Chapter 4
Overcoming practical challenges in mutual legal assistance and extradition

Legal obstacles aside, extradition and MLA also present many challenges in practice. Some of these issues are more technical and detailed, such as drafting requests for assistance. Others are larger and of an institutional nature, such as establishing central authorities. Regardless of the differences, all of these issues significantly affect the efficacy of international cooperation.

During the seminar, the use of central authorities was the most frequently discussed topic under the rubric of the practice of MLA. More and more countries have now designated central authorities that are responsible for transmitting, receiving, and handling all requests for assistance on behalf of a state. By way of example, Charles A. Caruso, Regional Anti-Corruption Advisor, American Bar Association/Asia Law Initiative, described in detail the operation of the central authority for the United States. Participants almost unanimously found central authorities to be crucial to the practice of extradition and MLA. Central authorities facilitate the process by identifying a visible contact point for other countries. Staffed with specialists in international cooperation, these central authorities serve as repositories of expertise and thus provide a source of advice for domestic and foreign law enforcement bodies on these matters. Unfortunately, the use of central authorities

remains far from universal, as Hasan Saqib Sheikh, Deputy Director, National Accountability Bureau, Pakistan, pointed out.

Though central authorities are useful, practitioners usually have little influence over their creation or operation. Nevertheless, there are many practical measures that they can take to improve international cooperation. As with overcoming legal obstacles, Jean-Bernard Schmid, Investigating Magistrate, Financial Section, Geneva, Switzerland, emphasized the need to be proactive and imaginative. For instance, practitioners in a requested state could alleviate the delay in formal communication channels by starting domestic investigations or by transmitting copies of evidence through informal channels.

There was also much discussion about technical matters such as the drafting of requests for assistance. Sean Mowbray, Senior Legal Officer, International Crime Cooperation Branch, Attorney-General's Department, Australia, offered some advice on the basic details that must be included in a request. Bernard Rabatel, French Liaison Magistrate in the United Kingdom, pointed out the importance of including information of a less obvious nature, ranging from the statute of limitations to assurances provided by the requesting state. Kimberly Prost, Chief, Legal Advisory Section, Treaty and Legal Affairs Branch, UNODC, demonstrated a software tool that should greatly assist practitioners in including all necessary information in requests. The tool is available at www.unodc.org/mla.

While all of these practical measures are important in facilitating cooperation, the most indispensable measure of all is likely to be communication. All experts and participants reiterated that frequent and effective communication is a cornerstone of success. As Gerry Osborne, Assistant Director of Operations, Independent Commission against Corruption, Hong Kong, China, pointed out, communication and liaison is necessary among all parties involved in both the requesting and requested states, not just between central authorities. As a liaison magistrate, Bernard Rabatel provided some helpful insights into the importance and utility of such magistrates in facilitating communication. In the end, participants and experts alike agreed that without effective communication, international cooperation cannot be effective.

The practice of MLA from a Swiss perspective

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The previous chapter looked at some legal problems that arise in MLA from a Swiss perspective. This paper will now discuss some problems that have arisen in the practice of MLA in Switzerland.

Drafting an MLA Request

It is trite to say that the description of the facts of a case is crucial to an MLA request. The description must be complete and sufficiently detailed to allow the requested state to determine whether the preconditions for cooperation are met. Incomplete description of the facts carries at least two risks. First, the requested state may consider the request to be an "exploratory" demand or a "fishing expedition." The requesting state can provide additional facts to rebut this challenge, but this is time-consuming. In the interests of justice, practitioners in the requested state should consider acting first and asking for additional facts later if necessary, rather than waiting for the perfect request to arrive. Second, an incomplete description of the facts may make it difficult to apply the test of dual criminality. The conduct that amounts to an offense in the requesting state may not be criminal in the requested state. Additional facts may be necessary to satisfy the test of dual criminality.

As to content, the description of facts should, of course, include the names of the individuals involved in the case. In some cases, the names of family members should also be included. Care should be given to the spelling of names. Dates of birth, if possible, should be included. The dates of events and the amounts of transactions are very important. The description of the modus operandi should be clear and simple. Avoid legal terms such as "embezzlement" or "corruption," if possible, as these could have different meanings in different legal systems. For most cases, the description of the case should be one to at most two pages.

Practitioners should also bear in mind concerns over confidentiality when describing the facts in an MLA request. In some cases, a requested state may have to provide a defendant with access to the request. Consequently, it may be advisable to withhold certain facts from a request for assistance. Decisions to freeze a bank account and to hand over the relevant documentation may have to be communicated as well to the

account holder. This may in turn reveal elements of the investigation to third parties and could thus jeopardize the case. To address these difficulties, practitioners may wish to inquire with the requested state about the legal possibility of ordering banks and similar entities to delay the disclosure of such information to their clients. They should also find out from the requested state what evidence is necessary to obtain assistance, and omit excess information from the request.

Urgent Requests

MLA requests are often urgent, but examining requests, checking their translation, and transmitting them through the formal channels take time. While waiting for these steps to be completed, the requested state could consider opening its own investigation, e.g., for a different crime such as money laundering or any other offense over which it has jurisdiction. The legislation of many countries requires law enforcement agents to act as soon as they learn of a crime within their jurisdiction. The source of this information could be a newspaper article or an e mail from a reliable foreign counterpart. Once an investigation is opened, the requested state can quickly freeze assets and safeguard evidence on a provisional basis.

Another interim measure that a requested state can take is to ensure that financial intermediaries respect their obligations to report suspicious transactions to FIUs and law enforcement. These intermediaries are required to act even on the basis of information contained in newspaper articles. It is therefore perfectly acceptable to draw their attention to such articles or other information about their clients or assets that have been deposited with them.

Gathering of Evidence

The information collected pursuant to an MLA request needs to be compatible with the legal system of the requesting state. A flawed testimony or seizure of documents can ruin the entire procedure. To avoid this problem, the requesting state must inform the requested state of any legal requirements in its own procedural law. This usually includes the form of sworn statements or affidavits (if they are to be used as evidence), the rights to be guaranteed to witnesses before they testify, validation of documents and signatures, etc. In turn, the requested state should ask its counterpart whether there are any special requirements in these matters.

