Chapter 3
Overcoming legal challenges in mutual legal assistance and extradition

Laws on extradition and mutual legal assistance can appear obscure to non-specialists. Many prerequisites for cooperation derive from legal concepts that are unique to these two fields of law. Practitioners who are unfamiliar with these concepts may therefore have difficulties meeting the legal requirements for cooperation. In fact, there are many practical ways of overcoming these difficulties.

Despite differences in legal systems, many countries face similar legal obstacles in the MLA and extradition process. During the seminar, participants heard the following describe the situation in their home countries: Umar Saifuddin bin Jaafar, Senior Federal Counsel, International Affairs Division, Attorney General's Chambers, Malaysia; and Jean-Bernard Schmid, Investigating Magistrate, Financial Section, Geneva, Switzerland. These presentations identified some common problems among different countries, such as difficulties in meeting intricate procedural requirements in extradition and MLA legislation.

One frequent obstacle is the requirement of dual criminality. As Kimberly Prost, Chief, Legal Advisory Section, Treaty and Legal Affairs Branch, UNODC, pointed out, this issue could be particularly thorny in cases involving illicit, unjust enrichment or bribery of foreign public officials, since this is not an offense *per se* in many countries. The experts at the seminar agreed that the key to overcoming problems with dual criminality is to remember that the concept is conduct-based. In other words, the question is whether the conduct underlying a request is a

crime in the requesting and requested states, and not whether the conduct amounts to the same offense in both states. If the requested state does not have the same offense, then practitioners should try to "fit" the conduct into a different offense in the requested state.

There was lively debate among the participants over the denial of cooperation for political offenses and political persecution. Experts like Charles A. Caruso, Regional Anti-Corruption Advisor, American Bar Association/Asia Law Initiative, predicted that the issue would arise in extradition and MLA in corruption cases. At the same time, there were widely diverging views on what constitutes political offenses and persecution. Participants clearly rejected the exception for cases in which proceeds of corruption are used to fund a political party that is being persecuted by a government. Much less clear was whether cooperation can be justifiably denied if a requesting state prosecutes former government officials who belong to a rival political party that is no longer in power. Some participants believed that this is a valid basis for denying cooperation. Others opined that a political motivation for committing or prosecuting a crime should not obscure the fact that a crime has been committed. In the end, the participants and experts reached no consensus on this issue.

On the other hand, all the experts and participants agreed that communication is the most important factor in resolving legal obstacles in extradition and MLA. Experts like Bernard Rabatel, French Liaison Magistrate in the United Kingdom, emphasized that legal obstacles often do not result from differences between the legal systems of the countries involved, but from a failure to appreciate those differences. Direct dialogue between the requesting and requested states, whether formal or informal, can eliminate many of these misunderstandings. Bilateral discussions could also sometimes allow a requesting state to narrow its request and hence avoid allegations that it is on a "fishing expedition." Some participants suggested that international organizations and initiatives (such as the ADB/OECD Initiative or the UNODC) consider setting up an Internet database of national legislation and requirements for cooperation.

The participants and experts also held the view that policy makers can take steps to reduce legal obstacles in extradition and MLA. Tan Huanmin, Director, Department of Laws and Regulations, Ministry of Supervision, P.R. China, emphasized the importance of countries not only signing treaties but also providing flexible and pragmatic non-treaty-based alternatives and engaging in multilateral discussions for cooperation. The participants noted as well that most international

conventions and treaties (including the OECD Convention on Combating Bribery of Foreign Public Officials, and the UNCAC) require signatories to afford one another the widest measure of mutual legal assistance possible. In this spirit, legal technicalities and requirements should be reduced to a minimum. More efforts should be made to train prosecutors and judges in MLA and extradition, since their unfamiliarity with these relatively obscure areas of law often leads to protracted proceedings. Countries should consider harmonizing their schemes for extradition and MLA to reduce misunderstandings over differences in legal systems. The use of standardized processes, forms, and language for making and executing requests can also greatly improve efficiency and lower costs.

Practical solutions to legal obstacles in mutual legal assistance

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The legal challenges that may arise in MLA are, for the most part, similar to those that arise in extradition. However, such challenges are generally less frequent and easier to overcome in MLA than in extradition. The following are some of the more common legal challenges that may arise in MLA and some suggestions for dealing with them.

Legal Basis for Assistance

Before MLA can be provided, it must generally have a legal basis. Different bases for assistance include:

- Bilateral treaties
- Multilateral conventions, including general MLA conventions (e.g., MLA Convention involving the ASEAN countries or the Council of Europe Conventions) or crime-specific ones (e.g., the UN Convention against Corruption [UNCAC])
- Schemes or arrangements like the Harare Scheme for Commonwealth countries
- National law, with or without a requirement for reciprocity

When determining whether there is a legal basis for seeking MLA, practitioners should think broadly in terms of applicable instruments. Many practitioners focus only on bilateral treaties when other avenues are available. If reciprocity is required, practitioners should check whether there is already reciprocity, e.g., because the country whose assistance is sought has given a promise of reciprocity in an earlier case. Ultimately, even when there is no apparent legal basis for cooperation, practitioners should still ask the foreign state for assistance. The foreign state could well be amenable to the request.

Dual Criminality

The concept of dual criminality is far more pervasive in extradition, while its applicability varies greatly in MLA. Some countries do not require dual criminality to provide MLA. Others may require it only for coercive measures or search and seizure. There are also countries that consider the absence of dual criminality as a discretionary ground for refusing MLA, while for others it is a mandatory prerequisite.

Given this myriad of approaches, practitioners who seek MLA should anticipate the problem when preparing a request for assistance. They ought to find out whether and to what extent the requested state requires dual criminality.

If a requested state does require dual criminality, practitioners should keep in mind that the test is whether the conduct giving rise to the investigation is criminal in both states, not whether the conduct is punishable as the same offense in the two states. This is particularly important when the offense underlying an MLA request in the requesting state is less common, such as unjust or illicit enrichment. If the requested state does not have the same offense, then practitioners need to be creative in trying to "fit" the conduct into a different offense in the requested state. When doing so, they should note that corrupt conduct can fit into a number of offenses in almost all countries. Many such offenses are also covered by the UNCAC, as follows:

- Bribery of National Public Officials (art. 15)
- Active Bribery of Foreign Public Officials (art. 16)
- Passive Bribery of Foreign Public Officials (art. 16)
- Embezzlement, Misappropriation, and Other Diversion of Property (art. 17)
- Trading in Influence (art. 18)
- Abuse of Function (art. 19)
- Illicit Enrichment (art. 20)
- Bribery in Private Sector (art. 21)
- Embezzlement in Private Sector (art. 22)
- Money Laundering (art. 23)
- Concealment (art. 24)
- Obstruction of Justice (art. 25)

Therefore, practitioners should bear in mind the law of the requested state when drafting a request.

Another important feature of the dual criminality test is that it is generally conduct-based. In other words, the question is whether the conduct giving rise to the investigation is criminal in both states. Hence, the request for assistance should include details of relevant conduct, such as the names of individuals and places. Even more important, the request should describe the details of all of the conduct in the case. In other words, the request should include not only the conduct that constitutes the elements of the offense in the requesting state. It should also include any additional conduct that may constitute an offense in the requested state, bearing in mind that this offense could be different from the one in the requesting state.

Grounds for Refusal

The grounds for denying MLA are largely similar to those in extradition, with perhaps the exception of the general grounds of sovereignty, security, *ordre public* and essential interests.

General Ground of Sovereignty, Security, Law and Order, and Essential Interests

This ground of refusal is not particularly common, except perhaps for national security. Practitioners will often know in advance the cases that may trigger these grounds. When such cases arise, the requesting and requested states should consult each other to strike an appropriate balance between international cooperation and the protection of national interests.

Fiscal Offenses and Bank Secrecy

MLA in corruption cases often involves making bank documents available. Some countries may deny MLA because the information sought falls under bank secrecy regulations. Treaties and legislation in many countries may also allow refusal of MLA because the offense underlying an MLA request involves fiscal matters. In practice, this ground is now rarely invoked.

When faced with a denial of assistance because of fiscal offenses and bank secrecy, practitioners should look at the provisions of a relevant treaty. Some treaties (e.g., art. 46[8] and art. 46[22] of the UNCAC) now prohibit the refusal of assistance on these grounds. Practitioners should also look at the legislation of the requested state to ascertain whether the state's claim of bank secrecy is justified.

