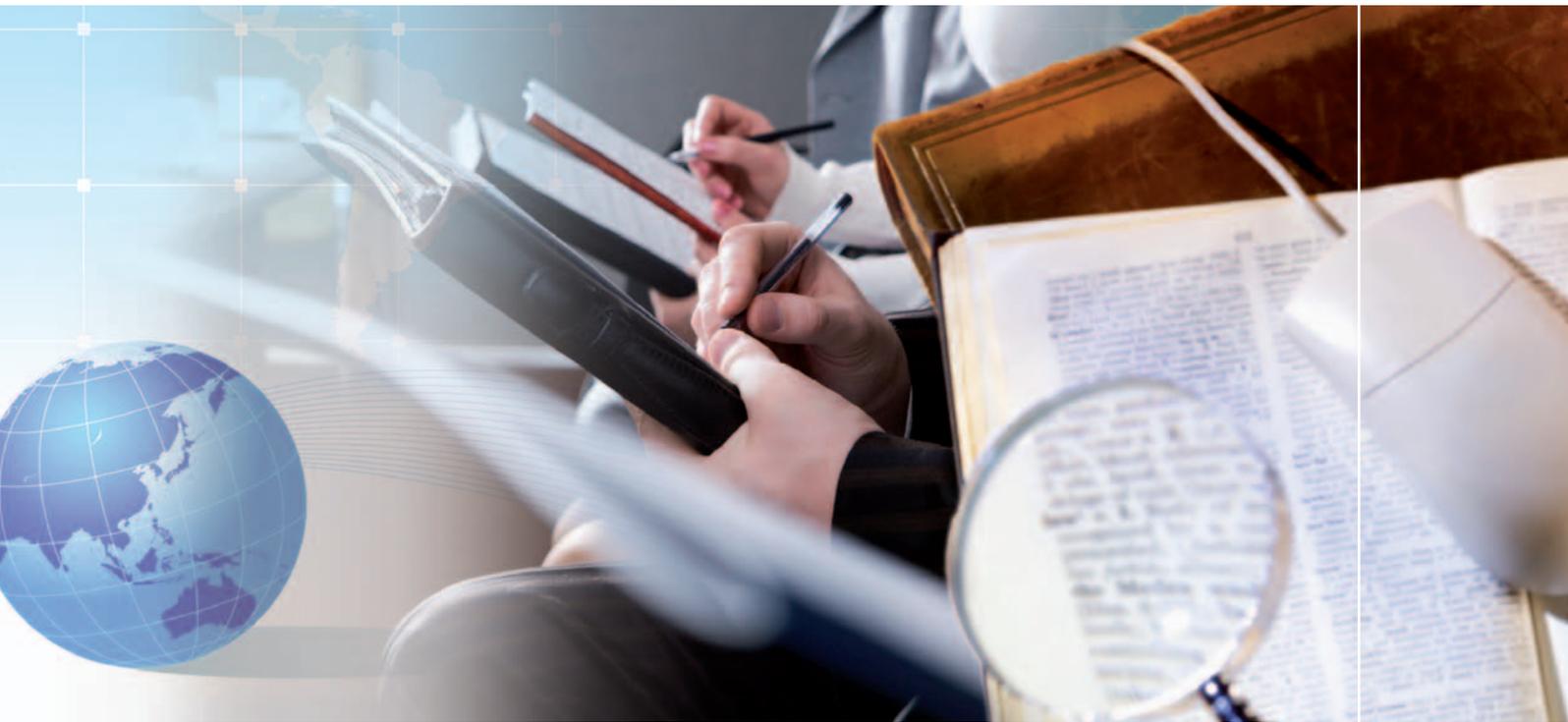




UNODC

United Nations Office on Drugs and Crime



3

International cooperation in criminal matters: counter-terrorism

COUNTER TERRORISM
LEGAL TRAINING CURRICULUM

Module 3

International cooperation in criminal matters: counter-terrorism

The module is divided into several sections and subsections to give trainers the flexibility to pick and choose items corresponding to specific needs, without necessarily having to complete all the items under a given module. In addition to general training on international cooperation in criminal matters related to terrorism, specific training can also be given, with an exclusive focus, for example, on extradition or mutual legal assistance, or on how to draft applications or collaborate with a country that has a different legal system.

Table of contents

	<i>Page</i>
Index of training tools	vi
Introduction	1
1. International cooperation in criminal matters: counter-terrorism — context and overview	3
1.1. Introduction to international cooperation in criminal matters	3
1.1.1. Why international cooperation? The transnational nature of crime	3
1.1.2. Forms of international cooperation in criminal matters	4
1.1.3. Extradition and mutual legal assistance in criminal matters: the principal tools of the “indirect enforcement system”	4
1.2. International cooperation and the universal legal framework against terrorism	6
1.2.1. Obligations arising from the Security Council resolutions regarding counter-terrorism	6
1.2.2. Tools provided by the universal counter-terrorism conventions and protocols	9
1.2.3. Interplay with bilateral and multilateral instruments	26
1.3. International cooperation during periods of armed conflict	28
2. Extradition	35
2.1. What is extradition?	35
2.1.1. Introduction: concept and general considerations	35
2.1.2. Extradition procedure: overview and comparative aspects	35
2.2. Legal bases for extradition	45
2.2.1. The treaties	45
2.2.2. Agreement based on reciprocity and comity	48
2.3. Extradition conditions	52
2.3.1. Conditions relating to the individual	52
2.3.2. Conditions relating to the facts	54
2.3.3. Conditions relating to punishment	58
2.3.4. Conditions relating to competence	61
2.3.5. Conditions relating to procedure	62
2.4. Forms of surrender used as alternatives to extradition	72
2.4.1. Abduction and illegal capture	74
2.4.2. Use of lures	77
2.4.3. Disguised extradition	78
3. Mutual legal assistance in criminal cases	81

3.1. What is mutual legal assistance?	81
3.1.1. Introduction: concept and background	81
3.1.2. Mutual legal assistance procedure: overview and comparative aspects	82
3.2. The main forms of mutual legal assistance	89
3.3. The legal bases for mutual legal assistance	93
3.3.1. The treaties	93
3.3.2. Agreement based on reciprocity and comity	94
3.4. Conditions applicable to mutual legal assistance	96
3.4.1. Conditions similar to those applicable to extradition	97
3.4.2. Conditions specific to mutual legal assistance	99
4. Other arrangements for international cooperation in criminal matters	105
4.1. Transfer of criminal proceedings	105
4.2. Execution of foreign sentences: the transfer of sentenced persons	106
4.3. Recognition of foreign criminal judgements	106
4.4. Confiscation of the proceeds of crime	106
4.5. The gathering and exchange of information between intelligence and law enforcement agencies	107
4.6. Regional and subregional judicial mechanisms	108
4.7. Access to justice	109
5. Challenges to and practical guidance for effective cooperation in criminal matters	115
5.1. Drafting laws and treaties on extradition and mutual legal assistance	115
5.2. Drafting requests for extradition and mutual legal assistance	117
5.2.1. Promoting the establishment and maintenance of contact: national competent authorities and other contact persons and networks	117
5.2.2. Drafting an effective request (content of the request)	119
5.3. Transmitting requests for extradition and mutual legal assistance	121
5.4. Executing requests for extradition and mutual legal assistance	123
5.4.1. Simplifying extradition procedure with surrender by consent	123
5.4.2. Managing concurrent requests	123
5.4.3. Covering the costs of extradition	124
6. Beyond the differences between legal systems towards effective cooperation: interaction between the civil-law and common-law systems	137
6.1. Overview of the world's main legal systems	137
6.2. Comparing civil-law and common-law systems	138

6.2.1. Comparative overview of civil-law and common-law systems: sources of law, legal systems and criminal procedure	138
6.2.2. Practical challenges facing international cooperation in criminal matters	140

Annexes

Samples of the programmes of training events on international counter-terrorism cooperation	149
--	-----

Index of training tools

 Focus boxes	<p>Readers are introduced by a series of boxes to topics of specific interest, providing in-depth background information or illustrative examples and allowing a comparative approach to the subject.</p>
 Interviews	<p>Internet links to filmed interviews with experts have been included as part of a practically-oriented training approach.</p>
 Practical guidance	<p>Frequent practical guidance has been included to encourage trainers to adopt a concrete and practical approach.</p>
 Case studies	<p>These are real and fictitious scenarios designed to aid understanding and stimulate discussion of the legal issues raised in each section and to inject a practical perspective. Some of the case studies straddle several sections of the module, and can either serve as “mini” case studies for working on specific issues or be brought together as a single whole. When using the fictitious case studies, trainers should limit their role to that of moderator, promoting an exchange of views rather than teaching as such. Participants should be encouraged to study the various scenarios with the help of the relevant legal texts.</p>
 Activities	<p>These boxes offer ideas for exploring how the various topics covered in the module are handled or reflected in the legal system and practice of the participants’ countries. Participants are encouraged to apply their skills and share their experience with reference to specific topics. During workshops, trainers may propose an activity to stimulate an initial discussion among participants. Persons studying independently will also be able to use the activity boxes to focus on the practical application of knowledge acquired.</p>

 <p>Assessment questions</p>	<p>There are tests on the topics covered in each section. Unlike the activities, assessment questions tend to require straightforward answers, making them a useful tool for trainers who need to quickly assess the level of knowledge acquired by participants. The assessment typically takes place at the end of a training session, but can also serve as a preliminary tool to identify training needs, delivery methods and the level of competence of participants.</p>
 <p>Tools</p>	<p>This section offers teaching materials to assist criminal justice practitioners. It includes practical guides, manuals, treaties and model laws, databases and sources, for a comparative law perspective. Website links have been added under each tool to enable practitioners to access them with just one click.</p>
 <p>Further reading</p>	<p>A condensed bibliography for trainers aimed at broadening their knowledge on specific legal issues.</p>
 <p>Supplementary material</p>	<p>PowerPoint presentations produced and used by UNODC provide a visual aid to trainers when they give oral presentations on various topics. The presentations are meant to provide inspiration to trainers, but should not be used without being adapted in each case. This type of material also includes copies of actual legal assistance and extradition requests, where available to trainers.</p>
 <p>Reference</p>	<p>There is inevitably a degree of overlap between the modules because the topics under consideration are often interrelated. In some cases, the same topic is examined from different angles in two or more modules. In other words, there are many ways of looking at the same subject. This should not be seen as a drawback, but rather as an asset enabling trainers to arrange tailor-made activities depending on specific training needs. For example, in preparation for a training workshop, the need may arise to cover certain issues more in depth, to analyse them from multiple perspectives, or to examine their connection with others. The symbol, along with links to parts of the same module, is used to inform trainers of the location of information covering the same or connected topics.</p>

Introduction

The transnational dimension of terrorism, a direct result of the increasing mobility of people and goods, is exacerbated by the increasing ease with which information circulates worldwide. In this increasingly interdependent world, no country can tackle terrorism effectively in isolation and cooperation among States to prevent and punish acts of terrorism is therefore of paramount importance. The ability of States to assist each other quickly and efficiently is no longer an optional bonus but an absolute necessity if they are to combat terrorism effectively.

The international counter-terrorism conventions and protocols provide the essential legal tools and mechanisms for national authorities to carry out cross-border investigations and to eliminate safe havens for suspected terrorists. Given its transnational nature, terrorism can no longer be combated solely through bilateral or regional agreements. By definition, international instruments provide all States parties with the legal foundations for judicial cooperation without geographical restrictions.

These treaties focus on international cooperation with regard to criminal justice and are designed to facilitate investigation and prosecution when offences are of an international nature. This does not include additional forms of cooperation in the fight against terrorism, such as the exchange of information in the interests of national security, the identification of crime trends and the study of the scope and nature of terrorist organizations.

Of the various forms of international cooperation in criminal matters that are recognized in States' national practice and doctrine, extradition and mutual legal assistance form the main focus of the treaties.

This module aims to help criminal justice practitioners engaged in counter-terrorism to act more efficiently and swiftly by becoming more familiar with the mechanisms in place for extradition and mutual legal assistance and, in particular, with the tools afforded by the universal conventions and protocols for effective cooperation with foreign counterparts. A further aim is to provide practical guidance for dealing with the challenges posed by international cooperation to criminal justice officers worldwide. These challenges are usually due to the different ways that legal systems are structured and function.

This module expands on a number of topics that are covered in less depth in module 2 (The universal legal framework against terrorism) and also touches on topics covered more extensively in modules 1 (Counter-terrorism in the international law context), 2 and 4 (Counter-terrorism and human rights), 5 (Financing of terrorism), 7 (Aviation-related terrorism), 8 (Maritime terrorism) and 9 (Chemical, biological, radiological and nuclear terrorism).

1. International cooperation in criminal matters: counter-terrorism — context and overview

1.1. Introduction to international cooperation in criminal matters

1.1.1. Why international cooperation? The transnational nature of crime

As a result of technological advances in transport, information technology and telecommunications, which have made the world a single vast global village, crime is no longer a national phenomenon but has taken on a transnational dimension.



What is a transnational offence?

The United Nations Convention against Transnational Organized Crime (article 3) gives a clear definition: *an offence is transnational in nature if:*

- (a) *It is committed in more than one State;*
- (b) *It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State;*
- (c) *It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or*
- (d) *It is committed in one State but has substantial effects in another State.*

Although the universal counter-terrorism conventions and protocols do not contain such a definition, they nevertheless apply only to transnational terrorism offences (see *Example of the scope of application of the treaties*, page 11 of this module).

Because of its transnational nature, terrorism, like all transnational organized crime, poses serious problems for national justice systems. It is the national courts that try perpetrators since there is no international court that is competent to try terrorism cases (unless such cases present elements that constitute crimes for which the International Criminal Court is competent).



See the box *The International Criminal Court: a new tool against terrorism?* in the section of this module on *International cooperation during periods of armed conflict (1.3)*.

It is difficult for criminal justice officers to investigate or institute criminal proceedings against persons suspected of participating in terrorist activities when such persons are outside their territory or where key evidence, witnesses, victims or the proceeds from the crime are located outside the country's jurisdiction, or where the legal and judicial systems with which they must cooperate are different from those of their own country.

However, practitioners cannot realistically work within the confines of national borders. They have no choice but to cooperate with their foreign counterparts in

order to bring the perpetrators of such offences to justice. The effectiveness of the fight against transnational crime depends on close cooperation between States in criminal matters.

1.1.2. Forms of international cooperation in criminal matters

Several interdependent forms of international cooperation in criminal matters can be identified from an analysis of legal practice and doctrine:

- ✓ extradition
- ✓ mutual legal assistance
- ✓ transfer of criminal proceedings
- ✓ execution of foreign sentences
- ✓ recognition of foreign criminal judgements
- ✓ confiscation of the proceeds from crime
- ✓ collection and exchange of information between intelligence and law enforcement services
- ✓ regional and subregional legal forums
- ✓ access to justice.

Of all these types of cooperation, the universal counter-terrorism conventions and protocols focus on extradition and mutual legal assistance. These are also the best-known and most common forms of cooperation in practice. Therefore, although each of these forms of cooperation will be covered in this module, extradition and mutual legal assistance will be considered in greatest depth.

1.1.3. Extradition and mutual legal assistance in criminal matters: the principal tools of the “indirect enforcement system”

The universal counter-terrorism conventions and protocols are enforced through national legal systems, i.e. through what is known as the “indirect enforcement system” of international criminal law.

What does this mean? The universal counter-terrorism conventions and protocols are international standards that are not enforced by an international court or tribunal but by national courts through the applicable national law.

How is this achieved? States parties must first incorporate the obligations arising from these treaties, such as the criminalization of specific acts in national law, so that they can be adapted to the requirements of national law and thus be enforceable. Once incorporated in national law, the international law provisions become enforceable through national legal systems, in accordance with national law. States must also use their national legal procedures to fulfil their obligation of international cooperation under the treaties.

Therefore, since the “indirect enforcement system” of the universal counter-terrorism conventions and protocols operates through the intermediary of national legal systems, the effectiveness of international cooperation shows up the strengths and weaknesses of the different national legal systems.



How do States incorporate the international instruments on terrorism in their national legal systems? The difference between monist and dualist systems

The incorporation of the international terrorism instruments into national legal systems follows the same rules that apply to other branches of international law.

Some States follow a so-called “dualist” approach, whereby international law and national law are considered two separate legal systems and a law is required for the incorporation of each international obligation in national legislation. In “monist” countries, however, the ratification and subsequent publication of a treaty automatically incorporates the provisions of that treaty in national law.

According to article 151 of the Constitution of Burkina Faso, a classic example of a monist State, “international treaties or agreements duly ratified have, from the date of their publication, a superior authority to that of national legislation, pending reciprocity.” Similar provisions are found in the constitutions of many other States.

Unlike dualist States, monist States can, in theory, apply treaty provisions without any other action being required on the part of the executive or legislative branches beyond the publication of the treaty in the country’s official gazette or by any other means of informing the public. For example, articles of the conventions relating to mutual legal assistance and other procedural matters usually already contain all the elements required for them to be immediately implemented by national authorities. Such provisions are considered to be “self-executing”. However, in practice, laws are often necessary, even in monist countries, for implementing the provisions of international treaties that are not self-executing. This is the case, as we shall see in the next section, for provisions governing criminalization.



Activities

- List the main difficulties you encounter, as a practitioner, when the case you are dealing with has a foreign component.
- Does your national legislation provide for all the forms of international cooperation in criminal matters? Have you encountered or used them in practice? Identify the advantages and disadvantages of each of the different forms of cooperation.



Assessment questions

- What is a transnational offence?
- Which are the different forms of international cooperation in criminal matters?
- International law is applied indirectly. What does that mean?



Tools

- The United Nations Convention against Transnational Organized Crime and the additional protocols thereto are available at the following address:
www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf

1.2. International cooperation and the universal legal framework against terrorism

The universal legal framework against terrorism consists of a set of instruments adopted at the global level that contain a series of legally binding standards for States to prevent and counter international terrorism. These instruments take the form of United Nations Security Council resolutions and treaties that have been developed by the international community over several years.



See module 2 which focuses exclusively on the study of the *universal legal framework against terrorism*. It contains a detailed analysis of the Security Council resolutions and the universal counter-terrorism conventions and protocols and provides various training tools (case studies, activities, tools, assessment questions).

1.2.1. Obligations arising from the Security Council resolutions regarding counter-terrorism

In its resolutions 1373 (2001) and 1566 (2004), the Security Council made cooperation in the area of criminal justice one of the key counter-terrorism strategies for States.

Although not all of the forms of cooperation in criminal matters are referred to explicitly, they constitute, in resolution 1566, a request to States to cooperate in bringing to justice all persons involved in financing, planning, preparing or committing acts of terrorism and, in resolution 1373, an obligation to afford one another the greatest measure of assistance in criminal investigations. Resolution 1373 also mentions the exchange of intelligence and operational information and cooperation under bilateral and multilateral agreements and arrangements aimed at preventing and suppressing acts of terrorism.



Key provisions on international cooperation in criminal matters in the Security Council resolutions

Resolution 1373 (2001)

2. Decides [...] that all States shall:

(f) Afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support

of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings;

3. Calls upon all States to:

(b) [...] Cooperate on administrative and judicial matters to prevent the commission of terrorist acts;

(c) Cooperate, particularly through bilateral and multilateral arrangements and agreements, to prevent and suppress terrorist attacks and take action against perpetrators of such acts;

(e) Increase cooperation and fully implement the relevant international conventions and protocols relating to terrorism [...];

(g) Ensure, in conformity with international law, [...] that claims of political motivation are not recognized as grounds for refusing requests for the extradition of alleged terrorists.

Resolution 1566 (2004)

2. Calls upon States to cooperate fully in the fight against terrorism, especially with those States where or against whose citizens terrorist acts are committed, in accordance with their obligations under international law, in order to find, deny safe haven and bring to justice, on the basis of the principle *to extradite or prosecute*, any person who supports, facilitates, participates or attempts to participate in the financing, planning, preparation or commission of terrorist acts or who provides safe havens.



Activities

- Resolution 1373 (2001) was adopted under Chapter VII of the Charter of the United Nations. What are the legal effects of such adoption? The terminology of the operative paragraphs varies, using different terms — “decides”, “calls upon” and “declares” — to introduce different paragraphs. Compare the different terms and discuss their possible effects on the binding force of each paragraph.
- Resolution 1373 (2001) decides that States shall afford one another the greatest measure of assistance “in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts.”
 - Do you think that this requirement is limited to offences relating to the financing of terrorist acts and material support? Discuss.
 - Since each Member State is required to provide mutual legal assistance, do you think this resolution can serve as a legal basis for your request for mutual legal assistance? Discuss.
- Resolution 1373 (2001) refers to acts of terrorism but does not define such acts explicitly. Why do you think it does not define them and what are the advantages and disadvantages of such an approach in terms of international cooperation?

- Are the areas of international cooperation in criminal matters identified by the resolution also reflected in the Global Counter-Terrorism Strategy? Compare the provisions of the two instruments.



Assessment questions

- According to the Charter of the United Nations, what are the legal consequences of violation by a Member State of Security Council resolution 1373 (2001)?
- What do resolutions 1373 (2001) and 1566 (2004) provide in terms of international cooperation in criminal matters?
- Which are the other Security Council resolutions on counter-terrorism?



Tools

- All the Security Council resolutions on counter-terrorism are available at the following address: www.un.org/documents/scres.htm%20
- The Global Counter-Terrorism Strategy is available at the following address: www.un.org/terrorism/strategy-counter-terrorism.shtml
- The Charter of the United Nations is available at the following address: www.un.org/en/documents/charter/index.shtml
- Counter-Terrorism Committee policy guidance on international cooperation (S/AC.40/2010/NOTE.99/Add.3) is available at: www.un.org/en/sc/ctc/docs/policypapers/policy_intlcooperation.pdf



Further reading

- Bianchi, Andrea. Security Council's anti-terror resolutions and their implementation by Member States. *Journal of International Criminal Justice*, vol. 4, No. 5 (2006), pp. 1044-1073.
- Cheng Yan Ki, Bonnie. Implementing Security Council resolutions in Hong Kong: an examination of the United Nations sanctions ordinance. *Chinese Journal of International Law*, vol. 7, No. 1 (2008), pp. 65-98.
- De Jonge Oudraat, Chantal. The role of the Security Council. In *Terrorism and the UN: Before and After September 11*, Jane Boulden and Thomas G. Weiss, eds. Bloomington, Indiana: Indiana University Press, 2004, pp. 151-172.
- Fassbender, Bardo. The United Nations Security Council and international terrorism. In *Enforcing International Law Norms Against Terrorism*, Andrea Bianchi, ed. Oxford: Hart Publishing, 2004, pp. 83-102.

- Sambei, Arvinder, Anton Du Plessis, and Martin Polaine. The United Nations counter-terrorism instruments. In *Counter-Terrorism Law and Practice: An International Handbook*. Oxford: Oxford University Press, 2009, pp. 17-83.
- Simma, Bruno, and others, eds. *The Charter of the United Nations: A Commentary*, 2nd ed., vol. I. Oxford: Oxford University Press, 2002.

1.2.2. Tools provided by the universal counter-terrorism conventions and protocols

The “universal counter-terrorism conventions and protocols” are a set of 18 treaties that have been adopted over a period of more than 40 years, from 1963 to 2010, and have been recognized as permitting the prevention and suppression of international terrorism. These treaties follow a “sectoral” approach to terrorism in that each covers different specific offences. The sectoral approach is a direct result of the complex and politically delicate task of defining terrorism in a single, legally binding and internationally accepted instrument.



In addition to module 2 (Universal legal framework against terrorism), see also modules 5 (Financing of terrorism), 7 (Aviation-related terrorism) and 8 (Maritime terrorism), which provide in-depth analyses of various topics together with a wide array of training tools (case studies, activities, tools and assessment questions).



Which are the 18 counter-terrorism treaties?

1. Convention on Offences and Certain Other Acts Committed on Board Aircraft (1963)
2. Convention for the Suppression of Unlawful Seizure of Aircraft (1970)
3. Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971)
4. Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (1973)
5. International Convention against the Taking of Hostages (1979)
6. Convention on the Physical Protection of Nuclear Material (1979)
7. Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation (1988)
8. Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (1988)
9. Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (1988)
10. Convention on the Marking of Plastic Explosives for the Purpose of Detection (1991)

11. International Convention for the Suppression of Terrorist Bombings (1997)
12. International Convention for the Suppression of the Financing of Terrorism (1999)
13. International Convention for the Suppression of Acts of Nuclear Terrorism (2005)
14. Amendment to the Convention on the Physical Protection of Nuclear Material (2005)
15. Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (2005)
16. Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (2005)
17. Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation (2010)
18. Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft (2010)



What do the two new universal counter-terrorism instruments provide?

At the International Conference on Air Law, which took place in Beijing from 30 August to 10 September 2010, there were adopted two new instruments that modified three of the then sixteen universal counter-terrorism conventions and protocols.

- The **Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation of 2010** combines the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 1971 and the supplementary Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation of 1988, while also adding new offences and criminal responsibilities, as well as new procedural provisions that were already contained in the most recent counter-terrorism instruments. This new Convention does not replace the 1971 and 1988 instruments, except between States Parties.
- **The Protocol of 2010** amends the Convention for the Suppression of Unlawful Seizure of Aircraft of 1970, again by adding new offences and procedural provisions.

Important points regarding the new procedural provisions governing international cooperation in criminal matters include the obligatory establishment of jurisdiction based on the nationality of the offender, respect for fair treatment, the elimination of the exception of political offences and the anti-discrimination clause.

The treaties only apply when the offence is transnational, i.e. where it includes a foreign element, for example where the alleged perpetrator of the offence is not a national of the State in which the offence was committed. This condition is a direct

consequence of the aim of the treaties: to facilitate cooperation between States. If the commission of a terrorist act is purely national in scope, without international involvement, the treaties do not apply.



Example of the scope of application of the treaties — article 3 of the International Convention for the Suppression of Terrorist Bombings

This Convention shall not apply where the offence is committed within a single State, the alleged offender and the victims are nationals of that State, the alleged offender is found in the territory of that State and no other State has a basis under [...] this Convention to exercise jurisdiction, except that the provisions of articles 10 to 15 [relating to extradition and mutual legal assistance] shall, as appropriate, apply in those cases.

1.2.2.1. *Offences*

One of the key provisions in all save two of the counter-terrorism conventions and protocols is the requirement that States parties incorporate certain criminal offences in their national law.

Doing so enables States parties to harmonize their criminal legislation with one another and provides them with a common language for international cooperation. The introduction of the offences provided for in the treaties into the national law of States parties makes it possible to identify similar offences in each of the States parties and thus to avoid obstacles due to the absence of dual criminality.



What is the principle of dual criminality?

The principle of dual criminality is a criterion that is not provided for in the universal counter-terrorism conventions and protocols but is provided for by the majority of reciprocity laws and regimes related to extradition and mutual legal assistance. If this criterion is not satisfied, extradition or mutual legal assistance may be unsuccessful.

This principle requires the offence to be criminalized in a comparable way in the requesting State and the requested State. Even if the two legal systems do not name, define or classify the act in the same way, dual criminality must also be considered to be satisfied if the judge finds that the act in question would be punishable if it had been committed in the territory of his or her country (see 2.3.2.1. on dual criminality with respect for extradition and 3.4.1.1. on dual criminality with respect for mutual legal assistance).



Activities

- Can your country extradite a person suspected of having committed a terrorist bombing attack if the offence does not exist in your laws?
- Identify the different offences in your national legislation that facilitate the fight against terrorism. Compare these with the offences the universal

counter-terrorism conventions and protocols. If these offences were part of the legislation of a country that applied to you with an extradition request, would there be a problem of dual criminality that could be an obstacle to extradition?

- With regard to international cooperation in criminal matters, what are the advantages and disadvantages of having a sectoral approach to terrorism and of not having a definition of terrorism in a universal convention?



Assessment questions

- Do the universal counter-terrorism instruments contain a definition of what constitutes an act of terrorism and do they state a requirement for it to be criminalized?
- How do the universal counter-terrorism instruments deal with the question of sentences?
- Is the perpetrator's intention to intimidate a population or force a government to carry out or refrain from carrying out certain acts one of the essential elements laid down in the universal counter-terrorism instruments?
- How is the offence of financing terrorism linked to the offences referred to in the counter-terrorism instruments?
- In the interests of international cooperation, why is it necessary to accurately incorporate the offences described in the treaties in national criminal law?



Tools

- All the universal counter-terrorism instruments are available at the following address:
www.unodc.org/tldb/en/universal_instruments_list_NEW.html
- The Guide for the Legislative Incorporation and Implementation of the Universal Anti-Terrorism Instruments, which defines each of the offences, is available at the following address:
www.unodc.org/unodc/en/terrorism/technical-assistance-tools.html
- The database of the Terrorism Prevention Branch of UNODC, which is a collection of the criminal legislation of more than 140 countries and can be consulted, inter alia, to check respect for the principle of dual criminality, is available at the following address:
www.unodc.org/tldb/

1.2.2.2. Cases of jurisdiction and the principle of aut dedere aut iudicare (extradite or prosecute)

Once the acts described in the universal conventions and protocols have been criminalized as offences within the national legislation of each State, it must still be determined which State must bring legal proceedings against the alleged perpetrators of the offence. Each State has an obligation to establish the scope of its

jurisdiction with respect to the acts of terrorism. The direct aim of the universal conventions and protocols is to ensure that as many States parties as possible have jurisdiction to prosecute in order to prevent the creation of safe havens for alleged terrorists.

How should States establish jurisdiction?

- Generally, when an offence covered by these instruments is committed within one State, that State is normally responsible for prosecuting the perpetrator. This type of jurisdiction is based on the “*territoriality principle*”, so called because it means that States cannot tolerate their territory being used for criminal purposes. Therefore, when treaties require that States Parties exercise jurisdiction for offences committed on their territory, States already do this in practice. They must also, as an “extension” of the territoriality principle, prosecute the perpetrators of offences committed on vessels flying the flag of that State or aircraft registered in accordance with the laws of that State.
- The conventions and protocols go further than the territoriality principle and request that States are able to prosecute certain offences committed outside their territory, for example offences committed by their own nationals, regardless of the place of commission. This type of jurisdiction is based on the “*active nationality principle*” which is applicable in civil-law countries but less frequently applied in common-law countries. This difference may be explained by the fact that many civil-law countries, unlike common-law countries, cannot extradite their nationals and therefore, to compensate, extend the scope of application of criminal law to cover offences committed abroad by their nationals.
- The treaties also cover a number of other required and optional grounds, such as the *passive nationality principle*, according to which States have jurisdiction over offences committed abroad against their nationals.



See the UNODC *Guide for the Legislative Incorporation and Implementation of the Universal Anti-Terrorism Instruments* and the UNODC *Model Legislative Provisions Against Terrorism*, which detail all the required and optional grounds for jurisdiction.

- The treaties also thus adopt part of the system of *universal jurisdiction* in the sense that a State is bound to exercise jurisdiction in cases where the perpetrator of the offence is found within the territory of that State and is not extradited, in accordance with the *aut dedere aut iudicare* principle.



The aut dedere aut iudicare principle in the universal counter-terrorism conventions and protocols and Security Council resolutions

Article 8 of the International Convention for the Suppression of Terrorist Bombings (1997):

The State Party in the territory of which the alleged offender is present shall, [...] if it does not extradite that person, be obliged, without exception whatsoever and

whether or not the offence was committed in its territory, to submit the case without undue delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State.

Security Council resolution 1373 (2001) is generally understood to incorporate the *aut dedere aut iudicare* principle in subparagraph 2(e), which states that States shall “Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice [...]” This principle is also indirectly recognized in subparagraph 3(d), which calls upon States to “Become parties as soon as possible to the relevant international conventions and protocols relating to terrorism [...]”

Subsequent Security Council resolutions are more explicit, in particular, resolutions 1456 (2003), 1566 (2004) and 1963 (2010) specify that the requirement to bring terrorists to justice shall be carried out through the application of the *aut dedere aut iudicare* principle.

The scope of this principle can be better understood by breaking it down into its various parts:

- ***A decision not to extradite***: This is the prerequisite triggering the obligation of the State party to submit the case for domestic prosecution.
- ***Submission for prosecution***: Sometimes an overly literal reading of the *aut dedere aut iudicare* principle can give the impression that if a State decides not to extradite an alleged offender, it must prosecute him or her. Actually, under the universal counter-terrorism conventions and protocols, the requirement is not to prosecute but to determine whether or not, in light of the facts and circumstances, prosecution should be brought. The imposition of the prosecution of suspected terrorists would constitute a breach of what many countries consider to be the cornerstone of their criminal justice system: the principle of discretionary prosecution by which the competent authorities have the power to decide whether or not a case should be tried before the courts. The constitutional law and substantive and procedural rules of the country concerned will determine to what extent the prosecution must be carried out.
- ***Without exception whatsoever***: This condition can be interpreted in different ways. One interpretation is that the words eliminate the traditional public order exception to international cooperation. Under that exception, a State would not be required to render cooperation in a matter that would undermine its domestic stability by causing public disturbance or upsetting public morale. In the context of terrorism, that might equate to the refusal of cooperation for fear that a terrorist group would retaliate against the requested State’s nationals or national interests if it granted extradition. Similarly, the language used appears to be an implicit rejection of the political offence exception. In any event, if the State does not grant extradition, whether on legitimate grounds or not, it must submit the case for criminal prosecution.
- ***Take the decision in the same manner as in the case of any other offence of a serious nature***: While allowing States to maintain discretion as to whether or not to prosecute, the counter-terrorism treaties make it clear that such

discretion has to be exercised in the same manner as with any other offences of a grave nature under the law of the State. In other words, national prosecutors are expected to handle those offences by applying the same criteria that they generally apply to other grave offences. In practice, this reduces the scope for prosecutors to decide not to proceed.



Practical guidance for implementing the aut dedere aut iudicare principle

In practice, this principle can prove difficult to implement. When extradition is not possible or is refused and the requested State is required to prosecute the person in question in accordance with the aut dedere aut iudicare principle (which must be permitted under that State's national law!), the requested State will not have all the necessary evidence, because in most cases the offence will have been committed outside the territory of that State. It is therefore extremely important that the requesting State provide the requested State with all the evidence it has in order for the requirement to prosecute to be respected and for the prosecution to have the best chances of success. The aut dedere aut iudicare principle therefore has no force in the absence of well-functioning channels of mutual legal assistance with the requesting State. Requested States and States that are denied extradition must therefore assist each other judicially.



Case study: the M. Hamadei case

The application of the “extradite or prosecute” principle and how it can help resolve sensitive political situations is demonstrated by the case involving Mohammed Hamadei. In 1985 a Trans World Airlines flight left Athens for Rome. During the flight armed hijackers seized control of the flight and diverted it to Beirut. On the ground, American citizen Robert Stetham was shot in the head and thrown out of the plane. In 1987 Hamadei was arrested at the Frankfurt, Germany airport carrying liquid explosives. He had already been charged in the United States in connection with the aircraft hijacking, and his extradition was immediately requested.

Under the terms of the Germany-United States bilateral extradition treaty and the 1970 Convention for the Unlawful Seizure of Aircraft, Germany was obligated to either extradite Hamadei or submit the case for prosecution in the same manner as a serious domestic offence. Two West German citizens were kidnapped in Lebanon about this time, and Hamadei's brother was subsequently convicted in Germany for complicity in that act. German authorities declined the American request for the extradition of Mohammed Hamadei and elected to prosecute the aircraft seizure, hostage taking and murder offences.

The hostages in Lebanon were released. Mohammed Hamadei was convicted and sentenced to life imprisonment. American authorities, while expressing a preference to have prosecuted the case in the United States, publicly expressed understanding for the German position, cooperated with the German prosecution by supplying necessary witnesses, and complimented German authorities for the resolution of the case (*Extract from the UNODC Digest of Terrorist Cases*).



Case study: the Lockerbie case

The Lockerbie case, following the explosion of Pan-American Airlines Flight 103 over Scotland in 1988 that caused 270 fatalities, provides a clear example of the legal and practical challenges faced by the application of the *aut dedere aut iudicare* principle, in relation to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 1971.

Study the Judgement of 27 February 1998 by the International Court of Justice for a description of the facts, the legal analysis thereof and the course of events, in particular the diplomatic disputes between the United States of America and the United Kingdom on the one hand and the Libyan Government on the other hand (Judgement available at the following address:

www.icj-cij.org/docket/index.php?p1=3&p2=3&k=82&case=89&code=lus&p3=4).

