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ON THE OPERATION OF EUROPEAN CONVENTIONS

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(PC-OC)

CONSULAR LEGAL ASSISTANCE IN CRIMINAL MATTERS: STATE OF PLAY AND ADDED VALUE OF DEVELOPING THE COUNCIL OF EUROPE'S FRAMEWORK

Discussion Paper

by Mr Pyotr Litvishko (Russian Federation), PC-OC Mod Substitute Member

Contents

I. Introduction 3

II. Nature, Scope and International Instruments of Consular Legal Assistance in Criminal Matters. "Self-Executing" and "Non-Self-Executing" Provisions 4

III. Domestic Legal Frameworks for Consular Legal Assistance in Criminal Matters 9

IV. Applicability of the Sending and Receiving States' Laws, Regulations and Policies to Consular Criminal Proceedings 16

V. Consuls as Overseas Process Servers. Lack of Treaty Safeguards for Recipients 17

VI. Relationship between Provisions on Consular Legal Assistance in Criminal Matters and European Convention on Consular Functions of 1967. Conclusion and Recommendations 19

I. Introduction

According to the List of decisions taken at the 79th meeting of the PC-OC under the chairmanship of Mr Erik Verbert (Belgium) held by videoconference 4–6 May 2021, the PC-OC decided to ask the PC-OC Mod to continue the examination of the different proposals [for a future update of the 1959 Convention in an additional protocol], based on the discussions held and to present their conclusions to the plenary, and noted the proposal to address the issue of the use of consular legal assistance in criminal matters.[1]

There are weighty reasons that warrant this undertaking. While the legal mechanism at hand is employed rather occasionally in comparison to the ordinary international mutual legal assistance in criminal matters, it has a significant practical value for law enforcement and judicial authorities of the sending States and sometimes happens to represent the only means to procure the required evidence for a criminal case, for example, due to:

the sensitivity or urgency of the matter under investigation for the sending State;

the immunities from the receiving State's jurisdiction enjoyed by the premises or persons of interest. This exemption may only be overcome through the sending State's express waiver;

the general prohibition for law enforcement and judicial authorities conducting their activities on foreign soil themselves or other reasons preventing them from traveling to the receiving State and participating in or being present at the execution of their legal assistance requests, as opposed to diplomatic agents and consular officers whose presence and lawful official activities are *a priori* approved by the host government by reason of an agreement4, exequatur or notification;

reluctance of the sending State's own nationals to come into contact with the local law enforcement. Expats may often tend to avoid contacts with local authorities regarding criminal matters for various innocuous or at least lawful reasons and prefer the cooperation with their home country's representatives instead.

In addition, it is a simplified and expedited form of legal assistance that is able to reduce the workload and save other resources of host States which would otherwise have to provide the requested international judicial assistance themselves, and it is cost-effective for sending States which would avoid expenses for translation or interpretation services associated with the execution of legal assistance, while also taking account of costs or *de minimis* requirements as possible grounds for requested States' refusing ordinary international judicial assistance.

Further benefits include enhancing the admissibility of evidence that is collected by consuls, as a general rule, under the sending State's own criminal procedural rules and in its official language preventing the "lost in translation" scenarios.

The mechanism at stake has been gaining on relevance in times of the pandemic and other emergencies, when the otherwise available targets or witnesses who are their own nationals or residents, or pieces of evidence become inaccessible to the sending States because of the border closures and suspension of international traffic.

This paper explores the nature, distills the scope and takes stock of domestic legal frameworks and international instruments of consular legal assistance in criminal matters, underscoring the decisive distinction between the self-executing and non-self-executing provisions. It identifies some solutions for the challenging issues of the applicability of the sending and receiving States' laws, regulations and policies to consular criminal proceedings as well as protection of rights and interests of recipients of the "consular" legal process. It addresses the relationship between the CoE's instruments of ordinary international judicial assistance in criminal matters which could

[1] List of decisions taken at the 79th meeting of the PC-OC under the Chairmanship of Mr Erik Verbert (Belgium). Meeting held by Videoconference 4-6 May 2021. Strasbourg, 17 May 2021 [PC-OC/Docs PC-OC 2021/ PC-OC (2021)05E], pp. 3–5, items 3b and 5.

integrate consular legal assistance, and the European Convention on Consular Functions of 1967, identifying the CoE's possible stakeholders to be canvassed on the subject. The paper concludes with the concrete alternative proposals for filling the gaps in the CoE regulation of this important legal institution.

II. Nature, Scope and International Instruments of Consular Legal Assistance in Criminal Matters. "Self-Executing" and "Non-Self-Executing" Provisions

The origins of consular criminal procedural powers can be traced back to ancient times and were primarily associated with the extensive extraterritorial "consular jurisdiction" over expat communities and consular courts.[2]

The Vienna Convention on Consular Relations of 1963 (hereinafter referred to as the "1963 Convention"), as the universal primary source of contemporary consular law, has retained the execution of the sending States' competent authorities' requests for legal assistance in criminal matters as a residual criminal procedural function of consuls recognized by customary international law.[3] Pursuant to the Vienna Convention on Diplomatic Relations of 1961 (art. 3), nothing in this Convention shall be construed as preventing the performance of consular functions by a diplomatic mission.

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[2] See, e.g.: S.S. Liu, *Extraterritoriality: Its Rise and Its Decline*, Studies in History, Economics and Public Law, Vol. CXVIII, no. 2 (New York: Columbia University Press, 1925), 235 p.

[3] Another remaining penal functional component of foreign missions is the legal institution of Chiefs of Mission or other designated persons as Criminal Investigation (Inquiry) Authorities. This capacity is conferred on them by the codes of criminal procedure of several Commonwealth of Independent States (CIS) countries and Mongolia. For instance, it was introduced in Russia in 2001 (art. 40(3)(3) of the Criminal Procedure Code) and Ukraine in 2012 (arts. 519–523 of the Criminal Procedure Code). See: Уголовно-процессуальный кодекс Российской Федерации от 18.12.2001 № 174-ФЗ (as of July 1, 2021); Кримінальний процесуальний кодекс України від 13.04.2012 № 4651-VI (as of Aug. 8, 2021).

Other examples include the Bureau of Diplomatic Security (the Diplomatic Security Service) and the Office of the Inspector General which are the law enforcement arms of the US Department of State conducting criminal investigations (22 U.S. Code §§ 2709, 4802 (as of Aug. 6, 2021)). E.g., the DS personnel authorized to conduct criminal investigations at US foreign posts are special agent; regional security officer; assistant regional security officer for investigations, also known as "Overseas Criminal Investigator" (these agents are given special training in consular functions, and are commissioned consular officers); locally hired foreign service national investigator; there are also investigative assistants (US Department of State Foreign Affairs Manual (as of Aug. 10, 2021), 12 FAM 423.4, 423.7).

Such functions and powers are derived from the sending States' customary extraterritorial jurisdiction to enforce over their overseas representations, personnel thereof and their residences or other accommodations.

Offences committed on these premises fall within the receiving State's territorial prescriptive and enforcement jurisdiction; the sending State's extraterritorial jurisdiction to prescribe and to enforce, i.e. the substantive and adjective criminal laws' effect, extend to those compounds only if the State criminalizes and penalizes such extraterritorial acts in its substantive law.

While enjoying the inviolability and other immunities from the receiving State's jurisdiction, these premises always constitute part of the territory of the host nation in terms of public international law, regardless of any private property rights to the land or buildings. However, the host State's enforcement jurisdiction in respect of foreign States' missions or their personnel's residences is restricted to the extent compatible with the immunities of the missions and their personnel, and its positive obligation to investigate and adjudicate offences committed on the missions' compounds or the said residences or other accommodations is limited by its negative obligation not to breach their privileges and immunities.

For the sake of clarity, the rest of this paper does not deal with that type of criminal proceedings nor does it specifically handle consular aid (assistance) to the sending States' nationals in criminal proceedings, such as visiting those deprived of liberty, assisting victims of crimes or managing their corpses, assuring legal representation, their functions with respect to vessels and aircraft in criminal cases, roles in extradition, transfer of sentenced persons, or consular legalization.

Under art. 5(j) of the 1963 Convention,[4] consular functions consist, among other things, of "transmitting judicial and extrajudicial documents or executing letters rogatory or commissions to take evidence for the courts of the sending State in accordance with international agreements in force or, in the absence of such international agreements, in any other manner compatible with the laws and regulations of the receiving State".