Capital Punishment

Many countries may deny MLA if the death penalty could be imposed by the requesting state in the case. The principle is harder to apply to a request for MLA than to one for extradition, because the request for MLA often occurs at an early stage in a case, when it may be difficult to say with certainty whether the death penalty may be imposed. Practitioners faced with this problem may wish to consider whether the death penalty is in fact applicable to the case. If the death penalty is a discretionary ground for denying assistance, then the requesting and requested states should consult each other to resolve the issue.

Extraterritoriality and *Non Bis in Idem (Double Jeopardy)*

There may be special restrictions for MLA in cases where the underlying offense occurs outside the territory of the requesting state. Under some treaties and legislation, MLA may be granted only if the laws of the requested state provide for the punishment of the same offense committed outside its territory. If these principles are applied reasonably, then international cooperation should not be unduly restricted.

MLA may also be denied because of the principle of *non bis in idem* (double jeopardy). There are numerous variations of this principle from one treaty to another. For example, some treaties look at whether a person has been punished for the crime in the requesting and/or requested states, while others may also consider whether the person has been punished in a third state. Different treaties also use different language: some ask whether the person has been punished, while others look at whether the person has been tried, acquitted, or convicted. Hence, if double jeopardy might be an issue, practitioners should closely examine the language of the relevant treaty and legislation.

Another approach to dealing with the problem of double jeopardy is to examine whether there are facts that support a different offense. The comments above concerning dual criminality are also applicable here: corrupt conduct may be caught by different offenses, and, hence, practitioners may need to be creative in trying to “fit” the conduct into a different offense. For instance, if a person has been convicted of laundering a bribe, the principle of double jeopardy arguably does not bar further proceedings against that person for accepting the same bribe, since bribe taking and money laundering are separate and distinct delicts.

Political Offenses, Offenses of a Political Character, and Persecution

Denial of MLA for a political offense or an offense of a political character poses a great challenge in corruption cases. The definition of a political offense is not always clear. Hence, some countries could conceivably argue that this ground applies to the prosecution of a former public official who belongs to a rival political party that is no longer in power.

To address this concern, some instruments such as the UNCAC (e.g., art. 44[4]) state that corruption offenses cannot be political offenses. If the relevant instrument has no such provision, then emphasis should be placed on the facts and evidence. In other words, a claim that an offense is of a political character must be founded on sufficient evidence. As with other grounds for denying assistance, the requesting and requested states must consult each other.

Many countries may also deny assistance on the grounds that the request for assistance was made to prosecute or punish a person on account of his or her sex, race, religion, nationality, ethnic origin, or political opinions. As with political offenses, MLA should not be denied because of a mere allegation of persecution. The claim ought to be supported by adequate evidence.

Differences in Evidentiary Procedures

Different legal systems may call for different procedures to gather the same type of evidence. This can create problems. For example, a requesting state may fail to include sufficient evidence in the request for assistance because the state requires less evidence to obtain the particular investigative measure than the requested state. Another problem could arise when the laws of the requesting state require the evidence to be gathered according to certain procedures. The requested state might not follow these procedures when executing the request, either because its laws do not impose the same requirements or because its laws prohibit such procedures. As a result, the evidence gathered by the requested state may be inadmissible at trial in the requesting state.

To prevent these problems, a requested state must not assume that a requesting state has the same procedures for gathering evidence. It must ascertain and meet the requirements of the requesting state. Requesting states must also clearly explain in the request for assistance any unique procedural requirements that must be met.

Requested states must bear in mind that evidence inadmissible in the requesting state is equivalent to no evidence at all. They should make efforts to follow the instructions for gathering evidence that are provided by the requesting state, unless it is illegal under their domestic law to do so. Flexibility and creativity are key. A requested state must try to interpret its own legal requirements flexibly so as to accommodate the requesting state as much as possible.

Challenges and Appeals

Depending on the relevant laws, the MLA process could be subject to challenges at various stages of the process, such as when the request is sent, when the request is executed, or when the evidence is transmitted. Court orders could be subject to appeal at several levels. There may also be objections when the evidence is gathered, e.g., a witness may refuse to answer a question on the basis of a claim of privilege or immunity. Of course, the requesting and requested states cannot prevent an individual from exercising his or her legal right to challenge the MLA process. Nevertheless, both states should anticipate challenges whenever possible. Cooperation between the states can also sometimes shorten the process.

Legal challenges in mutual legal assistance

Bernard Rabatel
French Liaison Magistrate in the United Kingdom

Investigating judges and prosecutors need evidence to bring alleged offenders to trial. Fifty years ago, they could rely in most cases on evidence obtained locally or nationally. Nowadays, crimes (including corruption) are increasingly complex. Criminals are more sophisticated and employ teams of highly qualified lawyers. Moreover, a large part of the evidence in these complex cases has to be imported from foreign countries. Criminal procedure law has become more and more an evidence-consuming process. Without MLA, this process will break down.

Unfortunately, there are technical and legal obstacles that often prevent the MLA process from working smoothly. Even if these legal hurdles are not as numerous in MLA as they are in extradition, they nonetheless exist. The following are some of the most common legal obstacles and some practical solutions for dealing with them.

Rule of Reciprocity in the Absence of an MLA Treaty

To obtain evidence, judges and prosecutors must rely on the goodwill of foreign states even in the presence of international obligations stated in treaties and agreements. However, if there is no MLA agreement between the two states, then the result may be what economists call a barter economy: reciprocity. In other words, if state A requires evidence from state B, then state A must also give state B evidence that the latter wants in a different investigation.

Reciprocity in MLA differs from a barter economy in at least one respect. In such an economy, the swapping of one thing for another happens simultaneously. However, the exchange of evidence rarely occurs at the same time. Reciprocity is usually only a promise to return the favor in the future, and this is why reciprocity is often unsatisfactory. It is more desirable to rely on bilateral or multilateral agreements.

However, the absence of a treaty is increasingly insufficient to justify, in and of itself, a state's refusal to cooperate. Several states have even removed reciprocity as a prerequisite for providing assistance, though this statement is sometimes viewed with skepticism.

Importance of Communication

Even between countries that have signed and ratified MLA instruments, legal issues often inhibit the rendering of assistance. At first glance, these legal obstacles are often the result of differences in the legal systems of the requesting and requested states. Worse, these problems can even lead to "self-censorship," i.e., when a requesting state decides not to ask for assistance because it perceives the legal obstacles in the requested state to be insurmountable.

In fact, the greater problem often is not differences in legal systems, but misunderstandings about those differences. In many instances, differences in systems can be overcome if both states make a concerted effort to carefully and fully explain the niceties of their laws to each other. Equally important, states should make inquiries about the other country's legal systems whenever there is a doubt.

In addition to legal requirements, it is also important to communicate one's expectations about the timing of a request. Investigating judges and prosecutors frequently denounce significant delays in international cooperation. These delays undermine their mission: "Time and tide wait for no man." It may therefore be advisable to write on the top of the letter of request the same warning that one finds on perishable goods: "Best before…"

Channels of Communication

Older MLA instruments often require communication through the diplomatic channel, which is notoriously slow. More recent ones often allow communication between central authorities, which are usually located in a ministry of justice or prosecutor's office. This approach tends to reduce but not necessarily eliminate delays.

There are institutional measures for reducing delays. For example, some practitioners have suggested that embassies create special procedures for urgent cases or designate legal officers to specialize in handling MLA requests. However, these institutional measures are beyond the powers of prosecutors and investigators to implement.

On the other hand, there are more practical solutions for practitioners. Many MLA schemes now allow urgent requests to be transmitted outside the diplomatic channel, followed by written confirmation through the usual channels. Even when this avenue is not available, some practitioners suggest seeking permission to send an informal copy of the request to the authorities in the requested state

that will execute the request. This would allow the executing authorities to begin preparations immediately, e.g., by drafting documents to apply for a search warrant or asking a bank to begin assembling the documents it must produce. When the formal request arrives through the diplomatic channel, the request could then be executed without further delay.

Legal Challenges Concerning the Offense

Dual criminality is one of the most common legal issues concerning the offense that underlies an MLA request. Fortunately, dual criminality is not as great an obstacle in MLA as in extradition. The absence of dual criminality should not prevent non-coercive forms of assistance, but it may preclude measures such as a search of premises, or the restraint or forfeiture of proceeds of crime. The issue could also arise when the investigation in the requesting state is based on extraterritorial jurisdiction.

For this reason, it is important to describe the underlying crime very clearly, so that the foreign authorities can identify a similar offense in its own legal system. For example, the French offense of *abus de biens sociaux*, or the misuse of company property, needs to be explained in a manner that allows the foreign authorities to determine whether the conduct amounts to breach of trust or embezzlement in their jurisdiction. A clear description of the criminal conduct also has the advantage of preventing misunderstandings about the rule of "*Non bis in idem*" (double jeopardy).

