

# INTERNATIONAL COOPERATION AGAINST TRANSNATIONAL ORGANIZED CRIME: EXTRADITION AND MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS

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## I. EXTRADITION AND MUTUAL LEGAL ASSISTANCE: THE BASIC TOOLS OF INTERNATIONAL COOPERATION IN CRIMINAL MATTERS

Investigating and prosecuting cases against persons suspected of participation in organized crime is often notoriously difficult. It is all the more difficult to try to bring a case together when the suspect, the victim, key evidence, key witnesses, key expertise or the profits of crime are located outside one's jurisdiction. Dealing with such cases can be so daunting that the file may be placed aside and "forgotten", perhaps with the fervent hope that the authorities in other countries will take up the matter.

This, of course, is what organized criminals acting across international borders very much hope will happen. By fleeing to another country and in particular by sending the profits from crime beyond the reach of the domestic authorities, offenders seek to frustrate the purposes of law enforcement. If law enforcement remains passive in the face of transnational crime, this will only encourage offenders to continue to commit crime. For the investigator and prosecutor confronted with modern organized crime, relying on international cooperation has become a necessity, and extradition and mutual legal assistance

in criminal matters have become two key tools.<sup>1</sup>

Extradition and mutual legal assistance, however, are not tools that can simply be taken down from the shelf. The legal basis (whether treaty or legislation) must exist, the practitioners must know how (and if) this basis can be applied to the case at hand, and above all the practitioners in both the requesting and requested country must be able to work together to achieve the desired result.

Furthermore, as tools, extradition and mutual legal assistance can take many different forms. The possibilities depend not only on the existence, age and contents of a valid international agreement, but also, for example, on the type of offence and on the legislation and practice in a country. The new United Nations Convention against Transnational Organized Crime (the "Palermo Convention") is a case in point. It does, indeed, set out detailed provisions on how extradition and mutual legal assistance should be provided. In many ways, it has expanded the possibilities available. However, these possibilities must first be implemented in domestic law and practice.

This presentation looks at the extent to which the new Palermo Convention can

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<sup>1</sup> The terms mutual assistance, mutual legal assistance and mutual assistance in criminal matters are often used interchangeably.

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improve the basic tools available to the practitioner. Even though the focus is on extradition and mutual legal assistance, the Palermo Convention also requires States Parties to make other major changes that can facilitate international cooperation. Examples of this are the criminalisation of four specific offences, provisions on joint investigations, special investigative techniques, protection of victims and witnesses, improving the readiness of suspects to cooperate with law enforcement authorities, cooperation among law enforcement authorities themselves, confiscation and seizure, the transfer of proceedings and the transfer of sentenced persons, the collection, exchange and analysis of information on organized crime, and training and technical assistance. As noted by Mr. Kofi Annan, the Secretary-General of the United Nations, the Palermo Convention is a milestone in the fight against Transnational Organized Crime. He emphasised that “we can only thwart international criminals through international cooperation.” It is the Palermo Convention that provides a strong framework for this cooperation.

## II. EXTRADITION

### A. The Evolution of the Extradition of Offenders

Extradition is the process by which a person charged with an offence is forcibly transferred to a state for trial, or a person convicted of an offence is forcibly returned for the enforcement of punishment (see, for example, Third Restatement, pp. 556–557).

For a long time, no provisions or international treaties existed on the conditions for extradition or on the procedure which should be followed. Extradition was largely a matter of either

courtesy or subservience, applied in the rare cases where not only did a case have international dimensions, but also the requesting and the requested states were prepared to cooperate. In short, extradition was rarely required, even more rarely requested, and even more rarely still granted.

In the absence of effective treaties on extradition and on mutual legal assistance, some States have engaged in unilateral actions. This, however, is a violation of international law. According to universally accepted and well-established principles, states enjoy sovereign equality and territorial integrity. States should not intervene in the domestic affairs of other states. In particular,

*“a party has no right to undertake law enforcement action in the territory of another party without the prior consent of that party. The principle of non-intervention excludes all kinds of territorial encroachment, including temporary or limited operations (so-called “in-and-out operations”). It also prohibits the exertion of pressure in a manner inconsistent with international law in order to obtain from a party “the subordination of the exercise of its sovereign rights” (Commentary to the 1988 Convention, para. 2.17).<sup>2</sup>*

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<sup>2</sup> The Commentary cites as authority the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV), annex), and the principle concerning the duty not to intervene in matters within the domestic jurisdiction of any State, contained in para. 2 of the Charter.

The principles of sovereign equality, territorial equality and non-intervention in the domestic affairs of other States are explicitly noted in art. 4(1) of the Palermo Convention. To further clarify the point, art. 4(2) of the Palermo Convention states specifically that “Nothing in this Convention entitles a State Party to undertake in the territory of another State the exercise of jurisdiction and performance of functions that are reserved exclusively for the authorities of that other State by its domestic law.”

Bilateral extradition treaties did not begin to emerge until the 1800s. In particular the common law countries and the (former) USSR have made wide use of bilateral treaties. The first multilateral convention was the Organization of American States Convention on Extradition in 1933.<sup>3</sup> It was followed twenty years later by the Arab Extradition Agreement in 1952, and then by the influential European Convention on Extradition in 1957 and the 1966 Commonwealth scheme for the rendition of fugitives.<sup>4</sup> The most recent multilateral treaties have been the 1995 European Union Convention on simplified extradition within the European Union, and the 1996 European Union Convention on the substantive requirements for extradition within the European Union.

In order to promote new extradition treaties and to provide guidance in their drafting, the United Nations prepared a Model Treaty on Extradition (GA resolution 45/116 of 14 December 1990).

<sup>3</sup> This has subsequently been replaced by the 1981 Inter-American Convention on Extradition.

<sup>4</sup> As amended in 1990. The Commonwealth scheme, although not a formal treaty, has been unanimously approved by all members of the Commonwealth.

In addition to these general treaties on extradition, provisions on extradition have also been included in several international conventions that deal with specific subjects. Perhaps the best-known example is the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances; the twelve paragraphs of article 6 deal with extradition. Article 16 of the Palermo Convention was largely drafted on the basis of this 1988 Convention.

## **B. The Conditions for Extradition**

Among the common conditions included in agreements are the double criminality requirement (generally accompanied by the definition of the level of seriousness required of the offence before a State will extradite), a refusal to extradite nationals, and the political offence exception.

### 1. The Principle of Double Criminality (Dual Criminality)

The great majority of extradition treaties require that the offence in question be criminal in both the requesting and the requested State, and often also that it is subject to a certain minimum punishment, such as imprisonment for at least one year.<sup>5</sup> Even where a State allows extradition in the absence of an extradition treaty, this principle of double criminality is generally applied.<sup>6</sup>

<sup>5</sup> The Palermo Convention does not directly stipulate a certain minimum punishment as a condition for extradition, since art. 16(1) provides only that the article applies to extradition for the offences covered by the Convention. However, the entire Convention is drafted to cover serious crime, which is defined by article 2 as “conduct constituting a criminal offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty”.

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The double criminality principle may cause legal and practical difficulties. Legal difficulties may arise if the requested State expects more or less similar wording of the provisions, which is often an unrealistic expectation in particular if the two States represent different legal traditions. Practical difficulties may arise when the requesting State seeks to ascertain how the offence in question is defined in the requested State.

Double criminality can be assessed both in the abstract and in the concrete. *In abstracto*, what is required is that the offence is deemed to constitute a punishable offence in the requested State. *In concreto*, only if the constituent elements of the offence in both States correspond with each other will the offence be deemed extraditable.

The United Nations Model Treaty on Extradition clearly favours the simpler approach, an assessment *in abstracto*. According to article 2(2)(a), "In determining whether an offence is an offence punishable under the laws of both Parties, it shall not matter whether ... the laws of the Parties place the acts or omissions constituting the offence within the same category of offence or denominate the offence by the same terminology."

An example from Finland cited by Korhonen<sup>7</sup> is that during the summer of 2000, the Ministry of Justice of Finland was informed that a former high Kremlin

official who is wanted by the Swiss for money laundering offences had been granted a visa to Finland. The Finnish authorities were prepared to take him into custody pending a formal request for his extradition. The suspected money laundering offence related to the taking of bribes in Moscow from Swiss construction companies in return for granting them lucrative contracts in the renovation of the Kremlin, and to the depositing of the money in Swiss banks. The problem faced in Finland is that he was suspected of laundering the proceeds of his own crime, which is not separately punishable according to Finnish law. On the basis of the *in concreto* approach, Finland would have had to turn down a possible Swiss request for extradition.

On the other hand, the Finnish authorities could take into account all of the facts that were provided in the Swiss warrant of arrest. Clearly, some offence which was punishable also according to Finnish law had been (allegedly) committed in the Russian Federation. Since those facts were included in the Swiss warrant, which implied that the Swiss had considered them in issuing the warrant, the Finnish authorities concluded that double criminality had been sufficiently established *in abstracto*. (Ultimately, the Finnish authorities did not have to take any more action, since the person in question never showed up in Finland.)