Letters rogatory are issued "for the purpose of procuring evidence or transmitting articles to be produced in evidence, records or documents". "The expression "procuring evidence" refers, *inter alia*,[5] to the hearing of witnesses, experts or accused persons, the transport involved *[sic]* as well as search and seizure".[6]

L. Oppenheim refers to the examination of witnesses and the administration of oaths for the purpose of procuring evidence for the courts and other authorities of the appointing State as the notarial and similar functions of consuls.[7] At the same time, many members of the International Law Commission saw this consular function as judicial and in no way administrative in character.[8]

The 1961 International Law Commission report states that "[t]he execution of certain procedural or investigatory documents through consuls meets practical needs. A consul may execute letters rogatory in accordance with the procedure prescribed by the law of the sending State, whereas the courts of the receiving State would be obliged to do so in accordance with the procedure prescribed by the law of the receiving State. Furthermore, this procedure is much speedier, apart from the fact that the foreign court is not obliged, in the absence of conventions on the subject, to accede to the request made in the letters rogatory".[9]

Since the norm in art. 5(j) does not stipulate any concrete qualifying requirements or restrictions, it appears that based on such provision, consular officers may be entitled to execute the requests of law enforcement or judicial authorities (letters rogatory) of the sending State to perform a virtually unlimited range of any investigative measures or other proceedings on their behalf aimed at gathering any type of evidence, including its courts' commissions to take evidence (i.e., testimony),[10] or even particular covert special investigative techniques, or to serve or otherwise deliver any writs in any manner, in relation to any persons irrespective of their citizenship, all this being subject to the only proviso that another treaty or laws, regulations or policy of the host State do not prescribe otherwise.

For example, it is conceivable for consular officers to carry out inspections or seizures of documents or other objects, identification of individuals or objects, including by means of photographs (such identification may also be part of consular notarial functions in some jurisdictions), obtaining handwriting and signature samples, voiceprints or buccal swabs or other specimens using non-invasive techniques and on a voluntary basis, all of them not requiring any advanced specialized skills or being informed by the minimal guidelines from the requesting authority. Where a consul has the relevant professional qualifications and expertise, he or she can also obtain fingerprints, conduct forensic document examinations, for instance, in cases of passport or visa fraud, prepare expert

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[4] For the drafting history of this provision, see: Third Report on Consular Intercourse and Immunities by Mr. Jaroslav Žourek, Special Rapporteur, Yearbook of the International Law Commission, 1961, Vol. II, p. 62 (UN Doc. A/CN.4/137).

[5] Emphasis mine.

[6] Explanatory Report to the European Convention on Mutual Assistance in Criminal Matters (commentary on art. 3).

[7] L. Oppenheim, *International law: a Treatise, Vol. I, 3rd ed.,* edited by R.F. Roxburgh (Clark, New Jersey: The Lawbook Exchange, Ltd., 2005), pp. 598–599, § 433.

[8] Consular intercourse and immunities, summary record of the 585th meeting, Yearbook of the International Law Commission, 1961, Vol. I, pp. 22–24, paras. 20, 25, 45 and 51 (UN Doc. A/CN.4/SR.585).

[9] Report of the International Law Commission on the work of its Thirteenth Session, 1 May to 7 July 1961, Official Records of the General Assembly, Sixteenth Session, Supplement No. 10 (A/4843), Yearbook of the International Law Commission, 1961, Vol. II, p. 98, para. 19 (UN Doc. A/CN.4/141).

[10] The terms "examination, hearing, interrogation, interview, questioning, taking evidence and taking testimony" are used as equivalents in this paper.

opinions on the legality of the acquisition of citizenship, issuance of passports or visas of the sending State as well as on the law, economics, policies, language, culture or customs of the host nation.

In addition, notwithstanding the purview of the Additional Protocol to the European Convention on Information on Foreign Law of 1978 or the European Convention on Mutual Assistance in Criminal Matters of 1959 (hereinafter referred to as the "1959 Convention") (arts. 13 and 22), consular officers may furnish certified information on the host country's laws and regulations in the criminal field as well as obtain and transmit its judicial records, in particular with respect to the sending State's nationals, to the latter's competent authorities.

At the same time, as will be shown further, the ordinary scope of consular legal assistance in criminal matters, its thresholds and conditions can be inferred from the regional or bilateral agreements or other arrangements or domestic frameworks, where they are narrowly circumscribed.

However, the major problem with the 1963 Convention's article 5(j) is that it is not self-executing and only takes effect through other applicable international instruments and/or domestic legislation of the receiving countries. In the absence of the relevant treaties that have direct effect, the sending States have to additionally clarify and update the issue of the compatibility of specific consular proceedings with the laws and regulations of the receiving State. Where the sending States' authorities or foreign missions try to make such compliance assessment on their own, they run the risk of reaching a false conclusion.

Apart from the 1963 Convention and bilateral consular conventions,[11] the consular function in question is set out in many bilateral treaties on legal assistance and legal relations, as well as two multilateral ones concluded by the CIS countries, the 1993 Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters and the 2002 Convention of the same name.

Their provisions, as distinguished from the 1963 Convention, most bilateral consular treaties and the 2002 Convention, are self-executing, and lay down the conditions as follows:

(1) the scope of legal assistance which consular officers are authorized to render to the sending State's competent authorities submitting the relevant requests or commissions, is limited to taking testimony and/or transmitting (serving) documents;[12]

(2) persons with respect to whom the said proceedings are performed should be citizens of the sending State (since a State retains the jurisdiction over its nationals who are overseas[13]);

(3) there are no limitations as to the procedural status of individuals to be examined or addressees of documents to be served;

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[11] E.g., the USSR–Turkey Consular Convention of 1988 (art. 43 that, unlike most treaties in force, specifies the procedural status of individuals and sets out that "a consular officer shall be entitled and authorized, at the request of competent authorities of the sending State, to take voluntary testimony from its citizens in the capacity of a party, witness or expert as well as notify them of court (judicial) and other documents. It shall be forbidden to use compulsory measures or the threat thereof during these actions."); the Russia–Poland Consular Convention of 1992 (art. 37, "a consular officer shall have the right to serve judicial or extrajudicial documents as well as take testimony. This right may only be exercised with respect to nationals of the sending State and without compulsion."); the Consular Convention between the Russian Federation and the Republic of Cuba of 1998 (art. 37(l) under which the respective consular function consists of "transmitting investigatory, court or other documents or executing commissions of pre-trial investigation authorities or courts of the sending State in accordance with international agreements in force or, in the absence of such agreements, in any other manner that is not contrary to the laws and regulations of the receiving State".

[12] Most legal assistance treaties envisage that the Contracting Parties shall have the right to perform these measures "through their diplomatic missions or consular posts". The ambiguity of this formulation as to the actual actors occasionally leads to the misperception among the practitioners as if the treaty would authorize the sending State's investigative authorities to perform those interrogations or service of documents themselves on the premises of the missions or posts, such misinterpretation, of course, running counter to the very nature and purpose of consular legal assistance, which is the actual subject matter of those treaty norms, and being not consistent with the state sovereignty.

[13] See also: Article 1. A State's "jurisdiction" for the acts of its diplomatic and consular agents (Council of Europe/European Court of Human Rights, 2019), 19 p.

(4) procedural actions, including service of documents, are carried out on a voluntary basis, the use of coercive means or the threat thereof are prohibited.[14]

This choice of just two forms of consular legal assistance may be explained by them being the least intrusive, not associated with coercion and not requiring advanced knowledge or skills in the areas of criminal law, criminal procedure or criminalistics.

The draft United Nations Convention on Countering the Use of Information and Communications Technologies for Criminal Purposes in art. 54 ("Powers of Diplomatic Missions and Consular Posts") establishes the sending States' rights to serve documents on their own citizens, under instructions from their competent authorities to interrogate their own citizens through their diplomatic missions or consular posts, including through the use of video or telephone conferencing systems, while no means of coercion or the threat thereof may be used.[15]

The CoE's 1990 Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (art. 21) and 2005 Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (art. 31) provide for competent authorities of the Party of origin to effect service of judicial documents (or notifications thereof) directly through the consular authorities of that Party to persons abroad who are affected by provisional measures or confiscation orders.

Under the 1997 Russia–Canada and the 1998 Russia–India treaties on Mutual Legal Assistance in Criminal Matters (art. 19), "[c]onsular officials may take evidence in the territory of the receiving State from a witness on a voluntary basis without a formal request. Prior notice of the intended proceedings shall be given to the receiving State. That State may refuse its consent for any reason provided in Article 3 of the Treaty ("Refusal of Legal Assistance"). Consular officials may serve documents on an individual who appears voluntarily at the consular premises". These treaties do not limit nor make the range of persons, with respect to whom those actions may be performed, dependent on their nationality, but their added value is significantly curtailed as they nearly equate the procedure for prior notification of the intended consular legal assistance to the receiving State with the latter's preapproval of the ordinary international judicial assistance.

