УДК 343.144.5

СТАТУС БЕЖЕНЦА – ПРЕПЯТСТВИЕ К ЭКСТРАДИЦИИ? СРАВНИТЕЛЬНЫЙ АНАЛИЗ РОССИЙСКОГО И БЕЛОРУССКОГО ПРАВА

***Т. КРЮСМАНН*[1)], *А. А. СОЛТАНОВИЧ*[2)]**

[1)]*Грацский университет им. Карла и Франца, Университетштрассе, 15/C3, 8010, г. Грац, Австрия*
[2)]*Белорусский государственный университет, пр. Независимости, 4, 220030, г. Минск, Беларусь*

Ни Республика Беларусь, ни Российская Федерация не ощутили серьезно существующие на сегодня потоки беженцев, покидающих страны Ближнего, Среднего Востока и Северной Африки. Тем не менее с недавнего времени система защиты беженцев этих двух государств начала использоваться беглецами из других стран ЕАЭС, преимущественно Казахстана, которые ходатайствуют о получении статуса беженца с целью избежать экстрадиции в страны их гражданства. Данная статья исследует, насколько легко статус беженца может быть получен в России и Беларуси и какую защиту такой статус предполагает в сравнительной перспективе. Высказывается предположение, что в России (которая является наиболее предпочтительным пунктом назначения) статус беженца сам по себе не является препятствием к экстрадиции, однако запрет на выдворение должен основываться на соблюдении первичных прав человека. Белорусское право же, напротив, отличается большей гибкостью. На сегодня существует необходимость в модернизации сотрудничества в области уголовного правосудия с целью предотвращения развития подобных «зон безопасности» в рамках ЕАЭС.

Ключевые слова: статус беженца; экстрадиция; Кишиневская конвенция; Минская конвенция; запрет на выдворение.

REFUGEE STATUS AS A BAR TO EXTRADITION? A COMPARATIVE PERSPECTIVE ON RUSSIAN AND BELARUSIAN LAW

***T. KRUESSMANN*[a], *A. A. SOLTANOWICH*[b]**

[a]*University of Graz, 15/C3 Universitätsstraße, Graz 8010, Austria*
[b]*Belarusian State University, 4 Niezaliežnasci Avenue, Minsk 220030, Belarus*
Corresponding author: A. A. Soltanowich (anyasoltanovich@gmail.com)

Neither Russia nor Belarus have been significantly touched by the current wave of refugee flows stemming from the Near and Middle East as well as from Northern Africa. Recently though, their systems of refugee protection have been used by fugitives from other Eurasian Economic Union countries, primarily from Kazakhstan, to claim refugee status in order to escape extradition requests from their home countries. This article looks into the question how easily refugee status can be obtained in Russia and Belarus and what protections it offers in a comparative perspective. It argues that for Russia (which is the preferred destination), refugee status does not provide a per se bar to extradition, but that a human rights-based non refoulement needs to be observed. Belarusian law, by comparison, is much more amenable. In order to prevent the emergence of safe havens within the Eurasian Economic Union, criminal justice cooperation needs to be modernized.

Keywords: refugee status; extradition; Chisinau Convention; Minsk Convention; non-refoulement.

Образец цитирования:
Крюсманн Т, Солтанович АА. Статус беженца – препятствие к экстрадиции? Сравнительный анализ российского и белорусского права. *Журнал Белорусского государственного университета. Право.* 2019;2:38–45 (на англ.)

For citation:
Kruessmann T, Soltanowich AA. Refugee status as a bar to extradition? A comparative perspective on Russian and Belarusian law. *Journal of the Belarusian State University. Law.* 2019;2:38–45.

Авторы:
Томас Крюсманн – доктор юридических наук, профессор; старший научный сотрудник, координатор проекта «Модернизация магистерских программ для будущих судей, прокуроров, следователей с учетом европейских стандартов в области прав человека» (CRIMHUM) Института уголовного права, уголовного процесса и криминалистики.
Анна Андреевна Солтанович – студентка юридического факультета.

