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## Treaty between the Republic of Kazakhstan and the United States of America on mutual legal assistance in criminal matters: problems and perspectives

**Abstract.** *The formation of an international legal framework in the field of combating crime through the conclusion of bilateral agreements with the authorities of foreign states is a priority activity of law enforcement agencies of the Republic of Kazakhstan in the fight against crime.*

*Signing of the Treaty between the Republic of Kazakhstan and the United States of America on mutual legal assistance is a logical continuation of the work of the Prosecutor General's Office of the Republic of Kazakhstan to expand international cooperation in combating international crime.*

*In this article, the authors tried to consider in detail the procedural and legal norms of the signed Treaty, because since almost six years have passed since its ratification, and the parties have not demonstrated any serious achievements of interaction based on this document.*

*This article also highlights some historical and factual aspects of the formation and development of international legal cooperation of Kazakhstan and its strategy of interaction with the competent authorities of foreign states in the XXI century.*

**Keywords:** *MLAT, contract, legal assistance, international legal cooperation, international crime, transnational organized crime, stolen asset recovery, international law, memorandum of understanding, Federal Bureau of Investigation, Constitution of the Republic of Kazakhstan, Amendment to the United States Constitution.*

DOI: <https://doi.org/10.32523/2616-6844-2022-141-4-34-47>

### Introduction

Interstate treaties on mutual legal assistance in criminal matters are the foundation of legal interaction between law enforcement agencies of

different states to combat transnational types of crime in the 21st century.

The Republic of Kazakhstan, as a young state, takes all possible measures to establish close cooperation with foreign counter-partners

not only in the field of international economy, politics, and other spheres, but also deep legal relations based on the fundamental principles of international law, the fulfillment of legal obligations assumed.

The objects of this article are the subjects of international law - the Republic of Kazakhstan and the United States of America and their interaction.

The subject of the article is the legal relations between the Republic of Kazakhstan and the United States of America on mutual legal assistance in criminal matters, existing problems, and results.

The purpose of the article is an attempt to conduct a comprehensive analysis of the main norms of the ratified treaty, to identify its problematic areas and possible prospects, as well as to prepare proposals for improving such international treaties, especially in the light of the events of modern Kazakhstan, where the problem of stolen assets recovery from abroad is a fundamental component of the new Kazakhstan.

### Research methods

In the course of writing this article, there were used both materials from open sources and data from state databases, speeches and interviews of respected statesmen, historical facts, and fundamental documents of both states.

### Discussion

The Treaty between the Republic of Kazakhstan and the United States of America on mutual legal assistance in criminal matters was signed by the both Parties on February 20, 2015 in Washington, DC.

In accordance with Article 20, the Treaty had to enter into force upon the exchange of instruments of ratification.<sup>1</sup> The Republic of Kazakhstan ratified the Treaty on July 16, 2015 by the Law №331-V. The United States of America ratified the Treaty on November 14, 2016.

<sup>1</sup> Treaty between the Republic of Kazakhstan and the United States of America on mutual legal assistance in criminal matters, art. 20.

According to the Constitution of the Republic of Kazakhstan, international agreements ratified by the Republic have primacy over its laws.<sup>2</sup>

The Treaty has been made possible due to close interstate cooperation on the highest level and has gained the concrete traits at the dawn of the 25<sup>th</sup> anniversary of the Independence of the Republic of Kazakhstan. The most important historical and legal aspect of this document is the fact that the Republic of Kazakhstan became the first state in the Central Asia region with which the United States has signed such an agreement.<sup>3</sup>

The adoption by the both state's of such an important procedural document must be based on the deep understanding that an effective combat against international crime can be carried out only with the active interaction of the competent authorities on both sides, through cooperation and mutual legal assistance in criminal matters.

In accordance with the provisions of this Treaty, the Parties shall provide mutual assistance in connection with the investigation, prosecution and prevention of criminal offenses, and in proceedings related to criminal matters.<sup>4</sup>

Despite the specific framework established by the Treaty, it functions within much broader perspectives through which the Parties will be able to communicate effectively in order to achieve common goals. The possibility of a wide scope of maneuverability has been provided by sub-clause «h», section 3 of the Article 1 of the Treaty, which stipulates that legal assistance shall include any other form of assistance not prohibited by the laws of the Requested State.<sup>5</sup>

Along with this, the latitude scope of the application of norms is characterized by section 4 of Article 1 of the Treaty, which explicitly stipulates that, except when required by the laws of the Requested State, assistance shall be provided without regard to whether the conduct that is the subject of the investigation,

<sup>2</sup> Republic of Kazakhstan [Constitution] art. 4, sec. 3, available at [http://www.akorda.kz/en/official\\_documents/constitution\(KZ\)](http://www.akorda.kz/en/official_documents/constitution(KZ)).

<sup>3</sup> Bruce C. Swartz, Deputy Assistant Attorney General and DOJ Counselor for International Affairs, interview, available at <https://www.youtube.com/watch?v=iJQ6Q5p73Es>.

<sup>4</sup> Treaty between the Republic of Kazakhstan and the United States of America on mutual legal assistance in criminal matters, art.1.

<sup>5</sup> Id. art.1, sec.3, cl.«h».

prosecution, or proceeding in the territory of the Requesting State would constitute an offense under the laws of the Requested State.<sup>6</sup>

In addition, the seriousness of the intentions of close cooperation between the central authorities approved by the norm of the Article 17 of the Treaty, which states: "This Treaty is not intended to be the sole mechanism for the Parties to provide assistance to each other. A Party may also provide assistance to the other Party through any other available means, including, but not limited to, applicable bilateral and multilateral agreements, the provisions of its own laws, and other arrangements or practices. No request under this Treaty shall be required when one Party wishes to share information or evidence spontaneously with the other Party."<sup>7</sup>

According to the information of the Department of International Cooperation of the Prosecutor General's Office, since 2015, 33 requests for legal assistance have been received from the United States to Kazakhstan, of which 7 are requests from the FBI. At the same time, the Prosecutor General's Office of Kazakhstan has sent 40 requests to the United States for legal assistance in criminal cases.