The Lockerbie case is an unprecedented example of the relationship between international law and policy and the “innovative” legal solutions that are sometimes necessary to break critical deadlocks. In this case, following several years of diplomatic confrontation, the two perpetrators were finally tried by a national court which applied Scottish law but was located in the Netherlands. The trial was a compromise solution based on the idea that a Scottish or Libyan court would run the risk of not ensuring a fair and impartial trial in a case involving the explosion of an international flight, which was caused by terrorists and caused significant human losses in the plane and on the ground. Study the trial at the following address: http://i-p-o.org/lockerbite_observer_mission.htm (see also the *UNODC Digest of Terrorist Cases*).



Case study: the case of M. Scappato

Consider the following scenario with reference to the International Convention for the Suppression of Terrorist Bombings.

M. Scappato detonated a device in a public place in State A. He and the victims were nationals of State B. After the bombing, M. Scappato escaped to State C.

In this scenario, it can be argued that State C has no obvious interest in prosecuting M. Scappato since neither he nor the victims were nationals of that State. M. Scappato was simply present in that territory, possibly with no intention of remaining there.

Ultimately, M. Scappato was able to find refuge in State C, purely because that State has no reason to be concerned with him. States may not normally prosecute offences committed outside their territory unless their own interests are involved. Although States A and B may have jurisdiction on the basis of the territoriality and active nationality principles (as well as the passive nationality principle, if applied within those countries), they cannot claim M. Scappato in order to try him.

It is precisely for cases like this that the universal counter-terrorism instruments try to fill the legal gaps in existing national laws through the application of the *aut dedere aut iudicare* principle. If State A had demanded the extradition of

M. Scappato, State C would have been obliged to either extradite or to refer the case to court for prosecution.



Activities

- Note the provisions on jurisdiction that are in force in your country regarding terrorism-related offences. Can your country exercise jurisdiction in each of the cases covered by the universal counter-terrorism instruments? Does your country go beyond the requirements of those instruments?
- Can you think of cases in which the courts of your country have declared jurisdiction for terrorism-related offences or other offences committed outside your country? In which case or cases was jurisdiction exercised?
- Is the aut dedere aut iudicare principle reflected in criminal law in your country? In which provisions? Which offences does it apply to?
- In your opinion, what are the basic prerequisites and conditions that need to be fulfilled at the national level for the aut dedere aut iudicare principle to be effective?



Assessment questions

- The universal counter-terrorism instruments require States parties to establish certain grounds for jurisdiction. What are these grounds? How does this differ from the exercise of jurisdiction?
- Do the universal counter-terrorism instruments envisage extraterritorial jurisdiction of any kind for States? If so, what does this imply?
- Does a State party to a counter-terrorism treaty have the right to establish bases for jurisdiction that are not provided for in the treaty?
- What is included in the universal counter-terrorism instruments with regard to criminal acts on board ships and aircraft? Can States parties prosecute offences committed on board flag vessels of their State even if such vessels were sailing in the waters of another State party?
- What is the overall aim, with regard to criminal justice, of the aut dedere aut iudicare principle, as set forth in the universal counter-terrorism instruments?
- Describe the measures that a State party to the International Convention for the Suppression of Terrorist Bombings must take if it refuses to extradite to another State party the suspected perpetrator of an offence specified in that Convention.
- Is the aut dedere aut iudicare principle compatible with the principle of discretionary prosecution that is in effect in many countries?

- Compare the aut dedere aut iudicare principle as set out in the universal counter-terrorism instruments and in article 16 of the United Nations Convention against Transnational Organized Crime. What, if any, are the differences?



Tools

- The Legislative Guide to the Universal Legal Regime against Terrorism dedicates an entire chapter to the provisions governing jurisdiction that are contained in the universal counter-terrorism instruments. Similarly, the UNODC Guide for the Legislative Incorporation and Implementation of the Universal Anti-Terrorism Instruments provides an overview of the various bases of jurisdiction, with examples taken from national legislation. They also illustrate the aut dedere aut iudicare principle.
www.unodc.org/tldb/en/legislative_guides.html
- The UNODC Model Legislative Provisions against Terrorism provide draft proposals listing all the bases of jurisdiction, in chapter 3, article 26, and detailing the obligation to prosecute or extradite, in article 55.
www.unodc.org/tldb/en/model_laws_treaties.html
- The aut dedere aut iudicare principle is analysed within the broader context of criminal justice systems and the role of prosecutors in the UNODC Handbook on Criminal Justice Responses to Terrorism:
www.unodc.org/unodc/en/terrorism/technical-assistance-tools.html
- The database of the UNODC Terrorism Prevention Branch provides extracts from the criminal codes of several countries, covering jurisdiction and the obligation to extradite or prosecute (aut dedere aut iudicare), in the section of the website covering national legal resources. www.unodc.org/tldb/
- The UNODC Digest of Terrorist Cases is available at the following address:
www.unodc.org/documents/terrorism/09-86635_Ebook_English.pdf
- The United Nations Convention against Transnational Organized Crime and its three Protocols are available at the following address:
www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf



Further reading

- Betti, Stefano. The duty to bring terrorists to justice and discretionary prosecution. *Journal of International Criminal Justice*, vol. 4, No. 5 (2006), pp. 1104-1116.
- Kelly, Michael J. Cheating justice by cheating death: the doctrinal collision for prosecuting foreign terrorists — passage of aut dedere aut iudicare into customary law and refusal to extradite based on the death penalty. *Arizona Journal of International and Comparative Law*, vol. 20, No. 3 (2003), pp. 491-532.

- Kolb, Robert. The exercise of criminal jurisdiction over international terrorists. In *Enforcing International Law Norms Against Terrorism*, Andrea Bianchi, ed. Oxford: Hart Publishing, 2004, pp. 227-282.
- Plachta, Michael. The Lockerbie Case: the role of the Security Council in enforcing the principle *aut dedere aut iudicare*. *European Journal of International Law*, vol. 12, No. 1 (2001), pp. 125-140.

1.2.2.3. *Tools for international cooperation in criminal matters*

The universal counter-terrorism conventions and protocols focus on two mechanisms for international cooperation in criminal matters: extradition and mutual legal assistance.

Why? These two mechanisms for international cooperation in criminal matters are the best known and the most frequently used. Extradition is the oldest tool for legal cooperation in criminal matters. The rules of customary international law governing extradition that have been developed over the years promote new forms of cooperation between States, among other things. Mutual legal assistance, one of the newer forms of such international cooperation, is recognized by practitioners as a highly useful means to obtain evidence.

How? The universal counter-terrorism conventions and protocols contain a number of provisions governing extradition and mutual legal assistance which are effective tools for practitioners, with regard to facilitating cooperation between States. These provisions can be applied to provide practical assistance and reduce the barriers that delay extradition, where the conventions and protocols are duly ratified by States and incorporated into their respective legal systems.

These conventions and protocols do not cover all the possible issues that may arise in these matters, nor do they offer a comprehensive mechanism for extradition or mutual legal assistance — they are not designed, for example, to replace an extradition law or treaty that is incomplete or obsolete. Rather, States must rely on national law and on bilateral and international agreements for the conditions to apply and procedures to follow, both when they require assistance from another State and when they are providing assistance to another State.

What are these tools? As regards extradition, the Convention on Offences and Certain Other Acts Committed on Board Aircraft (1963) (the Tokyo Convention) has no provisions regarding extradition; the first provisions governing extradition in the context of the fight against international terrorism are found in the Convention for the Suppression of Unlawful Seizure of Aircraft (1970) (The Hague Convention). These provisions have been developed progressively through new instruments.

- The offences specified in the conventions and protocols are considered as a matter of law to be extraditable offences between States parties. States parties that do not make extradition conditional on the existence of a treaty recognize all offences as extraditable offences between them, according to the provisions of the requested State. When an extradition treaty exists between two or more States parties, even before the entry into force of the conventions and protocols, States parties must consider the treaty to include all the offences specified in the universal conventions and protocols as extraditable offences. It

also means that, for any future extradition treaty, all offences shall be considered by States parties to be extraditable offences.

- The universal counter-terrorism conventions and protocols form a legal basis for extradition for States. Some States, particularly common-law States, require the existence of a treaty in order to extradite. This means that if a treaty has not been signed with the requesting State, it is unable to grant extradition. The counter-terrorism treaties can be considered as a legal basis for extradition for States parties with regard to the offences laid down therein. This is one of the key tools provided by the treaties, enabling States to operate as if they are bound by a treaty vis-à-vis all other States parties, for example 172 other States in the case of the Convention for the Suppression of the Financing of Terrorism, and avoiding the need for thousands of bilateral extradition treaties between States parties.
- The Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (1998) introduced a provision that is found in all the subsequent conventions, stating that all extradition treaties or agreements signed between States parties to a particular convention are deemed to be modified by that convention if they are incompatible with its provisions.

This is another tool that can prove very useful. In practice, extradition requests are rejected by the requested State on the grounds that the offence is of a political nature. These grounds for refusal are found in many extradition treaties. However, for the purposes of extradition, the universal counter-terrorism conventions and protocols explicitly reject this exception and consider that none of the offences covered in the conventions and protocols may be deemed a political offence, an offence connected to a political offence or an offence with political motives. Treaties and agreements are therefore deemed to be modified and the brake on extradition is removed.



See *the political nature of the offence (2.3.2.3.)* in the section on extradition in this module.

- The treaties also include an anti-discrimination clause that protects a person from any prejudice on political or any other unacceptable grounds. It also ensures respect for the legitimate interests of the alleged perpetrators. If a person is being prosecuted or punished for his or her political views, the anti-discrimination article provides for the rejection of the extradition request. Such rejection is also provided for if the prosecution or punishment is for reasons of race, religion, nationality or ethnic origin.
- For the purposes of extradition between States parties, offences are considered as having been committed both in the place they were carried out and in the territory of the States that have established jurisdiction. This provision ensures that extradition is not refused on the grounds that the offence was not committed in the territory of the requesting State.
- States are not under a general obligation to extradite but rather to cooperate effectively in order to bring the perpetrators of acts of terrorism to justice, either before the courts of another State or before their own courts.

- For the purposes of both extradition and mutual legal assistance, the offence of financing terrorism cannot also be considered a tax offence as this could impede cooperation.

With regard to mutual legal assistance, there have been no major developments in the treaties. The Convention on Offences and Certain Other Acts Committed on Board Aircraft (1963) does not mention mutual legal assistance and it is not until the Convention for the Suppression of Unlawful Seizure of Aircraft (1970) that we find the first explicit reference:

- States parties must afford one another the greatest measure of mutual legal assistance for any investigation, criminal procedure or extradition procedure in respect of the offences set out in the universal counter-terrorism conventions and protocols. This obligation covers assistance for obtaining evidence available to States and required for procedural purposes. This cooperation obligation shall be carried out in accordance with any treaty or agreement governing mutual legal assistance which may exist between the States. In the absence of such a treaty or agreement, States parties must afford this mutual assistance in accordance with their national legislation.
- When the request for mutual legal assistance is in connection with an offence involving the financing of terrorism, States parties may not claim bank secrecy in order to refuse a request for legal assistance.
- Regarding mutual legal assistance, the treaties have also established the speciality rule: information and evidence provided by the requested State may not be used for any investigations, criminal proceedings or legal procedures other than those for which the assistance was required without prior consent from the requested State.
- The exception for political offences is also ruled out with regard to mutual legal assistance for offences covered by the universal counter-terrorism conventions and protocols.
- At the same time, as with extradition, the anti-discrimination clause allows a request for mutual legal assistance to be rejected if a person is prosecuted or punished for his or her race, religion, nationality, ethnic origin or political views.



Case study: the case of the “Invincible Warriors”

Preliminary information

For the purposes of this case study, it is assumed that Bluelandia and Pinklandia are States parties to the universal counter-terrorism instruments and have duly incorporated the provisions of those instruments into their domestic legal systems. This case study has been developed for the purpose of stimulating expert legal discussion on scenarios that may occur in the practice of international cooperation. The suggested answers (see Annex II of Module 2 regarding the universal legal framework against terrorism) are not the only possible solutions but highlight the practical mechanisms and tools available in light of the universal counter-terrorism instruments.

Background

Tom is the leader of an international terrorist group known as Invincible Warriors, which aims to destabilize the political institutions of various countries. He carries out a bomb attack in a kindergarten in Bluelandia, killing 30 children, including the children of various diplomats. Following the attack, Tom manages to escape from Bluelandia and find refuge in Pinklandia, a neighbouring State.

Extradition: the legal basis

Bluelandia swiftly sends a request to Pinklandia for the arrest and extradition of Tom on the basis of the International Convention for the Suppression of Terrorist Bombings.

1. Scenario 1: Bluelandia and Pinklandia are not bound by any extradition treaty. Moreover, the laws of Pinklandia prevent a person from being extradited in the absence of a specific extradition treaty. Should Pinklandia refuse to extradite Tom to Bluelandia?
2. Scenario 2: An old bilateral extradition treaty binds Bluelandia and Pinklandia. However, in an exchange of diplomatic notes, Pinklandia anticipates that Tom will not be extradited because the offence is not specified in the list of the extraditable offences annexed to the extradition treaty in question. Is the old extradition treaty definitely unusable?
3. Scenario 3: Pinklandia is not a State party to any multilateral convention in criminal matters, nor is it bound by any extradition treaty to Bluelandia. In addition, it has no law in place regulating the conditions and procedure for extraditing alleged offenders to third countries. Should Bluelandia abandon all hope of Tom being surrendered to it?

Extradition: politically motivated offences

4. Bluelandia requests the extradition of Tom from Pinklandia on the basis of the International Convention for the Suppression of Terrorist Bombings. During the extradition hearing, Tom's lawyer argues that the Invincible Warriors act with the noble goal of liberating Bluelandia from a repressive and bloody dictatorship. The offence for which Tom is requested is therefore a political one, since it was committed in an attempt to force Bluelandia's oligarchs to open the way to democratic and fair elections. How should the authorities of Pinklandia balance the need to extradite Tom against consideration for his "noble" purpose?
5. Since some of the victims of the attack at the kindergarten were the children of diplomatically protected persons, the request for extradition from Bluelandia to Pinklandia is based on the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (ratified by both States). However, the Convention does not cover the issue of "political offences". Should the authorities of Pinklandia refuse to extradite Tom?

Mutual legal assistance: dual criminality and admissibility of evidence

6. In the absence of an extradition request from Bluelandia, the authorities of Pinklandia decide to investigate the case themselves. The prosecutors realize

that technical advice is needed from an expert on explosives living in Jollylandia, and make a request to Jollylandia for an expert on explosives to be granted. The authorities of Jollylandia refuse to accommodate such a request, arguing that it is based on an offence that the Criminal Code of Pinklandia describes as a “terrorist bombing”, which does not exist in the legislation of Jollylandia. If you were the prosecutor from Pinklandia, how could you persuade the authorities of Jollylandia to execute the request?

7. Finally, prosecutors in Pinklandia gather enough evidence to convict Tom. However, the trial takes an unexpected turn when the court decides that evidence provided by Jollylandia is not admissible, since it was not made under oath. According to the laws of Pinklandia, it is a requirement that evidence of witnesses be given under oath, whereas the laws of Jollylandia do not contain such a requirement. As the prosecutor, what could you have done to ensure that the evidence provided by Jollylandia could be used in court?

Mutual legal assistance: banking secrecy and the spontaneous transmission of information

8. Pinklandia seeks to obtain details of a bank account held in Jollylandia under Tom’s name, which may provide evidence of his activity in the financing of terrorism. However, Jollylandia informs the authorities of Pinklandia that the request cannot be executed because of a strict domestic law protecting the confidentiality of banking information. Is the refusal to cooperate by the authorities of Jollylandia acceptable?
9. During the execution of the request, the authorities of Jollylandia realize that different bank accounts held at the same bank have all been used in the same criminal operation. However, the request from Pinklandia only relates to one of those bank accounts and not the others. Should the authorities of Jollylandia disclose information relating to all the suspect bank accounts, despite the absence of a specific request from Pinklandia?

Mutual legal assistance: informal channels and alternative means for executing requests

10. In order to bring charges against Tom, Pinklandia needs the testimony of Palo, an old enemy of Tom’s who belongs to a rival criminal gang. Palo lives in Jollylandia. Despite the fact that his testimony has to be collected as a matter of urgency, the authorities of Pinklandia are told that they have to submit their request through the diplomatic channel, known to be a lengthy process. Should Pinklandia proceed through the diplomatic channel, as requested?
11. Eventually, Pinklandia decides to send an official request for legal assistance to Jollylandia. The request specifies that it is essential that the questioning be carried out directly by the judicial authorities of Pinklandia. The response from Jollylandia is that no foreign authorities are to be allowed to exercise official functions on its soil. Moreover, Palo has just been convicted and sentenced to life imprisonment in Jollylandia. Discuss possible ways to meet both States’ concerns.



Activities

- Look at the status of ratification by your country of the universal counter-terrorism conventions and protocols and ascertain whether or not the provisions relating to extradition and mutual legal assistance have been incorporated into your national legislation.
- According to the laws of your country, would you reject an extradition request if the offence in question was politically motivated? Discuss.
- Is it possible for your country to extradite suspects to a country with which it does not have an extradition treaty? Discuss.
- In your country's legislation, is bank secrecy considered to be professional secrecy, whereby banks are required not to disclose information about their clients to third parties? If so, would your country grant a request for mutual legal assistance from another country as part of an investigation into a case of financing of terrorism?
- Is it possible for your country to use evidence provided by a foreign country in connection with an investigation into a case of the financing of a terrorist bombing for an investigation into a case of money-laundering? Under what conditions?



Assessment questions

- Explain the value of the universal counter-terrorism instruments where a large network of regional and bilateral cooperation treaties already exists.
- What added value can the universal counter-terrorism instruments bring to cooperation between two States that are not bound by any extradition or mutual legal assistance treaty?
- What do the universal counter-terrorism instruments say about future extradition treaties that may be concluded between two States parties?
- Explain the role that the universal counter-terrorism instruments can play for States whose domestic legislation requires an extradition treaty as a condition for surrendering alleged offenders.
- What does it mean that the universal counter-terrorism instruments constitute a legal basis for extradition and mutual legal assistance? Does it imply an obligation to extradite suspects and provide requested evidence without exception? Explain.
- Is it possible for a bank to claim bank secrecy during an investigation into the financing of acts of terrorism?



Tools

- The UNODC Manual on International Cooperation in Criminal Matters related to Terrorism is available at the following address:

www.unodc.org/unodc/en/terrorism/technical-assistance-tools.html

The Manual is divided into four modules. The first introduces the basic principles of international cooperation against terrorism. These are the rules that apply whatever the form of cooperation required for prevention and criminal prosecution. The second module is specifically on mutual legal assistance in criminal matters and the third module covers extradition. The fourth module covers other types of cooperation. At the end of the Manual there are annexes on the developments and there is an index which enables the user to search by topics.

- The UNODC Digest of Terrorist Cases is available at the following address:
www.unodc.org/documents/terrorism/09-86635_Ebook_English.pdf
- Part V of the Legislative Guide to the Universal Legal Regime against Terrorism covers international cooperation in criminal matters. The UNODC Guide for the Legislative Incorporation and Implementation of the Universal Anti-Terrorism Instruments covers this in greater depth and devotes an entire section to the modalities of international cooperation in criminal matters, including examples taken from national legislation.
www.unodc.org/tldb/en/legislative_guides.html
- The technical assistance working paper from UNODC on “Preventing Terrorist Acts: A criminal justice strategy integrating rule of law standards in implementation of United Nations anti-terrorism instruments” contains a section on international cooperation mechanisms:
www.unodc.org/pdf/terrorism/TATs/en/3IRoLen.pdf
- Extradition and mutual legal assistance are analysed within the broader context of criminal justice systems and the role of prosecutors in the UNODC Handbook on Criminal Justice Responses to Terrorism:
www.unodc.org/unodc/en/terrorism/technical-assistance-tools.html



Further reading

- Report of UNODC on the treatment of the political offence exception in international anti-terrorism legal instruments:
www.unodc.org/tldb/bibliography/Biblio_Pol_Off_Exception_UNODC_Report_Interpol_2004.doc
- Duffy, H. Implementing justice: international cooperation and enforcement (4A.2), in *The war on terror and the framework of international law*, Camb. 2005.
- Peyro Llopis, A. and Vandermeersch D. L’extradition et l’entraide judiciaire, in *Juger le terrorisme dans l’Etat de droit*, Bruylant, 2009.
- Petersen, Antje C. Extradition and the Political Offense Exception in the

Suppression of Terrorism. *Indiana Law Journal*, vol. 67, No. 3 (1992), pp. 767-796.

- Maged, A. International Legal Cooperation: an essential tool in the war against terrorism. In *Terrorism and the Military: International Legal Implications*, Wybo P. Heere, (ed.) The Hague: TMC. Asser Press, 2003, pp. 157-180.
- Phillips, R. Stuart. The political offense exception and terrorism: its place in the current extradition scheme and proposals for its future. *Dickinson Journal of International Law*, vol. 15, 1997, pp. 337 ff.



Supplementary information

- International cooperation in criminal matters to fight terrorism (PowerPoint presentation by UNODC)

1.2.3. Interplay with bilateral and multilateral instruments

The universal counter-terrorism conventions and protocols form part of a complex and partly overlapping network of international legal instruments concluded by States at the global, regional and bilateral levels. Thus, implementing these instruments relies on national legislation.

It is often difficult to make sense of this articulated legal structure and the task is made even more complex by differences in membership of international organizations and in numbers of accessions to international treaties. Criminal justice officials must be aware of the complex interplay between the various layers in order to maximize the chance of cooperation from other States.



Which instruments offer the best legal framework for international cooperation in criminal matters?

Bilateral and regional instruments offer useful frameworks for international cooperation in criminal matters as they contain detailed procedural provisions. However, their geographical scope is limited.

The international framework of the United Nations provided by the universal counter-terrorism conventions and protocols enables States to liaise with other States parties beyond their bilateral and regional frameworks, through a truly global cooperation network. It is thus difficult to establish, in general, which of the bilateral and regional or the universal instruments offer the best legal framework.

In some cases, one framework might appear more suitable than another. This will depend on the circumstances of the case, the quality and quantity of the legal frameworks available, and the opportunities offered by each to achieve the desired outcome. Ultimately, it is important to understand that the universal counter-terrorism instruments do not aim to replace other instruments but rather to provide criminal justice officers with complementary legal tools.



Resolving conflicts between the treaties

It may be that two or more applicable treaties conflict with one another. Where this is the case, reference should be made to the treaty provisions that govern such conflicts. In this regard, all the universal counter-terrorism instruments starting with the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation of 1988 provide that they modify all extradition treaties or agreements concluded between States parties to the extent that they are incompatible with the text of the conventions (see 1.2.2.3. *Tools for international cooperation in criminal matters*). In the absence of relevant treaty provisions, application of the provisions that are most favourable to extradition and mutual legal assistance is recommended.

Examples of relevant treaty provisions:

Article 9, paragraph 5 of the International Convention for the Suppression of Terrorist Bombings (1997): “The provisions of all extradition treaties and arrangements between States Parties with regard to offences set forth in article 2 shall be deemed to be modified as between State Parties to the extent that they are incompatible with this Convention.”

Article 30, paragraph 3 of the Vienna Convention on the Law of Treaties of 23 May 1969: “When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.”

Article 35 of the Convention on Mutual Assistance in Criminal Matters of the Economic Community of West African States (ECOWAS, 1992): “The present Convention repeals all preceding Treaties, Conventions or Agreements concluded between two or several Member States on mutual legal assistance in areas specified (...).”

Article 8, paragraph 2 of the Protocol of 8 July 2004 to the Convention on the Prevention and Combating of Terrorism of the African Union: “Should any dispute arise between State Parties on the interpretation or applicability of any existing bilateral extradition agreement or arrangement, the provisions of the Convention shall prevail with respect to extradition.”

One should also bear in mind that the Charter of the United Nations, in article 103, states the primacy of the obligations of the Members of the United Nations under the Charter, with regard to their obligations under any other international agreement.



Activities

- Make a list of the extradition and mutual legal assistance treaties to which your country is a party. Examine them carefully and see whether they allow extradition for all the offences set out in the universal counter-terrorism conventions and protocols. Where there are several treaties in question

(for example, a bilateral and regional treaty), which is the most practical in terms of rapid procedure, conditions etc.? Which do you think best protects the human rights of the person in question?



Tools

- The database of the UNODC Terrorism Prevention Branch, which includes the criminal legislation of more than 140 countries as well as a number of extradition and mutual legal assistance treaties to which those countries are party, is available at the following address: www.unodc.org/tldb/

1.3. International cooperation during periods of armed conflict

Terrorist acts may occur in times of peace or during armed conflicts, and the suppression of such acts requires States to cooperate with one another in all cases.

The universal counter-terrorism conventions and protocols do not apply in situations of armed conflict. The International Convention for the Suppression of Terrorist Bombings (1997) and subsequent instruments specify that they are not applicable to acts committed by armed forces during an armed conflict. The branch of international law that is applicable when a situation of armed violence escalates into an armed conflict is that of international humanitarian law, whether the conflict is international or not. However, drawing a line between these two legal frameworks in order to decide which governs a particular situation is seldom straightforward.



See module 4, which focuses on *counter-terrorism and human rights* and provides a detailed analysis of the interplay between the international legal framework against terrorism, international humanitarian law, human rights and refugee law.

International humanitarian law expressly prohibits “acts of terrorism” against persons who are not taking part in hostilities and acts that aim to “spread terror among the civilian population”, as well as some “grave breaches” that may be considered acts of terrorism when they are committed in peacetime, such as murder, wilfully causing serious bodily injury, illegal detention or hostage-taking.

The international humanitarian law treaties, in particular the four Geneva conventions of 1949 and Additional Protocol I, consider breaches to be grave if they are committed against persons or property protected by the Conventions, such as war crimes. So that none of these crimes go unpunished, these treaties require States parties to incorporate in domestic legislation all the grave breaches that they specify, and to set effective penal sanctions and establish universal jurisdiction for such breaches.

Under the relevant articles of the four Geneva conventions of 1949 (articles 49, 50, 129 and 146 of the respective conventions), States are required to search for persons alleged to have committed such “grave breaches” “regardless of their nationality” and either bring such persons before their own national courts or extradite them for trial to another State party that has made out a prima facie case.



Universal jurisdiction in the Geneva conventions and the universal counter-terrorism treaties

Universal jurisdiction is defined as the jurisdiction exercised by a State to prosecute the alleged perpetrator of an offence, regardless of where the offence was committed, the nationality of the perpetrator and the victims or the State interests harmed.

While the Geneva conventions do not expressly state that jurisdiction is to be asserted regardless of the place of the offence, they have to be interpreted by some countries as providing for universal jurisdiction.

The universal counter-terrorism treaties differ from the Geneva conventions in that they require the presence of the individual in the territory of a State in order for that State to exercise jurisdiction. This means that a State shall not be bound to exercise jurisdiction except in cases where the offender is found in its territory and he or she is not extradited.



Case study: the Cavallo case

Ricardo Miguel Cavallo, an Argentine citizen, served as a naval officer during the military dictatorship that ruled Argentina from 1976 to 1983 (the period known as the “Dirty War”) and is suspected of having committed crimes against civilians. In 1999, Judge Baltasar Garzón initiated proceedings against him in Spain on the basis of the principle of universal jurisdiction.

Judge Garzón formally requested the extradition of Cavallo for genocide, terrorism and torture while Cavallo was living under a pseudonym in Mexico. Thanks to a Mexican newspaper that reported that Argentine former political prisoners had identified him, Cavallo was arrested in August 2000. Cavallo challenged the request for his extradition before the Mexican courts. In June 2003, the Supreme Court of Mexico granted extradition for genocide and terrorism. It did not grant extradition for the offence of torture because, under Mexican law, the statute of limitations has expired.

After his extradition to Spain, he was re-extradited to Argentina (before being prosecuted in Spain) under article VI of the Convention on the Prevention and Punishment of the Crime of Genocide, which requires of States parties, including Spain and Argentina, that persons charged with genocide be tried by a competent tribunal of the State in the territory of which the act was committed. Cavallo is currently being tried along with 15 other naval officers.

The so-called “ESMA” case, named after the naval installation (the Navy Mechanics School, Escuela de Mécanica de la Armada in Spanish) where numerous people were detained, tortured and killed during the military regime, can be accessed at the following address: www.cij.gov.ar/esma.html

In order for States parties to take all the necessary steps to bring the alleged perpetrators of such grave breaches to justice, for which the cooperation of several

States is often necessary, the first Additional Protocol provides additional tools for international cooperation in criminal matters:

In matters of mutual legal assistance:

- States parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of grave breaches. Accordingly, States parties must provide each other with the fullest possible assistance during any proceedings relating to a “grave breach”.
- The provisions of the treaties on international humanitarian law shall not affect the obligations arising from the provisions of any other treaty of a bilateral or multilateral nature which governs or will govern the whole or part of the subject of mutual assistance in criminal matters.

In extradition matters:

- When the circumstances so permit, States parties shall cooperate in the matter of extradition. They shall also give due consideration to the request of the State in whose territory the alleged offence has occurred.
- There is no obligation to extradite. If extradition is refused, the State must submit the case to the competent authorities within that State for prosecution on the basis of universal jurisdiction.



Is an extradition convention between two States at war applicable during a period of armed conflict?

The effects of armed conflicts on extradition treaties between the parties involved remains an area of uncertainty in law. This is an issue that clearly has political aspects. Practice and theory alike are divided between the suspensive and abrogatory effects of armed conflict on extradition conventions.

Some courts have ruled that a war had the effect of terminating an extradition treaty (*Netherlands, State Council, Case of Rijn-Schelde Verome NV, 1976; Italy, Court of appeal of Milan, Case of Barnaton Levy, 1979*) while others have ruled that the application of the conventions was simply suspended (*Seychelles, Supreme Court, Case of R. c. Meroni, 1973*) and even that “offences committed during the period of the suspension may lead to extradition when the convention comes back into force” (*United States, Cases of Gallina (1960) and Ryan (1973)*).

While it does provide for the possibility of extradition, the first Protocol includes nothing on the issue of exceptions, such as the political nature of an offence, which are traditionally provided through national laws and may impede extradition. This issue has been resolved through numerous bilateral and regional treaties and national laws, which stipulate that the political offence exception cannot be applied to offences that are crimes under international law.

The penal system provided through international humanitarian law very often involves “cross-border” elements and much of its effectiveness depends on the quality of cooperation between the competent authorities of each State.



The International Criminal Court: a new tool against terrorism?

The International Criminal Court (ICC) was created through the Rome Statute, which came into force on 1 July 2002 and currently has 115 States parties. This first permanent international court is responsible for investigating the most serious crimes committed worldwide and for prosecuting and trying the perpetrators.

Its jurisdiction is complementary to that of States: the ICC exercises jurisdiction only when a State is unwilling to do so or when it is genuinely unable to carry out the investigation or prosecution.

Although the question of expanding the jurisdiction of the ICC to include the commission of terrorist acts (including the behaviour set out in the universal counter-terrorism conventions and protocols) was debated during the negotiation of the Statute, it was finally decided, in article 5, that jurisdiction would be limited to the crime of genocide, crimes against humanity, war crimes and the crime of aggression.

In theory, the ICC may deal with acts of terrorism if they present elements of one of the crimes listed above. With regard to war crimes, article 8 of the Rome Statute covers in particular “grave breaches of the Geneva conventions” as mentioned above.

When a State is unwilling or unable to prosecute, the case may then be turned over to the ICC. Technically, the alleged perpetrator of the offence is then “handed over” to the ICC rather than extradited. This type of transfer is made possible by the fact that the State that detains the suspect is unable to invoke many of the grounds for refusal that are normally applicable under extradition laws. However, the ICC cannot be considered to be in competition with the traditional mechanisms of cooperation created by international law, but should be regarded more as an additional and subsidiary tool to be resorted to when all the conditions for its jurisdiction are satisfied.



Case study: the case of the Airbus A-320

An Airbus A-320 aircraft of an airline of country B, where it is also registered, took off from country A towards country B. It flew over your country (country D) and exploded over an area of desert in your country. The explosion caused 165 deaths. Among the passengers killed were nationals of countries A and B, including the national football team of country A and representatives of interfaith exchange and reconciliation groups from countries A and B.

1. Could the explosion on the Airbus flight qualify as a crime of genocide or a crime against humanity? If so, what would be the legal consequences?
2. How else could it be classified under international law?



Activities

- Do the limits in the scope of application of the universal counter-terrorism conventions and protocols during periods of armed conflict pose problems with regard to prosecuting persons suspected of having committed terrorist acts during an armed conflict? Discuss.
- In your country's legislation, identify the provisions governing the jurisdiction of your courts with regard to war crimes and examine whether or not the authorities of your country can prosecute the alleged perpetrator of a war crime, irrespective of any link with your country (irrespective of the nationality of the perpetrator and the victims and the place where the crime was committed). Whether or not this principle of universal jurisdiction is incorporated into your country's legislation, list the advantages and disadvantages of the principle with regard to national law.



Assessment questions

- What is the scope of application of the universal counter-terrorism conventions and protocols during periods of armed conflict?
- What is international humanitarian law? Where is it found? When is it applicable?
- What acts of terrorism are punishable under international humanitarian law?
- Which mechanisms are provided through international humanitarian law for prosecuting persons suspected of having committed terrorist acts during periods of armed conflict?
- In which cases does the International Criminal Court have jurisdiction to combat terrorism?



Tools

- The text of and commentaries on the four Geneva conventions of 1949 and their two Additional Protocols of 1977, as well as their ratification status, can be accessed through the international humanitarian law database of the International Committee of the Red Cross: www.icrc.org/ihl
- The Rome Statute of the International Criminal Court is available at: www.c-fam.org/docLib/20080625_Rome_Statutes_Criminal_Ct.pdf, and elements of crimes of genocide, crimes against humanity and war crimes appear in the following document: http://untreaty.un.org/cod/icc/asp/1stsession/report/english/part_ii_b_e.pdf
- The UNODC document on “Frequently Asked Questions on International Law Aspects of Countering Terrorism” includes a section on international humanitarian law. It can be accessed at the following address: www.unodc.org/tldb/pdf/09-81183_Ebook.pdf



Further reading

The four first articles below can be downloaded from the database of the UNODC Terrorism Prevention Branch at the following address:

www.unodc.org/tldb/en/selected_bibliography.html#Terrorism3

- Hans-Peter Gasser. *Acts of terror, terrorism and international humanitarian law*, vol. 84, No. 847, RICR September (2002).
- Yves Sandoz. L'applicabilité du droit international humanitaire aux actions terroristes, in: Jean-François Flauss (dir.), *Les nouvelles frontières du droit international humanitaire*, Brussels (2003).
- Michael P. Scharf. International Law Weekend Proceedings: Defining Terrorism as the Peace Time Equivalent of War Crimes: a case of too much convergence between International Humanitarian Law and International Criminal Law, 7 *ILSA Journal of International & Comparative Law* 391, (2001).
- Silja Voneky, The Fight against Terrorism and the Rules of the Law of Warfare, Walter, Christian/Voneky, Silja/Roeben, Volker/Schorkopf, Frank (eds.), *Terrorism as a Challenge for National and International Law: Security versus Liberty?*, Berlin/Heidelberg, Springer (2003).
- Sassoli, Marco. La «guerre contre le terrorisme», le droit international humanitaire et le statut de prisonnier de guerre, in *The Canadian Yearbook of international law*, vol. 39 (2001):
www.icrc.org/web/fre/sitefre0.nsf/html/5TPG2X
- Arnold, Roberta. *The ICC as a New Instrument for Repressing Terrorism*, Transnational Publishers (2004).

