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Manual on
Mutual Legal Assistance and Extradition

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Contents

I. Introduction

"Criminal groups have wasted no time in embracing today's globalized economy and the sophisticated technology that goes with it. But our efforts to combat them have remained up to now very fragmented and our weapons almost obsolete. The Convention gives us a new tool to address the scourge of crime as a global problem. With enhanced international cooperation, we can have a real impact on the ability of international criminals to operate successfully and can help citizens everywhere in their often bitter struggle for safety and dignity in their homes and communities."

Source: Secretary-General Kofi Annan, foreword to *United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (New York, United Nations, 2004).

1. The above quote from then Secretary-General of the United Nations Kofi Annan describes the challenges facing all nations today, challenges that have inextricably tied all people, including those involved in illegal activities, to one another. Criminals have embraced the breakdown of the traditional barriers of nation States far more readily than have the Governments that promoted and embraced such barriers in the first place. Those who operate outside the law are in no way bound by it; instead, they capitalize on the new international state of affairs, which allows them newfound flexibility and areas of operation, in which they enforce their own regime, which is well funded and brutal in its approach.[1] The types of crimes anticipated by the United Nations Convention against Transnational Organized Crime[2] and the threats they pose are many, varied, constant and real. In a time of limited budgets and resources and in the light of the seriousness of the offences, it is imperative that States requesting mutual legal assistance make every effort to provide cogent and legally sound requests, thereby conserving precious resources. Requested States also have a major role to play in the process, as their flexibility in interpreting their own laws, along with their ability and desire to advise the requesting State on substantive and procedural requirements in their own country, have a major impact on the success or failure of any extradition or mutual legal assistance request.

2. Nations are bound to embrace globalization while at the same time maintaining their sovereignty in order to protect their citizenry and maintain their nationhood. Those tasked with enforcing the law are in the ironic and unfortunate position of being potentially fettered by the very laws

[1] Bernard Rabatel describes that dynamic and its history in the following manner: "Fifty years ago, they could rely in most cases on evidence obtained locally or nationally. Nowadays, crimes (including corruption) are increasingly complex. Criminals are more sophisticated and employ teams of highly qualified lawyers." (Bernard Rabatel, "Legal challenges in mutual legal assistance", in *Denying Safe Haven to the Corrupt and the Proceeds of Corruption: Enhancing Asia-Pacific Cooperation on Mutual Legal Assistance, Extradition, and Return of the Proceeds of Corruption—Capacity-Building Program,* Anti-Corruption Initiative for Asia and the Pacific of the Asian Development Bank (ADB) and the Organization for Economic Cooperation and Development (OECD) (Manila, ADB; Paris, OECD, 2006), p. 38.

[2] United Nations, *Treaty Series*, vol. 2225, No. 39574.

that they are asked to uphold.[3] The Organized Crime Convention was designed not only to combat the criminal acts listed therein, but also to address the challenges facing States when they are tasked with cooperating internationally while at the same time maintaining their sovereignty and upholding their national laws.[4] The tension between these two occasionally competing interests need not be the impediment that it once was, and cannot continue to be an obstacle if States wish to truly take on the challenge of global crime. The challenges to international cooperation are many. They have been well documented by many experts and will be referred to throughout the body of the present *Manual*. Reference will also be made to the most recent responses to those challenges demonstrating that the state of the law is certainly not static, that change can be effected through practical efforts made on the part of States and that those changes need not be of such a novel nature that the sovereignty of any nation is threatened.

A. The Organized Crime Convention and the need for the present *Manual*

3. The Organized Crime Convention can be viewed as a model or blueprint for international cooperation in extradition and mutual legal assistance. Article 16 of the Convention allows States parties that make extradition conditional on the existence of a treaty to consider the Convention as the legal basis for extradition in their relations with other States parties. The Convention also allows for flexibility in approach in that all offences under the Convention are deemed to be included in existing extradition treaties, thus allowing States parties ease of implementation with respect to those crimes. That in turn lessens the effort and potential expense of implementing that section of the Convention.

4. With respect to mutual legal assistance, article 18 of the Convention is often referred to as a "mini-treaty". Article 18 allows States parties to provide one another the widest mutual legal assistance possible in relation to the offences under the Convention. At the time of writing, the Convention has been ratified by over 160 States, which are listed in the United Nations Office on Drugs and Crime (UNODC) online directory of competent national authorities.[5] It is hoped that the Convention will increasingly be used as a legal basis for extradition and mutual legal assistance.

5. The Conference of the Parties to the United Nations Convention against Transnational Organized Crime, in its resolution 5/8, entitled "Implementation of the provisions on international cooperation of the United Nations Convention against Transnational Organized Crime",[6] directed the Secretariat to develop a practical guide to facilitate the drafting, transmission and execution of requests for extradition and mutual legal assistance pursuant to articles 16 and 18 of the Convention in cases in which the Convention was used as a basis. The present *Manual* has been prepared in response to that mandate.

[3] For a discussion on the extent of global organized crime, the flexibility of organized criminals and their ability to capitalize on failed States and to feed the desires of non-failed States, see Misha Glenny, *McMafia: A Journey Through the Global Criminal Underworld* (New York, Knopf, 2008).

[4] Philip Reichel described the challenge in the following manner: "The tricky part, as you can well imagine, is to provide a specialized supranational structure that combats transnational crime but does not violate the spirit of each country's criminal code or criminal procedure." (Philip L. Reichel, *Comparative Criminal Justice Systems: A Topical Approach*, 5th ed. (Upper Saddle River, New Jersey, Pearson Prentice Hall, 2008), p. 11).

[5] Available from www.unodc.org/compauth/en/index.html.

[6] CTOC/COP/2010/17, chap. I.A.

Who the Manual *is for*

6. "In earlier times, most prosecutors would go through their entire career without ever having to obtain evidence from outside national borders."[7] This is certainly not the case today. The *Manual* is designed to be used by three major groups that are involved in international legal assistance:

- Central and other competent national authorities
- Policymakers
- Criminal justice practitioners, including lawyers, investigators, judges and magistrates, who are involved in international legal assistance.

7. Some of those who read the *Manual* will be experienced practitioners of criminal law who have been regularly involved in international cooperation cases, either in a management or an operational position, while others may be novices in that area. The *Manual* offers practical step-by-step suggestions on how best to initiate and follow through on the processes of both extradition and mutual legal assistance as a requesting State and how best to respond to and follow up on incoming requests when representing the interests of a requested State. These suggestions are intended to benefit both the novice and the experienced practitioner. The suggestions are imparted to the reader through summaries, case studies and quotes from authors who are leading practitioners in the field of international cooperation. The text itself is also augmented with various checklists, which are appended as best practice guidelines (see annexes I-VI).

8. Certain sections of the *Manual* will be of particular interest to those practitioners who are responsible for the management of law and policy within their respective Governments and are in a position to effect change. Topics such as the importance, organization and creation of central authorities and their place within a country's justice apparatus are discussed, and the importance of early and constant communication between States throughout the mutual legal assistance and extradition process is stressed repeatedly throughout the *Manual*. Emphasis is also placed on utilizing existing tools, such as the Mutual Legal Assistance Request Writer Tool, to aid in that communication.

The Manual *in relation to other established tools*

9. In order to promote effective communication, UNODC provides the following tools that help ensure that practitioners speak to the right people when requesting extradition or mutual legal assistance, communicate effectively in writing when making requests, can speak knowledgeably in the area of mutual legal assistance and extradition and can gain insight into how different States view the law and procedure in these areas:

- The online directory of competent national authorities
- The Mutual Legal Assistance Request Writer Tool
- The online legal library
- The human trafficking case law database[8]

[7] Kimberly Prost, "Breaking down the barriers: international cooperation in combating transnational crime", p.13. Available from www.oas.org/juridico/mla/en/can/en_can_prost.en.html.

[8] Available from www.unodc.org/unodc/en/legal-tools/index.html.

10. *Manuals* on the Model Treaty on Mutual Legal Assistance in Criminal Matters and the Model Treaty on Extradition have already been published.[9] The present *Manual* should be viewed as one of a suite of tools provided by UNODC that can be used in conjunction with one another in accomplishing the goal of effective international cooperation in general, and with respect to the Organized Crime Convention in particular. The wealth of information that is readily available from recognized experts in the field is ever expanding and can only help practitioners and Governments to achieve their goals. Recent reviews by expert working groups of the tools prepared by UNODC have emphasized that the tools are of high quality but are underutilized.[10] The present *Manual* stresses the fact that utilization of the tools will facilitate the drafting of documents in anticipation of requesting international assistance and that the tools themselves are a highly valuable source of information, allowing requested and requesting States to educate themselves with respect to one another and to engage in effective communication when discussing issues.[11]

How to use the Manual

11. The *Manual* has been divided into a number of chapters, which are intended roughly to follow the thought processes a practitioner would go through in deciding whether to use the Organized Crime Convention as the legal basis for either an outgoing or incoming mutual legal assistance or extradition request. Within the text of each chapter, there are additionally a number of different subheadings and text boxes, which are colour coded for ease of reference.

- The grey boxes show quotes from various sources that crystallize the issue that is to be discussed in each chapter of the *Manual*. There will usually be two of these quotes, one at the beginning of the chapter and one at the end to reinforce what has been discussed.
- The blue boxes summarize the essential points to be stressed in each chapter and will normally make reference to the various sections and subsections of the treaty and the best practices of various countries.
- The yellow text boxes make reference to situations or cases from various jurisdictions around the world. These illustrate how mutual legal assistance and extradition cases are adjudicated around the world in a general sense and, more particularly, how the provisions of the Organized Crime Convention have been perceived by the States themselves or by their courts.

12. All of the sections of the *Manual* show that, at an operational level, there must be effective coordination, a knowledgeable group of practitioners and a desire to move the law forward based upon sound and timely legal analysis. At the same time, there must be an acknowledgement and a management of expectations with respect to what one country can do for another. This entails effective communication and exchange of information or knowledge regarding their respective systems, rather than curt refusals and statements that requests cannot be complied with. Additionally, there must be effective communication before, during and after the requests have been made.

[9] Available from www.unodc.org/unodc/en/legal-tools/model-treaties-and-laws.html.

[10] See the 2004 report of the Informal Expert Working Group on Effective Extradition Casework Practice (available from www.unodc.org/pdf/ewg_report_extraditions_2004.pdf).

[11] As an example of the usefulness of the tools prepared by the United Nations Office on Drugs and Crime (UNODC), it should be noted that the central authority of the Russian Federation, in a conference room paper entitled "Requesting mutual legal assistance in criminal matters from G8 countries: a step-by-step guide", encouraged countries to refer to the UNODC Mutual Legal Assistance Request Writer Tool for "additional guidance on making mutual legal assistance requests to the Russian Federation".

13. In order to assist the reader, a brief glossary has been provided at the end of the *Manual* for ease of reference with regard to some of the terminology and acronyms used herein.

A point to ponder while using the *Manual*:

> Cooperation is as much of a way of thinking and working as it is a collection of "tools" or processes.

Source: Pauline David, Fiona David and Anne Gallagher, *ASEAN Handbook on International Legal Cooperation in Trafficking in Persons Cases* (Jakarta, Association of Southeast Asian Nations, Australian Agency for International Development and United Nations Office on Drugs and Crime, 2010), p. 23.

II. Legal traditions and systems and how they affect the provision of international legal assistance

"But effective implementation is not limited to legislation and administration. It runs far deeper than that. A country may have an excellent legislative and treaty scheme for mutual assistance and an established administrative process and it still may be virtually impossible to provide effective assistance; because the best designed system is only as good as the people who operate it on a practical level. In many instances, success in mutual assistance is dependent almost entirely on the knowledge and most critically—the flexibility—of the authorities request and, even more importantly, providing the assistance."

Source: Kimberley Prost, "Breaking down the barriers: International cooperation in combating transnational crime". Available from www.oas.org/juridico/mla/en/can/en_can_prost.en.html.

14. Over 160 States are parties to the Organized Crime Convention and are now obligated to cooperate internationally as per the terms of the Convention. In order to effectively combat transnational organized crime, national authorities must be able to work together on a variety of levels, including the provision of international legal assistance. Cooperating in this realm requires participants to become aware of and appreciate differences in legal traditions and systems so that they can work effectively with one another and provide the important flexibility of approach that is the hallmark of effective international cooperation.

15. All people, legal practitioners included, are products of the society and legal norms within which they live. Lawyers and the judiciary, of course, have the added dynamic of having studied the law of their country and then gone on to practise it, usually without giving much thought to the legal traditions or systems of other nations. Mutual legal assistance and extradition requests put that legal and societal knowledge deficit in sharp relief, sometimes with negative results. How can the habits and professional biases ingrained by a lifetime of practising within one legal tradition be overcome, and how can knowledge of another legal tradition that usually takes a lifetime of practice to gain be achieved? The answer lies in exhibiting a desire to appreciate another country's legal system and to impart knowledge of one's own legal system to others.[12] It should always be kept in mind that, although legal traditions and systems may vary in their approach, all of them are in place to ascertain the guilt or innocence of the accused. This commonality of purpose provides a basis for international cooperation.

[12] "Both bilateral and multinational cooperation in law enforcement present many problems for the countries involved. However, increasing transnational crime suggests that the potential benefits of cooperative efforts outweigh the problems. A necessary step in achieving that cooperation is an increased understanding of criminal justice systems in the various nations. Thus, more people taking an international perspective towards criminal justice will have definite universal benefits." (Reichel, *Comparative Criminal Justice Systems*, p. 13).

16. There are few aspects of a country and a society that are as fundamental to its identity as the laws that it imposes on its citizenry.[13] The law is part of the fabric of a nation and is a reflection of its history and its culture. Sovereignty and legal systems can be used as both a sword and a shield, and criminals are well aware of this. "The challenge for law enforcement authorities in every nation is that sovereignty, a fundamental principle which grounds the relations of States, is also a major tool in the armoury of the criminal element of our societies. Criminals depend heavily upon the barriers of sovereignty to shield themselves and evidence of their crimes from detection."[14]

17. Counsel grow accustomed to the legal regime within which they work on a daily basis, and it can sometimes be difficult to overcome the biases that become almost second nature when there has been limited exposure to other legal systems. Lawyers are usually trained in one of the major legal traditions of the world and, even today, it is relatively rare to see a lawyer who has been trained and practises in more than one of the major traditions. This is particularly the case for criminal law, in which the overwhelming number of cases pleaded before the courts in any jurisdiction are factually and procedurally based in one jurisdiction.

18. Government lawyers also view themselves as being the guardians of their nation's laws and can view the unfamiliar as being the unobtainable, particularly as it relates to the possible dilution of laws that are designed to govern and protect the country's citizenry. Legal systems are heavily entrenched in a society, and particularly among members of the legal profession and judiciary. "Upholding" the law has sometimes meant being inflexible in its application, perhaps nowhere more so than when members of one legal tradition ask members of another legal tradition to adopt their ways with respect to international cooperation. Such a reaction can sometimes have negative consequences when it comes to international cooperation.

19. Much has been said regarding the need to "break down barriers" or enter into a new era of cooperation and flexibility, but those who have been involved in the field of transnational crime and international cooperation know that this is easier said than done.[15] Treaties create binding obligations on States parties,[16] but the actual execution of an extradition or mutual legal assistance request also requires analysis and consideration of the domestic laws of the requesting and requested States. Gaining a basic understanding of the legal traditions of the world, ascertaining which legal tradition a country is subject to and then determining the legal systems that each country utilizes are necessary aspects of international cooperation. In the present *Manual*, a "legal tradition" is the rationale and methodology behind how laws are created, interpreted and enforced in a country, whereas a "legal system" is how an individual country utilizes or interprets that legal tradition, particularly with respect to procedure. The *Manual* will start by looking at legal traditions.

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[13] "A legal tradition puts the legal system into a cultural perspective. It refers to deeply rooted and historically conditioned attitudes about things such as the nature of law, the role of law in society, how a legal system should be organized and operated, and the way the law is or should be made, applied or perfected." Ibid., p. 100, paraphrasing John Henry Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin Western America*, 2nd ed. (Stanford, California, Stanford University Press, 1985).

[14] Prost, "Breaking down the barriers", p. 2.

[15] 2004 report of the Informal Expert Working Group on Effective Extradition Casework Practice; Prost, "Breaking down the barriers".

[16] See articles 26 and 27 of the Vienna Convention of the Law of Treaties (United Nations, *Treaty Series*, vol. 1155, No. 18232).

A. Legal traditions

20. Over the centuries, a number of different legal traditions have evolved; these traditions are now the basis for the law in every country. Owing to historical factors, some countries have blended legal traditions, creating unique procedural and legal requirements that may vary among different regions of the same country and/or for different areas of law. Ongoing communication with the central authority of a country can avoid any challenges that may arise as a result of this interweaving of legal traditions. Some legal traditions are more widespread than others; these will be examined more closely later in the present chapter. Given the global scope of transnational organized crime, however, it is useful to at least be cognizant of all of the major traditions of the world, given that mutual legal assistance and extradition requests may truly be global in scope.

21. The three major legal traditions are the following:

- The civil law tradition is premised on the system of codification of laws, thus giving clear direction to a State's citizenry as to what the law is. It is the most commonly found legal tradition in the world.
- The common law tradition is premised on the law being developed through jurisprudence, essentially meaning that the courts make the law. Common law originated in England and is the legal tradition typically followed in the Commonwealth countries of the former British Empire. It is the second most commonly found legal tradition in the world.
- The Islamic legal tradition is premised on the fact that there is no distinction between a legal system and other controls on a person's behaviour. The tradition operates under the assumption that Islam, as a religion, provides all the answers to questions about appropriate behaviour and acceptable conduct. It is important to note that not all Muslim societies are bound solely by Islamic law and that some have a blended approach to their laws that incorporates other legal traditions.[17,18]

B. The dualist/monist question

22. Countries also have different traditions for creating and incorporating international law. These are known as the dualist and monist traditions. Each country will utilize the tradition to which it subscribes in order to implement the Organized Crime Convention pursuant to its article 34. That article requires each State to take the "necessary measures, including legislative and administrative measures" in accordance with domestic law to implement the Convention. It further requires that offences be established in the domestic law of each party, in accordance with articles 5, 6, 8 and 23 of the Convention, independent of the transnational nature of the offence or the involvement an organized criminal group. The only exception requiring the involvement of an organized criminal group is for offences pursuant to article 5. In combating organized crime, each State may adopt measures that are stricter and more severe than those provided for by the Convention (art. 34, para. 3).

[17] Countries such as Jordan and Kuwait have a mixture of civil and Islamic law; Kenya and Nigeria, on the other hand, have a mixture of common and Islamic law. (Philip Reichel, *Comparative Criminal Justice Systems, A Topical Approach*, 3rd ed. (Upper Saddle River, NJ, Prentice Hall, 2002, p. 98.)

[18] Reichel also mentions the socialist legal tradition as one of the four legal traditions found in the world today, although there is some dispute among scholars as to whether it can still be viewed as such. The socialist legal tradition is the newest of the legal traditions mentioned in the present *Manual*. Some scholars view it as being a modification of the civil law tradition. Other scholars, including Reichel, believe that it warrants consideration as its own, distinct legal tradition. The socialist legal tradition is evolving with the new world order and appears to have become an amalgam of other legal traditions and systems. (Reichel, *Comparative Criminal Justice Systems*, 3rd ed., p. 81.)

23. In a dualist system, international and domestic law are viewed as separate entities and, for the most part, they function independently of one another. As a general rule, States that follow the common law tradition are dualist in nature, although there are exceptions. A State can ratify an international treaty or convention without it automatically having the force of law in that particular State until the State enacts new or amends existing domestic legislation to reflect the provisions of the treaty or convention. In dualist systems, once the State ratifies the treaty or convention, it is compelled to ensure that its domestic legislation reflects the requirements of that particular treaty or convention. The time period between ratification and enactment in domestic law can be lengthy, as legislative drafters must draft the new domestic legislation and it must go through whatever government process exists for it to become law.

24. In a monist system, international and national law are of a unified nature. Thus, when a State ratifies a treaty, the treaty automatically has the same authority as domestic law and there is no need to go through the additional step of including it in domestic legislation. Many civil law States have a monist system, although, as with dualist States and the common law tradition, there are exceptions. There are two points to consider with monist systems: a State may consider only certain treaties as applicable to domestic law, and the treaty may be viewed as inferior to any constitutional provisions that exist in the State. Finally, monist States may need to amend their domestic law to create penalties or provide for other measures that are not clearly set forth in the treaty, if the treaty requires them to do so.

An example of a dualist regime awaiting incorporation of the Organized Crime Convention into its domestic legislation:

The United Kingdom of Great Britain and Northern Ireland notified the Secretariat that it did not have practical examples demonstrating the effective use of the Organized Crime Convention, as that treaty had not yet been included in its domestic legislation on extradition ... it was noted that the United Kingdom was currently amending its domestic legislation in that regard.

Source: Conference room paper entitled "Catalogue of cases involving extradition, mutual legal assistance and other forms of international legal cooperation requested on the basis of the United Nations Convention against Transnational Organized Crime" (CTOC/COP/2010/CRP.5 and Corr.1), para. 98.

25. The descriptions of legal traditions and legal systems found in the present chapter provide only an overview. Variations in the traditions are to be found in the legal systems of each State, along with the possible commingling of different legal traditions. As a result, there may be considerable variation in the rules of legal procedure, evidence and legislation, even among States that share the same legal tradition. This illustrates the need for practitioners to apprise themselves of the various legal traditions and systems so that effective communication can take place between requested and requesting States.

26. As previously mentioned, the civil law tradition and the common law tradition are the two most prevalent legal traditions. For that reason, the *Manual* will focus on comparing and contrasting the two.

C. A brief overview of the common law and civil law traditions

27. As has been previously stated, civil law is based on the codification of laws, while common law is based on law made by judges, or stare decisis. The major difference between the two traditions that causes the greatest challenge for practitioners in international legal cooperation relates to the criminal procedures that each tradition follows.[19] Procedurally, the civil law tradition follows the premise that the trial is an ongoing investigation in a search for the truth rather than a competition between two sides.[20] This allows the judge to take all information that is proffered as evidence as part of the continuum of the investigation. As a result of being part of the investigative process, the judge can decide what the relative strength of each piece of evidence is by examining it as part of the investigation.

28. By contrast, the adversarial system found in the common law tradition "assumes truth will arise from a free and open competition over who has the correct facts. The struggle is between the State on one side and the defendant on the other."[21] A salient part of the litigation process in adversarial common law traditions is the subjection of all information, both documentary and oral, that is intended for the court to rules of procedure and evidence. Argument and cross-examination regarding the admissibility of evidence are allowed; only after the judge has ruled on its admissibility will evidence be admitted and considered by the judge.

29. These differences in procedure between the civil law and common law traditions are of particular importance in the mutual legal assistance and extradition process. This is especially the case in the mutual legal assistance process, in which evidence is being gathered, as there are differences in who does the gathering (a magistrate in the civil law tradition or an investigator in the common law tradition) depending on the matter in which it is being gathered: no rules of evidence bar admissibility in the civil law tradition, while multiple evidentiary rules affect all aspects of an investigation in the common law tradition. In the extradition process, the challenges are similar, as evidence gathered in one legal tradition must be collated and presented in a form to which a judge from another legal tradition can apply the rules of evidence and procedure.

30. The paragraphs above give a brief description of the major differences between the common law and civil law traditions, particularly as they relate to the duties and responsibilities of the judiciary. How does this translate into challenges in international cooperation? The following quote highlights typical challenges that may be faced with respect to mutual legal assistance requests by common law and civil law systems and is illustrative of the challenges posed by the two systems regarding items that practitioners within those two systems take for granted regarding witness statements:

> A witness statement is sometimes admissible in a requesting State only if it meets specific requirements:
>
> - Interview by a judge or by a police officer of the requested State, or direct questioning by a prosecutor, an investigating judge, or a police officer of the requesting State
> - Presence of the accused or his or her counsel, or both (either in person or via videoconference)
> - Statement made under oath by the accused, or verbatim statement or summary (procès-verbal) of the interview with the accused

[19] Reichel, *Comparative Criminal Justice Systems*, 5th ed., p. 162.
[20] Ibid., p. 166.
[21] Ibid., p. 169.