The question may also arise as to whether double criminality should be assessed at the time of the commission of the offence, or at the time of the request for extradition. This problem arose in a recent and notorious case in the United Kingdom, where the House of Lords rejected most of the Spanish claim for the surrender of the former head of Chile, General Augusto Pinochet, on the

<sup>6</sup> See, for example, article 15(1) of the Palermo Convention.

<sup>7</sup> Juhani Korhonen, Extradition in Europe, paper prepared for the Phare Horizontal Project for Developing Judicial Cooperation in Criminal Matters in Estonia, Latvia and Lithuania, November 2000.

grounds that his alleged offences had not been criminalised in the United Kingdom at the time of their commission (Korhonen, p. 4). (Ultimately, Jack Straw, the UK Home Secretary, decided that Pinochet was not fit to stand trial and therefore would not be extradited to Spain. Pinochet thereupon returned to Chile.)

Yet another special problem in the application of the principle of double criminality is if the law of the requesting State allows extraterritorial jurisdiction for the offence in question, but the law of the requested State does not.<sup>8</sup> This is included as an optional ground for refusal in art. 4(e) of the UN Model Treaty on Extradition.

Finally, in practice it is possible that extradition is sought for several separate offences, and some of these do not fulfil the conditions of double criminality. The general rule expressed in art. 2(4) of the UN Model Treaty on Extradition and art. 2(2) of the Council of Europe Extradition Convention is that the offences in question must be criminal in both countries; however, the condition of the minimum punishment can be waived for some of the offences. Thus, for example, if extradition is sought for a bank robbery as well as for several less serious offences for which the minimum punishment would not otherwise meet the conditions for extradition, all of them can nonetheless be included in the request.

<sup>8</sup> Blakesley, Christopher and Otto Lagodny (1992), *Competing National Laws: Network or Jungle?*, in Eser, Albin and Otto Lagodny (eds.) (1992), *Principles and Procedures for a New Transnational Criminal Law. Documentation of an International Workshop 1991. Beitrage und Materialien aus dem Max-Planck-Institut fur auslandisches und internationales Strafrecht, Freiburg im Breisgau*, pp. 47–100, at 88–98.

The corresponding provisions of the Palermo Convention are constructed somewhat differently. Art. 16(1) lays down the basic rule that extradition is possible only where the offence in question is punishable under the domestic laws of both States. Art. 16(2) states that as long as the request refers to at least one offence that is extraditable under the Convention, the requested State may grant extradition for *all* of the serious offences covered in the request. The purpose of art. 16(2) is two-fold. It limits extradition only to serious offences. At the same time, however, it allows extradition also for additional offences where these do not as such (necessarily) involve an organized criminal group.

Recent trends in extradition have attempted to ease difficulties with double criminality by inserting general provisions into agreements, either listing acts and requiring only that they be punished as crimes or offences by the laws of both States, or simply allowing extradition for any conduct criminalised to a certain degree by each State (Blakesley and Lagodny, pp. 87–88).

## 2. The Rule of Speciality

The requesting State must not, without the consent of the requested State, try or punish the suspect for an offence not referred to in the extradition request and committed before he or she was extradited.<sup>9</sup>

This rule does not prevent an amendment of the charges, if the facts of the case warrant a reassessment of the charges. For example, even if a person has been extradited for fraud, he or she may be prosecuted for embezzlement as

<sup>9</sup> See, for example, art. 14 of the UN Model Treaty on Extradition.

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long as the facts of the case are the ones referred to in the request for extradition.

The rule of speciality is universally accepted, but in practice it does not automatically rule out all possibilities of bringing an offender to justice even for offences not referred to in the request. This, however, would require separate consent from the authorities of the requested State (Korhonen, p. 8). Let us assume that the suspect has been extradited, and in the course of the proceedings it is found that he or she has apparently committed another offence not referred to in the extradition request. Since the fugitive is already in custody in the requesting State, the authorities usually have the time to submit a supplementary request to the State from which the fugitive was extradited, requesting permission to proceed also in respect of these newly uncovered offences. Such supplementary requests must usually be accompanied by a warrant of arrest. It should be clear, on the other hand, that the authorities should not deliberately delay the initial proceedings in anticipation of receiving consent to the bringing of the new charges.

If, following extradition, the person in question is released in the territory of the requesting State, he or she may not be prosecuted for an offence that had been committed before the extradition took place until after this person has had a reasonable opportunity to depart from this State.<sup>10</sup>

### 3. The Non-Extradition of Nationals

As a rule, States have long been willing to extradite nationals of the requesting State, or nationals of a third State. When it comes to extraditing their own citizens,

however, most States have traditionally been of the opinion that such extradition is not possible. Some States have even incorporated such a prohibition into their Constitution. Furthermore, the principle of the non-extradition of nationals is often expressly provided for in treaties. The rationale for such a view is a mixture of the obligation of a State to protect its citizens, a lack of confidence in the fairness of foreign legal proceedings, the many disadvantages that defendants face when defending themselves in a foreign legal system, and the many disadvantages of being in custody in a foreign country.<sup>11</sup>

The United States, the United Kingdom and most other common law countries, in turn, have been prepared to extradite their own nationals. This may have been due in part to the fact that these States have been less likely than for example civil law countries to assert jurisdiction over offences committed by their citizens abroad—and thus, failing extradition, the offender could not have been brought to justice at all. The common law countries have also been aware of the advantages of trying the suspect in the place where the offence was alleged to have been committed. There is, for example, the greater ease with which evidence and testimony can be obtained in the *forum delicti*, and the difficulties in submitting evidence obtained in one country to the courts of another country.

In cases where the requested State does in fact refuse to extradite on the grounds that the fugitive is its own

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<sup>10</sup> See, for example, art. 14(3) of the UN Model Treaty on Extradition.

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<sup>11</sup> Ethan A. Nadelmann, *Cops Across Borders. The Internationalization of U.S. Criminal Law Enforcement*, The Pennsylvania State University Press, University Park, Pennsylvania, 1993, p. 427.

national, the State is generally seen to have an obligation to bring the person to trial. This is an illustration of the principle of *aut dedere aut judicare*—“extradite or prosecute”, “extradite or adjudicate”.<sup>12</sup> Such adjudication, however, would presuppose that the requested State applies the active personality principle, i.e. exercises jurisdiction over offences that its nationals have committed abroad (Korhonen, p. 5).

Such a provision is contained, for example, in article 16(10) of the Palermo Convention.<sup>13</sup> Jurisdiction for such offences is covered by article 15(3) of the Palermo Convention. Paragraph 16(12) of the Palermo Convention contains a parallel provision on enforcement of a sentence imposed on a national of the requested State, by a court in a foreign State.

In practice, some States that have refused to extradite their nationals have also been reluctant to prosecute. To address this issue, art. 16(10) of the Palermo Convention has a new feature in comparison with art. 6(9)(a) of the 1988 Convention and art. 4(a) of the UN Model Treaty on Extradition. It states that the authorities of such a State “shall take their decision and conduct their proceedings in the same manner as in the case of any other offence of a grave nature under the domestic law of that State Party.” The emphasis here is that, since the offence is by definition a serious case of transnational organized crime, the

State in question should make an earnest effort to bring the suspect to justice. The provision goes on to enjoin the two States Parties to cooperate in order to ensure the efficiency of prosecution.

Especially in Europe, the distaste towards extradition of nationals appears to be lessening. The Netherlands, for example, has amended its Constitution and drafted legislation to allow such extradition, as long as the national will be returned to the Netherlands for the enforcement of any sentence passed.<sup>14</sup>

The Palermo Convention incorporates a provision that reflects this development.<sup>15</sup> According to article 16(11),

*“Whenever a State Party is permitted under its domestic law to extradite or otherwise surrender one of its nationals only upon the condition that the person will be returned to that State Party to serve the sentence imposed as a result of the trial or proceedings for which the extradition or surrender of the person was sought and that State Party and the State Party seeking the extradition of the person agree with this option and other terms that they may deem appropriate, such a conditional extradition or*

<sup>12</sup> The principle of *aut dedere aut judicare* can, of course, be applied also to other cases where the requested State refuses extradition. See, for example, art. 4(f) of the UN Model Treaty on Extradition.

<sup>13</sup> See also art. 6(9)(a) of the 1988 Convention and art. 4(a) of the UN Model Treaty on Extradition.

<sup>14</sup> Germany is currently in the process of making a corresponding amendment to its Constitution.

<sup>15</sup> The 1988 Convention does not contain a similar provision. Article 12 of the UN Model Treaty speaks obliquely of the possibility that the requested State may “temporarily surrender the person sought to the requesting State in accordance with conditions to be determined between the Parties”; this, however, is in the context of possible proceedings for offences other than the one mentioned in the request for extradition.