Bank Secrecy

Bank secrecy has always been perceived negatively, and many states hesitate to refuse MLA solely for this reason. Moreover, multilateral conventions (e.g., section 46 of the UNCAC) strongly advise states against refusing MLA because of bank secrecy.

At the same time, some states will decline to execute a request in a corruption case because they cannot identify the account of the individual who received the bribe. Unlike France, several other states do not have a national database of bank accounts.

To prevent a rejection on the ground of bank secrecy, the requesting authority should try to obtain as much information as possible concerning a bank account before sending a request, even though this is a difficult task in some investigations.

Undertakings and Affidavits by Requesting Authorities

Many common law jurisdictions require a requesting authority to sign an undertaking. This is a promise not to use the evidence obtained in the requested states in another case or to disclose it to a third party.

Most investigating judges and prosecutors in civil law countries are not familiar with these undertakings and are therefore very reluctant to sign them. They do not know if they are legally qualified to do so and they fear that their signature will be challenged under their domestic law. It is often necessary to explain at length why these undertakings must be signed and why they must be signed with care. To prevent protracted discussions between the authorities of both countries, it may be worthwhile to prepare an advanced draft undertaking that serves as a model for future cases.

Similarly, officials in requesting states are sometimes asked to provide affidavits. These are unfamiliar to prosecutors and investigating judges in civil law countries, who consider that statements under oath should be made only by witnesses. Experience shows that they are right to be careful when signing such documents, which might be challenged by the lawyers of the accused.

Challenges Arising from the Right against Self-Incrimination

Many MLA requests seek permission to take evidence or statements from persons in the requested state. Upon receiving the request, the requested authorities must often ask their counterparts in the requesting state whether the witness is a suspect or a target, because the domestic legislation (and sometimes the constitution) in many states protects witnesses against self-incrimination. Therefore, different rules apply to witnesses and suspects. Another reason for the questions is differences in the rules of evidence between the two countries. To avoid delays, requesting authorities should include the answers to these questions in their request.

It is also common for requested authorities to ask the requesting authorities to offer a witness immunity from prosecution. This could be a problem in civil law countries, where granting immunity to a witness is not common.

Another, similar, issue is witness protection programs. Witnesses under these programs have agreed to cooperate with the prosecution in a domestic case in the requested state. Since these witnesses are often kept in hiding, they are not easy to reach for interviews.

Form of the Evidence

Evidence received from abroad is of no use if it is not in an acceptable, admissible form. A witness statement is sometimes admissible in a requesting state only if it meets specific requirements:

- Interview by a judge or by a police officer of the requested state, or direct questioning by a prosecutor, an investigating judge, or a police officer of the requesting state
- Presence of the accused or his or her counsel, or both (either in person or via videoconference)
- Statement made under oath by the accused, or verbatim statement or summary (procès-verbal) of the interview with the accused
- Original documents or certified copies of documents

At the same time, the requested state may have no such requirements for the admissibility of witness statements. The requesting state must therefore clearly stipulate any such requirements in its MLA request. Otherwise, the requested state may not comply with the requirements.

Legality of Investigative Techniques

Another potential problem is the legality of the investigative technique used to gather evidence. For example, wiretap evidence is inadmissible in the courts of some states. As a consequence, these states will not carry out requests to wiretap. This must be clearly explained to the requesting authority to prevent further misunderstanding.

Similar questions arise when one state requests another to engage in undercover operations. While such operations are an old and traditional way to obtain evidence, they can now involve the use of new surveillance technologies. Whether such requests will be executed depends on whether these technologies are legal in the requested state.

Search and Seizure

Legal challenges concerning search and seizure are among the most common causes of misunderstanding in international cooperation. Requested states often reject such requests because of insufficient evidence to justify the issuance of a search warrant by their judicial authorities. Experience shows that difficulties can often be avoided if

the requesting authority is aware that "fishing expeditions" are not permitted. However, this is not always so simple.

In other instances, a requested state may refuse to seek a search warrant because a production order is sufficient. This often arises in a request for bank documents. If an investigator or magistrate in the requesting state does not know the difference between these two procedures, he or she may be disappointed by the response of the requested state. Requesting authorities should therefore try to ascertain beforehand whether production orders are available in the requested state, and whether these are suitable substitutes for search warrants in a particular case.

Conflict with the Interests of the Requested State

An MLA request can come into conflict with the national or security interests of the requested state or with an ongoing investigation in this state. These conflicts remind us that MLA is a form of interference in state sovereignty, and that breaking through the language barrier does not always mean overcoming the legal and political ones. To resolve a problem with ongoing investigations, the requested state may have to postpone the execution of the request.

Punishment for the Offense

The issue here is the form of the punishment that might be imposed in the requesting state for the crime underlying a request. While this has always been an important issue in extradition, it is traditionally less so in MLA.

Nevertheless, requesting states are increasingly asked to provide assurances that the evidence requested will not lead to the imposition of degrading punishment against a person. Many requested states will likewise not accede to an MLA request unless they are assured that the requesting state will not impose capital punishment in the case.

These requirements may be understandable, but their practical application could be more difficult in MLA than in extradition. Unlike extradition requests, MLA requests often occur at a very early stage of a case. At that point, it may not yet be possible to identify the suspects and crimes involved, let alone the punishment that could subsequently be meted out. Practitioners should nonetheless be proactive by trying to anticipate problems in this area. By addressing them in the request for MLA, they stand a better chance of having their requests carried out.

Conclusion

This paper discusses some of the more common legal issues that arise in MLA, but it by no means presents an exhaustive list. The paper tries to demonstrate that, while these problems are legal and technical, they often have practical solutions. However, the overriding principle behind these solutions is that it is vital for practitioners (in both the requesting and requested states) to anticipate potential problems and to proactively address them. Communication between the two states is essential. Whenever there is doubt about an issue, making inquiries leads to better results than simply ignoring the problem.

Legal problems in MLA from a Swiss perspective

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Despite almost universal agreement on the necessity to fight corruption, the phenomenon remains as prevalent as ever. In theory, the legal framework for doing so is becoming state-of-the-art. The recent international treaties and conventions (such as the UNCAC and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions) are close to the best that can be formally achieved. At the same time, financial crime has become global as criminals use or abuse financial institutions, while law enforcement remains a prisoner of national boundaries that are hard to escape.

These are not necessarily intractable problems. With dedication and imagination and a lot of courage when pursuing the powerful and the rich, the judiciary can be an essential contributor to the fight against corruption. Technical obstacles often derive from a fragmented judicial world in which every country has its own set of laws and procedural idiosyncrasies. Yet this need not be the case. Every country has similar practical and judicial problems in the field of MLA.

The practice of MLA from Switzerland's perspective can thus be of relevance to these issues. This is especially so because Switzerland, along with other well-known financial hubs, remains a tempting place to harbor the proceeds of financial criminality, including corruption and its many derivatives. This paper will examine a series of legal problems that are routinely encountered in MLA and suggest solutions that Switzerland has tried to implement. A continuation in the next chapter will study problems and solutions relating to the practice of MLA in Switzerland.

Problems Arising from the Legal Framework for MLA

MLA in Switzerland operates under three concurrent regimes, namely, international conventions, bilateral treaties, and domestic law. Two problems of a general nature arise regularly. First, neither the requesting nor the requested state masters the other's legal system, such that requests for cooperation are badly formulated, precious time is wasted, and legally flawed means of proof that are of little use to the requesting state are communicated. Second, red tape and appeal procedures can slow any MLA request down to a near standstill.

There are a few basic rules for addressing these problems. Practitioners seeking MLA should contact their counterparts in the foreign state. For instance, the details of a bank account cannot be transmitted over the phone, but it is perfectly acceptable to help the person in charge in the requesting state to formulate a demand to obtain that information. In addition, whenever possible, authorities in a requested state should open a domestic investigation that permits quick local action and strengthens the judicial process against defendants who refuse to cooperate. Finally, requesting states sometimes seek material damages in cases involving acts of a corrupt public official. If the case is particularly important and complicated, the requesting state should consider hiring a lawyer in the requested state and joining the proceedings as a civil party.

Dual Criminality

Modern international treaties and conventions specifically address the question of dual criminality. The difficulty in corruption cases usually stems from the fact that every country punishes active and passive corruption of its national servants, but not corruption of foreign public officials. For years, Switzerland had to resort to interpreting dual criminality as an "abstract" or "fact-oriented" concept. In other words, one must transpose the facts (but not the offense) under investigation in the requesting country to the legal system of the requested country, and ask whether such facts would be considered illicit if committed there. In cases of bribery of foreign public officials, the corresponding foreign offense would often be different, e.g., falsification of books, unlawful management, embezzlement.