Participation of Foreign Authorities

The participation of foreign authorities in the execution of a request is a very touchy matter that can boost the efficiency of any inquiry or ruin it. The requesting state knows best the evidence and issues at stake in its inquiry, but its officials cannot operate in foreign territory. Hence, whenever possible, requested states should allow foreign investigators to:

- Be present when hearing witnesses, and allow them to ask questions, or signal what questions to ask
- Be present during searches, to help decide what to seize
- Participate in sorting out of the documents seized, to indicate which ones are of use to them

For example, Swiss legislation allows these measures on the condition that foreign investigators commit themselves to not using the information that they obtain in the foreign state until they receive it through the formal MLA channels.

Issues arise time and again when officials of the requesting state conduct undercover operations in the requested state. One of the obstacles to such operations is that the requesting state loses control over the gathering of information and its use by the requested state, which contradicts the basic principles of international cooperation. Hence, such undercover operations can be practiced only between countries bound by a "particular relation of confidence."[1]

Handing over of Evidence

Evidence is traditionally handed over through diplomatic channels, which are slow. Many pieces of national legislation and bilateral treaties have provisions about urgency that allow, or do not prohibit, direct handing over between law enforcement agencies. Practitioners should therefore send a copy of the documents directly to the requesting state's investigators whenever possible. They may not be able to use them formally as judicial proof, but the documents will help focus their inquiry.

Summary

MLA procedures are slow and cumbersome. They must conform to the requirements of at least two judicial systems, possibly of different inspiration and tradition. Nonetheless, this fact should stimulate rather

than discourage our imagination and ability to achieve the indispensable cooperation between law enforcement authorities if we want to successfully fight what we all consider to be serious crimes, among which corruption ranks high.

Note

[1] See the 2003 decision of the Swiss Federal Supreme Court (ATF 130 II 1). All decisions of the Court can be found at http://www.bger.ch/fr/index.htm.

Trends in the practice of MLA in Asia-Pacific

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It has been often observed that countries face similar challenges and problems in the practice of MLA. A comparison of the experiences of different countries could therefore assist in identifying both problems and solutions to common problems.

A common issue is the process used by various countries for transmitting requests. Older treaties and conventions tend to require conventional methods of transmission, e.g., through diplomatic channels. Recognizing the need for speed in MLA, more recent instruments permit transmission via fax or e-mail. For some countries, however, electronic transmission of the request must still be confirmed by transmission of the original request through conventional channels. The reason for subsequent confirmation is ostensibly to ensure the authenticity of the request. Some practitioners, however, find this unduly cumbersome. In their view, authenticity can be easily confirmed with a telephone call to the originator of the request.

Another development brought about by technological advancement is the use of videolink technology. Several countries now permit officials and defense counsel in the requesting state to participate in taking evidence through videolink. In practice, it appears that there is limited use of this technology in MLA among Asia-Pacific countries. This could be because the cost of the technology remains prohibitive. Regardless, most practitioners believe that it will be a matter of time before the use of videolink in MLA becomes widespread.

A more immediate issue is the drafting of requests for MLA. Most practitioners appear to agree on the nature and detail of the information that should be included in a request. All agree that it is essential to state precisely what assistance is sought. The request should include a copy of the relevant law of the requesting state, a description of the offense and the penalty (including the death penalty), and the purpose of the assistance. It is always a good practice to include a deadline, and urgent requests should be clearly so marked. Countries should consider developing a standard format for requests, as this would reduce the time required to prepare requests and make it less likely that important information is omitted.

FAQs on the extradition process

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The law enforcement and judiciary of one country cannot tackle corruption without forging close links with their counterparts abroad in order to obtain evidence and to seek the extradition of criminals. To achieve this aim, the vast majority of countries agree that the fullest international cooperation between states should be a priority.

Unfortunately, extradition in practice often falls short of this laudable goal. One recent example shows how difficult it can be for practice to coincide with theory. France sought the extradition from one European country of a man allegedly involved in the terrorist bombings in the Paris metro in summer 1995 in which many people were killed and injured. The man was arrested in England in November 1995, following a request for provisional arrest. He was surrendered to France on 1 December 2005, 10 years, 3 weeks, and 3 days after France had requested his extradition. The authorities of both countries did their best to bring this person to justice, but obstacles came from differences in legal systems and from the specificities of the extradition law in the requested country at that time. Fortunately, this legislation has been replaced by a more modern one.

The obstacles in this extradition case should be considered in a wider context. Two factors already favored extradition. The countries involved were signatories of a multilateral extradition convention (the European Convention on Extradition). Furthermore, fighting terrorism has been a priority for the last several years. If such inordinate delay resulted despite these factors, how can one reasonably hope that international cooperation will be successful in fighting other types of crime (such as corruption) between countries that:

- do not have extradition treaties,
- do not have the same definition of the offenses of corruption, or
- have different legal systems?

It is true that the legal landscape is much more developed today. Prosecutors and judges can rely on an armory of national codes, and bilateral and multilateral agreements to seek international cooperation. Yet, can these tools improve international cooperation in both theory

and practice? What are the practical "bricks" for building bridges between countries in order to overcome the main differences in their legal systems? To address these issues, it will be instructive to examine the questions on the extradition process that practitioners most frequently ask.

What Is the Legal Basis for Extradition?

The most common legal bases for extradition are bilateral extradition agreements, multilateral treaties and conventions, and memorandums of agreement.

It is crucial that the appropriate agreement is identified as soon as possible. For example, a fugitive was arrested last year on the Isle of Man, an island in the center of the British Isles. A new surrender procedure between EU member states, the European Arrest Warrant, had been in force between France and the UK since July 2004. A French prosecutor was about to issue such a warrant. Unfortunately, the warrant could not be enforced in the Isle of Man because the island had not implemented the framework decision on the European Arrest Warrant. Instead, France had to request provisional arrest under the old European Convention on Extradition. If France had issued the European Arrest Warrant instead, precious time would have been lost.

Which Type of Request Should Be Made?

One of the first decisions in making an extradition request is the type of request. Should the requesting state make a full order request (known in the United States as a full extradition package) or a request for provisional arrest?

The decision is sometimes dictated by the circumstances. Some countries like France may accept a request for provisional arrest even though there is no urgency or reason to believe that the fugitive will flee, e.g., the fugitive has been located and has been living and working in the requested country for a period of time. Other countries will accept full order requests only in these cases.

There are also practical considerations. When a person has been provisionally arrested, the requesting state must provide the full extradition package by a relatively short deadline. In complex extradition cases, this may not be enough time to prepare all of the documents.

