

Extradition and Mutual Legal Assistance in International Criminal Law

Manikanta Chowdary Veerapaneni¹, Adnan Raza Hussain Syed²

^{1,2}3rd Year LLB Student, Aurora Deemed To Be University, Aurora Higher Education And Research Academy School Of Law, Bhongir, Yadadri, Telangana.

ABSTRACT

Crimes occur internationally as an accused individual could have escaped from the State in which an offence was committed and witness information may be on documents in other States or electronic data may exist in another country or have moved to that country and financial resources are elsewhere. These issues of State territoriality pose barriers against evidence collection and prosecution in international/transnational crime. Two important State-led tools to counter this problem are extradition and MLA.

Extradition and MLA are two key mechanisms States may use. The formal definition of extradition is the surrender by one State of a person sought in criminal proceedings, either for prosecution or after being sentenced. MLA, on the other hand, refers to State cooperation within their legal systems to obtain evidence for and perform acts of investigative or judicial activity in criminal proceedings. Both extradition and MLA promote the fight against impunity, yet their operation varies and there are separate legal requirements each instrument imposes.

This project looks into the definition, legal basis, principles and procedural issues of extradition and MLA in International criminal Law as well as their limitations. It takes into consideration concepts such as "dual criminality," "speciality," "ne bis in idem," the "political-offence exception" as well as human rights concerns related to both extradition and MLA. Various instruments are analyzed within the project, such as the Model Treaty on Extradition developed by UN, Model Treaty on Mutual Assistance in Criminal Matters developed by the UN, United Nations Convention against Transnational Organized Crime as well as the Rome Statute of the ICC.

Conclusively, this study argues that extradition and MLA are vital mechanisms within International criminal justice that rely, for their effectiveness, on State cooperation. The project recommends that countries increase multilateral cooperation among themselves, have highly efficient central authorities to perform tasks as per both MLA and extradition rules and rely on technology to facilitate information exchange and respect human rights principles.

KEYWORDS: MLA (MUTUAL LEGAL ASSISTANCE), UNODC (United Nations Office on Drugs and Crime), ICC (International Criminal Law), UNCAC (United Nations Convention against Corruption)

1. INTRODUCTION:

International criminal law intends to protect persons from, and penalize, those crimes that are so serious they are of international concern, i.e., genocide, crimes against humanity, crimes of aggression, and war

crimes. Nevertheless, the prosecution of such international crimes is hampered by the purely territorial nature of criminal jurisdiction.

An accused of an international or transnational crime may not only try to escape State prosecution by fleeing to a third State before arrest but also important evidence necessary to secure a conviction in the prosecuting State could be found on a third State's territory; witnesses may live in another State, the accounts might be held by a banking institution in foreign countries, communication data is held by servers in different countries and so on.

A nation's national jurisdiction alone does not normally extend to and over an 'exercise of coercion' beyond the nation's own territory, and such exercise may usually take place outside territory without an individual's consent of the involved State or states. Thus there is a strong necessity for international co-operation.

There are two major ways that this problem is addressed, extradition and MLA; extradition is mainly applicable to convicted offenders and accused persons and it generally requires the delivering state to "surrender" suspects to a prosecuting state and MLA on the other hand "is aimed at the acquisition of evidence and other types of judicial assistance crossing the national boundaries," and UNODC¹, for example, stresses that treaties and other bilaterally, bilaterally and multilaterally are important juridical bases for such international legal assistance.

²The Model treaty on extradition adopted by The United Nations General Assembly in 1990 outlines the parameters within which the states negotiating bilateral extradition agreements should proceed and the United Nations Model treaty on mutual assistance in criminal matters provides similar guidance for bilateral judicial assistance in criminal matters³. The recent rise of transnational criminal activity implies the increased importance of these mechanism since they are not merely procedural tools, but represent a means by which states are committed not to provide impunity.