General Grounds for Denying Cooperation

International treaties and conventions, as well as national legislation, reserve specific grounds for denying an MLA request. Some of the most common ones are as follows.

Essential National Interests

The domains that are prone to bribery are numerous: economic interests, international competition, access to important resources (e.g., oil), defense requirements (e.g., arms), etc. One cannot deny the national importance of these realms of activity. However, one must also

acknowledge that another very essential national interest lies in developing, nationally and internationally, societies free of corrupt practices, in which citizens can trust the state's institutions and officials.

Human Rights

Cooperation can be refused when a requesting state does not respect basic rules such as the UN Universal Declaration of Human Rights and Pact II, and their European equivalent (see Annex for the relevant texts). One sensible approach for the requested state is to consider each case on its own and avoid general standpoints that would lead to blanket refusals of all MLA requests from certain countries.

Death Penalty

European countries refuse cooperation if it leads to the death penalty for a defendant. This could arise in corruption cases, since certain Asian countries apply the death penalty for serious corruption. The normal approach is for a requested state to ask the requesting state to guarantee that the death penalty will not be inflicted or carried out on the basis of the information transmitted through international cooperation. Trust is essential in that respect.

Corrupt Requesting States

A similarly difficult issue is executing MLA requests from judicial authorities that are known to be corrupt. Not only is it objectionable to trust one's counterparts in such a situation, but there is no way of knowing how the information sought will be used. However, no single country is totally corrupt or free of corruption. Hence, one solution is to get to know the country in question, including its political and legal systems, without any prejudice or preconceptions. The same applies to foreign officials that one has to deal with. A requesting state can require assurances from the country concerned. International openness is a means of checking whether the guarantees are respected. Finally, there always is a next time. In international cooperation, as in any business, it is in the interest of every party to respect promises that are made.

Political Offenses

The concept of political offenses is poorly defined. Almost anything can fall under that notion. An issue could arise if a real case of corruption is prosecuted for personal political reasons, e.g., to get rid of a political opponent.

Fiscal Offenses

Denying cooperation for fiscal offenses is a Swiss specialty. Switzerland will cooperate in cases of fiscal fraud but not fiscal evasion, though few specialists understand the difference. Should this become an issue, practitioners should ask and rely on their Swiss counterpart for advice.

Annex: Relevant Legal Documents

Instruments of the United Nations

The Universal Declaration of Human Rights
(10 December 1948)

Article 5 - No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 6 - Everyone has the right to recognition everywhere as a person before the law.

Article 7 - All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 8 - Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Article 9 - No one shall be subjected to arbitrary arrest, detention or exile.

Article 10 - Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 11

(1) Everyone charged with a penal offense has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense.

(2) No one shall be held guilty of any penal offense on account of any act or omission which did not constitute a penal offense, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offense was committed.

International Covenant on Civil and Political Rights
(16 December 1966)

Article 14 - General Comment on Its Implementation

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.
2. Everyone charged with a criminal offense shall have the right to be presumed innocent until proved guilty according to law.
3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
   (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing;
(c) To be tried without undue delay;
(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.
5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.
6. When a person has by a final decision been convicted of a criminal offense and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.
7. No one shall be liable to be tried or punished again for an offense for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Instruments of the Council of Europe

Convention for the Protection of Human Rights and Fundamental Freedoms (Rome: 4 November 1950) (also called Convention on Human Rights)

Article 5 - Right to liberty and security

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
   a. the lawful detention of a person after conviction by a competent court;
   b. the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfillment of any obligation prescribed by law;
   c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offense or when it is reasonably considered necessary to prevent his committing an offense or fleeing after having done so;
   d. the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
   e. the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
   f. the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
3. Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

Article 6 - Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
2. Everyone charged with a criminal offense shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offense has the following minimum rights:
   a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
   b. to have adequate time and facilities for the preparation of his defense;
   c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
   d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
   e. to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Overcoming legal challenges in extradition: The Malaysian perspective

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Traditionally, extradition cases have often been plagued by legal hurdles. Fugitives are also sometimes discharged from extradition proceedings on the basis of mere technical objections. This paper will examine some common problems by looking at Malaysia's experience in extradition cases.

Legal Basis for Extradition in Malaysia

Extradition matters in Malaysia are governed by the Extradition Act 1992 (Act 479). The act came into force on 21 February 1992 and has never been amended. It contemplates two bases for extradition, depending on whether or not Malaysia has a treaty with the requesting state.

For extradition based on treaties, the relevant treaty may be published in the Gazette (Act 479, s. 2[1]). The publication of a treaty in the Gazette is conclusive proof of the treaty and precludes challenges to the validity of the treaty in any legal proceeding (Act 479, s. 2[4]). As of March 2006, four treaties had been published in the Gazette (those with the Hong Kong Special Administrative Region, China; Indonesia; Thailand; and the United States). Malaysia signed a treaty with Australia on 15 November 2005, but the treaty has not yet come into force.

In the absence of a treaty, extradition requests must be sent to the Minister of Internal Security (Act 479, s. 12). The matter will proceed only if the Minister gives special direction in writing (Act 479, s. 3) that Act 479 applies to the non-treaty state, and the extradition request may then be acted upon. This may take considerable time, especially in the case of provisional warrants of arrest. In practice, although the Minister of Internal Security is the legal authority in extradition matters, the Attorney General's Chambers examines and advises the Minister on whether a request complies with Act 479. This requires communication between the two bodies and usually causes delay. Further delay may also occur because every request must be made through diplomatic channels. These delays could affect the prospects of locating a fugitive criminal.

Another difference between extradition with a treaty and without is that Act 479 applies to requests by non-treaty states in its entirety. For treaty-based extraditions, the relevant treaty may modify provisions of the act to suit the requirements of the states parties. A treaty may modify the application of Act 479, for example, by allowing the transmission of extradition requests outside diplomatic channels, thereby reducing delay. Treaty-based extraditions are thus more practical.

Dual Criminality

Dual criminality is a requirement under Act 479. A request can be entertained only if the foreign offense underlying the request is punishable by at least a year's imprisonment or death, and if the foreign offense is not punishable by a lesser punishment if committed in Malaysia (Act 479, s. 6). The focus is on the act or omission underlying the extradition request. In other words, the offense need not have the same label in Malaysia and the requesting state. The Malaysian authorities will do their best to "fit" the conduct into an offense under Malaysian law to accommodate the requesting state.

The requirement of dual criminality could be problematic for offenses that attract a mandatory death penalty in Malaysia, e.g., drug trafficking (Dangerous Drugs Act 1952, s. 39B). If Malaysia requests extradition for such an offense from a foreign state that does not have the death penalty, that state may not be able to grant the request.

Grounds for Denying Extradition

Section 8 of Act 479 lists the grounds for denying extradition:

(a) The offense is of a political character
(b) The request was made to prosecute or punish a person on account of his or her race, religion, nationality, or political opinions
(c) The person sought would be prejudiced on account of race, religion, nationality, or political opinions
(d) Prosecution is time-barred
(e) The request violates the rule of specialty, namely, that the fugitive must not be detained or tried for an offense other than the one specified in the request, unless the requested state so consents
(f) The fugitive cannot be further extradited to a state other than the requesting state, unless the requested state so consents

Extradition Proceedings before the Court

Extradition proceedings before Malaysian courts are two-tiered. The Magistrate's Court issues a warrant of arrest (Act 479, s. 13). Upon arrest, the fugitive criminal is brought before the Magistrate. The case is then transferred to the Sessions Court for a "committal hearing" (Act 479, s. 15 and s. 19). The decision of the Sessions Court may be appealed to the High Court, whose decision is final (Act 479, s. 37).

Case of P.P. v. Ottavio Quattrocchi

The recent landmark case of *PP v. Ottavio Quattrocchi*, [2003] 1 CLJ 557 demonstrates some procedural difficulties in extradition proceedings in Malaysia. Quattrocchi was an Italian national who was wanted in India for alleged corruption. He was arrested in Malaysia and brought before the Sessions Court for a committal hearing. Quattrocchi raised a preliminary objection before the hearing began, arguing that he had not been served with the charges against him. The prosecution submitted that the failure to serve charges was not fatal to its case because Quattrocchi had been served with the extradition request. Furthermore, Act 479 does not require the service of charges on a fugitive.