Authors:
Thomas Kruessmann, doctor of science (law), full professor; senior researcher, coordinator of «Modernization of master programmes for future judges, prosecutors, investigators with respect to European standard of human rights» (CRIMHUM), Institute of criminal law, criminal process and criminology.
https://orcid.org/0000-0003-3973-6173
Anna A. Soltanowich, student of the faculty of law.
anyasoltanovich@gmail.com
https://orcid.org/0000-0002-1575-8266

Introduction

The Eurasian Economic Union (EEU) has not been designed with a criminal justice dimension in mind. Unlike the EU in which a criminal justice agenda emerged from the logic of market integration, the EEU's founding fathers tried to prevent integrationist dynamics that do not have their source in the will of the supreme rulers of the land. As a result, the legal foundations for criminal justice cooperation still rest on the comparatively old, if not outdated conventions concluded in the framework of the Commonwealth of Independent States (CIS) [1, p. 10].

This halfway stand between integration and preservation of national criminal justice systems has led to certain practices which are clearly noted by defence attorneys, but still hardly ever discussed in academic criminal justice circles. One example is seeking refugee status in the Russian Federation to escape what is described as political persecution in other EEU member states. Over the years there has been a considerable number of persons, in most cases from Kazakhstan, with a history in business and politics who at some point in their career had been charged with economic crimes. Every single case is difficult to assess because the alleged culprits, as soon as they set foot into Russia, engage in reputational laundering, depicting themselves as benefactors and philanthropists, critical political thinkers and honest brokers for change. While normally having access to significant financial resources, they immediately hire lawyers and consultants to fend off the supposedly vengeful persecution emanating from their home country.

For a comparative analysis of Russian and Belarusian law this raises a number of questions. Apart from the lifestyle choices of those seeking refugee status, is there a specific weakness in Russian law (as compared to Belarusian law), perhaps even a loophole, that makes it desirable to seek refugee status in Russia? And is the General Prosecutor of the Russian Federation, when handling such cases, correct in refusing to extradite persons when they have obtained refugee status? In the recent *case of Zhomart Yertayev*[1] it came as no surprise that the General Prosecutor's Office first declined to extradite the banker to Kazakhstan, but subsequently the Moscow City Court granted the request. Admittedly, in such highly politicized cases it is never quite clear which amount of weight legal considerations carry in comparison to extra-legal influences. But starting to shed light on the legal situation will surely help to create a better understanding of the state of integration projects. Fundamentally, one may wonder why a refugee should not be extradited to his or her country of origin, if the extradition request is not related to the reason why he or she sought refuge in the first place. In the Convention Relating to the Status of Refugees (Geneva Convention)[2], this question has been approached from a different angle, moving the issue to an earlier stage: why should a person not be eligible to obtain refugee status when he or she has come into conflict with the law in the country of origin, especially when he or she had served a criminal sentence or had otherwise been cleared of criminal responsibility? The so-called exclusion clause in art. 1 F of the Geneva Conventionstates the following:

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

(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

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

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

The wording of the exclusion clause clearly shows the concern of the drafters for preserving refugee status to those who had minor conflicts with the law while elevating «serious non-political crime» onto a level with international crime, making sure that refugee status cannot be abused by «fugitives of justice» [2, p. 76, 289; 3, p. 103]. Between those extremes, there is a significant grey area. This same approach is expressed in Russian and Belarusian national law: refugee status is not available to persons who have committed serious crimes of a non-political character before seeking refugee status[3]. Clearly, this is a rule for refugee status determination (RSD), to be decided in the light of information available at the time when a request for refugee status is lodged. Obviously, an applicant for refugee status has good reasons to hide earlier criminal activity. But chances are that the past will become known and that earlier or later the country of origin will issue an extradition request. The problem then is to decide whether there is really a non-political offense that lies at the heart of the extradition request

[1] See, for instance Zhomart Yertaev has not appealed extradition decision yet-Lukin [Electronic resource]. URL: https://www.kazpravda.kz/en/news/society/zhomart-yertaev-has-not-appealed-extradition-decision-yet---lukin (date of access: 22.04.2019); Zhomart Yertaev will be extradited to Kazakhstan [Electronic resource]. URL: https://www.kazpravda.kz/en/news/society/zhomart-ertaev-will-be-extradited-to-kazakhstan (date of access: 22.04.2019).

[2] Convention Relating to the Status of Refugees / United nations, Treaty Series. 1951. Vol. 89. P. 137.