In accordance with the bilateral agreement, since 2021, international investigative orders are sent to the official e-mail of the US Department of Justice. During the entire period of interaction, there were no problematic issues regarding the execution of requests. Of course, the Treaty on legal assistance signed in 2015 between Kazakhstan and United States gave law enforcement agencies a new impetus in combating crime. Constructive dialogue allows them to improve the ways of interaction. As a result of the 2020 meetings, there was reached an agreement on the direct exchange of information via electronic communication channels, which significantly speeds up the process of sending requests for legal assistance and receiving responses to them.

Despite the absence of bilateral agreements on the extradition and transfer of convicts, Kazakhstan extradited Trent Howard (wanted for crimes related to the possession and distribution

<sup>6</sup> Id. art.1, sec.4.

<sup>7</sup> Id. art.17.

of child pornography) to the United States in 2020 and Leonardo Diaz (convicted in Kazakhstan for drug trafficking to 18 years in prison) in 2018.

In turn, in 2017, the American side extradited T. Nauruzbayev to Kazakhstan by deportation (he was wanted for committing fraud on a particularly large scale).

Due to the effective interaction of the Prosecutor General's Office of Kazakhstan with the DHS's Immigration and Customs Enforcement and the Federal Bureau of Investigation of the U.S., T. Nauruzbayev was denied immigration status in the United States, he was deported to Kazakhstan, where he was taken into custody by law enforcement agencies.

Unfortunately, a number of wanted persons who have committed serious crimes while living in the United States remain inaccessible to Kazakh law enforcement agencies to this day.

In general, it should be noted that the Parties mutually expect concrete results from this Treaty. At the same time, it must be assumed that the viability and effectiveness of this Treaty will be severely tested by modern challenges facing both states as the stolen assets recovery.

Thus, only a comprehensive consideration of all above issues will ensure the completeness and objectivity of the issues related to the Treaty between the Republic of Kazakhstan and the United States of America on mutual legal assistance in criminal matters.

The United States was the first country to recognize Kazakhstan's independence and establish diplomatic relations in December 1991.<sup>8</sup> During the quarter of a century, bilateral cooperation is intensifying in almost all spheres and relationship between the two countries has been firmly established at the level of strategic partnership.<sup>9</sup>

First ten years after independence, the relationship between Kazakhstan and the United States have developed intensively, but most of

<sup>8</sup> U.S. Department of State, U.S. Relations With Kazakhstan, Bureau of South and Central Asian Affairs, Fact Sheet, Feb.2016, available at <http://www.state.gov/r/pa/ei/bgn/5487.htm>

<sup>9</sup> Kairat Umarov, Kazakhstan-U.S. Strategic Partnership on the Rise, The Astana Times, March, 2014, available at <http://astanatimes.com/2014/03/kazakhstan-u-s-strategic-partnership-rise/>

the development were in the economic sphere, especially in the fuel and energy complex. Basically, this strategy on the part of Kazakhstan was made because of collapse of the former Soviet Union and with it the collapse of the country's economy. The young state urgently needed the money to ensure the macro-economic and social stability, payment of wages, pensions, benefits and vital needs of the government. And in this situation, the only true solution was investment money that came from the United States in the fuel and energy sector, together with Chevron company.

However, despite the current positive diplomatic and investment relations between the two countries, there was a serious imbalance, and it is associated with belated contractual relations in joint struggle against criminality. The first steps in this direction were taken only on November 17, 2009 in Astana city, where the Memorandum of understanding between the General Prosecutor's Office of the Republic of Kazakhstan and the Federal Bureau of Investigation, United States Department of Justice was signed. Eventually, in connection with the understanding of both parties, that only through the joint efforts it will be possible to achieve significant results in combating against criminality, the basic principles have been reflected in the second section, of the mentioned memorandum, which clearly stated that: "In order to enhance mutual cooperation and to deal with current issues connected with legal relationships in the field of criminal law, the Participants intend to provide each other with investigative assistance, primarily in the spheres of transnational organized crime fighting and money laundering."<sup>10</sup>

The Treaty has its own mission, detailed in its basic norms, which shall undoubtedly be used by both parties as efficiently as possible, not only for the investigation and for prosecution, but mainly for the prevention of criminal offenses that may arise in future.

Considering the nature of the Treaty between the Republic of Kazakhstan and the United States

of America on mutual legal assistance in criminal matters, first of all, it is necessary to give a legal definition of notion «legal assistance» and specify its role in the system of international treaties entered into by and between the countries of the world. Thus, in accordance with the established international legal practice, legal assistance in criminal matters is understood to mean procedural actions taken by law enforcement agencies based on requests of competent authorities of foreign states both under provisions of specific treaties, and under the principle of reciprocity.

Pursuant to paragraph 21 of Article 7 of the Criminal Procedure Code of the Republic of Kazakhstan, legal assistance is defined as «conduct by competent authorities of one State under request (instruction, petition) of competent authorities of another State or international judicial institutions of procedural actions necessary for pre-trial investigations, judicial proceedings or execution of judicial acts».<sup>11</sup> In view of a distinctive significance of legal assistance in interstate relations, the Criminal Procedure Code of the Republic of Kazakhstan regulates it in separate Chapter 59 «Legal assistance», which (Articles 565 - 578) sets out the basic requirements to such legal relations of States.