The Sessions Court upheld Quattrocchi's objection and ordered his discharge. The Court found that it would be unable to determine whether there was dual criminality if the charges were unknown. At a minimum, the prosecution should have provided a statement of the particular offense. On appeal, the High Court upheld this decision.

Because of this decision, the practice in Malaysia is now to read to the fugitive the relevant charge in the requesting state. To avoid any further technical deficiency, a charge formulated according to Malaysian law (the "Malaysian charge") is also read to the fugitive.

Procedure for the Committal Hearing

Act 479 also creates some uncertainties in the procedure for the committal hearing. For instance, the act is ambiguous as to which party should proceed first during the hearing. Section 19(1)(a) states: "Where a fugitive criminal is brought before the Sessions Court,…[the Court] shall receive any evidence tendered by or on behalf of the fugitive criminal to show that he did not do or omit to do the act alleged to have been done or omitted by him." The language of this provision suggests the fugitive must proceed first, since it allows the fugitive to tender evidence.

On the other hand, Section 19(4) states that the Sessions Court shall discharge the fugitive if a prima facie case is not made out. This suggests that the prosecution should proceed first, since the onus of proof is on the prosecution. This is in fact the current practice.

Act 479 creates another uncertainty regarding the standard of proof. Before ordering committal, the Sessions Court must be satisfied that there is a prima facie case in support of the extradition request (Act 479, s. 19). In Malaysian criminal proceedings, the Criminal Procedure Code also requires proof of a prima facie case (Criminal Procedure Code, s. 173(f)(i) and s. 180). Because both Act 479 and the Criminal Procedure Code use the same language, courts may find that the same standard of proof applies to both extradition and criminal proceedings. In this event, the committal court would be tantamount to a trial court, which requires evidence akin to that in a criminal trial. This would be inconsistent with the principle that extradition proceedings are not meant to be a trial, but merely a hearing to determine whether a fugitive should be surrendered to face trial in the requesting state. This trend may have the effect of elevating a committal hearing to the status of a trial, which may require the prosecution to produce more evidence than what is provided in the extradition request at the committal hearing. This would make it more difficult for Malaysia to extradite wrongdoers, and would undermine the global effort to fight transnational crimes. It would also encourage criminals to seek safe haven in Malaysia.

Because of these uncertainties, it may be desirable to review and revamp Act 479.

Conclusion

The system for extradition to and from Malaysia is similar to those in many other countries, particularly ones with common law traditions. The peculiarities created by Act 479 and certain judicial decisions may also exist in other countries. It is hoped that this overview of some of the legal hurdles in extradition in Malaysia will be instructive to practitioners in other countries.

Legal challenges in extradition and suggested solutions

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Extradition, the formal process by which an individual is restored to the competent judicial authority seeking to exercise in personam jurisdiction over the subject, is a process generally based on treaty relations, comity, or reciprocity. While at first blush this process would seem to apply solely to a relationship between states, modern practice, the evolving concept of individuals as subjects of international law, and the social and legal significance of the emergence of human rights considerations has complicated extradition as a tool of international cooperation.[1] As a general statement, it is accurate to say that most extradition is governed by treaty relations between engaged states and that it is not as yet regarded as an international duty according to customary international law.[2] Nonetheless, much of the legal regimen that now surrounds extradition is the result of the significance given to various recurring legal themes by the individual national judiciaries. Thus, in discussing ways of overcoming legal challenges in extradition, as with all things left to the disparate national judiciaries, we find differences as well as similarities between jurisdictions.

It is the purpose of this brief paper to: (1) identify and analyze various concepts, defenses, and substantive requirements commonly implicated in extradition practice; (2) discuss the interpretation of these issues in the jurisprudence of the US and other jurisdictions; (3) recognize alternative methods of rendition; and (4) suggest possible solutions to the difficulties caused by the employment of some of these mechanisms.

Substantive Prerequisites for Extradition

Extraditable Offense and Dual Criminality

The process of extradition, either by treaty or reciprocity, requires that the offense for which the relator[3] is to be returned is an act, or series of acts, that each of the national parties recognizes as extraditable, either on the basis of reciprocity or by specific reference to the applicable treaty. It therefore follows that the first prerequisite for extradition is the

recognition by both the requesting and requested parties that the offense is in fact one for which extradition is available. Thus, it is traditionally the case that extradition treaties either (1) list the offenses to which the treaty applies (thus the designation "list treaty"), or (2) create a formula by which the states indicate those offenses that are extraditable, i.e., all offenses that imply a term of incarceration of a specified period or a fine of a specified amount or both, etc.[4]

Additionally, in the establishment of extraditable offenses, the content of the offensive conduct must satisfy the requirement of dual criminality,[5] i.e., the imperative that "an accused be extradited only if the alleged criminal conduct is considered criminal under the laws of both the surrendering and requesting nations."[6] While the concept of dual criminality has been defined in various ways, it is generally accepted that "When the laws of both the requesting and the requested party appear to be directed to the same basic evil, the statutes are *substantially analogous*, and can form the basis of dual criminality"[7] (emphasis added). Thus, an extraditable offense is generally defined as "not requiring that the offense charged be identical to an offense listed in the treaty, but requiring that the acts performed which support the charge could sustain a charge under the laws of the requested state...."[8] The controlling law governing whether an offense is extraditable or not is the law of the requested state.[9]

In some jurisdictions the majority of serious challenges to the completeness of an extradition request are focused upon either: (1) the identity of the subject or (2) the question of whether or not the offense is extraditable. In the latter instance, the issue of dual criminality is one to be settled in the courts on a case-by-case basis.[10] While this issue can be troublesome, there are several arguments to be made in support of an act being properly characterized as extraditable.

Suggestion: It may correctly argued that: (1) the laws of the involved states need be substantially analogous only as to the inherent harm they strive to prevent and the activity they intend to punish; (2) that while one statute may be broader in scope than another, if the *conduct* for which extradition is sought would be included under both laws, an extraditable offense is noted; and (3) the primary focus of dual criminality is on the conduct charged, not the technical elements of an offense as they are found in the respective statutes.[11]

It should also be noted that purely jurisdictional elements of elaborated statutes need not be replicated under both systems in order for the charged conduct to be included as an extraditable offense. For

example, under US statutes often utilized in the prosecution of corruption offenses, it is necessary to prove the use of the mail or telephone in the commission of the underlying offense.[12] This proof, although essential to the assertion of federal jurisdiction under US law, has little if anything to do with the conduct being proscribed. The usually prevailing position in such cases is that this element is purely jurisdictional and should not hinder the dual criminality analysis, nor concomitantly, should it undermine the conclusion that the offense is extraditable.[13]

Doctrine of Specialty

This principle of law has been defined as representing the proposition that the requesting state must specify the offense or offenses for which it seeks the relator's return and that, upon his return, it may only try him for the offenses covered in the request and the treaty authorizing that request.[14] Obviously, one of the purposes of this doctrine is that it supports the doctrine of dual criminality and prevents the relator from being prosecuted for an act that would not be a crime in the requested state. "Accordingly, the principle of specialty is designed to ensure against a requesting state's breach of trust to a requested state and to avoid prosecutorial abuse against the relator after the requested [or for that matter, the Requesting] state obtained *in personam* jurisdiction over the relator."[15]

Suggestion: Whether or not the relator has the right to raise a violation of this principle as a defense against extradition in the absence of an objection made by the requested state may be in question in some jurisdictions.[16] Nonetheless, in practice this problem, at least in part, is dealt with by the current trend in the drafting of extradition treaties. In some instances the treaty itself clearly provides the remedy by stating that a relator may be tried for "an offense for which the executive authority or the Requested State consents to the person's detention…" following his extradition.[17] Although it does not speak directly to the doctrine of specialty, the UNCAC provides for extradition in cases of otherwise non-extraditable offenses under particular circumstances.[18]

Doctrine of Non-inquiry

Operating precisely as described by its title, the doctrine of non-inquiry is generally designed to prevent the courts of one state from reviewing the internal governmental processes of another state. This

principle is the means by which one sovereign respects the laws, beliefs, and indeed the culture of an equal sovereign. Thus, the principle implements the belief that no state may judge another state's legal system or process.[19] Following this doctrine, the court of the requested state is presumably precluded from judging or "supervis[ing] the integrity of the judicial system of another sovereign."[20]

While formerly this rule was breached infrequently by various means and for various reasons,[21] it can now be reasonably asserted that the doctrine of non-inquiry is beginning to be seriously challenged in some areas, among which is extradition practice. Perhaps the major impetus for this shift is the place that international human rights concerns are now engendering in the law as a whole.[22]

While this doctrine has no freestanding effect on extradition practice, its effects and the evolution it is undergoing are having rather dramatic repercussions in several areas that directly relate to extradition. Thus, the doctrine and its erosion may be considerations in the following areas.[23]

Denial of Extradition

The Political Offense Exception

The political offense exception is in large measure meant to provide that the legal processes of the requested state are not used to assist in the prosecution of an individual for either his or her political beliefs or to foster a politically motivated prosecution by the requesting state.[24] To say that the political offense exception has had a complicated genesis and an even more complicated growth is to put it mildly. However, a detailed history of this evolution will not be explored here.