[3] On Refugees : Law of Russian Federation of 19 February 1993 No. 4528-1. Art. 2 (1) lit. (2) // Vedomosti S'ezda narodnykh deputatov Rosiiskoi Federatsii. 25 March 1993. No. 12. P. 425; On Granting Foreign Citizens and Persons Without Citizenship the Status of Refugee. Additional Protection, Asylum and Temporal Protection in the Republic of Belarus : Law of the Republic of Belarus of 23 June 2008 No. 354-3. Art. 3 (3) // Natl. Register of Legal Acts of the Repub. of Belarus. Minsk, 2008. No. 158, 2/1451.

or whether seeking extradition is just a pretext when in reality extradition is used as a tool of persecution.

In the following sections, we shall first take stock of the legal background of refugee protection in Belarus and Russia in the light of the 1951 Refugee Convention and how these systems of protections are interrelated with international extradition obligations based on the Minsk Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters (hereinafter – Minsk Convention) of 22 January 1993 and similar provisions of the Chisinau Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters (hereinafter – Chisinau Convention) of 7 October 2002[4]. Secondly, we shall analyse the procedure for being recognized as a refugee in Belarus and Russia. And finally, we shall answer the question whether refugee status amounts to a *per se* protection against extradition.

Taking stock of the legal background

Extradition in the Criminal Procedure Codes of Russia and Belarus. Unlike other countries of the continental European legal family, both the Russian Federation (RF) and the Republic of Belarus (RB) do not have separate laws on mutual legal assistance and extradition, but regulate the subject-matter as part of their Codes on Criminal Procedure (CCP)[5].

Article 484 (1) (2) CCP RB provides:

«1. Request of a foreign state's body, containing provisions on extradition of a person to a foreign state for the purpose of criminal prosecution and (or) serving a sentence, shall not be executed, if…

2) a person, who is the subject of such request, is granted *refugee status*, subsidiary protection, *asylum* (hereinafter italics – *A. S.*), or interim protection in the Republic of Belarus, and they may not be expelled from the territory of the Republic of Belarus in accordance with legislative acts of the Republic of Belarus…»

Belarusian law thus explicitly acknowledges refugee status alongside asylum as a bar to extradition. By comparison, a similar rule in art. 464 (1) (2) of the CCP RF is more narrowly defined:

«1. Extradition is not allowed, if…

2) a person, who is the subject of a foreign state's request for extradition, is granted *asylum* in the Russian Federation due to the possibility of their persecution in that state on the basis of race, religion, citizenship, nationality, affiliation with a certain social group or political opinion…»

Russian extradition law thus refers to asylum status as a bar to extradition, but not to refugee status. Interestingly, however, art. 10 (1) of the Russian Federal Law of 19 February 1993 No. 4528-1 «On Refugees» (hereinafter Federal Law «On Refugees») provides for the following:

«1. A person, applying for refugee status or granted refugee status; or lost refugee status or revoked refugee status, *cannot be returned against their will to the territory of their state of nationality* (their previous habitual place of residence) on retention in that state of circumstances set forth in subparagraph 1 paragraph 1 article 1 of the present Federal Law».

The scope of this provision is rather wide: not only does refugee status protect against «being returned» (whether in the course of extradition, expulsion or whatever else remains to be determined), it is even when this status is lost that the protection continues. It is for of the Federal Law «On Refugees» is to be read into the wording of art. 464 of the CCP RF. Such rather flexible approach would be at odds though with the principle of codification which is rather rigorously enforced in Russian legal doctrine and which requires that all provisions which have a criminal procedure identity need to be consolidated into the CCP[6].

Extradition obligations under international law. Taking stock of national law would not be complete without considering international law which, as a matter of principle, takes precedence over domestic law[7]. As a starting point, it is important to observe that a state is free to decide on the conditions under which it will extradite or not, if it has not entered into an obligation to extradite. In this respect, the provisions in the CCPs of Belarus and Russia represent a default setting when there is no obligation to extradite. So, in the absence of an international treaty or convention it is perfectly legitimate for Belarus to use refugee status in addition to asylum as a bar to extradition. In the case of Russia, it would have been similarly straightforward it the lawmaker had included refugee status into the CCP along with asylum. The troubling issue here is, as mentioned, whether additional grounds for refusing extradition can be found outside the CCP, i. e. in the Federal Law «On Refugees».