In the United States, this issue is regulated by «The Criminal Resource Manual §276, which in detail outlines the procedural and other acts of authorized agencies on these issues».<sup>12</sup>

Speaking of the role of legal assistance in international relations, it is important to pay special attention to the fact that, in general, rendering legal assistance in criminal matters includes international treaties of States, among which the following types of treaties can be distinguished, as: interstate, intergovernmental and inter-agency ones. In this connection, looking ahead it should be noted that the Treaty between the Republic of Kazakhstan and the United States of America on Mutual Legal Assistance in Criminal Matters is more an inter-agency type, since it was signed between the

<sup>10</sup> Memorandum of Understanding Between the General Prosecutor's Office of the Republic of Kazakhstan and the Federal Bureau of Investigation, U.S. Department of Justice, Nov. 2009.

<sup>11</sup> The Criminal Procedure Code of the Republic of Kazakhstan

<sup>12</sup> David Marshall Nissman, *Proving Federal Crime*, Ch.5.03 (2005)

General Prosecutor's Offices of the Republic of Kazakhstan and the United States.

In order to ensure the completeness and quality of the research under review, each type of the above-mentioned treaties should be considered separately, since they all play a very important role in international relations in various fields.

So, interstate treaties are the most widespread in the contemporary international law. According to the established practice, they may be classified on the one hand as international crimes conventions, and on the other hand as treaties on legal assistance in criminal and civil cases.

Speaking of conventions, it is critical to note that the cooperation of States in combating international crimes is regulated mainly by multilateral agreements (conventions), either of which covers a particular type of crime. They usually provide for such items as: statutory definition of elements of a crime; a participating State's obligation to enshrine (implement) a convention's principle in its national legislation; and obligations of participating States to extend their jurisdiction over relevant crimes. To date, approximately twenty such conventions, including: the Inter-American Convention on Mutual Assistance in Criminal Matters 1992; the Convention for the Suppression of Unlawful Seizure of Aircraft 1970; the Inter-American Convention on Serving Criminal Punishment Abroad 1993; the Convention against the Taking of Hostages, 1979; the Inter-American Convention on Extradition 1933 and others. Many of them have already been joined by the Republic of Kazakhstan for the years of independence; however, as terrorism and other crimes assume international and global nature, the work in this course should be continued.

Along with conventions, a key role in international law is played by treaties on legal assistance in criminal and civil cases. It should be emphasized that to date some of the treaties ceased to have effect for some objective reasons, in particular, treaties with the German Democratic Republic and Yugoslavia. In both cases, termination of treaties was associated with the dissolution of these States as subjects of international law. In addition, it is important

to indicate that the legal assistance in criminal matters is not stipulated by all legal assistance treaties, some of them provide for assistance only in civil cases.

In addition, along with interstate treaties, intergovernmental treaties are also instrumental in the system of international relations. They tend to focus primarily on bilateral agreements to combat certain types of crimes of international character. These types of crimes most often include illegal transactions with drugs, illicit trafficking in cultural values of historical significance, smuggling, violation of tax laws and others. Speaking of the role of intergovernmental treaties, it is worth noting the positive trend of interaction between Kazakhstan and the United States in this field. For example, in recent years, Kazakhstan has managed to make significant progress in the development of international cooperation in the anti-drug field, including with the United States active support. Therefore, over the past years, the government of Kazakhstan jointly with foreign partners took a number of successive steps towards establishing effective drug control. As a result, the Decree of the President of the Republic of Kazakhstan approved the drug abuse and drug trafficking strategy in Kazakhstan. This strategy is designed to pursue a unified and balanced state policy, which allows establishing effective public and social control over the drug situation in the country, achieving its stabilization and reduction of the negative impact on the health and welfare of the nation. The Strategy is basically focused on strengthening the inter-state cooperation to fight international drug trafficking, improving the efficiency of drug prevention, treatment and rehabilitation of drug addicts. As part of this challenge, Kazakhstan has ratified three principal United Nations Conventions in the anti-drug field, the country has been implementing a long-term gradual strategy to combat drug abuse and drug trafficking, headed by the Special Commission established under the government of Kazakhstan.

Addressing the issues of intergovernmental treaties in the field of drug trafficking control, a special role of the United States in resolving such issues should be emphasized. So, in 2002

, a memorandum was signed between the Government of the Republic of Kazakhstan and the Government of the United States of America in the field of drug control and law enforcement. The purpose of the memorandum was the United States government's provision of assistance to Kazakhstan's law enforcement agencies in the amount of \$530 thousand, which as grants and machinery supplies were allocated to strengthen the operations of law enforcement agencies and special services of the country, combating the threat of drug trafficking and drug business.<sup>13</sup> Following the results of the joint fight against drug-related crimes, in 2005 an Additional Protocol to the Memorandum was signed, for which the US allocated additional assistance of \$1,01 million.<sup>14</sup> Due to these intergovernmental treaties, today Kazakhstan's regulatory and legal framework allows to effectively monitor the legal distribution of narcotic drugs, psychotropic substances and prevent their transition into the illegal trade. These large-scale projects made it possible to introduce significant changes into the criminal legislation of Kazakhstan, which prescribed stiffened penalties up to life imprisonment for drug smuggling and trafficking, and involvement of minors in drug trafficking.<sup>15</sup>