2. Extradition

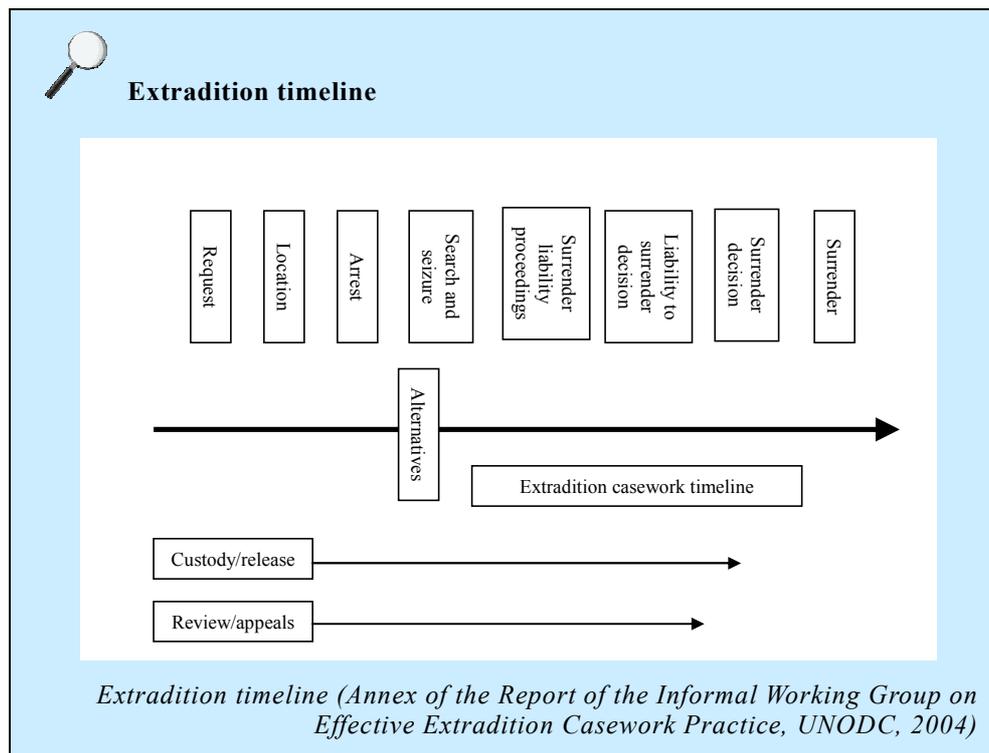
2.1. What is extradition?

2.1.1. Introduction: concept and general considerations

Extradition is the surrender by a State (the requested State) of a person present in its territory to another State (the requesting State) that seeks the person either in order to prosecute him or her or to enforce a sentence already handed down by its courts. Extradition is the oldest form of international cooperation in criminal matters and is recognized as an effective instrument of international cooperation in law enforcement. As a means of cooperation that directly affects the freedom of individuals, extradition is perhaps also the most complex mechanism and the one that raises the most challenges, in particular between States with different legal traditions.

2.1.2. Extradition procedure: overview and comparative aspects

The way the extradition process proceeds is governed by the national law of the requested State. The procedure therefore varies from one country to another, to a greater or lesser extent, according to each country's legal tradition. Common-law countries share similarities in their procedures, but these differ from those of civil-law countries, for example. This results in many differences in the positive law and procedural law of each country, differences that impede efficient extradition. The timeline below shows the main stages of the extradition procedure.



2.1.2.1. *The pre-extradition phase: provisional arrest*

General considerations — The extradition request itself is often preceded by a request for the provisional arrest of the person sought to prevent that person from taking advantage of the length of the extradition process to evade justice. Provisional arrest is a detention measure applied on a temporary basis, through the application of an extradition treaty and/or national legislation, prior to the submission of an extradition request. This is what is known as the pre-extradition phase.

Procedural requirements — The request for provisional arrest must not be confused with the extradition request. It is a document that requires that the person be arrested before the extradition request is formally submitted and is therefore less comprehensive than the extradition request. It is the basis for the extradition request, but does not replace it.



Practical guidance: what information must a request for provisional arrest contain?

Should this information not be found in the bilateral treaties or in the national law of the country, one can refer to the regional conventions on extradition that require the same type of information in order to prepare a properly formulated request for provisional arrest (see, for example, article 16 (2) of the European Convention on Extradition, article 14 (1) of the Inter-American Convention on Extradition, article 22 (2) of the Convention on Extradition of the Economic Community of West African States (ECOWAS) and article 43 of the Arab League Convention on Mutual Assistance in Criminal Matters).

The information required is as follows:

- Indication of the existence without producing it, of one of the documents mentioned in article 12 (2)(a) of the Convention, meaning either the conviction and sentence or the detention order or warrant of arrest or other order having the same effect, issued in accordance with the procedure laid down in the law of the requesting Party;
- Indication of the intention to send a request for extradition;
- A statement of the offences for which extradition is requested and the time and place of their commission;
- So far as possible, a description of the person sought.

(Article 16 (2) of the European Convention on Extradition)

Transmission of requests — The request for provisional arrest can generally be made by any means providing a written trace or materially equivalent record. In most cases, it is sent directly to the competent authorities or through the International Criminal Police Organization (INTERPOL).

In the latter case, the request may be transmitted in two ways: either directly to the National Central Bureau (NCB) through the I-24/7 network, or through a “red notice” issued by the General Secretariat of INTERPOL, at the request of the NCB

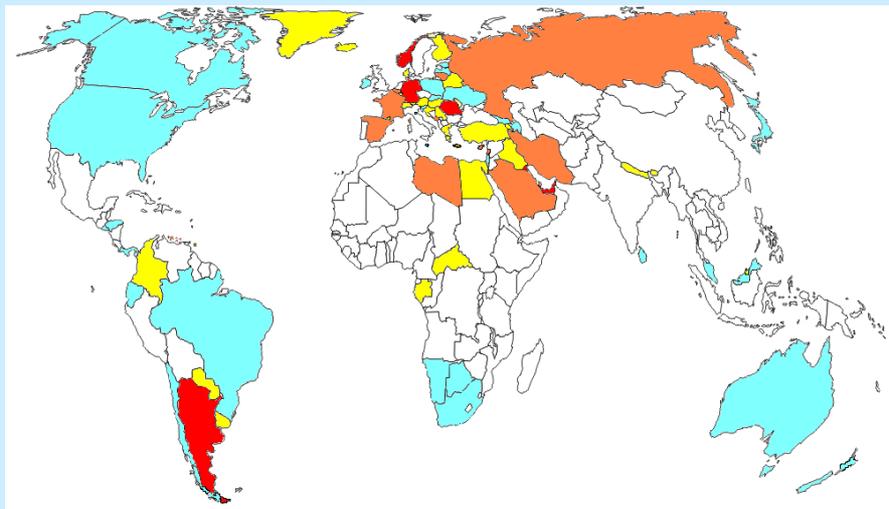
of the requesting State, acting on the request of the judicial authority. Unlike transmission, the red notice is a legal act of INTERPOL.



What is a red notice?

The INTERPOL red notice, which allows a national arrest warrant to be circulated worldwide to the police forces of other INTERPOL member States, has also been sent, since 1998, to legal authorities as the basis for provisional arrest with a view to extradition.

Legal value of red notices¹



	Countries that recognize the red notice as systematically having legal value to serve as a basis for provisional arrest
	Countries that recognize the red notice as automatically having legal value for provisional arrest, under certain conditions
	Countries that recognize the red notice as having legal value for provisional arrest, on a case-by-case basis and according to the decision of a judge or the police
	Countries that do not recognize the red notice as having legal value for provisional arrest
	Countries that did not respond to the questionnaire

¹ Summary of the questionnaire on the legal value of red notices sent to all INTERPOL member States on 6 February 2009. Fifty-eight member States have so far participated in the questionnaire and sent their responses to the General Secretariat.

The red notice contains:

- Identity particulars of the person sought (marital status, nationality, physical description, photograph(s), fingerprints and a DNA profile);
- The information necessary to assess the admissibility of the request by the requested authority (the nature of the offence, date and place of commission, arrest warrant, the authority that issued the warrant, a summary of the facts including the essential elements of the offence);
- The extradition treaty on which the request for provisional arrest is based;
- Assurance that extradition will be requested by the requesting State upon provisional arrest.

Of all the coloured notices used in the INTERPOL system, the red notice is most likely to have consequences for a person's rights. For this reason and unlike other notices, red notices cannot be circulated by the General Secretariat unless requested by an NCB and/or an international tribunal.

Although the legal value accorded to this notice varies from State to State, more and more treaties and agreements recognize INTERPOL as a channel for transmitting requests for provisional arrest.

The United Nations Model Treaty on Extradition encourages such transmission:

“In case of urgency the requesting State may apply for the provisional arrest of the person sought pending the presentation of the request for extradition. The application shall be transmitted by means of the facilities of the International Criminal Police Organization, by post or telegraph or by any other means affording a record in writing.” (Article 9: Provisional arrest)

The request for extradition must be transmitted within a certain time period, failing which the person sought must be released. Most of the treaties and laws stipulate that a person who is arrested on the basis of a request for provisional arrest cannot be detained beyond a certain time period if the request for extradition has not been received.

This time period varies among the different regional treaties: it is between 18 and 40 days for States parties to the European Convention on Extradition, 20 days for States parties to the ECOWAS Convention on Extradition, 30 days for States parties to the Arab League Convention on Mutual Assistance in Criminal Matters and 60 days for the States parties to the Inter-American Convention on Extradition. In the absence of a treaty, the requirements of the requesting State must be followed.



General practical guidance in matters of provisional arrest

The Report of the Informal Expert Working Group on Extradition (UNODC, 2004) includes the following recommendations:

- Make greater use of INTERPOL to locate persons sought or request provisional arrest.
- To avoid risks of persons being arrested in a country from which extradition would not be sought, requesting States should give clear instructions to INTERPOL, e.g. locate only, then notify — or locate and arrest, then notify.
- Only resort to provisional arrest where need for arrest is truly urgent: locating a wanted person naturally generates pressure for immediate arrest, particularly in high-profile and complex cases. When a request is made for provisional arrest, due account should be taken of the fact that the arrest precipitates deadlines for the production of documentation that may not always be met and will consequently result in the release of the wanted person. Such a request may be unwarranted where flight risk appears low — e.g., the wanted person is settled in the community or is already in custody in the requested State. In such cases, a full extradition request should be submitted rather than a request for provisional arrest.

2.1.2.2. *Review and decision phase of extradition*

In most countries of the world, the extradition procedure involves the executive and judicial branches of governments. At the executive level, this includes ministers for foreign affairs, justice ministers and/or interior ministers. The extradition request thus passes through a succession of official levels, between which there may be a lack of coordination, which can cause significant delays.

Traditionally, the extradition request is made through diplomatic channels to the Ministry of Foreign Affairs of the requested State. The requested State then decides, in accordance with its law, whether all the matters relating to the extradition procedure should be dealt with by the executive branch or assigned wholly or partly to the judiciary. Of the two bodies, the judiciary seems better suited than the executive to deciding on matters affecting the civil liberties of persons. However, this is not always the case and some governments continue to assign extradition matters to the executive only, while other countries give exclusive jurisdiction to the judicial authorities.

We can look at examples of countries with different legal traditions, in order to illustrate the two phases of the procedure that are found in most countries:

- ***The “judicial” phase:*** In Canada the judicial phase is triggered when the Minister, responding to a request from a requesting State, grants authority to proceed, authorizing an extradition hearing. At the hearing the judge determines whether or not the evidence provided by the requesting State is such that the person would be referred for trial if the offence had been committed in Canada. During the extradition hearing, the law provides that evidence may be presented in the same way as it is during national criminal

proceedings (such as calling witnesses), or in accordance with the conditions provided by a treaty (for example, in writing), or in a new way, by what is called a “dossier”. This is a new way of submitting evidence which allows the extradition hearing to present a document that summarizes the evidence obtained by the requesting State in support of its request for surrender, along with other relevant documents. The idea behind the dossier is to allow civil-law countries to send the evidence they have as it is without modification. If the judge is satisfied by the evidence submitted, he or she orders the detention of the person sought in the request, until the Minister of Justice decides whether or not to grant extradition. If extradition is not granted, the person is released.

The introduction of this new method of submitting evidence is a good example of the relaxation of the evidence requirements in common-law countries, where there are often stiff requirements regarding evidence which hinder the extradition process. The fact that there is a judicial procedure in many of these countries means that certain conditions must be satisfied, such as the condition that the requesting State establish a prima facie case, meaning that it provides sufficient evidence that the person sought is guilty. In civil-law systems, extradition is a tool of judicial cooperation, meaning that the authorities do not carry out a prima facie investigation on the question of guilt. These are the types of difference that slow down or even obstruct the extradition procedure.

In Madagascar, the Minister of Justice, having confirmed the legality of the request, refers it to the prosecutor with local jurisdiction, who orders the detention of the person sought (unless the prosecutor finds the attendance of that person at all the stages of the proceedings to be sufficiently ensured), sets the date for the extradition hearing and refers the matter to the court. The court then gives a substantiated opinion on the extradition request.



Practical guidance regarding extradition hearings

Extradition hearings are not trials to determine whether the persons sought are guilty or innocent. That judgement lies with the courts of the requesting State. Any issues that are not relevant to the extradition should be excluded in order to facilitate and accelerate the extradition procedure.

In Madagascar, if the court finds against the person sought, he or she may appeal before the Indictments Chamber. If the Indictments Chamber concludes that the person sought is extraditable, it refers the file to the Minister of Justice. If, on the other hand, it finds that the person is not extraditable, it orders the release of that person. The ruling of the Indictments Chamber cannot be appealed against and extradition cannot therefore be granted in the latter case. In Canada, there is also the possibility for the person sought to appeal against the decision of the extradition judge.



Practical guidance regarding appeal proceedings

Appeal procedures such as those in Canada and Madagascar protect against prejudging the wanted person's fundamental right to an appeal (International Covenant on Civil and Political Rights, articles 2 and 9). However, in general terms, in order to speed up the process of extradition, States should seek to simplify the procedure and limit the number of appeals that may be made and the number of courts where they may be made. The Informal Expert Working Group on Effective Extradition Casework Practice (UNODC, 2004) recommends that "wherever possible and consistent with its basic constitutional principles, States should adopt a single appeal mechanism for extradition casework to review all appropriate factual and legal issues, while eliminating repeated and partial reviews."

- **The executive phase:** In Canada, during the second stage, the Minister of Justice decides whether or not extradition should take place, taking into account all the circumstances and any applicable grounds for refusal, in accordance with the applicable treaty, the law and the Canadian Charter of Rights and Freedoms. In the judgement *Idziak v. Canada (Minister of Justice) [1992]*, the Supreme Court of Canada declared that the second decision-making process was political in its nature and that "Parliament chose to give discretionary authority to the Minister of Justice. It is the Minister who must consider the good faith and honour of this country in its relations with other states." In Madagascar, the Minister has the same authority as he or she decides on the extradition of the person through an order at the end of the judicial proceedings.

After extradition is authorized by the judicial authority, it is up to the executive authority to decide whether or not the person sought should be surrendered to the requesting State. The decision whether to grant extradition will be purely a question of political judiciousness relating to the handling of external relations by each State. However, in both Madagascar and Canada, this decision may also be subject to review for possible exceeding of powers (*judicial review* in Canada).

2.1.2.3. *Surrender of the person*

Once extradition is agreed, the requested State notifies the competent authority of the requesting State in order to organize the surrender of the person sought.

When the person has to travel through the territory of a State or several States that are neither the requested State nor the requesting State, it is advisable for the requesting State to arrange the transit so as to avoid any risk of jeopardizing the surrender of the person to that State. In practice, for example, making the person pass through a country that does not extradite its own nationals and permanent residents could compromise the surrender, if there is a risk that he or she might claim citizenship there.



Explanation of transit procedures — article 27 of the Convention on Extradition of the Economic Community of West African States (ECOWAS)

1. *Transit through the territory of one of the States shall be granted on submission of a request by the means mentioned in article 18, paragraph 1, provided that the offence concerned is not considered by the State requested to grant transit as an offence of a political or military character having regard to articles 4 and 7 of this Convention.*
2. *Transit of a national of the country requested to grant transit may be refused.*
3. *Subject to the provisions of paragraph 4 of this article, it shall be necessary to produce the documents mentioned in article 18, paragraph 2.*
4. *If air transport is used, the following provisions shall apply:*
 - (a) *when it is not intended to land, the requesting State shall notify the State over whose territory the flight is to be made and shall certify that one of the documents mentioned in article 18, paragraph 2 (a) exists. In the case of an unscheduled landing, such notification shall have the effect of a request for provisional arrest as provided for in Article 22 and the requesting State shall submit a formal request for transit;*
 - (b) *when it is intended to land, the requesting State shall submit a formal request for transit.*
5. *A State may, however, at the time of signature or of the deposit of its instrument of ratification of this Convention, declare that it will only grant transit of persons on some or all of the conditions on which it grants extradition. In that event, reciprocity may be applied.*
6. *The transit of the extradited person shall not be carried out through any territory where there is a reason to believe that his life or his freedom may be threatened by reason of his race, tribe, religion, nationality, political opinion or sex.*



Case study: the case of the Airbus A-320 (continued)

[An Airbus A-320 aircraft of an airline of country B, where it is also registered, took off from country A towards country B. It flew over your country (country D) and exploded over an area of desert in your country. The explosion caused 165 deaths. Among the passengers killed were nationals of countries A and B, including the national football team of country A and representatives of interfaith exchange and reconciliation groups from countries A and B.]

Nationals of country C who are suspected of having been involved in the explosion of the aircraft are located on the territory of your country. You are a prosecutor in your country.

3. Can you establish jurisdiction to prosecute the suspects? Do you think that other countries will have an interest in establishing jurisdiction? Which countries and for which interests? In your opinion, which would be the best placed country to prosecute the suspects? If various countries establish jurisdiction, what will you do?

Following consultation and coordination between your country and countries A, B and C, it is decided that country B is the best placed to prosecute the suspects since the plane is from that country, as are most of the victims. Country B submits to you a request for the provisional arrest of a person called Fofana, with a view to extradition through circulation of a red notice through the INTERPOL network. A warrant has been issued in country B for the arrest of Fofana and has been attached to the red notice.

4. What legal value do you give to the red notice? Do you proceed to arrest the individual? If your country does not recognize the red notice as having legal value for provisional arrest, what do you do?

In the end you proceed with the provisional arrest of the individual, either on the basis of the red notice or on the basis of the request that was made (whether or not it was made through diplomatic channels). There is no extradition treaty between your country and country B specifying the time period the country must adhere to in transmitting the extradition request.

5. What time period do you apply?



Activities

- Provisional arrest allows a person to be detained for a given time period with a view to his or her extradition. If the request for extradition is not received within this period, the person is released. What time period is provided for under the law of your country and under the treaties your country is bound to? In practice, do you think it is necessary to inform your counterparts in the requesting State of the duration of this time period as set out in your law? Discuss the advantages and possible disadvantages.
- Identify the possible grounds for the decision to proceed with the provisional arrest of a person.
- How does provisional detention pending trial differ from temporary detention (according to the terminology used in different countries)? Who can decide upon the provisional detention of a person in your country?
- What means of transmission for a request for provisional arrest are provided for in your national law? Identify the advantages and possible disadvantages of each of these means of transmission.
- What is the extradition procedure under the law of your country? Describe the different stages of the procedure.
- Explain the role of the Minister of Justice in your country with regard to extradition matters.



Assessment questions

- What is a request for provisional arrest? Why is a request for provisional arrest made before sending a request for extradition?
- What are the different means of transmission of a request for provisional arrest?
- What is a red notice?
- What are the different stages of an extradition procedure?



Tools

- A factsheet on the role of INTERPOL in tracing wanted individuals with a view to their extradition is available from their website at the following address: www.interpol.int/Public/ICPO/LegalMaterials/FactSheets/FS13.asp
- A table with details of the time limits for provisional arrest for some forty countries, prepared by the European Committee on Crime Problems (Strasbourg, 2004), is available on their website at the following address: www.coe.int/t/dghl/standardsetting/pc-oc/Standards_extradition_en_files/OC_INF_71_engl_fr_%20arrest%20-%20time%20limits.pdf
- The United Nations Model Treaty on Extradition, as well as the UNODC Revised Manual on this model treaty are available from the database of the UNODC Terrorism Prevention Branch: www.unodc.org/tldb/model_laws_treaties.html
- The Manual on International Cooperation in Criminal Matters related to Terrorism is available at the following address: www.unodc.org/unodc/en/terrorism/technical-assistance-tools.html
- The Report of the Informal Working Group on Effective Extradition Casework Practice (UNODC, 2004) is available at the following address: www.unodc.org/documents/legal-tools/lap_report_ewg_extradition_casework.pdf
- For the purposes of comparative law, the links listed below provide access to the extradition process in countries with different legal traditions:
 - For member States of the Organization of American States:

The database of the Hemispheric Information Exchange Network for Mutual Assistance in Criminal Matters and Extradition, of the Member States of the Organization of American States contains information on the extradition procedure of Member States:
www.oas.org/juridico/mla/index.html
 - For member States of the Council of Europe:

The database of the Council of Europe contains fact sheets on extradition procedure in member States:
www.coe.int/t/dghl/standardsetting/pc-oc/Country_information1_en.asp

- For Member States of the Indian Ocean Commission:

UNODC factsheets for making an effective request for extradition or mutual legal assistance to the States of the Indian Ocean Commission:

www.unodc.org/documents/treaties/organized_crime/international_cooperation/Publication_UNODC-COI_Fiches_pratiques_n.1.pdf

- For Commonwealth States:

www.thecommonwealth.org/shared_asp_files/uploadedfiles/%7BF427D7C-77DE-4CB8-8CCA-A132562F3DE5%7D_EXTRADITION_pt1.pdf

- For other States:

The database of the Terrorism Prevention Branch of UNODC lists the legislative provisions on extradition of many other countries (Algeria, Australia, Azerbaijan, Bangladesh, Bhutan, Botswana, Brunei Darussalam, Burkina Faso, Cape Verde, China, Congo, Democratic Republic of the Congo, Democratic Republic of Korea, Djibouti, Ethiopia, India, Indonesia, Islamic Republic of Iran, Israel, Jordan, Kazakhstan, Kenya, Kiribati, Kyrgyzstan, Lao People's Democratic Republic, Lesotho, Liberia, Madagascar, Malawi, Malaysia, Mali, Mauritius, Micronesia, Morocco, Myanmar, Namibia, Nepal, New Zealand, Niger, Nigeria, Niue, Pakistan, Papua New Guinea, Philippines, Russian Federation, Solomon Islands, Samoa, Senegal, Seychelles, Singapore, South Africa, Sri Lanka, Tajikistan, Tanzania, Thailand, Timor-Leste, Togo, Tonga, Tunisia, Tuvalu, Uganda, Uruguay, Vanuatu, Viet Nam, Zimbabwe): www.unodc.org/tldb/



Supporting material

- Civil-law and common-law systems: legal issues and challenges for international cooperation in criminal matters (PowerPoint Presentation from UNODC)

2.2. Legal bases for extradition

The legal basis for extradition may be a treaty, an ad hoc agreement or the principles of reciprocity or comity, principles that are generally supported by domestic legislation.

2.2.1. The treaties

In practice, extradition is most commonly granted on the basis of bilateral and multilateral treaties concluded among a number of States at the bilateral, regional and global levels. Such treaties either deal exclusively with extradition or contain specific provisions on the subject. The fact that these treaties are not specifically concerned with counter-terrorism does not mean that they cannot be considered applicable and used to request the extradition of alleged perpetrators of acts of terrorism.

Unlike bilateral treaties, multilateral treaties can serve as a legal basis for a large number of States, thus averting the need for hundreds of bilateral treaties. In

particular, they are very helpful for States whose position is that they will not agree to extradite without a treaty in order to avoid being used as a haven for escaping extradition.

- The most important of the multilateral treaties are the universal conventions against terrorism, which may constitute a sufficient legal basis for States that need to invoke a treaty.



Example of combining bilateral and multilateral treaties as a legal basis for extradition

Articles 7 and 8 of the Suppression of Terrorist Bombings Act of Sri Lanka contains the most commonly used provisions to give effect to the obligation established by the 1997 International Convention for the Suppression of Terrorist Bombings:

- 7. Where there is an extradition arrangement made by the Government of Sri Lanka with any Convention State in force on the date on which this Act comes into operation, such arrangement shall be deemed, for the purposes of the Extradition Law, No. 8 of 1977, to include provision for extradition in respect of the offences specified in the Schedule to this Act.*
- 8. Where there is no extradition arrangement made by the Government of Sri Lanka with any Convention State, the Minister may, by Order published in the Gazette, treat the Convention, for the purposes of the Extradition Law, No. 8 of 1977, as an extradition arrangement made, by the Government of Sri Lanka with that Convention State providing for extradition in respect of the offences specified in the Schedule to this Act.*

- The universal conventions against terrorism are not the only option, however. Other instruments with international scope in the area of criminal law may, even if not specifically designed to deal with the terrorist threat, still prove sufficiently versatile and adaptable to hinder the operation of criminal groups involved in terrorist activities. One example is the United Nations Convention against Transnational Organized Crime. The human rights instruments, such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, may also provide a legal basis in cases of acts of torture.



Obstructing terrorist activities through the United Nations Convention against Transnational Organized Crime

Compared with the universal counter-terrorism instruments, the United Nations Convention against Transnational Organized Crime, in force since 2003 and ratified by 161 States so far, contains very detailed provisions on the mechanisms for international cooperation in criminal matters and especially mutual legal assistance, so much so that article 18 is often termed a “mutual legal assistance mini-treaty”. To be able to use these tools, there needs to be a suspicion of the involvement of an organized criminal group in transnational offences. The only

limitation in the definition of “organized criminal group” is that it should act with the aim of committing one or more serious crimes or offences “in order to obtain, directly or indirectly, a financial or other material benefit”, which in practice is not always applicable in the case of terrorist groups.

Another universal instrument that could be applicable in this connection is the United Nations Convention against Corruption, which entered into force on 14 December 2005 and has been ratified to date by 151 States (see Chapter IV, “International Cooperation”).

- The multilateral treaties governing extradition include a large number of regional instruments reflecting common legal traditions or rules that are commonly accepted in certain regions. However, the disadvantage presented by the regional conventions is their geographically restricted scope of application; they cannot provide a legal basis for cooperation between two States unless they belong to the same regional community.

At the regional level there are other types of international agreement, adopted by the Commonwealth countries, that cannot be classified as treaties. For extradition, the agreement in question is the *London Scheme for extradition within the Commonwealth*.



What are the Commonwealth agreements?

The Commonwealth scheme for extradition within the Commonwealth, known as the “*London Scheme*”, together with the Commonwealth scheme for mutual legal assistance in criminal matters, or the so-called “*Harare Scheme*”, are agreements between Commonwealth countries adopted by the ministers of justice of the member countries of the Commonwealth. The aim of these two agreements is to facilitate mutual legal assistance and extradition between these countries. These agreements are not treaties but declarations by each member State agreeing to establish legislation that allows for extradition or mutual legal assistance between Commonwealth countries, in compliance with the principles set out by the two schemes. States are only bound by them once they are incorporated into their domestic legislation. The schemes are not binding but are authoritative in such matters. The vast majority of Commonwealth countries apply the schemes, greatly facilitating mutual legal assistance between themselves.



What advice can one give countries that do not extradite in the absence of a treaty and do not yet have an extensive network of treaties?

The informal expert working group on effective extradition casework practice (UNODC, 2004) recommends that States that do not yet have a wide network of treaties should, in the absence of bilateral or multilateral treaties, authorize their services to respond to extradition requests on a case-by-case basis. They may, for example, make provision in their law for the possibility in particular cases of concluding ad hoc extradition agreements with other States in the absence of a pre-existing agreement. Canadian law, for instance, permits the conclusion of a specific agreement to extradite an individual in connection with a single case.

A second possibility, in the absence of a treaty, is to make extradition subject, in legislation, to the consent of the Head of State. For example, in South Africa any person accused or found guilty of an extraditable offence committed in the territory of a foreign State not party to an extradition agreement may be surrendered to that State with the approval in writing of the President (1962 Extradition Act, art. 3-2).

2.2.2. Agreement based on reciprocity and comity

Many States prefer to extradite to countries with which they have concluded a treaty. However, in the absence of a treaty or if the treaty is not applicable (for example, if it does not include the offence for which the individual is requested in the list of extraditable offences), it is still possible for most States to extradite on the basis of reciprocity and comity.

- By requesting extradition on the basis of reciprocity, a State undertakes to do the same for another State that responds positively to its request. In practice, unless the law or national custom provide otherwise, the assurance of reciprocity may be expressed in the form of a diplomatic note attached to the extradition request or contained in the request itself.
- Since ultimately the decision whether or not to extradite an individual often falls within the sovereign right of States, extradition may be granted, in the absence of a treaty, on the basis of the comity, or courtesy, of nations, provided this does not contravene public policy. Comity contributes to the maintenance of good relations between States.



Case study: the Ramankhan case

An individual claimed by the United Kingdom challenged his extradition on the grounds that there was no extradition treaty between the United Kingdom and Mauritius and that extradition was not possible without a treaty. The Supreme Court of Mauritius drew attention to the fact that, after independence, Mauritius had maintained two separate extradition regimes, one with Commonwealth countries and the other with non-Commonwealth countries. It found that, while there was a need for an extradition treaty with a non-Commonwealth country for extradition to take place, there was no such need with regard to the United Kingdom; since Mauritius and the United Kingdom were both Commonwealth countries; in the latter case extradition could be based on reciprocity to the extent that both countries had legislation covering extradition (*Ramankhan, M.F. v. The Commissioner of Prisons, 2002*).



Case study: the Fioconni case

Italy extradited individuals to the United States of America on the sole basis of comity of nations. The request from the United States was not based on the bilateral extradition treaty between the two countries because the treaty did not specify the offence in question as an extraditable offence (*United States v. Fioconni, 1972*).

In countries where extradition is granted on the basis of the principle of reciprocity or comity, national law provides for the set of conditions in which the extradition procedure should go forward in the absence of a treaty. For example, many francophone countries apply the French Extradition Act of 10 March 1927: “In the absence of a treaty, the conditions, procedure and effects of extradition are determined by the provisions of the present Act”. If there is no specific extradition law, many practitioners resort to the applicable criminal procedure law, or even sometimes extend the application of certain new laws that contain provisions on extradition, for example, a law on money-laundering and international cooperation in relation to the proceeds of crime.



What advice to give practitioners when there are several applicable legal bases?

If a State is party to several conventions applicable to an extradition case, practitioners are advised to carefully examine the provisions of the different conventions in order to assess which is/are legally applicable and, where there are more than one, to choose which affords or afford the greatest chances of the request being successful; for example, one treaty may be chosen in preference to another because of the channel of communication that it provides between the requesting and requested States, or because it does not allow a State party to invoke the political offence exception as grounds for refusing extradition.



Case study: Airbus A-320 (continued)

[An airbus A-320 of an airline of country B, where it is also registered, took off from country A towards country B. It flew over your country (country D) and exploded over a desert region of your country. The explosion caused 165 fatalities. Among the passengers were nationals of countries A and B, including the national football team of country A and representatives of inter-faith exchange and reconciliation groups from countries A and B. Nationals of country C suspected of complicity in the explosion of the aircraft in flight are present in your territory. You are a prosecutor in your country.]

You receive the extradition request several days after proceeding with the provisional arrest of the individual by the authorities of country B. There is no legal basis stated in the request for the extradition.

1. What do you do? Envisage different scenarios according to whether your country and/or country B have ratified the universal counter-terrorism conventions and protocols.



Case study: Le Triomphant

During the night from 30 to 31 October 2010, the ship *Le Triomphant*, which was in operation at an oil terminal, was approached by three speed boats 180 km along the Gallia peninsula of country A. The ship was flying the flag of country F.

Armed individuals boarded the ship and took 15 crew members hostage. There were no casualties during the attack, although a part of the ship was destroyed by a bomb explosion. The hostages included two persons from country A, one from country B, one from country C and six from country F. The group called the Gallia Freedom Fighters claimed responsibility for the attack. They threatened to kill the hostages if they did not talk to the Government of country A within three days. The investigation revealed that the speed boats had been supplied by a businessman from country N.

1. What convention(s) or protocol(s) would be applicable in this case? Which would you use as a legal basis to request the extradition of persons suspected of the hostage-taking and of the businessman from country N? Give the reasons for your answer.
2. Two of the persons suspected of the hostage-taking are present in the territory of your country, which is country F. Can your country arrest them and establish its jurisdiction to prosecute them?
3. List the countries that could establish their jurisdiction and on what grounds. In your opinion, which State should prosecute these individuals? Give the reasons for your response.



Activities

- List all the legislation of your country that is applicable to extradition, including all bilateral, regional and international treaties applicable in your country.
- Has your country ever used an international treaty as a legal basis for extradition?
- Is your country able to extradite in the absence of a treaty? If so, on what basis?
- Identify the advantages and disadvantages of an extradition system based solely on treaties.
- Acquaint yourself with the typical language, structure and content of an extradition treaty by reading the model extradition treaty adopted by the United Nations General Assembly.



Assessment questions

- What are the different legal bases on which a State may base an extradition request?
- What are the advantages and disadvantages of each of these legal bases?
- Do all States accept all the legal bases as valid for granting extradition?
- What would your advice be to countries that do not extradite in the absence of a treaty but do not yet have a wide network of treaties?



Tools

- The full text of the multilateral treaties cited is available at the following addresses:
 - the universal conventions and protocols against terrorism:
www.unodc.org/tldb/en/universal_instruments_list_NEW.html
 - the regional conventions against terrorism:
www.unodc.org/tldb/en/regional_instruments.html
 - the United Nations Convention against Transnational Organized Crime:
www.unodc.org/unodc/en/treaties/CTOC/index.html
 - the United Nations Convention against Corruption:
www.unodc.org/unodc/en/treaties/CAC/index.html
 - the Convention against Torture
www2.ohchr.org/english/law/cat.htm
- The Report of the Informal Expert Working Group on Effective Extradition Casework Practice (UNODC, 2004) is available at the following address:
www.unodc.org/documents/legal-tools/lap_report_ewg_extradition_casework.pdf
- The UNODC Digest of Terrorism Cases for Practitioners contains a number of cases that illustrate the links between terrorism and other forms of criminality, such as corruption, drug trafficking and organized crime:
www.unodc.org/documents/terrorism/09-86635_Ebook_English.pdf
- A catalogue of cases of 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 [En](#) [Fr](#) [Sp](#) [Ru](#) [Ch](#) [Ar](#)) is available at the following address:
<https://cms.unov.org/DocumentRepositoryIndexer/GetDocInOriginalFormat.drxx?DocID=3f52c8d3-d37c-48e4-997c-768de78058e0>
- The Commonwealth mechanisms are available at the following address:
www.thecommonwealth.org/Internal/38061/documents/
- Compendiums of bilateral, regional and international agreements relating to extradition and mutual legal assistance have been compiled according to the specifications of practitioners in a number of countries who have requested them from UNODC (www.unodc.org/unodc/en/legal-tools/training-tools-and-guidelines.html). The compendium prepared for member countries of the Indian Ocean Commission is available online at:
www.unodc.org/documents/treaties/organized_crime/internationalcooperation/Compendium_IOC_French_complet.pdf
- The aforementioned UNODC Manual on International Cooperation in Criminal Matters related to Terrorism is available at:
www.unodc.org/unodc/en/terrorism/technical-assistance-tools.html

- The United Nations model treaty on extradition and the UNODC manual related to it are available among the electronic legal resources of the UNODC Terrorism Prevention Branch, together with the UNODC Model Law on Extradition:
www.unodc.org/tldb/model_laws_treaties.html

2.3. Extradition conditions

Since the extradition procedure is governed by the domestic law of the requested State, each State is at liberty, generally speaking, to establish the grounds for refusal that may be invoked and the imperative or discretionary nature of such refusal, and to do so in conformity with its obligations under international law.

This is expressed in the universal counter-terrorism conventions in a “catch-all” formula whereby “No provision [of the convention] will affect other rights, obligations and responsibilities of States and individuals under international law”. This means that the conditions governing extradition must be determined and applied taking account of the whole legal framework binding upon the State at the international level, which includes human rights treaties.



Practical guidance regarding any potential grounds for refusal

Generally, it is recommended to the competent authority of the requested State that it informs their counterparts in the requesting State at the outset of the procedure regarding any issue that could be invoked as grounds for refusal. Such notification allows the authorities of the requesting State to produce the information or documents needed to resolve the problem. It may be a question, for example, of providing an assurance that the death penalty will not be imposed.



See module 4, which is exclusively devoted to the human rights aspects of counter-terrorism and offers a range of training tools (case studies, activities, tools, assessment questions and bibliographies).

2.3.1. Conditions relating to the individual

2.3.1.1. Nationality of the person sought

While a requesting State may request the extradition of any individual, even one of its own nationals, it is traditional for many States, especially civil-law States, not to extradite their own citizens. This does not mean that they can find refuge in their home country: the non-extradition rule in respect of nationals is tempered by the existence of active personality principle, which allows these States to establish their competence and to prosecute their nationals for offences that they have committed abroad. This rule does not exist in most common-law countries, which extradite their nationals.