The 1961 International Law Commission report states that "a consul cannot execute letters rogatory in the absence of a convention authorizing him to do so, unless the receiving State does not object",[16] which means that the general treaty provision on the freedom of consular communications with and access to nationals of the sending State, as well as the absence of an express prohibition by the host State of the exercise of the consular function in question *per se* do not constitute sufficient grounds for exercising it neither through the conduct of procedural actions, nor through the service of documents.

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[14] The last condition does not mean that the voluntary testimony of a willing witness must not be preceded by apprising them of the criminal liability for refusing to testify, knowingly giving false testimony (perjury), false accusation or disclosing the investigative information as required by the sending State's procedural rules, nor that a voluntary recipient must not be warned of the sanctions or other possible adverse effects of his failure to appear in the territory of the sending State (but not the failure to appear before the consul) after having been served a summons by the consul, unless the treaty itself (currently, there are none) or the receiving State put forward specific conditions not allowing such warnings. Such legitimate advisement of the liability that the voluntary witness or recipient would face on the territory of the sending State does not reach the reasonable threshold for qualifying as a coercive measure or a threat thereof, serves the person's interests and protects his informed and voluntary consent to participate in the consular proceeding or accept the document.

[15] United Nations Convention on Countering the Use of Information and Communications Technologies for Criminal Purposes (Draft as of 29 June 2021), https://www.unodc.org/documents/Cybercrime/AdHocCommittee/Comments/RF_28_July_2021_-_E.pdf, accessed Aug. 3, 2021.

[16] Yearbook of the International Law Commission, 1961, Vol. II, p. 98, para. 19 (UN Doc. A/CN.4/141); Consular intercourse and immunities, summary record of the 585th meeting, Yearbook of the International Law Commission, 1961, Vol. I, pp. 21–24 (UN Doc. A/CN.4/SR.585); L. Oppenheim, *op. cit.*, pp. 598–599, § 433.

The extensive interpretation of that rule has been inherited from the USSR Consular Statute by some CIS countries, for example, it is employed by the Consular Statute of ***Ukraine*** (art. 28, "a consul shall execute commissions of the investigative or court (judicial) authorities of Ukraine in respect of citizens of Ukraine, *unless it is prohibited*[17] by the laws[18] of the receiving State. Said commissions shall be executed in compliance with the procedural legislation of Ukraine").[19] There are instances of the Ukrainian consuls' summoning willing witnesses to the consulate abroad and participating with them in the court hearings held in Ukraine by video conference based on this provision.[20]

One might assume that, unless the host State recognizes the right of the particular sending State to exercise the consular function at issue, its unauthorized execution would arguably entail the breach of international legal principles stemming from the sovereign equality of States, such as the duty to respect the laws and regulations of the receiving State, prohibition to use the mission's premises in any manner incompatible with its functions, duty of non-interference in the internal affairs of the host country, and may, in addition to automatically rendering the evidence so obtained inadmissible, lead to the host country denying the consul the immunity from its jurisdiction or witness immunity with regard to the actions done by the consul in the exercise of that function, and under certain circumstances trigger the liability, including criminal,[21] of the consul under the host State's law.

Some consular treaties do not include the consular function at stake in the list of consular functions envisaged by them. However, such lists are generally open-ended, providing that consular officers shall be entitled, in addition to the consular functions for which provision is made in the treaty, to exercise any other consular functions entrusted to them by the sending State which are not prohibited by the laws or regulations of the receiving State or to which no objection is made by the receiving State.

Thus, in the absence of a pertinent self-executing treaty, the sending State is supposed to apply to the host State's ministry for foreign affairs or central authority for legal assistance and relations for their consent to the conduct of the consular actions in question. It may be advisable to attach the text of the sending State's criminal procedure statute to such an application, for an assessment of whether it is consistent with or not contrary to the host State's domestic law. The latter can then give the requested permission either generally, for all such actions in the future, or just for the particular case, or deny such permission altogether.

It flows from the freedom of consular communication with and access to nationals of the sending State that a consular officer may, unless stipulated otherwise by the host State, execute requests for legal assistance with respect to the sending State's nationals not only in the premises of a consular office, but also at the person's place of residence or whereabouts within his consular district, or by video- or telephone conference, especially where their appearance at the consular office would be problematic.

It is appropriate to view consular legal assistance as a type of international judicial assistance in criminal matters as it is hard to deny its major interstate dimension. Its prerequisite is consent of a foreign Power expressed in a treaty or other international arrangement, foreign domestic legislation or policy or given in each particular case. It is firmly associated with the observance of the laws and

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[17] Italics mine.

[18] However, as is shown elsewhere in this paper, such prohibitions may take a variety of forms, not necessarily that of statutory law.

[19] Консульський статут України, затв. Указом Президента України від 2 квітня 1994 р. № 127/94 (as of May 21, 2002).

[20] Y.T., and John Does 1 through 50, on behalf of themselves and all of those similarly situated, Plaintiffs, against D.F., et al., Defendants (U.S. Distr. Court for the Southern Distr. of New York, 2013, Case 1:11-cv-02794-KMW) (Order of Apr. 18, 2013)

[21] E.g., under the blocking statutes, such as arts. 271 and 299 of the Swiss Criminal Code of 1937 (as of July 1, 2021). See also: *What a Consular Officer Is Authorized to Do As Opposed To What He Can Do with Impunity* (edited and reviewed by FindLaw Attorney Writers, last updated Feb. 27, 2018), URL: https://corporate.findlaw.com/law-library/what-a-consular-officer-is-authorized-to-do-as-opposed-to-what-he.html, accessed Aug. 1, 2021.

regulations of the receiving State, and it is performed on foreign soil. Last but not least, its regulation is contained in bilateral or multilateral treaties, laws and regulatory acts, on international mutual legal (judicial) assistance. Some scholars regard it as a "passive form" of international legal assistance.[22]

Compared to the consular legal assistance in criminal matters, the universal and regional (CoE) instruments of international mutual legal assistance in civil, commercial and, to some extent, administrative matters set forth more detailed regulations of consular evidence gathering or service of writs. These are the 1970 Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (art. 15–22), the 1954 Convention on Civil Procedure (arts. 6 and 15), the 1965 Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (art. 8), the 1978 European Convention on the Obtaining Abroad of Information and Evidence in Administrative Matters (arts. 11 and 22) and the 1977 European Convention on the Service Abroad of Documents relating to Administrative Matters (arts. 10 and 12).[23]

III. Domestic Legal Frameworks for Consular Legal Assistance in Criminal Matters

The civil law and common law jurisdictions have similar approaches to regulating consular legal assistance in criminal matters. The relevant general or detailed legal provisions can be found in criminal procedure laws, statutes on international judicial assistance in criminal matters or laws on consular service and functions, or secondary legislation, such as guidelines or other agency regulations. Some countries have laid down the procedures for both their own and foreign consular officers' performing procedural actions. Below are some examples.

Germany's domestic regulation of the consular powers to serve documents, interrogate witnesses and administer oaths pursuant to the commissions of the federal state's authorities as well as the equivalence of evidence was already provided in the Law on the Organization of Federal Consulates and Official Rights and Duties of Federal Consuls of 1867 (§§ 19 and 20).[24]

Currently, the Law on Consular Officers, Their Functions and Powers of 1974 (§§ 15, 16 and 19) sets out the rules for the conduct of consular examinations and service of documents under which consular officers shall at the request of German courts of law and authorities conduct interrogations and hearings, including under oath, serve documents of any kind on persons residing in their consular district; and are authorized to administer oaths. German rules of procedure for such interrogations and hearings shall be applied *mutatis mutandis.* Interpreters do not have to be sworn. The consular officer conducting the interrogation or hearing may not use coercive methods. Such interrogations, hearings and oaths as well as records thereof shall be equivalent to interrogations and hearings conducted by and oaths sworn before domestic courts of law and authorities, as well as to records thereof. Interrogations and hearings in lieu of judicial interrogation may only be conducted by career consular officers holding the qualifications for judicial office *(ipso facto)*, or by other career consular officers if they have been specially authorized by the Federal Foreign Office. Such authorization may only be granted to career consular officers of the senior branch of the foreign service, and is based on

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[22] М.І. Пашковський, *Особливості доказування у кримінальних справах, пов'язаних з наданням міжнародної правової допомоги: дис. ... канд. юрид. наук* (Київ, 2003); М.І. Пашковський, Концепція міжнародного співробітництва з кримінально-процесуальних питань, *Актуальні проблеми держави і права: зб. наук. праць*. Вип. 27 (Одеса: Юридична література, 2006), с. 17–18.