How Should the Crime(s) Be Described?

Dual criminality is a requirement in many bilateral extradition treaties, especially in old treaties with lists of extraditable crimes. In theory, it should not be an obstacle to extradition in modern treaties such as multilateral conventions. In reality, dual criminality may still prevent a judge from issuing a warrant against a fugitive who has been charged with a crime of corruption. This could occur when the presentation of the facts in the extradition request is not as clear as it should be. Some commonly asked questions that should be addressed in the request include:

- Is it a criminal or civil case?
- Is it a fiscal matter?
- Has the fugitive been prosecuted for the same crime in the requested state (*non bis in idem* [double jeopardy])?

Practitioners should also anticipate the consequences of the rule of specialty to prevent future difficulties in the requesting state. This is the principle that precludes a person from being extradited for one crime and being tried for another.

Which Statute of Limitation Applies?

If not clearly explained in the request, the statute of limitation in the requesting state may create an unfortunate misunderstanding in the requested state. The request should therefore explain what the limitation period is, how it is calculated, and how it has not yet expired in the particular case. In some cases, the request should state why the limitation period has not yet expired (e.g., explain that the limitation period is suspended when an accused absconds).

Which Procedure in the Requesting State Applies?

It may be important to describe the procedure that will be applied to the fugitive in the requesting state if extradition is granted. When a fugitive is sought for prosecution, the definition of what constitutes a prosecution in the requesting state can raise questions for the requested state. One common question is whether the person is sought for prosecution or merely for questioning.

If the person is wanted to serve a sentence, convictions resulting from a trial in absentia may be subject to challenge. If a conviction is obtained under such circumstances, the request should clearly so state. Some countries (such as the UK) also require the request to show that the convicted person is "unlawfully at large." The definition of this concept varies from one jurisdiction to another. Practitioners should therefore seek clarification in this regard.

What Evidence Should Be Included in the Request?

This is a recurring question to which the unsatisfactory answer is: "It depends." One particularly difficult issue is the evidentiary requirements of the requested state. Judges in some states do not examine the arrest warrant too closely. In others, they appear to be trying the foreign case. Different jurisdictions also use different evidentiary tests (e.g., prima facie case or probable cause). It is advisable to find out more about this issue when preparing the request.

Bail issues should also be anticipated. In several countries, fugitives may be granted bail after their arrest. Bail has always been considered a domestic issue to be decided by an independent judge of the requested state. This judge will base his or her decision largely on the evidence provided by the authorities of the requesting state. If the requesting state has information and arguments relevant to this issue, it is very important to communicate them to the requested state in a timely fashion. The requested state is often surprised to find out about these arguments after the judge has decided on bail.

Additional questions that should be considered when drafting a request include:

- Is it necessary to include a photo, fingerprints, or a description of the fugitive, or all of these? If none is available, it may be advisable to so state in the request so that the requested state will not have to ask for them.
- What are the authentication requirements? Do the main request and all supplementary evidence have to be bound and sealed?
- The authorities of the requested state may ask for an update about the status of the case in the requesting state. This can be anticipated in the request.

What Is the Impact of the Fugitive's Citizenship?

Many countries do not extradite their nationals. Moreover, the principle of *aut dedere, aut judicare* (extradite or prosecute) is easier said than done. Prosecuting a national for an alleged offense perpetrated in a foreign country is not simple. It becomes impossible if the two states do not cooperate closely on procedural and evidentiary aspects to ensure the efficiency of the prosecution.

What Assurances Should Be Given?

The requesting state may be asked to provide different levels of assurances in return for extradition. These could include assurances that the fugitive will receive a fair trial, or that torture, degrading punishment, or the death penalty will not be imposed on the fugitive. The issue becomes even more complicated if the requesting state has a federal structure. It will then be necessary to ascertain whether the federal or state authorities or both should provide assurances.

Which Language Should Be Used?

Language requirements are often stipulated in the relevant treaty or legislation. On a more practical level, poor translations of the request in the language of the requested state can delay or even seriously compromise the extradition process. Translation is time-consuming and expensive as well. There is therefore a tendency to reduce it when possible, such as by translating only a part of the evidence or an excerpt. However, the requested state may consider partial translations of evidence as unfair and hence unacceptable.

What Is the Priority of a Request?

How should a requested state treat multiple extradition requests for the same person from different countries? The relevant treaties and legislation may contain provisions dealing with these situations. There may also be provisions dealing with a fugitive who is serving a sentence in the requested state. In these situations, the requested state may consider delaying surrender, or conditionally surrendering the fugitive for trial before he or she is returned to complete the sentence.

What Is the Appeal Process?

The extradition process is often subject to appeals, be it a habeas corpus appeal, judicial review, *pourvoi en cassation* or *recours en Conseil d'Etat*. Appeals not only delay the surrender of a fugitive, but they can cause confusion for the authorities of the requested state if they are not explained. As always, "Explain—do not complain!"

Which Channels of Communication Should Be Used?

It is very important to consider the use of judicial networks and liaison magistrates in addition to or in place of diplomatic and official transmissions. Most of the time, these channels complement each other. It is therefore advisable to include one's phone number and e-mail address in the request so that a contact point can be quickly identified.

Conclusion

In theory, extradition in corruption cases is no different from that involving other types of crimes. However, experience shows that the former is often more complicated. One of the reasons is that corruption cases are usually complex. They also often involve defendants who can afford to spare no expense and hire highly qualified lawyers. The defendants cannot be blamed for acting in their own interests. Nevertheless, prosecutors and law enforcement would be rightly criticized if they do not take the practical steps that maximize the usefulness of all available legal tools.