2. LITERATURE SURVEY

A survey of the relevant literature reveals that Extradition and Mutual Legal Assistance (MLA) under International Criminal Law is understood as a system where the international community collectively uses extradition and MLA as a means to prevent offenders from escaping justice across sovereign borders. Extradition and MLA are discussed from a variety of perspectives including those of sovereignty, criminal justice and due process, human rights and effective enforcement.

One key work by M. Cherif Bassiouni on international extradition delineates the rationale for extradition and how it functions as a vital mechanism of cooperation between States. Bassiouni analyzes important concepts associated with extradition such as dual criminality and the speciality principle of extradition, reciprocity and the political offense exception, concluding that extradition's reliance on bilateral agreements and municipal law reflects an ongoing dynamic between State sovereignty and its desire to tackle crime.

¹ U.N. Off. on Drugs & Crime, *Manual on Mutual Legal Assistance and Extradition* 3–4 (2012), https://sherloc.unodc.org/cld/en/bibliography/2012/manual_on_mutual_legal_assistance_and_extradition.html.

² G.A. Res. 45/116, *Model Treaty on Extradition* (Dec. 14, 1990), <https://digitallibrary.un.org/record/105573?ln=en&v=pdf>.

³ G.A. Res. 45/117, *Model Treaty on Mutual Assistance in Criminal Matters* (Dec. 14, 1990).

United Nations Model Treaties on Extradition and Mutual Legal Assistance in Criminal Matters represent the concerted efforts of the international community to create framework agreements for States and are indicative of the global trends towards harmonized international cooperation and MLA. Both documents delineate detailed provisions for the process of extradition and the requests for MLA. The United Nations Model Treaty on Extradition, among other aspects, discusses extraditable offences, extraditable grounds for refusal, dual criminality, speciality and surrender procedures.

Furthermore, it touches upon some related grounds for refusal and additional issues concerning surrender of fugitives.

In the latter, they focus on obtaining evidence, serving of documents, searches and seizures and judicial assistance during criminal investigations and proceedings.

The United Nations Manual on Mutual Legal Assistance and Extradition provides a practical explanation and guidance for practitioners, including Prosecutors, investigators and members of relevant central authorities, on the use and application of extradition and MLA and their effective operation in practice is seen not solely in its reliance on treaties, but also in efficient processing of international requests through an integrated national legal framework. Literature relevant to the limits of international cooperation in practice often finds relevance here.

In addition to that, the literature has addressed and highlighted the relevance of human rights considerations to modern extradition. The landmark case of *Soering v. United Kingdom* established that extradition could even breach human rights standards of receiving states when there is substantial ground to believe that a serious risk of inhuman or degrading treatment will occur). As a response, modern extradition law has witnessed an emergence of important exceptions on due cooperation in criminal matters between States and relevant human rights instruments.

The ICC Rome Statute adds another layer of inquiry. ICC surrender operates on entirely different grounds than traditional State to State extradition and extradition may not fully fit its purpose regarding arresting of indictees and handing them to the court). Scholarship addressing the ICC reveals its complete dependence on cooperation from States due to its lack of an independent international police force and international judicial assistance is critical at every juncture of the criminal proceedings.

Finally, the newest research frontiers cover issues of electronic evidence and cyber crime whereby the traditional, slow procedure of MLA is proving inadequate to counter rapidly shifting information and there is thus an impetus to modify and advance existing frameworks for international cooperation. It can be concluded from the foregoing that MLA and Extradition function as complimentary systems of international criminal justice. However there appears to be an enormous research vacuum regarding how these tools may be harmonized in practice and yet at the same time cater to the competing concerns of State sovereignty, human rights standards as well as ICC assistance provisions and newly arising challenges like evidence based crimes and cyber crime. This project aims at filling in this research gap using a combined legal and comparative approach.

3. CONCEPT AND NATURE OF EXTRADITION

Extradition can be said as the official process where one State surrenders an offender to another State for the purpose of criminal prosecution and punishment.

