

BOSNIA AND HERZEGOVINA
REPUBLIKA SRPSKA
Judicial and prosecutorial training center team

INTERNATIONAL COOPERATION IN CRIMINAL MATTERS
(Practical approach to certain issues which are not regulated by
law and international treaties)

INTERNATIONAL COOPERATION IN CRIMINAL MATTERS	1
(Practical approach to certain issues which are not regulated by law and international treaties).....	1
I Introduction	2
II Specificity of procedures of international legal assistance in criminal matters	4
1. Concept, scope and importance of international legal assistance in criminal matters for Bosnia and Herzegovina	4
2. Legal framework for international cooperation in criminal matters.....	5
3. Standards and rules which are not into legal norms but have a binding character	9
4. Economy and efficiency through the choice of forms and ways of providing legal aid.....	10
5. The role of Ministry of Justice of Bosnia and Herzegovina in procedures of providing a legal aid.....	12
III – Review of essential solutions according to the Law on international assistance in criminal matters	15
1. Implementation and new solutions permitted by law	15
2. The importance of implementation of the international treaty	15

I Introduction

International legal assistance by its nature is an action of the state body upon request for legal assistance of the other state, as set forth by the international agreement concluded between these states.

Legal assistance can be provided on the basis of reciprocity if it is not prohibited by the law of the state requested.

Complexity of communication between the two states' bodies can be explained by the fact that each sovereign state regulates criminal law protection by its own interests at its own territory.

How it works? We will illustrate through the example of delivering summons to a witness who lives out of the state where criminal procedure is conducted. In this case, the requested state has to deliver a written explanation of the purpose of summoning, providing details on the criminal procedure, details of the accused and details about the criminal offence.

Besides the facts above mentioned, the summons need to be issued in the proper form and must not contain any threat for the witness in case of his/her failure to appear before the court. On the other hand, the summons should contain specification of rights guaranteed to him/her by the requested state.

The above mentioned example illustrates only certain specifics of international cooperation in criminal matters through the simplest act of legal assistance.

International cooperation in criminal matters is realized through relation between two or more states where one state which needs legal assistance is the requesting state and the other state which receives request for legal assistance is the state requested.

Thus, the requesting state submits request on behalf of its bodies, and each state establishes a special body for communication about the matters of international cooperation.

The central communication state body should be specified in any international treaty related to international cooperation.

Each state can change the central communication body, which depends on the state authority and its regulation.

Once the central communication state body has been changed, it is not necessary to modify the international treaty, but this fact should be announced by a diplomatic note.

II Specificity of procedures of international legal assistance in criminal matters

1. Concept, scope and importance of international legal assistance in criminal matters for Bosnia and Herzegovina

There are numerous factors and specificities in Bosnia and Herzegovina which determine the level and scope of providing as well as requesting international legal assistance in criminal matters.

Namely, about 18 years ago when the former Yugoslavia disintegrated, a huge migration process started. There was migration between the newly established countries (ex Yugoslav republics), as well as to the so called third countries. Among the immigrants, there were many persons who had committed some criminal offences as well as witnesses of those offences. So, Bosnia and Herzegovina as well as other ex Yugoslav republics needed international cooperation in criminal matters in order to conduct and finish all crime procedures where the suspect / accused or witnesses or other evidence were not available to domestic judiciary.

Further important reasons, which might determine the scope of the international cooperation in criminal matters, are loose state borders, dual citizenships and improvement of technology. Due to the fact that no crime, especially no organized crime, is limited by the state border, it is more than clear that fight against organized crime would be successful if the states cooperated well.

2. Legal framework for international cooperation in criminal matters

International legal assistance in criminal matters includes: all actions of the authorized body of the foreign country undertaken upon the request of the domestic authorized body and vice versa, procedures of extradition, transfer of the convicted persons, transfer of the criminal procedure from one country to another and other procedures established by special International Conventions and treaties.

By accession of BiH to the European Conventions in the criminal law area (extradition, transfer of the convicted persons, transfer of the criminal proceedings and international legal assistance in criminal matters), the procedure of providing the international legal assistance has been significantly improved and simplified.

By the Succession Agreement, Bosnia and Herzegovina has assumed all International Agreements in this field which were obligatory for the former SFR Yugoslavia, which means that all international treaties related to international cooperation in criminal matters that the former Yugoslavia had signed, became a part of the BiH legal system. Besides the above mentioned, BiH as sovereign state joined many European and international conventions that are related to international cooperation in criminal matters and concluded bilateral treaties with other countries established after the disintegration of Yugoslavia.

Bosnia and Herzegovina took a step further by adopting the Law on International Assistance in Criminal Matters (hereinafter: the Law)¹.