- Original documents or certified copies of documents

At the same time, the requested State may have no such requirements for the admissibility of witness statements.[22]

31. With respect to extradition, the differences between the two major legal traditions are even more pronounced. In some legal systems arising from the civil law tradition, the judiciary has the final say in deciding whether to extradite an individual. In legal systems based on the common law tradition, the extradition is a bifurcated process, usually involving an initial hearing by a court. If the court grants the extradition request, the case is forwarded to the executive branch of the Government, where the ultimate decision to surrender the fugitive is made. Depending on the State, the decisions of either the court or the executive may be reviewed by a higher court before the issue of surrender is finally decided. In some civil law jurisdictions, the decision to extradite may be within the sole purview of the judiciary, with no executive involvement; however, this is changing in some States.[23]

32. The above brief discussion regarding the differences between the substantive and procedural aspects in the civil and common law traditions illustrates the challenges that exist when addressing issues of international cooperation that involve two different legal traditions. The differences may seem insurmountable at times, but is there room for flexibility in the approach? The next section of the *Manual* addresses this important aspect of international cooperation.[24]

D. How to address the differences: flexibility in the common and civil law traditions

33. The present *Manual* and other literature addressing the challenges of international cooperation speak of the need for flexibility in approach when it comes to requesting and providing mutual assistance and extradition. The present section provides some examples and explains in general terms how flexibility can be found in the common law and civil law traditions. A basic understanding of those legal traditions and how flexibility is built into them is beneficial when discussions take place between requesting and requested States, as it allows both parties to speak knowledgeably as to how such flexibility can be found in their respective systems in an attempt to achieve a successful outcome. Later in the present section, two hypothetical situations are given to explain that dynamic in more concrete terms.

1. A summary of the differences between common and civil law procedures and other practical differences

34. The following are some of the differences between civil and common law countries with respect to the requesting and provision of mutual legal assistance or extradition that may create challenges:

[22] Rabatel, "Legal challenges in mutual legal assistance", p. 42.

[23] An example of changing legislation can be found in Austria and Germany: with the entry into force of the European arrest warrant, both Austria and Germany made substantial amendments regarding their extradition legislation. In both countries, the initial decision on the extradition remains with the courts; however, Austrian and German legislation no longer leave it for the courts to take the ultimate decision, but rather assigns this competence to the executive. In Austria, however, in cases in which the request for extradition has been found to be inadmissible (by a prior decision rendered by the competent judicial authority), the minister of justice must reject the request for extradition.

[24] The United Nations Convention against Transnational Organized Crime exhorts signatories to provide the widest possible cooperation and to be flexible in their approach to international cooperation (art. 1; art. 16, para. 8; and art. 18, para. 1).

- Language and legal terminology: for example, an affidavit or writ of habeas corpus may not understood by civil law practitioners, or a commission rogatory or procès-verbal may not be understood by common law practitioners.

- Role and functions of competent authorities: throughout the procedure, there may be a lack of understanding of such roles and functions, in particular those of the *juge d'instruction* (investigating judge) in civil law systems and the police, lawyers, prosecutors and judges in common law systems.

- Criminal terminology and the elements of the offence: this may cause problems of interpretation of the double, or dual, criminality principle (e.g. conspiracy/*association de malfaiteurs*).

- The law surrounding non-extradition of nationals: the law in civil law countries is often misunderstood by common law practitioners. It is important to note that, unlike common law countries, countries that do not extradite nationals often establish their jurisdiction on the basis of the "active nationality" principle in compensation for that fact. This principle allows those countries to apply their domestic criminal law to offences committed by their nationals abroad.

- Confidentiality: civil law practitioners may lack awareness of the fact that common law States are often not in a position to maintain the confidentiality of requests. As a consequence, the contents of mutual legal assistance requests may be disclosed and prejudice the proceedings.

- Judgements in absentia: traditionally, common law countries reject the possibility of judging a person who was not personally present at trial, whereas civil law countries accept judgements in absentia.[25]

2. *Flexibility in common law*

35. How a judge adjudicates in the common law tradition and what results from the adjudication can be explained in the following quote:

> Luckily for the judge, and therefore for the nations under this tradition, common law provides for flexibility by empowering judges to develop solutions to unique cases by "making law" (Postema, 1986). The only restraint requires the solution to be built from a base of existing law. The result is law established by judicial decision and precedent rather than issuing from statutes, codes or divine proclamation.[26]

3. *Flexibility in civil law*

36. Flexibility in civil law is not found in the ability of a judge to create law based upon the application of precedent to a unique set of facts. Instead, flexibility in a civil law system is found in the ability to characterize legal issues as either problems of law or problems of fact. The

[25] United Nations Office on Drugs and Crime, *Counter-Terrorism Legal Training Curriculum, Module 3, International Cooperation in Criminal Matters: Counter-Terrorism*, sect. 6.

[26] Reichel, *Comparative Criminal Justice Systems*, 3rd ed., p. 140.

following quote illustrates the degree of flexibility that a civil law judge has respecting issues of evidence and testimony:

> While common law requires many issues to be considered questions of law, civil law provides courts with the discretion to view those same issues as questions of fact. Consider, for example, issues about evidence and testimony. A civil court judge may find it strange to keep an important piece of evidence or relevant testimony out of court, yet for that judge these are issues of fact: Did this person commit this offence? For the common law judge, the same issues may be legal ones: Was this evidence or testimony gathered in the appropriate (legal) manner? Obviously, providing the civil court judge discretion to decide whether an issue is a factual or legal question gives that tradition a degree of flexibility not found under common law.[27]

4. An example of flexibility: hypothetical mutual legal assistance requests by common law and civil law jurisdictions and their resolution

37. The following is an example of how a flexible approach can be used to deal with a common challenge that could arise between a requesting civil law jurisdiction and a requested common law jurisdiction. It is important to note the distinction between what is illegal and what is viewed as merely inconsistent. A request received or made may procedurally be viewed as a novelty, and the fact that the requested or requesting State is unfamiliar with the action proposed can lead to practitioners becoming uneasy when they view the request in the light of their own law and experiences. It is key to remember that refusal will occur when what is being asked is illegal in the requested State. Nevertheless, a request should not be refused because it has entered the realm of the unfamiliar. Analysis should be conducted to see if the request can be honoured:

> If an investigating judge seeks to interview a witness in a common law State, strictly speaking, it would be "inconsistent" with the law of the requested State for that judge to conduct the interview. It would not however be a violation of the domestic law if the judge were allowed to conduct the interview. In this instance, success or failure depends entirely on whether the authorities in the requested State allow the evidence to be gathered in an appropriate form for the requesting State, even where it is inconsistent with the normal process employed in the requested State.[28]

38. Conversely, here is an example of a request to a civil law jurisdiction by a common law State and how a flexible approach could lead to a successful result:

> In a civil law system very often an investigating judge hearing a witness will prepare a summary or "procès verbale" of what the witness said. In the common law, when a witness is examined and cross-examined before the court, his or her evidence must be recorded verbatim. A summary or "procès verbale" is not admissible. If a request is made by common law authorities to take the evidence of a witness on "commission" in a foreign State and to record the evidence verbatim, once again that process would be inconsistent with the practice of the requesting State. However, the foreign authorities would not be violating the law by allowing a verbatim record.[29]

[27] Ibid., p. 141.
[28] Prost, "Breaking down the barriers", p. 17.
[29] Ibid.

5. *Evidentiary considerations*

39. It has been mentioned previously that criminal procedure in the common law tradition is governed by complex rules of evidence. In the realm of international cooperation, there have been steps taken, particularly in the area of extradition, to address the challenges that arise with respect to these rules. In mutual legal assistance matters, such challenges are more pronounced, owing to the fact that the evidence that is gathered abroad will be tendered in a domestic court. Here are some very basic examples of common law evidentiary rules found in both extradition and mutual legal assistance matters that can prove to be problematic when dealing with requests involving two different legal traditions:

- *Hearsay*. Simply put, hearsay is a statement made outside of court by someone other than the person who is making the same statement in court. A more complete definition of the rule is found in the glossary section of the present *Manual*. As a general rule, hearsay evidence is inadmissible for the truth of its contents at trial. The rules against hearsay have been relaxed by some countries in the extradition context, thus allowing for hearsay to be considered by the courts in order to decide the narrow issue of extradition. In a criminal trial, however, in which, for example, evidence obtained by mutual legal assistance will be used to decide the ultimate issue of guilt or innocence of the accused, the rule against admitting hearsay will be applied far more stringently and be relaxed only under certain, well-established circumstances.

- *Prima facie case*. From the Latin meaning "on its first appearance", prima facie is an evidentiary standard commonly applied to extradition cases in common law countries. Prima facie denotes evidence that, unless rebutted, would be sufficient to prove a particular proposition or fact. In the extradition context, a judge hearing an extradition case must have some admissible evidence to rule that there is sufficient evidence of the commission of an offence that the fugitive could stand trial in the requested State and therefore be extraditable to the requesting State. This evidentiary standard is sometimes a challenge for civil law countries, as they are not familiar with this burden and therefore do not draft their extradition requests with it in mind. The prima facie evidentiary standard is much lower than the "beyond a reasonable doubt" standard that must be met in order to convict someone in a criminal trial in a common law country.

- *Continuity*. When an item is seized as evidence in a common law country and is to be entered into evidence at trial, it is normal for a "chain of custody" to be established to show that, once the police seized the exhibit, it remained within their control and was not tampered with in a manner that would lead a judge to an erroneous decision. This is particularly important in the field of forensic science, where, for example, DNA samples or tests for drugs are susceptible to possible contamination. Loss of continuity may not render an exhibit inadmissible, but a judge may ascribe very little evidentiary weight to it, meaning that the evidence becomes essentially worthless in deciding the issue of guilt or innocence. This rule can have a bearing on how mutual legal assistance requests are crafted because sometimes it may be very important to the requesting State to maintain the continuity of a particular exhibit, particularly if it is of a forensic nature.

- *Cross-examination*. In the common law system, any evidence that is proffered to a court by either of the parties to a proceeding can be challenged by the opposing side before the judge rules on its admissibility or weight. Testimony from witnesses is no exception, and the method used by the opposing party to challenge the testimony is cross-examination.

After the party proffering the witness has asked the witness questions (evidence in chief), the opposing party or parties may ask questions challenging that version of events. Considerable leeway is given in many common law countries as to what can be asked of a witness in cross-examination, and the questioning can sometimes be quite aggressive. In mutual legal assistance situations, this part of a common law proceeding can prove to be problematic if the requested State has a civil law tradition and is either not familiar with the process or does not allow it.

40. Different legal traditions and legal systems require different procedures and requirements for obtaining evidence during an investigation and using that same type of evidence at trial. These procedural and evidentiary rules can prove to be a challenge within the realm of mutual legal assistance and extradition.[30] Some legal systems will require less evidence in order to obtain a certain result, while others will require considerably more. The lesson to be remembered is to not assume that matters will be dealt with in the same manner as they are in the requesting State's jurisdiction. Efforts must be made by the authorities of the requesting State to educate themselves on what can be expected by speaking with authorities of the requested State. The requesting State's own evidentiary requirements must also be made clear to avoid the following observation made by Kimberley Prost: "Requested States must bear in mind that evidence inadmissible in the requesting State is equivalent to no evidence at all."[31]

The final word on different legal systems:

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

Source: Bernard Rabatel, "Legal challenges in mutual legal assistance", in *Denying Safe Haven to the Corrupt and the Proceeds of Corruption: Enhancing Asia-Pacific Cooperation on Mutual Legal Assistance, Extradition and Return of the Proceeds of Corruption—Capacity-Building Programme*, Asian Development Bank (ADB)—Organization for Economic Cooperation and Development (OECD) Anti-Corruption Initiative for Asia and the Pacific (Manila, ADB; Paris, OECD, 2006), p. 39.

[30] Kimberly Prost," Practical solutions to legal obstacles in mutual legal assistance", in Denying Safe Haven, p. 36.
[31] Ibid., p. 37.

Points to remember regarding different legal traditions:

It is important to make the effort to educate oneself as best one can about the legal traditions of the requested or requesting State. Miscommunication and the problems it creates are founded in misunderstanding.

When making mutual legal assistance and extradition requests, clarity as to what the legal requirements of the requesting State are with respect to the information being sought is key. If the information does not come in a usable form, then it is of no use, either in furtherance of an investigation or in a trial.

It is important to educate oneself further by understanding the legal system within which the requested and requesting State are working. The domestic legislation of each State is instructive, and early efforts to understand these systems and their methods will pay dividends, not only with the case at hand, but also for every case in the future.

One should speak with the central authorities. They are the national experts in the field of international assistance. By making use of their knowledge, trust and enhanced cooperation will follow.

Requests may take one out of one's comfort zone. It is key to remember, however, to differentiate between that which is illegal in a legal system and that which is inconsistent. A request inconsistent with a legal system could potentially still be processed and become a successful request.

III. The legal basis for mutual legal assistance and extradition: general principles

41. The present chapter deals with the law that is the basis for any request for mutual legal assistance or extradition, whether that request is made under a treaty, under domestic law or by way of the principle of reciprocity. The following chapters deal more specifically with the making of these types of requests pursuant to the Organized Crime Convention, but it is useful to look at the legal basis for mutual legal assistance and extradition, as it explains how requests are drafted, why certain items are asked for in the Convention and generally what can be expected during the mutual legal assistance or extradition process.

A. Mutual legal assistance and extradition

42. Mutual legal assistance in criminal matters is a process by which States seek and provide assistance in gathering evidence for use in criminal cases. Extradition is the formal process whereby a State requests the enforced return of a person accused or convicted of a crime to stand trial or serve a sentence in the requesting State.

B. Treaties

43. Treaties have been utilized as a basis for international cooperation throughout the world for many years. On the spectrum of international cooperation, they represent the most formal vehicle that can be used, whether for mutual legal assistance or extradition. Treaties allow for a focusing of effort and for either cooperation on certain types of offences or the consideration of regional concerns and the legal systems of a specific region. Treaties also oblige the parties to cooperate with one another under international law, provided that the request falls within the terms of the treaty.[32] This "scope" consideration will be discussed more fully throughout the present *Manual*, as it is a fundamental question that will have to be asked each time a treaty request is made.

44. Bilateral treaties can be tailored between States and provide a high degree of certitude regarding the obligations and expectations in the extradition process. This is particularly the case when States share the same legal tradition, as the commonality found in the treaty will follow through to the domestic court process as well. As shown in the chapter on legal traditions, the quest for certainty and clarity becomes more problematic when the States in a bilateral treaty come from a different legal tradition. Another challenge to engaging in bilateral treaties is the expense and effort it takes to see each bilateral treaty through to fruition.

45. Parties to regional treaties tend to share either the same geographical concerns regarding, for example, certain types of crime, or else they share the same legal traditions. There are many such

[32] United Nations Office on Drugs and Crime, *Manual on International Cooperation in Criminal Matters related to Terrorism* (New York, 2009), pp. 9-10.

treaties currently in place; some have been in existence for some time and have proven to be quite successful.[33] Regional treaties have also led to the creation of regional instruments that allow the treaty to be implemented. One of the most well-known of these instruments is the European arrest warrant, which has changed the manner in which individuals are extradited within the European Union.

46. The European arrest warrant can be defined as any judicial decision issued by a member State of the European Union with a view to the arrest or surrender of a requested person by another member State, for the purposes of conducting a criminal prosecution or executing a custodial sentence or a detention order. The warrant may be issued for acts punishable by the law of the issuing State by a custodial sentence or a detention order for a maximum period of at least 12 months or, if a sentence has been passed or a detention order has been made, for sentences of at least 4 months.

47. The principle of mutual recognition of judicial decisions replaces the traditional extradition system between the member States of the European Union. It requires each national judicial authority acting as an executing judicial authority to recognize requests for the surrender of a person made by the judicial authority of another member State (the issuing judicial authority).

48. The European arrest warrant process has the following innovations compared with the former extradition procedures:

- Expeditious proceedings: the final decision on the execution of the European arrest warrant should be taken within a maximum period of 90 days after the arrest of the requested person. If that person consents to the surrender, the decision shall be taken within 10 days after consent has been given.
- Abolition of the double criminality requirement in prescribed cases: the double criminality principle is not required for 32 enumerated offences punishable in the issuing member State by a maximum period of at least three years of imprisonment and defined by the law of the member State. Offences that are not included in the list or do not fall within the three-year threshold are still subject to the double criminality principle.
- "Judicialization" of the surrender: the new surrender procedure has been removed from the executive and placed in the hands of the judiciary. Both the issuing and executing authorities are considered to be the judicial authorities that are competent to issue or execute a European arrest warrant by virtue of the law of the issuing or executing member State.
- Surrender of nationals: European Union member States may no longer refuse to surrender their own nationals; however, there is an optional provision for making execution of the warrant conditional on a guarantee that, upon conviction, the individual will be returned to his or her State of nationality to serve the sentence there.
- Abolition of the political offence exception: The political offence exception is not enumerated as a mandatory or optional ground for the non-execution of a European arrest warrant. The sole remaining element of this exception is confined to the recitals in the preamble

[33] See, for example, the Inter-American Convention on Mutual Assistance in Criminal Matters, and the Inter-American Convention on Extradition. Both of these conventions are utilized in the region covered by the Organization of American States and are facilitated by the Hemispheric Information Exchange Network for Mutual Assistance in Criminal Matters and Extradition, the aim of which is to provide a portal for the exchange of information regarding mutual legal assistance and extradition matters for member States, thus making the mutual legal assistance and extradition process more efficient. For more information, see the box at the end of section VI.B. below.

of the Council of the European Union framework decision 2002/584/JHA on the European arrest warrant and the surrender procedures between member States (recital 12) and takes the form of a modernized version of a non-discrimination clause.

- Deviation from the rule of speciality: member States are required to notify the general secretariat of the Council that, in their relations with other member States that have given the same notification, consent is presumed to have been given for the prosecution, sentencing or detention to carry out a custodial sentence or detention order for an offence committed prior to surrender, other than the offence for which the person concerned was surrendered.

49. The multilateral conventions are also a powerful tool in international cooperation. Multilateral conventions such as the anti-terrorism conventions may apply to a specific type or group of offences, or they may be specific in the actions that are to be taken, as is the case in the Organized Crime Convention.[34] The international drug conventions were the first multilateral conventions that required international cooperation among member States; they established this requirement in all other criminal conventions, the Organized Crime Convention included, that followed. As a multilateral convention, the Organized Crime Convention covers a number of different types of offences, and a potentially very broad geographical area. How that Convention is used as a basis for extradition and mutual legal assistance will be looked at more closely in the following chapters.

50. Originally, extradition was based on pacts, courtesy or goodwill between Heads of sovereign States.[35] There was historically no general duty to extradite. Countries that desired such a relationship would enter into bilateral extradition treaties or agreements. The advent and increasing implementation of treaties, however, has created obligations to extradite where none existed before.[36] Article 16, paragraph 3, of the Organized Crime Convention states that any offence to which the Convention alludes is "deemed to be included as an extraditable offence in any extradition treaty existing between States Parties." In the absence of a treaty and if a State usually insists on the existence of a treaty for extradition, the option is given for that State to use the Convention itself as the vehicle for extradition. Article 16, paragraph 4, of the Convention provides that, in the absence of a treaty and if a State normally insists on a treaty for extradition, it "may consider [the Convention] the legal basis for extradition in respect of any offence to which this article applies."

51. The negotiating and drafting of individual treaties can be a costly and time-consuming exercise that may not be within the financial means of all States. Thus, bilateral treaties, although very common and effective, may not be possible, even if it is the desire of the participating States to have them. Realistically, it is not possible to have a bilateral treaty with every country in the world, but the increasing globalization of crime requires States to have some means of international cooperation with all parts of the globe. For those States that wish to embark on the treaty-drafting process with another State, or perhaps a region, UNODC has prepared the Model Treaty on Mutual

[34] Multilateral conventions may also have organizations created by member States to aid in facilitating international cooperation. An example is the Ibero-American Legal Assistance Network (IberRed), the organization created to promote judicial cooperation among Ibero-American countries. IberRed provides support for and facilitates judicial cooperation with respect to extradition and mutual legal assistance in criminal matters, the abduction of minors, the transfer of sentenced persons, the United Nations Convention against Transnational Organized Crime and the United Nations Convention against Corruption. For more information, see the box at the end of section VI.B. below.

[35] See 2004 Report of the Informal Expert Working Group on Effective Extradition Casework Practice, para. 8.

[36] Ibid., para. 9.

Assistance in Criminal Matters,[37] which can greatly assist those tasked with drafting the documents and achieving a timely resolution of the drafting process. The interplay between bilateral and multilateral treaties and the Organized Crime Convention is addressed in article 18, paragraphs 6 and 7, of the Convention. Major points to remember regarding the Convention and mutual legal assistance by way of treaty are the following:

- The Convention does not override any existing mutual legal assistance treaty already in place between States. Instead, the Convention gives States the option to use its article 18, paragraphs 9-29, if they would facilitate cooperation.
- Article 18, paragraphs 9-29, of the Convention will apply if there is no existing treaty in place between two States parties, thus allowing for a framework for mutual legal assistance to be followed when making a request pursuant to the Convention.
- If a State has ratified the Convention, it is bound by those obligations that are viewed as non-discretionary. For example, article 18, paragraph 8, states that States parties may not decline a mutual legal assistance request on the ground of bank secrecy.

52. The Organized Crime Convention also encourages States parties to enter into their own regional or bilateral agreements, with a view to enhancing cooperation regarding transnational organized crime.[38]

C. Domestic law

53. While many States rely upon the Organized Crime Convention, with its many strategic and procedural benefits, as the vehicle of choice for international assistance, some countries utilize their domestic law as the foundation, in whole or in part, for either extradition or mutual legal assistance. In some instances, domestic law addresses the issue of dealing with incoming requests for either extradition or mutual legal assistance. Other countries have domestic laws that go beyond the procedural and actually grant authority to accept such requests, while others have a combination of both approaches. Still other countries have in their legislation specific provisions that allow for extradition pursuant to their domestic law instead of in reliance upon a treaty. It is advisable for practitioners to look closely at the domestic law of a country and speak with representatives of its central authority to discern whether extradition without a treaty is an avenue that can be pursued in a specific case.

54. Normally, domestic legislation specifies the procedure to be followed in processing both incoming and outgoing requests, the type of requests that can be processed and how those requests are to be transmitted. A review of a country's legislation prior to contacting it with a request can be highly beneficial, as it allows the requesting State to converse knowledgeably about the request that it intends to make and provide clarity when the request is actually made. Domestic law can therefore provide direction and assistance to a requesting or requested State in two ways: the law can provide direction with respect to the implementation of any treaties, and it can be used as a legal basis for international assistance. In some instances, it can also provide information on whether the type of information that is required needs to be the subject of a request at all.

[37] See General Assembly resolutions 45/117, annex, and 53/112, annex I.

[38] "States Parties shall consider, as may be necessary, the possibility of concluding bilateral or multilateral agreements or arrangements that would serve the purposes of, give practical effect to or enhance the provisions of this article" (art. 18, para. 30) and "States Parties shall seek to conclude bilateral and multilateral agreements or arrangements to carry out or to enhance the effectiveness of extradition" (art. 16, para. 17).

D. The principle of reciprocity

55. The principle of reciprocity has long been an established principle in the relations of States with respect to matters of international law and diplomacy. It is basically a promise that the requesting State will provide the requested State the same type of assistance in the future, should the requested State ever be asked to do so. This principle is usually incorporated into treaties, memorandums of understanding and domestic law. It is particularly prevalent in States with a civil law tradition, where it is viewed as a binding covenant. In common law countries, it is not viewed as an obligatory principle. Some countries use their domestic legislation as a basis for extradition and apply the principle of reciprocity as a precondition to considering extradition to another State.[39] The Organized Crime Convention specifically mentions the principle of reciprocity in its article 18, paragraph 1, and obliges all States parties to adhere to it.[40] The principle can also be a useful tool in a situation in which there is no treaty, as it can be viewed as a stand-alone promise that one State will do the same for another State in future should the need arise. As with any promise, every effort should be made to ensure that it can be kept. Jean-Bernard Schmid, investigating magistrate for Geneva, Switzerland, had the following observation to make regarding the importance of honouring the promises that are made: "Finally, there always is a next time. In international cooperation, as in any business, it is in the interest of every party to respect promises that are made."[41]

[39] Japan provides international cooperation (mutual legal assistance and extradition) based on its domestic laws that consider assurances of reciprocity as preconditions to providing such assistance (see art. 3, para. (ii), of the Act of Extradition, and art. 4, para. (ii), of the Act on International Assistance in Investigation and Other Related Matters; both are available from the Ministry of Justice of Japan at www.moi.go.jp/ENGLISH).

