persons who have been granted asylum, etc? [As BiH has no reservation of that kind, it can't reciprocate, despite Article 415.1.b of its CPC, in order to make the other country extradite such persons too.]

- b. If again the other country is a Party, together with BiH, to the ECE or such a Convention which similarly provides for the eliminative or minimum imprisonment system to determine the extraditable offences instead of being restricted to an exhaustive list of offences (enumerative or listing system), what is that country's specific provision that criminalizes the offence?
- c. Is evidence of guilt [*prima facie* or *lesser quantum* evidence of the guilt] of the fugitive necessary (the common law system) or not (the civil law system)? What evidence might be required? It is noteworthy that **Parties to ECE do not generally require evidence**. Those which exceptionally do (such as Denmark, for example) have a clear Reservation to Article 12 of ECE that they might need evidence to grant extradition.
- d. What are the *non-extraditable offences* (political, military, fiscal) and who are the non-extraditable persons (nationals, residents, refugees for whom asylum has been granted)? Which of these impediments to extradition are mandatory grounds for refusal and which are optional? What are the exceptions to them? Is reciprocity necessary to benefit from these exceptions?
- e. What are the specific human right requirements under the law of the other country and will the legislation, judiciary and prisons in RS/BiH meet all of them? Is it possible to produce sufficient proof of that?
- f. What are the precise provisions on the *Rule of Speciality* under the law of the other country?
- g. What are the necessary supporting documents to the formal request for extradition (a full, explicit and exhaustive list) and how must they and the extradition request be authenticated?
- h. Is it possible that the extraditee, while under provisional or full arrest, might be released, and what can be done to avoid his/her release?

- i. Is accessory extradition possible for a non-extraditable offence of the same person, along with the main and extraditable offence, and, if so, under what conditions?
- j. Who decides on admissibility of extradition cases, the central authority or the court?

7. *What might be expected after the petition for international search and provisional arrest of the wanted person has been circulated worldwide through the Interpol channels?*

After the circulation of the petition worldwide, the “National Central Bureau” of Interpol in any foreign country is expected to take the information concerning the identity of the person and the criminal offence (s) for which s/he is being sought, from the international search list and by including this information, put him/her on the national search list of its country.

Once the law enforcement authorities in such a country within the Interpol’s network find the wanted person, they immediately put him/her under police arrest (usually, for up to 24 hours), as anyone else declared for search and arrest, and inform their Interpol of the apprehension of that person who has been sought through them. If the country in question extradites only under international treaties and has no such treaty with BiH, and therefore, no extradition proceedings at the request of BiH can take place, the person will be released. Otherwise, if the other country has an extradition treaty with BiH, It will also ask for confirmation of the petition and if its Interpol Bureau receives it within the time period of the police arrest there, it will forward the case (usually through the prosecution office) to its court for warrant of provisional arrest of the person. Subsequently, if the court does not find any obstacle (e. g. that country does not extradite its nationals and the apprehended person is such a national), it will issue warrant of arrest pending the arrival from RS/BiH of the official request for the extradition of the person. The provisional arrest is most often up to 40 days – Article 40 ECE. However, if its period and thus, the deadline for the submission of the request have not been understandably indicated in the decision of the court, the Sarajevo Interpol shall ask its counterparts in the other country for clarification on the issue.

In any case, it is much better and safer to directly obtain information from the other country and avoid using the Interpol channel. Above all, if the wanted person is arrested there, the RS/BiH authorities must make sure that their petition has been taken into account (as the only ground for the arrest or together with one or more other grounds for it) and the arrest is not carried out on other grounds only, as this would indicate that the other country does not react positively to the intentions of RS/BiH. For the purpose of efficient exchange of information about international legal assistance, a lot of countries have designated contact points. Most often they are public prosecutors or judges. Thus, whenever the public prosecutor or/and the official responsible for international legal assistance in RS/BiH is in need of any specific current information or has any question about the law of the other country, s/he shall not hesitate to identify that country’s contact point (his/her counterpart) for international legal assistance by searching in Internet, contact him/her and simply ask him/her.

8. *What to do after the provisional arrest?*

A. Once the provisional arrest of the wanted person has been granted in another country, the public prosecutor in charge of the case or/and the state official responsible for international legal assistance in RS/BiH has to receive and study, as quickly as possible, the decision of the arrest. This decision determines: [i] the deadline for the submission of the official request for extradition with the supporting documents (which coincides with the time period of the arrest); [ii] the possibility and conditions of its extension (which is very rare), and also the specific requirements with respect to documentation which will be sent (what specifically, in what language, whether and how to authenticate it, etc.); and [iii] the channels of communication

(which is never Interpol). For this purpose it is also advisable to find (for example, on Internet) the domestic extradition law of the other country. The extradition request in particular shall, *inter alia*, contain: (a) a statement when lapse of time would occur at the earliest, and (b) another statement that the criminal offence in respect of which extradition is sought has not been affected by any amnesty. The extradition request shall also enclose: (c) a copy of Article 430 CPC of BiH which stipulates that once surrendered to RS/BiH, the extraditee shall be prosecuted, tried and/or punished only to the extent (within the limits) of what s/he has been extradited for, and not for any other act or omission which has been committed by him/her prior to his/her surrender; (d) the RS/BiH arrest warrant of the person sought; (e) a full and reliable information for his/her identification, (f) a good description of the criminal offence(s) s/he is wanted for, and also (h) a copy of all applicable RS/BiH substantive criminal law provisions relevant to the case [namely, in relation to (i) the offence itself, and (ii) other relevant facts which might affect the criminal responsibility and/or punishment of the person]. Lastly, there should be a request for the delivery to BiH/RS of the items (property) found in the possession of the wanted person, even if s/he dies or escapes in the meantime.