Unlike Belarus which is outside the framework of the Council of Europe, Russia has ratified the Europe-

[4]Chisinau Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters // Bulletin of International Treaties. 1995. No. 2. p. 3–28.

[5]Code on Criminal Procedure of the Russian Federation of 18 December 2001 : adopt. by the State Duma 22 November 2001 : by the Federal Law No. 174; Code on Criminal Procedure of the Republic of Belarus of 16 July 1999 : adopt. by the House of Representatives 24 June 1999 : S. Council of Repub. of Belarus No. 295-3.

[6]CCP RF. Art. 1 (1).

[7]As it is written in art. 15 (4) of the Constitution of the Russian Federation: «The universally-recognised norms of international law and international treaties and agreements of the Russian Federation shall be a component part of its legal system. If an international treaty or agreement of the Russian Federation prescribes other rules than those envisaged by law, the rules of the international agreement shall be applied».

an Convention on Extradition in 1999; it entered into force on 9 March 2000. For extradition requests emanating from other Council of Europe member states, e. g. Armenia, the European Convention on Extradition is applicable, although in this case it could be argued that this extradition relationship is entirely within the EEU [4, p. 472]. For requests emanating from the EEU member states Kazakhstan or Kyrgyzstan, on the other hand, the legal basis can only be found in the Minsk Convention. Here, it is art. 56 (1) which obliges the signatories to afford each other extradition in a manner that is unconditional and only subject to the restrictions contained in the Minsk Convention itself. Exceptions are listed in art. 57, but surprisingly this list does neither include asylum nor refugee status as a bar to extradition.

The most straightforward conclusion would thus be that prosecutors and courts, in striking down extradition requests against persons having obtained asylum or refugee status, are not paying sufficient attention to the unconditional obligation to extradite under the Minsk Convention. However, Russian courts have repeatedly argued that they are required to strike down extradition requests because the catalogue of bars to extradition in the Minsk Convention is not a final and exclusive one. With regard to refugee status, they claim that additional bars to extradition can be found in the 1951 Geneva Convention on Refugees to which both the Russian Federation (in 1993) and the Republic of Belarus (in 2001) acceded. In particular, courts are referring to art. 32 (1) of this convention, dedicated to «expulsion»: «The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order».

Arguably, this provision is also reflected in art. 10 of the Federal Law «On Refugees». So, there is *prima facia* an argument to be made why seeking refugee status under Russian law is a rational strategy for any fugitive. In order to examine this strategy, let us now took first look at the determination of refugee status and how this matter is handled in Russia compared to Belarus. In a second step, we shall come back to the issue of whether refugee status can really protect a fugitive from extradition.

Refugee status determination under Russian and Belarusian law

Refugee Status Determination (RSD) under United Nations High Commissioner for Refugees (UNHCR) standards. RSD is a legal procedure under which the state determines whether a person seeking protection can be considered a refugee under international or national law and therefore, whether such person shall be granted a refugee status. As a matter of procedural law, RSD is generally regulated by national legislation, since the 1951 Geneva Convention on Refugees does not indicate what types of procedure have to be adopted by its contracting states. To further assist the states when establishing their own RSD procedures, the Executive Committee of the High Commissioner's Programme in 1977 recommended several basic requirements to be followed by each state: acting in accordance with the *non-refoulement* principle; establishing a clearly identified authority to make decisions on refugee status in the first instance; providing necessary guidance and facilities to the applicants; right to appeal the decision on the applicant's refugee status; etc.[8] Moreover, in 2003 UNHCR published its Procedural Standards for RSD under UNHCR's Mandate (hereinafter RSD Procedural Standards) which set out core standards and best practices to ensure harmonized, fair and efficient RSD procedures, including procedures for reception and registration. The issues addressed in the RSD Procedural Standards include, *inter alia*:

- standards for reception of asylum seekers and refugees;
- registration of applicants for RSD;
- issuing documents to asylum seekers and refugees;
- scheduling of RSD interviews and appointments;
- RSD file management;
- conducting and documenting interviews in RSD procedures;
- participation of third parties/legal representatives;
- preparing written RSD assessments;
- review of RSD decisions;
- appeal procedures;
- notification of decisions in RSD procedures;
- qualifications and training of staff who are involved in RSD;
- preserving confidentiality in RSD procedures;
- supervision and oversight in RSD procedures, etc.[9]