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*surrender shall be sufficient to discharge the obligation set forth in paragraph 10 of this article.”*

Thus, under the Palermo Convention a national can be extradited on condition that he or she be returned to serve out the possible sentence. Such a guarantee that the actual enforcement of any punishment will take place in the person's home country can well be helpful in overcoming any reluctance to extradite one's nationals.

4. The Political Offence Exception

During the 1700s and the early 1800s, extradition was used very much on an *ad hoc* basis primarily in the case of political revolutionaries who had sought refuge abroad (Third Restatement, p. 558). However, during the 1830s, the idea developed in France and Belgium that suspects should not be extradited for politically motivated offences (Nadelmann, p. 419).

There is no universally accepted definition of what constitutes a “political offence”. In deciding whether an offence qualifies as “political”, reference is generally made to the motive and purpose of the offence, the circumstances in which it was committed, and the character of the offence as treason or sedition under domestic law. One of the leading cases internationally is *In re Castione* ([1891] 1 Q.B. 149), where the refusal to extradite the suspect was based on the view that alleged offences that had been committed in the course of, or incident to, a revolution or uprising are political (cited in Nadelmann, p. 420).<sup>16</sup>

Gully-Hart argues that “The emergence of an international concept of a political offence should now be accepted”.<sup>17</sup> He notes that the European Convention on the Suppression of

Terrorism has barred a large number of offences from the political offence exception. He balances this by noting a tendency to “enlarge” the definition of a political offence in cases where there is a danger of persecution or an unfair trial. On the other hand, it may be noted that the danger of persecution or unfair trial is now emerging as a separate grounds for refusal in its own right (see below).

Although it may well be that the existence of such an international concept of a political offence “should now be accepted”, recent developments suggest that attempts are being made to restrict its scope or even abolish it (Korhonen, p. 4). This is the case, for example, in extradition among the European Union countries. The recent Palermo Convention does not make specific reference to political offences as grounds for refusal, even though the UN Model Treaty on Extradition, adopted only ten years earlier, had clearly included this as a *mandatory* ground for refusal.

The failure to specifically include the political offence exception in the Palermo Convention is significant. One of the reasons that the scope of the political offence exception has been lessening is that States have tended to avoid entering into extradition treaties with those States with whom such political problems might arise in the first place. This is not the

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<sup>16</sup> In respect of the United States, Nadelmann (p. 426) sees two trends: one trend is towards a narrower definition of the political offence exception, and another, somewhat opposing, trend is towards greater consideration of foreign policy interests and its bilateral relationship with the requesting Government.

<sup>17</sup> Gully-Hart, Paul (1992), *Loss of Time Through Formal and Procedural Requirements in International Co-operation*, in Eser and Lagodny (op.cit.), pp. 245–266, at pp. 257–258.



case with the Palermo Convention, which has been signed by over 120 States. With so many signatories, it is quite likely that a need for extradition may arise between States that are on less than friendly terms with one another. In the discussions on the Convention in Vienna, it was argued that the political offence should not be specifically mentioned, since the Convention itself was limited to serious transnational organized crime.

On the other hand, article 16(7) of the Palermo Convention provides States Parties with a built-in escape clause. It states that

*“Extradition shall be subject to the conditions provided for by the domestic law of the requested State Party or by applicable extradition treaties, including, inter alia, . . . the grounds upon which the requested State Party may refuse extradition.”*

Thus, if the domestic law of the requested State allows for the possibility of the political offence exception (as would almost inevitably be the case), this option remains, even if not specifically mentioned in the Palermo Convention.

One factor behind the restriction or abolition of the political offence exception is the growth of terrorism, a subject that was raised many times (both directly and obliquely) during the drafting of the Palermo Convention. A distinction is commonly made between “pure” political offences (such as unlawful speech and assembly), and politically motivated violence (Third Restatement, p. 558). If the offence is serious—such as murder, political terrorism and genocide—courts in different countries have (to varying degrees) tended not to apply the political offence exception. Examples include the extradition from the United States of

several persons suspected of being Nazi war criminals or IRA terrorists (Nadelmann, pp. 421 and 424). Violation of international conventions is one criterion in determining such seriousness; a case in point is the readiness of many countries to extradite persons suspected of skyjacking.

An example in which the political offence exception arose in European practice, cited by Korhonen (p. 5), is when the Kurdish leader Abdullah Öcalan was taken into custody in Rome in November 1999 on the basis of a German warrant for his arrest. However, Germany, which was clearly concerned with the possibility of domestic unrest if Öcalan would be extradited to Germany to stand trial, withdrew its warrant and did not proceed with the request for extradition. At the same time, Turkey had also issued a warrant for the arrest of Öcalan. In the extradition hearings, the local court in Rome decided that since Germany had withdrawn its warrant and there was a risk that Öcalan would face the death penalty if he were to be extradited to Turkey, the court had no legal grounds to proceed in the matter. (Apparently the Italian court had not considered the possibility of extraditing Öcalan under the condition that he would not be sentenced to death if found guilty. Upon accepting such a condition, Turkey would have been bound by it.) Öcalan was consequently expelled from Italy and moved from one country to another in Europe, with no country willing to allow him in. He finally ended up in Nairobi, Kenya, where he was kidnapped and transported to Turkey to stand trial. He was eventually sentenced to death by a Turkish court, a sentence which on 25 November 1999 was upheld by a court of appeal.<sup>18</sup>

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5. The Refusal to Extradite on the Grounds of the Danger of Persecution or Unfair Trial, or of the Expected Punishment

Originally, extradition treaties between States were seen to be just that, treaties between sovereign and equal States as parties. According to this approach, other parties, in particular the fugitive in question, had no standing to intervene in the process, nor was the nature of the proceedings or expected treatment in the requesting State a significant factor. Recently, however, also the individual has been increasingly regarded as a subject of international law. This has perhaps been most evident in extradition proceedings. Democratic countries have been increasingly reluctant to extend full co-operation to countries which do not share the same democratic values, for example on the grounds that the political organization of the latter countries is undemocratic, or because their judicial system does not afford sufficient protection to the prosecuted or convicted individual (Gully-Hart, p. 249).

In line with this reassessment in the light of the strengthening of international human rights law, many of the more recently concluded treaties pay particular attention to the nature of the proceedings or the expected treatment in the requesting State. States will generally refuse to extradite if there are grounds to believe that the request has been made for the purpose of persecution of the person in question, or that the person would not otherwise receive a fair trial (Gully-Hart, p. 249–251, 257).

<sup>18</sup> According to “The Economist” (11 January 2001), the death sentence passed on Mr. Öcalan has been stayed pending a review of his case by the European Court of Human Rights, a process that could take years.

Refusal on the grounds of expected persecution is dealt with in, for example, article 16(14) of the Palermo Convention:

*“Nothing in this Convention shall be interpreted as imposing an obligation to extradite if the requested State Party has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person’s sex, race, religion, nationality, ethnic origin or political opinions or that compliance with the request would cause prejudice to that person’s position for any one of these reasons.”<sup>19</sup>*

The question of fair trial and treatment is in principle distinct from the question of persecution. Art. 3(f) of the UN Model Treaty on Extradition gives as a mandatory ground for refusal the possibility that the person in question would be subjected to torture or cruel, inhuman or degrading treatment or punishment, or the absence of the minimum guarantees in criminal proceedings, as contained in art. 14 of the International Covenant on Civil and Political Rights.<sup>20</sup>

The issue of fair trial and treatment is dealt with in article 16(13) of the Palermo Convention:

<sup>19</sup> This wording is taken from art. 3(b) of the UN Model Treaty on Extradition (see also the United Nations Convention Relating to the Status of Refugees).

Within the European context, such refusal would be highly unusual, since the European Convention on Extradition is based on mutual trust in the administration of criminal justice of one another’s State.

*“Any person regarding whom proceedings are being carried out in connection with any of the offences to which this article applies shall be guaranteed fair treatment at all stages of the proceedings, including enjoyment of all the rights and guarantees provided by the domestic law of the State Party in the territory of which that person is present.”*

This provision is a new one in UN Conventions. No similar provisions are to be found in the 1988 Convention or in the UN Model Treaty on Extradition.

Perhaps the most notable and influential case concerning fair treatment is the transatlantic case of *Soering v. the United Kingdom* (ECHR 1/89/161/217). Soering had been charged with murder in Virginia, where murder was a capital offence. Following a request for extradition from the United States, he was arrested in the United Kingdom and his extradition was prepared. He appealed the extradition decision, however. Article 3 of the European Convention prohibits torture or inhuman and degrading treatment or punishment. ECHR unanimously found that extradition would be a violation of this, since circumstances on death row—6–8 years of isolation, stress, fruitless appeals, separation from family and other damaging experiences—would be inhuman and degrading. (The follow-up

to this case is that Soering was extradited, after the Attorney General had promised not to seek the death penalty.)