Together with above-mentioned two types of international treaties, an important role is played by inter-agency treaties as well. In fact, this particular type of treaties is the subject of this study, where the author has taken measures to give a legal evaluation of the provisions of the Treaty between the Republic of Kazakhstan and the United States of America on Mutual Legal Assistance in Criminal Matters. So, according to the prevailing international practice, in the preparation of inter-agency treaties on mutual

legal assistance, parties primarily determine central authorities for intercommunication. This issue has been regulated in Article 2 of the Treaty, which states that «Each Party shall designate a Central Authority to make and receive requests pursuant to this Treaty, to determine whether and how the request should be executed and to execute the request or refer it to other competent authorities for execution»<sup>16</sup>

As per Paragraph 2 of this Article, «For the Republic of Kazakhstan, the Central Authority shall be the Prosecutor General's Office. For the United States of America, the Central Authority shall be the Attorney General or a person designated by the Attorney General».<sup>17</sup> Since the Treaty on Mutual Legal Assistance in Criminal Matters between Kazakhstan and the United States has already been signed, «the Central Authorities shall transmit requests and communicate directly with one another for the purposes of this Treaty.»<sup>18</sup> In other words, in the absence of such a treaty between states, they would interact on the principle of reciprocity, through diplomatic channels.

In accordance with paragraph 1 of Article 4 of the Treaty, «a request for assistance, and related communications, shall be in writing and bear the signature of an official of the Central Authority of the Requesting State.»<sup>19</sup> This provision of the Treaty regulates the procedure for submitting requests, as in the case of their non-compliance, the central authority of the Requested State may refuse to provide assistance. At the same time, the efficiency of international legal assistance is becoming increasingly important in the modern world, where almost all available technical means of acceptance and transmission of requests are used. This aspect is regulated by the same provision of the same Article 4, which explicitly states that «A request may be made by expedited means of communications, including facsimile or electronic mail, with the original request to

<sup>13</sup> Caravan newspaper, Dec.13, 2002, available at: <http://news.caravan.kz/news/podpisan-memorandum-o-vzaimoponimani-mezhdu-pravitelstvami-rk-i-ssha-v-oblasti-kontrolya-nad-narkotikami-i-obespecheniya-pravoporyadka-newsID163379.html>

<sup>14</sup> Resolution of the Government of the Republic of Kazakhstan, July 7, 2005 № 701

<sup>15</sup> The Criminal Code of the Republic of Kazakhstan, Art. 299. «Declination to consumption of narcotics, psychotropic substances, their analogues».

<sup>16</sup> Treaty between the Republic of Kazakhstan and the United States of America on mutual legal assistance in criminal matters, art. 2.

<sup>17</sup> Id. art.2. cl.2.

<sup>18</sup> Id. art.2. cl.3.

<sup>19</sup> Id. art.4. cl.1.

follow if required by the Central Authority of the Requested State. In very urgent situations, the Central Authority of the Requested State may accept a request other than in a written form. In any such urgent case, the request shall be confirmed in writing within ten (10) days thereafter unless the Central Authority of the Requested State agrees otherwise»<sup>20</sup>

The gained experience of cooperation between Kazakhstan's and the United States' law enforcement agencies in gathering evidences in criminal cases made it possible to define the basic legal and organizational requirements for the preparation and provision of legal assistance requests, which attained clear frames in this Treaty. However, it is necessary to bear in mind that in the preparation of requests for legal assistance in criminal matters, Parties should make a preliminary planning on them. The need for planning is determined by the complexity of this field of activity, a large amount of preparatory work, and the fact that requests shall contain specific data for investigative and procedural actions. Before such requests are processed and sent to a law enforcement authority of the requested Party, their list, execution order and range of issues for resolution should be defined in detail by preliminary investigation agencies.

Thus, pursuant to Article 4 of the Treaty, in the course of interaction of Kazakhstan's and the United States' central authorities, a legal assistance request shall contain the following basic points:

- a) "the name of the authority conducting the investigation, prosecution, or proceeding to which the request relates;
- b) a description of the subject matter and nature of the investigation, prosecution, or proceeding, including a statement of the facts and how they constitute the specific criminal offenses on which the request is based, and the applicable penalties;
- c) a description of the evidence, information, or other assistance sought; and
- d) a statement of the purpose for which the evidence, information, or other assistance is sought."<sup>21</sup>

<sup>20</sup> Id. art.4. cl.1.

<sup>21</sup> Id. art.4. cl.2.

In this case, it is important to note that the same article of the Treaty also regulates additional aspects according to which, to the extent necessary and possible, a request may contain:

- a) "information on the identity and location of any person from whom evidence is sought;
- b) information on the identity and location of a person to be served, that person's relationship to the proceedings, and the manner in which service is to be made;
- c) information on the identity and possible whereabouts of a person to be located;
- d) a precise description of the place or person to be searched and of the articles to be seized;
- e) a description of the manner in which any testimony or statement is to be taken and recorded;
- f) a description of any particular procedure to be followed in executing the request;
- g) a list of questions to be asked of a witness;
- h) information as to the allowances and expenses to which a person asked to appear outside the Requested State will be entitled; and
- i) any other information that may be brought to the attention of the Requested State to facilitate the execution of the request."<sup>22</sup>

Now it is difficult to say for sure to that extent this list shall meet the expectations of the Parties. However, pursuant to Article 19 of the Treaty, this list can be expanded or reduced as a result of bilateral negotiations, by mutual written agreement of the Parties.

In addition, this version of the Treaty already contains essential details to which preliminary investigation authorities, prior to sending any request, should pay special attention. In this case referring to a frequent use in Article 4 of the Treaty of the words «any» and "other", which can be interpreted by law enforcement agencies in different ways. Consideration must be given to the fact, that in the first instance we speak about constitutional rights of persons in respect of whom such requests shall be sent. In this case, all actions of prosecution agencies should be performed strictly within the national

<sup>22</sup> Id. art.4. cl.2.

legislation and international law, while respecting fundamental rights of persons involved in the orbit of a legal assistance request.