The political offense exception has three basic purposes, i.e., the recognition of political dissent, the guaranteeing of the rights of the accused, and the protection of both the requesting and requested states. The political offense exception is further subdivided into those offenses known as *pure* political offenses and *relative* political offenses, the former being those directly related to the structure of national matters while the latter combine political goals with common illegal activities. Briefly stated, while pure political offenses are easily identifiable and traditionally non-extraditable, the claimed relative political offense is more difficult to categorize and has caused considerable consternation in extradition practice.[25] It is unnecessary here to distinguish these differences further other than to point out that in recent practice the political offense

exception has become more limited in scope, i.e., its application has become less acceptable and confined to a narrower range of circumstances.[26]

Suggestion: As pointed out above, there is a growing trend in extradition law to limit the scope of the political offense exception. This is obvious in the construction of treaties specifically excluding the use of the exception in the case of treaty-delineated crimes.[27] Of more interest at present, the UNCAC contains a proviso whereby if a country "uses [the UNCAC] as the basis for extradition, [it] shall not consider any of the offenses established in accordance with this Convention to be a political offense."[28]

Extradition of Nationals

One of the most sensitive problems confronted in extradition practice is the request that one country surrender one of its nationals for prosecution or service of sentence to another. Many nations, particularly those of the civil law tradition, refuse to extradite their nationals. The basis for this refusal is in many instances of constitutional origin,[29] and in others grows out of a jurisdictional philosophy that suggests that the criminal justice system of one's native land has the authority to punish the illegal behavior of one of its citizens irrespective of where that behavior may have occurred.[30] However, as an adjunct of this jurisdictional position, many countries following this philosophy adopt the policy of *aut dedere, aut judicare*—prosecution in the offender's native jurisdiction for crimes committed in other jurisdictions, or, more commonly, "prosecute or extradite."[31] As might well be anticipated, however, this policy is often criticized as one that is more often ignored than not, given to sham prosecutions, inefficient in that the evidence and witnesses are located elsewhere, or fostering sentences in the case of conviction that don't meet the expectations of the offended state.[32] For better or for worse, little can be done about the constitutional regimen of a requested state relative to its position regarding the extradition of nationals. However, there are several remedies available to ameliorate the situation where one state refuses extradition on the basis of nationality.

Suggestion: *Aut dedere, aut judicare*[33] and conditional extradition. Many modern extradition treaties, particularly those between states with contiguous borders, feature an option much like that envisioned by the UNCAC. Thus, (1) where the domestic law of a state permits a national

to be extradited only on the condition that he or she be returned for purposes of sentencing, and (2) both parties agree that such an arrangement will satisfy the "extradite or prosecute" responsibilities of the requested state,[34] conditional extradition may be a viable alternative to traditional measures. Along similar lines, where extradition is sought to execute a sentence and is refused on the basis of nationality, where the state law of the requested state so permits, both parties may agree to the service of sentence under the domestic law of the requesting state party.[35] In both cases, the obligation to extradite will be deemed to be satisfied.

Capital Punishment

Perhaps contrary to popular belief, the prohibition on the extradition of individuals based on the possibility of their being subjected to capital punishment is not a new concept.[36] In general, treaties were formulated, and still are to a large extent, with the provision that if the requesting state did not guarantee that the subject would not be subjected to the death penalty, the requested state was free to deny extradition.[37] In today's practice, the typical extradition treaty between states with differing views on capital punishment often conditions extradition as follows: "Extradition may be refused in any of the following circumstances…[i]f the offense for which extradition is requested carries the death penalty under the law of the requesting State, unless that State gives *such assurance as the requested State considers sufficient* that the death penalty will not be imposed or, if imposed, will not be carried out"[38] (emphasis added). Even in those instances where both states have and use the death penalty, extradition treaties feature limits on the use of capital punishment and the ability of one party to deny extradition based on those issues.[39]

Suggestion: Thus, it seems that to overcome opposition to extradition based on the fact that the crime for which extradition is sought carries the death penalty, "sufficient assurances" must be given that if extradition is granted the death penalty will not be imposed. On occasion, assurances that, should the death penalty be imposed, commutation will be recommended by the requesting state are considered sufficient.[40] Short of these assurances being made and accepted, this seems to be one of the areas in which the doctrine of non-inquiry is losing ground.[41]

Alternatives to Extradition

On occasion, governments have found it convenient or necessary to avoid the process of extradition in order to achieve jurisdiction over the person of an individual wanted for prosecution in their country. Here follows a review of some of these methods of rendition.

Irregular Rendition

The return of an individual through the "informal surrender" of that individual by one nation to another (1) without formal or legal process; (2) through the use of immigration laws to expel an accused or convicted criminal from a country; (3) by means of luring a fugitive to the territory of the country seeking his return; (4) in international waters; (5) or to other countries where their renditions can be more readily obtained has been termed "irregular rendition." Simply put, this term describes processes for returning fugitives without resort to the recognized extradition regimens of the respective countries.[42]

Luring

This is a practice that has been used successfully in instances where extradition is unavailable (no treaty) or barred by other circumstances. In simple terms, it involves the country that seeks the rendition of the otherwise unavailable fugitive taking measures to entice the wanted individual to a place from which extradition is possible or unnecessary. Lures usually involve a subterfuge, trick, or other deception, often by undercover law enforcement agents or informants in communication with the fugitive, which attempt to trick the wanted person to voluntarily leave the country of refuge.[43] For example, prosecutors have used the guise of collecting a prize, attending a social event, further engaging in a criminal activity, or delivering funds to entice a fugitive to a particular location. This was the case in 2000, when unknown persons believed to be in Kazakhstan were attempting to extort Michael Bloomberg, founder and owner of Bloomberg L.P. The subjects demanded via the Internet that Bloomberg pay them money in exchange for information on how they had managed to infiltrate Bloomberg L.P.'s computer system. Undercover agents, with the assistance of Mr. Bloomberg, engaged in e-mail communications with the subjects while they were in Kazakhstan—an area where extradition was not possible—and convinced them to travel to London for a meeting. On 10 August 2000, they were identified as the

authors of the communications to Bloomberg and arrested for extradition to the US by the London Metropolitan Police and New Scotland Yard.[44]

Suggestion: While this technique can be effective, it can likewise produce undesirable collateral, and sometimes direct, consequences. In some jurisdictions, luring is illegal and those who put such a device in motion are themselves thus exposed to criminal sanctions.[45] Law enforcement agencies that use lures also run the risk of incurring the disfavor of the country in which the fugitive was located on the basis that such a technique is regarded, correctly or incorrectly, as an intrusion into national sovereignty. This being the case, the techniques involved in irregular rendition might best be cleared through an agency such as the central authority discussed earlier in an effort to determine what the overall effect of such an operation will be.

Expulsion and Deportation

On other occasions where extradition was either impossible or difficult, countries have resorted to other legal techniques demonstrating voluntary cooperation between governments. Thus, for example, where a citizen of one country is located in another country and an arrest warrant is outstanding in the former jurisdiction, that jurisdiction may cancel the passport of the wanted individual and request that the country of refuge expel that person. This device proceeds on the theory that the fugitive is in the host country without a valid travel document and allows the host country to use its immigration law or other available legal means to return the wanted person to his country of origin. Whether and under what circumstances a foreign country is willing to execute such requests varies, and depends both on its domestic law, and its willingness to utilize immigration procedures to accomplish a purpose more often pursued via international extradition.[46]

Suggestion: Despite their appeal to some based on the fact that they may be easier to execute than the standard extradition procedures, these methods have their detractors[47] and have in some instances been found to be outside the law.[48] Thus, once again, it must be seriously suggested that a central authority as previously described would be strategically and tactically positioned to determine the efficacy, and more importantly the legality, of such measures prior to their employment.