Another recent example is the case of Ira Einhorn, who was arrested in 1981 for the 1979 murder of his lover in the United States. Before being brought to trial, however, he jumped bail and disappeared. He was convicted in the US *in absentia*. In 1997, he was finally found living under an alias in France. The US called for his extradition. The French Court of Appeals ruled in 1999 that he could be extradited provided that he would be allowed to have a new trial and would not face the death penalty. After the United States agreed to this, and his appeal all the way to the European Court of Human Rights was denied, he was finally extradited to the United States at the end of July 2001.

Following the adoption in 1983 of Protocol No. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, which abolished the death penalty, European countries have been reluctant to extradite suspects to countries where the death penalty might be imposed.<sup>21</sup> One common outcome is that, as in the *Soering* case, the requesting State agrees to waive the death penalty or, if this is imposed by the court, the requesting State agrees to ensure that it is not enforced. Another option is to agree that the suspect, if convicted, will be returned to the requested State for enforcement of the sentence. This latter option has been followed in art. 16(11) the Palermo Convention, already referred to above.

<sup>20</sup> Furthermore, art. 3(g) of the UN Model Treaty on Extradition cites as mandatory grounds for refusal the rendering of the judgment of the requesting State in absentia, the failure of the convicted person to receive sufficient notice of the trial or the opportunity to arrange for his or her defence, and the failure to allow him or her the opportunity to have the case retried in his or her presence.

<sup>21</sup> See also art. 4(d) of the UN Model Treaty on Extradition.

6. Other Grounds for Refusal to Extradite

Some extradition treaties specifically rule out extradition for military offences or fiscal offences, or extradition when the person in question has already been judged for the offence.<sup>22</sup>

Art. 16(15) of the Palermo Convention makes specific reference to fiscal offences: "States Parties may not refuse a request for extradition on the sole ground that the offence is also considered to involve fiscal matters."

One of the fundamental legal principles of the rule of law is that no one should be subjected to double jeopardy (*non bis in idem*). Consequently, extradition will generally be refused if the person requested has already been prosecuted in the requested State for the acts on the basis of which extradition is requested, regardless of whether the prosecution ended in conviction or acquittal (Third Restatement, p. 568). According to art. 3(d) of the UN Model Treaty on Extradition, extradition shall not be granted "if there has been a final judgment rendered against the person in the requested State in respect of the offence for which the person's extradition is requested."

Some States may also deny extradition if the person in question has been prosecuted in the requesting State or in a third State (*ibid.*). The UN Model Treaty on Extradition also includes, as a mandatory grounds for refusal, the fact that "the person whose extradition is requested has, under the law of either Party, become immune from prosecution

or punishment for any reason, including lapse of time or amnesty."

A ground for refusal that is becoming increasingly rare is that the proof of the guilt of the person in question supplied by the requesting State does not meet the evidentiary standards of the requested State. According to Korhonen (pp. 6–7), at least within the European context requiring additional proof of the guilt of the person in question would be in violation of the principle of mutual trust in one another's administration of criminal justice.

**C. The Extradition Procedure**

*Provisional arrest.* The process of extradition may be lengthy. In order to ensure the continued presence of the person in question, the requesting State may request that the fugitive be taken into custody pending the outcome of the proceedings (see, for example, art. 9 of the UN Model Treaty on Extradition). According to article 16(9) of the Palermo Convention,

*"subject to the provisions of its domestic law and its extradition treaties, the requested State Party may, upon being satisfied that the circumstances so warrant and are urgent and at the request of the requesting State Party, take a person whose extradition is sought and who is present in its territory into custody or take other appropriate measures to ensure his or her presence at extradition proceedings."*

One issue that may arise in this connection is who determines the urgency of the request: is it the requesting State or the requested State (Korhonen, p. 9)? Although the Palermo Convention is phrased so that it is the requested State

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<sup>22</sup> Art. 3(c) refers to military offences as a mandatory grounds for refusal, and art. 3(d) refers to double jeopardy.

that is to be “satisfied that the circumstances ... are urgent”, it should in fact be left to the requesting State to determine the urgency of the matter.

The Palermo Convention and many extradition treaties do not require that provisional arrest be used in such circumstances, as long as “other appropriate measures are taken”. Korhonen (p. 9) has argued that it can be reasonable to assume that there is a presumption that the fugitive is indeed placed under provisional arrest, since otherwise there is the risk that the fugitive will attempt to flee from justice. This, of course, very much depends on the effectiveness of the “other appropriate measures”.

“*Disguised extradition*” and *abduction*. A State generally has the right to expel a foreign national who is deemed to be “undesirable”, for example on the basis of his or her criminal activity. Occasionally, the authorities of the State in question have expelled the foreign national not to his or her home State or to the State from which he or she arrived, but to the State which has requested extradition. The use of such “back-door” procedures instead of the normal extradition procedure has rightfully been criticized as a violation of international comity and international law.

An example of how this can operate in practice is provided by a case involving the return of a Chinese national from Canada to China. The same person was wanted in the United States on charges related to alleged organized crime activity, but the extradition process appeared to be becoming quite complex and time-consuming. Ultimately, Canada placed the person on a flight back to China—knowing that the flight touched down in San Francisco for refuelling. At

San Francisco, the US authorities boarded the plane and took the person into custody.

The case of *United States v Alvarez-Machain* ((91-712), 504 U.S. 655 (1992)) raises another type of improper extradition, that of abduction. A Mexican physician, Humberto Alvarez-Machain, was suspected of taking part in the torture and murder of a US narcotics agent in Guadalajara, Mexico in 1985. Alvarez-Machain was seized by Mexican bounty hunters in Mexico and flown to the United States. The defendant argued that the US court had no jurisdiction to try the case because he, a Mexican citizen accused of a murder that had been alleged to have been committed in Mexico, had been improperly brought to the United States by a US-sponsored abduction. The defendant further argued that such an abduction was a violation of the extradition treaty between the United States and Mexico. The majority on the Supreme Court ruled, however, that the forcible abduction of the defendant does not prohibit his trial in a United States court for violations of this country’s criminal laws. (This is an application of the doctrine of “*male captus, bene detentus*”, which essentially holds that the court need not look at how a defendant was brought before it.) The Supreme Court also held that there was no violation of the treaty, since this treaty did not expressly say that the two States Parties were obliged to refrain from forcible abductions of persons from one another’s territory.<sup>23</sup>

*Supplementary information and consultation*. Many agreements provide that, if the information provided by the requesting State is found to be insufficient, the requested State may (or even “shall”) request the necessary supplementary information (for example

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art. 8 of the UN Model Treaty on Extradition and article 13 of the European Convention on Extradition).

According to article 10(16) of the Convention against Transnational Organized Crime, "before refusing extradition, the requested State Party shall, where appropriate, consult with the requesting State Party to provide it with ample opportunity to present its opinions and to provide information relevant to its allegation." This is a new provision, which has no parallel in the 1988 Convention or in the 1990 UN Model Treaty. The provision can thus be understood as a reflection of "good practices" as they have evolved during the 1990s.

*Simplification of extradition proceedings.* As noted, extradition can be a long, drawn-out and expensive process. During recent years, many efforts have been made to expedite and simplify the process, in particular by eliminating grounds for refusal.

Art. 16(8) of the Palermo Convention calls for the simplification of extradition: "States Parties shall, subject to their domestic law, endeavour to expedite

extradition procedures and to simplify evidentiary requirements relating thereto in respect of any offence to which this article applies."

In 1995, the European Union adopted a Convention on simplified extradition within the EU. Essentially, the Convention focuses on the many cases where the person in question consents to extradition.<sup>24</sup>

In 1996, the EU adopted a convention that supplements the 1957 Council of Europe Convention, and is designed to facilitate and speed up extradition. The 1996 Convention widened the scope of extraditable offences, restricted refusals on certain grounds (the absence of double criminality, or the nationality of the offender) and eliminated the political offence exception as well as refusals on the grounds that the prosecution or punishment of the person in question would be statute-barred in the requested State.<sup>25</sup>

The European Union is currently considering various options for "fast-track extradition". These discussions have been held within the context of the discussion on mutual recognition of decisions and judgments in criminal matters. In regards to extradition, the goal is to have a warrant of arrest issued by the competent authorities of one State recognized as such by the authorities of another EU State, establishing a basis for extradition.

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<sup>23</sup> New York Times, 15 and 16 June 1992. See also Nadelmann, pp. 449–450 and Heymann, Philip B. and Ian Heath Gershengorn (1992), Pursuing Justice, Respecting the Law, in Eser and Lagodny (op.cit.), pp. 101–147, at pp. 132–135.

In December 1992, the defendant was acquitted by the U.S. District Court in Los Angeles of all charges on the grounds that the Government had not produced any credible evidence linking him to the torture and murder of the narcotics agent.

In a somewhat Kafkaian follow-up to the case, on his release by the court, the defendant was arrested by the US Immigration Service and held for several hours on the grounds of "illegal entry into the U.S."

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<sup>24</sup> This 1995 Convention has been ratified by Austria, Denmark, Finland, Germany, Greece, the Netherlands, Portugal, Spain and Sweden.