At the same time, the detailed regulation of the content of requests in this Treaty is determined by the need to obtain from abroad all necessary data (evidence) for circumstances, subject to be proven in a criminal case. Therefore, prior to sending a relevant request abroad, law enforcement authorities of the requesting party should thoroughly carry out preliminary investigations and operational search activities aimed at obtaining specific data on such evidence.

Failure to comply with the above list, predetermines that requests to be sent abroad, do not comprise the exact list and scope of investigation and procedural actions to address issues of interests for the preliminary investigation, that entails provision of the requesting party with materials that do not actually have a significant evidential value in the investigation of a criminal case.

Therefore, a legal assistance request shall include as much information and data on evidence findings as necessary and sufficient for its execution. This provision is crucial, because any lack of information provided to the requested party, could result in a delay or even non-execution of a filed request, in full or in part, or entail a poor quality execution. Despite the fact that this issue is regulated by paragraph 4 of Article 4 of the Treaty, provision of additional information necessary for the execution of a request shall require additional efforts, time and money. Consequently, such a scenario could negatively affect the quality of a criminal case under investigation and create other related procedural obstacles.

Since Article 4 is a «core» of the Treaty under review, it requires additional attention to its major aspects. For example, alongside with above, attention should be paid to the fact that Article 4 of the Treaty has not covered the form and content of requests in respect of legal entities related to the request matters. In this case, it means to legal entities' names, locations (headquarters), information on their places of registration, their foreign branches, bank

accounts and financial transactions. Since the whole essence of the Treaty directly involves the fundamental issues that are directly related to constitutional rights of people in respect of which such requests are filed, one of its most important provisions is subparagraph «f» of paragraph 3 of Article 1 of the Treaty, which allows Parties to conduct searches and seizures. This issue shall be considered with extreme caution when filing relevant requests. From the perspective of the protection of constitutional rights of persons, the Parties shall comply with all regulations stipulated by the legislation, especially when it comes to conduct of searches and seizures, as it is this aspect is directly regulated by the Constitutions of both Kazakhstan and the United States.

So, pursuant to paragraph 1 of Article 25 of the Constitution of the Republic of Kazakhstan, «Housing shall be inviolable. Deprivation of housing shall not be permitted unless otherwise stipulated by a court decision. Penetration into housing, its inspection and search shall be permitted only in cases and according to the procedure stipulated by law.»<sup>23</sup> Furthermore, this provision is also regulated by Chapter 31 «Search and seizure» of the Criminal Procedure Code of the Republic of Kazakhstan. Pursuant to paragraphs of Article 252 «Search» of the Code, «Search shall be made for the purpose of detection and seizure of items or documents relevant to the case, including detection of property to be seized.»<sup>24</sup> «The basis for a search shall be the existence of sufficient evidence to believe that specified items or documents may be in a particular premise or other place, or with a particular person.»<sup>25</sup> At the same time, Article 253 «Seizure» of the Code states clearly that «Seizure shall be made for the purpose to withdraw certain items and documents relevant to a case, and if it is known exactly where and with whom they are kept, and property to be seized.»<sup>26</sup>

The Fourth Amendment to the United

<sup>23</sup> Republic of Kazakhstan [Constitution] art. 25, sec. 1, available [https://www.akorda.kz/ru/official\\_documents/constitution](https://www.akorda.kz/ru/official_documents/constitution).

<sup>24</sup> The Criminal Code of the Republic of Kazakhstan, Art. 252.

<sup>25</sup> Id. art.252.

<sup>26</sup> Id. art.253.



States Constitution is part of the Bill of Rights, which protects the rights of citizens against unreasonable searches and seizures. It says: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."<sup>27</sup>

According to this Amendment, searches and detentions (including seizure) should be limited to the purposes set out in a court order. Such an order may be issued only on the basis of a written testimony under oath, as a rule, of a police officer. We well know from the history, that James Madison proposed the Fourth Amendment in 1789, which prohibits unreasonable searches and seizures, and requires any search warrants to be issued by the court only and supported by probable cause. We also know, that the Amendment was adopted as a response to the abuse of so-called "writ of assistance", a kind of a search warrant, which was issued by the Government of the British Empire. According to the historical sources, these «writs» allowed a government representative to search any premises and any person in pursuance of objectives described in the warrant only in general terms for example, «to prevent the smuggling» or «to prevent the commission of crimes». In such cases, searching persons did not bear any responsibility for damages caused during searches, and could delegate any search to others. The worst thing in this case was that such a writs were of indefinite duration and could be canceled only six months after the death of a monarch, during the reign of whom it was issued. It is worth mentioning, such unreasonable searches had become one of the causes to trigger the American Revolution in the history. Thanks to the wisdom and fidelity of the founders of American democracy and statehood, to their principles, on March 1, 1792 the United States Secretary of State Thomas Jefferson declared the Amendment had been adopted and had become a part of the United States Constitution.

<sup>27</sup> U.S. Const. amend. IV

Considering the peculiarities of the Treaty between the Republic of Kazakhstan and the United States on mutual legal assistance in criminal matters, the exceptional role of the Fourth Amendment to the United States Constitution in the modern United States law enforcement operation system should be mentioned. A very important aspect is the fact that, since the second half of the XX century, American courts have come to recognize that the Fourth Amendment protects the whole person's right to privacy, and not only his/her physical integrity. Although over the years, American constitutionalists have elaborated exceptions to the rules for the need for order, as in cases of voluntary consent to a search; a search of a vehicle; a search of a public place; a search at the border; and the presence of exceptional circumstances, evidences received in violation of the Fourth Amendment cannot serve as evidence in courts. A brief overview of the history of the United States Fourth Amendment was not made by chance, because we need not only remember about it, but also to take into account and to apply when performing the procedural actions of the law enforcement agencies of the both states.