The Law has high importance in terms of specifying the procedure of communication for domestic authorities and bodies which we find very important especially for those who write the letters rogatory and have to bear in mind that the language of the letter should be appropriate.

Before adoption of the Law, the process of providing international legal assistance in criminal matters was not sufficiently regulated by the

¹ Official Gazette BiH, No 53/09 in effect since July 15th 2009

Criminal Procedure Code of either BiH or its entities (Republika Srpska and Federation BiH). The CPCs contained only general provisions related to certain aspects of providing this type of legal aid.

In recent practice of providing international legal assistance in criminal matters, domestic authorities and bodies had problems related to interpretation and implementation of some provisions of the laws regulating this matter.

The provision concerning implementation of the Law in case that particular question is not regulated in a different way by the treaties, existed even in the previous laws and, despite that fact, there were cases where some domestic bodies returned letters rogatory to international bodies advising them that the letter rogatory should be resolved in accordance with BiH Law.

Bearing in mind all the above mentioned as well as the fact that BiH adopted the Law on International Cooperation in Criminal Matters, we could say that this subject matter is completely regulated.

3. Relation between the BiH Law on International Assistance in Criminal Matters and international treaties

The BiH Law on mutual international assistance in criminal matters stipulates the way in which the handling authorities in Bosnia and Herzegovina should act in the case of seeking the necessary assistance, as well as in cases of providing the required assistance. As the provision of Article 1 Paragraph 1 stipulates that the Law would be applicable only in cases when certain actions are not otherwise stipulated by international treaties, at the very beginning there was a dilemma in how to apply the Law.

There is the same dilemma: Was there need to adopt the Law if we had international treaties according to which the international legal assistance was provided, and was the procedure for international legal assistance stipulated by the CPC sufficient?

We stressed the above mentioned dilemmas with the aim to highlight the importance of the Law, in particular the provisions of Article 1 Paragraph 1.

Namely, Bosnia and Herzegovina undertakes a number of multilateral and bilateral treaties in the field of providing international legal assistance in criminal matters, and interpretation of this provision could indicate that domestic state bodies act differently upon the letters rogatory of different countries.

Nevertheless, that is not the case, because the treaties are generally standardized by standards which are incorporated in the law and only in certain matters; there are specifics about what must be taken into account. For instance, by the treaty signed between BiH and Austria, the matter of language is resolved in a way that no attachments to the letter rogatory should be translated.

Although the Criminal Procedure Code contains a provision which stipulates that the law would be applicable only if there are no international treaties, the state bodies often ignored this provision in the past and there were cases in which letter rogatory returned to Austria with explanation that Austria should translate the documentation into one of the BiH languages.

The Austrian authorities reacted sharply to this way of communication, referring to the concluded agreement.

On the contrary, the Law will always apply to the countries with which there is no signed treaty, so on the basis of reciprocity they may provide all forms of international legal aid except in cases which are prohibited by the law.

Inappropriate forms of international legal assistance are specifically mentioned in the law. For example, in the procedure of the enforcement of foreign court judgments in criminal matters, Article 62 of the Law stipulates that the domestic court will act upon the request of the state of

sentencing court for enforcement of judgments in criminal matters only when it is provided by international treaty.

Therefore, foreign court judgments in criminal matters can in no case be enforced in Bosnia and Herzegovina if there is no international treaty concluded between Bosnia and Herzegovina and the requesting state.

Nevertheless, the country which has been denied legal aid for enforcement of judgments in criminal matters could be provided other forms of international legal assistance, and even allow extradition of a foreigner because this procedure is not conditioned by the existence of a treaty.

The question is why attach great importance to the law, if there is a treaty between two or more states as grounds for action in the proceedings of providing international legal assistance in criminal matters.

This question can be answered only after careful analysis of any international agreement in this field. Namely, the treaty between the countries regulates the rule of procedure between those countries. The procedure inside a country and act of bodies within a country are prescribed by domestic legislation.

The Criminal Procedure Code in subject matter was incomplete. The CPC did not contain any provisions that prescribe contents of letter rogatory, precise way of communication with foreign countries or way of covering the costs of providing international legal assistance, or clearly define authority and costs bearing, especially in cases of extradition and transfer of sentenced persons. These and many other issues in this subject matter were first settled by a special law which should eliminate many of the current uncertainties.

3. Standards and rules which are not into legal norms but have a binding character

Conventions that are regulating diplomatic relations between countries prescribe polite language in communication between the bodies of two states. So, the same way of communication is obligatory in terms of providing international legal assistance.

Therefore, the state requested does not accept orders, threats etc., but wants to be asked politely to provide appropriate assistance required. This method of communication is primarily required for the bodies that perform communication through diplomatic channels, as well as the central communication state body in the steps of providing international legal assistance, but it must be used also by other bodies that seek and provide this assistance.