A request for consular legal assistance is referred to by some authorities as a "quasi-international request for legal assistance". See: *Metodyka pracy w sprawach karnych ze stosunków międzynarodowych*, S.R. Buczma, I. Chećko, J. Gemra, B. Hlawacz, R. Kierzynka, C. Kłos, M. Kołodziej, Ł. Łukuć, S. Modliński, P. Radomski, E. Sidwa, G. Stronikowska, A. Wiśniewska; pod red. J. Gemry (Warszawa: Wydaw. C.H. Beck, 2013), s. 2.

[23] Explanatory Report to the European Convention on the Obtaining Abroad of Information and Evidence in Administrative Matters (Strasbourg, 15.III.1978) (paras. 41 and 70–71); Explanatory Report to the European Convention on the Service Abroad of Documents relating to Administrative Matters (Strasbourg, 24.XI.1977) (paras. 38–42 and 46–48).

[24] Gesetz betreffend die Organisation der Bundeskonsulate sowie die Amtsrechte und Pflichten der Bundeskonsuln vom 8. Nov. 1867.

the assumption that the career consular officer concerned possesses the qualifications required by virtue of his education and professional experience for the proper discharge of the duties assigned to him.[25]

The German Code of Criminal Procedure does not contain any provisions concerning consular legal assistance.

Pursuant to the Guidelines of the German Federal Ministry of Justice and Consumer Protection on Intercourse with Foreign States in Criminal Matters, commissions from German courts and other authorities to German foreign missions for official acts are referred to as requests for administrative assistance *(Amtshilfeersuchen)*, as distinguished from requests for (international) legal (judicial) assistance (*Rechtshilfeersuchen*). This assistance "can be rendered if it is compatible with the law of the receiving State, and ordinarily is confined to the provision of information, service of documents on German nationals and their examinations as witnesses, experts or accused. The use of coercive measures or the threat thereof are not permitted. In these cases, the intercourse between the German authorities and foreign representations is not interstate, but domestic".[26]

The Guidelines also prescribe that "requests for consular questioning or other actions of administrative assistance may be forwarded by German authorities only in exceptional cases, where there are special grounds, in particular, if the pursued objective will not be achieved at all or in due time through applying for legal assistance to the competent authorities of the requested State, or if a request for legal assistance would be associated with an impermissible expenditure of labor, time or financial resources. The application to the German foreign representation should be substantiated."[27]

The Guidelines contain the aggregate information, which is regularly updated, on the permissibility for German consular officers to perform the functions related to criminal proceedings and their scope in each particular country.[28] The rules reflected in that information flow both from the international treaties to which Germany is a party and permissions of the host States assembled through diplomatic channels, the latter sometimes providing more latitude for the consuls in comparison with the treaty provisions.

It follows from the Guidelines that some host nations permit foreign consular officers to perform proceedings not only with respect to the sending State's nationals, but also other persons, including their own citizens. A number of countries attach various conditions to such consular proceedings, *inter alia*:

(1) the person concerned should be a national of the sending State or a third country, or should not have citizenship of the receiving State;

(2) certain procedural status of the person concerned;

(3) the nature of the offence under investigation;

(4) conduct of the actions (examinations or service of documents) within the premises of the foreign mission;

(5) rarely, the pre-approval of the prospective action by the ministry for foreign affairs, judicial or other competent authority of the receiving State in each particular case.

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[25] Gesetz über die Konsularbeamten, ihre Aufgaben und Befugnisse (Konsulargesetz, KonsG) vom 11. Sept. 1974 (as of Mar. 28, 2021).

[26] Die Richtlinien für den Verkehr mit dem Ausland in strafrechtlichen Angelegenheiten (RiVASt) vom 23. Dez. 2016 (BAnz AT 12.10.2017 B1) (Nr. 129 Abs. 3). For this view, see also: P. Wilkitzki, in H. Grützner, P.G. Pötz, C. Kreß, *Internationaler Rechtshilfeverkehr in Strafsachen, 2. Aufl.,* 29. Lfg. Nov. 1991, I. A2, § 59 IRG Rn. 32. S. 21; D. Thörnich, *Der Auslandszeuge im Strafprozess* (Baden-Baden: Nomos Verlagsgesellschaft, 2020), S. 263–264.

[27] RiVASt (Nr. 130).

[28] RiVASt. Anhang II–Länderteil. Stand: März 2021, Länder A–Z. URL: http://www.verwaltungsvorschriften-im-internet.de/bsvwvbund_01012017_IIB6935088.htm, accessed Aug. 10, 2021.

There is German case law analyzing the interplay of consuls' interlocutions with their compatriots when providing consular legal aid to them in a criminal case and consular interrogations or hearings of fellow countrymen in execution of requests for consular legal assistance emanating from their home country's judicial authorities,[29] as well as research on consular hearings by video conference implicating the States' sovereignty issues.[30]

A provision on consular legal assistance exists in ***Poland's*** criminal procedure law since 1969.[31] Under art. 586 of the Polish Code of Criminal Procedure of 1997, which is in Part XIII "Proceedings in Criminal Cases Pertaining to International Relations", Ch. 62 "Legal Assistance and Service of Documents in Criminal Matters" "[t]he request to have a document served upon a person who is a Polish citizen and is staying abroad, or to have such a person examined as accused, witness or expert, shall be addressed by the court or state prosecutor to a Polish diplomatic mission or consular office. If this action cannot be performed in this way, such a request may be addressed to a court, prosecutor's office or other appropriate agency of the foreign State".[32]

Historically, consular legal proceedings consisting of the non-exhaustive list of actions such as interrogating the parties, witnesses or experts, administering oaths, serving documents or summoning persons in execution of requisitions issued by the Polish judicial authorities as well as the equivalence of evidence were also regulated by the Law on the Organization of Consulates and Activities of Consuls of 1924 (art. 18) which was modelled on the German Law of 1867 mentioned above, and envisaged in bilateral treaties on legal assistance in criminal matters concluded in the 1920s.[33]

Currently, the parallel regulation of the consular function at hand in Poland is contained in the Statute on Consular Law of 2015 (arts. 26 and 27) which establishes that pursuant to requests from the public administrative authority in Poland, court or public prosecutor, the consul serves documents, interrogates parties or participants in the proceedings, witnesses or accused persons while applying, *mutatis mutandis*, Polish legal norms, if the recipient of the document to be served or the person to be interrogated is a Polish citizen and voluntarily consents to accept the document or give evidence as a witness or an accused.[34]

Some further details of consular legal proceedings are developed in two Ministerial regulations by the Minister of Justice of Poland, namely, the Ordinance on Particular Activities of Courts in Matters of an International Character in Civil and Criminal Proceedings in International

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[29] BGH, Beschluss vom 14. Sept. 2010 - 3 StR 573/09 - OLG Koblenz; M. Heghmanns,"Entscheidungsanmerkung (BGH, Beschl. v. 14.9.2010 – 3 StR 573/09)", *Zeitschrift für das Juristische Studium* 1 (2011), S. 98–101; R. Pest, "Die konsularische Unterstützung im Strafverfahren. Aktuelle Tendenzen der höchstrichterlichen Rechtsprechung", *Juristische Rundschau* 7 (2015), S. 359–371.

[30] K. Malek, *Verteidigung in der Hauptverhandlung. 5. Auflage* (Heidelberg: C.F. Müller, 2017), S. 249; A.B. Norouzi, *Die audiovisuelle Vernehmung von Auslandszeugen. Ein Beitrag zum transnationalen Beweisrecht im deutschen Strafprozess* (Tübingen: Mohr Siebeck, 2010), S. 96–98.

[31] Ustawa z dnia 19 kwietnia 1969 r. Kodeks postępowania karnego (art. 520).

[32] Ustawa z dnia 6 czerwca 1997 r. Kodeks postępowania karnego (as of June 16, 2021). See also: *Zasady obrotu prawnego z zagranicą w sprawach karnych w postępowaniu przygotowawczym*, pod red. E. Zalewskiego, K. Karsznickiego, A. Wiśniewskiej, C. Michalczuka (Warszawa: Prokuratura Krajowa, 2009), s. 18, 92–93, 143–147.

[33] Ustawa z dnia 11 listopada 1924 r. o organizacji konsulatów i o czynnościach konsulów; L. Babiński, "Zagadnienia prawne w działalności konsulów", *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 1 (1935), s. 1–18; Umowa pomiędzy Rzecząpospolitą Polską a Republiką Czeskosłowacką w przedmiocie uregulowania obrotu prawnego w sprawach cywilnych, karnych i niespornych, podpisana w Pradze dnia 6 marca 1925 r. (art. 21).

[34] Ustawa z dnia 25 czerwca 2015 r. Prawo konsularne (as of June 16, 2021).