[40] The article states, in part, that States "shall reciprocally extend to one another similar assistance".

[41] Jean-Bernard Schmid, "Legal problems in mutual legal assistance from a Swiss perspective", in *Denying Safe Haven*, p. 47.

IV. The Organized Crime Convention as the basis for international cooperation

> "When determining whether there is a legal basis for seeking mutual legal assistance, practitioners should think broadly in terms of applicable instruments."
>
> *Source*: Kimberley Post, "Practical solutions to legal obstacles in mutual legal assistance", in *Denying Safe Haven*, p. 32.

56. Although the above quote refers to mutual legal assistance, it could just as easily refer to extradition. The present chapter addresses the issue of the application of the Organized Crime Convention in a formal mutual legal assistance or extradition request. Issues such as scope, the relationship of the Convention to pre-existing treaties and ratification are discussed. As with any aspect of international cooperation, prior research, effective communication between the two States parties involved and clarity of purpose will be key in obtaining a successful and timely outcome.

57. Whether the Organized Crime Convention can be used as the legal basis for international cooperation is dependent upon a number of factors:

- Scope
- Whether the requesting or requested State has ratified the Convention
- Whether the State has incorporated the Convention into its laws, thus giving the Convention the effect and force of law (the dualist/monist question). Non-incorporation of the provisions of the Convention into domestic laws does not mean that a State is not bound by the provisions of the Convention once it is ratified. This obligation is founded in article 27 of the Vienna Convention on the Law of Treaties,[42] which states that a party to a treaty "may not invoke the provisions of its internal law as justification for its failure to perform a treaty".
- Whether the State has filed a reservation or declaration that limits its involvement with respect to the Convention.

A. Scope

58. Article 16, paragraph 1, of the Organized Crime Convention defines the scope of the obligation to extradite by providing that an extradition request is to be granted, subject to the double criminality requirement, respecting "the offences covered by this Convention or in cases where an offence referred to in article 3, paragraph 1 *(a)* or *(b)*, involves an organized criminal group and the person who is the subject of the request for extradition is located in the territory of the

[42] United Nations, *Treaty Series*, vol. 1155, No. 18232.

requested Party". The extradition obligation applies initially to offences covered by the Convention, serious crimes punishable by a maximum deprivation of liberty of at least four years or by a more severe penalty, and to the offences covered under its Protocols,[43] provided that they are transnational in nature and involve an organized criminal group.

59. In addition, subject to the dual criminality requirement, the extradition obligation also applies in cases in which the offences involve an organized criminal group and the person whose extradition is requested is simply located in the territory of the requested State, without a need for the transnational nature of the criminal conduct to be established. In this sense, the scope of application of article 16 of the Convention is broader than the scope of application of the Convention itself, since this provision could also be applicable in cases of domestic trafficking in which the offender is simply apprehended in the territory of another State party.

60. Similarly broader in scope is the application of the mutual legal assistance provisions found in article 18 of the Convention. In article 18, paragraph 1, States parties are required to provide "the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by the Convention". This means that these investigations, prosecutions or proceedings should relate to Convention offences, serious crimes and Protocol offences, provided that they are transnational in nature and involve an organized criminal group.

61. In addition, States parties are also obliged to "reciprocally extend to one another similar assistance" if the requesting State has "reasonable grounds to suspect" that one or more of the offences are transnational in nature, including that victims, witnesses, proceeds, instrumentalities or evidence of such offences are located in the requested State party and that they involve an organized criminal group.

62. It is evident that the specific provision on mutual legal assistance sets a lower evidentiary standard, as compared with article 3 of the Convention, requiring only a reasonable possibility, rather than evidence based on facts, with respect to the transnational nature of the offence and the involvement of an organized criminal group. The lower evidentiary threshold is intended to facilitate mutual legal assistance requests for the purpose of determining whether the transnational nature of the offence and organized crime are present in a certain case, and whether international cooperation may be necessary and may be sought under the Convention for subsequent investigative measures, prosecution or extradition.

63. Clarifying the nature and extent of the crime being alleged or investigated by applying the facts to the definitions will become important when it comes time to initiate communications with the central authority of the requested State. Any discussions that are held prior to the preparation of the mutual legal assistance or extradition request and the contents of the actual application will be much clearer if the issue of how the alleged offence fits within the framework of the Convention is carefully considered.

B. The Organized Crime Convention and pre-existing treaties

64. There are provisions in both article 16 (extradition) and article 18 (mutual legal assistance) of the Organized Crime Convention that address pre-existing treaties and how they interact with the Convention. These articles are unique to the Convention and are an important component in

[43] Ibid., vols. 2225, 2237, 2241 and 2326, No. 39574.

allowing States to easily interact domestically with this international convention. It is important to note these provisions, as they may have a bearing on how actual requests are conducted pursuant to the Convention.

C. Pre-existing extradition treaties

65. Article 16, paragraphs 3-6, of the Convention relate to how the Convention is to be perceived by States depending on whether they require a treaty in order to effect extradition. They can be summarized as follows:

- Article 16, paragraph 3, states that all the offences articulated in the Convention are deemed to be extraditable offences in any pre-existing or future extradition treaty between States parties.
- Article 16, paragraph 4, states that, if a requested State party that requires a treaty to effect extradition receives a request from a requesting State party with which it has no extradition treaty, the requested State party may consider the Convention itself as the legal basis for effecting extradition for any of the offences covered by the Convention.
- Article 16, paragraph 5, compels a State party that requires an extradition treaty to *(a)* indicate whether it will take the Convention as the legal basis for extradition involving other States parties to the Convention, and *(b)* if it does not accept the Convention as a legal basis, to seek to conclude extradition treaties with other States parties to the Convention.
- Article 16, paragraph 6, compels States parties that do not require a treaty for extradition to recognize the offences listed in the Convention as being extraditable offences between themselves.

D. Pre-existing mutual legal assistance treaties

66. Article 18, paragraphs 6 and 7, relate to how the Convention is to be perceived by those States which already have pre-existing mutual legal assistance treaties, either bilateral or multilateral. They can be summarized as follows:

- Article 18, paragraph 6, states that the mutual legal assistance provisions of the Convention shall not affect obligations arising from any pre-existing or future mutual legal assistance treaty, be it bilateral or multilateral.
- Article 18, paragraph 7, states that, if States parties are not bound by a treaty, then paragraphs 9-29 (which cover all facets of a mutual legal assistance request) apply. If the States parties are bound by a treaty, then the provisions of the treaty apply, unless the States parties agree to apply paragraphs 9-29. States parties are urged to apply those paragraphs if they contribute to more effective mutual legal assistance.

E. The importance of checking ratification

67. It will be possible to use the Organized Crime Convention only if both the requesting and requested States are parties to it. Requesting and requested States should verify the website of the

depositary[44] to see if both States are parties to the Convention. If they are not, both States should still endeavour to engage in mutual legal assistance or extradition, either by using other methods or treaties or by exploring whether there is an intention to become a party to the Convention sometime in the future, as the below case summary shows:

An example of ratification leading to cooperation:

... in June 2007, the United Arab Emirates had requested the extradition of a Serbian national suspected of being involved in an armed robbery at a jewellery store in April 2007. Since there was no treaty base, the Netherlands refused the request, arguing that the Organized Crime Convention could supply the legal basis needed if the United Arab Emirates were a State party. The United Arab Emirates ratified the Organized Crime Convention on 7 May 2007 and again submitted the request for the extradition of the suspected Serbian national. The High Court of the Netherlands granted the request, using as a legal basis the Organized Crime Convention. The suspect was extradited in February 2009.

Source: Conference room paper entitled "Catalogue of cases involving extradition, mutual legal assistance and other forms of international legal cooperation requested on the basis of the United Nations Convention against Transnational Organized Crime" (CTOC/COP/2010/CRP.5 and Corr.1), para. 79.

Points to remember in deciding whether to utilize the Organized Crime Convention:

Consider and enquire as to whether a formal request for the assistance you require has to be made at all. Are there alternatives available that allow you to achieve your goal without having to prepare a formal request?

Confirm through the depositary website or other means that the requested or requesting State has ratified the Convention.

Confirm through the central authorities that the articles of the Convention have been incorporated into the domestic law of the State.

Confirm through your central authority that there is no bilateral or other type of treaty that takes precedence in international cooperation with the requested State.

Confirm that the type of crime that your request refers to falls within the scope of the Convention.

Review the terms found in article 2 of the Convention, as these will help clarify your discussions and correspondence with the requested or requesting State.

[44] The website of the United Nations Treaty Collection is http://untreaty.un.org.

V. Central authorities: the importance of communicating with the right people and the case for domestic expertise in an international world

> The critical problem is a lack of, or inadequate, programmes and procedures for effective implementation of mutual assistance programmes and the provision of evidence on a practical, case-by-case, level ... Governments must enact the relevant legislation, negotiate the necessary instruments and establish some form of administrative framework, most critically a central authority, for the processing of mutual assistance requests and resources to implement requests.
>
> *Source*: Kimberley Prost, "Breaking down the barriers", p. 16.

68. International cooperation with respect to criminal matters has grown considerably in recent years.[45] The ability to perpetrate crime via the Internet, the ease of international travel and the globalization of international markets have all created an increase in requests for international assistance. To combat the growing threat of international crime, many countries have begun relying heavily on existing agreements or are busy creating new bilateral, multilateral, regional or subject-matter agreements to combat the moving targets that today's criminals have become. In many instances, the groups and individuals perpetrating international crime are well funded and show considerable intelligence and sophistication when it comes to the perpetration of their crimes, the lengths to which they will go to hide the evidence of their acts and the wealth accumulated as a result. There are many people in many parts of the world using many different international treaties to bring these people to justice, but the criminals are flexible and resourceful and will capitalize on any opening that disarray or disagreement between States can offer them.

69. Organizing the efforts of a State to combat transnational organized crime is a complex task. Keeping track of all of the agreements, treaties, memorandums of understanding, police liaison services, legal regimes, developments in domestic and international law and various enforcement and investigative services that are the source of the requests, along with all of the incoming and outgoing requests themselves, requires legal and administrative expertise and authority in order to be effective. This area of law is growing increasingly complex, with many different instruments utilized among many different nations. A designated central authority is the tool that is needed to maintain the necessary control and supervision over these matters.

[45] Prost, "Breaking down the barriers", p. 1.

A. The central authority and the Organized Crime Convention

70. The Organized Crime Convention, in article 18, paragraph 13, specifically references the creation of a central authority[46] for each of the parties to the Convention and makes it compulsory that each party designate a central authority for the purposes of mutual legal assistance:

> Each State Party shall designate a central authority that shall have the responsibility and power to receive requests for mutual legal assistance and either to execute them or to transmit them to the competent authorities for execution. Where a State Party has a special region or territory with a separate system of mutual legal assistance, it may designate a distinct central authority that shall have the same function for that region or territory. Central authorities shall ensure the speedy and proper execution or transmission of the requests received. Where the central authority transmits the request to a competent authority for execution, it shall encourage the speedy and proper execution of the request by the competent authority. The Secretary-General of the United Nations shall be notified of the central authority designated for this purpose at the time each State Party deposits its instrument of ratification, acceptance or approval of or accession to this Convention. Requests for mutual legal assistance and any communication related thereto shall be transmitted to the central authorities designated by the States Parties. This requirement shall be without prejudice to the right of a State Party to require that such requests and communications be addressed to it through diplomatic channels and, in urgent circumstances, where the States Parties agree, through the International Criminal Police Organization, if possible.[47]

There is no requirement for the central authority to be created for the purposes of extradition, although States may wish to consider this office to be responsible for dealing with extradition matters, as is the practice in some countries.

B. The benefits of a central authority and the duties it can perform

71. The central authority should be the home of all information pertaining to the conduct of any sort of international criminal legal cooperation with a State. The benefit of having a central authority is that a State has more control over incoming and outgoing requests and begins to create a centre of expertise with respect to international cooperation. With the plethora of international instruments to which each State may be a party and therefore be tasked with dealing with, the concept of a central authority to provide a uniform response to incoming and outgoing requests makes perfect sense. It also avoids duplication of effort and inconsistency resulting from a lack of control.[48] Ongoing and consistent responses from central authorities help not only in advising on domestic requirements but also in developing a knowledge base of other legal systems and the requirements of those systems, either as a result of dealing with these foreign requirements on a daily operational basis or through outreach and liaison functions that can be performed by these

[46] The United Nations Office on Drugs and Crime makes available an online directory of competent national authorities. This allows for quick and easy reference in contacting those countries which are parties to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (United Nations, *Treaty Series*, vol 1582, No. 27627) and the Organized Crime Convention and which have set up authorities to deal with international cooperation in criminal matters (see www.unodc.org/unodc/en/legal-tools/directories-of-competent-national-authorities.html).

[47] Note that there is no direction as to how the central authority should be managed or staffed. Various publications, however, speak of the need for experienced criminal practitioners to be part of the central authority.

[48] See 2001 report of the Informal Expert Working Group on Mutual Legal Assistance Casework Best Practice (www.unodc.org/pdf/lap_mlaeg_report_final.pdf), p. 7.

authorities. A comprehensive list of the duties and services that a central authority can perform is included later in the present chapter to give practitioners guidance on the scope of duties and expertise that these offices are expected to be able to perform in order to be effective.

72. Consistently dealing with the day-to-day business of international cooperation has the added benefit of creating a cadre of lawyers who will develop an expertise in an increasingly complex and growing field of law.[49] This expertise can in turn be used internally to advise other Government departments with respect to issues involving international cooperation and can perform an educational function, in the advising and mentoring of police agencies and prosecutors with respect to the issues that arise in this sort of enterprise.[50] Examples of the additional duties that can be performed as a result of having this expertise include the coordination of arrests of fugitives and their transfer, the coordination and support of searches in other States and the provision of legal advice on matters pertaining to international cooperation to Government ministers.

C. The International Criminal Police Organization and its complementary interaction with central authorities

73. Article 18, paragraph 13, of the Organized Crime Convention mentions that the International Criminal Police Organization (INTERPOL) can be utilized in urgent circumstances as a communications conduit for mutual legal assistance should the need arise. The use of the services offered through INTERPOL is also urged in both the enforcement and the international cooperation provisions of the Convention, found in articles 26-29.

74. It is useful to be aware of the considerable assets that INTERPOL can bring to States seeking effective communication in matters of international assistance. In that realm, the police, judiciary and counsel are tasked with finding methods of complementing one another in investigations that span different countries and legal traditions. The contribution of INTERPOL to the realm of central authorities is the parallel network of national central bureaux. These bureaux are created pursuant to article 32 of the Constitution of INTERPOL and are mandated to be the focal points of each member State for the purpose of liaising internally with other departments of that member State, with national central bureaux in other States and with the General Secretariat of INTERPOL.

75. Each national central bureau is connected to the I-24/7 network, which enables the transmission of requests for cooperation in a timely and secure manner. Through this system, requests related to mutual legal assistance and extradition may be forwarded in the following ways (which are not mutually exclusive):

(a) From the relevant national authority (e.g. national court) or from the central authority to the national central bureau in the country. The national central bureau will then forward the request to the national central bureau of the requested country, which in turn will forward it to the relevant authorities. This scenario is implemented in the current practice of INTERPOL on a regular basis;

(b) Extending, in accordance with national legislation and the legal framework of INTERPOL, the I-24/7 system beyond the national central bureau to relevant national authorities

[49] "Laws on extradition and mutual legal assistance can appear obscure to non-specialists. Many prerequisites for cooperation derive from concepts that are unique to these two fields of law." (Seehanat Prayoonrat, "The use of financial intelligence units for mutual legal assistance in the prosecution of corruption", in *Denying Safe Haven*, p. 29).

[50] See 2001 Report of the Informal Expert Working Group on Mutual Legal Assistance Casework Best Practice, sect. 3.1.

which are authorized to fulfil the role of a public institution in enforcing criminal law. Accordingly, the possibility of connecting the central authorities directly to the I-24/7 system for the purposes of circulating mutual legal assistance requests merits consideration and discussion at the national level.

76. The I-24/7 system also enables investigators to check relevant information against INTERPOL databases (e.g. on criminal background, DNA, fingerprints and stolen or lost travel documents).

77. Requests for cooperation circulated via INTERPOL channels can be made in a number of ways:

(a) Through the publication of INTERPOL notices by the General Secretariat upon the request of a member country. Among the various notices that can be published by INTERPOL, the following may be of particular relevance to extradition and mutual legal assistance requests: (i) red notices, which are requests to seek the location and arrest of a person with a view to his or her extradition and which in many INTERPOL member countries are considered valid requests for provisional arrest pending extradition; and (ii) blue notices, which are requests to obtain information (e.g. location, identification) about a person of interest in a criminal investigation;

(b) Through a message called a "diffusion", sent directly by a requesting country to all or some INTERPOL member countries and recorded in INTERPOL databases;

(c) Through an exchange of messages on a bilateral level between the requesting and requested States.

D. Police liaison officer programmes and their complementary interaction with INTERPOL and central authorities

78. Police liaison officer programmes, found in many police forces around the world, can also be highly beneficial to those who are involved in international cooperation. Many police forces throughout the world have officers posted overseas to liaise with police forces in specific countries or geographical areas. As a result, they possess knowledge in their area of operations, such as the command structure of local police forces; the structure of local administrations, including the courts; and local geographical or political challenges that may exist, all of which may have a bearing on matters pertaining to international cooperation. The liaison officers can also perform a useful reporting function, being the "eyes and ears" of a central authority and keeping other participants informed of potential challenges that may arise in the course of a mutual legal assistance or extradition request. Many of these liaison officers are members of police forces that are also members of INTERPOL, and thus have access to the powerful investigative tools that this agency makes available to its members. For these reasons, the liaison officers should be viewed as a group that complements the efforts of the central authority and agencies such as INTERPOL.

INTERPOL and police liaison programmes: complementary entities to the central authority

Central authorities should consider utilizing the expertise and capabilities found in these entities to complement the work of the central authority and address the challenges of international cooperation.

E. Creating a central authority

79. A central authority is an administrative entity and as such can be created simply by placing it into the organizational chart of whatever Government agency or department is responsible for international assistance and justice matters. A "central" authority should be just that, a central repository of expertise and information where all international assistance matters pertaining to a State are acted upon. This allows for a consistency of response and a focusing of effort that will benefit the State, whether it is requesting or responding to a request.[51] Where the central authority is placed, what its defined role is in relation to other agencies or departments that are tasked with justice matters and who staffs it, however, are factors that will decide whether the central authority is simply a response to article 13 of the Organized Crime Convention or a major facilitator of international assistance as envisioned by the Convention.

80. States should make every effort to create a central authority as soon as possible, as they are at a distinct disadvantage in both requesting and providing international assistance if they do not have this important office. Those responsible for procedural policy in each State should also emphasize to their domestic counterparts that consultation with their central authority should be one of the foremost concerns when dealing with international matters, as it leads to effective coordination of both incoming and outgoing requests, policy and general international cooperation.

81. The ideal to be striven for by those intent on creating a central authority or restructuring an existing one is described in the actions listed below. The list emphasizes the importance of the functions of a central authority and the challenges in creating one that is effective. It also describes the functions that a strong and vigorous central authority can bring to bear in the realm of international cooperation. This ideal is difficult to attain, but illustrative of what should be striven for in order to be effective:

Practical processing of requests

- Act as the recipient of all incoming and outgoing extradition and mutual legal assistance requests
- Review all requests for adequacy and assign to counsel for action
- Correspond with requesting States regarding the adequacy of or the need to supplement a request, e.g. provide legal advice on what is needed to comply with the laws of the requested State
- Review draft requests for adequacy and provide information on how they can be improved
- Provide round-the-clock coverage so as to be able to respond to urgent requests in a timely way
- Answer queries and prepare information, templates and examples for countries wishing to make requests
- Coordinate with other central authorities so that arrests or searches in complex cases with multiple accused in multiple jurisdictions and countries are carried out at the same time and in a coordinated manner that best meets law enforcement needs, e.g. when the element of surprise is of benefit

[51] Ibid. sect. 2.

- Provide advice on extradition and/or mutual legal assistance law and practice to police, crown prosecutors and investigating magistrates making or executing requests
- Instruct counsel who may appear in court on positions to take, from arrest through to the surrender process, including appeals
- Provide advice to ministers, including by summarizing case law, evidence, the history of the proceedings in court and advice as to the application of extradition law to the facts of the request and by providing any other relevant information
- Act as liaison with immigration/border authorities and other governmental departments that may have an interest in the person sought in extradition cases, or in the evidence sought in mutual legal assistance cases
- Make any arrangements for prisoner transit through the State during the surrender process to the requesting State
- Can advise prosecutors/judicial authorities and police on what to expect when they have to travel to collect evidence in a requested State, e.g. the need to obtain prior approvals or anything else needed to comply with other aspects of the laws of the requested State
- Can maintain tools currently available online for use and review by requesting States that are considering making a request to the State

Channel of communication

- Act as a communication conduit to the executing authority for incoming requests and as the means of communicating with other central authorities for outgoing requests
- Act as a liaison to judicial authorities who may execute requests and monitor case developments as they proceed through the judicial system of a requested State
- Conduct outreach to other central authorities—through informal mechanisms (e.g. bilateral meetings) or formal ones (e.g. regularly scheduled visits)—to discuss issues and/or cases of mutual concern and to open channels of communication

Centre of expertise

- Act as a centre of expertise in international criminal law as it relates to extradition/mutual legal assistance
- Negotiate treaties and act as a centre of expertise in not only the theory but also the practice of implementing treaties
- Advise national politicians about extradition and mutual legal assistance law and policy
- Instruct legislative drafters if changes in legislation are proposed or needed
- Provide practical advice and suggestions to policymakers considering amending legislation to make extradition or mutual legal assistance statutes operate more effectively

- Act as liaison to diplomatic channels/foreign policy specialists and ministers
- Participate in regional and multilateral forums, e.g. the Conference of the Parties to the United Nations Convention against Transnational Organized Crime
- Provide training to both internal and external stakeholders, e.g. prosecutors within the country and extradition and mutual legal assistance partners outside of the country
- Establish and maintain representation in *magistrat de liaison*-type programmes

Ideal candidates for staffing a central authority

- To head the authority, someone who has expertise in extradition and mutual legal assistance law, including both practical and theoretical knowledge
- Lawyers (as opposed to diplomats or policymakers) with criminal law experience as prosecutors or magistrates who have dealt with actual cases in the State's criminal law system
- Candidates with capability in more than one language, as well as diplomatic skills and discretion
- Candidates with flexibility and creativity in terms of trying to find solutions and assist (rather than who simply say "We don't do it that way") and with open-mindedness regarding the requirements of another State's laws
- Counsel who are genuinely interested in this area of the law or prosecutors who can rotate in and out of a unit to better learn how to obtain evidence abroad and to bring fugitive criminals to justice

Management considerations

- Senior management needs to recognize that financial and timely investments in a thriving and strong central authority will bring results. While crime is an intensely local, sensitive national issue, States can no longer afford not to invest in creating a strong central authority, because a great deal of local crime has international dimensions to it.
- There needs to be recognition that there is only way forward: more cooperation between States.
- Extradition and mutual legal assistance are based on reciprocity: one day you will need to make an urgent request, and you will want a cooperative response; the best way to ensure cooperation is to keep lines of communication open through regular contact and to assist others when they need help.
- Having these functions concentrated in one place assists with efficiencies, leading to consistent and speedier responses as counsel develop both legal expertise and relationships with other central authorities. These relationships can be invaluable in ensuring that cases move forward expeditiously.

F. Staffing and locating the central authority

82. Staff in a central authority are required to deal with broad and complex issues, such as weak or outdated laws and treaties, lack of awareness of national and international extradition law and practice, and communication and coordination problems between domestic agencies and States. They are also required to give a good representation of the breadth and the complexity, both legal and organizational, that exist in this realm.[52]

83. Outgoing or incoming mutual legal assistance or extradition requests will essentially be a legal exercise involving domestic criminal law and procedure, such as the rules of evidence and search and seizure, of at least two States, along with the applicable domestic laws, if any, pertaining directly to mutual legal assistance or extradition. Issues of international criminal practice such as the interpretation of a treaty, or perhaps a number of treaties, in an attempt to either find standing to make a request or respond to a request, may also have to be considered. In many cases, there will also be interaction with police, appearances before magistrates and judges, negotiations with defence counsel, communication with prosecutors and witnesses and the management and assessment of legal documentation, pleadings and exhibits.

