

# THE LEGAL STATUS OF CONSULAR AND DIPLOMATIC SERVICES IN THE PROVISION OF INTERNATIONAL LEGAL ASSISTANCE AND EXTRADITION

**Botagoz N Kalmukhametova, Academy of Law Enforcement Agencies under  
the Prosecutor General's Office of the Republic of Kazakhstan**

**Yerbol A Omarov, Academy of Law Enforcement Agencies under the  
Prosecutor General's Office of the Republic of Kazakhstan**

**Sabigul Bekisheva, Academy of Law Enforcement Agencies under the  
Prosecutor General's Office of the Republic of Kazakhstan**

**Dariga B Kainazarova, Academy of Law Enforcement Agencies under the  
Prosecutor General's Office of the Republic of Kazakhstan**

## ABSTRACT

*Consular services are necessary to resolve criminal cases that occurred within another state. Consul's aim is to protect the legal and economic interests of their state and its citizens. Therefore, the set problems require detailed study and are relevant for research. The main purpose of the work is to review the regulatory framework for the implementation of consular and diplomatic services procedural and other actions in the order of providing legal assistance in criminal matters. To achieve this goal, the authors used the method of analysing the current legislation, which allowed scientists to do a much detailed research. The authors also found that the provision of legal assistance by consular services has some disadvantages, but at the same time it is an effective and convenient way of obtaining evidence on the territory of a foreign state. During the analysis it was revealed that consuls can perform procedural and other actions not only in the premises of the consular service, but also in the place of residence (work) of their citizens, as long as they stay in the consular district or outside it, but in the agreement with host country.*

**Keywords:** International Cooperation, Rendering First Aid in Criminal Cases, Diplomatic Services, Consular Agreement, Contractual Obligations.

## INTRODUCTION

Consuls' traditional function in the issues of international cooperation in criminal procedure is associated with sending and receiving materials of commission on rendering legal assistance in the case of absence of international agreement determining central competent authorities.

However, consul's participation in rendering legal assistance is limited not only with the specified actions. Provisions of Vienna Convention of Consular intercourse dated 24 April 1963 appears to be interesting, this convention is the main source of modern consular law. Thus, clause 'J' art. 5 states that the function pertaining to criminally-remedial one is laid onto the

consular services transfer of judicial and non-judicial documents or execution of court requests or requests on taking of evidence for courts of the represented state in accordance with effective international agreements or in other manner failing to contradict laws of the host state (The Decree of the Supreme...).

This provision of the international convention which was joined by the Republic of Kazakhstan invests consular services with the functions not only on sending the commissions but also on the execution of international commissions.

The specified mechanism is one of the effective ways for execution of the procedure and other actions on the territory of an international state with significant time and money saving. Its basic advantage is the absence of a complicated procedure for sending an agreement of commission in competent authorities of the foreign state which takes a long time (Safarov, 2007).

Besides that, this mechanism acquires special topicality in the need of questioning of the person on the issues concerning state secrets or information of strictly intimate nature or in other circumstances which are undesirable for disclosure to foreign competent authorities.

One more advantage of this mechanism is cases of obtaining of refusal from person's extradition of the competent authority of the foreign state.

The same function can be played by the consular services in the procedure for the implementation of the European arrest warrant (hereinafter referred to as the EEA) introduced by the European Union Framework Decision in 2002 and effective January 1, The European arrest warrant was conceived to solve a two-pronged task (Vojnikov, 2006). Firstly, it was required by Member States in order to speed up the procedure for extradition of persons suspected of committing a crime from one country to another. Secondly, with its help, they wanted to strengthen the cooperation of the EU countries in the criminal law field on the basis of the "cornerstone" of cooperation mutual recognition of the decisions of national courts.

## **MATERIALS AND METHODS**

The article is based on the study of the participation of consular and diplomatic services in the provision of international legal assistance in criminal matters. For a detailed study, the authors used various theoretical methods. With the help of analysis, both literature and normative documents, it was established that the consul is an official who resides in a foreign country and protects the interests of the represented state, the legal rights and interests of fellow citizens and legal entities. An embassy abroad usually establishes a consular department and specifically appoints a diplomat responsible for consular matter or who can perform consular duties concurrently. Logical methods that are used for all sciences allowed the use of dialectical laws, based on the unity of opposites; transition of quantity to quality; negation. As logical methods were used dialectical-materialistic axiological, as well as the method of idealism.