The nature of extradition process is governed by Treaties Convention and domestic law. The United Nations Model Treaty on Extradition was introduced, in order to create guidance for every State so that they will

enter bilateral extradition treaties⁴,
for example

It must be said that, extradition must be separated and distinguished from Deportation and Expulsion in order to have proper distinction between the nature of each extradition. Extradition concerns directly with criminal process whereas the latter concerns territorial control and immigration control.

The purpose of extradition is to remove the chance to avoid criminal responsibility by any chance, for instance by leaving international frontiers.

4. Extradition Legal Principles

A. Principle of Dual Criminality

Dual criminality is normally the requirement that the crime for which extradition is sought is a criminal offence in both the requesting State and the requested State. Dual criminality protects the requested State from obliging to surrender an individual, as regards conduct which it does not consider criminal. Many current treaties provide for a more flexible approach by focusing on conduct rather than names of offences.

B. Principle of Speciality

This principle prescribes that where an individual is extradited to stand trial for a specific offense he should usually be proceeded against for that offense only. In other words, this principle does not allow a requesting State to acquire physical possession over a person for the purpose of prosecuting him or her for offenses that are other than those upon which extradition was predicated.

C. Ne Bis in Idem

It stipulates that a person may not be extradited if he or she has already been finally convicted and sentenced for or acquitted of the offense for which extradition is sought. It is generally considered that this follows from the principles of double jeopardy.

D. Political-Offence Exception

International law traditionally provides an exception for 'political offenses'. Historically the State considered that it was inappropriate to extradite an individual for offenses committed on political grounds. This has more recently been considerably limited especially in cases dealing with grave international/transnational crime such as terrorism and crimes involving physical violence against an individual or crimes falling into similar categories.

E. Principle of Reciprocity

This enhances the cooperation between two countries by making them aware of the assistance that shall be granted under specific circumstances should both States be required to extradite one another over the years.

5. HUMAN RIGHTS AND EXTRADITION

Extradition is not unlimited. Modern international law requires States to consider the fundamental rights of the person whose surrender is requested.

One of the leading authorities is **Soering v. United Kingdom**. In that case, the European Court of Human Rights held that extradition could engage the responsibility of the requested State where there were

⁴ G.A. Res. 45/116, supra note 2.

substantial grounds for believing that the individual would face treatment contrary to Article 3 of the European Convention on Human Rights.⁵

The principle emerging from *Soering* is that a State cannot necessarily avoid responsibility for human-rights violations simply by transferring a person to another State.

Human-rights considerations may therefore arise where there is a substantial risk of:

- Torture;
- Inhuman or degrading treatment;
- Arbitrary detention;
- Denial of a fair trial;
- Discriminatory prosecution; or
- The death penalty, depending upon the applicable legal framework.

This demonstrates the need to balance **international criminal accountability with protection of individual rights**.

6. MUTUAL LEGAL ASSISTANCE

This process is a formal one which states use to assist each other in carrying out criminal investigations and proceedings.

MLA doesn't involve surrendering an individual, unlike the process of extradition. Instead it allows authorities in one state to retrieve assistance from other state authorities.

In line with material from the UNODC sources such assistance can range from: evidence gathering, interviewing witnesses to document verification; location of witnesses; service of documents; search and seizure; acquisition of criminal records; and various forms of judicial assistance⁶.

By way of assistance countries may use the Model Treaty on Mutual Legal Assistance in Criminal Matters⁷.

7. TYPES OF MUTUAL LEGAL ASSISTANCE

MLA may involve:

a) Taking of Evidence

The requested state can take the testimony of a witness or the examination of other evidence for use in a criminal proceeding.

b) Search and Seizure

A requested state can apply search and seizure upon request of a foreign State, in accordance with domestic law.

c) Acquisition of documents

A State may have documents such as banking, corporate, government records acquired from other States.

d) Identification of persons

Mutual legal assistance may be used in tracing witnesses, perpetrators, or other persons identified as having significance in a particular investigation.

e) Service of process

Official judicial documents may be served on individuals abroad.