84. Counsel who are staff members of a central authority should have the experience to operate and communicate effectively within an area that requires these multiple skill sets. Experienced criminal practitioners with prior litigation experience and a desire to work together with foreign and domestic partners should be the type of persons considered to staff this important office.

85. Different States view the role and responsibilities of a central authority in different ways and place the central authority in different branches of their Governments. Some States view the central authority as having a foreign relations or diplomatic function, while others view it as having a legal function with foreign relations overtones. Still others view it as having an administrative function, forwarding requests to other branches of Government for action, with little or no review or analysis being conducted at the central authority level.

86. The role and responsibilities of such an office have been described above, along with the suggested profile of the counsel who should staff it. Given the nature and type of work described, it is suggested that a justice department would be best placed to house a central authority. Legal expertise of the type previously mentioned, as well as already established domestic lines of communication to the courts, prosecutors, police and other investigative agencies, all bolster the concept of housing the central authority in this department.

G. The central authority and international staff: an argument for posting members of the central authority abroad

87. In previous chapters of the present *Manual*, it has been mentioned that differing legal traditions can create barriers to effective international assistance. Unfamiliarity with foreign legal systems and the biases inherent in one's own legal system can make for what sometimes are perceived as insurmountable difficulties. The marked differences in the requirements of different legal systems can lead to ineffective mutual legal assistance and extradition requests, which in turn leads to delay, frustration and wastage in the processing of requests.[53]

[52] 2004 Report of the Informal Expert Working Group on Effective Extradition Casework Practice, para. 12.
[53] Ibid., para. 68.

88. Having a national representative in a foreign posting is a positive step in creating a more effective international cooperation regime, and offers the following benefits:

- A national representative can advise and process a request in real time during the business hours of the requesting or requested State.
- A national representative has the opportunity to personally interact with other representatives, thus gaining invaluable first-hand knowledge of other legal traditions and systems.
- National representatives can personally impart their knowledge of their own legal systems to each other during the course of providing assistance or in informal or educational settings.

89. The central authority is a necessary part of any regime of international assistance and should be given all of the authority and power necessary for it to be able to perform its duties. It should be staffed by knowledgeable personnel who have the dedicated task of engaging in international legal assistance and outreach. Central authorities will become more and more necessary as States engage in addressing the ever-increasing challenge of international crime.

The final word on the importance and duties of, and requirement for expertise in, central authorities:

> As crime and criminals continue to have less respect for international boundaries, which modern society dictates they are both bound to do, the function of extradition becomes more vital. Concurrently, those involved in the practice will be required to become ever increasingly familiar with international legal practice, not solely on a theoretical but on a practical level as well. Functionally, modern criminal justice systems must discover, collate, and absorb the rules, policies and practices of their partners in the international community.

Source: Charles A. Caruso, "Legal challenges in extradition and suggested solutions", in *Denying Safe Haven*, p. 66.

An example of successful communication between two central authorities

> In January 2008, the law enforcement authorities of the United Kingdom carried out an investigation of a case of value-added tax fraud and money-laundering involving a large amount of funds. Since a Chinese company, in Guangdong Province of China, was related to the case, United Kingdom authorities made a request of mutual legal assistance in criminal matters to the Ministry of Justice of China, on the basis of the Organized Crime Convention, with the hope of sending officials to China for evidence collection. The Ministry of Justice of China transmitted the request to the General Administration of Customs of China after it had reviewed the request and confirmed that the request was in conformity with the main elements of the Organized Crime Convention format. Authorities of the two countries conducted several rounds of consultations on the timing and means of evidence collection; ways for witnesses to present testimony and the associated costs; and the methodology and scope of the inquiry. On 15 April 2008, presided by the Chinese central authorities, the witness testimony and related evidential documentation were provided to the United Kingdom authorities. The Chinese authorities concerned did a large amount of work throughout the process to ensure the successful collection of evidence for the case.

Source: See conference room paper entitled "Catalogue of cases involving extradition, mutual legal assistance and other forms of international legal cooperation requested on the basis of the United Nations Convention against Transnational Organized Crime" (CTOC/COP/2010/CRP.5/Corr.1), para. 1.

Importance of tracking incoming and outgoing requests

- Acknowledging receipt of and providing updates on requests has been cited as one of the most important factors in international cooperation.
- Those States which have made requests should also make every effort to keep track of them from an outgoing perspective. If the assistance is no longer needed, this should be communicated to the requested State promptly so that it can close its file and turn its attention to those matters which are still ongoing.
- Communication and courtesy can go far in promoting international cooperation.

Best practices in international cooperation: the Brazilian experience

Brazil has developed a reminder system that aids in tracking and automating the responses to be furnished by its central authority when processing outgoing requests. This system has been found to assist greatly in achieving the goals of timely and ongoing communication with requested States. The Brazilian system requires the following for each request that the central authority receives from other agencies:

- Acknowledgement by official letter or e-mail to the requesting agency that the request has been forwarded to the requested State.
- The filling out of an "alert system" form, which enables reminders to be provided so that the requested State can be contacted every 30, 60 or 90 days (depending on the urgency of the matter) for an update on executing the request.
- The notification of the requesting authority that enquiries have been made and the encouragement of both requested and requesting authorities to use e-mail or other technologies to quickly communicate the results of the request.

Points to remember with respect to central authorities

- Article 18, paragraph 13, of the Organized Crime Convention requires that a central authority be created with respect to mutual legal assistance. (States may wish to have this entity deal with extradition matters as well.) This entity should be created as soon as possible to ensure operational effectiveness with respect to international cooperation.
- The central authority should be more than a distribution centre for the dissemination of requests. It should take an active role in international cooperation and be staffed, mandated and supported accordingly.
- The central authority should actively promote cooperation with established networks such as those provided and maintained by INTERPOL and the various police liaison officer programmes.
- Acknowledgment of receipt of a request for mutual legal assistance or extradition and timely updates and communication with respect to the progress or challenges experienced with these requests are a cornerstone of international cooperation that should be actively promoted by the central authority.

VI. Extradition: the process for a successful return of the accused

> "At the international level, the sheer size and scope of the resulting domestic variations in substantive and procedural extradition law create the most serious ongoing obstacles to just, quick and predictable extradition".
>
> *Source*: 2004 Report of the Informal Expert Working Group on Effective Extradition Casework Practice, para. 11.

90. "Extradition is the formal process by which one jurisdiction asks another for the enforced return of a person who is in the requested jurisdiction and who is accused or convicted of one or more criminal offences against the law of the requesting jurisdiction. The return is sought so that the person will face trial in the requesting jurisdiction or punishment for such an offence or offences".[54]

91. Extraditions can be time-consuming and expensive for both the requesting and requested State; it is therefore important to have a sound grounding in the general principles of extradition and how these principles are reflected in the Organized Crime Convention.

A. Extradition as a tool of international cooperation

92. Extradition is one of the oldest forms of international cooperation; its roots can be traced to antiquity. Originally designed to seek the return of persons alleged to have committed political offences, the concept has grown and evolved so that it now covers a plethora of criminal offences, and obligations related thereto have been solidified by way of bilateral, regional and multilateral treaties. Although extradition has been used for centuries, the law has not developed to the point where it places a positive obligation on any State to extradite. The obligation to extradite arises only in the presence of a treaty and, even then, there are certain limitations, as shall be shown below, regarding certain offences and classes of persons, who, depending upon the jurisdiction, may not be extraditable. Not being subject to extradition, however, does not necessarily mean not being subject to trial or punishment, as will be discussed later in the present chapter. First, the *Manual* will look at how extradition is governed, preconditions for extradition in States and how the Organized Crime Convention fits into all of these factors.

B. Extradition and how it is governed

93. How extradition is governed is as varied as the States that entertain such an action, as it is usually within a State's domestic laws or its treaties that the rules of procedure and evidence are

[54] Ibid., para. 7.

articulated.[55] The following issues are usually addressed in domestic law, and as such it is instructive to review the legislation of the State from which extradition is being sought, in order to set the tone for the communications that will later be made with the requested State's central authority:

- Procedures for arrest, search and seizure and surrender
- How an extradition request will be acted upon
- What refusal grounds apply and whether refusal is mandatory or discretionary
- Which decisions, if any, are taken by the executive and which, if any, by the judiciary
- What evidentiary requirements govern that decision-making and to what extent, if any, evidentiary rules exclude relevant material from consideration
- Whether persons sought remain in custody pending those decisions and, if not, what conditions are set to ensure that the person does not flee
- Which review and appeal mechanisms apply to which decisions and at what stage(s) of the extradition process
- How much time elapses between receipt of an extradition request and the final decision on whether or not to return the person.[56]

94. Article 16, paragraph 7, describes the interplay between the Organized Crime Convention and the domestic law of a State as it relates to extradition:

> 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, conditions in relation to the minimum penalty requirement for extradition and the grounds upon which the requested State Party may refuse extradition.

95. Depending upon the domestic legislation of the State, a number of factors may be considered by a requested State when dealing with an extradition matter. The decision to surrender a person to another State is usually the result of a bifurcated system involving the judiciary at the outset of the process and the executive branch during the latter part of the process. Depending on the jurisdiction, the courts may consider a number of different factors in deciding to extradite, among them dual criminality, identity, sufficiency of the supporting evidence and the existence of an extradition treaty. Once the case is turned over to the executive, the Government representative responsible for extradition matters may, before ordering surrender, consider other issues, such as human rights concerns, that are separate from those considered by the court. In some jurisdictions, the decisions of either the court or the executive can be appealed or reviewed, with further litigation arising as a result. The process is subject to strict timelines for filing documents, perfecting appeals, bringing the suspect before court and surrendering the suspect if ordered to do so. The process can seem quite complex to those unfamiliar with a particular legal system, and there is a high degree of risk that attempting to navigate a foreign process without constant consultation with the central authority will lead to failure.

[55] Ibid., para. 90.
[56] Ibid., para. 92.

Some useful references for determining the extradition requirements of various States

It is sometimes difficult to readily discern the requirements of various States with respect to extradition. UNODC has compiled a compendium of databases, both internal and from regional agencies, that provide links to the international cooperation requirements of many countries, including all of those States which have ratified the Organized Crime Convention. Below is a summary of what each of these agencies does and the geographical area that it covers. The links to these can be found on the UNODC website at www.unodc.org/unodc/en/legal-tools/international-cooperation-networks.html.

UNODC online directory of competent national authorities

The online directory of competent national authorities provides access to the contact information of competent national authorities designated under the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988[a] and the United Nations Convention against Transnational Organized Crime and the Protocols thereto.

With a view to facilitating communication and problem-solving among competent authorities at the interregional level, the directory contains essential information on:

- State membership in existing international cooperation networks
- Legal and procedural requirements for the granting of requests
- Use of the Organized Crime Convention as the legal basis for requests
- Links to national laws and websites
- Indication of requests that can be made through INTERPOL

All States parties to the Conventions can access the directory, which is password protected.

Regional judicial platforms for Sahelian and Indian Ocean Commission countries

Regional judicial platforms have been established by the Terrorism Prevention Branch and the Organized Crime and Illicit Trafficking Branch of UNODC to strengthen international cooperation in criminal matters in the regions of the Sahel and the Indian Ocean. UNODC has developed a compendium of bilateral, regional and international agreements on extradition and mutual legal assistance, which is a practical guide for formulating effective requests for extradition and mutual legal assistance to the five States members of the Indian Ocean Commission.

The regional judicial platform for Sahelian countries (currently Burkina Faso, Mali, Mauritania and Niger) was launched at a meeting held in Bamako from 22 to 24 June 2010.

[a] United Nations, *Treaty Series*, vol. 1582, No. 27627).

Commonwealth Network of Contact Persons

The purpose of the Commonwealth Network of Contact Persons is to facilitate international cooperation in criminal cases between Commonwealth member States, including on mutual legal assistance and extradition, and to provide relevant legal and practical information.

The Network comprises at least one contact person from each of the jurisdictions of the Commonwealth.

Members:

Antigua and Barbuda, Australia, Bahamas, Bangladesh, Barbados, Belize, Botswana, Brunei Darussalam, Cameroon, Canada, Cyprus, Dominica, Fiji, Gambia, Ghana, Grenada, Guyana, India, Jamaica, Kenya, Kiribati, Lesotho, Malawi, Malaysia, Maldives, Malta, Mauritius, Mozambique, Namibia, Nauru, New Zealand, Nigeria, Pakistan, Papua New Guinea, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Samoa, Seychelles, Sierra Leone, Singapore, Solomon Islands, South Africa, Sri Lanka, Swaziland, Tonga, Trinidad and Tobago, Tuvalu, Uganda, United Kingdom, United Republic of Tanzania, Vanuatu and Zambia.

European Judicial Network

The European Judicial Network is a network of national contact points for the facilitation of judicial cooperation in criminal matters between the member States of the European Union. The Network's secretariat forms part of Eurojust but functions as a separate unit.

Eurojust

Eurojust is a judicial cooperation body that was established with the goal of providing an area of freedom, security and justice within the European Union. It is also able, through the Council of the European Union, to conclude cooperation agreements with non-member States and international organizations or bodies such as UNODC for the exchange of information or the secondment of officers. At the request of a member State, Eurojust may assist investigations and prosecutions concerning that particular member State and a non-member State, if a cooperation agreement has been concluded or if there is an essential interest in providing such assistance. In addition to cooperation agreements, Eurojust also maintains a network of contact points worldwide.

Members:

Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and United Kingdom.

Hemispheric Information Exchange Network for Mutual Assistance in Criminal Matters and Extradition of the Organization of American States

The Hemispheric Information Exchange Network for Mutual Assistance in Criminal Matters and Extradition has three components: a public website, a private website and a secure electronic communications system.

The public component of the Network provides legal information related to mutual assistance and extradition for the 34 States members of the Organization of American States.

The private component of the Network contains information for individuals who are directly involved in legal cooperation in criminal matters. The private site includes information on meetings, contact points in other countries, a glossary of terms and training on the secure electronic communication system.

Members:

Antigua and Barbuda, Argentina, Bahamas, Barbados, Belize, Bolivia (Plurinational State of), Brazil, Canada, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname, Trinidad and Tobago, United States, Uruguay and Venezuela (Bolivarian Republic of).

Ibero-American Legal Assistance Network (IberRed)

The Ibero-American Legal Assistance Network (IberRed) is a structure formed by contact points from the ministries of justice, central authorities, prosecutors and public prosecutors and judicial branches of the 23 countries and territories comprising the Latin American community of nations. It is aimed at optimizing instruments for civil and criminal judicial assistance and strengthening cooperation between countries.

Members:

Andorra, Argentina, Bolivia (Plurinational State of), Brazil, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Portugal, Puerto Rico, Spain, Uruguay and Venezuela (Bolivarian Republic of).

C. Extradition preconditions

1. Extraditable offence

96. The first precondition that must be looked at by both the requested and requesting State is whether the offence alleged in the extradition request is an offence for which the law allows extradition. The issue of what is an extraditable offence is found in two ways in a treaty: either by the

listing method or the penalty method. The listing method means that the treaty lists the offences for which extradition may be allowed. This method is usually found in older treaties and can be problematic, as it requires a degree of accuracy that is difficult for the requesting State to attain. In the penalty method, the extraditable offence is determined by the seriousness of the penalty that may be imposed. In this case, the definition can be more general because the potential length of punishment will be the deciding factor in whether it is an extraditable offence. The Organized Crime Convention recognizes both methods in article 16, paragraph 1.

97. Article 16, paragraph 1, of the Convention defines the scope of the obligation to extradite by providing that an extradition request is to be granted, subject to the double criminality requirement, with respect to "the offences covered by this Convention or in cases where an offence referred to in article 3, paragraph 1 *(a)* or *(b)*, involves an organized criminal group and the person who is the subject of the request for extradition is located in the territory of the requested State Party…". The extradition obligation applies initially to offences covered by the Convention, serious crimes punishable by a maximum deprivation of liberty of at least four years or by a more severe penalty (art. 3), and to offences covered under the Protocol offences, provided that they are transnational in nature and involve an organized criminal group.

98. Subject to the dual criminality requirement, however, the extradition obligation under article 16 also applies in cases in which these offences involve an organized criminal group and the person whose extradition is requested is simply located in the territory of the requested State, without the necessity of establishing the transnational nature of the criminal conduct. In this sense, the scope of application of article 16 of the Organized Crime Convention is broader than the scope of application of the Convention itself, since this provision could also be applicable in cases of internal trafficking in which the offender is simply apprehended in the territory of another State party.

99. Article 16, paragraph 2, expands the scope of what is an extraditable offence in that it allows for the realistic eventuality that, when a "request for extradition includes several separate serious crimes" and some of them are not covered by the Convention, the requested State "may apply this article" with respect to the offences that are not covered by the Convention. This is of great benefit to both requesting and requested States, as it allows for extradition to be undertaken pursuant to one Convention (the Organized Crime Convention) with respect to a fugitive or group of fugitives who are alleged to have committed a plethora of offences covering a broad range of criminal behaviour. This allows just one request to go through to the requested State, and gives the requested State the option of being able to deal with that request as a single action, thereby greatly streamlining the extradition process.

2. *Extraditable offences and the Organized Crime Convention*

100. The Organized Crime Convention creates extraditable offences in a number of ways:

- Article 16, paragraph 3, states that all the offences articulated in the Convention are deemed to be extraditable offences in any pre-existing or future extradition treaty between States parties.
- Article 16, paragraph 4, states that, if a requested State party that requires a treaty to effect extradition receives a request from a requesting State party with which it has no extradition treaty, the requested State party may consider the Convention itself as the legal basis to effect extradition for any of the offences covered by the Convention.

- Article 16, paragraph 5, compels States parties that require an extradition treaty to: *(a)* indicate whether they will take the Convention as the legal basis for extradition with other States parties to the Convention; and *(b)* if they do not accept the Convention as such a legal basis, seek to conclude extradition treaties with other States parties to the Convention.

- Article 16, paragraph 6, compels States parties that do not require a treaty for extradition to recognize the offences listed in the Convention as being extraditable offences between themselves.

To utilize the Organized Crime Convention for extradition, it must first be established that the fugitive is in another State before continuing on with the actual extradition request.

D. Evidentiary tests

101. As mentioned earlier, the evidentiary requirements for an extradition request will be found either in the treaty that is being utilized or within the domestic law of the requested State. There will always be variations in the requirements, based on the legal tradition and legal system of the State and possibly the specific requirements of the treaty, particularly if it is bilateral. Listed below are the three major tests that are used in extradition; it is usually one of these, or a variation of them, that is found in most domestic legislation or treaties:

- The "no evidence" test requires no actual evidence of the offence that is alleged; instead, a statement of the offence, the applicable penalty, the warrant of arrest for the person and a statement setting out the alleged criminal conduct are required to found a request for extradition in jurisdictions using this test.

- The "probable cause" evidence test requires sufficient evidence to create reasonable grounds to suspect that the person sought has committed the alleged offence.

- The "prima facie" evidence test requires actual evidence that must be presented to the authorities that would allow them to form the opinion that the person sought would have been required to stand trial had the alleged conduct of the criminal offence occurred in the requested State.

102. As a general rule, common law States require actual evidence in addition to any warrant for the extradition of a person, while civil law States tend to require the warrant plus a statement. It is the process of discerning what is required in each requested State, along with the actual preparation of the documentation, that prove to be the greatest challenges for requesting States making extradition requests to a State from another legal tradition. As with mutual legal assistance requests, prior research into the requirements of the requested State, along with ongoing communication with the requested State's central authority, will be key to moving an extradition request forward. Article 16, paragraph 8, of the Convention also seeks to further break down the barriers to extradition by exhorting States to simplify their extradition requirements.

1. Dual criminality

103. Dual, or double, criminality is a concept prevalent in the law of extradition, although efforts have been made to limit the difficulties that it had previously posed. When looking at the question of dual criminality with respect to extradition, it is good to keep the following factors in mind:

- The focus of dual criminality should be the substantive underlying conduct and not the technical terms or definitions of the crime. Article 43, paragraph 2, of the United Nations Convention against Corruption[57] defines the conduct-based test as follows:

  > In matters of international cooperation, whenever dual criminality is considered a requirement, it shall be deemed fulfilled irrespective of whether the laws of the requested State Party place the offence within the same category of offence or denominate the offence by the same terminology as the requesting State Party, if the conduct underlying the offence for which assistance is sought is a criminal offence under the laws of both States Parties.

- The laws of the requesting and requested States generally need only be substantially similar as to the harm they seek to prevent and the activity they intend to punish

- If the law of one State is broader than the that of the other in scope, so long as the conduct for which extradition is sought could be included in both laws, then it is an extraditable offence

- Purely jurisdictional elements of statutes need not be replicated under both systems in order for the conduct to be an extraditable offence[58]

2. Dual criminality and the Organized Crime Convention

104. The concept of dual criminality is addressed in article 16, paragraph 1, of the Organized Crime Convention, which states that the dual criminality requirement will be met if the offence for which the extradition is sought "is punishable under the domestic law of both the requesting State Party and the requested State party". Upon becoming parties to the Convention, all States must adopt legislation to establish the offences envisaged by the Convention. As a result, once the Convention is implemented, there is automatically a commonality of law between the requesting and requested States, which have both ratified the Convention, allowing for the dual criminality question to be resolved.

3. Rule of speciality or use limitation

105. The rule of speciality or use limitation is designed to ensure that the offence or offences for which the requesting State seeks the return of the suspect to answer pursuant to the extradition request are the only offences for which the suspect will have to answer in the requesting State. This ensures that the requested State is aware of what it consented to when it ordered the extradition of a person in its jurisdiction to the requested State and that the suspect was aware, both during his extradition hearing and afterwards, what the allegations against him are. As with many

[57] United Nations, *Treaty Series*, vol. 2349, No. 42146.

[58] Charles A. Caruso, "Legal challenges in extradition and suggested solutions", in *Denying Safe Haven to the Corrupt and the Proceeds of Corruption*.

investigations and trials, new facts may arise that, in turn, give rise to new allegations and perhaps new charges. If new charges are considered after surrender in the requesting State, they must be laid only with the consent of and in consultation with the requested State. Ongoing communication between the requesting and requested State allows for those eventualities to be dealt with should they arise. The rule of speciality becomes critical when drafting an extradition request. Time must be taken to consider exactly what offences are alleged against the suspect.

4. Retroactivity

106. The Organized Crime Convention is silent with respect to the question of whether the Convention applies retroactively. The question to be answered is whether the Convention applies to conduct that occurred prior to the entry into force of the Convention in the requested State. It is not clear if any court has yet addressed this issue with respect to the Convention. Several domestic courts, however, have addressed this issue, with respect to the retroactive application of other treaties, and have held that a treaty may be applied retroactively, as an extradition proceeding is not a criminal proceeding.

An example of the challenge of retroactivity in dual criminality

One State reported that an extradition request had been refused on the grounds of a lack of dual criminality, as the conduct was not unlawful in the requested State at the time the offence was committed, although the conduct had subsequently been criminalized in the requested State and was a criminal offence at the time the request was made.

E. Refusal of an extradition request

107. Traditionally, there have been a number of principles or factors that can prove to be either an impediment or an outright bar to extradition. These principles or factors, discussed in further detail below, are:

- Non-extradition of nationals
- Concerns over the severity of punishment of the fugitive in the requesting State
- Human rights issues, with respect to either punishment or the fairness of the trial in the requesting State
- Non-extradition for fiscal offences
- The political offence exception to extradition

1. Non-extradition of nationals

108. The doctrine of non-extradition of nationals is found in many States, particularly those with a civil law tradition. Depending on the country, the refusal may be mandatory or discretionary; as always, it is worthwhile to look at the domestic legislation of the requested State to see if there

is a possibility that the suspect who is a national of that State can be extradited under its legal system. It should be noted, however, that non-extradition does not necessarily mean non-prosecution. There are no safe havens in the world for many types of crimes, including those contemplated by the Organized Crime Convention. Those States which are parties to the Convention should enact domestic laws pursuant to the Convention that are designed to punish those who are guilty of these offences.