<sup>25</sup> The 1996 Convention has been ratified by Denmark, Finland, Germany, Greece, the Netherlands, Portugal and Spain.

### III. Mutual Assistance in Criminal Matters

#### A. The Evolution of Instruments on Mutual Assistance in Criminal Matters

The purpose of extradition is to get a foreign State to send a fugitive to the requesting State so that he or she can be placed on trial, or so that any punishment imposed can be carried out. The purpose of mutual assistance, in turn, is to get a foreign State to assist in other ways in the judicial process, for example by securing the testimony of possible victims, witnesses or expert witnesses, by taking other forms of evidence, or by checking judicial or other official records.

Generally, mutual legal assistance is based on bilateral or multilateral treaties. No global mutual assistance treaties have been drafted that would apply to a broad range of offences. Efforts to smooth international cooperation by developing such a global mutual assistance treaty had long been thwarted in particular by the United States and the United Kingdom, which prefer bilateral treaties that would take into consideration the idiosyncratic features of their common law systems.

Instead, over the years, some international treaties have been drafted that deal with specific offences. These instruments generally include extensive provisions on mutual legal assistance as well as on extradition. The sets of provisions included in some of these agreements are so extensive that they have been referred to as “mini-treaties” on mutual legal assistance.

Such is the case, for instance, with the following conventions:

- the Convention for the Suppression of Unlawful Seizure of Aircraft of 16 December 1970 (article 10),
- the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 23 September 1971(article 11),
- the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, of 10 March 1988,
- the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 19 December 1988 (article 7),
- the International Convention against the Taking of Hostages of 17 December 1979 (article 11), and
- the Palermo Convention, opened for signature on 12 December 2000 (article 18).

In addition, there are two influential multilateral arrangements that apply to a wide spectrum of offences, a Convention prepared by the Council of Europe, and an instrument applied within the context of the British Commonwealth (the so-called “Harare Scheme”).

The oldest, most widely applied and arguably most influential is the Council of Europe Convention on Mutual Assistance in Criminal Matters. This was opened for signature in 1959, and entered into force in 1962.<sup>26</sup>

The Council of Europe Convention focuses on assistance in judicial matters (as opposed to investigative and prosecutorial matters). Furthermore, since it has been in force for almost 40 years, it has in some respects been bypassed by practice. In order to improve the effectiveness of the Convention, the

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fifteen European Union countries have prepared their own Mutual Assistance Convention of 29 May 2000. This supplements the 1959 Council of Europe convention and its protocol in order to reflect the emergence of “good practices” over the past forty years.

The Commonwealth Scheme for Mutual Assistance in Criminal Matters does not create binding international obligations; instead, it represents more an agreed set of recommendations.<sup>27</sup> It deals with identifying and locating persons; serving documents; examining witnesses; search and seizure; obtaining evidence; facilitating the personal appearance of witnesses; effecting a temporary transfer of persons in custody to appear as a witness; obtaining production of judicial or official records; and tracing, seizing and confiscating the proceeds or instrumentalities of crime. A model Bill to assist countries in preparing legislation has been developed by the Commonwealth Secretariat.

The Commonwealth scheme extends to both “criminal proceedings that have been instituted in a court” and when

“there is reasonable cause to believe that an offence in respect of which such proceedings could be instituted have been committed”. Thus, it effectively also allows mutual assistance when certain serious offences, such as terrorism, could potentially be prevented.

The United Nations, in turn, has prepared a Model Treaty on Mutual Assistance in Criminal Matters (General Assembly resolution 45/117 of 14 December 1990). The purpose of the Model Treaty is to provide a suitable basis for negotiations between states that do not have such a treaty. The Model Treaty is by no means a binding template. The States can freely decide on any changes, deletions and additions. However, the Model Treaty does represent a distillation of the international experience gained with the implementation of such mutual legal assistance treaties, in particular between States representing different legal systems.

*Competing international treaties.* Over the years, several multilateral treaties have been drafted that deal with mutual legal assistance. In addition, many states have entered into bilateral treaties with other countries. This raises the possibility that two or more treaties may be applicable to the same facts. Since there may be differences between these treaties (for example in relation to the conditions under which mutual legal assistance can be provided, or the procedure used), the question arises of which treaty should be applied.

General conflicts between treaties can be decided on the basis of the Vienna Convention on the Law of Treaties, which was concluded on 23 May 1969. Among the principles applied are that, other things being equal, a later treaty replaces

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<sup>26</sup> At present, the following 40 States are parties to the 1959 Convention: Albania, Austria, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, the Netherlands, Norway, Poland, Portugal, Romania, the Russian Federation, Slovakia, Slovenia, Spain, Sweden, Switzerland, the former Yugoslav Republic of Macedonia, Turkey, Ukraine and the United Kingdom. In addition, it has been signed by Armenia and San Marino.

<sup>27</sup> David McClean, *International Judicial Assistance*, Clarendon, Oxford, 1992, p. 151. The Harare Scheme was originally adopted in 1983. It has been amended most recently in 1999.



an earlier one, and a treaty dealing with a specific issue replaces a treaty dealing only with general issues.

In addition, some new treaties contain specific provisions on the resolution of possible conflicts between treaties. For example, article 18(6) of the Palermo Convention stipulates that “the provisions of this article shall not affect the obligations under any other treaty, bilateral or multilateral, that governs or will govern, in whole or in part, mutual legal assistance.” (Article 7(6) of the 1988 Convention is similar.)

This provision means in practice that obligations under other agreements remain in force. The Palermo Convention (or the 1988 Convention) does not in any way diminish these obligations. The practitioner should examine the agreements side by side, and identify which provisions of the different agreements would, in combination, result in the highest possible level of mutual assistance.

Despite the network of international instruments, cases will continue to arise between States that are not linked by a mutual legal assistance treaty. If the States in question are, nonetheless, Parties to the Palermo Convention, and the case involves transnational organized crime, the Palermo Convention can form the basis for mutual legal assistance. According to article 18(7) of the Palermo Convention, paragraphs 16(9)–(29) of the Convention apply to such requests. (Article 7(7) of the 1988 Convention contains a similar provision.) Even if the States in question are bound by a treaty, they can decide to apply paragraphs 16(9)–(29), and indeed the Palermo Convention strongly encourages them to apply the corresponding provisions of this new Convention. As noted in the

Commentary to the 1988 Convention (para. 7(23)), “this enables pairs of States to follow the procedures with which they have become familiar in the general context of mutual legal assistance”.

## **B. The Scope of Mutual Legal Assistance**

In article 18(1), the Palermo Convention calls for States Parties to afford one another the widest measure of mutual legal assistance (see also art. 1(1) of the 1959 Council of Europe Convention). The scope of measures that can be requested under mutual legal assistance is rather large, and the practice appears to be moving towards a constant expansion of this scope.

According to art.18(3) of the Palermo Convention, which in this respect is based on the 1988 Convention, mutual legal assistance can be requested for any of the following purposes:

- a. taking evidence or statements from persons;
- b. effecting service of judicial documents;
- c. executing searches and seizures, and freezing;
- d. examining objects and sites;
- e. providing information, evidentiary items and expert evaluations;
- f. providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records;
- g. identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes;
- h. facilitating the voluntary appearance of persons in the requesting State Party; and
- i. any other type of assistance that is not contrary to the domestic law of the requested State Party.

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Most of the items on the above list are familiar from art. 7(2) of the 1988 Convention, art. 1(2) of the UN Model Treaty and para. 1 of the Commonwealth Scheme, as well as from many bilateral Conventions. There are, however, four new elements in the Palermo Convention that reflect the evolution of thinking on mutual assistance.

- point (c) also includes the freezing of assets, and not just searches and seizures. The freezing of assets has been found to be particularly important in preventing and controlling organized crime. (Para. 1(i) of the Commonwealth Scheme separately refers to the tracing, seizing and confiscating of the proceeds of criminal activities.)
- point (e) includes the provision of expert evaluations; the earlier multilateral treaties had not specified this form of assistance.
- point (f) specifies that originals or certified copies can be obtained also of government records; again, this was not clearly noted in the 1988 Convention or the UN Model Treaty. The Commonwealth Scheme, on the other hand, does refer to the “production of judicial or official records”. (See also below under “Provision of documents”.)
- point (i), which is a catch-all reference to “any other type of assistance that is not contrary to the domestic law of the requested State Party”, provides considerable flexibility to the listing.<sup>28</sup>

*Requests related to offences for which a corporate body may be liable.* One feature of (transnational) organized crime is that corporate bodies (legal persons) may be

involved, often as the front for the activities of the actual offenders, and in particular for the laundering of the proceeds of crime. The situation may arise where State A, which recognizes the possibility of corporate criminal liability, requests assistance from State B, which does not recognize such a possibility. Since art. 10 of the Palermo Convention requires that corporate bodies be held liable for serious crime in some manner (no matter whether criminal, civil or administrative), art. 18(9) requires States Parties to provide mutual legal assistance to the fullest extent possible under relevant laws, treaties, agreements and arrangements. Absence of corporate criminal liability in the requested State is thus not a bar to providing mutual legal assistance.