Relations of 2002[35] and the Ordinance on the Regulations on Internal Functioning of Common Units of the Prosecutor's Office of 2016.[36]

There is an ongoing discourse in Polish jurisprudence and scholarly sources concerning the issues of ensuring due process in the course of consular questionings and service of documents in criminal matters, equality of arms and other rights of defendants, defence counsel, victims and their legal counsel, while the current policy of the Ministry of Foreign Affairs of Poland is to deny notifying defence counsel or legal representatives of the parties to the Polish criminal proceedings of the intended consular interrogations abroad ordered by Polish public prosecutors or judges and not to allow those defence counsel or representatives to take part in the interrogations (which is to a large extent offset by the unconditional voluntariness of appearance and testimony of the person concerned). Additionally, the RP MFA argues that consular officers' procedural role in an interrogation is of a "recording and technical character" rather than active engagement of a judicial authority in charge of the case (which they are not), as they are bound by the scope of questions and instructions in the request (interrogatories) and are not in a position to modify them or otherwise exercise their discretion and proactively influence the requested proceeding. In addition, the receiving States may often impose restrictions on the activities of foreign legal counsel in their territory or not permit them altogether.[37]

As regards the participation of Polish prosecutors or judges in consular interrogations, the prevailing opinion tends to be against it due to the fact that a requesting authority (prosecutor or court) delegate their own powers to the consul to the extent defined in the request.[38]

Consular legal assistance in criminal matters may be entrusted to and rendered by Polish career consular officers, but not honorary (non-career) consular officers.[39]

In 2020, Poland's Code of Criminal Procedure (art. 177) and Statute on Consular Law (art. 26) were amended, among other things, to enable hearings of witnesses or experts who are Polish nationals staying abroad by video conference in the presence of Polish consular officers. Some authors argue that consular hearings by telephone conference are admissible under Polish law as well.[40]

Thus, as opposed to the extraordinary nature of consular proceedings compared to ordinary international legal assistance in criminal matters prescribed by Germany's Ministerial regulations, under Poland's statutory law the latter is subsidiary in relation to the consular function in question[41] when exercised with respect to its own nationals.

In accordance with the ***Czech Republic's*** Act on International Judicial Cooperation in Criminal Matters of 2013 (§ 76 in Ch. "Special Provisions on Some Actions of Legal Assistance"), a

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[35] Rozporządzenie Ministra Sprawiedliwości z dnia 28 stycznia 2002 r. w sprawie szczegółowych czynności sądów w sprawach z zakresu międzynarodowego postępowania cywilnego oraz karnego w stosunkach międzynarodowych (§§ 14, 18–19, 36–37, 39–40 and 61.1) (as of Nov. 14, 2019).

[36] Rozporządzenie Ministra Sprawiedliwości z dnia 7 kwietnia 2016 r. Regulamin wewnętrznego urzędowania powszechnych jednostek organizacyjnych prokuratury (§ 266) (as of May 21, 2021).

[37] Ł.D. Dąbrowski, *Dowód z przesłuchania stron i innych uczestników procesu przez konsula – wybrane zagadnienia procesowe,* w *Polskie prawo konsularne w okresie zmian.* Pod redakcją W. Burka i P. Czubika (Warszawa: Ministerstwo Spraw Zagranicznych RP, 2015), s. 33–42; M. Świstak, N. Karpiuk, "Ochrona prawna interesów klienta radcy prawnego w świetle praktyki przeprowadzania przesłuchań przez konsula – wybrana problematyka", *Studia Prawnicze i Administracyjne* 24(2) (2018), s. 17–24; T.J. Tadla, "Rekwizycje zagraniczne w sprawach cywilnych i karnych", *Radca Prawny. Dwumiesięcznik* 184 (2019), s. 20–22.

[38] *Metodyka pracy w sprawach karnych ze stosunków międzynarodowych*, s. 2–8, 18; *Postępowanie w sprawach karnych ze stosunków międzynarodowych. Komentarz do Działu XIII KPK*, S. Buczma, M. Hara, R. Kierzynka, P. Kołodziejski, A. Milewski, T. Ostropolski (Warszawa: Wydaw. C.H. Beck, 2016), s. 136–140.

[39] *Metodyka pracy w sprawach karnych ze stosunków międzynarodowych*, s. 6, 18.

[40] Ł.D. Dąbrowski, *op. cit.*

[41] The same is true for the ***Mexican*** approach (art. 59 of the Mexican Criminal Procedure Code and art. 44 of the Mexican Foreign Service Act). In more detail, see: *Manual on Mutual Legal Assistance and Extradition* (New York: United Nations, 2012), p. 68.

Czech judicial authority (court or public prosecutor's office) may entrust a Czech foreign representation with the service of procedural documents. Regarding the contents of such a commission, the relevant requirements for a request for international legal assistance apply. On the basis of that commission, the Czech foreign representation may effect:

(1) service of a document on a person in the receiving State, unless the regulations of the State in whose territory the service is to be effected preclude it, and if the person consents to accept the document;

(2) service of a document on a Czech national who enjoys diplomatic or consular privileges and immunities in the State in whose territory the service is to be effected.

In those cases, the foreign representation shall act in accordance with the relevant legal regulations of the Czech Republic on the service of documents, and the actions performed by the representation shall have the same effect as if they have been performed by a judicial authority itself. Prior to submitting the commission to the foreign representation in the case of service on any person (item 1 above), the judicial authority shall request the Czech central authority (Ministry of Justice, Supreme Public Prosecutor's Office) to certify whether the regulations of the State, where the service is to be effected, do not preclude such actions.

The Act (§§ 94, 121, 122 and 303) also establishes that the transmission of foreign requests for extradition, recognition and enforcement of foreign decisions to a representation of the Czech Republic abroad or the Czech MFA, has the legal effect of delivery to the Czech Ministry of Justice or a Czech court. The Czech Ministry of Justice may also commission the relevant Czech foreign representation to obtain the consent of an individual who is in custody in a foreign State, to the recognition and enforcement of a foreign judgment with respect to him or her.[42]

At the same time, the Czech Ministry of Justice's Instructions on the Proceedings of Courts in Intercourse with Foreign States in Criminal Matters of 2014 (§ 25(4)) inform that "in view of actions of criminal proceedings being associated with the State sovereignty, it is neither appropriate nor expedient in the area of legal assistance in criminal matters to apply the provisions of some bilateral treaties[43] that enable the conduct of some actions (in particular, a questioning of a national of the Czech Republic abroad) by diplomatic missions or consular posts."[44] However, the Instructions stop short of giving reasons for such unconventional stance in that they do not disclose what kind of prejudice towards the receiving State's sovereignty may be anticipated from the foreign missions of the Czech Republic doing the consular legal assistance mutually agreed upon in the two countries' own treaties.

Pursuant to § 540 of the Code of Criminal Procedure of the ***Slovak Republic***, "a foreign consular post acting for the territory of the Slovak Republic may carry out, being commissioned by the authorities of the sending State, an action for the purposes of criminal proceedings for those authorities only with the consent of the Ministry of Justice. For the service of documents on a national of the sending State or questioning of a person, if the person appears voluntarily, the consent of the Ministry of Justice shall not be required".[45]

"A foreign consular post acting for the territory of the Slovak Republic" means that some consular posts act concurrently with respect to several neighboring States, therefore they may exercise these delegated powers from the territory of another State.

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[42] Zákon ze dne 20. března 2013 č. 104/2013 Sb., o mezinárodní justiční spolupráci ve věcech trestních (as of Oct. 1, 2020).

[43] E.g., see: the Soviet Union–Czechoslovakia Treaty on Legal Assistance and Legal Relations in Civil, Family, Matrimonial and Criminal Matters of 1982 (self-executing art. 10 ("Powers of Diplomatic Missions and Consular Posts") under which the Contracting Parties shall have the right to serve documents on their own citizens and interrogate them through their diplomatic missions or consular posts. Means of coercion or the threat thereof must not be used).

[44] Instrukce Ministerstva spravedlnosti ze dne 9. dubna 2014, č. j. 37/2013-MOT-J/65, o postupu soudů ve styku s cizinou ve věcech trestních.

[45] Zákon z 24. mája 2005 č. 301/2005 Z.z. Trestný poriadok (as of Aug. 1, 2021).

Thus, in Slovakia a foreign consul has the right to take evidence on a voluntary basis from any individual regardless of their nationality or procedural status as well as, upon receipt of the consent of the Ministry of Justice of Slovakia, perform any other investigative or procedural measures.[46]

Under art. 547 of the Criminal Procedure Code of ***Ukraine***, consular posts or diplomatic missions of other States in Ukraine may obtain, on a voluntary basis, explanations, objects or documents from nationals of the State they represent, as well as serve documents on such persons. (The respective regulations concerning Ukrainian consuls' powers were discussed in Sec. II above.)