Working together and intensifying actions to strengthen the extradition process

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Chapter IV of the United Nations Convention against Corruption (UNCAC),[1] specifically article 44, deals with the framework proposed for extradition in the instances of rendition between States Parties. Among the many challenges posed by the UNCAC and this regimen is the issue of preventing safe haven to those who would abuse their public position to amass enormous wealth, and follow this crime by fleeing to a jurisdiction in which they believe they can find shelter from prosecution. Oftentimes this shelter is not purposely provided by the country to which these criminals have fled, but is the result, in part, of the inefficacy of the extradition mechanisms existing between the injured state and the state reluctantly providing safe haven. It cannot be denied that even in the most sophisticated extradition regimens between states there are on occasion: (1) long periods of delay between the request for extradition and the decision on rendition; (2) extraordinary procedural demands made by the legal regimen in the requested state; 3) difficult and unnecessary proofs required before extradition; (4) the danger of the party being sought fleeing yet once again; and (5) other problems that delay the procedure, resulting in at least a temporary safe haven for these criminals. Thus it is that article 44(9) of the UNCAC requires that "States Parties shall...endeavor to expedite extradition procedures and to simplify evidentiary requirements relating thereto…"[2] This paper will address only a few of these problems as they have surfaced in one extradition regimen and demonstrate the manner in which that system has dealt with simplifying the evidentiary and procedural requirements in an effort to create a more efficient process. As all countries ratifying the UNCAC will be called upon to "expedite" and "simplify" their procedures, it is hoped that some of the processes outlined here may prove useful in other systems.

A Central Authority

Often, in connection with mutual legal assistance and other recurring matters involving foreign governments, treaties require that parties

"designate a central authority..." to be responsible for coordinating intergovernmental efforts to accomplish a variety of tasks. In extradition matters this can be particularly important given the time constraints that invariably accompany the extradition process. However, such an office so created has the potential of being far more effective and vital to the process of extradition when it provides more than a receptacle for the service of international documentation.

By way of example, the United States Department of Justice has created the Office of International Affairs (OIA), which has been designated by the US Attorney General as the central authority of the United States for dealing with international legal issues, including both extradition and mutual legal assistance. However, this office has evolved into much more than the official point of service for foreign governments wishing to engage in the extradition process with the US.

As a demonstration of the importance of such a mechanism, it is worth noting that when OIA was created in 1979, it employed five attorneys and was then handling only a limited number of extradition cases per year. It can be well argued that the growth of the office to more than 40 lawyers, stationed around the world, and a caseload of hundreds of cases per year is the direct result of the globalization, the internationalization, of organized criminal activity. What cannot be argued is the growing importance in finding successful solutions to the ever-growing number of complications in the extradition process.

While OIA does not, in the normal course of extradition proceedings, actually appear at the in-court hearing, it is always responsible for coordinating the efforts of the US in these proceedings; e.g., the representation of foreign governments by the United States Government in extradition matters must be done in coordination with the OIA. The government prosecutors actually appearing in court are advised by members of OIA, which is also responsible for ensuring assistance in seeing that all time parameters of the extradition processes are met among the other technical requirements that attend this intergovernmental effort. What is most important about the concept of the OIA is that these attorneys are specialists on the topic of extradition and thus are current on the law that governs the process. This expertise and up-to-date understanding of the law and current policy helps to ensure that embarrassing and harmful errors do not jeopardize international relationships. While it might seem as though having a layer of authority above the attorneys actually handling the case would slow the process, experience has demonstrated that because that layer of authority reduces errors and stimulates timeliness in meeting deadlines,

a comparatively small cadre of attorneys deal effectively with the problem in some 94 federal districts.

It is also clear that in many instances, extraditions are delayed or, in some cases, defeated by the inadequacy or tardiness of required documentation. There is less likelihood of these errors occurring where a specialized office is available for consultation by both members of the requesting and requested state officials. Where experts are available to assist in the drafting of extradition documentation, both outgoing and incoming, experience has demonstrated fewer ministerial or technical glitches. Again by way of example, the US maintains in Asia, i.e., Bangkok, Jakarta, Manila, and Beijing, attorneys charged, in part, with assisting in extradition and other matters of mutual legal assistance.

An effective centralized authority can also serve as the mechanism that has intergovernmental responsibility for agreeing to simplification procedures with similar bodies of other treaty partners. A policy of scheduling annual or biannual conferences with extradition or MLA treaty partners for the purposes of agreeing to interparty simplification procedures or updating partners as to changes in national law and problems encountered in particular cases between partners, etc., has proven very useful.[3]

To the extent that maintaining an office specifically to monitor and supervise extraditions might be seen by some as extravagant, it should be pointed out that OIA currently employs a relatively small staff to accommodate the needs of a very large constituency. Perhaps most importantly, having one central office deal with all extradition matters involving foreign governments assures (1) consistency in results; (2) the utmost in efficiency; and (3) the assurance that one office is ultimately answerable for the results obtained.

In summary, one could reasonably suggest that the single most fruitful suggestion for improving the extradition process between cooperating governments would be the existence of a well-informed, well-functioning central authority. To the extent such a body exists, its maintenance and financial support would appear to be wise investments in the overall process of extradition.[4]

Extradition under US Law

A brief review of the extradition law of the US, which follows a pattern similar to other common law jurisdictions, may be helpful in this discussion. Extradition under the law of the United States can be accomplished only when: (1) there is a treaty in place between the country requesting the

return of the fugitive and the country in which the fugitive is found,[5] and (2) the request for extradition meets the terms and conditions specified in that treaty.[6] Thus, for UNCAC purposes, the US can be described as a country "…that makes extradition conditional on the existence of a treaty...."[7] Once it is established that a treaty exists and that the request for extradition meets the terms and conditions of the treaty, the question to be answered by the courts of the US is whether the evidence is "sufficient to sustain the charge under the provisions of [that treaty]."[8]

Common Scenario for Extradition from the US to a Foreign Jurisdiction

The following set of facts illustrates a common, but not the only, scenario where a requesting state seeks the extradition of a fugitive from the US.

Extraditions can be sought from the US either through (1) a *formal request* through diplomatic channels or (2) *provisional arrest*. Where extradition is formally sought through diplomatic channels, the US Department of State reviews the extradition documents submitted to ensure compliance with formal requirements. Where provisional arrest is employed, the matter is reviewed and processed for compliance with proper procedure and adherence to protocol by OIA. After that, the matter is referred to the appropriate United States Attorney's Office (the prosecutor) for handling in the courts. Then the court makes a judicial determination as to whether or not the person is extraditable according to US law (e.g., certifies that the subject is extraditable). Ultimately, the warrant for the subject's extradition, should it be decided that extradition is appropriate, is a matter for the signature of the Secretary of State.

Practical Issues that Arise in Extradition Proceedings

Bringing the Subject before the Court

As previously pointed out, extradition requests can be received through separate means—either through a formal request for extradition made through diplomatic channels or, where the circumstances dictate urgency, through a request for provisional arrest.

