

MLA AND EXTRADITION IN THE REPUBLIC OF KOREA

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I. BASIC MECHANISM, PROCEDURES AND RESPONSIBLE AGENCY

MLA is prescribed in the Act on International Judicial Mutual Assistance in Criminal Matters, and extradition is dealt with according to the Extradition Act. The Central Authority for MLA and extradition in Korea is the Ministry of Justice.

A. MLA

The Central Authority for MLA in Korea is the Ministry of Justice. Korea receives letters requesting MLA through diplomatic channels or by direct mail. Officially, the acceptance of a request for mutual assistance and the sending of materials of mutual assistance to the requesting country shall be made by the Ministry of Foreign Affairs. Provided that there are urgent or special circumstances, the Ministry of Justice may act with the consent of the Minister of Foreign Affairs.

B. Extradition

When the Minister of Foreign Affairs has received a request for the extradition of a criminal from a requesting state, the requesting state shall send the written extradition request and the related data to the Minister of Justice.

II. CONDITIONS AND REQUIREMENTS TO REQUEST MLA AND EXTRADITION TO KOREA

A. Necessity of a Treaty Basis & Reciprocity

Even if an MLA treaty or an extradition treaty has not been concluded, if it is guaranteed that any requesting country would comply with any request of the Republic of Korea with respect to the same or similar matters, the Act on International Judicial Mutual Assistance in Criminal Matters or Extradition Act shall be applicable. In cases where a mutual assistance treaty or extradition treaty includes different provisions from those of the Act, the provisions of the treaty shall prevail over the Act.

B. The Procedure to be Followed by a Requesting State

1. MLA

Any request for mutual assistance shall be made in writing specifying matters falling under the following elements:

- (i) Agency taking charge of the investigation or trial related to the request for mutual assistance;
- (ii) Summary of the case;

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- (iii) Object and contents of the request;
- (iv) Other matters necessary for carrying out mutual assistance.

In case of a request for mutual assistance, such as examination of a witness, delivery of objects, testimony in the requesting country, etc., the requesting country shall explain whether it is a request for investigation or trial.

2. Extradition

There is no provision relating to the procedure of requesting in the Extradition Act. But extradition treaties generally prescribe that all requests for extradition shall be submitted in writing through diplomatic channels. All requests shall be supported by:

- (i) Documents, statements, or other types of information which describe the identity, including nationality, and probable location of the person sought;
- (ii) Information describing the facts of the offence and the procedural history of the case;
- (iii) The text of the law describing the essential elements of the offence for which extradition is requested;
- (iv) The text of the law prescribing punishment for the offence;
- (v) A statement of the relevant provisions of its statute of limitations on the prosecution or the execution of punishment of the offence.

C. Dual Criminality and Scope of Offences

Dual Criminality is necessary for both MLA and extradition requests.

1. MLA

Where the crime under mutual assistance does not constitute a crime, or it is a crime against which no public action may be instituted, under the Act of the Republic of Korea, it may not be required to give any mutual assistance.

2. Extradition

Extradition may be requested only in cases where an extraditable crime corresponds to capital punishment or imprisonment or imprisonment without prison labour for life or not less than one year under the Acts of Korea and the requesting state.

D. Limitations of Use (MLA)

Provisions on use limitation exist in most MLA treaties. The requesting state should not use any information or evidence obtained under an MLA treaty in any investigation, prosecution, or proceeding for any purpose other than that described in the request without the prior consent of the requested state.

E. Assurance of Specialty of Extradition

If there is no guarantee from a requesting state that an extradited criminal will not be punished for crimes other than those permitted to be extradited, and he is not extradited to a

third country, the criminal shall not be extradited, except in cases where the criminal falls under any of the following circumstances:

- (i) Where the criminal is punished for a crime which may be deemed guilty in the limit of the criminal facts for which an extradition is admitted, or a crime committed after the criminal is extradited;
- (ii) Where the criminal left the territory of a requesting state after extradition, and he or she voluntarily re-entered the requesting state;
- (iii) Where the criminal fails to leave the territory of a requesting state within 45 days from the time when he or she may freely leave the requesting country; and
- (iv) Where Korea agrees to it.

III. AVAILABLE TYPES OF ASSISTANCE

The scope of MLA is as follows:

- (i) Investigation of the whereabouts of a person or object;
- (ii) Presentation of documents and records;
- (iii) Service of documents;
- (iv) Gathering of evidence, seizure, search and verification;
- (v) Delivery of objects, such as evidence, etc.; and
- (vi) Hearing of statements, and other measures to make any person testify or cooperate with the investigation in the requesting country.