⁵ *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) at 35–36 (1989).

⁶ U.N. Off. on Drugs & Crime, *supra* note 1.

⁷ G.A. Res. 45/117, *supra* note 3.

f) Transfer of evidence

The evidence acquired under MLA may be forwarded to the requesting State in conformity with the applicable law.

g) Financial Investigations

An MLA process can be utilized to investigate the traces of bank accounts, financial and financial assets tied to crime.

The UNODC Model Law on Mutual Assistance in Criminal Matters, developed to help States enacting, reform their own MLA legislation⁸.

LEGAL BASES FOR MLA

MLA could operate through:

- Bilateral treaties;
- Multilateral conventions;
- Regional conventions;
- Domestic legislation;
- Reciprocity; and

Other international mechanisms.

The UN Convention against Transnational Organized Crime UNTOC is a valuable multilateral instrument which lays down various mechanisms for international cooperation in criminal matters. The Article 18 addresses MLA⁹.

The UN Convention against Corruption UNCAC is also an important convention and provides for mechanisms for international cooperation in criminal matters.

Through instruments like above one notices the movement away from bilateral modes of cooperation.

8. EXTRADITION AND MLA: A COMPARATIVE ANALYSIS

Basis	Extradition	Mutual Legal Assistance
Main purpose	Surrender of a person	Assistance in investigation/prosecution
Main subject	Accused or convicted person	Evidence, documents, witnesses and judicial acts
Result	Transfer of custody	Transfer/obtaining of evidence or assistance
Legal basis	Extradition treaty/statute	MLA treaty/convention/statute
Key principles	Dual criminality, speciality, human rights	Legality, relevance, procedural safeguards
Typical use	Fugitive prosecution	Cross-border investigation

Thus, extradition and MLA are **complementary rather than competing mechanisms**.

⁸ U.N. Off. on Drugs & Crime, *Model Law on Mutual Assistance in Criminal Matters*(2007),https://sherloc.unodc.org/cld/en/bibliography/2007/model_law_on_mutual_assistance_in_criminal_matters_.html.

⁹ United Nations Convention Against Transnational Organized Crime art. 18, Nov. 15, 2000, 2225 U.N.T.S. 209.

For example, if a person accused of an international crime escapes from State A to State B, State A may request extradition to obtain custody of the accused. At the same time, it may send an MLA request to State B to obtain bank records or witness evidence located there.

9. EXTRADITION AND THE INTERNATIONAL CRIMINAL COURT

It is essential to differentiate between extradition and the surrender of an individual to the International Criminal Court.

When reference is made to the transfer of an individual from one State to another by the Court, this practice is generally termed "surrender".

Article 89 sets forth that: "The Court may transmit a request for the arrest and surrender of a person to the State in which that person is found, and the States Parties shall comply with the request in accordance with the present Statute and the relevant laws and procedures of that State."¹⁰

Article 90 of the Rome Statute also lays down principles concerning cases of multiple requests where there is extradition to a third country as well as surrender to the ICC¹¹.

This difference in wording is significant in law, because, in the traditional sense, extradition takes place between one state and another, whereas surrender involves a State and the supra-national judicial institution (the court).

10. IMPORTANT CASE LAW

a. *Soering v. United Kingdom*

Soering is a leading authority on the relationship between extradition and human rights. The Court recognised that extradition may be prohibited where there is a real risk of treatment contrary to fundamental human-rights standards.¹²

The case established an important safeguard against the unrestricted transfer of persons between States.

b. *United States v. Alvarez-Machain*

In ***United States v. Alvarez-Machain***, the United States Supreme Court considered the forcible abduction of an accused from Mexico and whether the circumstances of his apprehension deprived the U.S. courts of jurisdiction.¹³

The case demonstrates the complex relationship between territorial sovereignty, criminal jurisdiction and cross-border enforcement.