Within the framework of cooperation of the prosecution authorities of Kazakhstan and the United States, it is necessary to pay attention to aspects that limit the provision of legal assistance. Thus, in accordance with Article 3 of the Treaty, requests should be strictly within the framework of general crime, that is, they should not apply to the military type of crime.<sup>28</sup> At the same time, the restriction on assisting installed by the clause «b» of Article 3 of the Treaty, under which the request would prejudice the sovereignty, security, public order or other essential interests of the Requested State, they are subject to failure in execution.<sup>29</sup> In fact, this provision is essential for both parties, however, it is hardly possible argued that highly qualified lawyers of the Parties shall submit requests, deliberately violating the above-mentioned fundamental rights of the sovereign state.

<sup>28</sup> Treaty between the Republic of Kazakhstan and the United States of America on mutual legal assistance in criminal matters, art. 3.

<sup>29</sup> Id. art.3, cl. "b".

Although there are quite a lot of the basis for denial of the request execution, including for non-compliance with the provisions of the Treaty requests, Article 2 provides for the norm at which the decision to refuse assistance on the basis of aforementioned points, central authorities shall consult with each other on these issues.<sup>30</sup> Obviously, all these provisions of the Treaty are primarily aimed to ensure that the Parties could cooperate fully within the legal framework, while respecting both the internal law of the State and international law. Also, in this case, it is fair enough that the reservation, in which the Parties undertake to assistance in such conditions that the Requested State deems necessary, if there is a real threat of refusing to execute the request.<sup>31</sup>

Continuing review of the provisions of Article 3 of the Treaty, it is important to draw attention to paragraph 3 of Article 3, which according to the author's opinion is no less important in the preparation of an international investigative request. Although this clause's requirement directly corresponds with the Criminal Procedure Code of the State, in view of their importance, they were further reflected in this bilateral Treaty. In this case, we are talking about those kinds of crimes, that are punishable by less than one year of imprisonment in the Requesting State, or involves an offense that does not give rise to a significant material loss.<sup>32</sup> Speaking of about these things, it should be noted, that these requirements has its own rationality. So, paying attention to the crimes that are punishable by less than one year of imprisonment in the Requesting State, we can immediately understand that in this case we are talking about minor offenses that do not represent a great danger to the public.

The Article 5 of the Treaty also plays a very important role in the performance of requests. According to its regulations, "The Central Authority of the Requested State shall promptly execute the request or, when appropriate, shall transmit it to the authority having jurisdiction to do so."<sup>33</sup> In this article, there are two key words:

«immediately» and «jurisdiction». In this case, they are both very significant. Although the Treaty does not set a specific timeframe requests performance, it is important to keep in mind that during the interaction of the law enforcement agencies, Parties should be directed to each other intermediate information letters «on the receipt / transmitted» request with a summary of accepted decisions on them. These measures will help to monitor the fate of the directed request and, if necessary, use the response in the proceedings, such as for example, the extension of investigation of criminal cases.

Another key word «jurisdiction» also has a direct bearing on the execution of the request. So, since the crimes are divided by types, each corresponding to a law enforcement agency considers them within their competence. Thus, the Central authorities after the decision on the request according to the norms of the Treaty must immediately send them for execution to the competent authorities of their States. For example, in Kazakhstan, general criminal nature of the crimes involved in the Ministry of Internal Affairs of the Republic of Kazakhstan, and crimes related to money laundering, along with the National Security Committee of the country, the Financial Monitoring Agency is also involved.

In the United States, like the distribution of competences between the law enforcement authorities also exist and operate on the same principle, strictly in accordance with their jurisdictions.

At the same time, in accordance with paragraph 1 of Article 5 of the Treaty, "The competent authorities of the Requested State shall do everything in their power to execute the request."<sup>34</sup> However, in this case, the prosecuting authorities of the Parties, as the Central organ of interaction must monitor and supervise the timely and quality execution of the request.

In general, the essence of the Article 5 of the Treaty leaves the General Prosecutor's Office both States broad legal framework for effective cooperation and maneuverability in the event of any complications.

<sup>30</sup> Id. art.2.

<sup>31</sup> Id. art.3, cl.2.

<sup>32</sup> Id. art.3, cl.3.

<sup>33</sup> Id. art.5, cl.1.

<sup>34</sup> Id. art.5, cl.1.

The Article 6 of the Treaty relating to the financial costs should not be considered in detail in the framework of this article, as both States have provided for these purposes the appropriate financial resources. In the event of any unforeseen circumstances, the Parties are determined to address them through appropriate consultation, as provided herein.

Another important norm of the Treaty is Article 7, «Limitations on Use» in which there are aspects of the use of information or evidence obtained during the execution of the request. In this case, in view of the importance of information, “The Central Authority of the Requested State may request that the Requesting State not use any information or evidence obtained under this Treaty in any investigation, prosecution, or proceeding other than that described in the request without the prior consent of the Central Authority of the Requested State.”<sup>35</sup> These standards have been incorporated in this article because of the potential negative impact of this information on the progress of the investigation or any other significant moments for the criminal case. In addition, this article provides that “The Central Authority of the Requested State may request that information or evidence furnished under this Treaty be kept confidential or be used only subject to terms and conditions it may specify.”<sup>36</sup> In this case, we are talking about the confidentiality of information, illegal or improper use of which can significantly affect the objects and subjects of the investigation.