B. According to Article 419 [Communication of A Request for Legal Assistance] RS CPC, “Requests of the court or the prosecutor for legal assistance in criminal matters shall be communicated to foreign authorities by diplomatic channels by the court or the prosecutor through the Ministry of Justice of Republika Srpska to send them to the Ministry of Justice of Bosnia and Herzegovina”. Pursuant to Article 428 BiH CPC in conjunction with Article 418 of RS CPC the state Minister of Justice must sign the extradition request and dispatch it through diplomatic channels (by the state Foreign Ministry to the Foreign Ministry of the other country asking for the referral of the request to the appropriate judicial authorities of its country). Hence, the state Ministry of Justice is the so-called Central Authority for extradition and other methods for international legal assistance in criminal matters not only for the state level but also at the entity level of RS, at least, that is to say, for the whole criminal justice system of the Republic.

It is noteworthy that: [a] There are not two requests for extradition, the request is only one, it is of the state of BiH issued by its Justice Ministry. The “requests” of courts and prosecutors are actually proposals for the issuance of respective extradition requests. Moreover, as any search for international legal assistance is a matter of discretion, the proposals are not binding for the Justice Ministry; it can turn them down. [b] The aforementioned communication channel is a matter of law rather than a matter of courtesy only. If not complied with, the judicial authorities of the requested country can conclude that as they have not been properly approached the request itself is not valid and should be rejected. Of course, the request might be sent again to them using the right channel this time but meanwhile the wanted person would be released and likely to hide and/or escape to a third country which is much more hostile to extradition. [c] The determination of the exact channel of outgoing communications, especially its first, internal part, within BiH is entire responsibility of this country’s authorities. No one else can determine the internal part of this channel for them, let alone instead of them, e. g. by stating that the RS Ministry of Justice might directly forward an extradition request to the embassy of the other country. [d] In accordance with Article 12.1 of the ECE [as amended by Article 5 of the Second Additional Protocol to this Convention, 1978, ratified by BiH on 24.07.2005], “the request shall be in writing and shall be addressed by the Ministry of Justice of the requesting Party to the Ministry of Justice of the requested Party; however, use of the diplomatic channel is not excluded. Other means of communication may be arranged by direct agreement between two or more Parties.” In any case, the arrangement of other channels might be done only at the state level

rather than at the level of entities or prosecution offices of BiH and the other country. It should be remembered that Parties to the ECE can also unilaterally designate a Central Authority (contact point) for incoming extradition requests by a Declaration to the Convention. That is why prior to requesting a specific Party, the Declarations and Reservations which this Party has made to the Convention should be read and taken into account.

C. After the official request for extradition with all supporting documents has been delivered to the other country and in case of positive development, the *full arrest* of the wanted person is ordered there, the competent judicial authorities will probably require additional information from RS/BiH. If that country is not very experienced in extradition relations, it may invite the RS/BiH prosecutor to assist it in this, especially in court for the extradition proceedings there.

#### 9. *How does active extradition end?*

Once the final decision on the requested extradition is rendered, the authorities of the other country will notify their counterparts in RS/BiH of the decision, usually through Interpol. If extradition has been refused, the wanted person is released immediately unless there are other grounds for his/her detention.

If the granted extradition is not postponed, the Central Authority for international legal assistance in the requested country will notify RS/BiH (through diplomatic channels and also via Interpol) of the positive decision and about the surrender scheme (including the time, place and manner of surrender of the extraditee). Interpol is given a copy of the court decision, a document on the period of the detention of the extraditee and a document reflecting the terms of his/her surrender. These documents must be delivered to the police officers of RS/BiH who are to assume custody of the extraditee. If the extradition granted is postponed, the other country organizes the handover in the same manner as soon as the obstacle for it is over, i. e. the person has been tried for another offence or has served his/her effective (not suspended) punishment for it.

Customarily, the foreign police take the extraditee to an international airport for a flight to the receiving country. Transfer of custody occurs at the door of the airplane transporting the extraditee out of the country. Occasionally, the rendering police may at the expense of the receiving country handle all aspects of the transportation to the requesting country. The person must be taken over no later than 30 days after the appointed date. Otherwise, if the fugitive is not taken within 30 days after the appointed date, he must be released and cannot be surrendered later for the same offence.

If within that one month: [a] the fugitive dies or acquires nationality of the requested country, or [b] RS/BiH as requesting country revokes his/her arrest or judgment or [c] withdraws its request for extradition or [d] declares that it will not take over custody of him/her (for another reason or without giving any reason), the competent agency of the other country will issue a ruling for termination of the procedure and immediate release of the person, if there are no other grounds for his/her detention. Exceptionally, where the fugitive succeeds in acquiring nationality of the rendering country, it will not be a solution to send to that country a file of the materials against him/her for institution of criminal proceedings for the same offence, unless it is established that the other country can apply its criminal law to it. This will hardly be possible. Thus, it is generally much better to keep the criminal case and try to extradite the person from a third country.

After the escort and arrival of the extraditee in RS/BiH, s/he is subject to the Rule of Speciality as provided for in Article 430 CPC of BiH in conjunction with Article 418 (1) RS

CPC, regardless of whether the competent court in the requested country has ruled on this issue or not. Thus, if prior to his/her surrender the extraditee had committed other criminal offences, for which extradition was not granted, s/he cannot be prosecuted, tried and/or punished. In short, the extraditee obtains procedural immunity for all such offenses<sup>2</sup>. However, s/he may be prosecuted, tried and punished for his/her criminal offences committed after his/her escort and arrival in RS/BiH.