109. The principle of aut dedere aut judicare (extradite or prosecute) is a principle that should be explored in cases in which a national cannot be extradited. The Convention recognizes this principle in article 16, paragraph 10; however, that paragraph does not go so far as to compel a State to prosecute. Instead, it compels the requested State that refuses extradition, when requested by the State seeking extradition, to "submit the case without undue delay to its competent authorities for the purpose of prosecution". The difficulty of successfully mounting a prosecution in these types of cases is of course compounded by the fact that the crime was not perpetrated in the State where the suspect now resides. Differences in legal traditions and systems between where the investigation was conducted and where the case is to be tried can further compound the problem. This is particularly the case if there is a question as to whether the requested State has the jurisdiction to prosecute the case domestically. Mutual legal assistance should be utilized in cases of this type to aid in the proposed prosecution in the requested State. Evidence gathered to date by the requesting State can be provided, and any additional evidence can be acquired through further mutual legal assistance requests.[59]

110. Conditional extradition of nationals is contemplated in article 16, paragraph 11, for those States whose laws allow for the extradition of their nationals conditional upon the service of the sentence imposed as a result in the requested State. Difficulties can potentially arise with respect to this option if both the requesting and requested States do not coordinate their efforts with regard to the amount of time needed to try the fugitive in the requesting State and the amount of time that the requested State is prepared to allow one of its nationals to remain in the requesting State's custody before being returned. To avoid this problem, the conditions imposed with regard to the temporary removal of a fugitive to stand trial in another State should be limited to those required by the domestic law of the requested State and those necessary to ensure the fugitive's return from the requesting State upon completion of the trial.

2. Severity of punishment

111. Considerations of the likely severity of punishment have been a concern with respect to extradition cases. If the domestic law of the requested State contains provisions regarding refusal of extradition on the basis of the potential imposition of the death penalty, the requested State may consider exercising the following options:

- Seeking assurances or obtaining necessary information from the requesting State that the death penalty will not be imposed should the suspect be convicted
- If legally possible, prosecuting the case in its own jurisdiction, given the commonality of offences in the Organized Crime Convention
- Seeking the return of the suspect upon conviction from the requesting State to serve his or her sentence in the requested State's jurisdiction

[59] See 2004 Report of the Informal Expert Working Group on Effective Extradition Casework Practice, para. 134.

Even if the requested State has constitutional or other legally based bars to extradition to a State for a crime for which the death penalty is possible, it may be able to honour a request from that requesting State and still meet its own legal and/or constitutional obligations. It is always worth enquiring with one's own central authority and asking if it could undertake exploratory discussions with the central authority of the other State.

3. Human rights issues regarding torture/treatment

112. The issue of human rights, particularly the potential of extradition to lead to torture, is also a concern that has to be considered when engaging in the extradition process. If concerns do arise, States should communicate with one another and seek assurances that this type of prohibited conduct will not occur. If these assurances cannot be given, States should consider having the suspect, if convicted in the requesting State, serve his sentence in the requested State. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[60] imposes specific obligations upon signatory parties with respect to the transfer of individuals to other countries. Article 3 of that convention requires that no State party expel, return or extradite a person to another country where "there are substantial grounds for believing that he would be in danger of being subjected to torture." Thus, requested States are required to consider whether grounds exist to believe an individual would be in danger of being subjected to torture. States parties are required to take into account "all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights" in deciding whether to extradite.

113. Some States will extradite individuals if they receive assurances from the requesting State that it won't use torture and other inhuman and degrading treatment against such individuals. In his report to the General Assembly, however, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment concluded that "States cannot resort to diplomatic assurances as a safeguard against torture and ill-treatment where there are substantial grounds for believing that a person would be in danger of being subjected to torture or ill-treatment upon return" (A/60/316, para. 51). Indeed, several arguments tend to demonstrate that such diplomatic assurances are imperfect: for example, concerns that requiring a diplomatic assurance from a requesting State is equivalent to an implicit acknowledgement that torture is used generally and systematically in the requesting State. In addition, post-return monitoring mechanisms have proven to be no guarantee against torture: diplomatic assurances are not legally binding and therefore carry no legal weight and no sanctions if breached; and the person whom the assurances are aimed at protecting has no recourse if the assurances are violated.

114. Other guiding principles that States must consider when deciding on extradition are found in the Universal Declaration of Human Rights.[61] The relevant principles in these conventions are the following:

- The right to liberty and security of the person[62]
- The right not to be subject to torture or cruel, inhumane or degrading punishment.[63]

[60] United Nations, *Treaty Series*, vol. 1465, No. 24841.
[61] General Assembly resolution 217 A (III).
[62] Ibid., art. 3.
[63] Ibid., art. 5.

4. Human rights considerations

115. Human rights considerations are an important part of the analysis that all parties to the process of extradition must engage in when considering an extradition request. Article 16, paragraph 13, of the Organized Crime Convention alludes to human rights with regard to due process and the fairness of the extradition process:

> 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.

5. Human rights issues at trial

116. It is important to be cognizant of the following issues when dealing with an extradition request: the process that is taking place, i.e. the extradition request; and the end result of a potential trial in another jurisdiction, which must be viewed through the lens of human rights considerations throughout the extradition process.

117. Article 16, paragraph 14, of the Organized Crime Convention specifically refers to particular human rights issues regarding discrimination where it states that there is no obligation on any State to extradite if that State believes that the extradition request was 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".

118. The following list shows other concerns that must be taken into consideration with respect to human rights issues that have a bearing on the fairness of a trial:

- The right to equality before the law[64]
- The right to a fair and public hearing[65]
- The right to counsel and interpreters[66]
- The right to be presumed innocent[67]
- The right not to be held guilty of offences retrospectively or to have retrospective penalties imposed[68]
- The right to not be compelled to incriminate oneself[69]

119. The issues raised in paragraph 116 above can arise when a fugitive has been tried in absentia and a request has been made for his extradition to serve a sentence. States should consider a number of factors when deciding whether to extradite in response to this type of request:

[64] Ibid., art. 7; and International Covenant on Civil and Political Rights, art. 14, para. 1.

[65] *International Covenant on Civil and Political Rights* (General Assembly resolution 2200 A (XXI), annex), art. 14, para. 1; and Universal Declaration of Human Rights, art. 10.

[66] Ibid., art. 14, para. 3.

[67] Universal Declaration of Human Rights, art. 11, para. 1.

[68] Ibid., art. 11, para. 2.

[69] International Covenant on Civil and Political Rights, art. 14, para. 3 *(g)*.

- Did the proceedings deny the fugitive the right to a fair trial?
- Did the fugitive participate meaningfully in his or her defence?
- Will the fugitive be given an opportunity to appeal his or her verdict upon his or her return to the requesting State?
- Can the requesting State grant a new trial?

Two examples of decisions made on whether to grant or refuse extradition based upon conviction after trial in absentia:

- A fugitive who was a lawyer fled the jurisdiction of the requesting State prior to charges being laid, knowing that his arrest was imminent. He was tried in absentia. It was confirmed that he had been in contact with his court-appointed counsel during the course of his trial in absentia. In this case, there was found to be no legal bar to his extradition.
- In another case, there was evidence that the fugitive knew nothing of the charges against him or of his subsequent trial in absentia. The fugitive's court-appointed counsel had gone on to exhaust his appeal rights, and the domestic law of the requesting State did not allow for a new trial. In this case, extradition was refused.

6. Fiscal offences

120. Article 16, paragraph 15, of the Convention prohibits the refusal of extradition based upon the fact that the alleged crime is fiscal in nature. In doing so, the Convention reflects the growing concern that offences with fiscal overtones, such as money-laundering, are major components of transnational organized crime and should therefore not be immune to investigation, extradition and prosecution.[70]

7. Political offences exception

121. The political offences exception is founded on three basic premises:

- The recognition of political dissent
- The guarantee of the rights of the accused
- The protection of both the requesting and requested States.[71]

122. Based upon the above, it can be seen that the premise behind the exception is the balancing of two main competing interests: the recognition of political dissent as a form of protest and the

[70] United Nations Office on Drugs and Crime, Revised Manuals on the Model Treaty on Extradition and on the Model Treaty on Mutual Assistance in Criminal Matters, para. 23. Available from www.unodc.org/pdf/model_treaty_extradition_revised_manual.pdf.

[71] Caruso, "Legal challenges in extradition and suggested solutions" in *Denying Safe Haven*, p. 60.

rights inherent in the pursuit of that ideal; and the rights of States to protect themselves from influences that may be bent on harming or destroying them. Thus, terrorist acts, such as bombing or the financing of terrorism, do not benefit from this protection.[72] The political offences exception is sometimes used as a reason for refusing extradition. It sometimes proves to be problematic, as what constitutes a political offence is poorly defined.[73] This can lead to accusations, recriminations and defences being fielded under this exception, which could lead to suspicion and confusion becoming the norm in this field. Efforts should be made to look behind what is being alleged in the request to see if it is indeed a political offence in and of itself or if the criminal charges shield what is essentially a request that is political in nature.

123. The universal counter-terrorism instruments prohibit States parties from rejecting another State party's extradition request (concerning any offence based on those instruments) on the grounds that it concerns a political offence, an offence connected with a political offence or an offence with political motives. The International Convention for the Suppression of Terrorist Bombings[74] explicitly rejects the political offence exception for the offences defined in the Convention. All subsequent conventions and protocols against terrorism contain the same provision:

> None of the offences set forth in article 2 shall be regarded, for the purposes of extradition or mutual legal assistance, as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. Accordingly, a request for extradition or for mutual legal assistance based on such an offence may not be refused on the sole ground that it concerns a political offence or an offence connected with a political offence or an offence inspired by political motives.[75]

124. Security Council resolution 1373 (2001) validated this approach by extending the exclusion of the political offence exception to acts of terrorism in general. In paragraph 3 *(g)* of that resolution, the Council called upon States to "ensure ... that claims of political motivation are not recognized as grounds for refusing requests for the extradition of alleged terrorists".

F. Refugee status and non-refoulement: the interplay between asylum proceedings and extradition

125. Another factor that must be taken into account with respect to extradition is the protection afforded to refugees under international treaties and the limits of this protection should the asylum-seeker be accused of a serious crime or terrorist act that is the subject of an extradition request. As can be seen below, there is an analysis to be conducted that is designed to reconcile the two competing interests of refugee protection and the protection of the country in which the asylum-seeker finds himself or herself if convicted by final judgement of a "particularly serious crime".

126. The principle of non-refoulement is found in article 33, paragraph 1, of the Convention relating to the Status of Refugees,[76] which states that:

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[72] See article 11 of the International Convention for the Suppression of Terrorist Bombings (United Nations, *Treaty Series*, vol. 2149, No. 37517); and article 14 of the International Convention for the Suppression of the Financing of Terrorism (United Nations, *Treaty Series*, vol. 2178, No. 38349).

[73] Schmid, "Legal problems in mutual legal assistance from a Swiss perspective", p. 48.

[74] United Nations, *Treaty Series*, vol. 2149, No. 37517.

[75] Ibid., art. 11.

[76] United Nations, *Treaty Series*, vol. 189, No. 2545.

> No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

127. It should be noted, however, that there are limits to the protections granted by the Convention relating to the Status of Refugees. In its resolution 1373 (2001), the Security Council called upon States to "take appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum-seeker has not planned, facilitated or participated in the commission of terrorist acts".[77]

128. Article 33, paragraph 2, of the Convention relating to the Status of Refugees shows that the mere claim of refugee status does not amount to automatic protection under article 33, paragraph 1, of that Convention:

> The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

G. Open communication in the event of a refusal to extradite

129. Communication is important even in the event of a potential refusal of an extradition request. Article 16, paragraph 16, of the Organized Crime Convention states that, before refusing extradition, the requested State should, where appropriate, give the requesting State ample opportunity to address any concerns that the requested State may have. This gives the requesting State the opportunity to either rectify defects that may be present in its extradition request or at least come away from the discussions with new knowledge and a better appreciation of the requirements of the requested State. A central authority that is well versed in international criminal law and has experience in dealing with certain regions of the world or countries where this outcome is likely can assist in anticipating that such an issue may arise and be proactive in addressing it with the requesting State.

H. The extradition process

130. The process of one State seeking the removal of a person from another State for the purpose of a criminal trial is a complex and serious endeavour. What is being asked in an extradition request is extraordinary in that it involves the legal systems of more than one State—a complex set of laws and procedures that are meant to protect the sovereignty of a nation, the rights of an accused and the integrity of a justice system. The extradition process is legally and procedurally complex, with strict filing requirements and deadlines. The exercise can prove to be logistically complex as well, with the transfer of a suspect having to be carried out sometimes at the last minute. The present section of the *Manual* is meant to address these concerns and hopefully provide some guidance in avoiding some of the common challenges that have been identified in extradition requests.

[77] See also extract of *International Cooperation in Criminal Matters: Counter-Terrorism*, Counter-Terrorism Legal Training Curriculum Module 3, sect. 2.3.1.2.

131. As always, communication will be key. Communication must be commenced and maintained before, during and after the request.[78]

1. Locating the suspect

132. In order to ask a State to extradite a person from its territory, the requesting State first has to prove that the person is in the requested State. The more information that can be provided to the requested State the better, as locating an individual in a country can potentially be a time- and asset-consuming process:

- Mutual legal assistance or INTERPOL requests (blue or red notices) made early in the investigation may help in locating the suspect.
- When seeking the suspect, the requesting State should send a physical description and other modes of identification, if available, e.g. DNA, fingerprints, nationality, passport number and identity card.
- In some jurisdictions, the names of other family members, particularly the father, can help establish identity.

133. As much information as possible should be provided and every effort made, using available methods, to verify that the suspect is actually in the territory of the requested State prior to requesting the authorities of the requested State to locate him. The requested State should make every effort, once in receipt of the information provided by the requesting State, to quickly locate the fugitive so that extradition proceedings can be commenced and the possibility avoided of the fugitive absconding to another jurisdiction, requiring another extradition request.

134. It is important for requested States to attempt to locate the suspect as quickly as possible. This allows for either the formal extradition process to be commenced or, if the suspect is no longer within the jurisdiction, for the requesting State to continue its investigation and possibly initiate the extradition process in another State. Once a fugitive is located, the requesting State must ensure that he or she is the person sought.

2. Three major factors to be considered once the suspect is located

135. Once a suspect has been located and his or her identity confirmed, the requesting State must ensure the following before moving forward with an extradition request:

- The requested State is able to extradite the person.
- The legal basis that grounds the request for extradition has been defined.
- The requirements of the domestic law of the requested State regarding the form and contents of an extradition request have been ascertained. It is important to remember that each State has different requirements.[79]

[78] See 2004 Report of the Informal Expert Working Group on Effective Extradition Casework Practice, paras. 113-115.
[79] Ibid., para. 91.

The three aforementioned factors arise at the beginning of what can become a very long and involved process involving multiple parties, levels of court and jurisdictions. Planning is key, and keeping track of events as they unfold is the responsibility of all those involved. One way of doing so is to utilize a checklist for outgoing extradition requests such as the one found in annex IV to the present *Manual*. That checklist guides the practitioner through factors that will have an effect on any extradition, allowing him or her to focus on various factors *before* they become a potential challenge or bar to an anticipated extradition request and to provide further tracking and guidance if the request becomes active.

3. *Provisional arrest*

136. A provisional arrest allows a suspect to be detained prior to extradition proceedings being commenced against him or her. This is particularly useful in cases of the type anticipated by the Organized Crime Convention, as international criminals could have contacts and networks that would allow them to evade the authorities should they be at large. A requesting State should speak with the central authority of the requested State to confirm what is needed in order to affect a provisional arrest in the requested State. Article 16, paragraph 9, of the Organized Crime Convention speaks to the possibility of a provisional arrest warrant being issued:

> 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.

When seeking a provisional arrest, it is important to bear in mind the following:

- Ideally, a request for provisional arrest or for extradition should cite the applicable provisions of the Organized Crime Convention and the fact that both the requesting and requested States are party to the Convention (and its Protocols, if applicable).

- Once the provisional arrest has been made, the clock starts ticking and the requesting State will have to provide all of the information needed to commence the extradition hearing within a certain time frame. Domestic laws usually establish the time limit for commencement as between 30 and 60 days. These short time frames mean that care must be taken early on to establish the time constraints for each case. Previous chapters in the present *Manual* have addressed the varying requirements of different legal traditions and systems and how they can cause frustration and delay. Those challenges are nowhere more pronounced than with respect to extradition.[80]

- Early and ongoing contact with the central authority of the requested State will aid in alleviating the procedural stress that will arise once the extradition process has been set in motion. With a bit of planning and foresight, discussions regarding possible bail, the preparation of supporting documentation, filing deadlines, a description of the entire process in the requested State and what is expected of the requesting State can all be conducted beforehand.

[80] Ibid., paras. 88-89.

- Provisional arrest should be used only if it is urgently needed to ensure the attendance of the suspect at subsequent hearings.[81]
- Communication of a request for provisional arrest pending extradition may be done, inter alia, by using the I-24/7 system of INTERPOL. States should consider availing themselves of this service.

Advice on drafting the extradition request for provisional arrest:

From time to time, there will be situations in which several international conventions may have provisions that are applicable to the facts alleged. There may also be times when the facts are not sufficiently developed to enable a prosecutor to identify with certainty which international convention is applicable. In such cases, the request for provisional arrest should refer to any specific provisions known and "to any other relevant provisions of international agreements to which both requesting and requested States are a party".

I. Drafting and transmitting the request for extradition

137. The present chapter started with a quote from the UNODC Informal Expert Working Group on Effective Extradition Casework Practice stating that the major challenge to extradition was the size and scope of the laws that governed it around the world. The Organized Crime Convention attempts to limit this challenge through the provisions that allow for States parties to attain some degree of commonality regarding the offences themselves and its effect on principles such as dual criminality and with respect to some other procedural factors. What remains, however, is an area of law that is still very dependent on the legal systems of each State and their respective legislation governing extradition. The present section of the *Manual* will deal generally with the preparation and transmission of extradition requests. It is important to keep in mind that there will be many variations on the required material and timing from State to State.

138. The major factor that will lead to success in the preparation of an extradition request is ongoing communication between the requesting and requested State. Communication before, during and after the request is transmitted will assist greatly and have a tangible effect on the potential success of the application.

139. There is a plethora of considerations to keep in mind when preparing an extradition request. The best method to approach this in an organized and consistent manner is to have a generic checklist such as the one provided in annex V to the present *Manual*. A checklist of this type may not be exhaustive or speak to every possible eventuality, but it is a good starting point. If such a checklist is completed, the requesting State will be in a much better position to begin communicating with the central authority of the requested State. If, as is a distinct possibility, the requesting State finds itself in the position of being unsure as to the legal requirements that need to be satisfied in the requested State in order to complete the checklist, then any conversation had with the central authority can focus on that particular issue. The checklists should be viewed not as an exercise in filling in the blanks, but rather as a guide to communication, both oral and written, which will lead to the drafting of a proper extradition request prior to it being submitted.

[81] Ibid.

A note on translation

- Requesting States should ensure the quality of translations so that they accurately describe what is being requested and, most importantly, the requisite legal concepts and terms
- Ongoing communication between central authorities and the sharing of draft requests can help ensure that the request is accurately transmitted to the requested State
- Requesting States should take care in preparing packages pursuant to a request for extradition
- Sufficient facts should be detailed to demonstrate that the applicable legal standard (as outlined in the treaty or domestic law of the requested State) has been met: that the offence was an offence where it is alleged to have occurred, that the offence was committed by the fugitive and that the person sought for extradition is the fugitive
- Packages that contain large amounts of documentation that relates to the criminal case itself, but does not assist in addressing the narrower issues of extradition, should be avoided, as analysing them for relevance requires considerable effort, which can lead to lengthy delays in processing the request.
- Formal proof of documentation may sometimes be a difficult requirement to meet and a potential impediment to a successful extradition request. In order to avoid this, the Swiss authorities, for example, maintain a database that contains the extradition and mutual legal assistance requirements of other countries. The website is available in French, Italian and German and is accessible to the public (www.rhf.admin.ch/rhf/fr/home/rhf/index.html)
- A similar source of information on extradition and mutual legal assistance in Europe, in both English and French, is the Council of Europe website on transnational criminal justice (www.coe.int/t/dghl/standardset ting/pc-oc/Tools_implementation1_en.asp).

Points to remember in all extradition matters:

- Each State has different legislation with respect to extradition, with different procedures, different timelines and different evidentiary tests.
- Timelines and deadlines are part of the process the world over. Regardless of its strengths or merits, a case can be dismissed for failure to abide by those requirements.
- It is important for the requesting State to consult with the central authority of the requested State, as that authority will be able to explain the process to the requesting State and keep it engaged in the process.
- The central authority of the requesting State will rely on the requested State to inform it of its obligations. Timely requests and advice, along with ongoing communication, will help ensure that the requesting State provides the required material at the required time.

J. Logistical concerns if extradition is successful

140. Moving a prisoner who has been accused of an offence related to transnational organized crime and has been the subject of an extradition request is not just a matter of putting him on a plane or other form of transport. The decision to order surrender, once made, sets in motion events that can occur quite quickly, and a requesting State must be prepared to act with promptness once the surrender order has been made. Careful planning with respect to the timing, routing and responsibility for the move all have to be considered. The following factors should be considered:

- Which party will be responsible for the transfer of the prisoner? Once this has been decided, others should not be involved, as the potential for confusion multiplies with each new participant. There are too many factors, e.g. tickets, visas, security, actions to be taken if the aircraft is diverted, to let too many people be involved in this process.
- The route should be planned carefully, keeping in mind the nationality and citizenship of the prisoner and his family. Direct routing is best, but, if it cannot be achieved, then third-country stops that may provide an opportunity to the prisoner to exercise citizenship rights or otherwise seek to circumvent the extradition process should be avoided.[82] Prisoners may also attempt to claim refugee status; attention should be paid to this possibility.
- Any requirements or concerns that may arise if the surrendered individual has to pass through a third county should be addressed. Problems may arise with respect to authorization to transit through the third country.

[82] Ibid., para. 121.

A cautionary tale regarding travel arrangements

A requesting State made arrangements to bring a foreign national back to its jurisdiction through the extradition process. In transit, the foreign national was routed through a country where the fugitive had citizenship. Upon arrival, the fugitive claimed his citizenship and asked not to be extradited to the requesting State. The country of citizenship did not allow for extradition to the requesting State. As a result, despite a successful extradition request, the choice of routing for the return of the fugitive led to him claiming citizenship in another country, thus avoiding trial.

An example of a successful transit through a third country based on communication and planning

In August 2011, Brazilian authorities received a transit request from a European country. It was intended that the fugitive would be transferred from a South American country, with a stop in Brazil while in transit, and then continue on to the European country. Prior to the transit taking place, the central authority of the European country contacted Brazil's central authority to confirm which documents were needed to allow the transfer. Brazil responded to the enquiry, providing information on the documentation required. The completed documents were returned to Brazil via diplomatic channels, and the Brazilian central authority issued the transfer authorization. As a result, the transfer occurred without incident and the fugitive was successfully returned.

K. Alternatives to extradition: their use and reception

141. In the past, some States have exercised alternatives to extradition when the option of formal extradition was not available. Listed below are actions that have been taken by some States to achieve the return of a fugitive without having to actually initiate the formal extradition process. Decisions on when or whether to exercise those alternatives must be made on a case-by-case basis and in the light of the fact that such actions have been ruled as illegal in some jurisdictions and should be viewed with great caution. Options such as a country allowing a suspect to "informally surrender" without an extradition process or the arrest of a suspect while in international waters[83] are two alternatives to a formal extradition request. Two other options—luring, and expulsion and deportation—are illustrative of the weighing of factors that may have to take place when using alternatives to extradition.

1. Luring

142. When extradition is not available, such as when no treaty exists, luring has been used as an option.[84] This method usually involves undercover operators creating a scenario that draws the suspect out from his safe haven to a country from which he or she can be extradited.

[83] Caruso, "Legal challenges in extradition and suggested solutions", p. 63.
[84] Ibid.