Along with the above, great importance in the Treaty plays an Article 8, which enshrines procedural norms of testimony or evidence in the Requested State. The most important side of this article is that during the execution of the request, law enforcement authorities should pay particular attention to the presence of immunity or privileges for persons who are required to testify.<sup>37</sup> In addition, it should be noted that the evidence obtained on the territory of the requesting State pursuant to this Article, and

authenticated by Form “A” shall be admissible in evidence in the Requesting State.<sup>38</sup>

In general, other articles of the Treaty are also important in this or that sphere, but many of them are standard requirements imposed on law enforcement authorities, practicing international legal assistance in criminal matters. Therefore, their significance in this article will not be considered in detail. Although, it should be noted, that most bilateral treaties in this sphere, somehow duplicate basic norms, however in spite of this, in practice, we often meet these same requirements are implementing in different ways. Nevertheless, Kazakhstan and the United States prosecuting authorities should take in the framework of this Treaty, all measures aimed to protecting the fundamental rights of the people equally, without any discriminations.

## **Results**

In the Republic of Kazakhstan, the central authority for interaction with foreign States in matters of extradition of wanted persons, providing legal assistance in criminal cases, as well as the transfer of convicted persons, is the Prosecutor General’s Office. Therefore, the Kazakh side is constantly working to expand the international legal framework in the field of combating crime through the conclusion of multilateral and bilateral agreements.

Moving from the analysis of the norms of the treaty between Kazakhstan and the United States to the global legal results of Kazakhstan as a whole, it is important to note that Kazakhstan has become a full participant in almost all the fundamental unified conventions in the field of combating crime, ensuring law and order, as well as protecting the fundamental rights of citizens. Among them are 26 United Nations conventions on combating various types of crime; 6 conventions of the Commonwealth of Independent States; 3 inter-American conventions in the field of criminal justice.

As for bilateral agreements, today Kazakhstan has 69 such international agreements with 33

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<sup>35</sup> Id. art.7, cl.1.

<sup>36</sup> Id. art.7, cl.2.

<sup>37</sup> Id. art.8, cl.4.

<sup>38</sup> Id. art.8, cl.4.

non-CIS countries. Among them are such major world powers as the USA, China, India, Brazil, Saudi Arabia.

As for cooperation with European countries, Kazakhstan now has 32 agreements with 14 European countries, including Spain, Italy, Hungary, Romania, Bulgaria, Serbia, Macedonia, Czech Republic, Great Britain, Monaco, and others.

Considering that funds obtained illegally are withdrawn from one country and millions are cashed in another, cybercrime, international terrorism and drug trafficking infect an increasing number of countries, Kazakhstan, for its part, is deeply convinced that it is possible to put an effective barrier to transnational crime and ensure international security only by combining the efforts of Kazakhstan and the European Union, so as Kazakhstan and the United States did by signing and then ratifying the mutual legal assistance Treaty.

### Conclusion

Summarizing up, it should be noted that Kazakhstan, as a relatively young country continues to diversify and get involved in the international community in various ways. However, all the main areas of integration also remain decisions based on legal and contractual relationship with the competent authorities of foreign states.

Speaking about the merits of the Treaty between the Republic of Kazakhstan and the United States of America on mutual legal assistance in criminal

matters, it should be also noted, that the legal quality of the Treaty in general, deserves respect. However, as it was noted earlier, the Treaty has already entered into force, but unfortunately there is no any precedents of cooperation under this Treaty stated by both sides in mass-media. Extensive experience in providing legal assistance as the law enforcement agencies of Kazakhstan and the United States leads to the conclusion that any serious difficulties should not be arise in the foreseeable future.

The role of the Treaty in interstate relations has a truly historic significance. It strengthens legal relations of Kazakhstan and the United States as equal partners, sharing common objectives in the fight against crime, which unfortunately are increasingly becoming international.

It is obvious that this Treaty will improve over the time by the Parties through changes and amendments, as provided in Article 19. However, again, it must be borne in mind that any possible changes or additions must not violate the fundamental rights of the people involved in the orbit of this Treaty.

In general, there is no doubt, that the further research of the role of the Treaty should be continued, especially after the execution of specific requests that will reveal the strengths and weaknesses its nature.

In conclusion, we would mention that this Treaty brings together not only two very different legal systems of Kazakhstan and the United States in the single document, but also incorporates essentially two different states, located on different continents.

### References

1. Treaty between the Republic of Kazakhstan and the United States of America on mutual legal assistance in criminal matters, article 20. Available at: <https://www.state.gov/wp-content/uploads/2019/02/16-1206-Kazakhstan-Law-Enforcmt - MLAT.pdf> (accessed 08.11.2022).
2. Constitution of the Republic of Kazakhstan article 4, section 3. Available at: [https://www.akorda.kz/en/official\\_documents/constitution](https://www.akorda.kz/en/official_documents/constitution) (accessed 08.11.2022)
3. Bruce C. Swartz, Deputy Assistant Attorney General and DOJ Counselor for International Affairs, interview, available at <https://www.youtube.com/watch?v=ijQ6Q5p73Es> (accessed 08.11.2022)
4. Treaty between the Republic of Kazakhstan and the United States of America on mutual legal assistance in criminal matters.