Besides, if the extradition is from a Party to the ECE, the more flexible and detailed rules of Article 14 [Rule of speciality] of this Convention should apply. It reads:

*“1. A person who has been extradited shall not be proceeded against, sentenced or detained with a view to the carrying out of a sentence or detention order for any offence committed prior to his surrender other than that for which he was extradited, nor shall he be for any other reason restricted in his personal freedom, except in the following cases:*

*a when the Party which surrendered him consents. A request for consent shall be submitted, accompanied by the documents mentioned in Article 12 and a legal record of any statement made by the extradited person in respect of the offence concerned. Consent shall be given when the offence for which it is requested is itself subject to extradition in accordance with the provisions of this Convention;*

*b when that person, having had an opportunity to leave the territory of the Party to which he has been surrendered, has not done so within 45 days of his final discharge, or has returned to that territory after leaving it.*

*2. The requesting Party may, however, take any measures necessary to remove the person from its territory, or any measures necessary under its law, including proceedings by default, to prevent any legal effects of lapse of time.*

*3. When the description of the offence charged is altered in the course of proceedings, the extradited person shall only be proceeded against or sentenced in so far as the offence under its new description is shown by its constituent elements to be an offence which would allow extradition”.*

It must be borne in mind that the violation of the Speciality Rule is not only a matter of disrespect to the other country. Such a violation is also likely to result in the production of **invalid evidence** which shall be rejected by court.

#### F. Decision-Making Systems for Active Extradition

There are two typical decision-making systems for active extradition of suspects where there is no investigating judge and the prosecutor leads the criminal investigation – a Decentralized System and a Centralized System. They display significant differences based on the following criteria (formulated as questions):

##### **A. HAS THE PROSECUTOR IN CHARGE OF THE CRIMINAL CASE A LEADING ROLE IN TAKING DECISIONS (FOR INTERNATIONAL SEARCH, FOR EXTRADITION REQUEST)?**

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<sup>2</sup> By contrast to the procedural immunity of the so-called “cooperative witness” as it is limited only to the criminal offences about which s/he testifies. See Articles 298 - 303 of the CPC of Kosovo, for example.

- **The Decentralized System:** Yes, s/he has as other institutions (courts, center) can halt his/her initiatives on legal grounds only.
  - **The Centralized System:** No, as the center can halt his/her initiatives for tactical reasons too.
- B. IS THERE A SINGLE CENTER FOR THE OUTGOING REQUESTS (FOR INTERNATIONAL SEARCH, FOR EXTRADITION REQUEST)?
- **The Decentralized System:** No, there are two central institutions, acting independantly, namely: the Ministry of Secutiry which is responsible for petitions for international search and provisional arrest, and the Ministry of Justice which is responsible for extradition requests.
  - **The Centralized System:** Yes, this is the Chief Prosecutor's Office with its International Department.
- C. CAN THE CENTER, IN TURN, ORDER TO THE PROSECUTOR IN CHARGE OF THE CRIMINAL CASE WHAT DOCUMENTS TO PREPARE FOR THE OUTGOING REQUESTS AND HOW TO PREPARE THEM?
- **The Decentralized System:** No, as the prosecutor is not subordinate to it.
  - **The Centralized System:** Yes, as the prosecutor is subordinate to it.
- D. IS THE CENTER SUFFICIENTLY POWERFUL TO ACT IN ACCORDANCE WITH THE OPPORTUNITY PRINCIPLE TOO?
- **The Decentralized System:** No, the implementation of this principle is within the powers of the prosecutor in charge of the criminal case; the center can resort to the legality principle only.
  - **The Centralized System:** Yes, as the center can do anything within the powers of the prosecutor in charge of the criminal case.
- E. IS THIS ORGANIZATION FLEXIBLE AND EFFICIENT?
- **The Decentralized System:** No, as the decisive part of active extradition work is entrusted to first instance prosecutors rather than specialized, professionalized staff; that is why, even though the prosecutors are authorized to act in accordance with the opportunity principle too, they can't really take into account the specific relations with the potential and actual requested countries.
  - **The Centralized System:** Yes, as the decisive part of active extradition work is entrusted to specialized, professionalized staff (of the International Department of the Chief Prosecutor's Office) which is also authorized to act in accordance with the opportunity principle too and take into account the specific relations with the potential and actual requested countries.



## ***II. Letters rogatory to another country (obtaining evidence from abroad)***

### **A. The Idea of Letters Rogatory**

Any national judicial official who has the powers to undertake investigative actions and thus obtain valid evidence admissible in court is confined in his/her work to the territory of his/her country. S/he cannot obtain any evidence in another country. His/her work in another country could produce only information, which lacks any judicial significance and effect. That is why, if any evidence from another country is needed, it would be necessary to request its appropriate judicial authorities to undertake those specific investigative actions, by means of (through) which the evidence may be gathered.