A look at the dialectical method as the only scientific method of cognition gave rise in the near past to a certain disdain for the particular techniques of specific sciences. Now it is becoming increasingly obvious that in the process of cognizing the state-legal phenomena a simple understanding of the basic provisions of dialectics is not enough. In addition to knowledge of general laws and categories of dialectics, it is also important to have a skilful possession of general and private methods.

It is established that consular workers represent the interests of many government departments; therefore many citizens are interested in their activity. Relations between the government and citizens of the sending state living abroad are carried out mainly through consular employees. In connection with the development of economic globalization and the expansion of international contacts, the scope of the duties of the consular service is continuously expanding.

## RESULTS AND DISCUSSION

The consular services' powers described may be used as the solution of the problem arising upon sending of the commission to the foreign state with which there is no agreement of rendering mutual legal assistance, but there is already a consular agreement.

At the same time, the specified way of execution of the procedure and other actions has a number of limitations and conditions.

- The limited scope of legal assistance only questioning and delivery of documents is allowed.
- Persons having procedure actions must be the citizens of the state represented.
- Procedure actions, including delivery of documents, are performed based upon voluntariness, application of means of enforcement or threatening with them is prohibited.
- Execution of the commission on the execution of the procedure and other actions by the consular services must not contradict legislation of the host (Litvishko, 2011).

Part 2 article 1 Criminal Procedure Code of the Republic of Kazakhstan defined that international contractual and other obligations of the Republic of Kazakhstan regulating the procedure for criminal proceedings are the component part of the criminal procedure law. On the condition that the Republic of Kazakhstan has joined Vienna Convention of Consular intercourse dated 24<sup>th</sup> April 1963, by the Decree of the Supreme Soviet of the Republic of Kazakhstan dated 31<sup>st</sup> March 1993 this provision of the international agreement of execution of procedure and other actions by the consular services in a manner of execution of commissions on rendering legal assistance is subject to application.

However this provision found its reflection only in article 17 of the Consular chart of the Republic of Kazakhstan stating that the consul is assigned with powers on execution of commission of the state authorities and officers fulfilling functions of criminal prosecution concerning its citizens in a manner stipulated by the legislation of the Republic of Kazakhstan and international agreements (Consular Charter...).

The essence of this norm states that the representatives of the consular services of the Republic of Kazakhstan in foreign states are assigned with separate functions of prosecution authorities execution of procedure and other actions concerning its citizens on the territory of the foreign state, including execution of separate investigatory actions (questioning, face-to-face interrogation, etc.), execution of actions of provisory nature (summons, delivery of documents, familiarization with procedure documents, etc.).

In other words, law enforcement of the Republic of Kazakhstan can assign execution of some procedure and other actions on the territory of the foreign state to Kazakhstani consular

services by means of the specified powers with no need to send the commissions to the competent authorities of the foreign state.

For example, article 43 of the Consular Convention made between the Republic of Kazakhstan and Turkish Republic on 2 September 1993 in Ankara stipulates that the consular officer is entitled and authorized to receive voluntary testimony from its citizens on the request of the competent authorities of the represented state as the party, witness and expert, as well as notify them of judicial and other documents. Upon execution of these actions application of enforcement measures or threatening with their application is prohibited (Law of the Republic of...).

There is a similar provision in art. 12 of the Agreement made between the Republic of Kazakhstan and the Republic of Uzbekistan of legal assistance and legal relationships on civil, family and criminal cases (Law of the Republic of Kazakhstan...). The difference is that procedure actions are allowed to be made not only by consular but also by diplomatic services.

However, the above agreement does not define the place of execution of the procedure and other actions by the consular with the participation of citizens which may cause a certain complication. "Consular district" stands in the above agreements for the district of the host state which is answerable to the consular institution for execution of the consular functions, i.e., consular district refers not only to the premises of the consular service, but also the territory of the foreign state. And consular officer's execution of its function beyond its consular district is allowed only with the primary consent of the host state.

With regard to the facts that powers on the questioning of its citizens and delivery of documents refer to the consular functions, the reasonable conclusion that the consuls may execute procedure and other actions not only in the premises of the consular service, but also where its citizens live or work is made, given that they enter the consular district or beyond its borders as agreed with the host state.

As for the normative basis of execution of the procedure and other actions on the territory of the foreign state, it should be mentioned that international agreements steered clear of the said moment and do not regulate the procedure for execution of the procedure and other actions. Due to this, the reasonable question arises, what state's criminal procedure legislation are they obliged to govern in their execution?