143. Different jurisdictions view this option in different ways. Some view these types of actions as illegal, thus warranting possible criminal sanctions, while others do not. Thus, depending upon the State, there may be a possibility that any goodwill that existed or was hoped to be gained between the State initiating the action and the safe-haven State could either be compromised or disappear as a result of the action taken. States have long memories and, legal or not, this type of activity can be viewed in a negative light. This type of action should be taken only after discussion with subject-matter experts in the central authority.[85]

2. *Expulsion and deportation*

144. Expulsion and deportation is another possible action that has been taken when no treaty exists between two States. The difference with this approach is that it can be used for the return of a national of the requesting State when he or she has fled to the requested State in an effort to avoid arrest and/or trial and punishment. This option operates on the premise that the suspect has fled to the requested State's jurisdiction on the requesting State's passport.[86] The requesting State then cancels that passport, leaving the suspect with no valid travel documents. What happens next is up to the requested State: it has the option of deporting the suspect back to the requesting State, as the suspect is now without valid travel documents. That potentially triggers the immigration law regime in the requested State, with deportation of the fugitive back to the requesting State being a potential remedy.

145. There are potential challenges to this method, as it is illegal in some jurisdictions. This method is also dependent on whether the requested State has a mandate under its domestic law to pursue the matter in this fashion, as well as whether it is prepared to do so. These factors reinforce the need for careful consideration of this course of action by subject matter experts in the central authorities of both jurisdictions, so as to avoid an accusation of disguised extradition.[87]

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[85] Ibid.

[86] Ibid., p. 64.

[87] For the legal parameters of disguised extradition see *Rebmann v. Canada (Solicitor General)* (F.C.), 2005 FC 310 [2005] 3 F.C.R. 285, paras. 10 and 11:

> [10]The applicant has not convinced me that the exclusion order is, in reality, a disguised extradition. The onus of proving that a deportation order is not valid on its face, is a sham, or is not bona fide is on the party who alleges it (*Moore v. Minister of Manpower and Immigration*, [1968] S.C.R. 839). In other words, to support a disguised extradition argument, an applicant must show an improper purpose or bad faith on the part of the government. Furthermore, to establish a disguised extradition, the applicant has a very heavy onus to bear.
>
> [11]Moreover, this Court has confirmed in *Halm v. Canada (Minister of Employment and Immigration)*, [1996] 1 F.C. 547 (T.D.) that [at pages 562-563]:
>
> 1. If the purpose of the exercise is to deport the person because his presence is not conducive to the public good, that is a legitimate exercise of the power of deportation.
>
> 2. If the purpose is to surrender the person as a fugitive criminal to a State because it asked for him, that is not a legitimate exercise of the power of deportation.
>
> 3. It is open to the courts to inquire whether the purpose of the government was lawful or otherwise.
>
> 4. The onus is on the party alleging an unlawful exercise of power. It is a heavy onus.
>
> 5. To succeed, it would be necessary to hold that the Minister did not genuinely consider it in the public interest to expel the person in question.
>
> 6. The adoption of the Charter has not lessened the onus.

146. There may be times, after reviewing the facts and the law, when it appears to a requesting State that there is no viable and legal method of seeking the return of the accused. Requesting States should still speak with their counterparts in the requested State to see if they have any insight into how a return of the accused may be accomplished in a legal manner. It should be kept in mind that any type of communication is better than no communication at all, and that discussions with the requested State may result in a resolution that is legally sound and satisfactory to both parties.

A final thought on extradition practice:

"In striving for effective and predictable extradition, it is essential that the State seeking the enforced return of a person (the requesting State) proceed from the axiom that extradition is country-specific."

Source: 2004 Report of the Informal Expert Working Group on Effective Extradition Casework Practice, para. 90.

Points to remember regarding extradition requests

Review the Organized Crime Convention to decide whether it can provide the needed legal basis to make the request.

Utilize other tools offered by UNODC, websites of the State to which you intend to make the request or other international websites to familiarize yourself with the legal tradition, legal system and domestic law that have a bearing on your request.

Initiate contact with the central authority of the requested State as early as possible after educating yourself as much as possible regarding the requirements of the requested State, and discuss your intended request with the central authority.

If applicable, submit a draft request to the central authority of the requested State to see if it meets the requirements of the requested State. Discuss this further with the requested State to further improve your application.

Early on in the request process, address logistical issues such as timelines, costs, travel arrangements and transport.

Maintain communication with the requested State, initiating it before the request, maintaining it during the request and following up after the request. Remember that, although this is a legal exercise, much will depend on the relationships you develop and endeavour to maintain both in relation to the subject of this request and in future requests.

VII. Mutual legal assistance: preparing, issuing and following up on outgoing requests and acting on incoming requests

Commentary on mutual legal assistance

"Two problems of a general nature arise regularly. First, neither the requesting nor the requested state masters the other's legal system, such that requests for cooperation are badly formulated, precious time is wasted, and legally flawed means of proof that are of little use to the requesting state are communicated. Second, red tape and appeal procedures can slow any mutual legal assistance request down to a near standstill."

Source: Jean-Bernard Schmid, "Legal problems in mutual legal assistance from a Swiss perspective", in *Denying Safe Haven*, p. 45.

147. "To obtain evidence, judges and prosecutors must rely on the goodwill of foreign states even in the presence of international obligations stated in treaties and agreements."[88] No matter how involved the treaties or agreements between two States are, mutual legal assistance is still a matter of asking another State for help. How those acting for the requesting State describe the required assistance, and whether they are viewed as being reliable and trustworthy, will be the barometer of the degree of assistance the State receives. Conversely, as a requested State, how well those acting for the State provide that assistance, and the timeliness and candour of any refusals of or postponements to a mutual legal assistance request, will go far in building trust. Finally, how well two States communicate with one another will ultimately decide the success or failure of any mutual legal assistance request.

148. Mutual legal assistance is meant to allow for a wide range of assistance between States in the production of evidence. Article 18, paragraphs 1 and 2, of the Organized Crime Convention speak of States parties affording "one another the widest measure of mutual legal assistance" and mutual legal assistance being "afforded to the fullest extent possible", but these actions can only take place when the request itself is communicated effectively and ongoing communication takes place during its execution. The above commentary illustrates not only what the common challenges are to mutual legal assistance but also gives direction on how to avoid these pitfalls. An understanding of the needs of the requesting State, as well as the needs of the requested State, is imperative to conducting a successful mutual legal assistance request.

A. Alternatives to formal requests for mutual legal assistance

149. Before embarking on the creation of a formal request for mutual legal assistance, time should be taken to consider and enquire as to whether the formal request actually has to be drafted at that time. In the case of mutual legal assistance, consideration should be given to whether current

[88] Rabatel, "Legal challenges in mutual legal assistance", p. 38.

goals can be achieved through police-to-police cooperation or whether the documentation required is in the public domain of the requested State and is therefore something that does not require mutual legal assistance. Normally, the less intrusive or coercive a request, the more likely it can be achieved without having to resort to a formal request which, no matter how efficient a system is in place, will take more time than an informal request.[89] If an investigation is viewed as a continuum, there may be a period of time, particularly in the early stages of a mutual legal assistance relationship, when there will be no need to prepare a formal request. Knowing when to initiate formal requests is just as important as knowing how to initiate them.

150. Thought should be given to utilizing the options discussed below, especially during the initial phases of an investigation.

1. Police-to-police communication: liaison officers and agency-to-agency communication

151. As previously stated, there are a number of different channels of communication that can be utilized by investigators prior to going to a central authority for a formal mutual legal assistance request. Investigators are encouraged to avail themselves of these options, particularly during the early phases of an investigation, in order to attain information that can be used in any judicial proceedings or as the basis for a later mutual legal assistance request. Caution should be exercised, however, when availing oneself of these services, so that investigators do not obtain evidence from a source the introduction of which into evidence at trial is not allowed. Ongoing communication with the central authority of the investigator's State and keeping in mind the general rule that the more sensitive the information, the more likely it will require a mutual legal assistance request, will help ensure that international investigations are successful in obtaining evidence from foreign sources.

152. It is particularly important to avoid a situation in which a mutual legal assistance request is perceived in the requested State as an attempt to conduct a foreign criminal investigation, which may be in violation of the laws of that State. To that end, it would be useful for each State to put in place step-by-step instructions on how to conduct foreign investigations in its territory. An example of these instructions can be found in the Protocol on Foreign Criminal Investigators in Canada (www.rcmp-grc.gc.ca/interpol/fcip-pcece-eng.htm).

153. Police-to-police communication can be a very useful way of acquiring information, especially in the early phases of both an investigation that requires mutual legal assistance and in extradition matters.[90] Police agencies have well-established networks of liaison officers throughout the world, as well as tried-and-true lines of communication and protocols with the many police agencies that they consistently deal with. In addition, there is INTERPOL, which consistently assists its members in their investigations.[91] In some cases, matters like locating witnesses or suspects, conducting

[89] 2001 Report of the Informal Expert Working Group on Mutual Legal Assistance Casework Best Practice, sect. 4.

[90] See 2004 Report of the Informal Expert Working Group on Effective Extradition Casework Best Practice. The Expert Working Group suggests, in paragraph 52 of that report, using mutual legal assistance to enhance and bolster extradition requests.

[91] The Informal Expert Working Groups strongly advocate utilizing the resources of INTERPOL when preparing mutual legal assistance and extradition requests (see 2004 Report of the Informal Expert Working Group on Effective Extradition Casework Practice, paras. 83-87; and 2001 Report of the Informal Expert Working Group on Mutual Legal Assistance Casework Best Practice, sect. 4).

interviews, sharing police files or documentation on a person or assessing whether a witness would be prepared to speak with investigators can all be done through police agencies, with no need to resort to a mutual legal assistance request. As a rule, the more coercive a request is, the less likely that information can be obtained by this method, but such initial, simple steps in an investigation can be done quickly and cheaply. They can prove invaluable when it comes time to initiate a formal request, as this information can be incorporated into the request, thus improving the chances of the request being successful the first time around. It is important to remember that there are limits to what can be asked for and what can be done with informally obtained information, but that such information can be very useful when preparing formal requests.

An example of potential penalties for not seeking the proper authorization to investigate

Article 271 of the Swiss Criminal Code

Unlawful activities on behalf of a foreign State

1. Any person who carries out activities on behalf of a foreign State on Swiss territory without lawful authority, where such activities are the responsibility of a public authority or public official, any person who carries out such activities for a foreign party or organization, any person who encourages such activities, shall be liable to a custodial sentence not exceeding three years or to a monetary penalty, or in serious cases to a custodial sentence of not less than one year.

2. Any person who abducts another by using violence, false pretences or threats and takes him abroad in order to hand him over to a foreign authority, party or other organization or to expose him to a danger to life or limb shall be liable to a custodial sentence of not less than one year.

3. Any person who makes preparations for such an abduction shall be liable to a custodial sentence or to a monetary penalty.

2. *Agency-to-agency communication*

154. Agency-to-agency communication can also help facilitate mutual legal assistance without the need for a formal request. A good example of this is communication between the central authorities and the liaisons that report to them. The lines of communication that can be established between these agencies complement the lines that the police and INTERPOL have already established. It is important to note the ability of INTERPOL to assist in the timely and secure communication of mutual legal assistance requests. Article 18, paragraph 13, of the Organized Crime Convention refers to the fact that States may wish to utilize this option. The I-24/7 system of INTERPOL, mentioned earlier in the present *Manual*, is well established, with national central bureaux spread around the world. This network of bureaux can be utilized during the investigative phase of a file but can also be used in conjunction with central authorities as a conduit for forwarding requests from one central authority to another when direct communication may be a challenge.

155. The Organized Crime Convention also has language that relates to the informal provision of information. Article 18, paragraph 4, allows States to proactively transmit information relating to criminal matters to other States. Article 18, paragraph 5, outlines the protocol for using and disseminating the information with respect to issues such as confidentiality and disclosure. Additional language that relates to the informal sharing of information, such as article 18, paragraph 29, compels States to provide government documentation that is available to the general public and gives them the discretion to provide government documentation that is not in the public domain.

Practitioners should remember that any informal contact with a requested State's authorities should be referenced in any formal mutual legal assistance request.

An example of potential problems arising as a result of informal communications between investigators.

An investigator posted abroad used his informal relationship with another investigative agency to acquire sensitive information that normally would have required a search warrant to obtain. These documents contained exculpatory information and, pursuant to the law of the requesting State, they had to be disclosed to defence counsel. The requested and requesting States were both placed in a difficult position owing to the fact that:

- The information was of a sensitive nature, the requested State had not consented to its release and that same information was potentially sought to be presented in a public forum.
- The requested State could not consent to the release of the information without a search warrant and therefore the information could not be disclosed by the requesting State as per its obligations under the law.

3. Consular communications

156. Some countries rely on their consulates abroad to assist in obtaining mutual legal assistance as an alternative to preparing a formal mutual legal assistance request. Mexico, for example, utilizes its consulates to obtain evidence, declarations or information regarding particular investigations or judicial causes.[92] Once the consular channel has been exhausted, the Mexican authorities then turn to a formal mutual legal assistance request as the instrument of international cooperation.

[92] Mexico bases its consular model on article 5, paragraph *(j),* of the Vienna Convention on Consular Relations (United Nations, *Treaty Series*, vol. 596, No. 8638). Article 59 of the Mexican Criminal Procedure Code and article 44 of the Mexican Foreign Service Act augment international cooperation in regulating the use of consulates as a venue for executing letters rogatory emanating from Mexican authorities.

B. General principles of mutual legal assistance

1. Sufficiency of evidence

157. In order for a successful mutual legal assistance request to be prepared, there must be sufficient evidence to make that request. The amount of evidence required is dictated partly by the legislation of the requested State and partly by the nature of the assistance sought. Generally, the more coercive the means of obtaining the evidence, the more involved and complex the evidentiary requirements become. For example, the interviewing of a witness who provides a statement to the police will require less evidence than a mutual legal assistance application that seeks the conducting of a search of a person's business or home. The evidentiary requirements to obtain the same type of assistance in different States will vary greatly, depending on treaty requirements, domestic legislation and the legal systems of the States involved. Reviewing the laws of the requested State and holding prior discussions with the requested State's central authority will enable a requesting State to provide a mutual legal assistance request that satisfies these basic requirements.

2. Dual/double criminality

158. Dual or double criminality is a legal principle that requires that the conduct of the person who, in this case, is the subject of a mutual legal assistance request be conduct that can be viewed as a criminal offence in both the requesting and the requested State. It is a concept that tends to play a larger role in the law pertaining to extradition; however, it can be found from time to time in the law pertaining to mutual legal assistance. It can range from not being required at all, to being required for certain coercive acts of mutual legal assistance, to being required for any type of mutual legal assistance.[93] All of this will be dependent upon the domestic legislation of the requested State, and drafters of a mutual legal assistance request should keep this in mind when drafting their request.[94] It should be emphasized that the test for dual criminality is whether the *conduct* that is the subject of the mutual legal assistance request is criminal in both States, not whether the conduct is punishable as the same *offence* in each State.[95]

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[93] Prost, "Practical solutions to legal obstacles in mutual legal assistance", in *Denying Safe Haven*, p. 32.

[94] "For this reason, it is important to describe the underlying crime very clearly, so that the foreign authorities can identify a similar offense in its own legal system. For example, the French offense of *abus de biens sociaux*, or the misuse of company property, needs to be explained in a manner that allows the foreign authorities to determine whether the conduct amounts to breach of trust or embezzlement in their jurisdiction. A clear description of the criminal conduct also has the advantage of preventing misunderstandings about the rule of 'Non bis in idem' (double jeopardy)." (Rabatel, "Legal challenges in mutual legal assistance" in *Denying Safe Haven*, p. 40).

[95] Prost, "Practical solutions to legal obstacles in mutual legal assistance", in *Denying Safe Haven*, p. 33; see also article 43, paragraph 2, of the United Nations Convention against Corruption, in which the issue of dual criminality is addressed even more forcefully than in the Organized Crime Convention. The dual criminality requirement is deemed fulfilled as long as the conduct constitutes a criminal offence in both States:

> In matters of international cooperation, whenever dual criminality is considered a requirement, it shall be deemed fulfilled irrespective of whether the laws of the requested State Party place the offence within the same category of offence or denominate the offence by the same terminology as the requesting State Party, if the conduct underlying the offence for which assistance is sought is a criminal offence under the laws of both States Parties.

3. Dual criminality and the Organized Crime Convention in mutual legal assistance matters

159. Article 18, paragraph 9, of the Organized Crime Convention addresses the issue of dual criminality, allowing a State to decline a request in the absence of dual criminality but giving it the option to waive the requirement of dual criminality and provide the assistance in any situation it sees fit, irrespective of whether the conduct in question would constitute an offence in the requested State. Requesting States should explore this option with requested States that have the dual criminality requirement as part of their laws pertaining to mutual legal assistance. Article 46, paragraph 9 *(b)*, of the United Nations Convention against Corruption goes further by stating that dual criminality is required only with respect to coercive measures.

4. Limits on transmission or use of information obtained by mutual legal assistance

160. Article 18, paragraph 19, of the Organized Crime Convention enshrines the principle of limiting the use of information gathered as a result of the mutual legal assistance request to the investigation, proceeding or prosecution that is the subject matter of the request unless permission is granted to use it in other matters. Information that has been gained that is exculpatory in nature may be disclosed to an accused. If this action is be taken, "the requesting State Party shall notify the requested State Party prior to the disclosure and, if so requested, consult with the requested State Party. If, in an exceptional case, advance notice is not possible, the requesting State Party shall inform the requested State Party of the disclosure without delay."

C. Grounds of refusal of a mutual legal assistance request

1. National or public interest

161. The principle of national or public interest is a broad concept that covers a multitude of aspects that a State may wish to protect. Although not commonly used, it can usually be applied in cases with national security overtones.[96] What practitioners may see in this day and age is a situation in which a number of different agencies—some law enforcement, some intelligence—are looking at the same target for a variety of reasons.[97] These types of scenarios may be more prevalent than initially suspected, and this principle may be used more frequently in the future. Article 18, paragraph 21 *(b)* of the Organized Crime Convention lists this as one of the grounds on which mutual legal assistance may be refused.

162. The judgment of the International Court of Justice dated 4 June 2008 in the case of *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*[98] is instructive, as it enshrines

[96] Prost, "Practical solutions to legal obstacles in mutual legal assistance", p. 34.

[97] "Testifying to the House Committee on Banking in 1999, the former director of the Central Intelligence Agency, James Woolsey, illuminated this conundrum when he asked the congressmen and women to consider the following hypothetical situation: 'If you should chance to strike up a conversation with an articulate, English-speaking Russian in, say, the restaurant of one the luxury hotels along Lake Geneva, and he is wearing a $3,000 suit and a pair of Gucci loafers, and he tells you that he is an executive of a Russian trading company and wants to talk to you about a joint venture, then there are four possibilities. He may be what he says he is. He may be a Russian intelligence officer working under commercial cover. He may be part of a Russian organized crime group. But the really interesting part is that he may be all three.'" (Glenny, *McMafia: A Journey Through the Global Criminal Underworld*, pp. 110-111).

[98] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), Judgment, I.C.J. Reports 2008*, p. 177.

the principle that States have the discretion to refuse mutual legal assistance in certain cases but that the underlying premise is to provide assistance to the fullest extent and only refuse a request in good faith and within a limited category of permitted exceptions. The observations of the court regarding mutual legal assistance, although not pertaining directly to the Organized Crime Convention, still resonate with respect to the principles enshrined in the Convention.

2. Severity of punishment

163. More recently, considerations of the likely severity of punishment have arisen in mutual legal assistance cases. This principle has been concerned with respect to extradition cases, but it has been seen in mutual legal assistance cases as well. There are treaties and laws of States that include provisions for the refusal of mutual legal assistance in cases in which the investigation may lead to charges that may result in the imposition of the death penalty or cruel, inhuman, degrading punishment or torture. The challenge for a requested State is that there could be little to indicate that this would be the likely outcome of an investigation, particularly if the investigation is in its early stages. A central authority that is well versed in international criminal law and has experience in dealing with certain regions or countries where this outcome is likely can assist in anticipating that this issue may arise and be proactive in addressing it with the requesting State by obtaining necessary information regarding sentencing in the event of a conviction prior to the assistance being provided.

An example of assurances of the non-imposition of the death penalty that led to the provision of mutual legal assistance

A requesting State made a mutual legal assistance request to a requested State for information to be used in relation to a hostage-taking investigation involving the attempted murder of the hostages by a terrorist group. The attempted murder charge carried a potential imposition of the death penalty. The requested State sought assurances that the death penalty would not be imposed in the case. In response to this request, the requesting State provided information that, over the previous 20 years, none of the persons convicted of attempted murder had been sentenced to the death penalty nor had life imprisonment been imposed upon them. As a result of these assurances, the requested State decided to provide the requesting State with the information it sought.

3. Bank secrecy

164. The principle of bank secrecy has, in the past, been a ground of refusal of mutual legal assistance for some States. Article 18, paragraph 8, of the Convention prohibits States parties from refusing mutual legal assistance pursuant to the Convention on this ground. Similarly, article 18, paragraph 22, prohibits States parties from refusing to provide assistance solely on this ground when the case involves fiscal offences. Nonetheless, there may be situations in which a State is insistent on maintaining bank secrecy even in the face of provisions like those found in article 18, paragraph 22. If a requesting State anticipates or actually is faced with a scenario of this type, it is advisable to look carefully at what is being requested and for what purpose to see if the refusal

is based upon how the request is worded, and to speak with the central authority to enquire as to what can be done to resolve this situation.[99]

4. Political offences

165. As with extradition, the political offences exception is a potential ground for refusal of mutual legal assistance. The law and constituent elements that make up this exception are the same as those articulated in the extradition chapter of the present *Manual*. The same caveats exist with respect to mutual legal assistance requests as for extradition, and efforts should be made to look behind what is being alleged as the crime in the mutual legal assistance request to see if it is indeed a political offence in and of itself or if the charges shield what is essentially a request that is political in nature.

5. Human rights considerations

166. Human rights considerations are an important component in preparing an outgoing mutual legal assistance request and taking action on an incoming one. The following aspects of human rights will have to be looked at in relation to mutual legal assistance matters:

- The right to liberty and security of the person[100]
- The right not to be subject to torture or cruel, inhumane or degrading punishment[101]
- The right to equality before the law[102]
- The right to a fair and public hearing[103]
- The right to counsel and interpreters[104]
- The right to be presumed innocent[105]
- The right not to be held guilty of offences retrospectively or to have retrospective penalties imposed[106]
- The right to not be compelled to incriminate himself[107]

167. When addressing a request from a requesting State, all of these factors need to be taken into consideration. For those preparing outgoing requests, it is important to address any concerns that may arise regarding the information that is being requested and how it is to be obtained. These factors should be considered on an ongoing basis by both requested and requesting States.

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[99] Schmid, "Legal problems in mutual legal assistance from a Swiss perspective", p. 48. The author alludes to the difference between fiscal fraud and fiscal evasion under Swiss law and how the one allows for a claim of bank secrecy while the other does not. Consultation with an expert in the field may enable one to overcome any problems experienced with claims of this type.

[100] Universal Declaration of Human Rights, art. 3.

[101] Ibid., art. 5.

[102] Ibid., art. 7.

[103] International Covenant on Civil and Political Rights, art. 14, para. 1.

[104] Ibid., art. 14, para. 3.

[105] Universal Declaration of Human Rights, art. 11, para. 1.

[106] Ibid., art. 11, para. 2.

[107] International Covenant on Civil and Political Rights, article 14, para. 3 *(g)*.

168. Although initially it may seem that breaches, or concerns regarding potential breaches, of any of these principles may mean that there will be automatic refusal, that is not necessarily the case. Before refusal is given regarding concerns on any of the aforementioned grounds, the provisions of article 18, paragraph 26, of the Organized Crime Convention are triggered. That article states that a "requested State Party shall consult with the requesting State Party to consider whether assistance may be granted subject to such terms and conditions as it deems necessary. If the requesting State Party accepts assistance subject to those conditions, it shall comply with the conditions."

6. Double jeopardy

169. Double jeopardy is a principle that can sometimes prove problematic when dealing with issues of mutual legal assistance. Different States have different definitions of what constitutes double jeopardy in treaties to which they are party and in their domestic legislation. Various definitions take into account the following:

- Has the person been punished for the crime in the requested and/or requested State?
- Has the person been punished for the crime in a third State?
- Sometimes the question is not whether the person has been punished but whether the person has been *(a)* tried, *(b)* convicted or *(c)* acquitted?