*Video conferences.* Art. 18(18) of the Palermo Convention adds the possibility of the hearing of witnesses or experts by means of video conference.<sup>29</sup> This is a completely new provision in UN conventions; nothing similar was contained in the 1988 Convention or in the 1990 UN Model Treaty. Its newness, of course, is a reflection of the rapid

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<sup>28</sup> Mutual legal assistance is distinct from the transfer of proceedings and the transfer of persons in custody to serve sentences, which would thus not be covered by point (i). The Palermo Convention deals with these subjects separately in articles 17 and 21.

Some commentators and even courts have held that mutual legal assistance treaties are general, and can apply to forms of assistance not specifically mentioned in them. For example, in the United States, the *Re Sealed Case* (1987; 832 F.2d 1268. US Court of Appeals for the District of Columbia) determined that the existence of a treaty does not limit evidence gathering to the procedures stipulated in the treaty; indeed, this point is generally explicitly stated in such treaties.

development of communications technology. Even though this possibility requires an initial investment in the necessary equipment, video technology can considerably facilitate the hearing of witnesses and experts, since they would no longer have to travel from one country to another. It can also serve to protect witnesses or experts, if they fear to reveal their location or fear travelling to a court hearing in the requesting State.

Having a “direct” connection between two countries, however, raises some interesting issues. A normal situation would be when an attorney or a judge located in the requesting State uses a video link to hear a witness located in the requested State. In order to forestall concerns that the requested State may have about possible violations of its sovereignty, or concerns about due process, art. 18(18) specifies that the States may agree that a judicial authority of the requested State may attend the hearing.

*The spontaneous transmission of information.* In the investigation and

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<sup>29</sup> According to article 18(18) of the Palermo Convention, wherever possible and consistent with fundamental principles of domestic law, when an individual is in the territory of a State Party and has to be heard as a witness or expert by the judicial authorities of another State Party, the first State Party may, at the request of the other, permit the hearing to take place by video conference if it is not possible or desirable for the individual in question to appear in person in the territory of the requesting State Party. States Parties may agree that the hearing shall be conducted by a judicial authority of the requesting State Party and attended by a judicial authority of the requested State Party. See also article 10 of the 2000 European Union Convention. Art. 11 of the 2000 European Union Convention also permits teleconferences.

prosecution of offences, now and then the law enforcement authorities of a country receive information that may be of interest to the authorities of another country. Art. 18(4) of the Palermo Convention allows the authorities, even without a prior request, to pass on information to the competent authorities of another State.<sup>30</sup> Again, this is a new element in UN conventions. Its usefulness has been demonstrated in practice in, for example, Europe.

*Provision of documents.* Art. 18(3)(f) of the Palermo Convention states in general that mutual legal assistance can be requested in the provision of originals or certified copies of relevant documents and records. A practical question that was not addressed in the 1988 Convention was the scope of application of this provision. Does it, in particular, extend to documents that are considered secret in the requested State? The matter was considered in art. 16 of the UN Model Treaty, which served as the basis in the drafting of art. 18(29) of the Palermo Convention. This provision *requires* that the requested State provides copies of government records, documents or information in its possession that under its domestic law are available to the general public, but leaves the requested State with *discretion* over whether or not to provide any other government records, documents or information in its possession.

*Transfer of persons in custody.* In the investigation and prosecution of transnational organized crime cases, a situation may well arise where a person

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<sup>30</sup> This spontaneous exchange of data is provided under article 10 of the 1990 European Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime. See also art. 7 of the 2000 European Union Convention.

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held in custody in one State can provide key testimony in a case in another State.

Art. 7(4) of the 1988 Convention states quite generally that States Parties shall facilitate “to the extent consistent with their domestic law and practice, the presence or availability of persons, who consent to assist in investigations or participate in proceedings”. Art. 18(10)–(12) of the Palermo Convention provide more detail on the transfer of persons in custody for this purpose.<sup>31</sup> Transfer is possible only if the person in question consents, and the competent authorities of the two States agree (subject to possible conditions). The person is to be kept in custody in the State to which he or she is transferred, and is to be returned without delay as agreed by the two States. In addition, the person transferred is to receive credit for service of the sentence being served in the State from which he or she was transferred for time spent in the custody of the State to which he or she was transferred.

When persons in custody are transferred from one State to another under art. 18(11) of the Palermo Convention, a form of the principle of speciality applies (art. 18(12)). Thus, unless the requested State agrees, they cannot be prosecuted, detained, punished or subjected to any other restriction of liberty in the territory of the State to which such persons are transferred in respect of offences committed or convictions imposed prior to their transfer.

*The concept of “international subpoenas”.* One, albeit rare, feature of some mutual legal assistance treaties is that they allow for the issuing of

subpoenas “backed up” by compulsion, such as penalties for failure to obey. This concept is applied for example in the United States-Italian Mutual Assistance Treaty, which provides for compulsory appearance of a witness in the requesting State (McClellan 1992, p. 158). Also, Australia has such an arrangement with New Zealand and Fiji, and Malaysia has such an arrangement with Singapore and Brunei (ibid.).

As noted above, art. 18(7) of the Palermo Convention refers only to facilitating the presence of persons who consent to assist in investigations or participate in proceedings. Witnesses and experts are thus completely free not to go to the requesting country. The Palermo Convention thus does not allow the use of compulsion against witnesses or experts in another State. This same approach is used in, for example, art. 8 of the 1959 European Convention, paras. 15(5), 23(4) and 24(3) of the Commonwealth Scheme, and art. 7(4) of the 1988 Convention.

### C. Grounds for Refusal

There are several basic common grounds for refusal for granting a request for mutual legal assistance:

- the absence of double criminality;
- the offence is regarded as a political offence;
- the offence is regarded as a fiscal offence; and
- the granting of mutual legal assistance would be counter to the vital interests (*ordre public*) of the requested State.<sup>32</sup>

*Absence of double criminality.* According to art. 18(9) of the Palermo Convention, a State may decline mutual legal assistance if the offence in question is not an offence under its laws. However, the Palermo Convention specifies that

<sup>31</sup> Parallel detailed provisions can be found in para. 24 of the Commonwealth Scheme.

this is not a mandatory ground. Thus, the State may decide at its discretion to provide mutual legal assistance even if the condition of double criminality is absent.

Also the Commonwealth Scheme includes a “discretionary double criminality rule” (art. 7(1)). According to the author of the scheme (McClellan 1992, pp. 155–156), this was to prevent a situation arising where mutual assistance is requested in respect of certain acts that are heavily punished in some Islamic law jurisdictions are not seen as appropriate for any penal sanctions in other jurisdictions.

*Political offences.* In respect of extradition, the political nature of the offence is generally a mandatory cause for refusal. In the field of mutual legal assistance in criminal matters, in turn, this is generally only an optional reason for refusing cooperation. Moreover, over the years the possibility or obligation to refuse assistance in such considerations has in general been curtailed, in particular with a view towards the need to combat terrorism. See, for example, art. 2 of the 1959 Council of Europe Convention, when read together with art. 8 of the European Convention on the

Suppression of Terrorism of 27 January 1977.

*Fiscal offences.* Under the 1959 Council of Europe Convention, legal assistance may be refused where the requested party considers the offence to be a fiscal offence. In order to restrict the scope of these grounds of refusal, an additional protocol to the European Convention was drawn up at the same time, in 1959. Signatories to this additional protocol undertake not to refuse assistance on the grounds that the offence in question is a fiscal offence

According to article 18(22) of the Palermo Convention, States Parties may *not* refuse a request for mutual legal assistance on the sole ground that the offence is also considered to involve fiscal matters.

*Violation of the vital interests of the requested State (ordre public).* Generally speaking, conventions on mutual legal assistance on criminal matters provide that the requested State can refuse assistance which it deems might endanger its sovereignty, security, law and order or other vital interests. This same “escape clause” is maintained even by the 2000 European Union instrument on mutual legal assistance.

The same principle is embodied in art. 18(21)(b) of the Palermo Convention, according to which the requested State Party may refuse to grant mutual legal assistance if it considers that execution of the request is likely to prejudice its sovereignty, security, *ordre public* or other essential interests.

*Conflict with the laws of the requested state.* According to art. 18(21) of the Palermo Convention, mutual legal assistance may be refused:

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<sup>32</sup> Art. 4(c)–(d) of the UN Model Treaty on Mutual Assistance in Criminal Matters and para. 7(1)(d) and 7(2)(b) of the Commonwealth Scheme provide as additional optional grounds for the refusal of assistance the presence of substantial grounds for believing that the request for assistance may lead to prosecution or punishment, or cause prejudice, on account of (for example) race, religion, nationality or political opinions, or that the prosecution in the requesting State would lead to double jeopardy. The UN Model Treaty adds as a further optional ground the fact that the offence is already under investigation or prosecution in the requested State.