However, forcible abduction should not be confused with ordinary treaty-based extradition. Extradition involves a formal process of inter-State cooperation.

CHALLENGES TO EXTRADITION AND MLA

A. State Sovereignty

States remain protective of their territorial sovereignty. They may therefore be reluctant to surrender individuals or permit foreign authorities to obtain evidence within their territory.

¹⁰ Rome Statute of the International Criminal Court art. 89, July 17, 1998, 2187 U.N.T.S. 90.

¹¹ Id. art. 90.

¹² *Soering*, 161 Eur. Ct. H.R. (ser. A) at 35–36.

¹³ *United States v. Alvarez-Machain*, 504 U.S. 655, 657–70 (1992)

B. Differences Between Legal Systems

Common-law and civil-law systems may have different rules concerning admissibility of evidence, searches, warrants and investigative procedures.

C. Human Rights

States must balance the objective of prosecution with the protection of fundamental rights.

D. Political Considerations

Extradition may become controversial where the accused is politically influential or where the requesting State's criminal justice system is perceived as politically motivated.

E. Procedural Delays

Requests can take considerable time because they may require translation, authentication, judicial approval and review by central authorities.

F. Digital Evidence

Modern criminal investigations increasingly depend upon electronic evidence stored across borders. Traditional MLA procedures may be too slow for rapidly changing digital information.

UNODC has developed tools intended to assist practitioners in drafting and transmitting international cooperation requests, reflecting the growing importance of efficient cross-border evidence gathering.¹⁴

11. PERSONAL OPINIONS AND FINDINGS

We came across several important findings.

- a) First, extradition is an essential mechanism for preventing accused persons from escaping prosecution by crossing international borders.
- b) Second, MLA is equally important because successful criminal prosecution depends upon evidence. Even if an accused person is arrested, a prosecution may fail if witnesses, financial records or other evidence cannot be obtained lawfully from abroad.
- c) Third, international cooperation is increasingly based upon multilateral conventions rather than exclusively bilateral arrangements.
- d) Fourth, human-rights principles have become an important limitation upon extradition. International cooperation must not become a mechanism for transferring persons into situations involving serious violations of fundamental rights.
- e) Fifth, ICC surrender is distinct from ordinary extradition. The former is governed by the Rome Statute and concerns surrender to an international court.
- f) Finally, the effectiveness of both mechanisms ultimately depends upon State cooperation and effective domestic implementation.

12. CONCLUSION:

Extradition and MLA both exist as cornerstones in providing the legal framework of international cooperation in criminal justice matters. The international reality that we are confronted with, should not see borders as sanctuaries where fugitives may go to escape justice, or as an impenetrable obstacle in locating required evidence and judicial assistance.

Extradition deals with fugitive offender through allowing the receiving state the surrender of an individual either wanted or convicted by the requesting state. MLA deals with evidence and assistance through

¹⁴ U.N. Off. on Drugs & Crime, *supra* note 1.

providing mechanisms by which States can work with each other in order to conduct an investigation or prosecute offenders.

As with all forms of international cooperation there are limits; these include the doctrine of dual criminality, the principle of ne bis in idem, human rights protection, sovereignty and the principle of specificity. It can be seen in international conventions that contemporary extradition law is aimed at reconciling accountability with the protection of human rights.

Further testament to the dynamic of international cooperation in criminal justice affairs is illustrated by the Rome Statute which established its own scheme for individual surrender to the court itself. Article 89 demands that all State Parties provide all legal and judicial assistance for the requested arrest of an individual pursuant to the Statute¹⁵.

Overall, this project establishes the conclusion that a framework of international criminal justice may not exist without the establishment of international co-operation; through extraditions it may become feasible to bring persons to justice. Through mutual legal assistance courts can obtain evidence abroad; through due process the rule of law can prevail. The existence of such a robust future lies in continued, though not unrestricted cooperation.

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¹⁵ Rome Statute, supra note 11, art. 89.