Common Obstacles Encountered in Extradition Practice

Non Bis In Idem or Double Jeopardy Provisions

Many modern extradition treaties contain provisions prohibiting extradition when the person sought has been convicted or acquitted for the same offense in the country from which extradition is sought[49] or in a third country.[50] The increased international mobility of many of today's criminals, combined with the inherently transnational nature of much contemporary organized crime, corruption, and terrorism, creates a growing need for the interpretation of such double jeopardy, or *non bis in idem*, provisions.[51]

Suggestion: As a practical matter, if there exists no clear, mutually accepted *travaux préparatoires* or negotiating history to the treaty, which sheds light on this issue, the answer will likely turn on the requested state's interpretation of the clause and its applicable domestic law. This may become particularly difficult where the requested and requesting states rely on fundamentally different legislation, such as was reviewed earlier in this paper.[52]

Severity of Punishment

In addition to those issues concerning capital punishment and its impact on extradition practice, analogous concerns have recently arisen relative to the severity of punishment in non-capital cases. The variation on this theme arises in instances where the punishment for a particular crime is life imprisonment in the requesting state or, in some instances, an indeterminate sentence. In all but a few instances, extradition treaties do not provide for sentencing with the exception of the previously mentioned "assurances" in capital punishment cases.[53] However, based on judicial decisions interpreting their own constitutions (wherein life and indeterminate sentences are found to be unconstitutional) and outside the terms of extant extradition treaties, some countries have begun to deny extradition where such sentences could be imposed. To implement domestic policy and jurisprudence in this case, demands have been made that the traditional "assurances" now be made in cases where life sentences could be imposed.[54]

Suggestions: In instances of this nature, short of the implementation of UNCAC art. 44(13) arrangements, where appropriate, there is little in the way of standard prosecution that addresses this issue. This, as well as many issues in extradition, is a concern that must ultimately be resolved politically as well as legally.

Conclusion

As crime and criminals continue to have less respect for international boundaries, which modern society dictates they are both bound to do, the function of extradition becomes more vital. Concurrently, those involved in the practice will be required to become ever increasingly familiar with international legal practice, not solely on a theoretical but on a practical level as well. Functionally, modern criminal justice systems must discover, collate, and absorb the rules, policies, and practices of their partners in the international community. Thus, if there is a central theme in this paper, it is that the themes lightly explored here will by necessity require further cooperative development to meet the changing demands of extradition practice.

Notes

1 M. Cherif Bassiouni, International Extradition: United States Law and Practice 29, 54 (4th ed., Oceana Publications Inc., 2001) [hereinafter, Bassiouni]

2 Id. at 37

3 This is the term commonly used in the jurisprudence of the US and other common law systems to refer to the person whose return is sought by the requesting state.

4 Bassiouni note 1, at 473

5 Satya D. Bedi, Extradition in International Law and Practice 69 (1966)

6 *United States v Saccoccia*, 18 F.3d 795, 800 n.6 (9th Cir. 1994)

7 *Shapiro v Ferrandina*, 478 F.2d 894, 908 (2nd Cir.), *cert. dismissed*, 414 US 884 (1973)

8 Bassiouni note 1, at 475

9 Id. at 483; see also United Nations Convention against Corruption, art. 44(8) [hereinafter UNCAC] found at www.unodc.org/pdf/crime/convention_corruption/signing/Convention-e.pdf as of 15 March 2006.

10 "Representing Foreign Governments in Extradition Proceedings before United States Courts: A Manual for United States Attorneys," Office of International Affairs, Criminal Division, US Department of Justice (2003), at 19

11 *Theron v United States Marshall*, 832 F.2d 492, 496 (9th Cir. 1987); *Cleary v Gregg*, 138 F.3d 764 (9th Cir. 1998)

12 18 U.S.C. §§ 1341 and 1343

13 Thomas G. Snow, *The Investigation and Prosecution of White Collar Crime: International Challenges and the Legal Tools Available to Address Them*, 11 Wm. & Mary Bill Rts. J. 209, 236 (December 2002) [hereinafter Snow]

14 *United States v Rauscher*, 119 U.S. 407, 424 (1986)

[15] Bassiouni, note 1, at 515 [added by the author]; compare with *United States v Tse,* 135 F.3d 200 (1st Cir. 1998)

[16] Id. at 511-17

[17] Extradition Treaty, 25 June 1997, US-India, art. 17(1), S. Treaty Doc. 105-30 (1997); see also *United States v. Riviere*, 924 F.2d 1289 (3d Cir. 1991)

[18] UNCAC note 10, art. 44(3)

[19] Bassiouni note 1, at 569

[20] *Flynn v Schultz*, 748 F.2d 1186 (7th Cir. 1984)

[21] See Ex parte *Fudera*, 162 F. 591 (S.D.N.Y. 1908); Ex parte *La Mantia*, 206 F. 330 (S.D.N.Y. 1913)

[22] Bassiouni note 1, at 569; see also William A. Schabas, *Indirect Abolition: Capital Punishment's Role in Extradition Law and Practice*, 25 Loy. L.A. Int'l & Comp. L. Rev. 581 (Summer, 2003) [hereinafter Schabbas]

[23] Kathryn F. King, *The Death Penalty, Extradition, and the War Against Terrorism: U.S. Responses to European Opinion about Capital Punishment*, 9 Buff. Hum. Rts. L. Rev. 161, 188 (2003) [hereinafter King]

[24] Bassiouni note 1, at 609

[25] Kai I. Rebane, *Extradition and Individual Rights: The Need for an International Criminal Court to Safeguard Individual Rights*, 19 Fordam Int'l L.J. 1636, 1653-54 (April, 1996) [hereinafter Rebane]

[26] Bassiouni note 1, at 655; Rebane note 25, at 1657

[27] Snow note 14, at note 25

[28] UNCAC note 10, art. 3

[29] See *Constitucao Federal* [Constitution] art. 5 (LI) (Braz. 1988); Grundgesetz [Constitution] art. 16(2) (F.R.G. 1949) (amended 1993, 2000) ("No German may be extradited to a foreign country.")

[30] Ethan A. Nadelmann, *The Evolution of United States Involvement in the International Rendition of Fugitive Criminals*, 25 N.Y.U. J. Int'l L. & Pol. 813, 847 (1993)

[31] Rebane note 25, at 1668

[32] Id.; see also Snow note 14, at 22

[33] UNCAC note 10, at art. 44(11)

[34] Id. at art. 44(12)

[35] Id. at art. 44(13)

[36] J.S. Reeves, *Extradition Treaties and the Death Penalty*, 18 Am. J. Int'l L. 298 (1924)

[37] Schabbas note 23, at 585

[38] Model Treaty on Extradition, U.N. GAOR 3d Comm., 45th Sess., Agenda Item 100, at 6, U.N. Doc. A/RES/45/116 (1991)

[39] Extradition Treaty With Thailand, Treaty Doc. 98-16, 1983 U.S.T. Lexis 418 December 14, 1983, Date-Signed: ("ARTICLE 6 Capital Punishment – When the offense for which extradition is sought is punishable by death under the laws of the Requesting State and is not punishable by death under the laws of the Requested State, the competent authority of the Requested State may refuse extradition unless: (a) the offense is murder as defined under the laws of the Requested State; or (b) the competent authority of the Requesting State provides assurances that it will recommend to the pardoning authority of the Requesting State that the death penalty be commuted if it is imposed.")

[40] See however *Venezia v. Ministero di Grazia e Giustizia*, Corte cost., 27 June 1996, n.223, 79 Rivista di Diritto Internazionale 815 (1996)

[41] King note 24, at 181–93

[42] Melanie M. Laflin, *Kidnapped Terrorists: Bringing International Criminals to Justice through Irregular Rendition and Other Quasi-Legal Options*, 26 J. Legis 315, 320 (2000) [herinafter Laflin]

43 Snow note 14, at 229

44 Id. at note 76

45 Schweizerisches Strafgesetzbuch [Swiss Criminal Code] art. 271(2) (Switz.) ("Whosoever, using violence, ruse or threat, lures a person abroad in order to deliver him to an authority, a party or another organization abroad, or to put his life or physical integrity in danger, will be punished by reclusion.")

46 Snow note 14, at 229

47 Stefano Manacorda, *Restraints on Death Penalty in Europe: A Circular Process*, 1 J. Int'l Crim. Just. 263, 283 (August, 2003) ("More subtle are the dangers arising from the increasing recourse to criminal and administrative procedures for the purpose of surrendering individuals to retentionist countries. Here, the development of European case law is not fully satisfactory, considering the dominant role played by political evaluations in the field of extradition and, even more so, expulsion where diplomatic considerations carry more weight than the standards of human rights law.")

48 *United States v. Usama Bin Laden*, 156 F. Supp. 2d 359 (S.D.N.Y. 2001), finding that the use of a similar technique violated South African law.