This rule is often criticized, but it is no longer an absolute these days: many of the States in question have agreed bilateral treaties that offer the requested State the

choice of extraditing their nationals or not and, in the case of refusal, the State undertakes to bring the case before its own judicial authorities in conformity with the aut dedere aut iudicare principle.



What advice to give in the case of non-extradition of nationals?

When extradition is refused on grounds of nationality and the requested country is called upon to prosecute the wanted person in conformity with the aut dedere aut iudicare principle, the requesting State must provide the requested State with all the information that it possesses through mutual legal assistance. In this regard, the Hamadei case cited above (under 1.2.2.2. *Cases of jurisdiction and the principle of aut dedere aut iudicare (extradite or prosecute)*) is an interesting case study.

There is an alternative solution to the problem of refusal to extradite that States may consider, namely **conditional extradition**. Some States will agree to surrender the individual on condition that he or she is returned after trial to serve the sentence handed down. This possibility is mentioned in the counter-terrorism conventions and protocols (see, for example, the Convention for the Suppression of the Financing of Terrorism, art. 10, para. 2).

2.3.1.2. Refugee status: interplay between extradition and asylum procedures

The United Nations Security Council, in its resolution 1373, requests 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”.

The 1951 Convention and 1967 Protocol relating to the Status of Refugees also specify that the protection afforded by those instruments may not be claimed by a refugee if there are serious reasons for considering that such person has “committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee”. They also state that the principle of “non-refoulement” (non-expulsion) may not be invoked by a refugee if there are reasonable grounds for considering that person as a danger to the security of the country in which he or she is or if, having been convicted by a final judgement of a particularly serious crime, he or she constitutes a danger to the community of that country.



What is the principle of non-refoulement?

No State party to the 1951 Convention or the 1967 Protocol relating to the Status of Refugees 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. (article 33)

2.3.1.3. Humanitarian and non-discrimination grounds

The universal counter-terrorism conventions and protocols provide for the possibility of refusing extradition if the requested State has substantial grounds for

believing that the request has been made for the purpose of “prosecuting or punishing a person on account of that person’s race, religion, nationality, ethnic origin or political opinion or that compliance with the request would cause prejudice to that person’s position for any of these reasons”.

In addition, many bilateral treaties and national laws provide for refusal to extradite on humanitarian grounds if surrendering the wanted person could have exceptionally serious consequences for the person on account of their age or state of health.



Case study: Pinochet

The British authorities refused to extradite the former dictator Pinochet on the grounds that “the attempted trial of an accused in the condition diagnosed in Senator Pinochet [...] could not be a fair trial in any country” (Decision of the Home Secretary, 2 March 2000).

2.3.2. Conditions relating to the facts

2.3.2.1. Dual criminality rule

The universal counter-terrorism conventions and protocols do not require dual criminality as a condition for extradition. However, it is a principle that is established by numerous bilateral treaties and laws on extradition. If that condition is not fulfilled, the extradition process falls through. In this regard, the most valuable aspect of the universal counter-terrorism conventions and protocols is that they permit harmonization of the offences that they provide for in the laws of the States parties in order to avoid any obstacle arising from the dual criminality requirement.



How to interpret the dual criminality rule?

According to this rule, the offence covered by the extradition request must constitute an offence under the law of both States concerned for the request to be granted. This rule must be deemed to be respected even if the two legislations do not name, define or classify the act in the same way. The crucial point is that the act should be deemed an offence in both countries. The judge in the requested country must ask himself whether the act in question would be punishable in some way if it had been committed in the territory of his country.



Case study: Judgement of the Italian Supreme Court of Cassation of 2 July 2000

France submitted an extradition request to Italy for the transfer of an alleged terrorist belonging to the Algerian terrorist group GIA (Armed Islamic Group). The Court interpreted the dual criminality condition in a very flexible fashion: what mattered was not the legal definition of the offence (in this case a criminal

association for terrorist purposes), but rather the fact that the act in question was punishable in both legal systems. It was not necessary for such an act to constitute the same offence or to be punishable by the same penalties. (*Italian Supreme Court of Cassation, 2 July 2000, available in the database of the Terrorism Prevention Branch: www.unodc.org/tldb/showDocument.do?lng=en&documentUid=3321&country=ITA*)

It should be noted that the recent trend in extradition law is towards a more flexible application of such grounds for refusal. For example, the United Nations Convention against Corruption allows derogation from the dual criminality rule: a State party whose legislation so permits may grant the extradition of a person for any of the offences covered by this Convention that are not punishable under its own domestic law.

2.3.2.2. *Speciality rule*

The speciality rule does not appear in the universal counter-terrorism conventions and protocols in connection with extradition, but it does appear in numerous bilateral and regional extradition treaties and is a recognized principle of international customary law. According to this rule, the individual may be prosecuted by the requesting State only for those acts that were the subject of the request for extradition. Generally, such prosecution is only possible if the requested State consents to the extradition request being extended to encompass the new acts or if it allows the person a reasonable amount of time from the outset to leave the State voluntarily and the person does not do so.



Illustration of the speciality rule — Convention on extradition of the Economic Community of West African States (ECOWAS)

Article 20 — Rule of speciality

1. A person who has been extradited shall not be proceeded against, sentenced or detained with a view to the carrying out of a sentence for any offence committed prior to his surrender other than that for which he was extradited, nor shall he be for any other reason restricted in his personal freedom, except in the following cases:

(a) When the State which surrendered him consents. A request for consent shall be submitted, accompanied by the documents mentioned in article 18 and a legal record of any statements made by the extradited person in respect of the offence concerned. Consent shall be given when the offence for which it is requested is itself subject to extradition in accordance with the provision of this Convention;

(b) When that person, having had an opportunity to leave the territory of the State to which he has been surrendered, has not done so within 45 days of his final discharge, or has returned to that territory after leaving it.

2. When the description of the offence charged is altered in the course of proceedings, the extradited person shall only be proceeded against or sentenced in so far as the offence under its new description is shown by its constituent elements to be an offence which would allow extradition.

Article 21 — Re-extradition to a third State

Except as provided for in article 20, paragraph 1 (b), the requesting State shall not, without the consent of the requested State surrender to another State or to a third State a person surrendered to the requesting State and sought by the said other State or third State in respect of offences committed before his surrender. The requested State may request this production of the documents mentioned in article 18.

2.3.2.3. *The political nature of the offence*

The exception for the political nature of an offence is a standard clause found in the majority of extradition treaties and in many States' national laws. Traditionally, extradition requests were rejected if the requested State maintained that the offence in question was of a political nature. That principle originates from the nineteenth century and is based on the idea that resistance to political oppression and dictatorship must be supported.

Although widely known, the term “political offence” is seldom defined in national treaties or legislations. What is more, the exception has always been difficult to analyse from a legal point of view, except when applied in its most simple form to non-violent political expression or activities. Problems arise in the case of offences that are similar to ordinary offences against persons or property, but have been committed on political grounds. These are interpreted by the case law of countries according to the various criteria that they have developed to determine whether an offence is an illegal attempt to force governmental change or is more akin to an ordinary offence. However, no coherent or satisfactory rule of applicability has emerged, and excusing attacks on innocent civilians on political grounds is seen increasingly as tantamount to protecting terrorists. The rise of terrorism and other forms of transnational criminality in recent decades has led some governments to rule out this exception for certain types of serious offence, as well as for offences set out in multilateral treaties, in particular the universal counter-terrorism treaties.

After the first universal counter-terrorism convention was adopted in 1963, it was another 34 years before any terrorism-related convention or protocol specified whether the offences described therein could be considered political. The problem was overcome through the explicit rejection of the political offence exception in the case of offences set out in the 1997 International Convention for the Suppression of Terrorist Bombings. All subsequent conventions and protocols contain the same provision in order to ensure that, in the case of serious offences, extradition is not compromised by unfounded requests to apply the political offence exception.



Example — exclusion of the political offence exception: article 11 of the International Convention for the Suppression of Terrorist Bombings

None of the offences set forth [in the Convention] 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.

Security Council resolution 1373 approves this approach by extending the exclusion of the exception for political offences to terrorist acts in general. In article 3, paragraph (g), States are requested to ensure that claims of political motivation are not recognized as grounds for refusing requests for the extradition of alleged terrorists.



Case study: the China Air flight case

In December 1989, a Chinese citizen hijacked a China Air flight with 223 passengers on board, threatening to destroy the aircraft with explosives. The hijacker claimed that his motive for forcing the plane to land at a Japanese airport was to seek political asylum due to his involvement with the Tiananmen Square incident of June 1989. He therefore claimed protection under the political offence exception contained in the Japanese Extradition Act. The subject was surrendered to the Chinese Government in February 1990 after a ruling by the Tokyo High Court that the hijacking was not a political offence. The Court argued that any political connection with the Tiananmen Square incident did not outweigh the victimization to which he subjected the passengers and crew of the commercial aircraft. (Extract from the UNODC Digest of Terrorist Cases.)



Case study: the Battisti case

Cesare Battisti, convicted for murder in Italy, escaped to Brazil after passing through Mexico and France where requests were made to extradite him. He was granted political asylum in Brazil in 2009 but that decision was appealed before Brazil's Supreme Court. Italy also requested that Brazil extradite him.

The Supreme Court passed its decision, with a majority declaring that it was not possible to refuse Battisti's extradition to Italy on the basis of the political nature of the offence, since it constituted an ordinary offence (the extradition request was based on a conviction for four murders committed while Battisti was a member of a secret revolutionary organization, during a normal period of government and under the rule of law), and there was no immediate political objective or grounds to believe that it was a legitimate reaction to an oppressive regime. It also repealed the decision of the Minister of Justice to grant Battisti refugee status, on the basis of assertions made in the decision. In a majority decision, the Supreme Court ruled that Battisti should be extradited to Italy and that the President had a duty to adhere to the terms of the treaty with Italy concerning the surrender of the person undergoing the extradition process. However, the President decided not to extradite Battisti and the case was referred back to the Supreme Court, where it is pending.

Although the case is still pending, the ruling of 12 December 2009 still makes interesting reading:

[www.stf.jus.br/portal/jurisprudencia/listarJurisprudencia.asp?s1=%28Ext\\$.SCLA.%20E%201085.NUME.%29%20OU%20%28Ext.ACMS.%20ADJ2%201085.ACM.S.%29&base=baseAcordaos](http://www.stf.jus.br/portal/jurisprudencia/listarJurisprudencia.asp?s1=%28Ext$.SCLA.%20E%201085.NUME.%29%20OU%20%28Ext.ACMS.%20ADJ2%201085.ACM.S.%29&base=baseAcordaos)

2.3.2.4. *Military offences*

The exception for military offences does not appear in the universal counter-terrorism conventions and protocols. However, a considerable number of bilateral conventions and national laws prohibit granting extradition for acts punishable by the requesting State's military law, such as desertion or insubordination. This exception also appears in the United Nations Model Treaty on Extradition.

Traditionally, there are two conditions for this exception: the acts must not be classified elsewhere as ordinary criminal offences, nor may they constitute violations of international humanitarian law for which they would be considered international crimes.

2.3.2.5. *Fiscal offences*

The exception for fiscal offences also traditionally appears in many bilateral treaties and national laws on extradition as an expression of the sovereignty of States that tax their citizens. "Fiscal offences" are offences relating to taxation, customs duties, exchange control or other State revenue matters.

However, given the rise in money-laundering, corruption, the infiltration of the proceeds of crime into national economies and the financing of terrorism, there is currently a clear tendency for modern treaties to refuse such an exception. The International Convention for the Suppression of the Financing of Terrorism reflects this approach by ensuring that, for the purposes of extradition, States parties do not consider an offence relating to the funding of terrorism a fiscal offence, and do not solely invoke the fiscal nature of the offence in order to refuse an extradition request. The United Nations conventions on transnational organized crime and corruption include similar provisions, along the lines of those set out in the United Nations Model Treaty on Extradition.

2.3.3. Conditions relating to punishment

2.3.3.1. *Severity of the punishment*

Since extradition is a cooperation measure that affects the freedom of the individual in question, as well as a costly mechanism for the States concerned, it follows that it should be reserved for relatively serious offences. Sometimes, the severity of the punishment results from the nature of the offence: many extradition treaties and national laws list extraditable offences and strictly limit extradition to this list. One major disadvantage is that it is necessary to renegotiate or supplement the treaty if the two States adopt laws that include new offences, or if the list inadvertently omits a serious offence that is punishable in both States. In order to limit the duration and cost of negotiations, States have preferred to include a general clause in more recent agreements, stipulating a certain degree of severity for the incurred or pronounced

sentence. Offences no longer need to be specifically listed in order for extradition to take place.



Example — article 2 of the United Nations Model Treaty on Extradition, “extraditable offences”

For the purposes of the present Treaty, extraditable offences are offences that are punishable under the laws of both Parties by imprisonment or other deprivation of liberty for a maximum period of at least [one/two] year(s), or by a more severe penalty. Where the request for extradition relates to a person who is wanted for the enforcement of a sentence of imprisonment or other deprivation of liberty imposed for such an offence, extradition shall be granted only if a period of at least [four/six] months of such sentence remains to be served.

2.3.3.2. *Nature of certain punishments*

2.3.3.2.1. *Death penalty*

Some States refuse to grant extradition to a country where the death penalty can be imposed. This is notably the case for State parties to the Second Optional Protocol to the International Covenant on Civil and Political Rights aimed at the abolition of the death penalty, in force since 1991, as well as for State parties to regional instruments (in particular the Protocol to the 1990 American Convention on Human Rights to Abolish the Death Penalty within the Organization of American States, and Protocol No. 13 to the 2002 Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty in all circumstances within the Council of Europe). States may, however, agree to the extradition request on the condition that the requesting State undertakes not to pronounce or implement capital punishment.



Case study: French case law related to the death penalty

French criminal legislation prohibits granting extradition, for example, if the act for which extradition has been requested is punishable under the requesting State’s legislation with a punishment or prevention measure that is contrary to French public policy. However, France grants extradition to countries implementing the death penalty on the condition that “the death penalty will not be requested, pronounced or implemented”, the reference to a moratorium being insufficient in itself for de facto abolitionist States (*Council of State, 27 February 1987*).

In addition, article 6 (2) of the International Covenant on Civil and Political Rights states that in countries which have not abolished the death penalty, this sentence may be imposed only for the most serious crimes, pursuant to a final judgement rendered by a competent court. Adherence to those restrictions must also be taken into consideration when responding to an extradition request.

2.3.3.2.2. *Risks of torture or cruel, inhuman or degrading punishment or treatment*

One of the fundamental principles of international law is the express prohibition to return an individual to a country where there are serious grounds to believe that they will risk being tortured. Article 3 of the Convention against Torture clearly stipulates that “No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture”. Likewise, according to article 7 of the International Covenant on Civil and Political Rights, “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”. Consequently, State parties must refuse to grant extradition to a country where torture or such treatment or punishment could be implemented.



Risk of torture and diplomatic assurances

Certain States will grant extradition if they are given assurances that the requesting State will not submit the individual concerned to torture or inhuman or degrading treatment. However, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment considers that States should not rely on diplomatic assurances as protection against torture and ill treatment when there are good reasons to believe that a person would risk being submitted to torture or ill treatment on his return. Indeed, there are many arguments for viewing such diplomatic assurances as flawed: for example, the question may arise as to whether the act of providing a diplomatic assurance for a specific case is equivalent to an implicit admission that torture is practised in a widespread and systematic way in the State in question. What is more, it should be noted that diplomatic assurances are granted by means of agreements that are not legally binding. In practice, it is very difficult to monitor adherence to the assurances given, and if they are not adhered to, the person that these assurances are designed to protect has no recourse.



Case study: *Chahal v. The United Kingdom* and *Saadi v. Italy*

In the *Chahal* and *Saadi* rulings, the European Court of Human Rights agreed to examine whether the diplomatic assurances “provided, in their practical application, a sufficient guarantee that the applicant would be protected against the risk of treatment prohibited by the Convention. The weight to be given to assurances from the receiving State depends, in each case, on the circumstances obtaining at the material time”. (*Chahal v. The United Kingdom*, 15 November 1996 (<http://sim.law.uu.nl/sim/caselaw/Hof.nsf/2422ec00f1ace923c1256681002b47f1/c28f4ac45dada004c1256640004c3154?OpenDocument>); *Saadi v. Italy*, 28 February 2008).



Case study: *Agiza v. Sweden*

In May 2005, the United Nations Committee Against Torture examined the *Agiza v. Sweden* case, in which Ahmed Agiza and Mohammed al-Zari were expelled from Sweden in December 2001 for alleged terrorist activities and sent to Egypt aboard a United States aircraft.

The Swedish authorities accepted the diplomatic assurances given by the Egyptian Government, namely that neither suspect would be subjected to the death penalty, torture or ill treatment and that each of them would be given a fair trial. The two Governments also implemented a monitoring mechanism after the return, in the form of visits to Egypt by representatives of the Swedish authorities. However, despite those assurances, Mr. Agiza was subjected to torture and ill treatment.

In this significant decision, the Committee judged that “the expulsion of the claimant by the State party violated article 3 of the Convention against Torture. The procurement of diplomatic assurances, which, moreover, provided no mechanism for their enforcement, did not suffice to protect against this manifest risk.”

The Agiza case is the first case of expulsion to another country to present a statement of law at an international level. In this case, the diplomatic assurances provided were insufficient protection against the manifest risk of torture and were therefore ineffective.

The Special Rapporteur considers that subsequent monitoring mechanisms have barely lowered the risk of torture and have proven inefficient either for protecting individuals from torture or for ensuring that States assume their responsibilities.

See the decision of the Committee against Torture, *Agiza v. Sweden*: www.unhcr.ch/tbs/doc.nsf/MasterFrameView/4dec90a558d30573c1257020005225b9?Opendocument

See also the progress report by the United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment: www.unhcr.org/refworld/pdfid/43f30fb40.pdf

2.3.3.2.3. *Other punishments*

In practice, extradition is also refused by some countries if the act for which extradition has been requested is punished by a penalty not provided for in the range of applicable penalties in their national law (for example, forced labour, which has been abolished in certain countries).

2.3.4. *Conditions relating to competence*

Competence of the requesting State — According to certain bilateral extradition treaties and national laws, extradition may only be granted if the offence has been committed within the requesting State’s territory. To avoid extradition being refused solely for this reason and resulting in impunity, the universal counter-terrorism treaties include the following legal fiction: “Offences shall be treated, for the purposes of extradition between State parties, as though they had been committed

not only in the place in which they occurred but also in the territories of the States that have established their jurisdiction”.

Competence of the requested State — Many bilateral extradition treaties and legislations state that extradition shall not be granted if the offence for which extradition has been requested has been committed within the territory of the requested State. This rule is justified notably by the fact that public policy in the requested State has been contravened.

2.3.5. Conditions relating to procedure

2.3.5.1. Fair treatment

Since 1973, the universal counter-terrorism treaties have explicitly stipulated that any detained person or any person tried according to these treaties receive “fair treatment”. That includes the exercise of rights and adherence to guarantees established by national law and the applicable provisions of international law, notably those relating to human rights. Reference to international law has become common practice since the 1997 International Convention for the Suppression of Terrorist Bombings. Among the instruments relating to human rights, the International Covenant on Civil and Political Rights in article 14 recalls the right of all individuals to a fair and public hearing by a competent, independent and impartial tribunal established by law, which will determine any criminal charge against him. Extradition may therefore be refused if the requested State judges that the extradition might expose the criminal to treatment in the requesting State that is considered unfair. In the context of counter-terrorism, for example, the Human Rights Committee has expressed its concern regarding the employment of military courts or other specialized courts for trying offences linked to terrorism.



Case study: the Vivanco case

In 1992, Mr. José Luis Gutiérrez Vivanco, a Peruvian citizen suspected of committing a terrorist bomb attack, was arrested by the police’s National Counter-Terrorism Directorate. He was charged in 1994 during a private hearing of the Special Terrorism Division of the Lima High Court, which sentenced him to 20 years’ imprisonment. The Court was composed of “secret judges”, who conducted the proceedings behind special windows which prevented them from being identified, and using loudspeakers which distorted their voices.

The Human Rights Committee, acting in accordance with article 5 (4) of the Optional Protocol to the International Covenant on Civil and Political Rights, recalled its decision in the *Polay Campos v. Peru* case, regarding trials held by faceless courts to which the public are not admitted, at which the defendants do not know who are the judges trying them and where it is impossible for the defendants to prepare their defence and question witnesses. In the system of trials with “faceless judges” neither the independence nor the impartiality of the judges is guaranteed, which contravenes the provisions of article 14 (1) of the International Covenant on Civil and Political Rights. (*Mr. José Luis Gutiérrez Vivanco v. Peru — Communication No. 678/1996*). Also refer to *Polay Campos v. Peru, Communication No. 577/1994*.



Extradition and trials in absentia

For countries that allow trials in absentia, extradition cannot be refused on the grounds that the individual whose extradition has been requested was not present when his sentence was passed. Conversely, for countries that do not allow trials in absentia, that fact may be used as an obstacle to extradition on the basis of the fair trial principle. Those countries consider that the accused should normally be present at his trial in order to guarantee a fair trial. However, it should be noted that, in many jurisdictions, the most important thing in practice is that the individual sentenced in absentia should have had the chance to participate in his trial, the chance to appeal or the chance to undergo a new trial to enable his extradition.



Case study: the Bozano case

In 1975, Mr. Bozano was sentenced in absentia to life imprisonment by the Genoa Assize Court of Appeal in Italy. The public prosecutor of Genoa issued an order for arrest, and an international arrest warrant was issued by the Italian police. In 1979, Mr. Bozano was caught and arrested in France by the police. The Indictment Division of the Limoges Court of Appeal appealed against Mr. Bozano's extradition on the grounds that the prosecution procedure carried out in absentia at the Genoa Assize Court of Appeal did not comply with French public policy. In particular, one of the arguments upheld was that Mr. Bozano was not able to appeal his conviction, even at the highest Court, namely the Italian Court of Cassation. (Read a continuation of this case in section 2.4.3. *Disguised extradition*).



Case study: the Colozza case

The act of being tried in absentia without ever having been heard by the court was declared as being contrary to article 6 of the European Convention on Human Rights, which establishes the right to a fair trial according to which all persons are entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, which will determine any criminal charge against them (*Colozza v. Italy*, 12 February 1985, <http://cmiskp.echr.coe.int>).

2.3.5.2. *The ne bis in idem principle*

The ne bis in idem principle is a general principle of criminal law in the majority of national systems, according to which no person may be tried or punished in criminal proceedings twice for the same offence(s). It is set out in article 14 of the International Covenant on Civil and Political Rights. However, application of the principle is generally confined within a single national system.

In extradition treaties, the principle is traditionally recognized in relation to the requested State, i.e. the extradition will be opposed if the individual concerned has

already been acquitted or finally convicted of the same offence(s) by the requested State.



Example — article 9 of the 1957 European Convention on Extradition

Extradition shall not be granted if final judgment has been passed by the competent authorities of the requested Party upon the person claimed in respect of the offence or offences for which extradition is requested. Extradition may be refused if the competent authorities of the requested Party have decided either not to institute or to terminate proceedings in respect of the same offence or offences.

There is a tendency to apply this principle more widely, particularly within the European Union, where countries undertake to recognize the judicial decisions of all member States. Under certain conditions, those countries can refuse to execute a European arrest warrant if the individual has already been convicted by a third State (other than the State that issued the extradition request) for the same offence(s). Nevertheless, there is no general rule in international law that obliges countries to apply the ne bis in idem principle, and States are not obliged to enforce decisions passed by foreign jurisdictions.

2.3.5.3. Statute of limitations, amnesty and pardon

In the majority of national laws and bilateral conventions, extradition may not take place if a basic obstacle, such as a statute of limitations, an amnesty or a pardon, is encountered.



Practical guidance on indicating periods of limitations

Due to the significant differences that exist between legal systems, the requesting State may encounter limitations on obtaining extradition in the requested State that they are not familiar with. It is extremely useful when practitioners indicate in the extradition request any deadline after which a person may not be tried, or any penalty which may not be enforced.



Case study: the “Liberation of the Nucla Hostages”

A commando unit comprising a dozen people attacked the premises of the foreign company Nucla, which processes uranium for use in the nuclear industry. Six employees, five of whom were foreigners, were kidnapped. The national movement for justice claimed responsibility for the abduction, sent a list of demands to the government and threatened to kill the hostages if those demands were not satisfied. The hostages were freed two weeks later even though the demands had not been met.

The investigation revealed the existence of two accomplices, who had been working as security officers on the mine site and who disappeared after the abduction. They were located in bordering country B and provisionally arrested

pending extradition to country A — the location of the mine site and the hostages — to face criminal prosecution there.

Country B's authorities received the extradition request from country A. Extradition was requested for aiding and abetting terrorist acts according to articles 71, 191, 317 and 320 of country A's criminal code. Those articles were attached to the request:

Article 71: An accomplice is a person who knowingly, through aid or assistance, facilitates the preparation or commission of a crime. Any person who, by means of a gift, promise, threat or order, or through abuse of authority or powers, provokes the commission of an offence or gives instructions to commit it, is also an accomplice. The accomplice to the offence is punishable as a perpetrator.

Article 191: Any person who arrests, abducts, detains or unlawfully imprisons another person, without an order from the established authorities and in cases not authorized by law, shall be punishable by imprisonment for a term of 30 years.

Article 317: The following offences constitute terrorist acts if they are committed intentionally in connection with an individual or collective enterprise aimed at seriously disrupting law and order through intimidation or terror:

(1) [...] abduction and unlawful imprisonment as defined by the present code.

Article 320: The maximum penalty for offences mentioned in article 317 shall be as follows when those offences constitute terrorist acts: [...]

(2) If the offence is punishable by imprisonment for a term of 20 years, the penalty shall be death.

In accordance with national law, country B's authorities must establish whether the offences for which extradition has been requested are also considered criminal offences according to their own legislation, in order to be able to grant extradition.

Country B's criminal law punishes aiding and abetting (article 58) and hostage taking (article 246 of the criminal code and article 15 of the counter-terrorism law), as follows:

Criminal code:

Article 58: Any person who, by means of a gift, promise, threat or order, or through abuse of authority or powers, or criminal stratagem or contrivance, incites or orders an act considered a crime or offence; any person who knowingly aids or assists the perpetrator or perpetrators of the act in preparing, facilitating or committing the act; and any person who procures weapons, tools or any other means used to commit the act, knowing that they are intended for that purpose, will be punished as an accomplice to this act.

Article 246: Any person who arrests, detains or illegally imprisons any other person(s) without the order of the competent authorities and except for cases in which the law orders arrest, will be punishable by a term of imprisonment of one to ten years.

Counter-terrorism law/Chapter V Hostage Taking:

Article 15: The acts set out in article 246 of the Criminal Code shall be punishable by a term of imprisonment of ten (10) to thirty (30) years if they have been committed in order to compel a third party, namely a State, an international intergovernmental organization, a natural or legal person or a group of persons to commit or abstain from committing an act as an explicit or implicit condition for the release of a hostage.

It should be noted that the counter-terrorism law defines neither terrorism nor acts of terrorism.

1. Compare the various offences, their material elements and elements of intention, and check whether the dual criminality principle is fulfilled according to country B's law.
2. Since country B has abolished the death penalty, it will not accept extradition to a State that enforces the death penalty for the offence for which extradition has been requested, unless there are sufficient guarantees that the death penalty will not be imposed or carried out. Country A's criminal code provides for the death penalty. However, it has not been carried out for 10 years. Also, in a recent statement, the President of country A announced a moratorium on the death penalty in the country with immediate effect. Do you consider the President's declaration sufficient assurance for granting the extradition of the individual? What advice would you give country B's authorities?
3. During the extradition hearing, the defence lawyer maintains that the national movement for justice is acting to deliver country A from a repressive and bloody dictatorship. Moreover, among the demands made to the government, it was requested that regular, democratic elections be organized. The lawyer therefore maintains that the offence leading to the request for extradition of the two accomplices is a political offence. What advice would you give country A's authorities?



Case study: the "Jihad fighters" case

Note for trainers:

The following case study is based on imaginary examples and has already been used in a training session that took place in the Sahel region. It should be noted that the names of the countries chosen in this practical example are those of the participating countries. Why use the names of participating countries in a fictitious case study? Because it allows the participants to use their legislation, to familiarize themselves with one another's laws and to get fully involved in the practical situation through role play. Trainers are therefore encouraged to change and personalize the names of countries according to their audience. It should be noted that there is no single right or wrong answer to these problems. The aim of this fictitious scenario is to stimulate discussion.

The facts

Amadou Oufaiba is a Malian national living in Niger. He is a driver and tourist guide for desert excursions, and is suspected by the Malian authorities of participating in terrorist operations for an organization that promotes a radical form of Islam and goes by the name of “the Jihad fighters”.

On 12 December 2008, he was arrested by the Nigerien authorities according to Act No. 2008-18 of 23 June 2008, amending and supplementing Act No. 61-27 of 15 July 1961, which established the Criminal Code. He was suspected of having participated in a bomb attack near Tahoua on a bus belonging to a public transport company on 20 November 2008. During the attacks, a total of 15 people were injured. Following the bus attack, the assailants took three people hostage (one Nigerien, one Chadian and one Beninese) but were forced to release them following a rapid intervention by the security forces, who had the assailants under surveillance.

The investigation will also establish whether Amadou Oufaiba had participated a few months earlier in an attack on the civilian airport in Zinder, which resulted in the interruption of the weekly Zinder-Niamey service for three consecutive weeks.

Having determined that it had jurisdiction over the case, Niger discovered that there were probably other people of several nationalities implicated in the attacks and proceeded to arrest them. However, some of these people were allegedly in other countries, notably Mauritania. One individual, a Mr. Mohamed Sidi Ba, was positively identified in Nouadhibou. An arrest warrant was issued against him for aiding and abetting the bomb attacks as part of a terrorist organization.

During the investigation, the Nigerien authorities also realized that a key witness in the case, Mr. El Houssein, was in Djanet in Algeria and that it would be necessary for this person to be heard by the Nigerien investigating judge in charge of the case.

The investigation also led the Nigerien legal authorities to an individual named Mr. Ben Biang, of Chadian nationality. An arrest warrant was issued and an INTERPOL red notice was distributed to all its national bureaux. One month later, Mr. Ben Biang was located in Burkina Faso. He was arrested by the Faso authorities while Niger submitted an extradition request, and placed in detention pending extradition proceedings. When informed of Mr. Ben Biang’s arrest, Sudan also submitted an extradition request in order to bring him to trial in Sudan for supplying arms to terrorist groups.

Once Burkina Faso decided to extradite Mr. Ben Biang to Niger, he was transferred by plane to Niamey. His plane made a stopover in Abidjan.

In order to conduct the investigation, the Nigerien judge had also sent a request for mutual legal assistance to the Malian authorities, to carry out a search of a house located in Commune III in Bamako, where Mr. Oufaiba had stayed at least twice before the attacks were carried out in Niger. The search would allow the seizure of documents attesting to the preparation of terrorist acts in Niger.

At the end of the trial conducted in Niger, Mr. Oufaiba was sentenced according to the aforementioned Act to 20 years’ imprisonment.

After Mr. Oufaiba was sentenced, his home country of Mali expressed a wish that he serve his sentence in Mali.

PART ONE

- Can the acts committed by Mr. Oufaiba be described as terrorist acts under the universal instruments? Which instruments are applicable in this instance?
- Can the delivery of arms by Mr. Ben Biang to Mr. Oufaiba be considered criminal according to the universal counter-terrorism instruments?
- Which States are able to establish their legal competence to prosecute, investigate and judge the perpetrators of the acts?

PART TWO

Questions for all three subgroups

- What should the Nigerien legal authorities do in order to hear the witness statement of Mr. El Houssein, who is living in Djanet? What type of request should be sent to Algeria, and on what legal basis? Specify the conditions in which this request should be made.
- On what basis can Niger make an extradition request to Mauritania in order to prosecute Mr. Mohamed Sidi Ba in the Nigerien courts? What will Mauritania do about this extradition request?
- Is Burkina Faso able to provisionally arrest Mr. Ben Biang on the basis of the red notice published and distributed by INTERPOL?
- How will Burkina Faso deal with the two extradition requests for Mr. Ben Biang? When examining extradition requests, Burkina Faso needs to assess Sudan's respect for human rights. How should the examining magistrate deal with this issue?
- Should Niger submit a specific request to the Ivorian authorities due to the fact that Mr. Ben Biang, as part of the extradition procedure from Burkina Faso to Niger, stopped over in Côte d'Ivoire?
- What could Mali do to allow Mr. Oufaiba to serve his prison sentence in Mali? On what legal basis could it base its request?



Continuation of the case study in section 5 with a request drafting exercise.



Case study: the airbus A-320 case (continued)

[An Airbus A-320 aircraft of an airline of country B, where it is also registered, took off from country A towards country B. It flew over your country (country D) and exploded over an area of desert in your country. The explosion caused 165 deaths. Among the passengers killed were nationals of countries A and B, including the national football team of country A and representatives of interfaith exchange and reconciliation groups from countries A and B. Country C nationals

suspected of having participated in the explosion on the aircraft are located in your country. The authorities of country B have sent an extradition request to your country. You are a prosecutor in your country.]

When examining the request, you realize that your country has just incorporated the offence for which the extradition has been requested into its national law, namely article 2 of the International Convention for the Suppression of Terrorist Bombings. However, this offence did not appear in the Criminal Code when the extradition request was made.

7. Does this present an obstacle to extradition?

The following day, the press in your country broadcasts a documentary on television illustrating the appalling detention conditions in country B's prisons and the systematic use of inhumane and degrading treatment in relation to detainees.

8. What role could this information play with regard to the extradition request that you have just received?



Activities

- Identify in your country's law the necessary conditions for granting extradition and compare them with the requirements of the universal counter-terrorism treaties and treaties relating to human rights. Which principles of international law must be adhered to by practitioners in your country, even if they have not been incorporated into your national law? In practice, are these principles applied in your country, even if they are not included in your national law?
- How do you reconcile cases where extradition is refused with the duty set out in Security Council resolution 1373 and the universal counter-terrorism treaties to bring the perpetrators of terrorist acts to justice?



Assessment questions

- What is the non-refoulement principle in terms of international law?
- When a country refuses to extradite one of its nationals, what obligation does it have under international law?
- What is the anti-discrimination clause in international law?
- How do you interpret the dual criminality principle in practice?
- What is the rule of specialty?
- How is the political offence exception applied in the case of a terrorist act?
- Is it possible to use the fiscal nature of a terrorism-funding offence as grounds to refuse extradition?
- What is understood by "fair treatment" in international law?