It can be seen from the abovementioned points that the international standards for RSD procedure in theory address all possible aspects of RSD, starting from the registration of applicants and ending with the trainings of RSD staff [5, p.1793; 6, p. 81; 7, p. 120]. On the one hand, such standards are deemed necessary to protect the rights of refugee status seekers and offer them fair and equal treatment. On the other hand, they are designed with a view to objectifying decisions, excluding undue influence and abuse. However, current Russian and Belarusian law is quite far from conformity with these standards, especially

[8]Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees. HCR/IP/4/Eng/REV.1. Geneva, 1992.

[9]Procedural Standards for Refugee Status Determination Under UNHCR's Mandate. 20 November 2003. URL: https://www.refworld.org/docid/42d66dd84.html (date of access: 22.04.2019).

with regard to complexity of RSD procedure and depth of fact-checking.

RSD in Russia. In Russia, RSD is regulated by the previously mentioned Federal Law «On Refugees». According to it, decisions on refugee status are made by the Ministry of Internal Affairs of the Russian Federation after examining the applications submitted to it. The law establishes five days as the preliminary term for application review and three months for the review of the application on its merits. In some cases, this term may be prolonged by 3 additional months. All applicants must go through obligatory medical examination and fingerprinting.

It appears that the Federal Law «On Refugees» lacks a detailed regulation on the process of determining whether a person has sufficient grounds for obtaining the refugee status (i. e. whether they really need it) and whether the facts and evidence presented by the applicant are true. Under international standards, the primary method of determining those facts (apart from written documentary evidence) is an interview. As an example, the 1992 Handbook on Procedures and Criteria for Determining Refugee Status in para. 196–199 highlights that the process of fact-checking may take several stages and that it is necessary for the examiner to apply different methods of verification and evaluation of the applicant's personal stories. While an initial interview should normally suffice to bring an applicant's story to light, it may be necessary for the examiner to clarify any apparent inconsistencies and to resolve any contradictions in a further interview, and to find an explanation for any misrepresentation or concealment of material facts.

Unfortunately, the Federal Law «On Refugees» does not include a detailed procedure for this significant part of RSD. The only mentioning of an interview can be found in art. 3 (3) (1) of the Federal Law «On Refugees», which states: «The decision on [refugee status] is made based on the results of applicant's questionnaire, examination list filled in on the basis of individual interviews, as well as based on the results of verification of information about the applicants and their family members, verification of the circumstances of their arrival at the territory of Russian Federation and the grounds for their presence at the territory of the Russian Federation, after thorough examination of facts and reasoning set forth in the application. For the purpose of clarifying the facts told by the applicant, it is permitted to conduct additional interviews».

Some more clarity concerning interviews with the applicants may be gleaned from the Administrative regulation of the Ministry of Interior Affairs of the Russian Federation «On the Provision of Public Service for Examination of Applications for Recognition of Refugee Status on the Territory of the Russian Federation», enacted by Order of the Ministry of Interior Affairs of the Russian Federation No. 838 of 7 November 2017[10]. Clause 70 of this Administrative regulation establishes the obligation to conduct individual interviews to ask the applicant additional questions when clarifications are needed, and to put the applicant's answers on paper in an additional questionnaire.

Clearly, this set of legal norms does not reflect the international «good practice» in full. There is still a great amount of issues to be regulated, such as: who is authorized to conduct the interviews and what are the requirements for them to be eligible for this procedure; by what principles and methods will the facts and evidence be assessed; is there some form of supervision over the course of the interview (e.g. a four-eyes principle); can third parties (e.g. legal representatives and others) be present at the interview; what kind of questions may be asked to the applicant and in what order; is the decision subject to independent review, and many others.

RSD in Belarus. The regulations in Belarus are quite similar to the Russian ones, but the situation with interviews seems to be even less specified. Under art. 41 of the Law of the Republic of Belarus of 23 June 2008 No. 354-3 «On Granting Foreign Citizens and Persons Without Citizenship the Status of Refugee, Additional Protection, Asylum and Temporal Protection in the Republic of Belarus», interviews shall be conducted for the purpose of *registering* the applications. Further interviews are not obligatory if the decision-making authority considers them not necessary. What is more, under para. 2 of the same article, the registering authority may register the applications without any interviews at all, if it comes to the conclusion that the decision on refugee status may be made based on the written documents only. As a result, there is a very high possibility that in Belarus the decision on granting refugee status can be made without resort to personal interviews. That goes against the international standard which stress that «under no circumstances should the refugee claim be determined in the first instance on the basis of the paper review alone»[11].