Thus, if a judicial police officer (investigator), public prosecutor or judge/court in RS needs to interview someone, s/he must summon that person to appear before him/her in his/her office or in court respectively, regardless of whether the person is in the country or abroad. If the witness lives in another country, it is likely s/he will not come to BiH/RS. This reluctance may be based on some generalized fear or misapprehension. Moreover, persons summoned to appear as witnesses in BiH/RS, in particular, may also be reluctant because there is no clear provision in the domestic law of BiH/RS, which would grant them the normal immunity as witnesses or expert witnesses summoned from another country. The domestic law in RS/BiH does not expressly recognize the principle of *salvus conductus* (Latin: free passage), which grants such persons immunity from prosecution for previously committed criminal offences or serving previously imposed sentences. Hence, the only reliable way to ensure the interview of the person and performance of other necessary investigative actions abroad in this atmosphere of distrust is to prepare and dispatch a letter rogatory as provided for in Article 419 CPC of RS. There is no other, alternative way to produce abroad any valid evidence admissible in court of RS/BiH. Interpol, law enforcement authorities, diplomatic and consular agents from embassies can only produce information, which lacks any judicial significance, and shall never be directly used for the purpose of obtaining evidence from a foreign country.

The *outgoing letter rogatory* and *active extradition* are the most important methods of active legal assistance in criminal matters. However, when compared to active extradition proceedings, the requesting country which dispatches a letter rogatory is “active” in a different way. In extradition, the requesting country is active in its attempt to physically obtain the person sought. After this has been accomplished, there are usually no problems with the validity of the proceedings against him/her. The situation presented by outgoing letters rogatory is just the opposite. Usually, the requesting country easily gets the materials (statements, items) it wants. However, if those statements or/and items have not been gathered properly as evidence, these materials, regardless of their necessity, might not be admissible in any event. Such materials, if inadvertently admitted, may compromise the validity of the proceedings for which they were obtained.

### **B. The Basic Rules on Letters Rogatory**

Foreign countries have strict rules about the prerequisites for obtaining international legal assistance generally, and foreign letters rogatory, in particular. Thus, if the country of interest to BiH does not grant any legal assistance without a treaty, nothing can be done until there is one. However, most countries proceed with foreign letters rogatory under conditions of reciprocity.

Wherever this is the case, reciprocity should be invoked and declared in the letter rogatory as suggested for active extradition. Therefore, in contrast to extradition cases, RS/BiH authorities, most often, do not need an international agreement (bilateral or multilateral, such as the European Convention on Mutual Assistance in Criminal Matters, 1959) with the foreign country to obtain evidence from it. If there is no agreement, relations of reciprocity with that country are generally sufficient.

Where international legal assistance from the foreign country is possible, a situation which constitutes the general rule, the next question becomes whether there are any obstacles in its law to granting such assistance to another nation. Most countries provide some grounds for the refusal of assistance in their domestic law. Customarily, these are because of the possibility of prejudice to the sovereign, security, public order or other essential interests of the requested country. It must be emphasised that the phrase "essential interests", sometimes called "vital interests" refers to the interests of the requested country, not the interests of individuals. Economic interests may, however, be covered by the concept of "essential interests". It is possible that any assistance to investigate political, military or fiscal offences, or offences that carry the death penalty might be considered endangering essential interests not only of the accused individual but the requested country as well. It is also worth remembering that the aforementioned impediments are expressly provided for in the European Convention on Mutual Assistance in Criminal Matters, 1959, ratified by BiH on 24.07.2005 [ECMACM]. Pursuant to its Article 2, any legal assistance, including for gathering of evidence requested by a letter rogatory, may be refused: (a) if the request concerns an offence which the requested Party considers a political offence, an offence connected with a political offence, or a fiscal offence; (b) if the requested Party considers that execution of the request is likely to prejudice the sovereignty, security, ordre public or other essential interests of its country. Yet, regarding the fiscal offences, in particular, Article 1 of the Additional Convention to the ECMACM prescribes that "the Contracting Parties shall not exercise the right ... to refuse assistance solely on the ground that the request concerns an offence which the requested Party considers a fiscal offence".

In this connection it is noteworthy that the ECMACM is the most important instrument for RS/BiH. As in the case of the European Convention on Extradition and its Article 28, in particular, the rules of the ECMACM are judicially stronger and take precedence over any other bilateral treaty concluded between any of its Parties. According to its Article 26, this European Convention supercedes the provisions of all bilateral treaties and agreements governing mutual legal assistance in criminal matters between any two contracting parties. The particular rules of the ECMACM dedicated to letters rogatory are its Articles 3, 4, 14, 15.

### C. The Requirements for and Peculiarities of Letters Rogatory

If there are no other obstacles to obtaining international legal assistance from the other country, then the specific requirements for foreign letters rogatory under that country's law must be ascertained. A letter rogatory must meet the following criteria.

a. A letter rogatory must enclose: (i) the full name of the person to be involved in the execution of the letter rogatory as witness, accused or in a different capacity together with all the information available for his/her identification, including his/her present address (other countries do not search for witnesses or even for accused which are not to be extradited); (ii) a questionnaire for the interview of the person or/and an exhaustive list of items sought for search and seizure, tasks for their expert evaluation; (iii) a recital of pending criminal proceedings; (iv)

the name of the investigated criminal offence and a short description of all those alleged facts (not more than two pages) which correspond to the elements of the offence in accordance with its legal description, and (v) the text of the specific legal provision which envisages the offence.