Before a determination is made as to whether a person can be extradited, that individual must be brought before the court. This is accomplished through the issuance of a warrant of arrest based on the facts alleged in the extradition papers forwarded by the requesting state.

Content of the Requesting Documents

Although they vary between the several jurisdictions, modern extradition treaties share several paradigms that are generally agreed to be sufficient for the purposes of the requested state. Most modern treaties require that requests are accompanied by, at least:

- A copy of the warrant or order of arrest, issued by a judge or other competent authority
- A copy of the charging document
- Documents, statements, or other types of information that describe the identity and probable location of the person sought[9]

These documents must be in a form that is readily usable by the authorities of the requested state, since copies are generally distributed directly to the authorities who will be involved throughout the procedure. It is equally important that all documentation be complete and in a form understandable to the requested state. One of the most common reasons for delays and resultant failures in the process is poorly translated documents, which cannot be sufficiently understood by those having to use the documents. While standard forms are useful in identifying a format that will be acceptable to the requested state authorities, the use of standardized language to describe the incidents supporting the documents is to be avoided. It should always be remembered that the content of the documents submitted will be the basis for establishing, or not, the standard of proof required to order extradition. By rule of thumb, it is a fair general recommendation that the requesting state submit as much of its file, most particularly sworn documents and those filed in national courts, as security allows. It also goes without saying that the more collaboration there is between the requesting state and requested state authorities before filing the requisite documentation, the more likely the result will be satisfactory to both parties.

The Parties in Court

Because extradition is most often a matter of parties entering appearances in court, one such party being the country asking for the return of a fugitive (the requesting state) and the other being the fugitive resisting that return, representation before the court for the requesting party can be anticipated. Anticipating the need for representation can accelerate the entire extradition process.

For example, while the US is itself not a party to extradition proceedings (as the requested state), it provides representation to the foreign government seeking extradition through the offices of US prosecutors. To provide clarity as to this aspect of the extradition process, the US often specifies in the terms of the treaty, or through other forms of diplomatic agreement, that it will provide such representation. Having a United States prosecutor representing the foreign government is of great import in that it provides the requesting state with a representative experienced in US law and serves to avoid errors that would result in costly delays. In the not too distant past, inasmuch as the United States was not a party to the extradition proceedings, the consulate of the country seeking extradition actually hired private American lawyers to represent their interests before the court. The far more efficient practice is that prosecutors familiar with national law and practice handle the procedures before the court. This practice (1) streamlines the process, 2) makes the cost of extradition more reasonable, and (3) avoids costly and embarrassing errors.

Appeals from the Court's Decision

An often criticized aspect of any legal process is the amount of time consumed between the start of the procedure and its final step—in this case, from the time extradition is requested until the time the fugitive is returned or the request is denied. One of the methods by which that time is shortened in extradition proceedings in the US is the absence of any appeal as to the certification by the court of whether the fugitive can be extradited. The court's finding that a person can legally be extradited cannot be directly appealed.[10] Once such a finding is made by the court, the matter is then referred to the Secretary of State for final decision as to whether the subject will be surrendered. Because the United States federal judicial system contemplates appeal by right to the Federal Appellate Courts and possible appeals to the Supreme Court of the United States under specific circumstances, limiting the right to appeal of the original decision in extradition matters saves a great deal of both time and expense.

Procedural Rules in Effect in Extradition Proceedings

The *nature* of extradition as characterized under United States law allows for considerable savings in time where extradition is involved. In the United States' understanding, extradition is a matter neither wholly

criminal nor completely civil. It is in fact described as sui generis (in a class by itself) and as such, procedures surrounding its execution are likewise unique. In this case, the rules of procedure regularly employed in matters before the federal courts of the United States are not applicable to extradition proceedings.[11] Because extradition is not regarded in the same light as are criminal proceedings before the courts, the safeguards normally surrounding such proceedings are not considered necessary in extradition matters. Likewise, because of the status of extradition as a sui generis proceeding, the rules of evidence ordinarily used in criminal matters before US courts are also not applied in extradition matters.[12]

Finally, in ordinary criminal matters brought before US courts, the device of pretrial discovery of the prosecution's evidence is ordinarily available to the defendant. Again, because of the legal characterization of extradition under US law, discovery is not available to the subject of an extradition proceeding. Thus, with the position under US law that the facts proffered in the extradition documents filed by the requesting state must be accepted at face value, there are few if any factual issues to be resolved in the process in the courts of the US. This being the case, there is no justification for discovery and the time that vehicle usually requires.[13] With the elimination of these three procedures from the various hearings, substantial savings in time and expense are realized in extradition proceedings with no violation of due process standards as defined under US law.

Waiver of Extradition or Consent to Be Extradited

In a process known as "simplified extradition" under some extradition treaties, an individual is advised that he or she may waive various rights under the rules of extradition and consent to be returned to the requesting country without the need for further judicial proceedings. This process is explained to a subject by the court, the individual's counsel, the prosecutor, or all three before the subject is permitted to sign a written waiver. Securing a written waiver supplies to the states involved the advantage of an obvious saving in time and expense that can otherwise be used in conducting formal proceedings. Where a waiver is obtained, the subject can be returned immediately without further formal intervention. The advantage to the subject lies in the fact that he or she returns to the requesting country and can more quickly attend to his or her defense. The disadvantage is that some of the possible protections attendant on formal extradition are waived where this avenue

is taken. This process, however, may not be recognized by the laws of some countries.

In a similar vein, a subject may consent to be extradited, wherein he or she allows the judge to certify him or her as extraditable without further court appearance. Again this method saves time and expense, while preserving the subject's rights to various extradition defenses, most particularly the rule of speciality.

Bail (Pretrial Release)

One of the most disconcerting aspects of extradition is the prospect that the subject may escape the jurisdiction of the requested state only to have to be pursued again, thus causing further expense and delay. Likewise, it cannot be gainsaid that whenever a fugitive is aware of pending detection and detention, he or she will take measures not only to escape but also to find further safe haven for ill-gotten gains. Thus, the issue of bail pending extradition proceedings is an important and sensitive aspect of extradition practice.