Tools

- The United Nations Model Treaty on Extradition and the UNODC manual on this model treaty are available on the database of the Terrorism Prevention Branch of UNODC, as well as the UNODC Model Law on Extradition: www.unodc.org/tldb/model_laws_treaties.html
- The text of the 1951 Convention and the 1967 Protocol relating to the Status of Refugees is available at the following address: www.unhcr.org/refworld/docid/3be01b964.html
- The International Covenant on Civil and Political Rights, the Second Optional Protocol to the International Covenant on Civil and Political Rights aimed at abolishing the death penalty, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, as well as all the other international instruments relating to human rights, are available at the following address: www2.ohchr.org/english/law/
- The report of the Informal Expert Working Group on Effective Extradition Casework Practice (UNODC, 2004) is available at the following address: www.unodc.org/documents/legal-tools/lap_report_ewg_extradition_casework.pdf
- The interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Mr. Manfred Nowak, pursuant to General Assembly resolution 59/182 (A/60/13), is available on the United Nations Official Document System: <http://documents.un.org/>
- The aforementioned Manual on International Cooperation in Criminal Matters related to Terrorism is available at the following address: www.unodc.org/documents/terrorism/Publications/Manual_Int_Coop_Criminal_Matters/English.pdf
- The UNODC Digest of Terrorist Cases is available at the following address: www.unodc.org/documents/terrorism/09-86635_Ebook_English.pdf
- A catalogue of examples of cases of extradition, mutual legal assistance and other forms of international legal cooperation on the basis of the United Nations Convention against Transnational Organized Crime (CTOC/COP/2010/CRP.5) is available at the following address: www.unodc.org/unodc/en/treaties/ctoc-cop-session-5.html
- The Digest of Jurisprudence of the United Nations and Regional Organizations on the Protection of Human Rights while Countering Terrorism (HR/PUB/03/1) is available at the following address: www.ohchr.org/Documents/Publications/DigestJurisprudenceen.pdf
- The Technical Guide to the United Nations Convention against Corruption contains a chapter relevant to the topic (extradition, pages 146-153): www.unodc.org/documents/corruption/Technical_Guide_UNCAC.pdf



Further reading

- The UNODC Compendium of United Nations Standards and Norms in Crime Prevention and Criminal Justice contains highly relevant provisions on torture and other cruel, inhuman or degrading punishments and treatment and capital punishment:
www.unodc.org/pdf/criminal_justice/Compendium_UN_Standards_and_Norms_CP_and_CJ_English.pdf
- The United Nations High Commissioner for Refugees (UNHCR) has published a Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, a practical guide advising national authorities on how to make the right decisions in this and other areas of refugee law, available at the following address:
www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b3314
- If you are interested in the complex interaction between the two separate but directly linked legal areas of extradition and asylum, see the UNHCR publication on the Interface between Extradition and Asylum, which is a good source of information and is available at the following address:
www.unhcr.org/refworld/docid/3fe846da4.html
- Report of the UNODC Terrorism Prevention Branch on the treatment of the political offence exception in international counter-terrorism legal instruments:
www.unodc.org/tldb/bibliography/Biblio_Pol_Off_Exception_UNODC_Report_Interpol_2004.doc
- Antje C. Petersen, *Extradition and the Political Offense Exception in the Suppression of Terrorism*, 67 Indiana Law Journal 767, Summer 1992
- Bassiouni, M. C., *Introduction to International Criminal Law*, Transnational publishers, 2003
- Bassiouni, M. C., *International Extradition: United States Law and Practice*, Oceana Publications, 1996
- Borelli Silvia, *Terrorism and Human Rights: Treatment of Terrorist Suspects and Limits on International Co-operation*, 16 Leiden Journal of International Law 803, 2003
- Gilbert G., *Transnational Fugitive Offenders in International Law, Extradition and Other Mechanisms*, Martinus Nijhoff Publishers, 1998
- Jones A., *Extradition and mutual assistance*, London Sweet and Maxwell, 2001
- Kelly Michael J., *Cheating Justice by Cheating Death: The Doctrinal Collision for Prosecuting Foreign Terrorists — Passage of Aut Dedere Aut Judicare into Customary Law & Refusal to Extradite Based on the Death Penalty*, 20 Arizona Journal of International and Comparative Law 491, Fall 2003

- Huet A., Koering-Joulin R., *Droit pénal international*, PUF, 2005
- Ana Peyro Llopis and Damien Vandermeersch, *L'extradition et l'entraide judiciaire*, in “Juger le terrorisme dans l’Etat de droit”, Bruylant, 2009
- McClean D., *International Cooperation in Civil and Criminal Matters*, Oxford University Press, 2002
- Nicholls C., Montgomery C. and Knowles J., *The Law of Extradition and Mutual Assistance*, in *International Criminal Law: Practice and Procedure*, Cameron, 2002
- Michael Plachta, *(Non-)Extradition of Nationals: a Never-ending Story?*, 13 *Emory International Law Review* 77, Spring 1999
- R. Stuart Phillips, *The Political Offense Exception and Terrorism: Its Place in the Current Extradition Scheme and Proposals for Its Future*, 15 *Dickinson Journal of International Law* 337, Winter 1997
- Prost K., *Extradition: the practical challenges*, in *Treaty Enforcement and International Cooperation in Criminal Matters*, OPCW, 2002



Supplementary material

- International Cooperation in Criminal Matters Related to Terrorism (UNODC PowerPoint presentation)

2.4. Forms of surrender used as alternatives to extradition

Extradition is a separate concept from deportation or the expulsion of non-nationals, which are unilateral acts that do not involve a request from another State and are aimed at implementing immigration policy and maintaining public order and security, rather than helping another State in the exercise of criminal proceedings.

Extradition is also distinct from surrender procedures in international criminal jurisdictions, as well as those set out on a regional level, such as the European arrest warrant.



See the box *What is the European arrest warrant?* in the section on *Regional and subregional judicial mechanisms* in this module (4.6.).

Other forms of surrender are used as alternatives to extradition for various reasons. Broadly speaking, the arguments used are that extradition procedures are too unwieldy, that they have failed in the past or that the length of time they take would allow the fugitive to escape again.

International law does not stipulate that regulated methods of extradition are the only means that can be used to transfer suspected criminals from one country to another to face prosecution. However, if States decide not to use such methods, they must still ensure that the person is surrendered with a minimum necessary adherence

to regular procedures that conform to international law, notably instruments relating to human rights. Although extradition procedures are often thought to be long and unwieldy, their complexity is a by-product of providing minimum guarantees to the investigated persons. A fugitive can indeed be transferred outside extradition channels in order to bring him or her before a court and buy time, but this could lead to the proceedings being annulled in the requesting State.



Case study: the Öcalan case

The decision of the European Court of Human Rights in the “Öcalan case” provides an interesting case study in that the surrender of a fugitive outside formal extradition procedures was judged to be admissible within the framework of safeguards and guarantees established in a regional convention on human rights. Mr. Öcalan, a former leader of the Kurdish Workers Party (PKK), was sought by the Turkish authorities, which had issued a number of international warrants for his arrest containing several charges linked to terrorism. After unsuccessfully requesting political asylum in several European countries, Mr. Öcalan arrived in Kenya on 2 February 1999, accompanied by Greek officials. Over subsequent days, he was put up in the Greek Ambassador’s residence. The decision of the European Court of Human Rights summarizes the ensuing events:

On the final day of his stay in Nairobi, the applicant was informed by the Greek Ambassador after the latter had returned from a meeting with the Kenyan Minister of Foreign Affairs that he was free to leave for the destination of his choice and that the Netherlands was prepared to accept him. On 15 February 1999 Kenyan officials went to the Greek Embassy to take the applicant to the airport. The Greek Ambassador said that he wished to accompany the applicant to the airport in person and a discussion between the Ambassador and the Kenyan officials ensued. In the end, the applicant got into a car driven by a Kenyan official. On the way to the airport the car in which the applicant was travelling left the convoy and, taking a route reserved for security personnel in the international transit area of Nairobi Airport, took him to an aircraft in which Turkish officials were waiting for him. The applicant was then arrested after boarding the aircraft at approximately 8 p.m. (para. 12).

When asked to decide whether the Turkish Government’s actions were in accordance with the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms, the Court judged that, “the fact that a fugitive has been handed over as a result of cooperation between States does not in itself make the arrest unlawful or, therefore, give rise to any problem under article 5” (para. 90).

Article 5 of the aforementioned Convention guarantees the right to freedom and security by considerably limiting cases in which those rights may be restricted. For example, any arrested person must be informed of the reasons for their arrest, must be brought before a judge as soon as possible and is entitled to bring an appeal before a court with a view to a prompt ruling as to the lawfulness of the detention and the person’s release if the detention is ruled to be unlawful.

As stressed by the Court, “the Convention contains no provisions concerning the circumstances in which extradition may be granted, or the procedure to be followed before extradition may be granted. It considers that, subject to its being

the result of cooperation between the States concerned and provided that the legal basis for the order for the fugitive's arrest is an arrest warrant issued by the authorities of the fugitive's State of origin, even an extradition in disguise cannot as such be regarded as being contrary to the Convention" (para. 91).

Although the Court's reasoning was limited by the scope of application of the European Convention and therefore cannot be considered to put forward a generally applicable principle, it gives an authoritative indication that consensual forms of surrender other than formal extradition cannot be automatically disregarded.

Nevertheless, the European Court of Human Rights has exercised caution, specifying that "the Convention does not prevent cooperation between States, within the framework of extradition treaties or in matters of deportation, for the purpose of bringing fugitive offenders to justice, *provided that it does not interfere with any specific rights recognised in the Convention*" (para. 89). Therefore, in the European context, the guarantees set out in article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms represent solid criteria by which the legality of practices other than properly regulated extradition procedures can be judged (*Öcalan v. Turkey*, 12 May 2005).

In practice, these forms of surrender vary enormously and do not fit into precise legal categories. In order to illustrate this point, we have listed certain practices below. However, they should not be considered rigid categories, as situations can include elements of several of the forms of surrender listed.

2.4.1. Abduction and illegal capture

In the fight against terrorism, the abduction and illegal capture of an individual are practised as alternatives to extradition in order to bring that person to justice before national courts. Abduction is carried out by officials from a State other than the State the individual is in, or by private persons acting on behalf of that State, with or without the authorization of national authorities. It differs from illegal capture carried out by officials of the State the individual is in, followed by his surrender to officials of the "requesting" State, outside legal procedures. Such practices are problematic as they can affect international relations by violating State sovereignty and can constitute violations of human rights.

The abduction of an individual without the agreement of the State automatically implies a breach of the principle of State sovereignty under customary law.



Case study: the Lotus case

The Permanent Court of International Justice recalled the principle of State sovereignty in the Lotus case: "Now the first and foremost restriction imposed by international law upon a State is that — failing the existence of a permissive rule to the contrary — it may not exercise its power in any form in the territory of another State" (*France v. Turkey*, 7 September 1927).

The abduction and illegal capture of an individual thus entail in themselves a violation of fundamental rights protected by international law, primarily the right to

freedom and the right to security, the prohibition of false arrest and imprisonment and the right to a fair trial, which are set out in the International Covenant for Civil and Political Rights as well as in regional human rights instruments. Such violations have been condemned by the United Nations Human Rights Committee.



Case study: the López Burgos case

Mr. López Burgos was abducted in Buenos Aires by the secret services of his home country Uruguay, with the help of Argentine paramilitary forces. He was detained there for approximately two weeks, before being taken secretly to Uruguay.

The United Nations Human Rights Committee confirmed that, although a number of the acts in question were committed on foreign soil — whether with or without the consent of a third country — Uruguay could not be absolved of its responsibility, since the acts were committed by its own agents. Indeed, the Covenant requires respect for the rights enshrined therein for all persons “subject to [the] jurisdiction” of the State. It is therefore a question of the relationship between the individual and the State at fault, irrespective of location. The Committee considered that Mr. Burgos’s abduction and false imprisonment had violated the International Covenant of Civil and Political Rights (article 9), as he had not been brought before a judge within a reasonable time and also because he had been deprived of a fair trial, since he was tried by a military tribunal on the basis of confessions obtained through torture and received legal counsel that had been appointed for him and was probably biased (*López Burgos v. Uruguay*, Communication No. 52/1979, Human Rights Committee, 29 July 1981).

In practice, one problem is that some national courts have relied on the *male captus, bene judicatus* rule in order to bring the abducted individual to justice. According to this rule, the means employed to bring an individual to trial are unimportant, and once the individual has been apprehended he can be brought to trial in the State that abducted him. These practices have therefore had no deterrent effect, since they have produced valid legal results for the courts.



Case study: the Alvarez Machain case

A Mexican doctor had been abducted in Mexico by Mexican nationals acting on behalf of American authorities, who were ordered to deliver him to the American judicial services so that he could be tried for suspected participation in criminal activities. The Supreme Court of the United States concluded that the existence of an extradition treaty did not preclude the acquisition of personal jurisdiction by other means unless expressly prohibited by the treaty. It also concluded that the means by which a person has been brought before a court do not normally affect its jurisdiction so long as torture or other inhumane means were not involved.

Ultimately, the accused was acquitted. Following the controversy caused by the abduction, a treaty was negotiated between Mexico and the United States, prohibiting transborder abductions. That instrument has not yet come into force. Moreover, Alvarez Machain sued the Government of the United States and his abductors. He won his case before the lower courts, but in 2004 the Supreme Court

of the United States decreed that the legislation in place did not allow prosecution of the perpetrators of a false arrest carried out outside the territory of the United States (*Alvarez Machain v. United States, 1992, Extract from the UNODC Digest of Terrorist Cases*).

Other courts adopted a different approach, questioning the *male captus, bene judicatus* rule, judging the abduction to be illegal and arguing that abduction and illegal capture cannot be considered a legal method of arresting fugitives, even when there has been a violation of international law and the State where the terrorist is found does not extradite him and does not wish to bring him to trial.



Case study: the Ebrahim case

In 1986, two men claiming to be South African police officers seized Ebrahim, a South African citizen, in Swaziland. Ebrahim was transported to Pretoria and accused of treason.

The court concluded that it did not have jurisdiction to try a person from another State through State-ordered abduction. The court stressed that the individual must be protected from unlawful arrest and abduction, jurisdictional boundaries must not be exceeded, international legal sovereignty must be respected, the legal process must be fair towards those affected by it, and the misuse thereof must be avoided in order to protect and promote the dignity and integrity of the judicial system. This applies equally to the State. When the State is itself party to a dispute, as for example in criminal cases, it must come to court “with clean hands” as it were. When the State is itself involved in an abduction across international borders as in the instant case, its hands cannot be said to be clean.

The Court also noted that “the abduction was a violation of the applicable rules of international law, that these rules are part of [South African] law, and that this violation of these rules deprived the trial court competence to hear the matter.” In a subsequent civil proceeding, Ebrahim was awarded compensation for the kidnapping (*State v. Ebrahim, 1991*).



What is extraordinary rendition?

Surrender is described as “extraordinary rendition” in situations where an individual is abducted and transferred from one country to a third country (other than the country that abducted him) in order to extract information, notably through torturing and detaining the individual outside any legal procedure (which would be applicable in the territory of the country that abducted the individual). This form of surrender is clearly a violation of international law.



Case study: the Abou Omar case

This case illustrates such practices: Oussama Mostafa Hassan Nasr (known as Abou Omar), an Egyptian imam living in Italy, was suspected of entering into

relations with fundamentalist networks and recruiting volunteers to fight in Iraq and Afghanistan. In 2003, he was abducted on a street in Milan and transferred to Egypt, where he was detained and tortured. He subsequently succeeded in returning to Italy.

The Milan court sentenced intelligence agents of a third country in absentia, as well as agents from the Italian services for their involvement in the abduction (*Abu Omar Case*, 4 November 2009, www.icj.org/IMG/Abu_Omar_-_SentenzaRubrica_Charges_Defendants_List.pdf). The Italian Constitutional Court, however, set aside the court ruling, as it had violated State secrets. Nevertheless, the ruling of the Milan court provides an interesting case study.

2.4.2. Use of lures

Lures have sometimes been used to trick individuals into leaving their own country and entering another one, where they are arrested or extradited to the country conducting the investigation. Certain courts have stressed that there is no rule of international law preventing the extradition of individuals lured out of their country of origin by trickery. However, some courts have judged that, in cases where there is an extradition treaty between the country where the individual is located and the requesting country, this treaty is violated, thus rendering the surrender unsuccessful.



Case study: decision of the German Constitutional Court, 5 November 2003

The Federal Constitutional Court of Germany has examined the international authorities and determined that no rule of international law prevents extradition when persons have been lured from their home country by subterfuge. An official of a country that does not extradite its nationals and his secretary were lured to Germany by an informant. While there Germany received a request for their extradition, to which the Government of their country of nationality objected. The German Constitutional Court was asked by the fugitives to decide that there was a rule of international law prohibiting the extradition of a person who was lured by trickery to leave his own country. The court found that there was no such rule and that the majority of courts allow extradition in cases in which a person was lured to leave his country by trickery. The Court took no position with respect to cases in which the subject of extradition might have been forcibly abducted (*Extract from the UNODC Digest of Terrorist Cases*).



Case study: decision of the Federal Supreme Court of Switzerland, 15 July 1982

The German authorities lured a Belgian citizen to Switzerland with the aim of extraditing him to Germany. The Federal Court of Switzerland stated that Switzerland must not extradite him to Germany because that would constitute a breach of their international obligations, since Germany and Belgium had signed an extradition treaty prohibiting the extradition of a Belgian national to Germany (*Federal Supreme Court of Switzerland, 15 July 1982*).

2.4.3. Disguised extradition

In what is known as disguised extradition, standard forms of surrender are used and diverted from their original purpose to bring about a de facto extradition. Using its immigration laws or police powers, a State will place an individual in a situation where he falls within the control of the authorities of another State wishing to prosecute him. By this expedient, a State uses its immigration laws to deny a foreign national the privilege of entering or staying in that State by means of administrative or legal procedures, such as exclusion, deportation or expulsion and denaturalization. The result of these procedures is that the individual is placed directly or indirectly within the control or reach of agents of the State investigating him.

Disguised extradition is not illegal per se under international law, since the individual has not been abducted, but has been surrendered using national administrative or legal procedures. However, certain aspects of these practices do violate international law, for example, when the individual does not have an adequate or prompt legal recourse, or does not have timely access to such recourse before being surrendered to the State seeking him or her, as required by the International Covenant on Civil and Political Rights, or when the individual is not afforded guarantees under the Convention relating to the Status of Refugees, since immigration laws are frequently abused or not applied.



Case study: the Bozano case

In 1975, Mr. Bozano was sentenced in absentia to life imprisonment by the Genoa Assize Court of Appeal in Italy. The public prosecutor of Genoa issued an order for his arrest, and an international arrest warrant was issued by the Italian police. In 1979, Mr. Bozano was caught and arrested in France by the police. The Indictment Division of the Limoges Court of Appeal ruled against Mr. Bozano's extradition on the grounds that the prosecution procedure carried out in absentia at the Genoa Assize Court of Appeal did not comply with French public policy. The Indictment Division's ruling was definitive. A few months later, the police arrested Mr. Bozano, informing him that the Ministry of the Interior had issued an expulsion order ordering him to leave French territory. Mr. Bozano brought an appeal against the order, but it was overruled and he was expelled and surrendered to the Swiss police. Mr. Bozano was then extradited from Switzerland to Italy. Meanwhile, his lawyer had brought the case before the French courts in order to secure his return to France.

In 1980, the district court issued a reasoned order stating that various events that had taken place between Mr. Bozano's arrest and his surrender to the Swiss police revealed manifest and highly serious irregularities with regard to French public policy. It also noted that it was surprising that the Swiss border had been specifically chosen for the deportation of Mr. Bozano, when the Spanish border was closer to Limoges. Finally, it stressed that the French courts had not had the chance to submit a conclusion as to the possible violation of the expulsion order issued against him because as soon as the order had been served, Mr. Bozano was surrendered to the Swiss police, despite his protests. The Government had thus implemented its own decision. The court therefore had the impression that the

operation had not been a straightforward expulsion based on an expulsion order but a surrender pre-arranged by the Swiss police.

In 1986, the European Court of Human Rights upheld the reasoning of the French court, in particular the following description of “disguised extradition”: “Viewing the circumstances of the case as a whole and having regard to the volume of material pointing in the same direction, the Court consequently concludes that the applicant’s deprivation of liberty in the night of 26 to 27 October 1975 was neither ‘lawful’, within the meaning of article 5 § 1 (f) (art. 5-1-f), nor compatible with the ‘right to security of person’. Depriving Mr. Bozano of his liberty in this way amounted in fact to a disguised form of extradition designed to circumvent the negative ruling of 15 May 1979 by the Indictment Division of the Limoges Court of Appeal, and not to ‘detention’ necessary in the ordinary course of ‘action ... taken with a view to deportation’. The findings of the [French courts] are of the utmost importance in the Court’s view; they illustrate the vigilance displayed by the French courts.” (*European Court of Human Rights, Bozano v. France, 1986*).

These various types of surrender should be considered neither equivalent to extradition nor acceptable and recommended alternatives. Extradition is by far the preferred and recommended method, as it ensures that the sovereignty of States and human rights are respected and does not risk annulment of the procedure as a result of the use of illegal or legally questionable methods. Enabling States to use alternative extradition practices encourages even more violations and undermines the States’ respect for international law. The solution to the problem is therefore to make extradition more effective in practice. This will be the topic of Chapter 5 of this module.



Activities

- Identify the different forms of surrender used by your country as alternatives to extradition. Are these forms of surrender considered legal alternatives to extradition according to case law? Research the relevant case law and identify the position of your courts.
- Imagine a case in which country A refuses the extradition requested by country B of an individual suspected of having committed a terrorist bomb attack in country B but does not prosecute him. What advice would you give to country B’s authorities?



Assessment questions

- What forms of surrender are used as alternatives to extradition? Do they comply with international law? Explain your answer.
- Is there a specific form of surrender to international criminal jurisdictions? If so, describe it.
- In what cases can expulsion or deportation be considered violations of international law?

- Does the abduction of an individual by country A within the territory of country B but without its authorization, for the purpose of bringing the individual to trial, constitute a violation of international law?



Tools

- The international human rights instruments are available at the following address: www2.ohchr.org/english/law/
- The Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Martin Scheinin; the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak; the Working Group on Arbitrary Detention represented by its Vice-Chair, Shaheen Sardar Ali; and the Working Group on Enforced or Involuntary Disappearances, represented by its Chair, Jeremy Sarkin (A/HRC/13/42), is available from the Official Document System of the United Nations: <http://documents.un.org/>
- The UNODC Digest of Terrorist Cases is available at the following address: www.unodc.org/documents/terrorism/09-86635_Ebook_English.pdf



Further reading

- Bassiouni, M. C., *International Extradition: United States Law and Practice*, Oceana Publications, 1996
- Borelli Silvia, *Terrorism and Human Rights: Treatment of Terrorist Suspects and Limits on International Co-operation*, 16 *Leiden Journal of International Law* 803, 2003
- Gilbert, G., *Transnational Fugitive Offenders in International Law, Extradition and Other Mechanisms*, Martinus Nijhoff Publishers, 1998
- O'Higgins, P., *Unlawful Seizure and Irregular Extradition*, *British Yearbook*, 1960

3. Mutual legal assistance in criminal cases



Practical guidance: use mutual assistance to support extradition requests or proceedings conducted in place of extradition

The Informal Expert Working Group on Effective Extradition Casework Practice recalls in its report to States that mutual legal assistance is a very useful means of obtaining evidence in support of a case when it is possible to make a request for extradition. It is preferable that the request for mutual legal assistance be separate from the request for extradition. When extradition is not possible or is refused (on grounds of nationality, for example) and the requested State is asked to prosecute the person sought in accordance (where domestic law permits) with the principle of *aut dedere aut iudicare*, the requesting State must place all the information it has at the disposal of the requested State. Where necessary, further evidence may be obtained through a request for mutual legal assistance.

3.1. What is mutual legal assistance?

3.1.1. Introduction: concept and background

The principle of the sovereignty of States prohibits the court hearing the criminal case from exercising its powers beyond the borders of the jurisdiction concerned and from gathering evidence relevant to the outcome of the case itself in a foreign State. The court must therefore request the assistance of the foreign State (unless that State accepts the intervention on its territory of agents of the State in which the court is located). Mutual legal assistance is therefore defined as the mechanism whereby States cooperate with one another in order to obtain the evidence required for criminal investigations and prosecutions.



Mutual legal assistance and the gathering and exchange of information between intelligence, surveillance and law enforcement agencies

The intelligence and law enforcement agencies of States have long cooperated in the gathering and exchange of information and evidence as part of investigations and criminal prosecutions. This is done chiefly through personal contact between police officers or through INTERPOL. It involves, for example, exchanging information in order to identify or locate a suspect or witness, or a vehicle or firearm, or to check an address, a passport or information in criminal records. This form of cooperation is very important in the fight against terrorism (see part 4 of this module) and is complementary to, rather than replaced by, the process of mutual legal assistance. In that regard, the Informal Expert Working Group on Mutual Legal Assistance Casework Best Practice (United Nations Office for Drug Control and Crime Prevention, 2001) recommends: “whenever possible, information or intelligence should initially be sought through police to police contact, which is faster, cheaper and more flexible than the more formal route of mutual legal assistance. Such contact can be carried out through ICPO-INTERPOL, Europol, through local crime liaison officers, under any applicable

memoranda of understanding, or through any regional arrangements, formal and informal, that are available.”

However, certain types of cooperation between States require the intervention of the judicial authorities of the requested State, as is the case with regard to coercive measures; for instance, when a State requests the search of a residence or seeks to obtain bank statements. In such cases, it is necessary to use the mechanism of mutual legal assistance, which enables States to obtain the authorization necessary in order to gather the evidence in such a manner as to ensure that that evidence will be admissible in the courts.

3.1.2. Mutual legal assistance procedure: overview and comparative aspects

Mutual legal assistance procedures vary between civil-law and common-law countries, but the differences are less significant than those relating to extradition procedures. One of the reasons for this is that mutual legal assistance procedures are influenced to a large extent by treaties, which tend to be similar to one another.

A growing number of international conventions provide that States parties must agree to the most comprehensive mutual legal assistance possible. In the context of the fight against terrorism, this is the case with regard not only to universal treaties but also to Security Council resolution 1373 (2001), which goes further by requiring all Member States to “afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings”.

Many international conventions therefore require the designation of a central authority that has 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. Such conventions include the United Nations drug control conventions, the United Nations Convention against Transnational Organized Crime and the United Nations Convention against Corruption.



Practical guidance for designating a central authority

The United Nations drug control conventions, the United Nations Convention against Transnational Organized Crime and the United Nations Convention against Corruption require each State party to inform the Secretary-General of the United Nations of its designated central authority.

Why? This information is extremely useful to requesting States that need to prepare and draft requests for assistance, particularly since the designated central authority must ensure the “speedy and proper” execution or transmission of such requests. The list of designated central authorities is available on the UNODC website at www.unodc.org/comppauth_dct/en/index.html. That is why it is necessary to encourage States parties to designate such an authority and to ensure that the information transmitted is accurate and up-to-date.

How? In its reports, the Informal Expert Working Group on Mutual Legal Assistance Casework Best Practice (United Nations Office for Drug Control and Crime Prevention, 2001) recommends the following to States:

- Central authorities should be staffed with specialists who are legally trained and have acquired continuous experience in the area of mutual legal assistance.
- The designation of authorities that have important responsibilities relating to national drug control in other areas (for example, health ministries) but limited competence in the area of international mutual legal assistance should be avoided.
- The central authority should be available 24 hours a day: it should be possible to contact a representative of the State party to seek the execution of an urgent request for mutual legal assistance outside office hours, if necessary.

In practice, States should also be recommended to designate **a single central authority responsible for any type of mutual legal assistance in criminal cases**, whether such assistance relates to corruption, organized crime or any other criminal offence.

What differs between countries is the way in which each type of mutual legal assistance is afforded. Requests for mutual legal assistance may be executed by the judges, prosecutors and law enforcement agencies (including the police and customs services) of the requested State, depending on the procedure established in each country. Sometimes the requested State authorizes a prosecutor or judge of the requesting State to conduct the investigation on its territory, but under the supervision of the judicial authorities of the requested State.

- In cases where a court of one State (the requesting State) requests an authority in another State, through a request for mutual assistance, to gather evidence and communicate its findings to it, the administration of evidence is carried out in the requested State (*lex fori*). As a result, the procedure for execution of a request is, in principle, determined by the rules of procedure established by the laws of the requested State, and it is the courts of that State that verify whether alleged acts have indeed been committed on its territory. However, attention should be paid to the special features of the procedures of each country in order to ensure that the evidence is usable by the requesting State in criminal proceedings.



A comparison of procedures for gathering witness evidence and conducting searches in common-law countries (Canada and Mauritius) and civil-law countries (Mali and Niger)

Example of a procedure for gathering witness evidence:

In Niger, witnesses are interviewed under oath, without the presence of a lawyer, by a criminal investigation officer or, in the case of pretrial proceedings, by an examining magistrate. In Canada, it is a judge (justice of the peace) who questions the witness under oath. However, the judge must allow the accused or his or her

lawyer to cross-examine the witness, which is not provided for in Niger, where witnesses are questioned separately, not in the presence of the accused, by the judge assisted by his or her clerk. In Mauritius, witnesses are required to appear before the judge during the hearing in order to allow a cross-examination, while in Niger their presence is not required. In Niger, a statement must be taken down and each page signed by the judge, clerk and witness. In Canada, the statement must be taken either in the form of a stenographic transcript or orally by means of a recording device in some provinces.

- *If Niger does not cross-examine witnesses as provided for in Canadian legislation, will a statement taken in Niger be admissible in Canada? If Canada transmits the oral recording of a statement to Niger, will the authorities of Niger be able to use that evidence during proceedings?*

Example of a procedure for conducting searches:

In Mauritius, any person whose home is searched must be informed of his or her rights, such as the right to have a lawyer present. In Mali, no such procedure is provided for.

- *If the Malian police do not inform the person whose home is searched of his or her rights, will the evidence gathered during that search be usable in Mauritius?*

Problems arise from laws that are not flexible enough to allow evidence to be gathered in anyway other than that normally provided for under the domestic law of the requesting State.

It may also be difficult for many countries to accept without any verification the action taken in the requested State, since that action may have been taken in violation of the fundamental principles to which they adhere. Such action taken in the requested State is often likely to be invalidated, as it would in the requesting State.



Practical guidance: how to ensure that the evidence gathered can be used by the requesting State

In practice, the competent authorities of the requesting State should specify in their request for mutual legal assistance the rules of procedure to be followed by the authorities of the requested State in providing that assistance. The competent authorities of the requested State, for their part, should endeavour to execute the action requested according to the procedures specified by the requesting State, in so far as such compliance does not contravene the domestic law of the requested State or infringe on the rights of persons. This requirement can be found in the provisions of the United Nations Convention against Transnational Organized Crime and the United Nations Convention against Corruption relating to mutual legal assistance.

For instance, the American judicial authorities made a request to the French judicial authorities for an examining magistrate, in France, to question a witness face-to-face with the defence attorney of the accused, even though such a procedure is not provided for by the provisions of the French Code of Criminal

Procedure. Nevertheless, the French authorities consented by courtesy, as the provision was not proscribed by French law (extract from the UNODC *Manual on International Cooperation in Criminal Matters related to Terrorism*).

Also, authorities of the requested State that do not consider themselves in a position to execute the request for mutual legal assistance according to the requested procedure or at all are advised to consult their counterparts in the requesting State before formally refusing that request, in order to determine whether the problems encountered can be overcome or whether the request can be modified in such a way that assistance can be granted.

- Mutual legal assistance may also be requested and obtained by another means: the court of one State requests an authority of another State to transmit to it objects or documents so that it can examine those objects or documents itself or to bring persons before it so that it can question those persons itself (for example, the appearance of a witness or accused person). In such cases, the administration of evidence is carried out in the requesting State.
- These two mechanisms for mutual legal assistance may also be used in the same case, even simultaneously, as is the case when new means of telecommunication are used, such as the use of videoconferencing to conduct cross-examinations or to enable the requesting State to question a witness. In the latter case, the action requested is thus executed simultaneously on the territory of the requesting State and on that of the requested State. The use of such methods may greatly reduce travel costs and make the procedure faster and is provided for, at the international level, by the United Nations Convention against Transnational Organized Crime and the United Nations Convention against Corruption and, at the regional level, between member States of the European Union or the Latin American States, for example. However, it is still not widely provided for by national legislation.



Videoconferencing in practice: report to the Court of Major Jurisdiction of Bobigny (France)

As part of a murder case, the presiding judge of a criminal court in France wanted to question a witness in the United States by using videoconferencing.

In the report, you can hear (or read the transcripts of) the interviews of:

- Olivier Christen, Secretary-General of the Court of Major Jurisdiction of Bobigny. He summarizes the reasons for the use of videoconferencing;
- Martine de Maximy, presiding judge of the criminal court. She stresses how videoconferencing can benefit both the courts and persons on trial;
- Laura Ingersoll, liaising judge in the United States. She welcomes the use of videoconferencing.

Access the report at the following address (available only in French):

www.justice.gouv.fr/actualite-du-ministere-10030/la-visioconference-un-outil-efficace-pour-laudition-de-temoins-17852.html



Case study: gathering witness evidence and conducting searches in common-law countries (Canada and Mauritius) and civil-law countries (Mali and Niger)

Study the following questions posed previously:

- *If Niger does not cross-examine witnesses as provided for in Canadian legislation, will a statement taken in Niger be admissible in Canada? If Canada transmits the oral recording of a statement to Niger, will the authorities of Niger be able to use that evidence during proceedings?*
- *If the Malian police do not inform a person whose home is searched of his or her rights, will the evidence gathered during that search be usable in Mauritius?*

What practical solutions would you suggest to your counterparts in Canada, Mali, Mauritius and Niger in order to ensure that all of the evidence requested can be used?



Case study: the Senzavvocato case

At the request of the competent authorities of your country, a person suspected of having bought explosives with the intention of committing an attack at an airport has been arrested and interrogated by a police officer in another country. The interrogation has been carried out without a lawyer present.

1. Do you consider that these circumstances violate the right to due process under your country's legislation? If so, what are the consequences of such a violation with regard to the criminal proceedings? Assuming that the action carried out is invalidated, what could you have advised your colleagues who made the request for mutual legal assistance to do in order to avoid such a consequence?
2. Now consider the same circumstances from the perspective of international law. Do they violate the right to due process?



Activities

- Examine your country's status of ratification of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, the United Nations Convention against Transnational Organized Crime and the United Nations Convention against Corruption. If your country has ratified one of those conventions, has it designated a central authority? Does the same authority receive every request for mutual legal assistance? Explain your response and check whether the information on your country's central authority is accurate and up-to-date on the UNODC website: www.unodc.org/comppauth_dct/en/index.html

- What is the procedure for mutual legal assistance provided for by your country's laws? Describe the different stages of the procedure.
- Give an example of an act of mutual legal assistance carried out abroad that would be invalidated in your country and could not be used in criminal proceedings.
- Could videoconferencing be used in your country to question a witness? Examine your country's laws and practice and explain your response, whether negative or affirmative. If your answer is yes, under what conditions could it be used?



Assessment questions

- What is mutual legal assistance?
- How does it differ from cooperation between intelligence and law enforcement agencies?
- What is the main requirement made of States by the universal counter-terrorism treaties and Security Council resolution 1373 (2001) with regard to mutual legal assistance? How does the scope of the requirement as set out in that resolution differ from that of the requirement established by treaties?
- What is a central authority? What is it for?
- Which is applicable to the execution of requests for mutual legal assistance: the law of the requested State or that of the requesting State, or both?



Tools

- The aforementioned international instruments are available at the following addresses:

The universal counter-terrorism instruments:

www.unodc.org/tldb/en/universal_instruments_list_NEW.html

United Nations Convention against Transnational Organized Crime:

www.unodc.org/unodc/en/treaties/CTOC/index.html

United Nations Convention against Corruption:

www.unodc.org/unodc/en/treaties/CAC/index.html

United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances:

www.unodc.org/unodc/en/treaties/illicit-trafficking.html

Ibero-American Convention on the Use of Videoconferencing in International Cooperation between Justice Systems:

www.piaje.org/EN/Video/Pages/inrules.aspx

Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (articles 9 (Hearing by videoconference) and 10 (Hearing by telephone conference)) is available at the following address:

<http://conventions.coe.int/treaty/en/treaties/html/182.htm>

Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (article 10 (Hearing by videoconference) and article 11 (Hearing of witnesses and experts by telephone conference)):

www.eurojust.europa.eu/jit/documents/c_19720000712en00010023.pdf

- The report of the Informal Expert Working Group on Mutual Legal Assistance Casework Best Practice (United Nations Office for Drug Control and Crime Prevention, 2001) is available at the following address:
www.unodc.org/tldb/en/legislative_guides.html
- The report of the Secretariat on the expert group meeting on the technical and legal obstacles to the use of videoconferencing, prepared for the fifth session of the Conference of the Parties to the United Nations Convention against Transnational Organized Crime, is available at the following address:
www.unodc.org/unodc/en/treaties/CTOC/CTOC-COP-session5.html
- The list of competent central authorities of whose designation the United Nations Secretary-General has been notified in accordance with the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, the United Nations Convention against Transnational Organized Crime and the United Nations Convention against Corruption is available at the following address:
www.unodc.org/compauth_dct/en/index.html
- The Model Treaty on Mutual Assistance in Criminal Matters, adopted by the General Assembly in its resolution 45/117 and subsequently amended by General Assembly resolution 53/112, and the revised manual relating to that Model Treaty, set out provisions relating to the designation of competent authorities:
www.unodc.org/tldb/en/model_laws_treaties.html
- For the purposes of comparative law, information on the procedures for mutual legal assistance in various countries can be accessed through the following links:
 - For the member States of the Organization of American States:
The database of the Hemispheric Information Exchange Network for Mutual Assistance in Criminal Matters and Extradition of the Organization of American States contains information on the mutual legal assistance procedures of its member States:
www.oas.org/juridico/mla/en/index.html
 - For the member States of the Council of Europe:
The database of the Council of Europe contains information on the mutual legal assistance procedures of its member States:
www.coe.int/t/dghl/standardsetting/pc-oc/Country_information2_en.asp

- For the member States of the Indian Ocean Commission:

The UNODC practical guide for formulating effective requests for extradition and mutual legal assistance to the States members of the Indian Ocean Commission:

www.unodc.org/documents/treaties/organized_crime/international_cooperation/Publication_UNODC-COI_Fiches_pratiques_n.1.pdf (available in French only)

- For the Commonwealth States:

www.thecommonwealth.org/shared_asp_files/uploadedfiles/%7B8656C658-41CA-4611-80C8-4AFF4E6449A7%7D_Mutual_AssistanceCriminal_Matters_pt2.pdf

- For other States:

The database of the UNODC Terrorism Prevention Branch brings together legislative provisions relating to mutual legal assistance in numerous other countries (Algeria, Australia, Azerbaijan, Bhutan, Botswana, Brunei Darussalam, Burkina Faso, Cameroon, China, Congo, Democratic Republic of the Congo, Djibouti, Fiji, India, Indonesia, Israel, Japan, Kazakhstan, Kenya, Kiribati, Lao People's Democratic Republic, Liberia, Malaysia, Mali, Marshall Islands, Mauritius, Micronesia, Morocco, Myanmar, New Zealand, Niger, Nigeria, Niue, Papua New Guinea, Russian Federation, Samoa, Senegal, Seychelles, Singapore, Solomon Islands, South Africa, Sri Lanka, Thailand, Tonga, United Republic of Tanzania, Uruguay, Vanuatu, Viet Nam, Zambia, Zimbabwe):
www.unodc.org/tldb/

3.2. The main forms of mutual legal assistance

One of the advantages of mutual legal assistance is that it can take diverse forms, from the gathering of witness evidence to the furnishing of tangible proof, such as bank statements or business accounts, and the conduct of investigations. Each treaty and law on mutual legal assistance lists the different types of assistance that may be afforded.