For example, criminal procedure codes of Russian Federation, Turkmenistan, Uzbekistan, Kazakhstan and other states stipulate the provision in accordance with which only norms of their internal legislation are subject to the application on their territory. In the Republic of Kazakhstan, the cases of application of international agreements and obligations are an exception. At the same time, in accordance with part 2 art. 1 of the Law of RK "Of diplomatic service of the Republic of Kazakhstan" it is established that the consular service of the Republic of Kazakhstan as the part of diplomatic service is performed in accordance with the Constitution of Kazakhstan, the specified law, other regulatory legal acts and international agreements (Law of the Republic of Kazakhstan dated...).

The similar norm concerning the application of the legislation of the Republic of Kazakhstan appears in part 3 article 1 of the Consular charter. Regardless of the fact that the consular legislation did not define directly the regulatory basis of execution of the procedure and other actions on the territory of the foreign state, the essence of art.1 of the Law of RK "Of diplomatic service of the Republic of Kazakhstan" and (p.3) art.1 of the Consular charter state that officers in their activities shall govern the legislation of RK stating the conclusion that upon

execution of the procedure and other actions on commission of competent authorities of Kazakhstan they must be governed by criminal procedure legislation of RK, rather than those of the host country.

It should be noted that consular services' procedure and other actions in a manner of rendering legal assistance have both advantages and some deficiencies. Particularly, the representative of the consular service failing to be an officer of the criminal prosecution authority, failing to have the corresponding legal education and special expertise and experience in criminal procedure activities will not be able to provide with the orderliness and accurate strategy of behavior of procedure actions in a full and proper manner, which may imply recognition of the evidence obtained as inadmissible.

Thus, in accordance with the international agreement the consul is assigned with powers on execution of commissions of the state authorities and officers fulfilling the functions of criminal prosecution and judicial authorities of the Republic of Kazakhstan concerning citizens of the Republic of Kazakhstan in a manner stipulated in the legislation of the Republic of Kazakhstan and international agreements.

Special befuddlement was caused by the fact that the powers of execution of the procedure and other actions in a manner of a rendering of legal assistance in criminal cases by the consular services concerning its citizens were not regulated by the norms of CPC RK. In order to implement criminal procedure powers of the consular services of the Republic of Kazakhstan, implementation of the norms of international law into the criminal procedure legislation is needed. Mashimbayeva correctly mentioned that effectiveness of activities of the consular services depends on the conformity of internal and international norms (Mashimbayeva, 2007).

Absence of legislative regulations of this field does not allow to establish the procedure for sending the commission: In a manner of direct address of the authority maintaining the criminal process to the consular service or by means of compliance with all the requirements of the procedure for sending commission on rendering legal assistance on criminal cases via the General Prosecutor's Office of the Republic of Kazakhstan.

With regard to the facts that the evidence source is on the territory of the foreign state, then the only way of its receipt is the institution of rendering legal assistance, as other effective norms (failed to be stipulated by the Division 12 CPC RK) of CPC RK do not admit direct receipt of evidence on the territory of the foreign state beyond this institution. Within this framework, commission on rendering legal assistance must be executed upon compliance with all the requirements stipulated with the division 12 CPC RK and sent to the General Prosecutor's Office (Akhmetzakirov, Omarov & Mussilimov, 2016). The General Prosecutor's Office must send the commission materials to the Ministry of Foreign Affairs of the Republic of Kazakhstan for further passing to the consular service of RK of the state where there is the evidence source. This provision is based upon the clause 16 of the Consular charter stating that interaction of the foreign states and organizations in the Republic of Kazakhstan with the consular services is performed via the Ministry.

Implementation of the legal norms formulated by the international law serves as one of the efficient mechanisms for improvement of criminal procedure legislation of the Republic of Kazakhstan concerning rendering legal assistance in criminal cases within international cooperation as a whole.

In this regard, we suppose that it is necessary to implement the above norms of international documents concerning execution of the procedure and other actions by the consular and diplomatic services within the execution of commissions of rendering legal assistance into the national legislation.