If no criminal proceedings have been instituted, only non-judicial (police, law enforcement) information, which cannot be admitted into evidence in court, may be requested and obtained. In any case, one should avoid asking the same country for the same information twice: once at the stage of prejudicial check (preliminary verification, enquiry), to determine as to whether there is such sufficient information of a criminal offence which warrants for institution of criminal proceedings (initiation of investigation) and later, for a second time, through a letter rogatory at the stage of investigation. Hence, it is advisable to ask the other country for the law enforcement information (e. g. through the international channels of the Financial Intelligence Unit or the Customs Office) on exceptional basis: only if it is known in advance, from unofficial contacts, that is very likely to get a response that there is no data of violation of law and to refuse initiation of investigation as no sufficient information of a committed criminal offence has been collected. In practice, however, the authorities in BiH can never be sure about the answer. Moreover, if the question concerns financial or other sensitive issue, the other country's response is likely to be that it can't check into the matter without a court order and the only way to open the way to its issuance is to receive an official letter rogatory from BiH. Apart from this, inappropriate persons there might get some information about the international police enquiry; this might result in disappearance of important potential evidence, meanwhile. That is why, if there is nothing extraordinary, it is much better to initiate an investigation against an unknown perpetrator and by doing this, make it possible to send an official letter rogatory to the other country rather than use the longer and more complicated way to ask the other country twice.

Furthermore, if there is no description of the facts related to the offence, the request will most probably be rejected. The description is expressly required under Article 14.2 of the ECMACM. This description (together with the applicable provision) is necessary so that the other country can determine whether there is *dual criminality*, that is, the investigated offence is a crime both under the law of the requesting and requested country {See further below}.

Under the law of some countries (e. g. Nigeria) dual criminality is a general requirement for all incoming letters rogatory. This means that the facts that form the basis of any request for legal assistance must also be punishable as a criminal offence in that country. Thus, these countries approach letters rogatory in the same manner as extradition. However, most countries no longer use this approach and, as such, passive legal assistance is not subject to the rules of extradition. Thus, dual criminality is a general requirement for extradition only and not for letters rogatory. Usually dual criminality is required (through Reservations; see those of Albania, Austria, Croatia, the Czech Republic, Germany, Hungary, Slovakia, Slovenia, Switzerland to the ECMACM) only for search and seizure of property, lifting bank secrecy or/and opening bank accounts. Thus, according to Article 2 of the Additional Protocol to the ECMACM, "*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”.*

b. A letter rogatory should request the performance of certain investigative actions<sup>3</sup>. It should not simply seek clarification of certain facts, even though relevant to the criminal case in RS. That is why no one should ask for fact finding results as it remains his/her duty, let alone send a request to “carry out all action necessary to get at the truth” and by doing this relinquish control over the investigation s/he is in charge of. The ultimate responsibility should remain in the hands of competent judicial authorities of RS, namely: the prosecutors and judges in charge of the respective criminal cases.

- When, for example, interviewing (questioning) is requested, it should be stated in what capacity the individual is to be interviewed, i. e. as a suspect or accused, witness or/and expert-witness), and the legal provision of RS determining his/her legal status attached. A list of questions or written interrogatory (questionnaire) should also be prepared. This list might be viewed in some countries as restrictive and not indicative only. This issue should be determined in advance.
- It is noteworthy that the common expression "executing searches and seizures" might be used in the sense of searching places, premises, vehicles etc. and compulsorily acquiring evidential material found there. It also must be interpreted now to cover search and seizure in a technological context e.g the search of computers and computer systems. However, this expression alone should not be used in requests for legal assistance, particularly in cases where the requesting and requested countries have different legal systems. The expression "search and seizure" can have different meanings in different jurisdictions. It is much better in this particular case to exceptionally describe also the result sought to be achieved rather than a legal methodology only, such as "search and seizure", by which the result is to be achieved.
- If interception of telecommunications is requested the letter rogatory should also contain the following specific information: (i) a description, as precise as possible, of the telecommunication to be intercepted; (ii) an indication why the purpose of the request cannot be adequately achieved by other means of investigation; (iii) an indication that the interception has been authorized by the competent authority of the requesting country; (iv) an indication of the period of time during which the interception is to be effected.

c. It is worth remembering that in order to obtain valid evidence abroad, it is never sufficient to name your request “a letter rogatory”. You must also take care that it is always implemented through perfect investigative actions and judicial recognition of the evidence produced will create no problems. Such actions are carried out entirely and only within legal proceedings and are generally based on the principle immediacy.

Hence, it will not be appropriate to request a copy of a witness statement that has already been taken in some domestic proceedings of the requested country; it'll be necessary to request a direct interview of the witness, even though s/he will most probably repeat the same. Likewise, it

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<sup>3</sup> In cases of parallel investigations though the requesting country might normally to ask for, pursuant to Article 3.3(i) of the ECMACM, a copy of all written materials collected against the suspect(s) of interest in the parallel investigation, or the parallel criminal proceedings as a whole, conducted in the requested country.

will not be appropriate to request an identification of a person by fingerprints or DNA profile that you send to the requested country, by comparing it only to the respective administrative (police) data base in that country; if the person is identified there at all, it will be also necessary to request that in the execution of the letter rogatory the other country's judicial authorities obtain directly from him/her [to the extent it is legally permissible and factually possible, of course] print or biological sample for DNA respectively, compare it to the one that the BiH authorities have sent them. Only afterwards the other country's authorities should make their final expert evaluation as to whether this seems the same person or not. Otherwise, the BiH Authorities risk that the evidence obtained abroad be rejected as not obtained in a proper judicial way.

Anyway, it does not necessarily mean that BiH/RS authorities will always obtain such a perfect execution of their letters rogatory. Nevertheless, it is worth trying and if they do not get the execution that they have insisted on, only then they will have to put up with the result, whatever it is, and try their best to legalize it and make it admissible into evidence.