As previously mentioned, extradition in the United States is not considered to be a strictly criminal offense to which the various constitutional and statutory rules regarding pretrial release must apply.[14] It is the case in the United States that a presumption favoring bail in extradition cases does not exist and that the opposite is in fact true.[15] Bail should be denied in extradition proceedings absent "special circumstances."[16]

Provisional Arrest

Often in matters involving fugitives, urgent action is necessary to ensure that a fugitive in transit between countries—one who is likely to intimidate or harm witnesses or one who will dispose of his or her assets when threatened with arrest—cannot succeed in these efforts before a formal extradition request can be prepared and delivered. This is most often accomplished through the provisional arrest of these individuals, on the condition that a formal extradition request will follow. To avoid legal disputes and the possibility that this mechanism will not be available, many modern extradition treaties specify provisions allowing for provisional arrest where urgency is demonstrated. Employing this method lessens the chances of further flight by an offender before formal extradition can be accomplished.

Certification of Documents

The authentication of documents from foreign countries is often one of the most problematic and time-consuming issues in international cooperation. The US has greatly reduced this problem. It has eliminated the usual courtroom challenges to these documents by statutorily requiring that in all extradition cases, where it is certified by the US consular officer that such documents would be received for the same purposes in the requesting country, these documents "shall be received and admitted as evidence…."[17] Thus, one of the most time- and labor-intensive processes in international litigation is made more efficient and less costly.

Summary

As extradition remains one of the most important mechanisms in international cooperation, the process must be constructed and utilized efficiently. While recognizing that extradition is a legal process and thereby subject to the constraints of due process under the major legal systems of the world, great strides toward a more efficient process can be made by simultaneously recognizing that the extradition process is not one in which guilt or innocence is determined, but one meant to ensure that the courts of the offended government will ultimately make such a determination. Regarding the extradition process in that light accommodates both efficiency and fairness while at the same time allowing a State Party to meet its obligations under articles 44(9) and 44(14) of the UNCAC.

Notes

1 United Nations Convention Against Corruption, on the Web at www.unodc.org/unodc/crime_convention_corruption.html
2 Id. art. 44 (9)
3 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 (December 2002), footnote 68
4 For those interested in its structure and organization, the Office of Internal Affairs can be found on the Web at www.usdoj.gov/criminal/oia.html
5 For the sole exception to this statement see 18 USC § 3181(b)
6 18 USC § 3181
7 UNCAC art. 44(5)
8 18 USC § 3184

[9] Extradition Treaty, 25 June 1997, US-India, art. 2(1), S. Treaty Doc. 105-30 (1997), art. 9(2) and 9(3)

[10] The matter may be attacked collaterally through habeas corpus, but that process and its ramifications are beyond our purposes here.

[11] Federal Rules of Criminal Procedure, Rule 1(a)(5)(A)

[12] Federal Rules of Evidence, Rule 1101(d)(3)

[13] *Gill v Imundi*, 747 F. Supp. 1028; *Surrender of Ntakirutimana*, 988 F. Supp. 1038 (S.D. Texas 1977)

[14] 18 USC § 3142

[15] *Beaulieu v Hartigan*, 544 F.2d 1, 2 (1st Cir. 1977)

[16] *United States v Williams*, 611 F.2d 914, 915 (1st Cir. 1977)

[17] 18 USC § 3190

Some common problems and practice points in the extradition process

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Extradition is often a time-consuming and procedurally complex process. The following are several common problems and some practice points that may help alleviate them.

Political Crimes

Many countries deny extradition for political crimes. This is a potential obstacle, since most developing countries experience corruption by people who hold political power. Denying extradition for political crimes gives a political hue to extradition in corruption cases that, more often than not, works to the benefit of the corrupt.

Absence of Central Authorities

Many countries now have central authorities to transmit and receive requests for extradition. The practice, however, is by no means universal. In these cases, requests must be transmitted via other means (e.g., through diplomatic channels), which can be time-consuming.

Confidentiality of Request

The requesting state may wish to keep an extradition request or the information in the request confidential. This may be necessary to effectively arrest the person sought, or to keep from divulging sensitive information. Practitioners should bear in mind that some requested states may be so corrupt that confidentiality may not be maintained, especially if the person sought is a high official. One possible solution is to minimize the number of agencies and officials that handle a request, e.g., through the use of a central authority.

Translation

Extradition treaties and legislation usually specify that an extradition request and all of the supporting evidence must be provided in a particular language. Documents therefore often have to be translated. Translation is not only time-consuming and costly, but its quality is often so poor that the success of the case is jeopardized. At the same time, requesting states often do not have qualified translators at their disposal. To overcome these problems, some countries now "outsource" the translation tasks to either a private company or the language faculty of a university. In some instances, the requested state may also be able to provide assistance.

Endorsement of Warrants

Extradition can be simplified through procedures such as the endorsement of warrants. This is a procedure in which a requesting state need not send a full extradition request and evidence that is ordinarily required under most extradition treaties. The requesting state only has to send the arrest warrant for the fugitive to the requested state. A judicial authority in the requested state then endorses the warrant, which becomes the legal basis for the fugitive's arrest and surrender. The extradition process is expedited because the requesting state does not have to send the same amount of documentation as in a regular extradition request, and because there is no lengthy extradition hearing to examine the evidence.

Consent Extradition

The extradition process can also be simplified if the relevant treaty and legislation provide for consent extraditions. Under this process, a fugitive is allowed to waive his or her right to have an extradition hearing and consent to his or her surrender. The extradition process is expedited, again because less documentation is required and because there is no full extradition hearing.

Five practice points for effective extradition

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It has often been said that extradition is a unique area of law. The legal intricacies in this area and the differences in legal systems pose many obstacles and challenges. Nonetheless, practitioners and policy makers can adopt certain policies and practices that may eliminate, or at least reduce, many of these problems. The number of good practice points in extradition are too numerous to be exhaustively discussed here, but the following are five of the most important ones.

Understanding of Evidentiary Requirements in the Requested Country

The authorities in the requesting country may omit certain evidence from the extradition bundle because the evidence could be considered inadmissible in the requesting country. However, the requesting and requested countries may have different rules for determining admissibility. Hence, evidence that is inadmissible at trial in the requesting country may be admissible in the extradition hearing in the requested country. The omitted evidence might therefore be very useful in the extradition hearing. To avoid this problem, the requesting country should fully understand the evidentiary requirements in the requested country.