Practical guidance: encourage the widest measure of mutual legal assistance

In order for States to be able to afford one another the “widest measure” of mutual legal assistance, it is important that they have flexible laws that allow them to afford all types of assistance, including those that they might need in the future. Such flexibility can often be achieved by formulating the relevant legislative provision in such a way that the list of types of assistance is not exhaustive, or by including a “catch-all” phrase at the end of the provision, such as that in article 18 of the United Nations Convention against Transnational Organized Crime, paragraph 3 of which establishes that mutual legal assistance may be requested for the purpose of “any other type of assistance that is not contrary to the domestic law of the requested State Party.”

Which are the types of action most commonly requested by a State in order to obtain evidence?

- ✓ The taking of evidence or statements. The requesting State may request that an individual be interviewed and make a deposition, that is, a statement of what he or she saw, heard or learned in connection with an offence.
- ✓ Assistance in making available to the judicial authorities of the requesting State detained persons or others to give evidence or assist in investigations.
- ✓ Searches for evidence at a person's domicile or any other relevant location, including searches of computers and computer systems, the seizure of property and the freezing of assets.
- ✓ Examination of objects and visits of sites.
- ✓ The submission or serving of judicial documents in order to obtain, for example, a writ or a ruling.
- ✓ The furnishing of information, evidence and expert opinions.
- ✓ The furnishing of originals or certified copies of relevant records and documents, including government, bank, financial, corporate or business records.
- ✓ The identification or tracing of proceeds of crime, property, instrumentalities or other things for evidentiary purposes.
- ✓ The monitoring, interception or recording of activities, movements or communications (including computer-based activities and telecommunications, whether in real time or after the event) of persons suspected of involvement in a criminal offence in the requesting State. Given its intrusiveness, electronic surveillance is generally subject to strict judicial control and numerous statutory safeguards to prevent abuse.
- ✓ Controlled delivery, whereby a State allows illicit or suspect consignments (for example, cargos of arms) to pass out of, through or into its territory under the direction and supervision of its competent authorities with a view to the investigation of an offence and the identification of persons involved in the commission of the offence.
- ✓ Undercover operations in which a law enforcement agent infiltrates a criminal organization to gather evidence.
- ✓ The granting of temporary authorization for investigators, prosecutors or other judicial officials of the requesting State to enter and remain on the territory of the requested State for the purposes of viewing/examining objects or sites, observing or interviewing persons, taking witness evidence or statements and obtaining evidence.



See the list of tools  below, which provide details of all the aforementioned types of mutual legal assistance, in particular the manual on the Model Treaty on Mutual Assistance in Criminal Matters and the UNODC *Manual on International Cooperation in Criminal Matters related to Terrorism*.



Case study: *Le Triomphant* (continued)

[During the night of 30 to 31 October 2010, the ship *Le Triomphant*, which was operating at an oil terminal, was approached by three speedboats 180 kilometres from the Gallia Peninsula of country A. The ship was flying the flag of country F. Armed individuals boarded the ship and kidnapped 10 of the 15 crew members. No one was injured in the attack, despite the fact that part of the ship was destroyed by a bomb explosion. Among the hostages were two persons from country A, one from country B, one from country C and six from country F. A group known as the “Gallia Freedom Fighters” claimed responsibility for the kidnapping. They threatened to kill the hostages unless they were given the opportunity to speak with the Government of country A within three days. The investigation revealed that the speedboats were provided by a businessman of country N. Two of the persons suspected of having taken the hostages are located on the territory of your country, which is country F.]

You decide not to extradite those alleged to have taken the hostages but to institute criminal proceedings against them. For the purposes of the proceedings, you wish to interview the five crew members who were not taken hostage, the hostages and the businessman. You also wish to search the boats and the place where the hostages were kept and to carry out seizures.

4. What action(s) do you take to carry out these measures? What precautions do you take in order to be sure of being able to use the evidence gathered in the criminal proceedings?



Activities

- Examine your country’s laws relating to mutual legal assistance, including any bilateral and multilateral treaties to which it is party. What types of mutual legal assistance are provided for? Do you think your country’s laws enable it to afford the other States the widest measure of mutual legal assistance? To answer this question, examine the list of different types of mutual legal assistance below and check whether they can all be requested by your State of another State and granted by your State at the request of another State.
- Examine the criminal procedures established by your country’s legislation for implementing each of the measures mentioned above (such as the taking of evidence, searches, seizures and freezing of assets) and identify the special features of each one.



Assessment questions

- What forms can mutual legal assistance take? Illustrate your response with examples of the actions most commonly requested by a State in order to obtain evidence.

- Do the universal counter-terrorism treaties allow States to afford one another all the types of mutual legal assistance that you have indicated in your answer to the question above?
- What is a controlled delivery?



Tools

- The aforementioned UNODC *Manual on International Cooperation in Criminal Matters related to Terrorism* is available at the following address: www.unodc.org/documents/terrorism/Publications/Manual_Int_Coop_Criminal_Matters/English.pdf
- The Model Treaty on Mutual Assistance in Criminal Matters, adopted by the General Assembly in its resolution 45/117 and subsequently amended by General Assembly resolution 53/112, and the revised manual relating to that Model Treaty, set out provisions relating to the designation of competent authorities: www.unodc.org/tldb/en/model_laws_treaties.html
- Report of the Expert Working Group on Mutual Legal Assistance and Related International Confiscation (United Nations Office for Drug Control and Crime Prevention, 1993): www.unodc.org/pdf/lap_maewg_1993_final.pdf
- The database of the UNODC Terrorism Prevention Branch brings together the criminal legislation of numerous countries, which enables practitioners to learn about the ways in which the various types of mutual legal assistance are afforded in other countries: www.unodc.org/tldb/
- The UNODC practical guide for formulating effective requests for extradition and mutual legal assistance to the States members of the Indian Ocean Commission details the legislative provisions of each of those States relating to certain types of mutual legal assistance: www.unodc.org/documents/treaties/organized_crime/internationalcooperation/Publication_UNODC-COI_Fiches_pratiques_n.1.pdf (available in French only)
- The Technical Guide to the United Nations Convention against Corruption contains an interesting chapter on mutual legal assistance (pages 157-171): www.unodc.org/documents/corruption/Technical_Guide_UNCAC.pdf



Further reading

- Prost, K. *Pratique et nouvelles tendances de l'entraide judiciaire: l'avenir de la coopération internationale* (1998): www.oas.org/juridico/mla/fr/can/fr_can_prost98.html

3.3. The legal bases for mutual legal assistance

According to the universal counter-terrorism treaties, the obligation of States parties to afford one another the widest measure of mutual legal assistance must be carried out in accordance with any treaty or agreement on mutual legal assistance that may exist between them. In the absence of such a treaty or agreement, the States parties must afford one another such assistance in accordance with their domestic laws.

3.3.1. The treaties

Requests for mutual legal assistance are often based on bilateral and multilateral treaties entered into by several States at the bilateral, regional and international level. As in the case of extradition, the fact that those treaties do not pertain specifically to the fight against terrorism does not mean that they cannot be used as the basis for requests for mutual legal assistance in terrorism-related cases. However, there are far fewer bilateral treaties on mutual legal assistance than there are on extradition, and very few States have national legislation on mutual legal assistance.² Which are those treaties?

- The universal counter-terrorism treaties, according to which States parties must afford one another the widest measure of mutual legal assistance in investigations and criminal proceedings in relation to the offences covered by those treaties.
- Other instruments of international criminal law, in particular the United Nations Convention against Transnational Organized Crime and the United Nations Convention against Corruption, which may also be useful. It is worth noting that these conventions contain very detailed provisions concerning mutual legal assistance, to the extent that they are often referred to as “mini-treaties on mutual legal assistance”. Furthermore, paragraphs 9 to 29 of the articles on mutual legal assistance of each convention are applicable to requests made if States parties are not bound by a treaty of mutual legal assistance.
- Regional instruments include not only conventions adopted under the auspices of regional and subregional organizations, such as the Inter-American Convention on Mutual Assistance in Criminal Matters of the Organization of American States, but also the scheme relating to mutual assistance in criminal matters within the Commonwealth (the Harare Scheme), introduced in subsection 2.2.1. above.



See “Legal bases for extradition” (section 2.2.) above, in particular the boxes entitled “Obstructing terrorist activities through the United Nations Convention against Transnational Organized Crime” and “What are the Commonwealth agreements?”.

² The number of States that have adopted legislation on mutual legal assistance is estimated at fewer than 50 of the 193 Member States of the United Nations (M. C. Bassiouni, *Introduction to International Criminal Law*, p. 353).

3.3.2. Agreement based on reciprocity and comity

In order to request or grant mutual legal assistance, a treaty is not essential, although States generally prefer requests based on a treaty. A request for mutual legal assistance may also be based on the principles of reciprocity and comity, which are supported by domestic legislation.

In some cases in which the action requested is not coercive in nature, it may even be possible to obtain certain information without using official channels and without submitting a formal request for assistance. This is the case, for example, where evidence has been voluntarily provided (such as statements) or can be found in public records or other sources available to the public.



Case study: a case between Nigeria and Switzerland — decision of the Federal Court of Switzerland, 23 April 2000

Within the framework of prosecutions for theft, breach of trust, participation in a criminal organization and money-laundering, the judicial authorities of Nigeria requested a mutual legal assistance measure, specifically the seizure of bank accounts, from the Swiss judicial authorities. The defendant appealed, in particular on the basis of the lack of a valid declaration of reciprocity. The Federal Court rejected the argument, pointing out that “according to the principle of confidence that pervades relations between States, the Swiss authorities are not required to verify the compliance of the declaration of reciprocity with the procedural rules of foreign law, nor the competence of the authority from which the declaration of reciprocity emanates, except in the case of obvious abuses. [...] In this case, the requesting State has spontaneously provided a declaration of reciprocity attached to the request for mutual assistance. This clear and simple document leaves no doubt as to the commitment made by the requesting State. There is also no objection to the fact that the assurance of reciprocity has been expressed in the customary form of a diplomatic note.” By this ruling, the Court encouraged the use of reciprocity as an independent basis for mutual legal assistance. This can be highlighted as an example of good practice. (*Judgement of 23 April 2003 of the First Court of Public Law of the Federal Court of Switzerland, extract from the UNODC Manual on International Cooperation in Criminal Matters related to Terrorism.*)



Activities

- List your country’s legislation on mutual legal assistance, including all bilateral, regional and international treaties on mutual legal assistance to which your country is party.
- Has your country already used an international treaty as a legal basis for mutual legal assistance?
- Can your country grant mutual legal assistance to another country in the absence of a treaty? If so, on what basis?

- Familiarize yourself with the typical language, structure and content of a treaty for mutual legal assistance in criminal matters by reading the Model Treaty adopted by the General Assembly of the United Nations.



Assessment questions

- What are the different legal bases upon which a State may base a request for mutual legal assistance in criminal matters?
- What are the advantages and disadvantages of each of those legal bases for mutual legal assistance?
- Do all States accept all legal bases for granting mutual legal assistance?
- Is it possible to exchange information and evidence outside official channels for mutual legal assistance? What are the advantages and disadvantages of this?



Tools

- The complete texts of the aforementioned multilateral treaties can be accessed at the following addresses:
 - Universal conventions and protocols against terrorism:
www.unodc.org/tldb/en/universal_instruments_list_NEW.html
 - Regional conventions against terrorism:
www.unodc.org/tldb/en/regional_instruments.html
 - United Nations Convention against Transnational Organized Crime:
www.unodc.org/unodc/en/treaties/CTOC/index.html
 - United Nations Convention against Corruption:
www.unodc.org/unodc/en/treaties/CAC/index.html
 - Inter-American Convention on Mutual Assistance in Criminal Matters (OAS):
www.oas.org/JURIDICO/MLA/en/traites/en_traites-mla-interam.html
- The Commonwealth schemes are available at the following address:
www.thecommonwealth.org/Internal/38061/documents/
- The report of the Informal Expert Working Group on Mutual Legal Assistance Casework Best Practice (United Nations Office for Drug Control and Crime Prevention, 2001) is available at the following address:
www.unodc.org/tldb/en/legislative_guides.html
- A 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) is available at the following address:
www.unodc.org/unodc/en/treaties/CTOC/CTOC-COP-session5.html

- The UNODC Digest of Terrorist Cases features numerous cases showing the links between terrorism and other forms of crime, such as corruption, drug trafficking and organized crime:
www.unodc.org/documents/terrorism/09-86635_Ebook_English.pdf
- The Model Treaty on Mutual Assistance in Criminal Matters, adopted by the General Assembly in its resolution 45/117 and subsequently amended by General Assembly resolution 53/112, and the revised manual relating to that Model Treaty, are available at the following address:
www.unodc.org/tldb/en/model_laws_treaties.html
- Compendiums of bilateral, regional and international agreements on mutual legal assistance and extradition have been specially produced for practitioners in countries that have requested UNODC to make such compilations available:
www.unodc.org/unodc/en/terrorism/technical-assistance-tools.html#Compendia
- A catalogue produced for member States of the Indian Ocean Commission and containing all treaties that may be used as a legal basis for mutual legal assistance is available online:
www.unodc.org/documents/treaties/organized_crime/internationalcooperation/Compendium_IOC_French_complet.pdf
- The aforementioned UNODC *Manual on International Cooperation in Criminal Matters related to Terrorism* is available at the following address:
www.unodc.org/unodc/en/terrorism/technical-assistance-tools.html

3.4. Conditions applicable to mutual legal assistance



Practical guidance: minimize grounds for refusing mutual legal assistance and consult prior to any refusal

The Informal Expert Working Group on Mutual Legal Assistance Casework Best Practice of the United Nations Office for Drug Control and Crime Prevention notes in its report (2001) that many of the existing grounds for refusal of mutual legal assistance are a “legacy” of extradition law and practice, where the life or liberty of the person concerned may be more directly and immediately at stake. However, such grounds are not necessarily as useful in the context of mutual legal assistance. The Group therefore recommends that States carefully examine those existing grounds for refusal in order to determine whether it is necessary to retain them in the context of mutual legal assistance: “If assistance is to be rendered as extensively as possible between States, the grounds upon which a request may be refused should be minimal, limited to protections that are fundamental to the requested State.” The model law on mutual legal assistance in criminal matters developed by UNODC (2007) also encourages States not to provide for refusal of a request in their national legislation — so that no authority is obliged to refuse such a request but may exercise its discretionary power to do so — in order to facilitate greater mutual cooperation among States.

The Working Group also recommends that, before making a formal refusal, any requested State that does not consider itself in a position to execute a request should consult with the requesting State to determine whether the problems encountered can be overcome or whether the request can be modified in such a way that assistance can be granted. For example, if assistance cannot be granted because an investigation is being carried out or proceedings are taking place in the requested State, it may be possible to agree to postpone the execution of the request until the proceedings in question are concluded. However, if the problem cannot be resolved, the reasons for the refusal should be given.

3.4.1. Conditions similar to those applicable to extradition

As in the case of extradition, treaties and national legislation relating to mutual legal assistance establish certain conditions applicable to such assistance. Those conditions are substantially similar to or the same as those for extradition; for example, the disallowing of the political offence exception in the case of terrorist offences, non-discrimination (a request may be refused if there are grounds to believe that it has been made for discriminatory reasons) and the exclusion of the financing of terrorism as a fiscal offence, which are provided for by the universal counter-terrorism treaties.

Following the example of the United Nations Model Treaty on Mutual Assistance in Criminal Matters, many treaties and national laws also provide for refusal to grant mutual legal assistance in the case of military offences or where the principle of *ne bis in idem* is applied.

It is worth referring to the section on extradition to examine those conditions of relevance to mutual legal assistance.



See *Extradition conditions* (2.3.) above.

3.4.1.1. Dual criminality

In the context of mutual legal assistance, the situation with regard to dual criminality varies according to States' domestic law. Some States require the offence in connection with which they are requested to provide assistance to be an offence under their own legislation in order for them to grant such assistance; some require dual criminality only if they are requested to implement compulsory measures, while other States never require it.

One might ask whether it is really necessary for both States concerned to have criminalized the acts in question in order for the requested State to provide assistance with regard to evidence. In general, international legislation encourages States to eliminate the application of that requirement. The universal counter-terrorism treaties do not require dual criminality and the United Nations Convention against Corruption encourages States parties to grant the assistance requested in the absence of dual criminality, especially if that assistance does not involve coercive measures.

3.4.1.2. *The rule of speciality*

With regard to mutual legal assistance, the universal counter-terrorism treaties state this rule explicitly: the information or evidence provided by the requested State may not be used for any investigations, prosecutions or judicial proceedings other than those in connection with which mutual assistance has been requested without the prior consent of the requested State.



Practical guidance: encourage a simplified approach to the rule of speciality in practice

The report of the Informal Expert Working Group on Mutual Legal Assistance Casework Best Practice (United Nations Office for Drug Control and Crime Prevention, 2001) notes that, in order to avoid cumbersome procedures that are often unnecessary, many States now apply simpler approaches in practice. For example, many recently concluded treaties on mutual legal assistance instead require the requested State to advise that it wishes to impose a specific limitation on the use of evidence; if the limitation is not deemed necessary, it should not be imposed.

At the regional level, some States have gone even further by concluding treaties in which they agree on a general list of ways in which evidence may be used without requiring the requesting State to obtain the consent of the requested State in each specific case. This is the case with regard to the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, which establishes such a provision with regard to other judicial and administrative proceedings directly related to the proceedings to which the Convention applies or in order to prevent an immediate and serious threat to public security.

3.4.1.3. *The nature of certain penalties and the guarantee of fair treatment*

Some States refuse to grant mutual legal assistance if the sentence applicable to the offence to which the request relates is the death penalty or if the execution of the request for mutual legal assistance could place a person at risk of being tortured or subjected to cruel, inhuman, degrading or unfair treatment.

The basis for such a refusal may be found, in international law, in the International Covenant on Civil and Political Rights and its Second Optional Protocol aiming at the abolition of the death penalty, in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and in the provisions of the universal counter-terrorism treaties relating to fair treatment.



See *Extradition conditions* (2.3.) above.

For other States, the issue is less clear than in the case of extradition, as the life or liberty of the person with respect to whom legal assistance is sought is not always directly and immediately at stake.

3.4.2. Conditions specific to mutual legal assistance

3.4.2.1. Cases of infringement of public interests and cases of incompatibility

Unlike in the case of extradition, other grounds for refusal provided for by treaties and laws relating to mutual legal assistance are set out in more general terms in order to give the authorities of the requested State more flexibility in deciding whether or not to grant the mutual legal assistance requested, depending on the type of measure requested.



Illustration — Grounds for refusal that are specific to mutual legal assistance

The Model Treaty on Mutual Assistance in Criminal Matters allows us to illustrate our discussion, as it provides that assistance may be refused if:

(a) The requested State is of the opinion that the request, if granted, would prejudice its sovereignty, security, public order or other essential public interests;

(b) The assistance requested requires the requested State to carry out compulsory measures that would be inconsistent with its law and practice had the offence been the subject of investigation or prosecution under its own jurisdiction.

The concept of public order is different in each State. Nevertheless, it should be noted that, for some States, risk to public order as a ground for refusal encompasses the protection of human rights and fundamental freedoms. This is the case, for example, when the offence that is being prosecuted, while not prejudicial to public order, is punishable in the requesting State by a penalty contrary to the public order of the requested State, such as the death penalty or hard labour in some States. It is also the case when the offence in question is not punishable under the laws of the States but is contrary to public order, as is the case of blasphemy or adultery in France. The granting of assistance to a country where there is no guarantee of a fair trial might also prejudice public order.

3.4.2.2. Lifting of bank secrecy for offences relating to terrorism

When the request for mutual legal assistance concerns the financing of terrorism, the States parties are prohibited from refusing a request for mutual legal assistance on the ground of bank secrecy. Why? Investigations in such cases require the submission of financial documents. Such a provision therefore allows the lifting of bank secrecy, which is provided for by national laws to protect the financial privacy of citizens from any unwarranted intrusion by individuals or the State, and also permits the granting of mutual legal assistance during criminal proceedings in order to safeguard the integrity of the financial sector. The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and the United Nations Convention against Transnational Organized Crime establish similar provisions.



Case study: a case between the United States and Switzerland, decision of 4 July 2006 of the Federal Court of Switzerland

In 2002, the Department of Justice of the United States submitted a request to the Swiss central authority for mutual legal assistance in an investigation led by an American prosecutor. The investigation involved an entity named Y, comprising some 100 organizations believed to be engaged in the financing of terrorist operations through complex financial transactions and to have links with Al-Qaida. More than \$26 million were believed to have been given to supposed charitable causes, one of which was A. In 2001, A had deposited more than \$7 million in an account in Switzerland in the name of X.

The requesting authority wished to obtain documentation concerning company X and its account from the Swiss bank in question. It submitted a request to the Swiss authorities for mutual legal assistance in relation to offences of money-laundering and support for terrorist activities. The United States sent a further request to examine the account held by X in Jersey, which was believed to have received funds from A through bank B in Zurich. The directors of bank B opposed the second request. The Swiss authorities accepted the additional request and rejected the protest. X lodged an administrative appeal, demanding the annulment of the decisions of enforcement and compulsory measures and the rejection of the two requests.

The Court rejected the appeal by X. It was of the opinion that the requesting authority (namely the United States) was not required to prove or even present plausible grounds for its suspicions, but only to explain those suspicions in such a way as to make them sufficiently comprehensible. For its part, the Swiss authority responsible for mutual assistance was not required to judge the reasonability of those suspicions. It should only refuse to cooperate in the event of gaps, errors or clear contradictions that made the action of the requesting State manifestly unreasonable. (The decision is available at the following address: www.lextel.ch/atf-1543_04_07_2006_1A_99_2006-entraide_et_extradition.html)



Case study: the Airbus A-320 case (continued)

[An Airbus A-320 aircraft belonging to an airline of country B, where it is also registered, took off from country A, bound for country B. It flew over your country (country D) and exploded above an area of desert in your country. The explosion caused 165 deaths. Among the passengers killed were nationals of countries A and B, including the national football team of country A and representatives of interfaith exchange and reconciliation groups from countries A and B. Nationals of country C who are suspected of having been involved in the explosion of the aircraft are located on the territory of your country. The authorities of country B have sent an extradition request to your country. You are a prosecutor in your country.]

In parallel with the extradition request, the counter-terrorism prosecutor of country B sends you a request to search the wreckage of the aeroplane for any evidence, remove the item or items of evidence and send them to him. He also asks you to question the persons who saw the aeroplane explode, take their statements

and send the statements to him. He asks you to make the witnesses testify under oath. You feel inconvenienced, since the aeroplane exploded over the desert 10 hours by road from your court.

1. How do you receive the request from your colleague in country B? What do you do? Regarding the taking of the witness statements, your code of criminal procedure does not require witnesses to testify under oath. What do you do?

During the investigation, it comes to light that the money used to buy the explosives came from a bank account in the name of “Foundation for the fight against poverty”, which is purportedly engaged in projects to reduce poverty but is suspected of using the money it receives to finance criminal activities. Moreover, the treasurer of the foundation has been questioned in several cases of arms trafficking. Mrs. Money, a rich heiress, had made a very large donation by bank transfer to the foundation’s account.

2. What do you do?



Case study: an arms trafficking case

X, an organized criminal group, is engaged in firearms trafficking. The trafficking extends across countries A, B and C. The arms are bought chiefly by a justice movement, Y, which wants to liberate country B from dictatorship. The movement is trying to take control of the ministries and the parliament using the arms it has purchased and home-made bombs. The trafficking has been detected by the gendarmerie of country A, which has discovered crates of arms on the border between countries A and B. An investigation is opened by the public prosecution service of country A.

1. The authorities of country A request the authorities of country B to provide them with all available evidence relating to the firearms trafficking. The authorities of country B agree to the request. The evidence provided includes items relating to a bomb attack carried out in country A several months ago.

Are the authorities of country A permitted to use the evidence provided by country B in the investigation that has been opened in connection with the trafficking of firearms?

2. The authorities of country C, having been informed of the investigation, request the authorities of country B to seize all bank documents relating to the accounts belonging to the traffickers.

You are a prosecutor working for the central competent authority of the Ministry of Justice. You receive the request from country C. What do you do?



Activities

- Compare the conditions established in the legislation of your country in relation to extradition and mutual legal assistance.
- Identify the conditions established by your country’s legislation that must be met in order for your country to grant mutual legal assistance. Compare them

with the requirements of the universal counter-terrorism treaties. Also examine closely the grounds for refusal. Do you think it is necessary to provide for the same grounds in the context of mutual legal assistance?

- Do the laws of your country provide for refusal of mutual legal assistance in cases in which there is a risk that the person concerned might be subjected to torture or cruel, inhuman or degrading punishment or treatment in the requesting State? If not, do you consider the granting of mutual legal assistance in such cases to constitute a violation of the human rights established under international law?
- How is it possible to reconcile the obligation of banks not to divulge information regarding their clients to third parties with the requests for mutual legal assistance that banks receive from the authorities to divulge information about their clients' bank accounts?
- Your counterpart in country A invokes the ne bis in idem principle to refuse your request for mutual legal assistance, since the suspect in your case has already been the subject of proceedings in country A. That principle is not established in your country's laws. In order to accept your request and assist you in your investigation, your counterpart suggests that you agree not to prosecute the person concerned for the same offence for which he or she has already been the subject of proceedings in country A. What do you think? Does this solution seem an acceptable alternative?



Assessment questions

- What is the significance of the anti-discrimination clause with respect to mutual legal assistance?
- How is the political offence exception applied in relation to acts of terrorism?
- What is the significance of the rule of speciality with respect to mutual legal assistance?
- Can the fiscal nature of an act of financing of terrorism be used as a ground to refuse mutual legal assistance?
- Can a bank invoke bank secrecy as a ground to refuse a request for information about a bank account submitted as part of an investigation into the financing of acts of terrorism? If not, in which other case(s) must the bank lift bank secrecy?



Tools

- The complete texts of the aforementioned multilateral treaties can be accessed at the following addresses:
 - Universal conventions and protocols against terrorism:
www.unodc.org/tldb/en/universal_instruments_list_NEW.html
 - United Nations Convention against Transnational Organized Crime:
www.unodc.org/unodc/en/treaties/CTOC/index.html

- United Nations Convention against Corruption:
www.unodc.org/unodc/en/treaties/CAC/index.html
- International Covenant on Civil and Political Rights, its Second Optional Protocol aiming at the abolition of the death penalty, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and all other international instruments relating to human rights:
www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx
- The report of the Informal Expert Working Group on Mutual Legal Assistance Casework Best Practice (United Nations Office for Drug Control and Crime Prevention, 2001) is available at the following address:
www.unodc.org/tldb/en/legislative_guides.html
- The model law on mutual legal assistance in criminal matters (2007), the Model Treaty on Mutual Assistance in Criminal Matters, adopted by the General Assembly in its resolution 45/117 and subsequently amended by General Assembly resolution 53/112, and the revised manual relating to that Model Treaty are available at the following address:
www.unodc.org/tldb/en/model_laws_treaties.html
- The aforementioned UNODC *Manual on International Cooperation in Criminal Matters related to Terrorism* is available at the following address:
www.unodc.org/documents/terrorism/Publications/Manual_Int_Coop_Criminal_Matters/English.pdf
- The Technical Guide to the United Nations Convention against Corruption, which contains an interesting chapter on mutual legal assistance (pages 157-171):
www.unodc.org/documents/corruption/Technical_Guide_UNCAC.pdf



Further reading

- Bassiouni, M. C. *Introduction to International Criminal Law*, Transnational Publishers, 2003
- Jones, A. *Jones on Extradition and mutual assistance*, Sweet and Maxwell, London, 2001
- Huet, A. and Koering-Joulin, R. *Droit pénal international*, Presses Universitaires de France, 2005
- McClean, D. *International Co-operation in Civil and Criminal Matters*, Oxford University Press, 2002
- Nicholls, C., Montgomery, C. and Knowles, J. *The Law of Extradition and Mutual Assistance*, Cameron, 2002
- Peyro Llopis, A. and Vandermeersch, D. *L'extradition et l'entraide judiciaire*, in *Juger le terrorisme dans l'Etat de droit*, Bruylant, 2009
- Prost, K. *Pratique et nouvelles tendances de l'entraide judiciaire: l'avenir de la coopération internationale (1998)*:
www.oas.org/juridico/mla/fr/can/fr_can_prost98.html

4. Other arrangements for international cooperation in criminal matters

Extradition, which is the arrangement for international cooperation that has been used the longest in criminal matters, is no longer the only effective means of obtaining justice in transnational cases. Practice has fostered the development of other forms of cooperation that serve as complementary means of achieving justice.



Practical guidance: bear in mind the interdependence of modalities for international cooperation in criminal matters

Tools for cooperation are in many respects interdependent. The Report of the Informal Expert Working Group on Effective Extradition Casework Practice (UNODC, 2004) calls for special attention to be paid to these interdependencies and recommends that States take due account of them when making decisions on extradition cases:

“The practical impact of this for extradition caseworkers is to not make extradition requests, respond to them or react to final decisions, particularly decisions refusing extradition, as if extradition is the only effective way of achieving justice in cross-border serious crime casework. Each of the tools have complementary roles and uses in ensuring that justice is done in respect of both international and local crimes. Decisions as to where justice can be best done in a particular case need to be taken objectively in the light of all the facts and circumstances.”

4.1. Transfer of criminal proceedings

This cooperation modality is provided for by a number of recent international conventions, notably the United Nations Convention against Transnational Organized Crime and the United Nations Convention against Corruption, but not by the universal counter-terrorism treaties, although that fact does not necessarily prevent the modality from being used in terrorism cases.

It is a procedure whereby a State transfers criminal proceedings to the State where the court most convenient to the resolution of the proceedings, also referred to as *forum conveniens*, is located. That court is the one to which it is most practical to refer the proceedings in the interests of justice, for example, a court in the State where the main act of terrorism took place or where most of the evidence is concentrated, thus allowing the prosecution and resolution of a case to be entrusted to the jurisdiction of the State in which it is most appropriate to conduct and conclude the proceedings. Such a court may also be in a State where a suspect is located but cannot be extradited because he or she is a national of that State.

Proceedings are transferred on the basis of an official request for the purpose of prosecution, which is the act by which the competent authorities of a State that has jurisdiction to judge an offence request the authorities of another State to carry out the prosecution.

4.2. Execution of foreign sentences: the transfer of sentenced persons

This is a procedure by which a person convicted on the territory of one State is transferred to the territory of another State to serve his or her sentence. It makes it possible to facilitate the social rehabilitation of convicted foreign nationals by allowing them to serve their sentences in their home countries. It also has a humanitarian objective in that it brings such persons physically closer to their families in their home countries. This arrangement is not referred to in the counter-terrorism treaties, but it is provided for in the United Nations Convention against Transnational Organized Crime and the United Nations Convention against Corruption, the relevant provisions of which are more detailed.

4.3. Recognition of foreign criminal judgements

States have historically considered criminal decisions to be an exercise of their national sovereignty and have therefore refused to recognize the decisions of foreign jurisdictions. That position is contradictory in that, for example, States grant extradition for the purpose of enforcement of a sentence on the basis of a foreign judgement, execute foreign sentences and confiscate the proceeds of crime. Legal doctrine explains that apparent contradiction by making a distinction between recognition of the consequences of a judgement and recognition of a judgement itself. To date, there is only one instrument at the regional level that deals with this issue, namely the European Convention on the International Validity of Criminal Judgements.

4.4. Confiscation of the proceeds of crime

When a State requests another State to assist in the identification, detection, freezing or seizure of assets, it is requesting the other State to gather evidence. The request is therefore one for mutual legal assistance, as discussed above.

What is considered in legal doctrine to differ from mutual legal assistance is international cooperation in matters relating to confiscation. In some countries, confiscation is a criminal penalty; consequently, cooperation in that area also falls within the scope of enforcement of foreign criminal judgements. Confiscation is also defined by the United Nations Convention against Transnational Organized Crime, the United Nations Convention against Corruption and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances as “the permanent deprivation of property by order of a court or other competent authority”. It is also provided for by numerous other instruments of international law in relation to action against the financing of terrorism.

Thus, a State that receives a request for the confiscation of proceeds of crime on its territory transmits that request to its competent authorities, in order either for those authorities to execute the decision of the court of the requesting State to confiscate or for them to refer the matter to a court in the requested State for decision and subsequently to execute that decision.

However, confiscation is not always a criminal penalty, and other countries regard assisting in the confiscation of proceeds of crime as a type of mutual legal

assistance. Indeed, those countries regard confiscation as entirely separate from criminal penalties, some treating it as an administrative measure, for example.



What provisions does the International Convention for the Suppression of the Financing of Terrorism establish with regard to confiscation?

Article 8:

- 1. Each State Party shall take appropriate measures, in accordance with its domestic legal principles, for the identification, detection and freezing or seizure of any funds used or allocated for the purpose of committing the offences set forth in article 2 as well as the proceeds derived from such offences, for purposes of possible forfeiture.*
- 2. Each State Party shall take appropriate measures, in accordance with its domestic legal principles, for the forfeiture of funds used or allocated for the purpose of committing the offences set forth in article 2 and the proceeds derived from such offences.*
- 3. Each State Party concerned may give consideration to concluding agreements on the sharing with other States Parties, on a regular or case-by-case basis, of the funds derived from the forfeitures referred to in this article.*
- 4. Each State Party shall consider establishing mechanisms whereby the funds derived from the forfeitures referred to in this article are utilized to compensate the victims of offences referred to in article 2, paragraph 1, subparagraph (a) or (b), or their families.*
- 5. The provisions of this article shall be implemented without prejudice to the rights of third parties acting in good faith.*

4.5. The gathering and exchange of information between intelligence and law enforcement agencies

In the context of the fight against terrorism, cooperation between intelligence and law enforcement agencies has increased considerably in recent years, since action against terrorism requires a high level of gathering and exchange of information. However, international cooperation of this kind is not considered comparable to the forms of cooperation referred to above, which is why there are no treaties dealing with such cooperation in the same way in which extradition and mutual legal assistance are provided for, nor has it been included in the treaties relating to mutual legal assistance. The United Nations Convention against Transnational Organized Crime and the United Nations Convention against Corruption do refer to such cooperation, but they do not establish provisions regulating it. Furthermore, since it is not regulated at the international level and is not generally monitored at the national level by judicial authorities when carried out outside national territory, it

poses challenges in terms of effectiveness and respect for the right to privacy and human rights in general.³



Joint investigations: a useful form of international cooperation against terrorism available to practitioners

Joint investigations have served as a form of international cooperation for many years in combating transnational crime. In relation to matters that are the subject of investigations, prosecutions or judicial proceedings in one or more States and that require coordinated and concerted action, two or more States may establish a joint investigative body. This is done on the basis of a bilateral or multilateral agreement or, in the absence of such an agreement, on a case-by-case basis.