In most cases, RS/BiH judicial players (investigators, prosecutors, judges), defence lawyers/councils (advocates), and other interested persons may be present at the execution of the letter rogatory and attend the requested investigative actions. Usually, none of them are allowed under the law of the requested country to take part in the investigative actions. They may not obtain any evidence: by asking questions, performing searches and seizures, etc. Pursuant to local procedural law (which is the only applicable one – see also Article 3.1 of the ECMACM), this is the duty of a commissioned magistrate (judicial official) of the requested country. The RS/BiH judicial player is not allowed to act in place of the commissioned magistrate (judicial official) of the requested country in charge of the execution of the letter rogatory. If s/he does, this will be in violation of the applicable law and the selected materials will not be admissible in evidence in RS/BiH. The letter rogatory is executed under the criminal procedure law of the requested country. RS/BiH judicial players should be prepared for the general objection, often used, that the procedure there is incompatible with criminal procedure in RS/BiH. The simple response is that it does not matter, because it is a separate proceeding and not part of the domestic criminal proceedings in RS/BiH.

d. There are certain requests RS/BiH authorities should not make. They should not ask that the other country hand over possession of items in favour of individuals or organizations in RS/BiH. Any item received may be used for physical evidence only. When it is no longer needed as evidence for the criminal case in RS/BiH, it must be returned to the requested country without delay, unless that country has declared expressly that it is not interested in the return of the item. [Crosswise, when the RS/BiH authorities send an item for expert evaluation abroad, incl. biological material/samples for DNA analysis, they should not leave it with the requested country but should get it back together with the execution of the request/the expert report. Otherwise, the authorities might deprive the defendant, the suspect or accused, of the opportunity to request new (repeated, expanded) expert evaluation, violate his/her right to defence and virtually, endanger the success of the criminal proceedings.]

There are no grounds, in particular, that justify the interruption of possession by an individual over an item. This means that authorities cannot deprive the possessor of his property rights while granting international assistance (legal or police) especially when executing letters rogatory. Any international assistance between countries must be in compliance with civil law

and above all, property law. While granting letters rogatory, no action should be taken to settle a possible civil law dispute or predetermine its result.

Furthermore, there is no way of asking, via Interpol or any other law enforcement agency, for a provisional seizure of a specific item (a car, a document) pending the arrival of a letter rogatory for its handover as physical evidence. There is no such form of international legal aid, analogical to the provisional arrest of a person sought for extradition. So the RS/BiH authorities can't ask for any temporary detention (seizure) of an item in the territory of another country, let alone its direct handover/delivery to RS/BiH without any letter rogatory as the item would not be admissible into valid physical evidence.

Lastly, unlike domestic criminal procedure, the defendant, suspect or accused, has only the opportunity but not the right (privilege) to be represented by defence counsel at the execution of the letter rogatory in the requested country. The judicial authorities of the requested country have no correlative obligation to ensure the presence of defence counsel at the execution of the letter rogatory and RS/BiH authorities may not insist on that presence. At most, the requested country will only state the date and the place of execution of the letters rogatory. Officials and interested persons may be present if the requested party consents. Thus, the magistrate (judicial official) who executes the letter rogatory will not adjourn the requested investigative actions if these persons do not attend the execution and in spite of their absence, the court in RS/BiH is expected to consider the collected evidence valid.

e. Finally, the channel of communications with the other country must be identified. Actually, it is the same as in extradition cases and all other cases of international legal assistance in criminal matters. According to Article 419 [Communication of a Request for Legal Assistance] RS CPC, "Requests of the court or the prosecutor for legal assistance in criminal matters shall be communicated to foreign authorities by diplomatic channels by the court or the prosecutor through the Ministry of Justice of Republika Srpska to send them to the Ministry of Justice of Bosnia and Herzegovina". Pursuant to Article 428 BiH CPC in conjunction with Article 418 of RS CPC the state Minister of Justice must sign the letter rogatory (drafted by the court or the prosecutor) and dispatch it through diplomatic channels (by the state Foreign Ministry to the Foreign Ministry of the other country asking the redirection of the request to the appropriate judicial authorities of his/her country). However, international treaties law tends to avoid the diplomatic channel. Parties to international conventions usually agree to shorter ways as it is the case with Parties to the ECMACM where the general channel is between the Ministries of Justice {See further below}.

(a) The communications channel, whatever it is, shall be considered a matter of law rather than a matter of courtesy only. If not complied with, the judicial authorities of the requested country can conclude that as they have not been properly approached the request itself is not valid and should be rejected. Of course, the request might be sent again to them using the right channel this time but meanwhile the source of wanted evidence might disappear, e. g. the targeted witness has gone to a third country. Besides, even if the other country has disregarded the fact that it was not properly approached, the court in RS/BiH might reject on this ground the validity of evidence produced. (b) The determination of the exact channel of outgoing communications, especially its first, internal part, within BiH is entire responsibility of this country's authorities. No one else can determine the internal part of this channel for them, let alone instead of them, e. g. by stating that the Ministry of Justice of Republika Srpska might directly forward the letter rogatory to the embassy of the other country. (c) For the Parties to the

ECMACM, in accordance with its Article 15 (1,2), “Letters rogatory ... shall be addressed by the Ministry of Justice of the requesting Party to the Ministry of Justice of the requested Party and shall be returned through the same channels. In case of urgency, letters rogatory may be addressed directly by the judicial authorities of the requesting Party to the judicial authorities of the requested Party”. In such cases the direct transmission can take place through Interpol as well but the results of the execution shall always be returned through the general channel, namely: from the Ministry of Justice of the requested country to the state Ministry of Justice of BiH as the requesting country – Paragraph 5 of the same Article.