170. The answer to whether any of these scenarios exist with respect to a specific mutual legal assistance request is dependent upon the facts surrounding each case and the legislation or treaty requirements of the requested State. If the issue of double jeopardy arises, it is possible that the mutual legal assistance request may be successful if the facts support a charge other than the one in which double jeopardy is claimed.[108]

7. The rights of suspects charged with criminal offences

171. Individuals who are the target of an investigation or who become a suspect in a crime are entitled to their rights in the country where they are being interviewed. It is important in matters of mutual legal assistance to indicate whether the person who is to be interviewed is a suspect in the investigation. If this is not done, there is a risk that the evidence will be inadmissible at trial.

Example of a refusal of mutual legal assistance on procedural grounds:

A requesting State requested a hearing via videoconference from a requested State. The requested State, through a court decision, refused on multiple grounds, one of which was that it considered videoconference hearings inadmissible. In this particular case, the requested State was to hear bank account administrators, who had given prior consent for the hearing to take place via videoconference and for their official report to be sent to the requesting State.

[108] Prost, "Practical solutions to legal obstacles in mutual legal assistance", p. 35.

At the other end of the videoconference, a public hearing by a court was to be taking place. One of the grounds for refusal was the following:

"The process had no basis in the requested State (neither the exchange of letters between the requested and requesting State, the domestic law of the requested State concerning mutual assistance, nor the federal criminal procedure provide for the possibility of organizing a hearing via videoconference)."

D. Refusal of a mutual legal assistance request: the provisions of the Organized Crime Convention

172. There may be times when a mutual legal assistance request from a requested State is refused. The Organized Crime Convention has a number of articles that address the issue of refusal and what can be done in the alternative if refusal is given. As with other parts of the Convention, the focus is not just on the action that can be taken, but also on maintaining open communication and seeking alternatives between the two States.

173. Pursuant to article 18, paragraph 21, a mutual legal assistance request may be refused for the following reasons:

- If the request is not made in conformity with the provisions of article 18. As can be seen, deviating from the form can potentially have negative consequences.
- If the requested State party considers that execution of the request is likely to prejudice its sovereignty, security, public order or other essential interests.
- 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.
- 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.

1. Postponement of mutual legal assistance request

174. The other option available to requested States, other than refusal, is postponement, which is discussed in article 18, paragraph 25, of the Convention. Postponement is not based on the same reasons as refusal and has its own set of triggers that would lead a State to grant the request, only at a later date. Reasons for postponing a request are based on the fact that the timing of the request interferes with:

- An ongoing investigation
- An ongoing judicial proceeding
- An ongoing prosecution.

2. *Timelines for processing a mutual legal assistance request*

175. Normally, a requested State would execute a mutual legal assistance request made pursuant to the Organized Crime Convention as soon as possible and would attempt to abide by any timelines mentioned in the request as per article 18, paragraph 24. Refusals or postponements can generate what could be lengthy delays in the execution of the request, and a reassessment may have to be undertaken by the requesting State to see if it still wants to pursue this avenue or whether the information can be found from other sources.

3. *Lines of communication to remain open in the event of a refusal or postponement of a mutual legal assistance request*

176. If a mutual legal assistance request is refused or postponed, it is not the end of the matter. Article 18, paragraphs 23, 25 and 26, all deal with the eventuality that a refusal or a postponement may occur. Paragraph 23 obligates the requested State to give reasons for the refusal. Paragraph 26 places an obligation on the requested State to discuss with the requesting State whether it would be amenable to terms and conditions that would allow for the request to be granted or for its execution not to be postponed.[109]

4. *Fiscal matters exception: mutual legal assistance shall not be refused*

177. Pursuant to article 18, paragraph 22, no mutual legal assistance request can be refused solely because the offence is considered to involve fiscal matters, such as money-laundering or proceeds of crime.

E. Drafting the outgoing request

178. When a mutual legal assistance request is made pursuant to the Organized Crime Convention, how it is made and how it is grounded are important points to be considered. These will be discussed in the present section of the *Manual*. One should keep in mind that communication with the central authority before, during and after the request will help ensure a successful outcome to the request or a cogent explanation as to why it cannot be complied with.

1. *The types of assistance that can be requested pursuant to the Organized Crime Convention*

179. Pursuant to article 18, paragraph 3, the following types of assistance can be asked for in a mutual legal assistance request pursuant to the Convention:

- Taking evidence or statements from persons

[109] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, (see in particular paras. 151-152). The Court highlighted the importance of providing notification of the reasons for refusing to execute a letter rogatory. It found that this obligation was not fulfilled through the requesting State learning of the relevant documents only in the course of litigation, some months later. The Court further observed that the mere reference to the article in the Convention based on which the refusal had been made would not have sufficed to meet the obligation to provide notification of the reasons. Some brief further explanation was called for, not only as a matter of courtesy but also to allow the requested State to substantiate its good faith in refusing the request and to enable the requesting State to see if its letter rogatory could be modified so as to avoid the obstacles to implementation.

- Effecting service of judicial documents
- Executing searches and seizures and freezing
- Examining objects and sites
- Providing information, evidence, items and expert evaluations
- Providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records
- Identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes
- Facilitating the voluntary appearance of persons in the requesting State party
- Any other type of assistance that is not contrary to the domestic law of the requested State party

2. *Specific types of assistance involving the seizing and freezing of assets*

180. The seizure and freezing of assets deemed to be proceeds of crime follow a specific protocol pursuant to the Organized Crime Convention that should be read in conjunction with article 18 when making a mutual legal assistance request for this specific type of action. Article 12 of the Convention addresses the issues surrounding confiscation and seizure, article 13 addresses the issue of international cooperation in identifying assets and making the actual seizures, and article 14 addresses the issue of disposal of seized property and assets and the potential repatriation of these assets to the requesting State. For the purposes of mutual legal assistance, the most salient article is article 13, particularly its paragraph 3. In order to obtain an order of seizure, an outgoing request shall contain the specific information listed in article 13, paragraph 3, in addition to the other information normally contained in a mutual legal assistance request:

> The provisions of article 18 of this Convention are applicable, mutatis mutandis, to this article. In addition to the information specified in article 18, paragraph 15, requests made pursuant to this article shall contain:
>
> *(a)* In the case of a request pertaining to paragraph 1 (a) of this article, a description of the property to be confiscated and a statement of the facts relied upon by the requesting State Party sufficient to enable the requested State Party to seek the order under its domestic law;
>
> *(b)* In the case of a request pertaining to paragraph 1 *(b)* of this article, a legally admissible copy of an order of confiscation upon which the request is based issued by the requesting State Party, a statement of the facts and information as to the extent to which execution of the order is requested;
>
> *(c)* In the case of a request pertaining to paragraph 2 of this article, a statement of the facts relied upon by the requesting State Party and a description of the actions requested.

181. Requests involving the seizure or freezing of property are, by their very nature, complex undertakings requiring accurate descriptions of the property to be seized or frozen and coordination of effort by agencies tasked with seizing, freezing and potentially disposing of or returning

the property in the requesting and requested State. States are advised to make every effort to establish and maintain communication between investigators and central authorities when engaging in actions of this type.

F. Comments on the actual writing of the request

182. It is evident that the scope of assistance that can be requested is quite broad and that the type of assistance described in the last bullet in paragraph 179 above may allow for assistance that does not neatly fit into the other types listed. It is important, however, to found the application in one or more of the above modes of assistance or, in the case of the last bullet, that the document accurately and concisely explain the type of assistance that is sought. This is important for more than just the purpose of style and clarity itself. Being clear in what is being requested assures the requested State that: *(a)* it can actually comply with the request; and *(b)* the request is founded in an investigation and is not just a "fishing expedition". The Mutual Legal Assistance Request Writer Tool is an excellent option to utilize in providing clarity and consistency to both the form and content of the request, thus avoiding the problems arising from vague drafting.

A note on the UNODC Mutual Legal Assistance Request Writer Tool

- The Mutual Legal Assistance Request Writer Tool has been prepared by expert practitioners for practitioners and provides a step-by-step guide in preparing requests, allowing even the most inexperienced practitioner to draft an acceptable mutual legal assistance request, thus avoiding potential postponement or refusal of the request.

- The software prompts the drafter to choose the type of mutual legal assistance required and then to supply information in a series of templates. The drafter is notified if essential information is missing. Once all of the required information is provided, a draft request is produced.

- The Mutual Legal Assistance Request Writer Tool can be easily adjusted to use a specific country's substantive and procedural law and can be utilized in many languages. It also allows access to key information on treaties and national legislation.

- An integrated case management system for both incoming and outgoing requests is part of the suite of services offered with the tool. This allows central authorities using the tool to keep track of incoming and outgoing cases that they are responsible for.

Ease of use, knowledge at one's fingertips, designed by acknowledged experts and the capability to perform the all-important task of tracking incoming and outgoing requests: there is no reason not to use this tool, which is available from www.unodc.org/mla/en/index.html.

183. Preparation of a request for assistance involves the consideration of a number of requirements:

- Treaty provisions (where applicable)
- Domestic law
- The requirements of the requested State.[110]

184. The drafting should be conducted in a clear, concise manner, with attention being paid to articulating what the desired outcome of the request is. There has to be enough information in the request to allow the requested State to act upon it without being bogged down in extraneous facts or limiting the requested State in how it can provide the assistance that is required. The major requirements for drafting a successful request for mutual legal assistance are:

- To be very specific in presentation
- To link the existing investigation or proceedings to the assistance required
- To specify the precise assistance sought
- To focus, where possible, on the end result and not on the method of securing that end result (for example, it may be possible for the requested State to obtain the evidence by means of a production or other court order, rather than by means of a search warrant).[111]

A note on focusing on the end result and not the method of obtaining evidence

Asking for what you require and not dictating the method of acquiring the item leads to a better method of cooperation.

1. The form and substance of a mutual legal assistance request pursuant to the Organized Crime Convention

185. The present *Manual* has previously discussed the challenges posed by different legal traditions and cultures and how a lack of understanding can lead to negative results that possibly could have been avoided. An appreciation of different legal traditions and systems can lead to better communication, as can finding common ground with respect to that communication. Article 18, paragraph 15, of the Organized Crime Convention is designed to provide that common ground when it comes to the form of mutual legal assistance requests made pursuant to the Convention. Over 160 nations can avail themselves of the Convention, and the potential for miscommunication would be very high if there were not a common form that everyone who wished to do so could use. For that reason, article 18, paragraph 15, provides the minimum requirements for an application for mutual legal assistance pursuant to the Convention. Not providing this information will probably lead to a request for more information or possibly to a refusal of the application. The minimum provisions that should be within each mutual legal assistance request are as follows:

- The identity of the authority making the request

[110] 2001 Report of the Informal Expert Working Group on Mutual Legal Assistance Casework Best Practice, sect. 6.
[111] Ibid.

- 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
- A summary of the relevant facts, except in relation to requests for the purpose of service of judicial documents
- A description of the assistance sought and details of any particular procedure that the requesting State party wishes to be followed
- Where possible, the identity, location and nationality of any person concerned
- The purpose for which the evidence, information or action is sought

186. In urgent circumstances, a verbal request can be made for mutual legal assistance in place of a written one if both the requested and requesting States agree to it. This is usually because of a time-sensitive issue that does not allow for a written mutual legal assistance request to be prepared. It is important to remember that, even if the request is a verbal one pursuant to article 18, paragraph 14, it will have to comply with the form found in article 18, paragraph 15, and will have to be followed up with a written version of the request.

187. Checklists of the type found in the annexes to the present *Manual* can assist in ensuring that the above information has been gathered and addressed prior to initiating contact with the requested State's central authority and prior to any drafting taking place. Once all of this required information has been gathered, then the actual drafting of the outgoing request can begin.

A note on priorities

Central authorities throughout the world have, over the years, seen a substantial increase in the number of incoming requests. Some States submit requests for mutual legal assistance in all criminal cases, including cases involving minor offenses such as theft of a bicycle or failure to pay a restaurant bill. To more effectively manage the caseload, requesting States should limit their requests for mutual legal assistance to serious, significant offenses. States receiving requests for minor offenses have noted that such requests will not be denied, but may not be processed, owing to the need to focus limited resources on processing more significant requests first.

188. As with all written communication, clarity and brevity are valued in requests for mutual legal assistance. The present *Manual* has repeatedly stressed the importance of effective communication, and it is no different with respect to actually sitting down to draft a request. There are several steps that can be taken to assist with clarity in drafting a request. These common-sense and plain-language approaches will assist in the actual drafting of the request and also allow for effective ongoing communication in discussing the request with the requested State.

189. Every legal tradition and legal system has its own specific legal lexicon that has been developed over the years. Challenges arise when certain words or phrases that may very well be commonplace and well understood in one legal tradition or system are used consistently throughout the letter of request, particularly when they are found in the part of the letter in which the actual

request is set out. It is easy to picture the potential confusion that can arise when the central authority of a requested State is unclear on what exactly the requesting State is asking for. This is particularly the case when requests must be translated into another language. If the State acts on the request, the requesting State may not obtain what it is actually seeking. If the State does not act on the request owing to a lack of clarity, delays will occur. To avoid this simple yet serious challenge, it is suggested that the following be considered:

- Contacting the central authority of the requested State before drafting to explain what it is that is being sought and seeking input as to how to clearly articulate the request before preparing the draft.[112]

- Using clear language and avoiding legal jargon as much as possible in the request, with explanations given for all necessary legal terms.[113]

- When using the Organized Crime Convention as the basis for a request, using the terminology found in articles 2 and 3 of the Convention. These definitions and statements with respect to scope can be incorporated into the body of the application, thus providing a commonality of language that both the requesting and requested State can be confident of understanding.

- Utilizing the Mutual Legal Assistance Request Writer Tool provided by UNODC. It will ground a written draft in a language and format that has been approved by specialists in mutual legal assistance from around the world and which was designed specifically for this purpose. As with any legal problem, mutual legal assistance can be fact-specific, with sometimes subtle variations in the nature of the request and timing, among other things. The Mutual Legal Assistance Request Writer Tool will provide a draft that can be the basis for discussion that will lead to the perfection of the document. Efforts made with the assistance of the Tool can help ease the time constraints under which all those involved in international legal assistance operate, while providing accurate, legally sound and timely assistance to the drafting process.

2. The language of the request and translation issues

190. Another consideration that must be taken into account is the accuracy of the actual language of the request. Defects in translation can lead to delays, confusion and frustration. Every effort should be made to secure the services of a translator who is well versed in legal terminology and who can accurately translate the contents of the request into the language of the requested State. Article 18, paragraph 14, of the Convention addresses the language requirement, and discussions should be had with the central authority of the requested State if it is unclear which language should be utilized for the request.

[112] See conference room paper entitled "Requesting mutual legal assistance in criminal matters", in which every member asked that its central authorities be contacted before a mutual legal assistance request was made.

[113] "Every legal system has its own terminology. For example, an 'affidavit' may have meaning in Canada but not in Switzerland. As a request for assistance is addressed to and intended for a foreign authority, system-specific terminology should be avoided. Instead the request should describe what is sought, rather than referring to a term. For example, rather than 'affidavit', the request should refer to a statement which is sworn or affirmed to by the person providing it." (Prost, "Breaking down the barriers").

3. Requests for confidentiality

191. In many investigations, there are sensitive aspects that cannot be divulged until the investigation is completed and charges are laid, or it may not be possible to divulge them at all. Article 18, paragraph 20, of the Convention allows for the requesting State to ask for the application for mutual legal assistance to be kept confidential, and requires the requested State to inform the requesting State promptly if such a request cannot be granted. It should be noted that it will normally not be possible for a request for confidentiality to be granted with a simple request. Justification for the request may be required, particularly if a court will be required to gather evidence. When sensitive information will be contained within an application for mutual legal assistance, it is therefore useful to address this issue with the requested State's central authority before the sending of the application itself. In this way, an informed choice can be made as to whether to proceed with the mutual legal assistance or whether the application itself can be successful without the inclusion of this information.

4. Communication is key

192. Communication before, during and after the request will aid in ensuring a successful request.

G. Processing incoming mutual legal assistance requests

193. The previous paragraphs discussed how requesting States can enhance the mutual legal assistance process by ensuring that the proper format and language are used in the request. It was also emphasized that early and ongoing communication are key to a successful outcome to the request. Much the same can be said with respect to those tasked with processing the requests made by requesting States. Communication will be key in bringing clarity to this action, particularly if the initial request is unclear or perhaps even not possible to comply with. The Organized Crime Convention exhorts those States which have ratified the Convention to not stop at refusal but rather to carry on to see if there is an alternate remedy available. The present section deals with the ongoing efforts that are entailed in the processing of a mutual legal assistance request.

194. It is hoped that, if requesting States follow the process of educating themselves on the legal tradition, legal system and legislation of the requested State, and with the assistance of tools such as the Mutual Legal Assistance Request Writer Tool and in compliance with the minimum requirements of the Organized Crime Convention, more and more mutual legal assistance requests will be successful the first time they are made. There will, of course, always be requests for which, owing to their extent or complexity and the resultant problems arising in the drafting of the request, the first attempt may not be the one that can be acted upon. The Convention has a number of articles that deal with the all-important matter of maintaining communication throughout the process. Both requested and requesting States should keep those in mind once a request has been made.

State may ask for additional information

195. Article 18, paragraph 16, of the Convention allows a requested State to ask for more information in order to be able to comply with a request. This allows a requested State to not have to

refuse a request outright owing to a lack of information contained within it. Instead, an ongoing dialogue can be entered into in which the requested and requesting State can discuss what is missing and steps can be taken to rectify the shortcomings in the request. It should be noted that this action may not need to take place if: *(a)* early informal communication took place between the central authorities of the requested and requesting State, at which point possible shortcomings could be identified and rectified prior to the formal request being sent; and *(b)* a draft mutual legal assistance request was sent to the requested State's central authority prior to a perfected formal request being sent. There will be times, of course, when such actions cannot be undertaken, owing to time constraints, or when the information required is easily found and inserted into an amended request. More effort during the initial stages, however, will always pay off once the formal request is sent.

196. When a requested State takes action on a mutual legal assistance request, it does so acting under its own laws. This part of the equation is the one that provides many of the challenges in mutual legal assistance and why it is so important to develop an understanding of the legal tradition and legal system of the requested State and to maintain good lines of communication. Referring back to the section II of the present *Manual*, on legal traditions, it is easy to see how, if the domestic law analysis were taken literally, there would be a great many problems with acting on even the most simple request. The Convention, however, has language that urges requested States to be flexible in their approach and not to reject a request simply because it is unfamiliar but rather to undertake the requisite analysis to see if the request actually runs afoul of its laws. Article 18, paragraph 17, of the Convention also urges requested States to assist as much as possible, but within the bounds of their own laws, by executing the request in compliance with their own procedures where possible.

H. Specific issues in processing incoming requests for the purpose of confiscation pursuant to the Convention

197. Article 13, paragraphs 1 and 2, of the Convention deal with the procedure and obligations to be followed with respect to processing an incoming mutual legal assistance request for international cooperation in confiscation. Care should be taken to establish good lines of communication between the requesting and requested State, as these types of matters can, by their nature, become extremely complex and technical, particularly when it comes to locating and tracing assets that a criminal may have taken great pains to conceal or commingle with legitimate assets. The technical expertise required to perform the duties mentioned in those paragraphs of the Convention may not be readily available in some jurisdictions and may prove costly to acquire. Thought should be given ahead of time to addressing the issue of costs pursuant to article 18, paragraph 28, should the need arise. Article 13, paragraphs 1 and 2 read as follows:

> 1. A State Party that has received a request from another State Party having jurisdiction over an offence covered by this Convention for confiscation of proceeds of crime, property, equipment or other instrumentalities referred to in article 12, paragraph 1, of this Convention situated in its territory shall, to the greatest extent possible within its domestic legal system:
>
> *(a)* Submit the request to its competent authorities for the purpose of obtaining an order of confiscation and, if such an order is granted, give effect to it; or
>
> *(b)* Submit to its competent authorities, with a view to giving effect to it to the extent requested, an order of confiscation issued by a court in the territory of the requesting

State Party in accordance with article 12, paragraph 1, of this Convention insofar as it relates to proceeds of crime, property, equipment or other instrumentalities referred to in article 12, paragraph 1, situated in the territory of the requested State Party.

2. Following a request made by another State Party having jurisdiction over an offence covered by this Convention, the requested State Party shall take measures to identify, trace and freeze or seize proceeds of crime, property, equipment or other instrumentalities referred to in article 12, paragraph 1, of this Convention for the purpose of eventual confiscation to be ordered either by the requesting State Party or, pursuant to a request under paragraph 1 of this article, by the requested State Party.

198. The tracing and seizing of assets is an area in which differences in legal traditions will come to the fore. Property (both real estate and personal property), banking systems and their protections, the management and disposal of seized assets and a plethora of other considerations are part and parcel of the regime of asset seizure and forfeiture. Communication will be key in ensuring that all phases of the seizure and forfeiture of assets run smoothly and that a successful result is obtained.

I. Videoconferencing

199. One developing area of law and procedure is that of videoconferencing. The benefit of this type of testimony is obvious. The videoconferencing option, which the Convention makes specific reference to in article 18, paragraph 18, allows for evidence to be gathered while at the same time avoiding what can be the prohibitively high costs and logistical challenges of obtaining testimony in another State. Earlier in the *Manual*, mention was made of the fact that not all States are legally capable of allowing evidence to be taken via videoconference. Those tasked with making a mutual legal assistance application for testimony from another State should nevertheless explore this option with the requested State to see if its legal system allows for it. An example of a regional agreement that allows for the taking of video evidence is the following, which describes the Mexican experience in the Ibero-American region:

The Mexican experience in videoconferencing in the regional cooperation context

The Ibero-American Convention on the Use of Videoconferencing in International Cooperation between Judicial Systems facilitates the use of videoconferencing between competent parties in civil, commercial and penal cases. The Convention makes possible the cross-examination of a person, as party, witness or expert, residing in another State, via videoconference. Article 5 of the Ibero-American Convention states that the cross-examination will be performed directly by the requesting State, under the supervision of a person from the requested State. States parties may choose not to use videoconferences with respect to people who are presently subject to legal process, or with respect to those who are suspected criminals. Article 9 requires that parties to the Ibero-American Convention declare, upon ratification, which national authorities will be responsible for the process in their State.

An example of flexibility and communication to obtain testimony by video link

Two accused were charged with assault and robbery in the requesting State. The sole witness to the crime was the victim, who was hospitalized and returned to the requested State and was unable to travel to the requesting State to testify. A request was made to have the victim testify via video link. The requesting State was concerned that the testimony would be inadmissible should the evidence be elicited in the manner normally required under the procedures of the requested State. The requested State was concerned that, if the requesting State's trial procedure was used, then its sovereignty would be violated.

To resolve the issue, the requested State considered the following:

- The victim was the only witness to the crime. An acquittal would be the likely verdict should he not testify and as such there was merit in the victim testifying in the case.
- The only way for the victim to testify was via video link.
- The criminal procedure of the requested State established universal jurisdiction over the crimes alleged, as they were perpetrated against a national of the requested State. Having the accused tried in the jurisdiction where the crime was allegedly committed was considered as having positive merit by the requested State.
- The requested State considered the request to testify via video link and compared it to a foreign authority conducting an investigation on the requested State's soil. This analysis showed the violation of sovereignty through the video link request to be minimal.

Other procedural concerns when assurances were sought by the requested State:

- That the appearance of the witness would be voluntary, with no sanctions sought for non-appearance.
- That the taking of the oath would be voluntary and there would be no sanctions sought for not taking the oath.
- That any claims of privilege not to testify would be in accordance with the requesting State's procedures but that officials from the requested State could observe the process and intervene if they saw fit.
- That the requesting State understood that it might be difficult for the requested State to extradite the witness should there be an allegation and charge of perjury.

J. Logistics/practical considerations

200. Any efforts that have been made in order to ensure a successful conclusion to a mutual legal assistance request will not end with a properly drafted request. Requesting States should anticipate a myriad of logistical concerns well ahead of the actual execution of the request so as

to avoid problems that can seriously affect the outcome of the request. Travel arrangements, the timing of the travel, inoculations, interpreters, local guides, vehicles, the availability of personnel to assist in the requested State, the costs of providing the request and other considerations have to be taken into account before the request can be successfully processed.

201. It should be noted that different jurisdictions will have different capabilities regarding the processing of requests. This will be even more pronounced as the complexity of the request increases. Requesting States should consider being proactive in offering assistance to the requested State that will assist in the granting of these requests.