A Dedicated Central Authority for Extradition Requests

The establishment of central authorities is one of the most important developments in the practice of extradition in recent years. As noted above, extradition can be effective and efficient only if the requesting country understands and complies with the legal requirements in the requested country. Having a central authority in the requested country with a team of experts who can provide prompt advice on these issues would make compliance much easier for the requesting country. Countries should also widely publish the contact details of central authorities, e.g., on a mutually known Web site.

Coordination between Central Authorities and Law Enforcement Officials

Even when central authorities are handling a request, it is still important to ensure the participation of all other agencies and authorities who are involved in the case. Central authorities are experts in extradition law and are thus best suited to deal with the legal issues in that area. On the other hand, the law enforcement authorities of the requesting country are more familiar with the evidence in the case. Court hearings in the requested country are usually conducted by the department of justice of the requested country, not the central authority. Hence, the extradition process may involve several bodies that have different responsibilities and expertise. To effectively address problems that arise, all parties should work closely together and constantly share information and concerns.

Attendance of Case Officer of Requesting Country at Extradition Hearings

One example of coordination among the parties is for the case officer of the requesting country to attend the extradition hearing in the requested country. During the hearing, the lawyers representing the fugitive may raise arguments that the case officer could easily refute because he or she has full knowledge of the case. Any political or legal issues raised by the lawyers representing the fugitive should be referred to the legal team in the requesting country, which is likely to be more familiar with the issues raised.

Financial and Personal Profiles of the Person Sought

When a fugitive is arrested under a provisional warrant in a foreign jurisdiction, he or she very often applies for bail. In determining whether to grant bail, a judge must assess whether the fugitive is a “flight risk.” This involves considering many factors that are unrelated to the facts of the case, e.g., the background of the fugitive, personal ties, financial standing. It would therefore be useful for the requesting country to include in the extradition request financial and personal profiles of the person sought, for use in a bail hearing.

The role of liaison magistrates in international judicial cooperation and comparative law

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French Liaison Magistrate in the United Kingdom

Until relatively recently, it was not common practice for a domestic judge to consult the legislation or the jurisprudence of foreign countries before giving his decision, though he might well have been given the opportunity to find out about the legal system of a foreign country more or less distant from his own, in geographical, cultural, and linguistic terms, during his legal studies.

This interest in foreign law now appears to be one of the elements forming part of the training of young lawyers. The large number of requests for internships that are received by French embassies confirms this and suggests that future judges may well adopt a different approach from that of their predecessors toward foreign legislation.

The École de la Magistrature, which has ensured the initial and continuing training of French judges for more than 40 years, has developed programs with the primary objective of raising awareness of the legal systems of other countries. However, there is a difference between, on the one hand, initiation in the law of other countries and, on the other hand, the concrete and practical use that judges are able to make of such knowledge when they must give judgment in cases where the issues are not merely domestic.

However, times are changing. The development of community law and the jurisprudence of the European Court of Human Rights, and the accompanying consequences, have profoundly changed the way in which judges have, up until now, viewed the operation of their legal systems. Equally, the arrival of the Internet in courts means that judges now have access to the law of foreign jurisdictions by means of a simple click.

It could therefore be thought that most of the barriers that discouraged judges from being inspired by, or indeed from borrowing, legal concepts or solutions from their neighbors have fallen. That would, however, be a somewhat premature conclusion. In reality, even with the assistance of technology, obstacles remain, and such obstacles go beyond simple questions of linguistics. A desire to resolve a legal problem by comparing solutions already adopted in other jurisdictions can come up against the problems caused by a greater or lesser understanding of the real meaning of foreign legislation and case law. A lack of knowledge

of the local context of a country's laws and jurisprudence can lead to misunderstanding, which does not assist the reasoning of a judge curious to know how a foreign colleague would respond to a question similar to the one before him.

For a little more than 10 years now, judges wishing to find out how foreign jurisdictions tackle a novel problem have been able to receive assistance from certain colleagues. In March 1993, the first French judge was appointed to a post in the Italian judicial authorities, in Rome, primarily to improve mutual judicial assistance between France and Italy. This first appointment was followed by the appointment of another French judge in Holland. Several other posts for so-called "liaison magistrates" have been created within the judicial authorities in Canada, the Czech Republic, Germany, Morocco, Spain, the United Kingdom, and the United States. Reciprocal posts for "liaison magistrates" have been created in France at the Ministry of Justice in Paris. These appointments, made with the common objective of improving, in a general manner, judicial cooperation between countries, have encouraged other countries to embark on this route. The process was formalized by a Joint Action of the European Union of 22 April 1996.

The activities undertaken by liaison magistrates fall into four broad categories:

- Mutual assistance in the sphere of international criminal law
- Mutual assistance in the sphere of civil law
- Comparative law
- The forging of links between judicial authorities

Liaison Magistrates and Mutual Assistance in Matters of International Crime

With their knowledge of the law and procedure of both their own country and their host country, liaison magistrates tend to be in a position to remove the principal obstacle that a domestic judge is likely to encounter when he or she considers that it would be useful to consult the law of another country: the misunderstanding, created by the real or imagined differences between the legal systems. In the sphere of bilateral cooperation in criminal law, an imperfect understanding of another country's legal system can still all too often lead to a form of self-censorship. Thus, for example, a French *juge d'instruction* (examining magistrate) wishing to hear evidence from a witness who is abroad or to collect evidence (bank documents, DNA samples, etc.) may well hesitate

to send an international letter rogatory, fearing that a response is by no means certain. On the other hand, if such a judge can request assistance from a colleague posted in the relevant country, he or she can direct the request, taking into account the requirements particular to the procedure applied in that other country.

An increasingly large number of *juges d'instruction* in France now send the liaison magistrate, by fax or e-mail, letters rogatory, which are in turn forwarded to the authorities of the foreign country. Their colleague in the foreign post will accordingly wish to clarify certain points, such as the capacity in which a person is to give evidence (as a witness or as a suspect), the evidence required for obtaining a search warrant, or the identification of telephone numbers. This advisory, indeed expert, work, carried out before the transmission of the request for assistance, can preempt the need for the foreign authorities to request further information, which would otherwise delay the execution of the letters rogatory. In an urgent case, the proximity of the liaison magistrate to his colleagues in the host country enables him to draw their attention to the need to respond to the request as quickly as possible.

Similarly, liaison magistrates are able to provide information to their foreign colleagues on the requirements of French law and on the rules of procedure applicable in their country of origin. This explanation is rendered easier by their presence in the workplace of their foreign colleagues. Even in the era of the Internet, nothing compares to a direct, face-to-face exchange between two people who know each other and meet regularly.