IV. RESTRICTION AND GROUNDS FOR REFUSAL

A. Restriction on MLA

Other than dual criminality, requests are restricted in the following circumstances:

- (i) Where it may be detrimental to the Republic of Korea's sovereignty, national security, public peace and order, or public morals;
- (ii) Where it is deemed that the criminal might be punished, or subject to an unfavourable penal disposition due to race, nationality, sex, religion, social status, or the fact that he or she is a member of a specified social organization, or by the reason that he has a different political view; and
- (iii) Where it is deemed that the crime underlying the mutual assistance request is one of a political nature, or the request for mutual assistance is made for the purpose of an investigation or trial on another crime of a political nature.

B. Grounds for Refusal of Extradition

1. Absolute Cause for Refusal of Extradition

- (i) Where the prescription of indictment or sentence against an extraditable crime is completed under the Act of Korea or the requesting country;
- (ii) Where a trial for an extraditable crime is pending in a court of Korea, or the judgment has become final;
- (iii) Where there is no proper reason to suspect that the criminal committed an extraditable crime, provided that in cases where the accused was convicted in the requesting state for an extraditable crime, this shall not apply; and
- (iv) Where it is deemed that there exist concerns that the criminals might be punished or subject to other unfavourable dispositions for reasons of race, religion, nationality, sex, political belief, or membership in a specific social group.

2. Refusal of Extradition in Crimes of a Political Nature

If an extraditable crime is one having a political nature or related to such a crime, no criminal shall be extradited, provided that if the extraditable crime falls under any of the following subparagraphs, the same shall not apply:

- (i) A crime injuring or threatening the life or body of the chief of the State or Government, or his family;
- (ii) A crime for which Korea exercises a trial right on the criminal or bears an obligation to extradite the criminal under a multilateral treaty; and
- (iii) A crime injuring, threatening, or provoking any danger to lives or bodies of many persons.

If it is deemed that an extradition request is made for the purpose of bringing to trial another crime of a political nature which the criminal committed, or executing a sentence which became final against such a crime, the criminal shall not be extradited.

3. Discretionary Causes for Refusal of Extradition

A criminal may not be extradited in cases falling under any of following subparagraphs:

- (i) If the criminal is a citizen of Korea;
- (ii) If all or part of the extraditable crime has been committed in the territory of Korea;
- (iii) If a trial concerning a non-extraditable crime which was committed by the criminal is pending in a court of Korea, or if the criminal was sentenced to a penalty but execution thereof has not yet been terminated or exempted;
- (iv) If the criminal was brought to trial on an extraditable crime and punished in a third country, or if a judgment that no punishment thereof will be made final;

- (v) If it is deemed inhumane to extradite a criminal in light of the nature of the extraditable crime and the circumstances, etc. faced by the criminal.

V. CONFIDENTIALITY OF THE REQUEST AND THE PROVIDED INFORMATION

The Minister of Justice may upon sending mutual assistance materials request confidentiality to the requesting state. In MLA treaties, there usually are provisions relating to confidentiality. Thus the requested state shall use its best efforts to keep confidential a request and its contents if such confidentiality is requested by the requesting state.

VI. INTERNAL PROCEDURES FOR REQUESTING TO FOREIGN STATES

A. MLA

In a case where a prosecutor makes a request for mutual assistance as to any investigation of a foreign country, he shall send a written request to the Minister of Justice, and the judicial police officer shall make a request to the prosecutor to send it to the Minister of Justice.

After receiving a written request from the prosecutor, in a case where the Minister of Justice admits that it is necessary, the Minister of Justice shall send it to the Minister of Foreign Affairs.

B. Extradition

When the prosecutor judges that a request for extradition of a criminal to the foreign country is proper, he may suggest a request to the Minister of Justice attaching relating materials.

If the Minister of Justice judges that it is necessary to request extradition, he may request, through the Minister of Foreign Affairs, that the foreign state extradite the criminal.

VII. OTHER METHODS OF LAW ENFORCEMENT COOPERATION

The Korea Supreme Prosecutors' Office concluded 21 Memoranda of Understanding (MOU) on mutual cooperation with various foreign authorities. Through these MOUs, the Korea Prosecution Service has been cooperating with foreign law enforcement directly and quickly, which has turned out to be very successful. The International Cooperation Center was established in the Supreme Prosecutors' Office (SPO), which is in charge of this kind of direct cooperation with foreign authorities.

Nowadays, the SPO is planning to launch the Asset Recovery Inter-Agency Network in Asia and the Pacific (ARIN-AP). An interim secretariat has been established as a central point of contact to receive expressions of interest and to progress the development of the Network (contact: ARIN@spo.go.kr). Direct and speedy inter-agency cooperation in the asset recovery area would be expected with the establishment of ARIN-AP.