The ***United Kingdom's*** Consular Relations Act 1968 (sec. 10) prescribes that a diplomatic agent or consular officer of any State may, if authorised to do so under the laws of that State, administer oaths, take affidavits and do notarial acts. Her Majesty may by Order in Council exclude or restrict this provision in relation to the diplomatic agents or consular officers of any State if it appears to Her that in any territory of that State diplomatic agents or consular officers of the United Kingdom are not permitted to perform functions corresponding in nature and extent to those authorised by that provision. Similar provisions are contained in the Diplomatic Agents and Consular Officers (Oaths and Notarial Acts) Acts of the ***Commonwealth of Dominica*** of 1978 and ***Trinidad and Tobago*** of 1971 (secs. 3 and 4) which regulate the relevant activities of both their own and foreign diplomatic agents and consular officers.

United States' consular officers and diplomatic agents' functions of conducting procedural actions and serving documents in criminal matters are regulated by the United States Code and the Code of Federal Regulations (as of Aug. 6, 2021) ("Notarial and Related Services").[47] The consul performing these functions acts in the capacity of a notarizing officer. They are authorized to administer to and take from any person any oath, affirmation, affidavit, or deposition (including to prove the genuineness of foreign documents), authenticate documents, serve a subpoena on a US national or US lawful permanent resident alien, and serve other procedural documents. Consular officers are either designated by US courts or other competent authorities to administer oaths or affirmations and execute commissions to take depositions, or requested by parties and their attorneys (counsel) to conduct these actions (depositions on notice); in the latter instance there is usually a charge of a special consular fee.[48]

Every secretary of an embassy or legation and consular officer of the United States is authorized to perform these procedural powers.

The Regulations describe the order to be followed by the consul performing the proceedings in question. Normally a commission or a request (notice) is accompanied by detailed instructions for its execution which a consul should comply with. Notarizing officers are not responsible for the correctness of the form of an affidavit or the manner in which the allegations therein are set forth, nor are they required to examine into the truth of the affiant's allegations or to pass upon any contentious questions involved. When necessary, he acts as interpreter or translator, or sees that arrangements are made for some qualified person to act in this capacity. Before the testimony is taken, he administers oaths (or affirmations in lieu thereof) to each witness, to the video or audio operator, to the interpreter or translator (if there is one), to the stenographer taking down the testimony, and to the court reporter. The consul conducts an oral examination of a witness with the participation of the counsel for the parties who may conduct a direct examination, a cross-examination, eventually followed by redirect and recross-examinations, themselves until the interrogation is complete. The notarizing officer taking the deposition should endeavor to restrain counsel from indulging in lengthy colloquies, digressions, or asides, and from attempts to intimidate or mislead the witness. The notarizing officer has no authority to sustain or overrule objections but should have them recorded. Instead of taking part in the oral examination of a witness, the parties notified of the taking of a

[46] M. Tiža, *Trestný poriadok a medzinárodné dohovory*, Učená právnická spoločnosť, Apr. 21, 2011. URL: http://www.ucps.sk/clanok-0-1307/Trestny_poriadok_a_medzinarodne_dohovory.html, accessed Aug. 5, 2021.

[47] 22 U.S.C. §§ 4215 and 4221; 28 U.S.C. § 1783; 22 C.F.R. 92. See also: 7 FAM 911–913 and 921–927, Exhibit 921–926.3.

[48] 22 C.F.R. 22.1 (items 51–53).

deposition may transmit written interrogatories to the notarizing officer. The notarizing officer should then depose the deponent on the basis of the written interrogatories. The notarizing officer should not furnish the witness with a copy of the interrogatories in advance of the questioning, nor should he allow the witness to examine the interrogatories in advance of the questioning. Although it may be necessary for the officer, when communicating with the witness for the purpose of asking him to appear to testify, to indicate in general terms the nature of the evidence which is being sought, this information should not be given in such detail as to permit the witness to formulate his answers to the interrogatories prior to his appearance before the notarizing officer. Normally he should be actually present throughout the examination of the witnesses, but recess the examination for reasonable periods of time and for sufficient reasons; he either records, or in most instances has recorded by a stenographer in his presence and under his direction, the testimony.

However, pursuant to the State Department's rules, a US consular officer presides over the deposition, but after administering the oaths he can withdraw, subject to recall, and then the interrogation is actually conducted by legal counsel.[49]

During consular examinations in criminal cases on consular premises tape recording and videotaping can be used, testimony can be taken there by video teleconference with a US court as well, and in civil cases it is permissible to take depositions there by telephone from the United States. Transporting electronic equipment of the kinds used in recording depositions is not permissible in some foreign jurisdictions, or the host country government may require its pre-clearance.

The officer must be a disinterested party. The Regulations also set forth circumstances requiring exclusion and recusal of an officer.

In countries where the right to take depositions is not secured by treaty, notarizing officers may take depositions only if the laws or authorities of the national government will permit them to do so. Subpoenas are served by US consuls in foreign countries whose law does not prohibit such action. Notarizing officers in countries where the taking of depositions is not permitted who receive notices or commissions for taking depositions should return the documents to the parties from whom they are received explaining why they are returning them, and indicating what other method or methods may be available for obtaining the depositions, whether by letters rogatory or otherwise.

US consuls are also tasked under US law with transmitting letters of request in criminal cases to the competent authorities of the host country, monitoring their execution and returning executed letters rogatory to the US judicial authority that issued them.

The US Department of State "sometimes will ask consular officers to obtain records (such as business registrations and bank records) where there is a government interest. Occasionally, a consular officer may be requested to perform such tasks as obtaining authenticated copies of fingerprints, voiceprints, handwriting analysis reports, host country passport files or photographs, or arranging for appraisals or for medical examinations of witnesses. All such evidence must be authenticated."[50]

The US Attorneys' Manual includes in "informal methods" of obtaining legal assistance in other countries, in addition to taking depositions of voluntary witnesses at US embassies and consulates, making requests through diplomatic channels for documents (e.g., hotel records) that may be considered public records in the requested country and that the foreign authorities will release to the appropriate US authorities if officially requested.[51]

Under a special provision of the US Code in existence since 1856, if any person shall willfully and corruptly commit perjury, or by any means procure any person to commit perjury in any oath, affirmation, affidavit, or deposition administered or taken by a secretary of embassy or legation or consular officer of the United States, such offender may be charged, proceeded against, tried, convicted, and dealt with in any district of the United States, in the same manner, in all respects, as if

[49] 7 FAM 921.

[50] 7 FAM 931.5–931.6, 932 and 933.1–933.3.

[51] USAM Title 9 Criminal Resource Manual 278 B, C.

such offense had been committed in the United States, before any officer duly authorized therein to administer or take such oath, affirmation, affidavit, or deposition, and shall be subject to the same punishment and disability therefor as are or shall be prescribed for such offense; and if any person shall forge any seal or signature of a secretary of embassy or legation or consular officer of the United States, or shall tender in evidence any such document with a false or counterfeit seal or signature thereto, knowing the same to be false or counterfeit, he shall be deemed and taken to be guilty of a misdemeanor and on conviction shall be imprisoned not exceeding three years nor less than one year, and fined, and may be charged, proceeded against, tried, convicted, and dealt with therefor in the district where he may be arrested or in custody.[52]

Like in Germany, the US authorities (currently, the Bureau of Consular Affairs of the US Department of State) publish and update a compendium of country-specific information on consular legal assistance by US consular officers.[53]

The ***Canada*** Evidence Act of 1985 (secs. 52–54) provides for the classes of officers of the diplomatic and consular services, including honorary consular officers of Canada who are authorized to administer, take or receive oaths, affidavits, solemn affirmations or declarations which are as valid and effectual and are of the like force and effect to all intents and purposes as if they had been administered, taken or received in Canada by a person authorized to do so. Documents obtained in this way shall be admitted in evidence, without proof of the seal or stamp or of the official's signature or official character.

In ***Ireland***, the Diplomatic and Consular Officers (Provision of Services) Act of 1993 (secs. 5 and 6) sets forth similar rules and establishes that every person who wilfully and corruptly swears falsely in any oath or affidavit taken or made by a diplomatic or consular officer shall be guilty of the offence of perjury in every case where if he had so sworn in a judicial proceeding before a court of competent jurisdiction he would be guilty of the offence of perjury. Such a person charged with perjury may be proceeded against, indicted, tried and punished in any county or county borough in which he was apprehended or is in custody as if such offence had been committed in such county or county borough, and for all purposes incidental to or consequential on the prosecution, trial or punishment of such offence, it shall be deemed to have been committed in such county or county borough.

IV. Applicability of the Sending and Receiving States' Laws, Regulations and Policies to Consular Criminal Proceedings

As evident from the examples in this paper, some sending States' legislation expressly reflects the general rule that consuls shall apply the sending State's criminal procedure when performing interrogations or service of documents.