Thus, in cases of urgency (which is determined solely by the requesting country), it is widely accepted that letters rogatory may be addressed directly by the judicial authorities of the requesting country to the judicial authorities of the requested country, avoiding not only their Foreign Ministries but also Ministries of Justice as well. It should be known that requested countries might offer two different types of direct contacts.

- The first type is decentralized: with local judicial authorities in whose territories witnesses and/or physical evidence sought is expected to be found and gathered. This type of direct contacts, however, has to be agreed on and arranged in advance. The Ministry of Justice (and/or another competent institution) of the other country should instruct the local judicial authorities there that they may directly receive letters rogatory from their counterparts in RS/BiH (prosecutors and judges) which they must consider and eventually execute. The prosecutors should be ordered to render judicial cooperation to RS/BiH prosecutors at the pre-trial phase, while the courts should be ordered to render judicial cooperation to RS/BiH judges at the trial phase of criminal proceedings.
- The second type of direct contacts with other countries’ judicial authorities is centralized. It is offered by such countries where at the pre-trial phase criminal proceedings, in particular, the central authority for international judicial cooperation is the National Prosecution Office. This Office is generally authorized to decide whether to render the requested legal assistance and in case of positive decision, it forwards the letter rogatory for execution to the competent agency which is most often central too (National Investigation Service, for example). Hence, the RS/BiH prosecutor might write by him/herself the letter rogatory, order its translation and directly send it to the National (Central State) Prosecution Office in a country which offers such a type of direct contacts. This Office, without any prior instructions from any other institution, would be in the position to consider the letter rogatory and decide, in particular, whether to honour (recognize) the channel of communications used or not. For sure, this problem may be solved in advance with that Office by asking its International Department whether they would accept a letter rogatory signed and sent directly by a RS/BiH prosecutor.

Under Article 15.7 ECMACM bilateral agreements or arrangements in force between Contracting Parties which provide for the direct transmission of requests for assistance between their respective authorities are honoured; they do not violate the Convention. In any case, the arrangement of other channels might be done only at the state level, through treaties ratified by state Parliaments, rather than at the level of entities or prosecution offices of BiH and the other country. It should be remembered that Parties to the ECMACM can also unilaterally designate one or more Central Authorities (contact points) for incoming requests by a Declaration to the

Convention. That is why prior to requesting a specific Party, the Declarations and Reservations which this Party has made to the Convention should be read and taken into account.

f. There are also some other recommendations about the letter rogatory itself. Simple and clear language should be used. Use as many standard words and phrases as possible. Avoid technical language and unnecessary information that may cause confusion. In general, the letter rogatory is formally addressed to the Ministry of Justice of the requested country, but its “Appropriate Judicial Authorities” are likely to be mentioned as they are asked to perform certain investigative actions. The essential elements of a letter rogatory are:

- A declaration that the request is made in the interests of justice;
- The type of pending case for which assistance is needed (criminal);
- A brief synopsis of the case, including a description of the specific offence(s) under investigation;
- The nature of the assistance required (e. g. compel testimony or production of physical evidence under the law of the requested country);
- Name, address and other identifiers of the person(s) in the requested country from whom evidence is to be compelled;
- List of questions to be asked. A warning relating to perjury under RS/BiH Law should never be inserted (requested), even to witnesses. As the interview is under the law of the requested country, the person questioned as witness will be warned before questioning starts about perjury under the law of that country;
- Request that the testimony of witnesses or/and expert witnesses is taken under oath – Article 3.2 ECMACM;
- List of documents or other physical evidence to be produced;
- The translation of all materials into English or/and the official language of the other country [If it is from Europe, look also for its Declarations and Reservations to Article 16 of the ECMACM, if any].

It is the general international practice to execute letters rogatory as quickly as possible. However, postponed execution is not ruled out. The requested country may postpone action on a request if such action would prejudice investigations, prosecutions or related proceedings by its authorities. For example, where the requesting country has sought to obtain evidence or witness testimony for purposes of investigation or trial, and the same evidence or testimony is needed for use at a trial that is about to commence in the requested country, the latter would be justified in postponing providing assistance. Where the assistance sought would otherwise be refused or postponed, the requested country may instead provide assistance subject to conditions. If the conditions are not agreeable to the requesting country, the requested country may modify them, or it may exercise its right to refuse or postpone assistance. In any event, the requested country usually attempts to act in a fair and open manner when such issues arise.

g. As explained, nobody from RS/BiH can directly obtain valid evidence in the territory of a foreign country. This does not mean though that interested officials of RS/BiH can never attend any investigative work undertaken on their request abroad. On the contrary, such officials may be present at the execution of RS/BiH letters rogatory. Most requested countries agree to such presence. Thus, pursuant to Article 4 of the ECMACM, on the expressed request of the requesting country the requested country shall state the date and place of execution of letters rogatory. Officials of the requesting country may be present if the requested country consents.



Where this “expressed request” is not contained in the letter rogatory, it should be transmitted by the channels laid down for such letters. Understandably, the requested country’s consent may be given only if the law of that country does not prohibit it.