The authors found that there is a European arrest warrant, the main task of which was initially based on the possibility of automatically recognizing the decision to transfer a person, adopted by the judicial authorities of one state, throughout the European Union (McClellan, 2012; Neha, 2016). The goal set before the Union to become a space of freedom, security and justice entails the abolition of extradition between Member States and the establishment of a system for the transfer of persons between the judiciary. Further, the introduction of a new simplified system for the transfer of convicts or suspects for the execution of a sentence or for criminal prosecution provides an opportunity to eliminate such features inherent in the current extradition procedures as the complexity and danger of delays. The classical cooperative relations that prevailed up to the present time between Member States should be replaced with a system of free movement of judicial decisions in criminal matters (including both final decisions and pre-sentencing decisions) within the space of freedom, security and justice. The traditional extradition procedure allowed the states of the European Union not to extradite terrorists, motivating the refusal by the political motives of the crime, the introduction of the European warrant of arrest ended this practice, which gave tangible results (Katzenstein, 2014). So, in 2007, under the warrant issued by the British court, it was possible to detain Hussein Osman, who was suspected of organizing an explosion in London in 2005: With the help of the EAO, the procedure for the transfer of the accused by Italy to the UK was carried out in the shortest possible time. At the same time, the analysis of statistical data shows that the warrant is used much more widely practically throughout the list of serious crimes. Against terrorism, the warrant is used mainly in those countries where this threat is traditionally higher than in other member states.

## CONCLUSION

Execution of procedure and other actions in a manner of rendering legal assistance by means of the consular services is an efficient and convenient way for getting evidence on the territory of the foreign state and experience of its application must pass into the category of traditional one despite the existing indifferent deficiencies.

However, simple implementation of the norm concerning the powers of the consular authorities to execute the procedure and other actions is not sufficient for effective implementation of this mechanism, as it requires their mutual recognition. In other words, the legislation both of the requesting and requested state must have a normative base for execution of the procedure and other actions performed in a manner of rendering legal assistance in criminal cases by the consular and diplomatic services.

Thus, we come to the conclusion that the Framework Decision on the introduction of the European arrest warrant is an effective legal model for the consolidation of many states to combat crime. Moreover, the ERA can serve as an example for the law making of other confederations or groups of states combining for various reasons.

## REFERENCES

- Akhmetzakirov, N.R., Omarov, Y.A. & Mussilimov, A.Y. (2016). Participation of a representative of a foreign country in the procedure of the legal proceedings in the Republic of Kazakhstan. *International Journal of Environmental and Science Education*, 11(13), 5809-5816.
- Decree of the President of the Republic of Kazakhstan (2016). Consular Charter of the Republic of Kazakhstan. Available at: <http://adilet.zan.kz/rus/docs/U1600000240>
- Katzenstein, S. (2014). In the Shadow of Crisis: The creation of international courts in the twentieth century. *Harvard International Law Journal*, 55(1), 151-209.
- Law of the Republic of Kazakhstan (1997). Of ratification of the Consular Convention between the Republic of Kazakhstan and Turkish Republic. Available at: <http://adilet.zan.kz/rus/docs/Z970000192>
- Law of the Republic of Kazakhstan (2002). Of diplomatic service in the Republic of Kazakhstan. Available at: <http://adilet.zan.kz/rus/docs/Z020000299>
- Law of the Republic of Kazakhstan (1998). Of ratification of the agreement between the Republic of Kazakhstan and the Republic of Uzbekistan of legal assistance and legal relationships on civil, family and criminal cases. Available at: <http://adilet.zan.kz/rus/docs/Z980000229>
- Litvishko, P.A. (2011). Execution of criminal procedure jurisdiction by the consular officer on the territory of diplomatic missions and consular institutions (as an example of some EU countries). *MGIMO University Herald*, 5, 251-257.
- Mashimbayeva, G.A. (2007). *International legal regulations of the Consular service of the Republic of Kazakhstan*. Ph.D. thesis, Almaty.
- McClellan, D. (2012). *International Co-operation in Civil and Criminal Matters*. Great Britain: Oxford University Press.
- Neha, J. (2016). Judicial law making and general principles of law in international criminal law. *Harvard International Law Journal*, 57(1), 11-150.
- Safarov, N.A. (2007). European court of human rights in the mechanism of legal regulation of the European Union. *Jurisprudence*, 1, 93-111.
- Decree of the Supreme Soviet of the Republic of Kazakhstan (1993). Of joining of the Republic of Kazakhstan the Vienne Convention of Consular intercourse signed in Vienne on 24 April 1963. Available at: <http://adilet.zan.kz/rus/docs/B930004800>
- Vojnikov, V.V. (2006). *The right to work in the European frames: The role of the eurosport. Collapse process and criminology: Contemporary problems and their solutions*. Kaliningrad: RGU named after I. Kanta.