At the same time, the 1961 and 1963 Vienna Conventions and other treaties establish the duty of foreign mission personnel *to respect* the laws and regulations of the receiving State and exercise their rights *in conformity with* those laws and regulations. The 1963 Convention, bilateral consular treaties and domestic legislation of some sending States[54] set forth that the execution of

[52] 22 U.S.C. § 4221, also 18 U.S.C. § 1546.

[53] Judicial Assistance Country Information. URL: https://travel.state.gov/content/travel/en/legal/Judicial-Assistance-Country-Information.html, accessed Aug. 10, 2021.

[54] Pursuant to the Federal Law "Consular Statute of the ***Russian Federation***" of 2010 (art. 2) and the Regulations on the Consular Post of the Russian Federation of 1998 (sec. 2), the consular activities shall be performed not only in accordance with the RF legal regulations, but also "*taking into account* the legislation of the receiving State". Under sec. 8 of the said Regulations, "a consular post shall exercise, within its competence, the functions concerning legal assistance in criminal matters *in compliance with* legislation of the receiving State". See: Федеральный закон от 05.07.2010 № 154-ФЗ "Консульский устав Российской Федерации" (as of June 11, 2021); Указ Президента РФ от 05.11.1998 № 1330 "Об утверждении Положения о Консульском учреждении Российской Федерации" (as of Aug. 21, 2012).

these measures should be *compatible with, not contrary to* or even *in compliance* with the laws and regulations of the receiving State.

Such provisions raise the question of whether they imply a duty for heads of mission and consular officers to comply with, observe or at least take into account the rules of criminal procedure of the host State establishing the procedures for interviews and other investigative actions, the rights and obligations of the participants in criminal proceedings, and legal restrictions or prohibitions, especially where such rules substantially differ from those in force in the sending State or are in conflict with them, if such compliance is not expressly required by the host State. The unequal scopes of the rights of defence in the sending and receiving States' laws or double citizenship (of both the sending and receiving States) of their nationals who are to be interrogated may serve as examples.

There is arguably no such duty, because otherwise it would amount to the consular officials applying foreign law, which is generally permitted only in cases expressly envisaged by the relevant treaties or domestic law. However, the application of foreign criminal procedure law by foreign mission officers is envisaged neither by the treaties nor, as a rule, by domestic law. Consequently, they are obliged to use the criminal procedure law of the sending State, unless the express dedicated regulations of the receiving State, including the policies articulated solely in the respective diplomatic notes, provide otherwise.

The compliance with the laws and regulations of the host State in that context should be understood not as their "unsolicited" application without the host State expressly requiring it, but as the consuls' having consent or permission of the host State to exercise their criminal procedural functions, while complying with the specific restrictions or other regulations contained in that permission, if any. In turn, the said consent may be expressed in a self-executing treaty or other international arrangement, including diplomatic correspondence, or in domestic law or regulation, or granted on an *ad hoc*, case-by-case basis.

However, since foreign mission compounds are located on the territory of the receiving State, the consular officer is to advise the person concerned of the substantive legal norms of the host State which the sending State's laws require to be taken into account in criminal proceedings conducted in the territory of the sending State. For example, if the sending State's law criminalizes a refusal to give evidence but makes the criminal liability of persons, including its own citizens, who commit a crime in a foreign country, conditional on the dual criminality, and the host State's law does not criminalize such refusal, then the sending State's official concerned may not apprise the witness of the criminal liability for refusing to testify. Additionally, some countries' laws establish that at sentencing persons who committed a crime abroad, the penalty imposed may not exceed the maximum penalty envisaged by law of the foreign State of the *locus delicti*. Accordingly, a notice warning of the criminal liability for refusal to testify, knowingly false testimony, false accusation or unauthorized disclosure of the investigative information must indicate the respective maximum penalties under the law of the host State, if they are lower than those under the law of the sending State.[55]

V. Consuls as Overseas Process Servers. Lack of Treaty Safeguards for Recipients

Treaties on mutual judicial assistance in criminal matters as well as domestic laws of both requesting and requested States concerning this ordinary, as distinguished from consular, international legal assistance generally provide for an array of the negative and positive obligations of the requesting States and safeguards for the persons they summon from abroad, *regardless of their citizenship*, concerning notices of penalty or threats to use coercive measures in case of nonappearance, including statements to the effect that no measure of restraint or punishment may be enforced directly by the court in the territory of the other State, safe conduct, advancing or reimbursing the recipient's

[55] For some examples, see: P.A. Litvishko, "Exercise of Criminal Procedural Jurisdiction by Consular Officers in the Compound of Diplomatic Missions and Consular Posts", *Internal Security. Semiannual Journal of the Police Academy in Szczytno*, Issue 1, Vol. 4 (2012), pp. 89–98.

expenses such as salary replacement or remuneration of experts, the language of the documents to be served and their translation, supplying the addressee with information regarding his rights and obligations as well as the minimum time for the transmission of a summons to be served on the accused person, lack of the obligation to give evidence in any proceeding other than the proceedings to which the request relates.

The same safeguards and legal effects ordinarily apply to the direct postal service of process that is permitted or required by some treaties as well.

The treaty guarantees at issue are only effective with regard to the service performed through ordinary international legal assistance or, on equal terms, directly by post, and are not applicable to consular service of legal process. And there is no customary international law in place governing those safeguards outside of the existing treaty law.

The dedicated treaty provisions regulating consular proceedings in criminal matters, be it mutual legal assistance treaties or consular conventions, contain no prohibition on the said notices in summonses or any other safeguards. However, if a summons or other process is to be served by a consular officer, the question of whether it is possible to include a noncompliance warning notice ought to be decided in conformity with the domestic laws and regulations of the particular host country, including those articulated in the respective diplomatic notes which may establish such a prohibition. The same goes for the documents that consuls are entitled to serve; these may be any procedural documents, including those containing noncompliance warnings since the treaties do not impose any restrictions on either the form or content of the documents that may be voluntarily received by the addressees from the consul. However, again, the host State's domestic regulations or policies can deviate from this general rule.

As a result, the person on whom a summons or other procedural document of the sending State's competent authority has been served by a consul or other mission official, either by hand or by post, will not have these safeguards, and the consular service of summonses or other documents is legally almost on a par with an informal "rogue" overseas transmission through relatives or other inappropriate persons.

Thus, a person who receives a summons from a consular officer or diplomatic agent finds himself, for no apparent reason, in a disadvantageous position as compared to an addressee, including the sending State's own citizen, on whom a summons is served under international legal assistance arrangements or by post, save the person of the process server other things being equal, which represents a certain limitation on such person's rights.

There are rare instances of the available "safety nets" in the sending States' laws or regulations. Under the US Code of Federal Regulations, the consular officer is required to make personal service of the subpoena and any order to show cause, rule, judgment or decree on the request of the Federal court or its marshal, and to make return thereof to such court after tendering to the witness his necessary travel and attendance expenses, which will be determined by the court and sent with the subpoena. When the subpoena or order is forwarded to the officer, it is usually accompanied by instructions directing exactly how service should be made and how the return of service should be executed. These instructions should be followed carefully.[56]

Consequently, the said safeguards should undoubtedly be embedded in treaties, for example, by reference to the relevant provisions devoted to ordinary international legal assistance.

There is also a question of whether the consul, being duly authorized, should in all cases personally serve by hand a summons or other procedural document on the addressee, or whether he may also transmit it to the recipient by post (which ought to be distinguished from direct postal transmission from abroad), via other means of communication, courier service or through a third person. The answer depends on the wording of each particular treaty provision as well as both the receiving and sending States' regulations permitting or disallowing other modes of direct or indirect

[56] 22 C.F.R. 92.88.

transmission, actual or constructive communication, including service by publication (e.g., in local media or social networks).

If a treaty or the regulations of the host country make the service of process conditional on the recipient's voluntariness or consent to accept the document, or his voluntary appearance for this purpose at the mission premises,[57] then the document is to be handed to the recipient by the authorized official personally.

VI. Relationship between Provisions on Consular Legal Assistance in Criminal Matters and European Convention on Consular Functions of 1967.

Conclusion and Recommendations

Article 9 of the European Convention on Consular Functions of 1967 (hereinafter referred to as the "1967 Convention") outlines a rule under which "a consular officer shall be entitled in civil and commercial matters to serve judicial documents, transmit extra-judicial documents or take evidence on behalf of the courts of the sending State, in accordance with international agreements in force or, in the absence of such agreements, if no objection is raised by the receiving State."

According to the Explanatory Report to the European Convention on Consular Functions (para. 58), "[t]he area covered by Article 9 is limited to civil and commercial matters. The Committee[58] did not think it appropriate to include in Article 9 a reference to penal questions, since these are already dealt with in the "European Convention on Mutual Assistance in Criminal Matters" concluded within the Council of Europe."