5. U.S. Department of State, U.S. Relations With Kazakhstan, Bureau of South and Central Asian Affairs, Fact Sheet, July 28, 2022, available at: <http://www.state.gov/r/pa/ei/bgn/5487.htm> (accessed 08.11.2022)
6. Kairat Umarov, Kazakhstan-U.S. Strategic Partnership on the Rise, The Astana Times, March, 2014, available at: <http://astanatimes.com/2014/03/kazakhstan-u-s-strategic-partnership-rise/> (accessed 08.11.2022)
7. Memorandum of Understanding Between the General Prosecutor's Office of the Republic of Kazakhstan and the Federal Bureau of Investigation, U.S. Department of Justice, Nov. 2009 available at: [https://www.kt.kz/eng/international\\_affair/state\\_office\\_of\\_public\\_prosecutor\\_of\\_kazakhstan\\_and\\_fbi\\_signed\\_memorandum\\_of\\_mutual\\_understanding\\_1153503337.html](https://www.kt.kz/eng/international_affair/state_office_of_public_prosecutor_of_kazakhstan_and_fbi_signed_memorandum_of_mutual_understanding_1153503337.html) (accessed 08.11.2022)
8. Ugolovniy Kodeks Respubliki Kazakhstan [The Criminal Procedure Code of the Republic of Kazakhstan] available at: <https://adilet.zan.kz/rus/docs/K1400000226> (accessed 08.11.2022)
9. David Marshall Nissman, Proving Federal Crime, Ch.5.03 (2005)
10. Ugolovniy Processualniy Kodeks Respubliki Kazakhstan [The Criminal Procedure Code of the Republic of Kazakhstan] available at: <https://adilet.zan.kz/rus/docs/K1400000231> (accessed 08.11.2022)
11. Caravan newspaper, podpisan memorandum o vzaimoponimaniy mezhdu pravitelstvami RK i SSHA v oblasti kontrolya nad narkotikami i obespecheniya pravoporyadka [A memorandum of understanding was signed between the Governments of RK and USA in the field of drug control and law enforcement] available at: <http://news.caravan.kz/news/podpisan-memorandum-o-vzaimoponimaniy-mezhdu-pravitelstvami-rk-i-ssha-v-oblasti-kontrolya-nad-narkotikami-i-obespecheniya-pravoporyadka-newsID163379.html> (accessed 08.11.2022)
12. Constitution of the United States available at: <https://constitution.congress.gov/constitution/amendment-4/>

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**Договор между Республикой Казахстан и Соединенными Штатами Америки  
о взаимной правовой помощи по уголовным делам: проблемы и перспективы**

**Аннотация.** Формирование международно-правовой базы в области борьбы с преступностью путем заключения двусторонних соглашений с компетентными органами иностранных государств является приоритетным направлением деятельности правоохранительных органов Республики Казахстан в борьбе с преступностью.

Подписание Договора между Республикой Казахстан и Соединенными Штатами Америки о взаимной правовой помощи является логическим продолжением работы Генеральной прокуратуры Республики Казахстан по расширению международного сотрудничества в вопросах противодействия международной преступности.

В данной статье авторы попытались подробно рассмотреть процедурные и правовые нормы подписанного Договора, поскольку с момента его ратификации прошло почти шесть лет, а стороны так и не продемонстрировали каких-либо серьезных достижений взаимодействия, основанных на данном документе.

В работе также освещаются некоторые исторические и фактические аспекты становления и развития международно-правового сотрудничества Казахстана и его стратегии взаимодействия с компетентными органами иностранных государств в XXI веке.

**Ключевые слова:** МСП, договор, правовая помощь, международное правовое сотрудничество, международная преступность, транснациональная организованная преступность, возвращение похищенных активов, международное право, меморандум о взаимопонимании, Федеральное бюро расследований, Конституция Республики Казахстан, Поправка к Конституции Соединенных Штатов.

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**Қазақстан Республикасы мен Америка Құрама Штаттары арасындағы қылмыстық істер бойынша өзара құқықтық көмек туралы шарт: мәселелер мен перспективалар**

**Аңдатпа.** Шет мемлекеттердің құзыретті органдарымен екіжақты келісімдер жасасу арқылы қылмысқа қарсы күрес саласында халықаралық-құқықтық базаны қалыптастыру Қазақстан Республикасы құқық қорғау органдарының қылмысқа қарсы күрестегі қызметінің басым бағыты болып табылады.

Қазақстан Республикасы мен Америка Құрама Штаттары арасындағы өзара құқықтық көмек туралы шартқа қол қою Қазақстан Республикасы Бас прокуратурасының Халықаралық қылмысқа қарсы іс-қимыл мәселелеріндегі халықаралық ынтымақтастықты кеңейту жөніндегі жұмысының қисынды жалғасы болып табылады.

Бұл мақалада авторлар қол қойылған шарттың процедуралық және құқықтық нормаларын егжей-тегжейлі қарастыруға тырысты, себебі шарт ратификацияланғаннан бері алты жылға жуық уақыт өтсе де, тараптар осы құжатқа негізделген өзара әрекеттесудің маңызды жетістіктерін көрсете алмады.

Мақалада Қазақстанның халықаралық-құқықтық ынтымақтастығының қалыптасуы мен дамуының кейбір тарихи және нақты аспектілері, оның ХХІ ғасырдағы шет мемлекеттердің құзыретті органдарымен өзара іс-қимыл стратегиясы баяндалады.

**Кілт сөздер:** шарт, құқықтық көмек, халықаралық құқықтық ынтымақтастық, халықаралық қылмыс, трансұлттық ұйымдасқан қылмыс, ұрланған активтерді қайтару, халықаралық құқық, өзара түсіністік туралы меморандум, Федералдық Тергеу Бюросы, Қазақстан Республикасының Конституциясы, Америка Құрама Штаттарының Конституциясына түзету.

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