Joint investigations are provided for notably by the United Nations Convention against Transnational Organized Crime and the United Nations Convention against Corruption. They have also proven very useful in the fight against terrorism. For example, the Spanish judicial authorities have established numerous joint operational investigation teams, particularly with France and Portugal, in order to counter terrorism.



Listen to interviews with Thierry Fragnoli, vice-president and examining magistrate of the counter-terrorism unit of the Court of Major Jurisdiction of Paris, and Anne Kostomaroff, deputy prosecutor and head of the counter-terrorism section of the Paris Public Prosecutor's Office (available in French only):
www.justice.gouv.fr/actualite-du-ministere-10030/zoom-sur-les-equipes-communes-denquete-14446.html

4.6. Regional and subregional judicial mechanisms

Most countries are members of regional and subregional organizations that work in the areas of criminal justice and, in particular, international cooperation in criminal matters. These organizations — for example, the Council of Europe, the Organization of American States and the Economic Community of West African States — have supported the preparation of conventions on regional cooperation in criminal matters that provide practitioners in the region with tools for cooperation. Others have created regional platforms for legal cooperation; for example, the Indian Ocean Commission has created what is known as the “Justice” platform comprising focal points in charge of extradition and mutual legal assistance procedures in each of its member States. Others have gone further by creating specific judicial mechanisms for such cooperation. One such mechanism is the European Union’s European arrest warrant.

³ M. C. Bassiouni, *Introduction to International Criminal Law*, pages 368 to 377.



What is the European arrest warrant?

Adopted on 13 June 2002, the European arrest warrant replaces traditional extradition procedures between member States of the European Union. The decision to issue a European arrest warrant is made by a judicial authority of a member State seeking the arrest and surrender of a person sought in another member State, with a view to instigating legal proceedings or executing a sentence. The European arrest warrant puts into practice the principle of mutual recognition. Member States are required to recognize the validity of the European arrest warrant and take the necessary steps to hand over the person sought.

The warrant transcends borders and differs from extradition requests in that it involves legal cooperation (in the strictest sense of the term) that applies to the whole territory of the European Union. Consideration of the request is left exclusively to the judicial authority and it is that body alone, no longer the Government, that decides whether the person sought should or should not be surrendered to the judicial authority of the other member State. Compared to the traditional extradition procedure, the European arrest warrant facilitates and speeds up the procedure for surrender between European Union member States.



Listen to the interview with Florence Merloz, judge of the Ministry of Justice and Freedoms of France, on the utility of the European arrest warrant (available in French only): www.justice.gouv.fr/actualite-du-ministere-10030/zoom-sur-le-mandat-darret-europeen-19534.html

4.7. Access to justice

Cooperation in criminal matters is also carried out at the international level in the context of access to justice. Many countries have concluded agreements to grant one another access to their respective justice systems. This means that the nationals of each of those countries have the right to bring a criminal case before the courts of any country with which their country has concluded such an agreement and the right to legal assistance in so far as such assistance is provided for and is available. In addition, the lawyers of each of those countries have the right to present cases before the courts of any country with which their country has signed such an agreement. In most cases, such cooperation is provided for by the agreements on legal cooperation concluded between the countries concerned. However, it may also be afforded, outside the framework of such agreements, on the basis of agreements between bar associations.



Illustration — General Convention on Cooperation in Matters of Justice between the Republic of Niger and the Republic of Mali

CHAPTER I: ACCESS TO THE COURTS

Article 3: The nationals of each of the High Contracting Parties shall have, on the territory of the other State, free and unhindered access to the administrative and law courts of that State for the purpose of pursuing and defending their rights. In particular, they shall not be required to deposit a bond or security of any kind for the payment of court costs on the grounds that they are nationals of the other State or that they have no domicile or place of residence in the State in which the court is located.

The preceding paragraph applies, subject to the public order provisions of the State in which proceedings are initiated, to legally constituted or authorized legal persons that are subject to the laws of one of the signatory States.

Article 4: Lawyers admitted to practise their profession in one of the States shall practise that profession freely in the courts of the other State, in accordance with the legislation of that State and with due respect for the traditions of the profession.

However, any lawyer who exercises the power to assist or represent the parties before a court of the other country shall select the offices of a lawyer of that country as his or her professional domicile for the purpose of receiving such notifications as may be provided for by the law.

Article 5: The nationals of each of the High Contracting Parties shall enjoy on the territory of the other State the same access to legal assistance as the nationals of that State, provided that they comply with the law of the State in which assistance is requested.



Case study: the Dellabomba case

A bomb has exploded in a café in the embassy district of the capital of country A. The explosion has killed one person and injured several others from countries A, B and C. A person suspected of having planted the bomb is found in country D, of which he is a national.

Country A requests the extradition of the suspect for the purposes of proceedings in country D. However, the request is rejected because the person concerned is a national of country D and country D does not extradite its nationals.

What advice do you give to the authorities of country A? Would you advise them to cooperate with the authorities of country D in a different way? If so, indicate the cooperation arrangement or arrangements that you would advise.



Activities

- Identify the arrangements for international cooperation in criminal matters other than extradition and mutual legal assistance that are provided for by your country's legislation, including the bilateral agreements to which your country is party, and that may be used by your country's authorities. Are they all used in practice? What are the advantages and disadvantages of each of those arrangements?
- List the regional and subregional organizations of which your country is a member. Do those organizations have a role in international cooperation in criminal matters? Are there any conventions on the subject that were negotiated under their auspices? If so, specify which those conventions are and which of them is the most valuable to practitioners in your country.



Assessment questions

- What are the arrangements for international cooperation in criminal matters, other than extradition and mutual legal assistance?
- What is the difference between the freezing, the seizure and the confiscation of proceeds of crime?
- What does "transfer of criminal proceedings" mean?
- In which cases are sentenced persons transferred to their home country?
- What forms of cooperation are available in the context of access to justice?
- What challenges might be posed by international cooperation between intelligence and law enforcement agencies in the context of the fight against terrorism?
- What role do the regional and subregional organizations of which your country is a member play in international cooperation in criminal matters?



Tools

- The United Nations Model Treaty on the Transfer of Proceedings in Criminal Matters (General Assembly resolution 45/118) is available in the Official Document System of the United Nations: <http://documents.un.org/>
- The UNODC Manual on International Cooperation in Criminal Matters related to Terrorism, referred to earlier in this module, contains sections specifically addressing the transfer of criminal proceedings (section 4.B), the transfer of detained persons already convicted (4.C) and mutual legal assistance in the fight against the financing of terrorism: identification, detection, freezing, seizure and confiscation (2.C). It is available at the following address: www.unodc.org/unodc/en/terrorism/technical-assistance-tools.html

- The Joint Investigation Teams (JITs) Manual, produced by Eurojust and Europol as part of their joint project on joint investigations teams, is available at the following address:
www.europol.europa.eu/content/page/jit-manual-995
- Report of the Expert Working Group on Mutual Legal Assistance and Related International Confiscation (United Nations Office for Drug Control and Crime Prevention, 1993):
www.unodc.org/pdf/lap_maewg_1993_final.pdf
- The aforementioned international instruments are available at the following addresses:

The universal counter-terrorism instruments:
www.unodc.org/tldb/en/universal_instruments_list_NEW.html

United Nations Convention against Transnational Organized Crime:
www.unodc.org/unodc/en/treaties/CTOC/index.html

United Nations Convention against Corruption:
www.unodc.org/unodc/en/treaties/CAC/index.html

Council of Europe Convention on the Transfer of Sentenced Persons:
<http://conventions.coe.int/Treaty/EN/Treaties/Html/112.htm>

European Convention on the International Validity of Criminal Judgments:
<http://conventions.coe.int/Treaty/EN/Treaties/Html/070.htm>
- Council of the European Union Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between the Member States:
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002F0584:EN:NOT>
- Details of the regional “Justice” platform created by the Indian Ocean Commission, and of the focal points for the platform are available at the following address:
www.unodc.org/unodc/en/legal-tools/international-cooperation-networks.html
- The UNODC Technical Guide to the United Nations Convention against Corruption contains interesting sections on the transfer of sentenced persons (pages 154-157) and on the transfer of criminal proceedings (pages 171-175):
www.unodc.org/documents/corruption/Technical_Guide_UNCAC.pdf
- In 2011, UNODC will also publish a manual on the transfer of sentenced persons, which will be accessible on the Office’s website: www.unodc.org



Further reading

- Bassiouni, M. C. *Introduction to International Criminal Law*, Transnational Publishers, 2003
- Bot, S., *Le mandat d'arrêt européen*, Éditions Larcier, 2009
- Oldrich Bures, *European Arrest Warrant: Implications for EU Counterterrorism Efforts*, Central European Journal of International and Security Studies, May 2009

5. Challenges to and practical guidance for effective cooperation in criminal matters

5.1. Drafting laws and treaties on extradition and mutual legal assistance



Practical guidance: draw up an inventory of laws and treaties

Each State should determine whether it has the legal foundations necessary to meet current and foreseeable needs in the areas of extradition and mutual legal assistance. The report of the Informal Expert Working Group on Effective Extradition Casework Practice (UNODC, 2004) recommends that each State draw up an inventory of its laws and treaties on extradition and mutual legal assistance and carefully review them to ensure that they facilitate cooperation with respect to all foreseeable serious offences. Particular attention should be given to agreements that have been published and forgotten, not officially published or that may have been concluded under former colonial regimes but are still applicable, or agreements that pose a problem of succession in the case of new separate States that have emerged from a formerly single State.

Although in theory some States can directly apply ratified conventions without creating a specific instrument governing the application or implementation of those conventions, in practice it is difficult to satisfy the requirements of the universal counter-terrorism treaties if there is no general legal framework at the national level to enable mutual legal assistance and extradition. Such a framework should empower national authorities to engage in international cooperation operations relating to criminal offences in general, not only terrorism-related crimes.

There is no definitive list of legislative prerequisites that a State must satisfy in order to be able to use available extradition and mutual legal assistance mechanisms. However, some examples of the choices and issues that national authorities should consider when planning the adoption of national legislation in the areas of extradition and mutual legal assistance are as follows:

- ✓ In terms of the scope of application of the national legal framework, is it better to adopt a law of general scope (that is, one that covers not only the offences provided for in the counter-terrorism treaties but other offences also) or one that targets specific criminal offences? Is a general law preferable in order to avoid creating inconsistent and unclear legal regimes and practices?
- ✓ On what legal bases may requests for extradition and mutual legal assistance be granted? In general, it is recommended that countries provide for and accept the widest possible range of legal bases in order to facilitate international cooperation in criminal matters; in particular, they should be able not only to use multilateral treaties as a legal basis but also to grant extradition requests on the sole basis of reciprocity and to grant requests for mutual legal assistance on the basis of comity.
- ✓ Which authority will be empowered to receive and execute requests for extradition or mutual legal assistance? The choice of a single central authority

is preferable in order to enable other States to approach the competent authority for any type of mutual legal assistance in criminal matters and to harmonize the practice followed with respect to different types of criminal offence.

- ✓ Can a person who is to be extradited appeal against the decision to surrender him or her to the authorities? What is the procedure and timescale for such an appeal?
- ✓ When a State gathers evidence on behalf of another State, to what extent can the procedural laws of the other State be applied? This is important, since that evidence may not be admissible under the criminal procedure of a State unless the procedures of that State have been followed.

The information provided and the issues raised above presuppose the existence of the basic structures of a functioning criminal justice system. The minimal operational capacity of national institutions in charge of defining criminal policies and administering justice is obviously a fundamental prerequisite.

At the bilateral and regional levels, it may also be useful for countries with a large number of joint cases to negotiate treaties or extend the application of existing treaties.



Specific tools for drafting laws

- The United Nations Model Treaty on Extradition and Model Treaty on Mutual Assistance in Criminal Matters and the UNODC revised manuals relating to those model treaties are available in the database of the UNODC Terrorism Prevention Branch: www.unodc.org/tldb/model_laws_treaties.html
- The Model Legislative Provisions against Terrorism (available in French and English) contain a chapter on international cooperation: www.unodc.org/tldb/model_laws_treaties.html
- The Model Law on Extradition and the Model Law on Mutual Legal Assistance in Criminal Matters, prepared by UNODC (in French and English): www.unodc.org/tldb/model_laws_treaties.html
- Model laws specific to certain legal traditions have also been elaborated by UNODC (www.unodc.org/unodc/en/legal-tools/model-treaties-and-laws.html):
 - For common-law countries: the Model Law on Extradition, the Model Law on Mutual Legal Assistance in Criminal Matters and the Model Foreign Evidence Bill (United Nations International Drug Control Programme, 2000), together with commentaries: www.unodc.org/unodc/en/legal-tools/model-treaties-and-laws.html
 - For Islamic-law systems: United Nations model law on international cooperation with regard to illicit traffic in narcotic drugs, psychotropic substances and precursors (for Islamic-law systems) (available in French only): www.unodc.org/pdf/model_law_islamic_d_fr.pdf

- For civil-law countries: United Nations model law on international legal cooperation with regard to illicit traffic in narcotic drugs, psychotropic substances and precursors (for civil-law systems) (available in French only): www.unodc.org/pdf/lap_civil_mod-leg_internat_cooperation_fr.pdf
 - Chapter 5 of the UNODC *Model Legislative Provisions against Terrorism* offers drafting suggestions with regard to international cooperation in criminal matters related to terrorism: www.unodc.org/tldb/pdf/Dispositions_1_EF_BF_BDgislatives_mod_EF_BF_BDles_contre_le_terrorisme.doc
- See also chapter 5 of the Legislative Guide to the Universal Legal Regime against Terrorism and chapter 4 of the Guide for the Legislative Incorporation and Implementation of the Universal Anti-Terrorism Instruments, both elaborated by the UNODC Terrorism Prevention Branch: www.unodc.org/tldb/en/legislative_guides.html
- For the purposes of comparative law, the database of the UNODC Terrorism Prevention Branch includes the criminal legislation of numerous countries relating to extradition, mutual legal assistance and related bilateral and multilateral treaties: www.unodc.org/tldb/



Further reading

- Chryssikos, D., *Commentary on the United Nations Draft Model Law on Extradition* (pp. 377 et seq.) and *Commentary on the United Nations Draft Model Law on Mutual Assistance in Criminal Matters* (pp. 403 et seq.), in Bassiouni, M. C., “*International Criminal Law*”, third edition, vol. II, 2008

5.2. Drafting requests for extradition and mutual legal assistance

5.2.1. Promoting the establishment and maintenance of contact: national competent authorities and other contact persons and networks

Direct contact between the competent authorities of each country is of key importance at every stage of proceedings, including the stage before a request for mutual legal assistance, provisional arrest and/or extradition is submitted.

Why? Such contact often helps to save time and avoid misunderstandings. In matters of mutual legal assistance, contact with a counterpart in the requested State makes it possible, for example, to determine the formal conditions to be fulfilled or to simplify the procedure concerned if information can be obtained without a formal request for mutual legal assistance. In matters of extradition, such contact serves as a means of identifying all the requirements of the requested State, particularly the evidentiary requirements that must be fulfilled in order for that State to surrender the individual concerned.

How? Contact can be established directly between representatives of central authorities whose details are provided in the UNODC online directory, or through the police services, designated liaison officers or consular staff, networks — such as the European Judicial Network, the Commonwealth Network of Contact Persons

and the regional judicial platforms of the Sahel and Indian Ocean Commission countries — or other bodies, such as the International Association of Prosecutors.



How can you find the contact details of your counterparts?

- Contact networks are generally accessible via the UNODC website at the following address:
www.unodc.org/unodc/en/legal-tools/international-cooperation-networks.html
- The list of competent central authorities of whose designation the United Nations Secretary-General has been notified in accordance with the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, the United Nations Convention against Transnational Organized Crime and the United Nations Convention against Corruption, together with the contact details of those authorities, is available at the following address:
www.unodc.org/comppauth_dct/en/index.html
- The list of focal points of the regional judicial platforms of the Sahel countries (Burkina Faso, Mali, Mauritania and Niger) and of the States members of the Indian Ocean Commission (Comoros, France, Madagascar, Mauritius, Seychelles), together with the contact details of those focal points, is available at the following address:
www.unodc.org/documents/treaties/organized_crime/internationalcooperation/Focal_points_IOC.pdf. All of these focal points have agreed to respond to any question relating to extradition and mutual legal assistance procedures in their countries and to give their opinion on draft requests.
- The Commonwealth Network of Contact Persons (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, Tanzania, Tonga, Trinidad and Tobago, Tuvalu, Uganda, United Kingdom, Vanuatu and Zambia) is available at the following address:
[www.thecommonwealth.org/shared_asp_files/uploadedfiles/1D0DC9F4-815A-4B0E-8B9D-718209E46D77_COMMONWEALTHNETWORKOFCONTACTPERSONS\(CNCP\).pdf](http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/1D0DC9F4-815A-4B0E-8B9D-718209E46D77_COMMONWEALTHNETWORKOFCONTACTPERSONS(CNCP).pdf)
- A virtual community of practitioners, through which it is possible to establish direct contact with a criminal justice officer in most countries, is accessible through the UNODC online Counter-terrorism Learning Platform at the following address: <https://ctlp.unodc.org>

This community is a cost-free online forum that allows criminal justice officers to contact and establish links with their counterparts, exchange experience, remain informed of current legal issues and benefit from ongoing training in the fight against terrorism.

Three types of activity are offered to members of the virtual community of practitioners:

1. *Online events*: practitioners can take part in discussions or “round tables” organized regularly by UNODC and led by a special guest, eminent person or counter-terrorism expert.
2. *Online discussion forums*: practitioners can debate with their counterparts in various forums dedicated to different aspects of the fight against terrorism.
3. *Members of the Community*: a network of all practitioners and members of the Community who are listed in a directory to facilitate rapid, direct and permanent contact with their counterparts. Each member can debate bilaterally through the “chat” feature.

How can you become a member of the Community?

1. *Connect to the Platform*: <http://ctlp.unodc.org>
To become a member of the virtual community of practitioners, you must first register on the Platform’s registration page. Click on “Submit your application” in the box “If you are not registered”.
2. *Fill in the application form*, making sure to complete the required fields. Ensure that the information you provide is as accurate and complete as possible. Do not use acronyms. Keep your user name and password in a safe place.
3. *Tick the box next to “Become a member of the Community only”*, then click on “Submit my application”. A confirmation e-mail will be sent to the address given in your application form.

5.2.2. Drafting an effective request (content of the request)

Each request should contain all the information necessary to facilitate a positive response on the part of the requested State and thus enable the request to be executed, and to avoid any difficulties relating to interpretation and obstacles that might arise in the event that the States concerned have different legal systems.

This means that each party should know both its own legal system and practices and those of the other; for example, they should know which is the competent authority of the requested State and how to transmit the request to that authority, what information and documentation is required by the laws of the requested State in order for the request to be accepted, what legal bases are accepted by the requested State, what evidentiary requirements of the requested State the requesting State should be aware of in order for a person sought to be surrendered, what grounds for refusal are provided for by the requested State, what criminal procedure should be followed in order to execute a request for a certain type of mutual legal assistance so that the executed measure is admissible in the criminal proceedings of the

requesting State, in what language the requests should be drafted and whether the confidentiality of the requests for mutual legal assistance can be assured.

UNODC has developed a number of tools to assist practitioners as much as possible and to facilitate cooperation.



Specific tools for drafting laws

- UNODC has created a tool that automatically generates mutual legal assistance requests: the **Mutual Legal Assistance Request Writer Tool**. The purpose of the tool is to help practitioners to issue relevant requests, to receive useful responses and to accelerate the judicial process. In addition to the offences set out in the relevant international conventions, it can be used to create requests relating to any type of offence committed on a State's territory. The system guides the practitioner through each stage of the drafting of a request for mutual assistance by offering different options to select from a drop-down menu on the on-screen forms. The practitioner then has to give the required information for each option in the boxes provided. The request can then be easily adapted to satisfy the legal and procedural requirements of the requesting State concerned. The user cannot move to the next screen without giving all the information required. This system prevents the drafting of incomplete requests for mutual legal assistance and reduces the risks of delay or refusal of their execution. Once the details are entered, the Request Writer Tool puts the information together and automatically produces a correct and complete request that simply needs to be checked and signed. All requests drafted using the software tool are automatically saved in a database and are accessible at any time

The tool is available in English, French, Spanish and Russian, and also in Bosnian, Croatian, Montenegrin, Portuguese and Serbian, on request, at the following address: www.unodc.org/mla/en/index.html

A demonstration video and a flowchart for drafting a request for mutual legal assistance are available at the following address:

www.unodc.org/mla/demonstration-of-the-mla-tool.html

- UNODC has produced a list of best practice recommendations for extradition and mutual legal assistance and has developed checklists to help requesting States to formulate requests for extradition and mutual legal assistance. The checklists can be found in the annexes to the report of the Informal Expert Working Group on Effective Extradition Casework Practice (www.unodc.org/documents/legal-tools/lap_report_ewg_extradition_casework.pdf) and the report of the Informal Expert Working Group on Mutual Legal Assistance Casework Best Practice (www.unodc.org/tldb/en/legislative_guides.html)
- UNODC has developed a practical guide for formulating effective requests for extradition and mutual legal assistance to the States members of the Indian Ocean Commission:
www.unodc.org/documents/treaties/organized_crime/internationalcooperation/Publication_UNODC-COI_Fiches_pratiques_n.1.pdf (available in French only)

A similar guide on requests to the to Sahel States (Burkina Faso, Mali, Mauritania, Niger) is being prepared and will soon be available at: www.unodc.org/unodc/en/legal-tools/international-cooperation-networks.html

- The Council of Europe has developed similar practical guidance for its Member States:
www.coe.int/t/dghl/standardsetting/pc-oc/Country_information1_en.asp
- The database of the Hemispheric Information Exchange Network for Mutual Assistance in Criminal Matters and Extradition of the Organization of American States, also contains useful information on formulating effective requests to the member States of that Organization:
www.oas.org/juridico/mla/index.html
- Similar information for the Commonwealth States can be found at the following address:
www.thecommonwealth.org/shared_asp_files/uploadedfiles/%7BF427D7C-77DE-4CB8-8CCA-A132562F3DE5%7D_EXTRADITION_pt1.pdf



Supplementary material

- Copies of a request for extradition (accompanied by an international arrest warrant) and a request for mutual legal assistance in connection with acts of terrorism.

5.3. Transmitting requests for extradition and mutual legal assistance

While a criminal can travel halfway across the world in less than a day, an extradition request can, through diplomatic channels for example, take weeks to reach its intended recipient. Both extradition and mutual legal assistance requests should be sent as quickly as possible to ensure that the legal cooperation is truly effective in bringing the perpetrators of acts of terrorism to justice.



How can the transmission of requests for provisional arrest and extradition be accelerated?

As we have seen, extradition requests are traditionally transmitted through diplomatic channels (see above “2.1.2.2. *Review and decision stage of extradition*”). These channels are reliable and the requested State can be confident that the request is authentic and emanates from another sovereign State. However, these channels can also be very slow, as pointed out by the Informal Expert Working Group on Effective Extradition Casework Practice. To avoid delays in the handling of diplomatic correspondence, the Group recommends, unless otherwise provided in special provisions of an extradition treaty:

- that requests for provisional arrest be transmitted through INTERPOL rather than diplomatic channels (see above “2.1.2.1. *The pre-extradition stage: provisional arrest*”).

- that the request for extradition be sent directly. When the request has to be transmitted through diplomatic channels, the Group recommends sending a copy directly to the executing authority of the requested State as well, to enable that authority to examine the request and prepare its documents before receiving the official request. Submission of the official request to the executing authority of the requested State rather than the judicial authority should be deemed sufficient for compliance with the requirements of treaties or domestic legislation relating to submission of a request following a provisional arrest.



How can the transmission of requests for mutual legal assistance be accelerated?

➤ Encourage the use of modern technology to transmit requests for mutual legal assistance:

The Informal Expert Working Group on Mutual Legal Assistance Casework Best Practice points out that the slower, traditional methods of transmission (such as the transmission of written sealed documents by diplomatic pouch or post) involve a risk of cooperation not being provided in good time. If there is reason to fear that evidence may vanish or significant prejudice be caused to persons or assets if cooperation is not provided in a timely manner, the Group recommends using faster methods of transmission, such as telephone, fax or e-mail. The requesting and requested States will have to determine between themselves how they should guarantee the authenticity and security of these communications and decide whether these communications should be followed by a written request sent through the normal channels. It should be pointed out that, unlike requests for extradition, in the case of mutual legal assistance requests direct communication between central authorities is the norm.

The United Nations conventions against transnational organized crime and corruption encourage the use of such quicker practices. They actually state that requests may be sent in writing or “by any means capable of producing a written record”. They also state that in urgent circumstances “requests may be made orally, but shall be confirmed in writing forthwith”.

➤ In urgent circumstances, consider using INTERPOL to transmit requests for mutual legal assistance:

In the absence of a universal procedure for the transmission of requests for mutual legal assistance, INTERPOL has gradually taken on the role of channel for transmitting these requests on the basis of various conventions and bilateral and multilateral agreements. The confidence that the signatory States of these treaties have in INTERPOL is a result of its legitimacy as a network for international cooperation and the tightly-knit global connections it has managed to establish. Transmission through the INTERPOL channel provides assurance that the request will be sent through a service charged with applying the law, experienced in international procedures and therefore equipped to transmit to the competent judicial authority. Moreover, INTERPOL offers guarantees of neutrality and independence (article 3 of the INTERPOL Constitution, AG-2006-RES-04) recognized by Member States.

Example: article 18 (13) of the United Nations Convention against Transnational Organized Crime: *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.*

Judges wishing to transmit requests for international mutual legal assistance are therefore requested to check whether the treaty or convention governing the request for mutual legal assistance contains a similar provision.

5.4. Executing requests for extradition and mutual legal assistance



See above the challenges described and practical guidance given in the general sections on *extradition (2.)* and *mutual legal assistance (3.)*, particularly with regard to applicable laws and the requirements for form and content that should be observed for the execution of requests: *Extradition procedure overview and comparative aspects (2.1.2.)*, *Extradition conditions (2.3.)*, *Mutual legal assistance procedure: overview and comparative aspects (3.1.2.)* and *Conditions applicable to mutual legal assistance (3.4.)*. Also see the use of videoconferencing for the execution of requests for mutual legal assistance under section 3.1.2. (with video transmission inside a court).

5.4.1. Simplifying extradition procedure with surrender by consent

Surrender by consent is a simplified surrender procedure in which the person sought, who is provisionally arrested and the subject of an official request for extradition, formally consents to being handed over to the authorities of the requesting State. The person waives the protection of the entire extradition process and is surrendered with no further formalities. In many States this procedure allows for a reduction in the number and costs of extradition procedures. However, as the person is unable to invoke certain rights, most countries ensure that, in order to prevent any abuse, a court officer of justice verifies that the person truly consents voluntarily and understands the consequences of this choice.

5.4.2. Managing concurrent requests

In cases of multiple requests for extradition, some universal counter-terrorism treaties, such as the International Convention for the Suppression of the Financing of Terrorism, encourage States parties to consult on and coordinate their action in order to determine which State would be best placed to institute proceedings. However, the treaties do not specify how to achieve that coordination, nor by what criteria the competence of one State prevails over that of the others concerned. This type of provision aims to offer a general framework for cooperation, allowing the States parties ample room for manoeuvre.



Practical guidance on handling concurrent requests for extradition

The Informal Expert Working Group on Effective Extradition Casework Practice recommends States adopt and use the following main criteria for dealing with concurrent requests:

- whether the requests are made pursuant to treaties: when this is the case, extradition is compulsory in some circumstances, whereas when extradition is only requested on the basis of legislation, it is generally discretionary
- the State where the greater part of the offence was committed or the State where the greater loss or damage was sustained
- the dates of the respective requests and the chronological order in which they were received
- the capacity and possibility for later extradition between the requesting States
- in cross-border cases, the capacity of a State to prosecute all the offences for all other States concerned
- the times, places and relative gravity of the commission of each offence
- the location of the witnesses and the granting of protection to those persons
- the nationality of the person sought
- the possibility for the victims to take part in the proceedings or to follow them
- the extent to which just and fair proceedings could take place in each State in question
- the relative availability and admissibility of evidence in each State
- the length of time for proceedings to be conducted and concluded
- the place where the social rehabilitation of the person sought would take place in the best conditions
- the extent and manner in which other cooperation tools can be used
- other respective interests of the requesting States

The later re-extradition of the person may also resolve problems of concurrent requests. The Expert Group considers this to be an excellent option, although the benefits may not be apparent until after prosecution or punishment in the priority State and it may not work at all if competing States seek the person for the same offence. Re-extradition can be prevented by the “double jeopardy” (ne bis in idem) principle.

5.4.3. Covering the costs of extradition

Traditionally, each State meets the costs incurred in its own territory for the extradition, such as the costs connected with the arrest, detention, custody and board of the person, their transfer and the seizure and transportation of property, and those

incurred for the mutual legal assistance, such as examination of items and visits of sites, searches and seizures, and taking of witness testimony. Nevertheless, for some requesting and requested States, the cost is an obstacle to the extradition of an individual or to mutual legal assistance.

In practice, States should consult one another because special arrangements can always be made among States, especially if the requesting State has more resources at its disposal than the requested State; the former may agree to bear the costs or even to provide the necessary expertise for mutual legal assistance to be conducted. For instance, Burundi made a request to France for a ballistics expert in the context of a mutual legal assistance procedure.



Case study: the Buongustaio case: extradition request drafting exercise

Note for the trainer:

The text in this exercise is a fictitious request for extradition in a terrorism-related case. The request (with its accompanying note verbale) has been drafted by a government official with little experience in extradition matters. As a result, it contains several flaws. Ask your group to advise the official in reformulating it to increase the chances of prompt and effective execution by the requested State. Encourage the group to read the background information carefully, and to think creatively with the help of the material provided.

To facilitate the analysis of specific legal issues, the extradition request has been divided into sections, each of which poses a specific substantive legal problem. Each section is followed by commentaries, which you should not make available while your group is still discussing the issues.

This exercise has been prepared on the basis of the Report of the Informal Expert Working Group on Effective Extradition Casework Practice (UNODC, 2004).

Texts to distribute to participants for this exercise:

- *International Convention for the Suppression of Terrorist Bombings*
- *International Convention for the Suppression of the Financing of Terrorism*
- *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents*
- *Convention on the Physical Protection of Nuclear Material*
- *United Nations Convention against Transnational Organized Crime (Organized Crime Convention)*

Background information

At 5.30 p.m. on 24 January 2007, two armed persons broke into a supermarket right next to the city's diplomatic compound in State X and opened fire, killing several people. After the shooting, they used a spray to write "BBB" on the walls of the supermarket. BBB was a well-known organization fighting to promote political change in State X. The police arrived at the crime scene too late to arrest the two men, who managed to escape quickly in a car.

Over the next few days, the main hospitals in the capital reported a dozen cases of death due to a severe form of a rare respiratory disease. The authorities of State X established that 90 per cent of the people reporting acute respiratory problems had visited the supermarket on the day of the shooting. In addition, forensic evidence showed traces of a dangerous toxic substance on the shelves and floors of the supermarket.

On the basis of witness testimony, the investigators identified Mr. A and Mr. B as the individuals who carried out the attack. They both had a history of escapes from prisons in State X.

The authorities of State X asked INTERPOL to issue a red notice. A few days later, State Y advised that one of the two individuals had been located in its territory. State X prepared and issued a request for his provisional arrest.

Mr. A was arrested by State Y on 31 January 2007. State X forwarded an extradition request to State Y through diplomatic channels.

At the same time, the authorities of State X were unofficially informed that a request for the extradition of Mr. A was also being prepared by State Z. Some of the victims of the supermarket attack were nationals of State Z.

Note verbale:

1. The Embassy of State X presents its compliments to the Ministry of Foreign Affairs of State Y, and has the honour to refer to the [regional convention on extradition], which both States X and Y have signed,

Commentary:

What matters is that both States are parties to the extradition convention (either through ratification or accession). The requesting State should use precise legal terminology to limit the risk of delays and misinterpretations.

2. And hereby requests, on behalf of State X, the extradition of Mr. A, a citizen of State X. Such request follows communication from your Government that Mr. A was arrested on 4 February 2007 upon request by the competent authorities of State X.

Commentary:

State X has submitted a specific request for provisional arrest, but has it enquired as to whether State Y might have already recognized the INTERPOL red notice as a valid request for this purpose?

3. The above-mentioned individual is wanted in order to be brought to trial before the competent courts of State X, for the offence of "Attempting to destroy

the Constitutional order of the State”, in relation to the tragic events of 24 January 2007 which occurred in a public place in the capital city of State X.

In the absence of any detailed provision in the regional convention on extradition concerning the submission of documents, and in order to expeditiously process the present request, the prosecutorial authorities of State X have chosen to enclose the following documents under the seal of the State:

- Authenticated copy of the arrest warrant.
- Description of the events giving rise to the charges against Mr. A; the offences for which extradition is requested; and the applicable legal provisions.

Commentary:

The requesting State appears not to have considered the requirements of State Y relating to the submission of documents, which are necessary even in the absence of specific provisions contained in applicable treaties.

4. The Embassy of State X avails itself of this opportunity to express to the Ministry of Foreign Affairs of State Y the renewed assurances of its highest consideration.

Commentary:

The request for extradition is submitted more than one month after the arrest by State Y. Under many treaties and national laws, this period would be far too long for the requested State to continue to enforce the arrest warrant. For example, under the European Convention on Extradition (<http://conventions.coe.int/Treaty/EN/Treaties/Html/024.htm>), a provisional arrest may be terminated after 18 days from the date of arrest if the requested party has not received the request for extradition and the relevant documents, and shall not in any event continue for longer than 40 days.

Material to be included with the extradition request:

- Authenticated copy of the arrest warrant.
- Descriptions of the events giving rise to the charges against Mr. A; the offences for which extradition is requested; and the applicable legal provisions.

1. At 4.25 p.m. on 24 January 2007, two men entered the back door of the Buongustaio supermarket, located in [street name] in the capital city of State X.

They carried two big bags and were masked. Standing in one of the most crowded aisles, they took two semi-automatic guns out of their bags and began to shoot people at random. The shooting lasted almost a minute, after which one of the two men put his gun back into his bag and took out a spray bottle. He sprayed for a few seconds in the air, and then wrote “BBB” on the walls of the supermarket. The two men eventually left the supermarket through the main door. A few minutes afterwards, the two men were seen in a sports car driving away at great speed. The above version of the facts has been reported in a consistent and detailed way by a number of witnesses who were present at the scene.

The police and ambulance arrived a few minutes later to find 10 people dead. Thirty-four other people were taken to hospital in a critical condition, six of whom died on the way and two in the next few days as a direct result of their gunshot injuries. It has been established that two of the victims were nationals of State Z. A video camera belonging to the Embassy of State W, located directly opposite the back door of the supermarket, made it possible to identify the two attackers, Mr. A and Mr. B. It is likely that Mr. A and Mr. B believed there would be no video cameras at the back entrance, as they only wore their masks after entering the supermarket. The video images of the two men before they put on their masks have been disseminated widely throughout the country.

Commentary:

The evidence provided by the requesting State consists of a statement that the facts reported in the request were confirmed by a number of witnesses. This may be sufficient under specific treaties that simplify evidentiary requirements, but many States would expect witness statements and other supporting material to be authenticated (the form of authentication should be established on the basis of the requirements of the requested State). Some countries even require “probable cause” to be established.

2. Mr. A and Mr. B did not remove any valuable objects from the supermarket, which provided the investigative authorities with an early indication that their purpose was not robbery.

Commentary:

The requesting State (State X) uses various arguments to convince the requested State (State Y) about the nature of the terrorist acts perpetrated by Mr. A. In doing so, a number of weak extra-legal arguments are put forward, including that the purpose of the perpetrators was not robbery.

3. Mr. A is one of the founding members of BBB, which has long been engaged in attempting to subvert the stability and democratic credentials of State X. The attack at the Buongustaio on 24 January 2007 reflects the violent tactics used by BBB to cause fear and death among innocent civilians in the capital city of the State.

Commentary:

Mr. A is identified as a terrorist, but there is no mention of the fact that he also has a history of escaping from prisons in State X. This information may be more important for the requested State than knowing that he is a terrorist: State X should have made it clear that there is a risk he may flee, to limit the possibility of a decision being reached to release him on bail during the extradition proceedings in the requested State.