Conclusion. Both Russian and Belarusian laws do not regulate the RSD process thoroughly enough, especially the interview part. It can be suggested that the decision on granting refugee status is made upon the discretion of the decision-making authority while there are no internal guidelines or standards limiting this discretion. As a result, the lack of detailed regulation and external control makes the whole process intransparent and prone to corruption. This legal situation leaves regular refugees without due protection while creating open doors for well-to-do fugitives who can support their case with the necessary amounts of cash.

[10]On establishment of administrative regulation of the Ministry of Interior Affairs of the Russian Federation «On the Provision of Public Service for Examination of Applications for Recognition of Refugee Status on the Territory of the Russian Federation» : Order of the Ministry of Interior Affairs of the Russian Federation of 7 November 2017 No. 838.

[11]Procedural Standards for Refugee Status Determination Under UNHCR's Mandate. Art. 4.3.1.

Effects of refugee status under Russian law in comparison to Belarusian law

If it is indeed easy to obtain refugee status in Russia and Belarus, will this legal status offer reliable protection against extradition? We are now faced with a dual question:

1. In extradition relationships governed by the Minsk Convention (as well as the Chisinau Convention, is it possible to circumvent the Convention's silence on refugee status by attracting the Geneva Convention on Refugees' art. 32 on non-expulsion?

2. Assuming this is not the case, may national authorities in Russia and Belarus ignore the Minsk Convention's position on the effects of refugee status when applying national law?

Extradition based on the Minsk Convention. Unlike constitutional law doctrine, the Vienna Convention on the Law of Treaties does not recognize a general *lex posterior* rule[12]. This means that in a given subject matter there is no general rule that the pronouncements of a younger agreement take precedence over an older agreement. On the contrary, agreements often regulate this issue between themselves by either claiming precedence or leaving older agreements intact. Thus, in the area of extradition law there is no way of arguing that the Minsk Convention would automatically take precedence over the Geneva Convention. The Minsk Convention itself declares that it does not collide with clauses of other international agreements, whose participants are the Contracting Parties[13].

Arguably, the CIS member states when negotiating the Minsk Convention must have been aware of the Geneva Convention's existence. Had they seen it as relevant for the subject matter of extradition, they would have surely added an exception to allow for non-extradition in case of refugee status. The fact that the Minsk Convention does not speak of refugee status as a bar to extradition is indeed so glaring that it cannot be an accidental omission by the «fathers» of this Convention. If, on the other hand, we have to accept that Minsk Convention and Refugee Convention need to be interpreted as a coherent whole, it should be possible to argue that the Refugee Convention's concern with expulsion cases is much narrower and does not affect the obligation to extradite a person suspected of criminal wrongdoing in his or her home country.

In the plain meaning of words, extradition and expulsion are not the same. Extradition is an act of international cooperation by which a person is handed over from the custody of state A to the custody of state B. Expulsion, by contrast, is a unilateral action: removing a person from the territory of state A to any other state's territory. Expulsion can either be by force or it can be an order to relocate to the territory of another state within a certain time frame, possibly followed by forceful removal, if the person does not comply. In any case, the essence of the process is not determined by the fact whether the addressee is a refugee or not, but by the modalities of inter-state cooperation or the lack thereof.

Looking at the historic context in which the term «expulsion» was used, the treaties of the 1930s, foremostly the Convention relating to the International Status of Refugees of 28 October 1933, had used the term «expulsion» to refer to either administrative orders requiring the addressee to leave the country or to the situation of factual removal by the exercise of police powers. The latter was also discussed as «deportation». Art. 3 of the abovementioned convention proclaimed: «Each of the Contracting Parties undertakes not to remove or keep from its territory by application of police measures, such as expulsion or non-admittance at the frontier (refoulement), refugees who have been authorized to reside there regularly, unless the said measures are dictated by reasons of national security of public order» [8, p. 730].