This reasoning cannot be accepted as, firstly, no consular function relating to "penal questions" has ever been dealt with in the 1959 Convention or its Protocols; secondly, if the Report proceeded on the assumption that this consular function in criminal matters became redundant after the adoption of the 1959 Convention, it was an untenable one as countries actively continued further concluding bilateral and multilateral treaties regulating the consular function at stake for all types of cases, including criminal ones, for years to come, and, in principle, these two legal institutions (consular criminal proceedings and ordinary international legal assistance) have always existed in parallel.

Still, the Report's statement to that effect is indicative and helpful in that it determines the proper place, that is the 1959 Convention, to where the subject matter at issue belongs. Other arguments in favor of the 1959 Convention or its Protocol and *a contrario* with respect to the 1967 Convention are, first, the non-self-executing character of art. 9 of the 1967 Convention (its "non-objection" criterion is similar to the "compatibility" test under the 1963 Convention);[59] second, the 1967 Convention having so far attracted only five ratifications/accessions over the course of 54 years while not taking account of later developments in international evidence gathering such as the use of technology (video- or telephone conference, available under the Second Additional Protocol to the 1959 Convention); third, subsequent drafting and adopting of the 1977 European Convention on the Service Abroad of Documents relating to Administrative Matters and the 1978 European Convention on the Obtaining Abroad of Information and Evidence in Administrative Matters containing provisions on the respective consular functions attest to the fact that the Council of Europe has decided in favor of further incorporating consular evidence gathering and service of documents into specialized

[57] See, e.g.: Russia–Canada, Russia–India Treaties on Mutual Legal Assistance in Criminal Matters (art. 19).

[58] The committee of governmental experts which carried out its duties under the supervision of the European Committee on Legal Co-operation (CCJ).

[59] See also: art. 44(1) of the 1967 Convention which, like art. 5(j) of the 1963 Convention, only becomes operative through the laws, regulations or even just the policy of the host State.

conventions based on the branches of law (in this case, administrative)[60] rather than supplementing the 1967 Consular Convention with the same.

As is evidenced by the facts in this paper, the legal institution at issue is situated at the intersection of criminal procedure law and law of nations, in particular diplomatic and consular laws, and "migrates" between consular conventions and mutual legal assistance treaties, the latter prevailing and arguably being more fit for purpose as they are aimed at and more familiar to the law enforcement and judiciary, them being the ultimate users of the "consular evidence".

The 1967 Convention falls, to varying degrees, within the purview of the Committee of Ministers' Directorate of Legal Advice and Public International Law (DLAPIL), European Committee on Legal Co-operation (CDCJ), Committee of Legal Advisers on Public International Law (CAHDI) and Rapporteur Group on Legal Co-operation (GR-J).

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[60] See also: Explanatory Report to the European Convention on the Obtaining Abroad of Information and Evidence in Administrative Matters (paras. 70 and 71) ("article [22] provides an alternative to the machinery for the execution of letters of request set out in the other provisions of this chapter; it provides for the obtaining of evidence directly by diplomatic agents or consular officials. The purpose of this provision is to facilitate to the maximum extent the taking of evidence abroad and to codify in this Convention, in an optional form, a useful procedure for the taking of evidence which exists in international practice and has already been recognised in other conventions such as the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters of 18 March 1970 and the European Convention on Consular Functions of 11 December 1967. […] The advantage which States can derive from using their diplomatic agents or consular officials for the execution of requests emanating from the authorities mentioned in Article 19, paragraph 1 is nevertheless not as far-reaching as that which will result from the ordinary system established in this chapter, because diplomatic agents and consular officials cannot apply any measures of compulsion. […] The use of the facility opened to Contracting States by this article is subject to the possible objection of the State on the territory of which the evidence is to be taken. Given the lack of any details in this article as to the grounds for such objections, it can be assumed that the State on whose territory the letter of request is to be executed may object either generally or in specific cases either because of the nature of the letter to be carried out or because of the nationality of the person concerned. It may also make the execution of requests subject to a system of previous authorisation, to be granted in each individual case. In this respect, it should be noted that most member States of the Council of Europe do not permit diplomatic agents or consular officials to execute letters of request concerning persons other than nationals of the State they represent.")

Explanatory Report to the European Convention on the Service Abroad of Documents relating to Administrative Matters (paras. 38–40) ("Although a principal channel for the transmission and service of documents in other Contracting States has thus been established, it was not considered advisable to give that channel an exclusive character. Other very simple means of transmission and service are already in use between certain States on a bilateral level, and to prohibit the use of such channels would have amounted to a retrograde step for those States. While the classical consular channel, which had previously been one of the most commonly used in practice, is replaced as the principal channel by the system of central authorities, it was not considered feasible to eliminate it completely and it has therefore been retained in this article as a subsidiary channel. Moreover, it should be noted that this channel may in certain circumstances be preferred to others, particularly when the requesting State, in the absence of precise details about the person who is the addressee of the document, believes that its consular officials in the State where service must take place will be better able, on the basis of information in their possession (birth and marriage registers etc.), to trace the addressee and serve the document on him. […] consular officials of the requesting State may, without reference to the competent authorities of the requested State, but with due regard to the pertinent provisions of the Convention and particularly those concerning its scope, effect service directly in the State of residence. In effecting service consular officials may not use any form of compulsion against the addressee; should the latter refuse to accept the document the attempt to serve it would not amount to service in the sense of the Convention. In the absence of consular posts in the State where service is to take place, the requesting State may, by way of exception, ask its diplomatic agents to effect service in the same way as that provided for service by consular officials. […] There should be no objection to the use by every State of the direct consular channel so long as the document in question is to be served on a national of the requesting State and the addressee of the document accepts it voluntarily, given the connection of a legal nature which exists between States and their nationals. However, it is a different matter when a State wants to use its consular officials to serve documents on nationals of the requested State or of a third State, whether a Contracting Party or not, or on Stateless persons. In this case the requested State may want to protect the authority of its own administration by prohibiting consular officials of foreign States from effecting service within its territory. For this reason, paragraph 2 [of Article 10] establishes that Contracting States may object to the use in their territory by other States of their consular officials or diplomatic agents for the purpose of service of documents except where such a document is served on a national of the requesting State.")

Prior to embarking on the suggested drafting of amendments to the 1959 Convention, it is advisable to canvass these stakeholders' opinions, seeking their acknowledgement that they would be supportive of or not opposed to the PC-OC's being seized of the matter, if necessary, jointly with themselves.

Notwithstanding the available bilateral agreements and/or arrangements between a few CoE countries containing the self-executing provisions on consular legal assistance in criminal matters, their number is obviously far from sufficient. The existing and future demand for exercising the consular function in question warrants its regulation in a CoE multilateral treaty.

Therefore, its streamlining in the CoE framework could be properly accomplished by supplementing the 1959 Convention with a dedicated article having the self-contained régime.

While making a case for employing the consular tools whose benefits far outweigh some inherent deficiencies mentioned in this paper, I nevertheless align myself with the German approach, under which the consular legal assistance in criminal matters should be of an auxiliary nature in relation to the ordinary international legal assistance and used on the basis of subsidiarity in exceptional cases. However, this must be a matter for each particular sending State to decide and regulate in their primary or subordinate domestic legislation to what extent and how often they would resort to the available consular mechanism provided by the international treaty.

Accordingly, an article on consular legal assistance might be incorporated into the 1959 Convention using the language and provisions of this Convention, its two Protocols as well as the 1963 Convention. Its suggested wording is as follows:

"**Article [...] – Powers of consular officers and diplomatic agents**

1 Consular officers or diplomatic agents of the Contracting Parties may execute in the manner provided for by the laws and regulations of the sending State requests for legal assistance relating to a criminal matter and addressed to them by the judicial authorities of the sending State for the purpose of serving procedural documents and judicial decisions on nationals of the sending State or taking evidence from nationals of the sending State, including by video conference or telephone conference.

2 When executing such requests for legal assistance, consular officers or diplomatic agents of the Contracting Parties may not use any coercive measures or the threat thereof.

3 The provisions of Articles 8, 9 and 12 of this Convention, Article 3 of the Additional Protocol to this Convention, paragraphs 1, 2 and 3 of Article 15 of the Second Additional Protocol to this Convention shall also apply to service of procedural documents and judicial decisions by consular officers or diplomatic agents of the Contracting Parties."

The Contracting Parties should be allowed making reservations to the suggested article.

Alternatively, one might ponder inviting the Committee of Ministers to issue a Recommendation to the Member States and/or the PC-OC to adopt the Guidelines on consular legal assistance in criminal matters.

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