In the proceedings of providing international legal assistance for any country, the central communication state body is usually the ministry of justice. In a complex federal system, that organ is usually the federal or state ministry of justice. Written communication between these bodies, through which letters rogatory for international legal assistance are forwarded, always starts with diplomatic language. For example, in the case of Germany, the letter starts: "The Ministry of Justice of the Federal Republic of Germany expressed respect for the Ministry of Justice of Bosnia and Herzegovina and has the honor to ask you ..." Also, in the end of that kind of letter the country will again express appreciation.

There are certain standards in the procedures of providing international legal assistance that are not defined by international treaties. In practice, the fact is that some state will not help another if the latter did not respond in proper time to its letter rogatory for international legal assistance.

In one case, which was forwarded to the Federal Republic of Germany through the Ministry of Justice of Bosnia and Herzegovina,

Germany responded that the letter rogatory was received, but reminded that Germany had delivered three letters rogatory to Bosnia and Herzegovina earlier and got no answer, and as a consequence reasonable time for acting had elapsed. This paper is prepared in diplomatic vocabulary, but it essentially means that the state will not act on the letters rogatory until Bosnia and Herzegovina acts on its letters rogatory. So, that kind of act could be the reason for the failure or untimely acting of foreign bodies.

4. Economy and efficiency through the choice of forms and ways of providing legal aid

There are lots of examples where the courts call witnesses abroad, and even in overseas countries, without thinking if it is possible for these witnesses to be heard in other way, without their appearance before the court. At the same time, the court does not take into account the level of costs of arrival of these witnesses before the court.

In one such case, the court in Bosnia and Herzegovina called two witnesses from the United States. If those witnesses had appeared and asked for costs of appearance, the costs would have jeopardized court budget. Namely, these invited witnesses would be entitled to claim all costs related to their appearance (plane tickets, residence costs, compensation for lost profit etc)

While summoning, the court should advise them on the above mentioned rights, without any threat of force bringing or punishment in case of non appearance. Thus, the invited witnesses cannot be punished if they do not respond to the summons of the court.

The above illustrated situation could have been avoided if the court used international legal assistance asking the country of witnesses' residence to hold a hearing.

In letter rogatory for international legal assistance, the court should list all relevant questions which the witness should answer. In more complex cases, the hearing could be done e.g. via video link.

This is just an example which shows how the countries need to make appropriate choice while requesting legal assistance from another country.

Of course, the method must always provide that this principle will not affect the determination of the true facts.

Some courts often require that the letter rogatory for international legal assistance which is sent to another country be forwarded through diplomatic channels even though the international treaty specifies that the communication should be done through the central communication state body.

With the requirement for use of diplomatic channels, which is not excluded by treaty, it would last much longer. That means that the Ministry of Justice of Bosnia and Herzegovina will forward this letter rogatory to the Ministry of Foreign Affairs of Bosnia Herzegovina, which will then forward it via the Embassy or in some other way. The Embassy will forward the letter to the Ministry of Foreign Affairs of the requested state. The Ministry of Foreign Affairs of the requested state will then forward the letter to the Ministry of Justice of its country, which will act the same way as if the letter rogatory was sent to it directly from the BiH Ministry of Justice.

This example shows that the diplomatic channel is too complicated and unnecessary.

There are more efficient ways of communication between two state bodies, such as direct communication, when stipulated by international treaty, but they should take into account whether the requested state in the case of multilateral treaty made a reservation to the provision that specifies the way of communication.

For example, Croatia has made a reservation to certain provisions of the Second Additional Protocol to the European Convention on Legal Assistance in Criminal Matters which excludes the possibility of direct communication between its judicial authorities with other countries under this Protocol, although general provisions allow such a possibility. Thus, for this way of communication, besides knowing substantive law, there is a need to have information on these issues.

5. The role of Ministry of Justice of Bosnia and Herzegovina in procedures of providing a legal aid

As mentioned in the introductory part, the country makes decision about the authority in charge of communication with other countries when the main point is to provide the international legal aid.

According to the Law on International Legal Aid in Criminal Matters and all international treaties that Bosnia and Herzegovina concluded with other countries related to providing international legal aid, the Ministry of Bosnia and Herzegovina has been appointed the authority of communication, the so called Central Communication Body for international legal aid.

This means that all the communication between the Bosnia and Herzegovina judiciary and foreign countries shall be handled by the Ministry of Justice, except in cases where the Law or international treaties stipulate otherwise.

Domestic judiciary often send their letter rogatory to the Ministry of Justice of Bosnia and Herzegovina, asking them to forward it by a diplomatic channel to the authorities of the other foreign country instead of communicating through the central communication body according to the treaty concluded with that country.