According to the *travaux préparatoires,* during the drafting of art. 32 the two notions of forceful removal and relocation order were a matter of constant debate [9, art. 32; 10, p. 305]. But throughout the discussions on the various drafts there was an understanding that the gist of the Convention to be negotiated was to restrict a state's power to unilaterally remove an unwanted refugee from its territory [9, art. 32 (6)]. The nearest that drafters came to discussing extradition was the «red line» that every state should remain entitled to remove a person (refugee or not) if he or she had earlier committed a serious non-political crime in the country of origin. This notion refers to the idea of extradition, but in the discussions on art. 32 it was not deemed relevant whether the country of origin had actually requested this person's extradition or not.

So, there is a compelling case to consider extradition and expulsion as two separate and distinct areas of law. From this understanding it follows that state parties to the Minsk Convention must accept to respect the limited grounds for non-extradition given in the Convention, not accepting refugee status as a *per se* bar to extradition. If one disagrees with this proposition, there is still the need to explain why the «public order» exemption in art. 32 would not be applicable in that case. It seems quite straightforward to argue that even if contrary to the Minsk Convention a person holding refugee status should not be expelled it might still be necessary in the interest of public order to remove this person from one's territory. It is hard to imagine that states like to become safe havens for criminals, and there will be cogent public policy considerations

[12] The closest is art. 30 on successive treaties relating to the same subject matter.

[13] Minsk Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters. Art. 82. The same rule can be found in Chisinau Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters in art. 118 (3).

arguing in favour of expelling a person if that person is charged with committing (serious) crimes abroad. The alternative in this scenario can only be *aut dedere aut iudicare*, imposing an obligation on the host state to prosecute the refugee for the crimes allegedly committed abroad [11, p. 19].

This rather strict position is mitigated by a different development that needs to be included into our perspective: the increasing influence of human rights law [12, p. 395]. The Geneva Convention came into force at the time when human rights jurisprudence only started to develop. Nowadays, there is a universally accepted rule of *non-refoulement* developed in a variety of regional human rights contexts, most prominently by the European Court of Human Rights. Russia, as a signatory of the European Convention of Human Rights, is obliged to protect all persons in the territories under its effective control not only from torture, inhuman and degrading treatment and to offer fair trial guarantees, but also to ensure that when it forcibly delivers persons to other countries (irrespective of the mode of doing so, e. g. expulsion, extradition) to ensure that those persons will not be subject to torture, inhuman and degrading treatment or will be deprived of a fair trial. Going back to the *Soering* decision[14], this need to prospectively protect human rights requires an analysis whether in the country to which a person is to be delivered there is a systemic and structural violation of fundamental human rights which makes the prohibition of *non-refoulement* an absolute one, or whether in the absence of systemic / structural violations, there are substantial grounds to believe that there is a real risk that he or she will become the target of abusive practices[15].

To sum up, where signatories of the Minsk Convention are under an unconditional obligation to extradite, they must not refer to the Geneva Convention to accord this person protection against extradition based on his or her refugee status alone. But for countries who are simultaneously signatories of the European Convention of Human Rights (such as Russia and Armenia), there is an obligation to observe the rule of *non-refoulement*, making a prognosis on the risks of human rights violations when the person is being delivered to his or her country of origin.

Effects of the Minsk Convention when applying national law. If we agree that there is no *per se* protection accorded by refugee status under the Minsk Convention, may states such as Russia and Belarus apply their national legislation nevertheless? As mentioned earlier, Belarusian legislation *does* recognize refugee status along with asylum as a bar to extradition. The matter is thus for constitutional law to decide: unlike the Constitution of the Russian Federation, the Constitution of the Republic of Belarus does not, apart from universally acknowledged principles of international law, contain a clear supremacy of international treaties over domestic law[16]. Therefore, it appears that Belarusian authorities may continue to treat refugee status as a bar to extradition even if contrary to the Minsk Convention.

In Russia, the Minsk Convention and the extradition provisions in the CCP provide no contradiction between themselves: national criminal procedure law is to be applied based on its direct wording which unlike «asylum» does not refer to «refugee status» as an obstacle to extradition. Whether on the level of national law art. 10 (1) of the Federal Law «On Refugees» can be used to override the CCP provision seems doubtful. It is true that the wording of art. 10 (1) «can not be returned» is sufficiently broad to eschew the plain word argument that there is a difference between expelling and extraditing a person. This matter will most likely be resolved based on national doctrine, either referring to *lex posterior* of the CCP or the requirement to codify all criminal procedure law in the CCP.