K. Travel arrangements

202. If officials from a requesting State must travel to a requested State pursuant to a mutual legal assistance request, care should be taken to ensure that the visit is effectively coordinated through the respective central authorities and diplomatic channels. Scheduling, travel arrangements, transportation and contacts in the requested State should all be handled before arrival. This will ensure that any costly delays or problems will be avoided during the mission.

L. Costs of executing the request

203. Article 18, paragraph 28, of the Organized Crime Convention addresses the issue of costs in providing mutual legal assistance. International investigations cost money and, in a time of shrinking budgets and fewer resources, the costs of investigations have to be borne in mind almost as much as the investigation itself. Pursuant to article 18, paragraph 29, the ordinary costs of executing a request will be borne by the requested State. States can, however, agree to different terms, including the sharing of costs if they wish. This is of particular use when a State does not have the financial or logistical ability to comply with a request.[114]

204. In some cases, the costs that are incurred as a result of international assistance are no more onerous to the requested State than if it were conducting its own domestic investigation. The police who conduct the interviews will be paid whether they are interviewing a witness for one of their own cases or for a foreign agency, for example. From time to time, however, a situation arises in which the nature and type of assistance requested result in costs above and beyond those which are normally incurred by a requested State. A search of a home or office on dry land is one thing; a search of an oceangoing ship, where there is evidence that drugs have been secreted either on the hull or within the actual superstructure of the ship, is an entirely different matter. The costs of a search of this type, with specialist divers, naval architects, shipwrights and possibly a master and a crew to move the ship, will cause costs to quickly mount far beyond the financial capabilities of a normal operation. Article 18, paragraph 28, addresses this issue by placing a duty on each State to consult before engaging in costly assistance so that some manner of financing the assistance can be discussed. Further cooperation is encouraged between States to share limited resources, be they monetary, personnel or equipment.[115]

[114] The 2001 Report of the Informal Expert Working Group on Mutual Legal Assistance Casework Best Practice, p. 14, refers to maximizing the availability and use of resources between States.

[115] The 2001 Report of the Informal Expert Working Group on Mutual Legal Assistance Casework Best Practice, p. 14.

M. Other considerations: prisoner transfer for testimony and safe conduct of consenting witnesses pursuant to the Organized Crime Convention

205. Article 18, paragraphs 10-12, are the provisions in the Convention that pertain to the transfer of prisoners in the requested State for identification purposes, testimony or the provision of other assistance in the requesting State. Although this scenario may have been somewhat rare in the past, the growth of international organized crime means this will become more commonplace. As States work together to combat different branches of the same organized criminal groups in their own territory, there will increasingly arise situations in which members of one branch of an organization who have been convicted and are serving their sentences may have information that is needed by way of testimony or otherwise in another jurisdiction.

206. The two ways in which a prisoner transfer pursuant to article 18, paragraph 10, can occur are:

- The prisoner consents to the transfer
- The requesting and requested States agree to the transfer, subject to agreed-upon conditions

The requesting State must, after the prisoner has been transferred:

- Keep the prisoner in custody while within the requesting State's jurisdiction
- Return the prisoner to the requested State's jurisdiction without delay as per the terms of their agreement
- Not require extradition proceedings to be instituted by the requested State for the return of the prisoner

The prisoner shall receive credit towards his or her sentence for any time served while in the requesting State's custody.

207. A prisoner transferred to a requesting State shall not be prosecuted, detained, punished or subjected to other restrictions on his liberty for any acts, omissions or convictions occurring prior to his leaving the requested State's jurisdiction unless both States agree to do so.

208. It is important that both the requested and requesting States establish travel arrangements that allow for an orderly transfer of the inmate and that the appropriate orders, warrants of committal or other documents be prepared and proper notification given to the prison authorities to allow for the transfer to occur into the custody of the requested State.

209. Situations arise in which a witness is not detained in custody in a requested State and a requesting State wishes to secure the testimony or assistance of that witness in its jurisdiction for the purposes of prosecution or a judicial proceeding or investigation. Article 18, paragraph 27, provides the framework for the transfer and safe conduct for a witness of the type described. In order for the transfer of a witness who is not incarcerated to take place, the following steps and procedures apply:

- The witness must consent to give evidence in a proceeding, or to assist in an investigation, prosecution or judicial proceeding in the territory of the requesting State.
- While in the requesting State's territory, the witness shall not be prosecuted, detained, punished or subject to any restriction of liberty respecting any acts, omissions or convictions that took place prior to his or her departure from the requested State's territory.

- The above-mentioned safe conduct ceases after 15 consecutive days (or a period agreed upon between both States) have passed from the day when the witness was officially informed that his or her testimony or assistance was no longer required, and the witness, having had an opportunity to leave the jurisdiction, did not avail himself or herself of it or, after leaving the jurisdiction, returned of his or her own volition.

210. It is important to have travel arrangements in place that allow for the witness to return to the requested State at the expiration of the 15-day or otherwise agreed-upon period. It is also important that it be clearly expressed to the witness when his or her services are no longer needed and the witness is truly released from the obligations that resulted in his or her travel to the requesting State. Requesting States should also consider, before requesting the transfer of the witness, whether there is a potential for an asylum or refugee claim that could result in lengthy proceedings before the witness can be returned to the requested State. If this turns out to be a concern, then the requesting State may consider seeking the assistance or testimony of the witness through videoconferencing pursuant to article 18, paragraph 18, of the Convention.

Points to remember regarding mutual legal assistance requests

Decide whether a formal mutual legal assistance request is needed or if one of the alternatives satisfy your requirements.

Investigators should stay in communication with their own legal advisers when engaging in police-to-police communication. Prior communication between police agencies may be of great importance and must be mentioned when making a formal mutual legal assistance request. Consistent communication will ensure that investigators are advised as to when the rules of evidence and procedure of their own country require a formal mutual legal assistance request instead of an informal police-to-police request.

Review the Organized Crime Convention to decide whether it is the tool needed to make the request.

Utilize other tools offered by UNODC, such as the Mutual Legal Assistance Request Writer Tool, websites of the State to which you intend to make the request or other international websites, to familiarize yourself with the legal tradition, legal system and domestic law that has a bearing on your request.

Initiate contact through your central authority with the central authority of the requested State after educating yourself as much as you can regarding the requirements and, if possible, discuss your intended request with the central authority

If applicable, submit a draft request to the requested State's central authority to see if it meets the requirements of the requested State and whether the requested State will be able to provide you with the evidence you intend to elicit in a format that can be utilized by you.

Early on in the request process, address logistical issues such as timelines, costs, travel arrangements and transport.

Maintain communication with the requested State, initiating it before the request, maintaining it during the request and following up after the request. Remember that this is a legal exercise; much will hinge on the relationships you develop and endeavour to maintain, both in relation to the subject of this request and in future requests.

"Ultimately, even when there is no apparent legal basis for cooperation, practitioners should still ask the foreign State for assistance. The foreign State could well be amenable to the request."

Source: Kimberley Prost, "Practical solutions to legal obstacles in mutual legal assistance", in *Denying Safe Haven*, p. 32.

The final word on mutual legal assistance requests:

"... all the experts and participants agreed that communication is the most important factor in resolving legal obstacles in extradition and mutual legal assistance ... legal obstacles often do not result from differences between the legal systems of the countries involved, but from a failure to appreciate those differences. Direct dialogue between the requesting and requested States, whether formal or informal, can eliminate many of these misunderstandings."

Source: "Overcoming legal challenges in mutual legal assistance and extradition", in *Denying Safe Haven*, p. 30.

Annex I. General checklist for requesting mutual legal assistance

Mutual legal assistance requests should include the following:

- *Identification*. Identification of the office/authority presenting or transmitting the request and the authority conducting the investigation, prosecution or proceedings in the requesting State, including contact particulars for the office/authority presenting or transmitting the request and, unless inappropriate, the contact particulars of the relevant investigating officer/prosecutor and/or judicial officer (see form I in annex III below).
- *Consideration as to what formal requirements need to be complied with, e.g. authentication or certification of documents*. Consideration of whether or not there is a requirement for translation services and where to make use of competent translators familiar with the legal lexicon of the States involved.
- *Prior contact*. Details of any prior contact between officers in the requesting and requested States pertaining to the subject matter of the request.
- *Use of other channels*. The request should make clear whether a copy of the request has been or is being sent through other channels.
- *Acknowledgement of the request*. A cover sheet incorporating the acknowledgement, for completion and return to the requesting State (see form I in annex III).
- *Indication of urgency and/or time limit*. A prominent indication of any particular urgency or applicable time limit within which compliance with the request is required and the reason for the urgency or time limit.
- *Confidentiality*. A prominent indication of any need for confidentiality and the reason therefore, and the requirement to consult with the requesting State prior to the execution if confidentiality cannot be maintained.
- *Legal basis for the request*. A description of the basis upon which the request is made, e.g. bilateral treaty, multilateral convention or scheme or, in the absence thereof, on the basis of reciprocity.
- *Summary of the relevant facts*. A summary of the relevant facts of the case including, to the extent possible, full identification details of the alleged offender(s).
- *Description of the offence and applicable penalty*. A description of the offence and applicable penalty, with an excerpt or copy of the relevant parts of the law of the requesting State.
- *Description of the evidence/assistance requested*. A description in specific terms of the evidence or other assistance requested.

- *Clear link between proceeding(s) and evidence/assistance sought*. A clear and precise explanation of the connection between the investigation, prosecution or proceedings and the assistance sought, i.e., a description of how the evidence or other assistance sought is relevant to the case.
- *Description of the procedures*. A description of the procedures to be followed by the authorities of the requested State in executing the request to ensure that the request achieves its purpose, including any special procedures to enable any evidence obtained to be admissible in the requesting State and reasons why the procedures are required.
- *Presence of officials from the requesting State in execution of request*. An indication as to whether the requesting State wishes its officials or other specified persons to be present at or participate in the execution of the request and the reason why this is requested.
- *Language*. All requests for assistance should be made in or accompanied by a certified translation into a language specified by the requested State.

Note: If it becomes evident that a request or the aggregate of requests from a particular State involve a substantial or extraordinary cost, the requesting and requested States should consult to determine the terms and conditions under which the request is to be executed and the manner in which the costs are to be borne.

Annex II. Supplemental checklist for specific types of mutual legal assistance requests

Search and seizure

In the case of a request for search and seizure, the request should include the following:

- As specific a description as possible of the location to be searched and the documents or items to be seized, including, in the case of records, the relevant time periods
- Reasonable grounds (sufficient evidence) to believe that the documentation or thing sought is located at the place specified within the requested State
- Reasonable grounds to believe that the documentation or thing will afford evidence of the commission of the offence that is the subject of investigation or proceeding(s) in the requesting State
- An explanation of why less intrusive means of obtaining the document or thing would not be appropriate
- An indication of any special requirements in relation to the execution of the search or seizure
- Any known information about third parties who may have rights in the property

Production of documents

In the case of a request for the production of documents, the request should include the following:

- Since a court order is generally required, as specific a description as possible of the documents to be produced and their relevance to the investigation
- An identification of the location and/or custodian of the required documents
- An indication as to whether a copy or certified copy of the documents will suffice and, if not, the reason why the original documents are required
- If certification or authentication is required, the form of certification/authentication, specified in an attached pro forma certificate (see form II below) if possible
- An indication as to whether it is likely that any of the documents might be subject to any claim of privilege, e.g. legal professional privilege

It is important to check with the requested State, as some may have additional requirements for the production of documents.

In cases involving requests for the production of computer records, the risks of deletion or destruction should be considered in consultation with the requested State. In such a case, an expedited, secure means of preservation may be required, e.g. special preservation order, or search and seizure.

Taking of witness statements/evidence

In the case of a request for a statement or testimony, the request should include the following:

- The identity and location of the person from whom the statement or testimony is to be obtained
- A description of the manner in which the evidence should be taken (e.g. under oath or any appropriate cautions to be administered) and recorded (e.g. procès verbale, verbatim, videotaped, via video link) and whether and in what manner the authorities of the requesting State's authorities wish to participate and why
- If officers of the requesting State are not participating, a list of the topics to be covered and specific questions to be asked, including a point of contact in the requesting State, should consultation by telephone become necessary during questioning
- In the case of video-link testimony, the reasons why video link is preferable to the physical presence of the witness in the requesting State, and a point of contact in the requesting State to be consulted with on the procedures to be followed
- If representatives of the defence in the requesting State are requested to be present, a clear specification thereof, with the reasons made clear

Temporary transfer of prisoners to give evidence

In the case of a request for temporary transfer of prisoners to give testimony, the request should include the following:

- An explanation of how the prisoner is able to assist in the investigation or proceeding(s)
- An indication as to whether the prisoner has consented to travel to the requesting State, or a request for that consent to be sought by the requested State
- An assurance that, if transferred, the prisoner will be held in custody by the requesting State at all times
- An assurance that the prisoner will be returned to the requested State as soon as possible when his or her assistance is no longer required for the purposes of the request or as otherwise agreed by the States involved
- To the extent required by the requested State, an assurance that the prisoner will not be detained, prosecuted or punished in the requesting State for any offence committed prior to his or her transfer to the requesting State
- An assurance that the prisoner will be returned to the requested State without the need for extradition
- A point of contact in the requesting State to be consulted with on any relevant issues, including credit for time spent in custody in the requesting State, the logistical arrangements and costs of the transfer, and any other relevant pre-conditions

Annex III. Sample cover note for an outgoing mutual legal assistance request, acknowledgment of receipt of an incoming request and sample authentication certificate

Form I

Cover note for all mutual legal assistance requests
(To be filled in by requesting authority)

Case:

Case number:

Name(s) of suspect(s):

Authority who can be contacted regarding the request

Organization:

Place:

Country:

Name:

Function:

Spoken language:

Telephone number:

Fax number:

E-mail:

Deadline

This request is urgent.

Please execute this request before: [date]

Reasons for deadline:

Date:

Signature:

Acknowledgement of request
(To be filled in by the requested authority)

Registration

Registration number:

Date:

Authority receiving the request

Organization:

Place:

Country:

Name:

Function:

Spoken language:

Telephone number:

Fax number:

E-mail:

Authority who can be consulted on the execution of the request

☐ Same as above

☐ See below

Organization:

Place:

Country:

Name:

Function:

Spoken language:

Telephone number:

Fax number:

E-mail:

Deadline

The deadline will probably [be met/not be met].

Reason:

Date:

Signature:

Please fill in this form upon receipt and fax it to:

Form II

Apostille

1. Country: _____

This public document

2. has been signed by _____
3. acting in the capacity of _____
4. bears the seal/stamp of _____

Certified

5. at _____ 6. the _____
7. by _____
8. No. _____
9. Seal/stamp: 10. Signature:

_____ _____

Note: In cases where authentication of foreign public documents is required, the Hague Convention of 5 October 1961 abolishing the requirement of legalization for foreign public documents provides for a simplified and speedy way of certifying such authentication by means of the "apostille" attached to that Convention.

Annex IV. Checklist for the contents of an outgoing extradition request

☐	Treaty requirements	Make sure to check the treaty requirements before continuing with the remainder of the checklist.
☐	Domestic law requirements	Make sure to check any domestic legal requirements in the requested State prior to continuing with the remainder of the checklist.
☐	Identity of the person sought	Provide a description of the person sought and, optionally, all other information that may help to establish that person's identity, nationality and location (including, for example, identity card, fingerprints, photo, DNA material).
☐	Facts and procedural history of the case	Give an overview of the facts and procedural history of the case, including the applicable law of the requesting State and the criminal charges against the person sought.
☐	Legal provisions	Provide a description of the offence and applicable penalty, with an excerpt or copy of the relevant parts of the law of the requesting State
☐	Statute of limitation	Specify any relevant limitation period beyond which prosecution of a person cannot lawfully be brought or pursued, with legal provisions provided in support.
☐	Legal basis	Give a description of the basis upon which the request is made, e.g. national legislation, a relevant extradition treaty or arrangement or, in the absence thereof, by virtue of reciprocity.

If the person sought is accused of an offence (but not yet convicted)

☐	Warrant of arrest	Provide the original or certified copy of a warrant issued by a competent judicial authority for the arrest of that person, or other documents having the same effect.
☐	Statement of the offence(s)	Provide a statement of the offence(s) for which extradition is requested and a description of the acts or omissions constituting the alleged offence(s), including as accurate an indication as possible of the time and place of the commission given the status of the proceedings at that time, maximum sentences for each offence, the degree of participation in the offence by the person sought and all relevant limitation periods.

☐ Evidence	Identity evidence is always required. Check whether sworn evidence is also required. If so, check whether the witness must depose that he or she both knows the person sought and knows that the person engaged in the relevant acts or omissions constituting the relevant offence(s). Suspicion of guilt for *every* offence for which extradition is sought must be substantiated by evidence. Check in advance whether this must take the form of sworn or unsworn evidence of witnesses, or whether a sworn or unsworn statement of the case will suffice. If a statement of the case will suffice, check whether it has to contain the particulars of every offence. If sworn evidence is required, check whether this has to show prima facie evidence of every offence for which extradition is sought. If so, clarify what is required and admissible to meet that or any lesser test. Ensure that everything is provided in the form required.

If the person sought has been convicted of an offence and has:

☐ Been sentenced	Include an original or a certified/authenticated copy of the original conviction/detention order, or other documents having the same effect, to establish that the sentence is immediately enforceable. The request should also include a statement establishing to what extent the sentence has already been carried out.
☐ Been sentenced in absentia	Provide a statement indicating that the person was summoned in person or otherwise informed of the date and place of the hearing leading to the decision or was legally represented throughout the proceedings against him or her, or specifying the legal means available to him or her to prepare a defence or to have the case retried in his or her presence.
☐ Not yet been sentenced	Provide a document setting out the conviction and a statement affirming that there is an intention to impose a sentence.

Annex V. Checklist for outgoing extradition requests: casework planning

Earliest contact with requested State	When the location of the person sought is known, communicate informally before making the request for provisional arrest and/or extradition in order to find out all of the relevant requirements and acceptable fast communication/transmission channels of the requested State.
Concurrent requests	Check for concurrent requests at the earliest stage. If there are any, ensure that the case for priority is prepared, communicated and negotiated as soon as possible.
Legal basis	Check whether a legal basis exists for an extradition request to be made to the proposed requested State.
Arrest, search and seizure	Check legal preconditions and limitations of the requested State for arrest, search and seizure in order to pre-empt any potential problems. Check whether conditional release/bail is possible. If so, supply (before arrest, if possible) all relevant information on the issue.
Time limits	Check the time limits in the requested State for receipt of the request following arrest and ensure that the time limits will be met.
Format of documents and any evidentiary requirements	Always check with the requested State to make sure that documents are in the correct format. If evidentiary rules apply, check for evidentiary requirements in the requested State, particularly as to the standard of proof required and the types of evidence needed. Check whether they should be in deposition or affidavit format, e.g. with one signed/sworn by the correct officer of the State/judicial authority and sealed together, to ensure that they will be admissible in the requested State.
Potential grounds for refusal	The requesting and requested States should communicate at the outset of the process to identify any issues that could be raised as potential grounds for refusal.
In absentia proceedings	Warn the requested State in advance if the proposed extradition request relates to in absentia proceedings. Check the requirements of the requested State for extradition in such cases and ensure that it will be possible to meet justifiable requirements.

Rule of speciality	Ensure that you identify all offences for which extradition will be sought, whether extraditable offences or not (this may not be possible for non-extraditable offences under domestic law). This avoids later problems with seeking a waiver of the rule of speciality from the requested State because you want to prosecute for another prior offence.
Language of request	The request and accompanying documents should be made in or accompanied by a certified translation into a language specified by the requested State.
Draft request for feedback	Consider submitting a draft request for feedback, particularly if you are not familiar with the requirements of the requested State or if the case is complex.
Presence of representatives at hearings	Check whether police, legal/liaison representatives and consular officials may be present at foreign extradition proceedings to assist if needed. If so, ensure the necessary arrangements and monitor the proceedings.
Transit arrangements	Responsibility should be clearly fixed as to which authority will secure the necessary transit authorizations. Care should be taken to avoid unnecessary risk factors. Ensure that the process is effectively planned, organized, conducted and monitored.
Surrender arrangements	Check time limits and the precise date by which the person must be surrendered in the requested State. Calculate the local time and date equivalents. Organize and ensure the entry before that date of escorts to remove the person from the requested State.

Annex VI. United Nations human rights instruments that apply to mutual legal assistance and extradition matters

Universal Declaration of Human Rights

1. The following articles of the Universal Declaration of Human Rights[a] apply to mutual legal assistance and extradition matters:

Article 5

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

Article 6

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

Article 7

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

Article 8

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

Article 9

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

Article 10

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

Article 11

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

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

[a] General Assembly resolution 217 A (III).

International Covenant on Civil and Political Rights

2. The following paragraphs of the International Covenant on Civil and Political Rights,[b] apply to mutual legal assistance and extradition matters:

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

[b] General Assembly resolution 2200 A (XXI).

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Glossary

Central authority	A central authority is an administrative entity designated by a State to be the central contact point for matters of international cooperation with other States. Treaties usually compel States to create a central authority as part of complying with the treaty.
Competent authority	A competent authority is an entity within a State with the legal competence or responsibility to respond to a request for international assistance and to take the steps required under domestic law to comply with the request.
Continuity of evidence (chain of custody)	When an item is seized as evidence in a common law country and is to be entered into evidence at trial, it is normal that the "chain of custody" is established to show that, once the police seized the item, it remained within their control and was not tampered with in a manner that would lead the judge to an erroneous decision. Continuity of evidence is particularly important in relation to forensic evidence.
Cross-examination	Cross-examination, the questioning of a witness proffered by the opposing party in attempting to challenge his or her testimony, is a cornerstone of the adversarial system and an important component of any common law trial in which evidence is tested through close and potentially aggressive questioning. Once the testimony is tested, the judge can decide to accept some, all or none of it as evidence.
Extradition	Extradition is the formal process whereby a State requests the enforced return of a person accused or convicted of a crime to stand trial or serve his sentence in the requesting State.
Hearsay	A definition of the general hearsay rule can be found in *Subramaniam v. Public Prosecutor* [1956] 1 W.L.R.965 (P.C.), at p. 970: > Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made. The fact that the statement was made, quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter of the witness or of some other person in whose presence the statement was made.

	Traditionally, there was a prohibition in common law countries against allowing hearsay evidence into court. In the extradition context, however, there has been a relaxation of this rule in many common law countries which allows a court to accept hearsay evidence for the truth of its contents if certain conditions are met. In the extradition context, hearsay is increasingly allowed into evidence for the purpose of extradition hearings.
International Criminal Police Organization (INTERPOL)	INTERPOL is the world's largest international police organization, with 190 member countries. Its role is to enable police around the world to work together to make the world a safer place and ensure public safety. In the extradition and mutual legal assistance field, the communications network and other services of INTERPOL provide highly effective assistance in furtherance of these actions.
INTERPOL red notice	An INTERPOL red notice is an international notice posted by a requesting State on the INTERPOL computer system seeking the arrest or provisional arrest of a fugitive for the purpose of extradition.[a]
INTERPOL blue notice	An INTERPOL blue notice is an international request posted by a requesting State on the INTERPOL computer system seeking assistance in obtaining additional information about a person's identity or activities in relation to a crime.
Mutual legal assistance	Mutual legal assistance in criminal matters is a process by which States seek and provide assistance in gathering evidence for use in criminal cases.
Prima facie	From the Latin term meaning "on its first appearance", prima facie is an evidentiary burden commonly applied to extradition cases in common law countries. In common law jurisdictions, "prima facie" denotes evidence that, unless rebutted, would be sufficient to prove a particular proposition or fact.
Reciprocity	In treaties and some domestic laws, the principle of reciprocity states that favours, benefits or penalties that are granted by one State to the citizens or legal entities of another State should be returned in kind. In the context of mutual legal assistance and extradition, it may constitute a written agreement, by means of which a State commits itself, under the same conditions and circumstances, to grant the same kind of request in the future to the requested State. It may be a useful legal basis for cooperation in the absence of a treaty basis, or it may be a requirement of domestic law.
Surrender	In extradition law, the term "surrender" is used to describe that phase in the proceedings when the fugitive who was the subject of an extradition request is ordered by the requested State to be turned over to the jurisdiction of the requesting State.

[a] Further information regarding the types of notices maintained by the International Criminal Police Organization (INTERPOL) is available from www.interpol.int/INTERPOL-expertise/Notices.

UNODC

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