Equally, the judge who has made the request for mutual assistance can, with the help of the colleague posted to the relevant member state, follow the execution of the request and so will not receive the impression that it has fallen into a black hole, a reproach heard all too often in the area of cooperation in international crime. Moreover, should difficulties arise in the execution of the request, the judge can swiftly be informed of the reasons for the problem. Such information is particularly useful if one or more of the people being investigated are being held in detention. How often is it heard that a *juge d'instruction* cannot finish his dossier since he is still waiting for the response to his international letter rogatory!

The formation of joint inquiry teams between two or more countries—a form of cooperation that is now indispensable in combating more effectively the new types of international organized crime—will cause liaison magistrates to increasingly play the role of facilitator and interpreter of legal systems. Even though the rules applicable in a country are often no more than the specific enunciation of common principles,

the intervention of liaison magistrates means that a rapid response can be provided to the everyday, practical problems of cooperation: changing the letter of the law is not enough unless there is also a simultaneous change of mentality. Mutual assistance must derive its strength from a great degree of confidence between operators, based on common standards that guarantee the respect of the rights and liberties of those participating in a criminal trial.

For some 10 years now, liaison magistrates have thus intervened as real "legal adapters" between different systems. Since they are integrated within the workplace of their foreign colleagues, liaison magistrates are also regularly consulted by the judicial authorities of their host country when members of such authorities have an interest in the legislation, the jurisprudence, or, more generally, the operation of the French legal system.

This role of facilitator between the procedures of different countries also encompasses extradition procedures (which underwent profound change in 2004 with the entry into force of the European Arrest Warrant). Around the world, there remain significant differences in extradition procedures among countries. Which should take priority: a provisional arrest request or an extradition request?

The answer may differ depending on the country in question. The compilation of a dossier must also take into account the avenues of appeal available in the country in question: for example, the opening of a dossier of extradition to the United Kingdom is directly dependent on habeas corpus appeals and judicial review, exercised against the decisions of the judge sitting at Bow Street in London and of the executive power (the Home Secretary). The liaison magistrate must thus play the role of adapter between two systems that are even farther apart.

The same goes for matters concerning the transfer of people who have been sentenced to imprisonment and who wish to serve their sentences in their country of citizenship.

Liaison Magistrates and Mutual Assistance in Civil Matters

Liaison magistrates also participate in the handling of bilateral cases, such as those concerning the international abduction of children by a parent (The Hague Convention of 1980). Liaison magistrates ensure that the two parties who are claiming custody of the child do not take advantage of the different legal systems to deprive one of them of the exercise of his or her rights as a parent of the child, or to render impossible any amicable agreement. Liaison magistrates thus aim to fill the gaps

between the legal systems that might otherwise present problems to the parents when they make submissions to the foreign judiciary.

Moreover, the recent creation of the European Judicial Network, including liaison magistrates, in civil and commercial matters should contribute to facilitating the execution of judicial decisions of one country in another, thereby preventing parties from "choosing" their judges.

The implementation of measures to protect those under guardianship also increasingly gives rise to the intervention of liaison magistrates, since as soon as those under guardianship move from one place to another, difficulties in the administration of their possessions arise.

The execution of letters rogatory in civil matters therefore means that the liaison magistrate's sphere of competence is not limited to matters of criminal law.

Liaison Magistrates and Comparative Law

An area in which liaison magistrates are increasingly involved is that of the dissemination of foreign law when a national court is called to pronounce on a new legal question.

In the absence of any relevant legislative provision or case-law precedent, it is tempting (maybe even advisable) for a domestic judge to try to find out how a foreign legislature or court has addressed a certain question. This situation can often arise in the sphere of so-called "social problems." In France, one can cite the legal problems raised by, for example: a couple's use of a surrogate mother; an application for adoption made by a same-sex couple; the case of involuntary manslaughter of a fetus; the principle of whether compensation should be granted to children who are born handicapped, where the mother was denied the option of abortion because of a clinical error. Each time they have been consulted, liaison magistrates have informed their colleagues of the response, or absence of a response, by the foreign legislature or courts to these sorts of fundamental questions that confront our society.

Even in more so-called "classic" cases, such as those bearing on the right to respect for private life, liaison magistrates are invited to inform the court of the approach adopted by the courts in their country of origin. Obviously, it is not simply a matter of copying another judge's decision, made in the context of a different legal system. However, the knowledge of the law applicable in another country and of its interpretation by a judge in that country undoubtedly provides valuable assistance in

reaching a decision. Liaison magistrates do not content themselves with simply providing a copy of the relevant judgment, which could be of limited use to a foreign court. Rather, they accompany their response with personal commentary, enriched by their knowledge of the legal system of their host country.

Not so long ago, when a lawyer cited foreign legislation or case law, it was considered an admission that he lacked a serious argument. That era appears to have been consigned to history–a welcome development. At their modest level, liaison magistrates thus participate in the growing convergence of legal cultures.

The "Rapprochement" of Judicial Authorities

Knowledge of the particular characteristics of a foreign legal system can assist in preventing misunderstandings, assuaging anxieties born of ignorance, and facilitating exchanges between those participating in the civil and criminal systems.

Each year, internships are organized to allow lawyers, judges, or public prosecutors to discover or to deepen their knowledge of the operation of justice in other countries. Evidently in those countries where there is a liaison magistrate, the latter will intervene directly, both in setting up the internship and in choosing the program. In this endeavor, liaison magistrates benefit from the valuable assistance provided by organizations that forge links with different legal cultures, such as associations of lawyers, schools, universities, or training institutions. In addition, the goodwill shown by many lawyers in welcoming their foreign colleagues and in helping them to get to know their legal system plays an important role.

Liaison magistrates also participate in the preparation of bilateral negotiations concerning, for example, the implementation of a convention on mutual judicial assistance in criminal matters with a view to forging links between the positions of the countries in question. During the elaboration of these new texts, liaison magistrates are asked to shed light on the difficulties that they have observed in the course of their everyday work, and their views enable the implementation of concrete and useful solutions.

At the point at which linguistic and textual barriers disappear, the barrier existing too often in the minds of those participating in the legal systems must also be removed, to give way to confidence: in their own way, liaison magistrates are dedicated to achieving this aim.