Conclusion

While it was not the authors' intention to provide a blueprint for defensive strategies against government persecution, it appears that in the current legal situation obtaining refugee status in Russia is not (no longer) a viable option. Neither the Minsk Convention nor the CCP RF recognize refugee status as a bar to extradition. So, despite an earlier practice, it is hoped that courts will increasingly disregard refugee status while simultaneously honoring the human rights-based *non refoulement* principle. The legal system of Belarus, by comparison, is much more closed. It recognizes refugee status as a bar to extradition in its CCP and at the same time it is not bothered by fact that it violates the Minsk Convention when protecting refugees against extradition. So, from a market perspective, Belarus presents more attractive offer in terms of obtaining refugee status and giving protection against extradition requests emanating from other EEU countries.

For the Union State of Russia and Belarus, not to mention the EEU, this situation is highly contradictory, if not absurd. The Minsk Convention as one of the foundations of Eurasian integration is currently unable to offer the kind of coherent framework to enable international cooperation in criminal matters. Every administrative decision that recognizes government persecution by a fellow EEU country is an unfriendly gesture

[14]Soering vs. The United Kingdom : European Court of Human Rights judgement of 7 July 1989. Appl. No. 14038/88.

[15]See the case of Yefimova vs. Russia which is part of the Ablyazov saga, dealing with the extradition of a BTA bank manager to Kazakhstan : European Court of Human Rights final judgement of 19 February 2013. Appl. No. 39786/09.

[16]Constitution of the Republic of Belarus. Art. 8 (1).

vis-à-vis a close partner. In addition, by protecting those who have amassed vast fortunes and are still key players in the respective countries' economies, the practice of thwarting criminal justice undermines the trust between the EEU partners and creates unnecessary frictions for economic integration projects. Criminal justice cooperation should be modernized to prevent the emergence of «safe havens» for well-to-do offenders.

References

1. Majoros F. Die Rechtshilfeabkommen der osteuropäischen RGW-Staaten. Teil II. Die Abkommen in Strafsachen. Cologne. *Bericht des BIOst*. 1983;34.
2. Grahl-Madsen A. *The Status of Refugees in International Law. Volume 1. Refugee Character*. Leyden: A. W. Sijthoff; 1966. 499 p.
3. Goodwin-Gill GS. *The Refugee in International Law*. Oxford: Clarendon Press; 1996. 848 p.
4. Krüßmann T. *Transnationales Strafprozessrecht*. Baden-Baden: Nomos; 2009. 775 S.
5. Smrkolj M. International Institutions and Individualized Decision-Making: an Example of UNHCR's Refugee Status Determination. *German Law Journal*. 2008;9:11(9):1779–1804.
6. Cantor DJ. Reframing Relationships: Revisiting the Procedural Standards for Refugee Status Determination in Light of Recent Human Rights Treaty Body Jurisprudence. *Refugee Survey Quarterly*. 2015;34(1):79–106. DOI: 10.1093/rsq/hdu017.
7. Storey H. Consistency in Refugee Decision-making: a Judicial Perspective. *Refugee Survey Quarterly*. 2013;32(4): 112–125. DOI: 10.1093/rsq/hdto18.
8. Jaeger G. On the History of the International Protection of Refugees. *International Review of the Red Cross*. 2001;83(843):727–738.
9. Zimmermann A, editor. *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: a Commentary*. Oxford: Oxford University Press; 2011. 1936 p.
10. Weis P. *The Refugee Convention, 1951*. Cambridge: Cambridge University Press; 1995. 272 p.
11. Burgstaller M, Manfred NM. *Aut dedere aut iudicare. Fragen der internationalen Zusammenarbeit in Auslieferungsverfahren*. Vienna: Neuer Wissenschaftlicher Verlag; 2010. 102 p.
12. Clark T, Crépeau F. Mainstreaming Refugee Rights. The 1951 Refugee Convention and International Human Rights Law. *Netherlands Quarterly of Human Rights*. 1999;17(4):389–410.

Received by editorial board 13.05.2019.