The presence at the execution of the letter rogatory (the so-called “passive participation”) can never become any active participation in investigative actions even if so invited, in one way or another, by the judicial authorities of the requested country. The execution of the letter rogatory, regardless of whether it is for collection of oral or physical evidence, is solely their duty as it is governed by their law - Article 3.1 of the Convention. Hence, if a BiH/RS official conducts in person any piece of interrogation/questioning there, s/he is likely to produce invalid evidence that should be rejected by BiH/RS court as obtained in violation of applicable law. In any case, the interrogation/questioning should be conducted by a local justice official (judge, prosecutor); the BiH/RS official, if allowed at all, can ask additional questions through him/her only.

h. Finally, under the generally accepted *Rule of Speciality*, BiH/RS authorities must promise to use the information transferred to them by the other country solely for the purpose for which it was originally given. In particular, this means that the requesting authority in BiH/RS is not allowed to transfer materials or information obtained in the course of a legal assistance procedure to a different authority. In addition, the BiH/RS judiciary is, in most instances barred from using the materials or information obtained by the request in a criminal case not named in the letter rogatory without prior consent of the requested country.

### Extradition and Letters rogatory – basic differences

[from the requesting country's point of view]

<u>Criteria for comparison</u>	<u>EXTRADITION</u> (a matter of prosecution or execution of punishment)	<u>LETTERS ROGATORY</u> (a matter of investigation)
What do you obtain?	Fugitive Offender	Valid Proof
Has the legality of the requested proceedings in the other country judicial significance for your own criminal proceedings?	No	Yes
Shall you indicate and, if necessary, prove the fairness of your criminal proceedings, for which you request the judicial assistance?	Yes	No
If the accused (or convicted) person is a citizen of the other country, is it likely to be an impediment to obtain the judicial assistance?	Yes	No
Is the dual criminality of the offence in respect of which you request the assistance, such an obstacle too?	Yes	No

### ***III. Other closely related methods to obtain legal assistance (aid) from another country***

International legal assistance in criminal matters is very rich in its methods. Along with extradition and letters rogatory, there are also several other methods that are worth mentioning.

1. **Transfer of detained witnesses** – again it is requested through a letter rogatory and executed for evidentiary purposes but in this case the requesting country does not directly obtain the oral evidence it needs; instead, it obtains the person him/herself, detained in the requested country (as a suspect, accused or convict), for a direct interview.

Pursuant to Article 11 ECMACM “a person in custody whose personal appearance as a witness or for purposes of confrontation is applied for by the requesting Party shall be temporarily transferred to the territory where the hearing is intended to take place, provided that he shall be sent back within the period stipulated by the requested Party ... Transfer may be refused: (a) if the person in custody does not consent, (b) if his presence is necessary at criminal proceedings pending in the territory of the requested Party, (c) if transfer is liable to prolong his detention, or (d) if there are other overriding grounds for not transferring him to the territory of the requesting Party”.

2. **Service of writs of summons, procedural decisions or other judicial documents** – it is requested through a letter which generally does not need to enclose a description of the criminal offence in respect of which this assistance is sought.

This method of legal assistance is expressly provided for in Articles 7-10 ECMACM. It is noteworthy that a witness or expert, whatever his nationality, appearing on a summons before the judicial authorities of the requesting Party shall not be prosecuted or detained or subjected to any other restriction of his personal liberty in the territory of that Party in respect of acts or convictions anterior to his departure from the territory of the requested Party. A person, whatever his nationality, summoned before the judicial authorities of the requesting Party to answer for acts forming the subject of proceedings against him, shall not be prosecuted or detained or subjected to any other restriction of his personal liberty for acts or convictions anterior to his departure from the territory of the requested Party and not specified in the summons. The immunity provided for in this article shall cease when the witness or expert or prosecuted person, having had for a period of fifteen consecutive days from the date when his presence is no longer required by the judicial authorities an opportunity of leaving, has nevertheless remained in the territory, or having left it, has returned – Article 12 ECMACM.

3. **Institution of criminal proceedings against a national of the requested country** – This method is not foreseen in the ECE and necessitates the “ping-pong” trick [page 17] if it is not provided for in a bilateral treaty. Where provided, the request creates a legal obligation to the other country to investigate and prosecute the offender which is its national. The method is most relevant to requested countries where as a general rule investigations and prosecutions are conducted under the principle of opportunity only rather than legality as it makes this particular investigation and prosecution mandatory. The requesting country should be careful in its expectations and clarify in advance whether, in particular, the judicial authorities in the potential requested country can indict and punish solely on the basis of evidence obtained through: confession(s), anonymous witness(-es), special investigative action(s). If this is the case and the authorities of BiH have and may

send only such evidence, then even if its validity is preserved (transfer of proceedings), the BiH authorities should discuss the matter with the other country's authorities (and their abilities to successfully take over and continue the investigative work) prior to doing anything.

4. **Spontaneous Information (Request for Confiscation) of Proceeds from Crime –** It triggers one of the three actions in the fight against organized crime, namely: (i) to disband the criminal associations, (ii) to send their leaders, at least, to prison, and (iii) to deprive the associations of their financial power/money. Under Article 25.1 of the European Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime ..., 2008, [ratified by BiH on 01/05/2008], the other Party where the assets are found disposes of them accordance with its domestic law and administrative procedures. The general idea is to harm the criminal rather than get a specific financial benefit. In many cases though the other country can't prove money laundering or any other offence to which its Criminal Code is applicable, and also has no domestic legal provision to authorize the confiscation of the proceeds. However, if it is not the case and the requested country has also a treaty with BiH of their sharing or, at least, a domestic provision that foresees such a sharing with the reporting country or organization, BiH will receive its share. In this case the information of BiH turns into a request for confiscation.

*Banja Luka, April 2009*