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- if the request is not made in conformity with the provisions of this article;
- if the authorities of the requested State Party would be prohibited by its domestic law from carrying out the action requested with regard to any similar offence, had it been subject to investigation, prosecution or judicial proceedings under their own jurisdiction; and
- if it would be contrary to the legal system of the requested State Party relating to mutual legal assistance for the request to be granted.

*Bank secrecy.* One relatively common ground for refusal is that granting the request would be contrary to bank secrecy. The scope of this ground for refusal has been restricted during recent years. In line with this development, art. 7(5) of the 1988 Convention and article 18(8) of the Palermo Convention stipulate that States Parties shall *not* decline to render mutual legal assistance on the ground of bank secrecy.

*The need to indicate the ground for refusals.* Good practice in mutual legal assistance requires that the requested State, if it refuses to grant assistance, should indicate the grounds for such refusal. Art. 18(23) of the Palermo Convention requires that reasons be given for any refusal of mutual legal assistance. Art. 19 of the 1959 Council of Europe Convention and para. 6(3) of the Commonwealth Scheme are similar.

*Reciprocity.* As noted above, art. 18(1) of the Palermo Convention *requires* that States Parties afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the type of offences covered by the Convention. States are not allowed to

refuse assistance unless they have a clear ground to do so.

However, in the drafting of the Palermo Convention, there was considerable discussion over at what stage it should be evident that the offence in question is covered by this Convention. After all, the requested State can simply say that, in its view, the requesting State has not shown that the offence is in fact transnational; this may well be difficult to prove especially at the earlier stage of the investigation.

The solution adopted was innovative. If State A has met with refusals from State B to provide assistance under the Palermo Convention even when State A has reasonable grounds to suspect that the offence in question falls under the Convention, then State A can legitimately refuse, in turn, to help State B should it happen to come forward with a corresponding request.

#### **D. The Mutual Legal Assistance Procedure**

*Letters rogatory.* The traditional tool of mutual legal assistance has been *letters rogatory*, a formal mandate from the judicial authority of one State to a judicial authority of another State to perform one or more specified actions in the place of the first judicial authority (see, for example, chapter II of the 1959 Council of Europe Convention). The concept of letters rogatory had been taken from civil procedure, and focuses on judicial action in the taking of evidence. More recent international instruments simply refer to “requests”.

In international practice, letters rogatory have typically been transmitted through diplomatic channels. The request for evidence, almost always originating from the prosecutor, is authenticated by

the competent national court in the requesting State, and then passed on by that State's Foreign Ministry to the embassy of the requested State. The embassy sends it on to the competent judicial authorities of the requested State, generally through the Foreign Ministry in the capital. Once the request has been fulfilled, the chain is reversed.

*Central authorities or direct contacts?* Increasingly, treaties require that States Parties designate a central authority (generally the Ministry of Justice) to whom the requests can be sent. The judicial authorities of the requesting State can then contact the central authority directly. Today, to an increasing degree even more direct channels are being used, in that an official in the requesting State sends the request directly to the appropriate official in the other State.<sup>33</sup>

In the drafting of the Palermo Convention, there was considerable discussion regarding whether or not direct channels could be used. Some states, which were not familiar with this practice, had a clear preference for the use of central authorities. The basic rule laid out by art. 18(13) of the Palermo Convention (see also art. 7(8) of the 1988 Convention and para. 4 of the Commonwealth Scheme) is that each State Party designate a central authority. Such a central authority has in effect

three roles: (1) to receive requests for mutual legal assistance; (2) to execute such requests; and (3) to transmit such requests to the competent authorities for execution.

Where a State Party has a special region or territory with a separate system of mutual legal assistance (as is the case, for example, with Hong Kong in China), it may designate a distinct central authority that shall have the same function for that region or territory. This is a new feature of the Palermo Convention; art. 7(8) of the 1988 Convention and art. 3 of the Model Treaty only contain a general reference to the designation of "an authority or when necessary authorities".

Direct requests may be possible also under some treaties in case of emergency. For example, art. 15(1) of the 1959 Council of Europe Convention allows the judicial authority of the requesting State to send the letter of request directly to the competent judicial authority of the requested State. Art. 18(13) of the Palermo Convention allows the possibility that, in urgent cases and when the States in question agree, the request can be made through the International Criminal Police Organization, if possible.

*The form and contents of the request.* The Palermo Convention contains several provisions on the procedure to be followed in sending a request for mutual legal assistance.

According to article 18(14) of the Palermo Convention (cf. art. 7(9) of the 1988 Convention), "requests shall be made in writing or, where possible, by any means capable of producing a written record ... under conditions allowing that State Party to establish authenticity. ... In urgent circumstances and where

<sup>33</sup> One of the earliest bilateral treaties to allow for this was the additional protocol to the 1959 Council of Europe Convention drawn up by France and Germany on 24 October 1974. The 1990 Schengen agreement in the framework of the European Union specifically allows the use of direct contacts between judicial authorities (art. 53). The same concept is embodied in the even more recent European Union 2000 Convention on Mutual Legal Assistance.

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agreed by the States Parties, requests may be made orally, but shall be confirmed in writing forthwith.”

The Palermo Convention, by referring to requests made “where possible, by any means capable of producing a written record ... under conditions allowing that State Party to establish authenticity”, opens up the possibility of for example transmission by fax or electronic mail. This was not possible under, for example, the 1988 Convention.<sup>34</sup>

The minimum contents of a request for mutual legal assistance are listed in article 18(15):<sup>35</sup>

- a. the identity of the authority making the request;
- b. the subject matter and nature of the investigation, prosecution or judicial proceeding to which the request relates and the name and functions of the authority conducting the investigation, prosecution or judicial proceeding;
- c. a summary of the relevant facts, except in relation to requests for the purpose of service of judicial documents;
- d. a description of the assistance sought and details of any particular procedure that the requesting State Party wishes to be followed;
- e. where possible, the identity, location and nationality of any person concerned; and

- f. the purpose for which the evidence, information or action is sought.

Article 18(16) notes that the requested State Party may request additional information when it appears necessary for the execution of the request in accordance with its domestic law or when it can facilitate such execution.

The formulation used in the Palermo Convention refers to “a language acceptable to the requested State Party”. This is a deliberately wide formulation. It includes the national language of the requested State Party, but the special circumstances of the relations between the two countries may suggest the use of other languages. For example, many countries around the world are prepared to accept requests in English and/or French.

#### **E. Execution of the Request for Mutual Legal Assistance**

*Law governing the execution.* The procedural laws of countries differ considerably. The requesting State may require special procedures (such as notarized affidavits) that are not recognized under the law of the requested State. Traditionally, the almost immutable principle has been that the requested State should follow its own procedural law.

This principle has led to difficulties, in particular when the requesting and the requested State represent different legal families. For example, the evidence transmitted from the requested State may be in the form prescribed by the laws of this State, but such evidence may be unacceptable under the procedural law of the requesting State.

The 1959 Council of Europe Convention is one international

<sup>34</sup> Recommendation R(85)10 of the Council of Europe (which is non-binding) in principle encourages the acceptance of the use of telephones, teleprinters, fax and similar means of communication in the transmission of letters rogatory in the application of the 1959 Convention.

<sup>35</sup> The list is word for word the same as in article 7(10) of the 1988 Convention.



instrument that applies to States representing two quite different legal families, the common law and the continental law systems. Although art. 3(1) of this Convention follows the traditional principle referred to above, the Commentary notes that the requesting State can ask that witnesses and experts be examined under oath, as long as this is not prohibited in the requested State.<sup>36</sup>

According to art. 7(12) of the 1988 Convention, a request shall be executed in accordance with the domestic law of the requested State Party and, to the extent not contrary to the domestic law of the requested State Party and where possible, in accordance with the procedures specified in the request. Thus, although the 1988 Convention does not go so far as to *require* that the requested State comply with the procedural form required by the requesting State, it does clearly exhort the requested State to do so. This same provision was taken verbatim into art. 18(17) of the Palermo Convention.

*Promptness in fulfilling the request.* One of the major problems in mutual legal assistance world-wide is that the requested State is often slow in replying, and suspects must be freed due to absence of evidence. There are many understandable reasons for the slowness: a shortage of trained staff, linguistic difficulties, differences in procedure that complicate responding, and so on. Nonetheless, it can be frustrating to find that a case must be abandoned because even a simple request is not fulfilled in time.

The 1988 Convention does not make any explicit reference to an obligation on the part of the requested State to be prompt in its reply. The 1990 UN Model Treaty (art. 6) does require that requests for assistance “shall be carried out promptly”. Para. 6(1) of the Commonwealth Scheme calls for the requested country to grant the assistance requested as expeditiously as practicable.

The Palermo Convention is even more emphatic about the importance of promptness, and makes the point in two separate provisions. Art. 8(13) of the Palermo Convention provides that, if the central authority itself responds to the request, it should ensure its speedy and prompt execution. If the central authority transmits the request on to, for example, the competent court, the central authority is required to encourage the speedy and proper execution of the request. Art. 18(24) provides that the request is to be executed “as soon as possible” and that the requested State is to take “as full account as possible of any deadlines suggested by the requesting State Party and for which reasons are given”.