49 Extradition Treaty, 25 June 1997, US-India, art. 6(1), S. Treaty Doc. 105-30 (1997)

50 Extradition Treaty, 13 Nov. 1994, US-Phil., art. 2(4), S. Treaty Doc. No. 104-16 (1995) ("If the offense was committed outside of the territory of the Requesting State, extradition shall be granted in accordance with the provisions of this Treaty: (a) if the laws in the Requested State provide for punishment of an offense committed outside of its territory in similar circumstances; or (b) if the executive authority of the Requested State, in its discretion, decides to submit the case to its courts for the purpose of extradition.")

51 Snow note 14, at note 129

52 See discussion concerning Dual Criminality above

53 Compare with Extradition Treaty, 19–21 Jan. 1922, US-Venez., art. 4, 43 Stat. 1698 ("In view of the abolition of capital punishment and of imprisonment for life by Constitutional provision in Venezuela, the Contracting Parties reserve the right to decline to grant extradition for crimes punishable by death and life imprisonment. Nevertheless, the Executive Authority of each of the Contracting Parties shall have the power to grant extradition for such crimes upon the receipt of satisfactory assurances that in case of conviction the death penalty or imprisonment for life will not be inflicted.")

See also Por. Const. (Constitutional Law No. 1/97, 1997) art. 33(5) ("Extradition in respect of offenses punishable, under the law of the requesting State by deprivation of liberty or detention order for life or an indeterminate term, shall only be permitted on condition of reciprocity based on an international agreement and provided that the requesting State gives an assurance that such sentence or detention order will not be imposed or enforced.")

54 Shaw note 14, at note 135; on 2 October 2001, the Mexican Supreme Court ruled that a sentence of life imprisonment constitutes inhumane punishment under the Mexican constitution, which permits only a sentence of finite years. *Jurisprudencia de 2 de octubre de 2001, 14 Semanario Judicial de la Federacion* [S.J.F.] 13 (Mex. 9a época 2001); *Mexico Makes Extraditions to U.S. Harder*, San Diego Union-Trib., 4 Oct. 2001, at A19, 2001 WL 27292686. Subsequently, lower courts in Mexico began demanding assurances from the United States that fugitives extradited to this country will not be imprisoned for life.

Strengthening bi- and multilateral cooperation against corruption to overcome challenges in extradition

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Corruption is a problem of international concern. It is an ulcer in the economic and political life of human society. With globalization, corruption has become a cross-boundary phenomenon that affects the political, economic, and social life of every country, severely undermining each country's political stability, economic development, and social advancement. The Chinese Government has always understood the grave damage caused by corruption and has dealt with corruption as an issue of great importance to the very existence of the whole country. We have been fighting corruption resolutely with marked results.

The Chinese Government has always attached great importance to international anti-corruption cooperation and drawn on successful experiences and practices from other countries. Bilateral and multilateral exchange and cooperation have been strengthened constantly. P.R. China has joined the United Nations Convention against Transnational Organized Crime and developed fruitful exchange and assistance with relevant countries in law enforcement cooperation and mutual legal assistance. On 27 October 2005, the National People's Congress of P.R. China ratified the United Nations Convention against Corruption, thus showing the firm stance of the Chinese Government on international anti-corruption cooperation.

The anti-corruption organs in P.R. China are strengthening the exchange and cooperation with other countries' corresponding departments. Currently, P.R. China has established friendly relationships of exchange and cooperation with over 70 countries and regions. Some of them have signed cooperation agreements and held high-level exchange visits, personnel training, and professional exchanges with P.R. China. In recent years, P.R. China's anti-corruption organs have established relationships with many international organizations: United Nations, World Bank, OECD, ADB, APEC, AOA, etc. P.R. China is actively participating in the International Anti-Corruption Conference, Global Forum on Re-inventing Government, Global Forum on Fighting Corruption and Safeguarding Integrity, APEC Anti-corruption Conferences, and other

influential international anti-corruption conferences. P.R. China also dispatches several delegations to attend the relevant anti-corruption seminars or workshops annually. As an APEC economy, P.R. China develops anti-corruption exchanges and cooperation actively under the framework of APEC. In April 2005, P.R. China became an endorsing member of ADB/OECD Anti-Corruption Initiative for Asia and the Pacific. In September 2005, it successfully hosted the 7th Steering Group Meeting and 5th Regional Anti-Corruption Conference of the ADB/OECD Anti-Corruption Initiative for Asia and the Pacific.

There will be great developments in the 21st century in international legal assistance in criminal matters. Extradition deals a deadly blow to those who engage in corruption and is the most important and common mechanism of legal assistance in criminal matters. Most countries admit the importance of extradition, but disputed issues continue to arise because of ideological, social, and legal differences. The main disputed issues include:

- Refusal to extradite political criminals: A request for extradition may be rejected if the requested state believes that the offense underlying the request for extradition is of a political nature. This principle originally aimed to protect revolutionaries in exile, but it has encountered certain difficulties in practice. First, because of the differences in ideology and social systems among countries, there are considerable discrepancies in the definition of a political offense. Second, a requested state has the power to decide whether to deny extradition on this ground and thus could use this power to protect a person. This can amount to interfering in the internal affairs of another country, thereby abusing and distorting the principle of non-extradition of political criminals.
- The principle the dual criminality: The conduct underlying an extradition request may not be criminal in both countries. A request for extradition may be rejected by the requested state because the conduct does not constitute a crime there.
- The principle of non-extradition of nationals: Most countries have adopted this principle, but others have not, and this discrepancy causes many disputes.
- Refusal to extradite because of the potential penalty: This principle applies when the requesting state may impose a certain penalty for the offense underlying an extradition request but the requested state does not recognize or impose that penalty. In these cases, the

requested state could reject extradition unless the requesting nation promises not to impose the penalty in that particular case.

Faced with these challenges in legal systems and practices in the field of extradition, I would propose the following solutions.

First, one solution to the refusal to extradite because of the potential penalty is partial rejection of an extradition request. Some countries wholly refuse to extradite because of the potential penalty. In other words, if a requested state does not accept the potential sentence that could be imposed, it will reject the extradition request absolutely and without any alternatives. A more flexible approach is to refuse extradition only partially, i.e., to allow extradition if the requesting state promises to meet certain requirements. We believe that partial rejection is more acceptable. In the ultimate analysis, whether to keep or to abolish a penalty is a matter for the requesting state to decide. For example, while the international trend is to abolish the death penalty, the number of states that have retained the penalty remains in the majority. Absolute rejection of extradition to countries that may impose the death penalty would not give adequate consideration to the interests of the states that have retained the penalty. It also hinders the ability of the international community to combat transnational crime. Partial rejection, however, would strike a balance among these competing interests.

Second, another solution to the refusal to extradite because of the potential penalty is to "shift" or change the penalty in question. When a requested state has grounds to believe that the requesting state may impose a certain penalty on the person sought, the requesting state may promise to change the criminal penalty as a precondition to extradition. For example, if extradition may be refused because the death penalty may be imposed, the requesting state can agree to shift the penalty to imprisonment of 100–200 years. Under such an approach, the offender will not escape justice and the punishment imposed still has a deterrent effect.

Third, it is necessary to sign limited bilateral extradition treaties. In international practice, extradition is usually based on treaties among states. Extradition treaties are very important because countries are not obliged to extradite in the absence of a treaty. However, there are still many obstacles to signing extradition treaties because of differences in ideology, and social and legal systems among states. We therefore suggest that countries negotiate and sign bilateral extradition treaties that are limited to certain serious crimes such as bribery and

embezzlement, money laundering, terrorism, and drug trafficking. Since a limited extradition treaty is easier to negotiate and ratify, this approach would allow the negotiation and signing of more extradition treaties that cover the most important crimes.

Fourth, it is necessary to conduct regular multilateral negotiations on extradition. For example, within the framework of APEC, many states have practical needs to extradite offenders. Accordingly, we could call on these states to come together and negotiate the various issues concerning extradition. After several rounds of talks, negotiations, and law enforcement cooperation on cases, these states could then sign bilateral or multilateral extradition treaties.

Fifth, it is necessary to consider alternatives to formal extradition. Considering the harmfulness and complexity of transnational crime (including corruption), every state must strengthen cooperation in the area of extradition. If there is no extradition treaty between two states, then the countries should take a flexible and pragmatic approach and consider alternatives such as repatriation for a specific crime.

Finally, it is important to study the financial aspects of corruption. States should explore cooperation measures to combat money laundering, to deny safe heaven to proceeds of corruption, and to recover such proceeds. Possible measures include directly recovering proceeds though civil procedures, sharing proceeds, and signing asset-sharing agreements with relevant states.