In this case, despite the request of the court, the Ministry of Justice is in charge to decide whether the letter rogatory will be forwarded

through diplomatic channels or through the Ministry as the Central Communication Body, if stipulated by the treaty concluded with subject country.

This implies that the Ministry of Justice of Bosnia and Herzegovina will forward the received letter rogatory to the Ministry of Justice of the state requested, instead of forwarding it to the Ministry of Foreign Affairs of Bosnia and Herzegovina, to avoid the procedure of diplomatic way.

The diplomatic way of communication was prescribed neither by the Law nor by international treaties which regulate the subject of providing legal aid, but only mentioned as an optional way of communication.

While submitting a letter rogatory, the domestic legal body does not need to determine the way of communication, but only to demand forwarding of the letter rogatory to the authority of the other country. Depending on the urgency, the Ministry of Justice would make the decision about the most efficient way, according to the international treaty.

Foreign courts often send letter rogatory for enforcement of foreign judicial decision together with the order entitled to the court in charge in Bosnia and Herzegovina.

Of course, the court would reject that kind of demand, because there is a certain process for recognition and enforcement of the foreign judicial decision in criminal matters, so the Ministry of Justice should return that letter rogatory to the requesting state advising it about the most efficient way of receiving legal aid. The same goes for the letters rogatory without translation if that is stipulated in the international treaty.

Even though there is no provision for the Ministry of Justice which stipulates the procedure of returning the letter rogatory to the domestic legal authority in case where it is obvious that the foreign authority would not act on such letter rogatory, the Ministry of Justice can return the letter rogatory indicating the reasons for returning, and giving instructions if necessary.

This kind of control is very important, because the letter rogatory of domestic legal authority with shortcomings and not based on the international treaty cannot reach the authority of the state requested.

If the Ministry of Justice of Bosnia and Herzegovina does not return it to the domestic authority it will be certainly returned by the Ministry of Justice of the state requested which will send a protest note to Bosnia and Herzegovina.

In this way, the reputation of the requesting state would be preserved, and authority that did not react properly would be able to ask for legal aid in a proper way.

It is important to stress that the BiH Ministry of Justice has a very active policy to conclude new treaties with countries with which these issues are not settled. So, they have completed negotiations for the conclusion of contracts with India and Algeria, and their conclusion is expected in the future.

Certain countries, like Canada and Australia, have shown no willingness to conclude treaties in this field, so Canada refused the request for extradition of a Bosnia and Herzegovina citizen convicted of murder, explaining that there is no international agreement between these two countries, which would oblige Canada to do so. This was an additional reason for BiH to propose Canada conclusion of appropriate agreements in this field, but there has been no response from Canada yet.

Unlike Canada, Australia has proposed to Bosnia and Herzegovina to establish a factual reciprocity in extradition procedures and BiH responded positively. Moreover, BiH emphasized the need for regulation of cooperation in criminal matters through signing of treaties. However, the Australian side has not given any feed back.

Thus, the problems in these proceedings will remain, because the sovereignty of each state, among other things, includes its own ability to create, regulate and organize the criminal law to protect its own interests.

III – Review of essential solutions according to the Law on international assistance in criminal matters

1. Implementation and new solutions permitted by law

The Law on International Assistance in Criminal Matters that entered into force on July 15th, 2009, has already given important results aimed at encouragement of this kind of legal aid. Before adoption of this Law, legal aid in Bosnia and Herzegovina was provided on the basis of the Criminal Procedure Code in Bosnia and Herzegovina and entity Criminal Procedure Codes which did not regulate this matter sufficiently.

This Law, for the first time, stipulates the whole procedure of international assistance in criminal matters.

Unlike previous laws that did not contain provisions about some of the expenses caused by providing legal assistance, such as transfer expenses for persons from abroad or expenses in the procedures of recognition of foreign courts' decisions and extraditions, the new Law has solved all these issues.

2. The importance of implementation of the international treaty

There are some issues which can be stipulated by the international treaty in a way different from that prescribed by the Law.

For example, the matter of language and translations of letter rogatory into the language of the state requested or some other language can always be a subject of the international treaty. In this way, the communication between Bosnia and Herzegovina and the Republic of India has been established in English.

Unlike the above mentioned, the Law stipulates issues related to the procedure of extradition from Bosnia and Herzegovina to another country,

where the court of Bosnia and Herzegovina always decides about the conditions of the foreign citizen's extradition, while the Minister of Justice of Bosnia and Herzegovina makes the decision on the foreign citizen's extradition.

In the first case, it will be checked if the international treaty exists, and if so, which language will be the language of communication.

In another case, it should be checked if there is the international treaty or reciprocity with the state requested, in order to make decision about other conditions for extradition, and if they exist, the procedure permitted by the law will be applied.