*Good practice in execution.* Other elements of “good practice” in mutual legal assistance also worked their way into the Palermo Convention, making the life of the practitioner easier than under, for example, the 1988 Convention. According to art. 18(24) of the Palermo Convention,<sup>37</sup>

- the requested State should not only execute the request as soon as possible but also “take as full account as possible of any deadlines suggested by the requesting State Party”;

<sup>36</sup> Explanatory Report to the 1959 Convention, p. 14.

<sup>37</sup> Cf. Art. 4 of the 2000 European Union Convention.

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- the requested State should respond to reasonable requests by the requesting State for information on progress of its handling of the request; and
- the requesting State should promptly inform the requested State when the assistance sought is no longer required.

Art. 18(25) of the Palermo Convention states that mutual legal assistance may be postponed by the requested State Party on the ground that it interferes with an ongoing investigation, prosecution or judicial proceeding. Art. 7(17) of the 1988 Convention is in this respect similar.

Art. 18(26) of the Palermo Convention states that, before refusing a request for mutual legal assistance, or postponing its execution, the requested State should consult with the requesting State to consider whether assistance may be granted subject to such terms and conditions as it deems necessary. The 1988 Convention (art. 7(18) called for consultations only in the case of postponements, not refusals. The model for the wider formulation used in the Palermo Convention was taken from art. 4(4) of the 1990 UN Model Treaty.

*Confidentiality of information and the rule of speciality.* Once the information has been sent by the requested State to the requesting State, how can it be used?

The requested State may ask that any information provided be kept confidential except to the extent necessary to execute the request (art. 18(5) and 18(20) of the Palermo Convention). However, the situation may arise that the information received in respect of one offence or suspect at the same time exculpates another suspect in a completely separate procedure. To address this potential

problem, art. 18(20) goes on to provide that the State receiving the information is not prevented from disclosing it in its proceedings if this information is exculpatory to an accused person. (The provision also deals with the necessity to inform and, if requested, consult with the other State prior to such disclosure.)

Art. 18(19) of the Palermo Convention embodies the rule of speciality: the State receiving information may not transmit or use it for investigations, prosecutions or judicial proceedings other than those stated in the request without the prior consent of the requested State Party. Again, however, exculpatory information may be disclosed.

*Costs.* According to article 18(28) of the Palermo Convention, the ordinary costs of executing a request shall be borne by the requested State Party, unless otherwise agreed by the States Parties concerned. If expenses of a substantial or extraordinary nature are or will be required to fulfil the request, the States Parties shall consult to determine the terms and conditions under which the request will be executed, as well as the manner in which the costs shall be borne. This latter provision has been modelled on, for example, art. VIII(3) of the Canadian-US treaty and para. 12(3) of the Commonwealth Scheme.<sup>38</sup>

**IV. SUMMARY: THE GENERAL  
EVOLUTION OF EXTRADITION  
AND MUTUAL LEGAL ASSISTANCE  
IN CRIMINAL MATTERS**

With the increase in international travel, the improvement in technology

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<sup>38</sup> In 1999, the Law Ministers of the Commonwealth adopted guidelines on the apportionment of costs incurred in providing mutual assistance in criminal matters.

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and communications, the greater likelihood that a crime can have an impact beyond national borders, and the increased profits that can be made from organized crime, the need to obtain assistance from other states in bringing offenders to justice has expanded rapidly. The basic tools that can be used—extradition and mutual legal assistance in criminal matters—have regrettably not evolved to keep pace with developments in crime.

Much of the everyday practice of extradition and mutual assistance continues to be reliant on bilateral and multilateral treaties that have been drafted many years ago. Moreover, many States which are parties to such treaties still do not have the necessary legislation or resources to respond to requests for extradition or mutual assistance.

- Requests are often transmitted through diplomatic channels or from Government to Government, and the resulting delays may cause a carefully assembled case to collapse in the hands of the prosecutor.

- The requesting State may misunderstand the formal requirements in the requested State as to the presentation and contents of the request. For example, the requesting State may not realize that, under some treaties, it must present documentation that the double criminality requirement is met, that the offence is extraditable, and that execution is consistent with the law of the requested party.
- The requested State, in turn, may not always demonstrate flexibility in demanding more details about the offence and the offender. Often, very specific information may be difficult to provide if the investigation is still underway.

Nonetheless, as shown in this paper, some developments have taken place in both extradition and mutual legal assistance, in particular over the past ten years.

Some of the main trends in the evolution of extradition are summarized in the following table.

<b>The traditional extradition regime</b>	<b>The “new, improved” extradition regime</b>
bilateral	multilateral
limited scope of offences; lists of offences	broad scope of offences; no offence lists
need to present prima facie evidence	an arrest warrant suffices
extradition of nationals not possible	nationals can be extradited, although conditions may be imposed
broad grounds for refusal	few grounds for refusal
no reference to the expected treatment or punishment of the suspect	human rights standards applied
slow	trend towards mutual recognition and the “backing of warrants”
bureaucratic	“good practice” standards followed; e.g. the possibility of consultation before possible refusal

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- bilateral treaties are being increasingly replaced by multilateral treaties. Although bilateral treaties have been preferred for example by the common law countries, the simultaneous existence of many international instruments complicates the work of the practitioner. For this and other reasons, also the common law countries are seeing the advantages of multilateral treaties with a wide scope of application
- the earliest treaties were based on lists of offences. If an offence was not included in the list, extradition could not be granted. More recent treaties are generic, in that they apply to a broad scope of offences.
- because courts have traditionally been cautious in applying coercive measures, the courts in particular in common law countries have required prima facie evidence that the suspect had indeed committed the offence in question. Because of the differences in the law of evidence and in criminal procedure in different countries, such prima facie evidence was often difficult to provide. More recent instruments have generally regarded it as sufficient that the requesting State (at least if it belongs to a select group of states) produce a valid arrest warrant
- one of the most cherished principles in extradition law has been that States will not extradite their own nationals and will, at most, undertake to bring them to trial in their own courts. Today, more and more States are allowing extradition of their own nationals, although some conditions may be placed, such as that the national, if convicted, should be returned to his or her own country to serve the sentence
- there is currently a clear trend towards elimination of the many grounds for refusal to extradite, such as the political offence exception
- there is a trend towards granting greater rights to the person in question as an object (as opposed to subject) of the process, and to greater consideration of how he or she would be treated or punished in the requesting State. Consideration can be given, for example, to the possibility of persecution on the grounds of sex, race, religion, nationality, ethnic origin or political opinions, the possibility of unfair trial, and the possibility of punishment which, in the requested State, is deemed inhumane
- another trend is toward less rigid procedural requirements, including direct communications and simplified procedure

There has also been a clear dynamic in the development of mutual assistance. New international instruments open up the possibility of mutual assistance between an expanding number of countries, the scope of offences has been enlarged, conditions and grounds of refusal have been tightened or entirely eliminated, and the process has been expedited. Some of the main trends are summarized in the following table.

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<b>The traditional mutual assistance regime</b>	<b>The “new, improved” mutual assistance regime</b>
bilateral	multilateral
limited scope of offences	broad scope of offences
assistance limited to the service of summons	many possible forms of assistance
use of central authority	possibility of direct contacts between lower level authorities requesting and granting assistance
broad grounds for refusal	few grounds for refusal
requested State applies solely its own laws in granting assistance	procedures requested by the requesting State can be applied if these are not contrary to the laws of the requested State
bureaucratic	“good practice” standards followed; e.g. the possibility of consultation before possible refusal

- as with extradition treaties, bilateral mutual legal assistance treaties are being increasingly replaced by multilateral treaties
- the earliest mutual legal assistance treaties covered only a limited scope of offences. More recent treaties cover a broad scope of offences.
- the measures offered under mutual legal assistance treaties (and domestic laws in many States) has expanded. At first, the focus was on service of summons. Today, a wide range of measures are offered.
- traditional mutual legal assistance treaties required that requests be sent through diplomatic channels or through a central authority. More recent treaties allow the use of direct contacts
- more recent treaties have restricted or even eliminated the many grounds for refusal to provide assistance
- requested State applies solely its own laws in granting assistance; procedures requested by the requesting State can be applied if these are not contrary to the laws of the requested State
- as with extradition treaties, another trend in mutual legal assistance treaties is toward less rigid procedural requirements, including towards the use of direct communications and simplified procedure.

The Palermo Convention, which was negotiated between 1998 and 2000, reflects in many ways the “state of the art” of extradition and mutual legal assistance. In particular, it includes many provisions that are new for practitioners in many countries, and may well improve the day-to-day practice of international cooperation.

Negotiation of the Palermo Convention, however, is only the first

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stage. The Convention must be ratified and the investigators, the prosecutors and the judges must be given the tools they need to complete the job.