4. In addition to this, it cannot be ignored that BBB appears in the list of terrorist groups compiled by a [regional organization] to which the Government of State Y belongs, and which State X intends to join soon. The list is accompanied by the requirement that “member States shall afford each other the widest possible measure of assistance in the fight against terrorist acts, and shall, with respect to inquiries and proceedings conducted by their authorities in respect of listed persons, fully take advantage, upon request, of their existing powers in accordance with all relevant international agreements”.

Commentary:

The argument that Mr. A should be extradited because BBB is listed as a terrorist group by a regional organization (to which State X is not yet a party, despite its intentions to join) is a weak one. State X cannot invoke the regulations of that organization. A duty of legal assistance exists for member States of that organization only, and it is a general duty.

The direct legal consequence of “listing” is the application of a sanctions regime (such as asset freezing), and not an obligation to apply criminal sanctions or to extradite.

It might have been preferable to focus on the conduct committed, and to find a solid legal basis to obtain cooperation, regardless of whether the acts in question could be characterized as terrorism.

Assuming that no extradition treaty was in force between the two States, one possibility would be to use the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents as a basis (since the attack was carried out in the proximity of an embassy, there is at least a possibility that diplomatically protected persons were among the victims).

5. The conduct on which this extradition request is based is in violation of the right to life, which is universally recognized by human rights treaties as the very essence of all other rights and freedoms. As such, it does not qualify as a political offence.

Commentary:

It is questionable whether the violation of a right, however fundamental, could be considered a non-political act by the requested State. In assessing the political nature of a conduct, the jurisprudence of States typically evaluates a number of additional factors, including the proportionality of the ends to the means employed, etc. In the absence of more persuasive arguments, the requesting State uses an argument here that carries a moral rather than a legal value. In addition, the argument that, under international treaty law in general, individuals can be held directly responsible for violating human rights, might not be acceptable to other States.

6. Additionally, in its resolution 1373 (2001), the Security Council called upon all States to “ensure, in conformity with international law [...] that claims of political motivation are not recognized as grounds for refusing requests for the extradition of alleged terrorists”.

Commentary:

Reference to Security Council resolution 1373 (2001) can be useful as a support for another legal basis. The paragraph mentioned is an authoritative one, but is not legally binding.

7. We submit that it is in the interest of all countries to disrupt the activities of BBB, as this organization is well known for its international retaliations. For example, in the weeks leading up to the Buongustaio attack, Mr. A had extensive contact with Mr. C, an independent consultant known for his international connections who sold radioactive material to a number of foreign criminal groups. After retaining a percentage of the profit made, part of the money could have been

used to support the terrorist activities of BBB and, more specifically in this case, to buy the sports car that Mr. A and Mr. B escaped in. There are indications that Mr. C is currently hiding in State D, which is in the last stages of the ratification process for the regional convention on extradition. Its authorities have indicated that a valid extradition request could be submitted only after the extradition treaty becomes applicable in State D, which should happen within a few weeks' time.

Commentary:

If the regional convention on extradition cannot currently be used as a legal basis to obtain the surrender of Mr. C, the requesting State should explore the possibility of relying on other legal grounds.

All universal counter-terrorism instruments can offer such a basis, therefore potentially providing the requesting State with a number of options. In particular, for States that do not need a specific extradition treaty to grant extradition, accepting the counter-terrorism treaties as a basis for doing so is a treaty obligation (for States that subordinate extradition to the existence of an extradition treaty, accepting the counter-terrorism treaties as a basis is optional).

In this specific scenario, the following could be considered:

- The Convention on the Physical Protection of Nuclear Material (Mr. C has been trafficking and smuggling radioactive material internationally).
- The International Convention for the Suppression of the Financing of Terrorism (Mr. C provided funds for the attack perpetrated by Mr. A and Mr. B).
- The United Nations Convention against Transnational Organized Crime (was Mr. C committing a serious crime involving a transnational organized group?).

In deciding which basis to use, the requesting State should look, among others, at whether the offences set forth in the chosen treaty existed in the law of the requested State at the time the offence was committed. For instance, the offence of radioactive smuggling might not or might have just been implemented into the domestic law of the requested State, but the offence of terrorist financing might have already been in place at the time the offence was committed.

8. In view of the above and in accordance with the penal code of State X, the acts committed by Mr. A and Mr. B at the Buongustaio supermarket fall within the scope of article [...], "Attempting to destroy the constitutional order of the State".

Commentary:

The requested State is not given sufficient material to fully assess the presence of the dual criminality requirement: the text of article [...] is not reproduced, and there is no explanation of its contents, nor any indication of the applicable penalties.

In any case, it is not certain that the requested State could find in its criminal laws an offence equivalent to the one contained in article [...]. This article only criminalizes damage to the interests of State X. The requested State could easily reject the request arguing that it cannot punish a conduct specifically affecting the interests of State X.

9. In addition to causing the death of several people, the gunshots fired at the supermarket damaged the building in various ways. There has therefore been severe disruption to a public place, an action which falls within the scope of the penal code of State X, under an offence of disrupting business activity or damaging commercial premises. However, the few investigative resources available to the police services, and the urgency to submit the present request, have meant the authorities could only focus on the most serious crimes committed. Pending the time needed to identify exactly the charges to be brought against Mr. A for these collateral offences, permission is sought in advance to prosecute him for causing such damage (if he is surrendered in relation to the offences that are the object of the present request).

Commentary:

The requesting State is asking to waive the speciality rule. However:

- The request to waive the speciality rule is submitted too early, before the requested State has even made a decision on the extradition request itself.
- Even if the request to waive the speciality principle had been received after the surrender of Mr. A, the exact charges have not been identified. The requested State cannot assess the presence of the dual criminality requirement, or whether the minor offences mentioned are extraditable (it is likely that the offences for damage would be punishable with a light sentence that would be less than the minimum one-year sentence required by most extradition treaties). The requested State risks not being able to prosecute Mr. A on these additional charges. A better course of action would have been for the requesting State to clearly identify, in the extradition request, all the offences for which State X intends to prosecute Mr. A. Even if some of these offences are not serious enough to be extraditable, many States would allow extradition in conjunction with extraditable offences.

10. Finally, we kindly ask your authorities to consider the present request as a matter of priority, due to the current situation where you might receive extradition requests from other States involving the same person.

Commentary:

The requesting State is stressing the need for the request to be given priority, but is not making a substantive case of priority. Why is it important that Mr. A be extradited to State X and not to other States which might also have valid reasons to prosecute him? The requesting State appears to assume that its request will be evaluated on a “first come first served” basis. It could have been useful to informally contact the other States that have an interest in prosecuting the same person in order to coordinate action collectively.

11. We stand at your disposal to transmit any additional information or document which you might need to execute the present request.

Commentary:

To limit the risk of the request not being executed (or being executed too late) due to the lack of supporting information or documents, the requesting State could have taken a more active approach and liaised informally with its foreign counterparts before submitting the official request.



Case study: the “Jihad fighters” case (continued)

Note for the trainers:

The following case study is based on imaginary examples and has already been used in a course that took place in the Sahel region. Please note that the names of the countries chosen in the case study are those of the countries that took part in the course. Why use the names of participating countries in a fictitious case study? This lets participants use their own legislation, familiarize themselves with one another’s laws and thus have greater involvement in the case study through role play. Each trainer is therefore encouraged to change the names of the countries and personalize them according to his or her audience. Please also note that there is not necessarily a single right or wrong answer to these problems. The aim of this fictitious scenario is to encourage debate.

The facts:

Amadou Oufaiba is a Malian national living in Niger. He is a driver and tourist guide for desert excursions, and is suspected by the Malian authorities of participating in terrorist operations for an organization that promotes a radical form of Islam and goes by the name of “the Jihad fighters”.

On 12 December 2008, he was arrested by the Nigerien authorities according to Act No. 2008-18 of 23 June 2008, amending and supplementing Act No. 61-27 of 15 July 1961, which established the Criminal Code. He was suspected of having participated in a bomb attack near Tahoua on a bus belonging to a public transport company on 20 November 2008. During the attacks, a total of 15 people were injured. Following the bus attack, the assailants took three people hostage (one Nigerien, one Chadian and one Beninese) but were forced to release them following a rapid intervention by the security forces, who had the assailants under surveillance.

The investigation will also establish whether Amadou Oufaiba had participated a few months earlier in an attack on the civilian airport in Zinder, which resulted in the interruption of the weekly Zinder-Niamey service for three consecutive weeks.

Having determined that it had jurisdiction over the case, Niger discovered that there were probably other people of several nationalities implicated in the attacks and proceeded to arrest them. However, some of these people were allegedly in other countries, notably Mauritania. One individual, Mr. Mohamed Sidi Ba, was positively identified in Nouadhibou. An arrest warrant was issued against him for aiding and abetting the bomb attacks as part of a terrorist organization.

During the investigation, the Nigerien authorities also realized that a key witness in the case, Mr. El Houssein, was in Djanet in Algeria and that it would be necessary for this person to be heard by the Nigerien investigating judge in charge of the case.

The investigation also led the Nigerien legal authorities to an individual named Mr. Ben Biang, of Chadian nationality. An arrest warrant was issued and an INTERPOL red notice was distributed to all its national bureaux. One month later, Mr. Ben Biang was located in Burkina Faso. He was arrested by the Faso authorities while Niger submitted an extradition request, and placed in detention pending extradition proceedings. When informed of Mr. Ben Biang's arrest, Sudan also submitted an extradition request in order to bring him to trial in Sudan for supplying arms to terrorist groups.

Once Burkina Faso decided to extradite Mr. Ben Biang to Niger, he was transferred by plane to Niamey. His plane made a stopover in Abidjan.

In order to conduct the investigation, the Nigerien judge had also sent a request for mutual legal assistance to the Malian authorities, to carry out a search of a house located in Commune III in Bamako, where Mr. Oufaiba had stayed at least twice before the attacks were carried out in Niger. The search would allow the seizure of documents attesting to the preparation of terrorist acts in Niger.

At the end of the trial conducted in Niger, Mr. Oufaiba was sentenced according to the aforementioned Act to 20 years' imprisonment.

After Mr. Oufaiba was sentenced, his home country of Mali expressed a wish that he serve his sentence in Mali.

Specific tasks for each subgroup:

As the Nigerien judge, you are asked to draft:

Subgroup 1: a request to Algeria to conduct a hearing of Mr. El Hossein, resident in Djanet.

Subgroup 2: a request for extradition to Mauritania for the purpose of prosecuting Mr. Mohamed Sidi Ba.

Subgroup 3: a request for mutual legal assistance to Mali, to conduct a search of a house in Bamako, in which Mr Amadou Oufaiba allegedly stayed.



Activities

- Draw up an inventory of the laws and treaties applicable to your country for any extradition or mutual legal assistance procedure. Examine them carefully and check whether they facilitate cooperation for all the offences provided for by the universal counter-terrorism treaties.
- Choose two countries you have not worked with before and with whom you will probably work in the future in matters of extradition and mutual legal assistance. Try to find the contact details of the competent authorities of those two countries.

- List ten or so checks to be made in order to draft an effective request for extradition and mutual legal assistance.
- Which methods of transmission of requests for provisional arrest, extradition and mutual legal assistance are provided for by your laws? Identify the advantages and possible disadvantages of each method of transmission.
- Do your laws allow for the procedure to be simplified when an individual consents to his or her extradition? What guarantees are provided by your laws to prevent any abuse? Do you think these guarantees are sufficient?
- In cases of multiple extradition requests, what criteria are set out in your laws to guide the choice of State to which to grant extradition? What criteria would you follow in practice in making that choice?



Tools

See the *specific tools* above for the drafting of laws and treaties, and requests for extradition and mutual legal assistance under sections 5.1. and 5.2., as well as:

- The Report of the Expert Working Group on Effective Extradition Casework Practice (UNODC, 2004), available at the following address:
www.unodc.org/documents/legal-tools/lap_report_ewg_extradition_casework.pdf
- The Report of the Informal Expert Working Group on Mutual Legal Assistance Casework Best Practice (United Nations Office for Drug Control and Crime Prevention, 2001), available at the following address:
www.unodc.org/tldb/en/legislative_guides.html
- The UNODC Manual on International Cooperation in Criminal Matters related to Terrorism, available at the following address:
www.unodc.org/unodc/en/terrorism/technical-assistance-tools.html
- The database of the UNODC Terrorism Prevention Branch, which covers the criminal legislation of over 140 countries and, in particular, provides details of the formal and substantive requirements for requests for extradition and mutual legal assistance to those States: www.unodc.org/tldb/



Assessment questions

- Do the universal counter-terrorism treaties require States parties to have specific legislation on extradition and mutual legal assistance in the context of counter-terrorism?
- How would you set about finding the contact details of the competent authorities of foreign countries?
- How do you make an effective request for extradition or mutual legal assistance? List at least ten points you need to bear in mind in drafting a request for extradition and one for mutual legal assistance.

- What are the most effective methods of transmitting a request for provisional arrest, a request for extradition and a request for mutual legal assistance?
- What does “surrender by consent” mean?
- List at least three criteria that, in cases of multiple demands for extradition, could help a State to choose which State should be granted the extradition.
- To which State does it fall to bear the costs incurred by extradition and mutual legal assistance?



Supplementary material

- “Practices and tools to facilitate extradition and mutual legal assistance” (UNODC PowerPoint presentation)

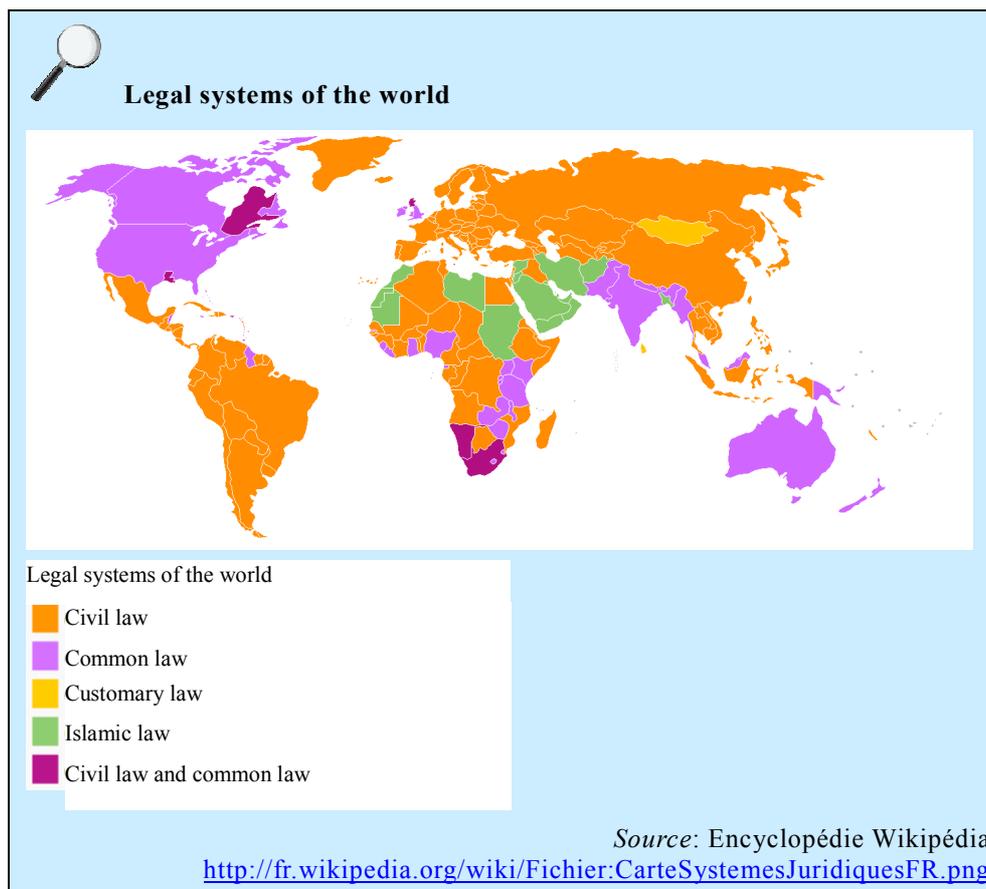
6. Beyond the differences between legal systems towards effective cooperation: interaction between the civil-law and common-law systems

As we have seen, the differences between the legal systems slow down extradition and mutual legal assistance procedures and obstruct effective cooperation. In order to help practitioners overcome these differences, trainers are encouraged to dedicate part of their programmes, or possibly even an entire training programme, to the legal systems of other countries and aspects that pose particular problems for international cooperation in criminal matters.

6.1. Overview of the world's main legal systems

The world's five main legal systems are:

- ✓ The civil-law or Romano-Germanic system originated in Roman law and gives precedence to statute law. Roman law was first codified in the civil code (*Corpus Juris Civilis* of Emperor Justinian). Codification of legal norms later developed further, most notably in the 18th and 19th centuries (from the Napoleonic Code to the *Bürgerliches Gesetzbuch*). The purpose of codification was to render the rules clearer and more intelligible to the citizen. This is the most commonly applied system in the world.
- ✓ The common-law or Anglo-Saxon system is a system essentially built on case law developed by judges as distinct from codified civil law. It evolved through the practice of kings sending judges to travel the kingdom in order to resolve disputes; the judges would return to London, where they discussed the cases and recorded their decisions. Thus they gradually forged a common uniform case law for the whole of England, what is known as common law. Many common-law principles have now been codified in law. This legal system is applied in some of the former colonies of the British Empire, which carried it overseas.
- ✓ The system of customary law is based on custom, defined as oral legal usage, time-honoured and accepted by the population of a particular territory. Nowadays there is hardly anywhere that has a completely and purely customary system; only Mongolia, Bhutan and Sri Lanka have a system where customary law is dominant. Nevertheless, customary law still has a role to play, sometimes a very important one, in issues of personal status in a relatively large number of countries with mixed-law systems. This is the case for a number of African countries and China and India.
- ✓ Islamic law is an autonomous system of what is strictly speaking religious law, the main foundation of which is the Koran. In some countries with a Muslim tradition, it is applicable only to questions of personal status.
- ✓ Mixed-system law does not form a category of its own, but is a combination of systems.



6.2. Comparing civil-law and common-law systems

Why compare the civil-law and common-law systems? Because over 80 per cent of countries have legal systems that are strongly influenced by civil-law or common-law traditions, even where the line between the two is blurred. Some civil-law countries have adopted elements of adversarial systems and vice versa.

6.2.1. Comparative overview of civil-law and common-law systems: sources of law, legal systems and criminal procedure



For the differences between the monist approach taken by civil-law countries and the dualist approach of common-law countries, see the beginning of this module under *1.1.3. Extradition and mutual legal assistance in criminal matters: the principal tools of the “indirect enforcement system”*.

- **The codification process:** Civil-law systems have complete and integrated codes that deal separately with numerous areas of law, such as civil law, criminal law and commercial law. Common-law systems also have laws (statutes) that are sometimes collected in codes which reflect the legal provisions invoked in court decisions or can overturn precedent.

- ***The role of court decisions in the evolution of law:*** In civil-law countries the main source of law is statute law. In common-law countries, even where case law has long been the main source of law, statute law has been gaining ever greater importance. In civil-law systems judges apply the law, whereas in common-law systems, judges could be said to be the source of law (where there is no legislative ruling). Thus, unlike in civil-law systems, there is a *stare decisis* whereby the legal principles established by a court decision have binding force provided they have not been superseded by a subsequent decision issued by a court at the same or a higher level. This is what is referred to as the precedent that links judges to rulings previously made by other judges in similar cases.
- ***Legal reasoning:*** In civil-law systems, legal reasoning is deductive, judges basing their judgements on the provisions of codes and law from which they deduce solutions for particular cases. In common-law systems, reasoning is inductive: the applicable rule is extracted from general principles or from precedential points of law and applied to a specific case (provided the principle or point of law has not been codified in legislation).
- ***Judges:*** In civil-law systems both judges and prosecutors are “magistrates” whose function is to judge when they form what is known as “the bench” and to ensure enforcement of the law when part of the prosecution service. They follow a different career path from barristers: they are recruited competitively as soon as they qualify, train at special institutes and are appointed by the Minister of Justice. In common-law systems, judges are generally selected after having demonstrated their competence as barristers. Like all barristers, their law studies often follow higher studies in a different subject and they do not train in a special school for judges. Neither is there any system for the promotion of judges in the higher courts, as is often the case in civil-law systems.
- ***The courts and tribunals:*** Civil-law systems have separate codes as well as special courts and tribunals to deal with different domains of the law, such as constitutional law, criminal law, administrative law, commercial law and civil law. In common law, there are traditionally integrated systems of general courts that hear both criminal cases and most civil cases, including cases involving constitutional, administrative or commercial law. The current trend in common-law countries, however, is to establish specialized chambers and courts.
- ***From offence to trial: overview of proceedings.*** In common-law systems there is a single event, namely a trial during which the offence and the culpability of the accused are analysed, while in civil-law systems there is no single event but rather a procedure with a series of hearings and consultations followed by a trial. At the pretrial stage, a judge analyses the facts, investigates the evidence and questions the accused person and witnesses, while the barristers have the opportunity to pose additional questions. The judge is termed an “examining magistrate” and his or her role is to determine whether the charges against the accused are sufficient for a case to be brought before that jurisdiction. Throughout this stage, he or she oversees the police investigation of the evidence. In common-law systems, the pretrial proceedings are prepared by the police, who investigate the crime and collect evidence without any

external oversight, except for the authorization of a judge that is required for certain coercive measures. The prosecutor prepares the case for trial at the same time as defence counsel, who are the main players in the trial process, since they introduce the evidence and question the witnesses in the public hearing. During the pretrial stage, the parties are required to disclose relevant evidence as part of the preliminary discovery procedure. The judge is neutral and simply manages the proceedings and arbitrates between the prosecution and the defence. The jury, which is a feature of common-law systems, is solely responsible for establishing the facts as presented to it by the rival parties.

- **Evidence:** In civil-law systems, evidence is often the result of an enquiry supervised by a judge (examining magistrate). All types of evidence are admitted and the judge decides according to his own private conviction. Generally speaking, there is a preference for evidence in writing. In common-law systems, evidentiary rules are relatively strict and formal. There is a preference for oral evidence, especially for testimony by witnesses under cross-examination. The judge, typically, has the power to exclude evidence that affects the fairness of the proceedings, by applying jurisprudential and/or statutory evidentiary rules.

6.2.2. Practical challenges facing international cooperation in criminal matters

Apart from the problems posed by laws that lack flexibility (see above 3.1.2. and 3.2.) or by language differences, what are the main issues that pose specific practical problems for international cooperation in criminal matters?



See the points of comparison already highlighted throughout the module, chiefly in the general parts above relating to *extradition* (2.) and *mutual legal assistance* (3.).

- **Difficulties in understanding legal terminology:** Requests made by common-law countries employ terms which, if they are not defined, are difficult to understand for practitioners from different legal systems. For example, the term “affadavit”, means a sworn statement, taken down and witnessed by a person authorized under the law to do so and intended to be used in judicial proceedings; or a habeas corpus mandate or warrant is a summons to bring an arrested person before a judge so that the latter can rule on whether or not the arrest was valid. Civil-law practitioners also use terminology in their requests that poses similar problems for those from different legal traditions. For instance, a *procès-verbal* (report or record) is a document in which an authority competent to do so receives verbal complaints or denunciations, establishes the existence of an offence directly or records the outcome of evidence collection; or a *commission rogatoire*, in an international context, is a document in which a judge delegates powers to a judicial authority from another State to proceed on his or her behalf in judicial proceedings.

Watch out too for false friends: in cases of cooperation with common-law countries, it is recommended, for example, to bear in mind that in matters of mutual legal assistance *règle de la spécialité* does not mean *rule of specialty*, but *limitations on use* or *use limitations*.

- ***Use of different legal bases:*** Common-law countries mostly require the existence of a treaty before undertaking extradition. For civil-law countries this means that they should base their requests on multilateral treaties rather than the universal counter-terrorism treaties or bilateral or regional treaties. Commonwealth agreements cannot be used with civil-law countries that are not members of the Commonwealth.
- ***Lack of understanding of the roles and functions of each actor throughout the criminal procedure, in particular that of the examining magistrate in civil-law systems and the role of the police, counsel and judges in common-law systems.***
- ***Ignorance of requirements relating to evidence:***
 - ***Prima facie evidence:*** For extradition, most common-law countries require that the requesting State establish a prima facie case, i.e. that it provide evidence of the guilt of the person under investigation. This rule needs to be brought to the attention of civil-law practitioners who, in their own system, do not need to undertake a prima facie investigation of guilt for extradition to be granted (see 2.1.2.2. above).
 - ***Reasonable proof:*** In questions of mutual legal assistance, when examining magistrates in a civil law country require that a judicial action, such as a search, be undertaken by their counterparts in a common-law country, they have to demonstrate reasonable grounds for believing that they will obtain from the search evidence of the commission of a crime or information that will help establish the whereabouts of the suspect, so that a search warrant can be issued by a judge or the search carried out in an emergency.
 - ***Hearsay evidence:*** Civil-law practitioners are recommended to avoid hearsay evidence in their requests to common-law countries, where, generally speaking, it is seldom admissible.
 - ***Cross-examination:*** Most common law require that the defendant be given the opportunity to cross-examine the witnesses (see 3.1.2. *The procedure for mutual legal assistance: overview and comparative aspects*), which is not always required or even recognized as a possibility in civil-law countries.
 - ***Form of evidence:*** A noteworthy requirement relating to evidence is the stipulation by many common-law countries that all evidence be transmitted in the form of an affidavit. Communication between practitioners of the civil-law and common-law systems to give advance notice of such requirements is extremely important in reaching agreement on the acceptable form for presentation of evidence, for example, the inclusion of a statement by the examining magistrate in the case file in lieu of the affidavit.
- ***Interpretation of the principle of dual criminality:*** Common-law and civil-law countries have different definitions of certain offences; there are some offences that do not have a firm foothold in one of the two systems, such as conspiracy in common-law countries or criminal association in civil-law countries. Such a principle needs to be interpreted with a degree of flexibility

among countries with different systems in order to avoid any obstacle (see 2.3.2.1. above in relation to extradition and 3.4.1.1. in relation to mutual legal assistance).

- **Refusal to extradite nationals**, which occurs in most civil-law countries, is often contested by common-law countries (see 2.3.1.1. *Nationality of the person sought*). One should bear in mind, however, that this principle is accompanied by the principle of “active nationality”, which allows countries that refuse extradition to prosecute the requested individual and not to be considered refuges for terrorists. It could be problematic for a common law jurisdiction to interpret such a refusal by applying reciprocity with regard to a civil law country and thus refusing extradition of its national to that country if its law does not permit it to prosecute the individual.
- **Confidentiality**: In common-law countries, where it is necessary in that country to have a ruling by a judge, for example, in order to obtain a search warrant, the content of the request for mutual legal assistance enters the public domain, which could impede the investigations conducted abroad. Civil-law practitioners are advised, if they wish to keep their request confidential, to make a substantiated request to that effect, and the requested State should inform the requesting State if it is unable to preserve confidentiality, so that the latter can determine whether, in the absence of the assurance of confidentiality, the request should nevertheless be implemented.
- **Proceedings in absentia**: Traditionally, common-law countries are distinguished from civil-law countries by the fact that the former reject the possibility of judging an accused person in his absence while the latter allow that possibility. The former consider that the accused should normally be present in order to guarantee a fair trial.



See box above “*Extradition and trials in absentia*” and the case studies cited in “*Fair treatment*” (2.3.5.1.).

In conclusion, we have seen that there are significant differences between the civil-law and common-law systems. However, once the practitioners know and understand the equivalences in their own systems and adopt a flexible approach, these differences are not always insurmountable. It is therefore recommended that trainers devote part of their programmes to teaching about the legal systems of other countries and the aspects of those systems that pose specific problems and slow down extradition and mutual legal assistance procedures.



Case study: Boeing 737

Note for trainers

The following case study is based on imaginary examples that have been created to work through the difficulties that may arise in international cooperation between civil-law and common-law countries. It should be noted that the names of the countries chosen in this practical example are those of the participating countries.

Why use the names of participating countries in a fictitious case study? Because it allows the participants to use their legislation, to familiarize themselves with one another's laws and to get fully involved in the practical situation through role play.

It should be noted that there is no single right or wrong answer to these problems. The aim of this fictitious scenario is to stimulate discussion. In order to do so, and to gain a better grasp of the possible difficulties that can arise between different legal systems, it is recommended that, for each of the questions posed, when doing the practical exercises, participants should suggest different scenarios based on the facts of the case and explore the possible difficulties.

The facts

A Boeing 737 operated by a company registered in Kenya, Kq47, took off from Dakar destined for Nairobi. It was carrying 284 passengers. After a stopover in Mali, on 15 June 2009, it exploded after taking off from Bamako above Ghanaian airspace. 245 people were killed in the accident. The victims were predominantly Kenyan, Malian and Senegalese.

Kenya and Ghana opened preliminary judicial investigations in their countries. The Kenyan investigators inspected the scene of the accident in Ghana in order to conduct their investigation alongside the Ghanaian investigators. They discovered that the explosion was discharged by an individual named Ild Abou, a Senegalese national resident in Mali, who had boarded the plane at Bamako Airport.

During the preliminary investigation opened in Bamako, the examining magistrate in Bamako sent a request to Nigeria to search the NGO headquarters in order, specifically, to check its bank account records. It also requested a phone tap to check on the telephone calls of the members of the governing board.

It also transpired that one of Mr. Abou's accomplices was a certain David Mensah, a Ghanaian, who was presumed to have obtained the explosives. The Malian authorities issued an international arrest warrant for the location and arrest of David Mensah. An INTERPOL red notice was transmitted to member States. One month later, Mr. Mensah was tracked down and arrested in Accra. Ghana recognized the legal force of the red notice and remanded the arrestee in custody pending. Two months later, the extradition request was received by the Ghanaian authorities.

In the investigation conducted in Mali, the name of another individual, a Kenyan named Kamau, came to the attention of the investigators. Mr. Kamau, a resident of Gao, was the subject of an international arrest warrant issued by Kenya for his alleged participation in a different terrorist attack committed several months earlier. He was arrested by the Malian authorities. The investigation was not able, however, to establish his complicity in the Boeing Kq47 attack. After being notified of his arrest, Kenya sent an extradition request to the Malian authorities in order to be able to prosecute him for offences he had committed in Kenya. Kenya also sent a request for mutual legal assistance to authorize a visit to Mr. Kamau's place of residence in Gao, Mali.

Questions for all groups

- Which countries would have an interest in establishing their competence and which country was best placed, in your opinion, to establish its competence? On what basis?
- What could be the legal base or bases for extradition requests by Mali addressed to Ghana or by Kenya to Mali? And what would be the legal bases of mutual legal assistance requests by Mali to Nigeria or by Kenya to Mali?

Exercises for each group

Note for trainers: The participants are divided into two separate groups: common law and civil law. These two groups are in turn divided into two subgroups: subgroups 1 and 2 for common law and 1 and 2 for civil law. Participants from the same country are distributed among the subgroups. It is up to each group to draft the request and then present it to the other group for discussion and to see whether the request can be accepted.

- *Civil law group*

Subgroup 1: As the Malian examining magistrate, draft a request for mutual legal assistance to Nigeria to search the NGO headquarters and to tap the phones of the members of its governing board and scrutinize its bank accounts.

Subgroup 2: As the Malian examining magistrate, draft an extradition request to Ghana for the extradition of Mr. King Mensah.

- *Common law group*

Subgroup 1: As the Kenyan judicial authority, draft a request to the Malian authorities for the extradition of Mr. Kamau for purposes of prosecution.

Subgroup 2: As the Kenyan judicial authority, draft a request to the Malian authorities within the framework of mutual legal assistance to inspect the place of residence of Mr. Kamau in Gao, Mali.



Case study: Collections of witness testimony and search reports in common-law countries (Canada, Mauritius) and civil-law countries (Mali, Niger)



See 3.1.2. *The procedure for mutual legal assistance: overview and comparative aspects* for the collection of witness testimony and search reports in common-law countries (Canada, Mauritius) and civil-law countries (Mali, Niger), and associated activities.



Activities

- What legal tradition does your country belong to? Explain your reply by giving examples that illustrate the legal tradition of your country.

- Choose a country that has the same legal tradition as your own country with which you have already cooperated or with which you think it likely that your country will cooperate at some point in the future. Familiarize yourself with its legislation and identify the main challenges that could arise in practice in the conduct of extradition or mutual legal assistance procedures with your country, as well as ways of meeting such challenges.
- Examine in detail your criminal procedure and identify the current features of the mutual legal assistance procedures that your counterparts in the requesting country should know about, especially if it has a different legal tradition from your own country.



Assessment questions

- What are the main differences between civil-law countries and common-law countries as regards the course of a criminal procedure (from the commission of an offence to the trial)?
- What is meant by the terms “affidavit” and “habeas corpus warrant” for civil-law practitioners and the terms “procès-verbal” (record or report) and letters rogatory for common-law practitioners?
- For civil-law practitioners, explain the prima facie rule.
- For common-law practitioners, explain the role of the examining magistrate.



Tools

- The legal systems of United Nations Members have been collected and classified by the World Legal Systems Research Group of the University of Ottawa, together with a large number of bibliographic references:
www.juriglobe.ca/eng/langues/index.php
- The UNODC Manual on International Cooperation in Criminal Matters related to Terrorism contains numerous comparative references and highlights a large number of features of common-law and continental-law countries:
www.unodc.org/unodc/en/terrorism/technical-assistance-tools.html
- Model laws specific to the legal traditions of common-law and civil-law countries have been elaborated by UNODC:
www.unodc.org/unodc/en/legal-tools/model-treaties-and-laws.html
- The Report of the Informal Expert Working Group on Effective Extradition Casework Practice (UNODC, 2004) also highlights specific features of common-law and civil-law countries:
www.unodc.org/documents/legal-tools/lap_report_ewg_extradition_casework.pdf

- A practical guide prepared by UNODC for formulating effective requests for extradition and mutual legal assistance among the States of the UNODC Indian Ocean Commission providing a detailed comparison of the common-law countries (Mauritius, Seychelles) and the civil-law countries (Comoros, France, Madagascar):
www.unodc.org/unodc/en/legal-tools/international-cooperation-networks.html



Further reading

- *Terrorist Investigations and the French Examining Magistrates System*, Home Office, July 2007
- Apple, James G., and Deyling, Robert P., *A Primer on the Civil-Law system, incl. Part III: The Common Law and a Comparison of the Civil-Law and Common-Law Systems*, Federal Judicial Center
[www.fjc.gov/public/pdf.nsf/lookup/CivilLaw.pdf/\\$file/CivilLaw.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/CivilLaw.pdf/$file/CivilLaw.pdf)
- Bassiouni, M. Cherif, *The Islamic Criminal Justice System*, ed. Dobbs Ferry, New York: Oceana Publications, 1982
- Blom-Cooper L., *Britain can learn from the French*
www.telegraph.co.uk/comment/personal-view/3623883/Britain-can-learn-from-the-French.html
- Merryman, J. H., Clark, D. S. and Haley, J. O., *The Civil-law tradition: Europe, Latin America and East Asia*, Charlottesville, Va., Michie Co., 1994
- Plachta, Michael, *(Non-)Extradition of Nationals: a Never-ending Story?*, Emory University School of Law, 13 Emory International Law Review 77, Spring, 1999
- Poirier, D. and Debruche, A. F., *Introduction générale à la Common Law*, Cowansville, Éditions Yvon Blais, 2005
- Prost, K., *Pratique et nouvelles tendances de l'entraide judiciaire; l'avenir de la coopération internationale (1998)*
www.oas.org/juridico/mla/fr/can/fr_can_prost98.html
- Rogowski, R., (ed.), *Civil Law*, New York, New York University Press, 1996
- Schacht, J., *Introduction au droit musulman*, 2e éd., Paris, Maisonneuve et Larose, 2000
- Servidio-Delabre, E., *Common Law, Introduction to the English and American Legal Systems*, Paris, Dalloz, 2004
- Werneer, M., *Comparative Law in a Global context: The Legal Systems of Asia and Africa*, 2nd ed., Cambridge, Cambridge University Press, 2006



Supplementary material

- Systèmes de droit civil et de Common Law: questions et défis juridiques pour la coopération *internationale* en matière pénale (Présentation Powerpoint de l'UNODC)

Annexes: Samples of the programmes of training events on international counter-terrorism cooperation

Annex I: Sample programmes of national training workshops

Training for judges on mechanisms for international cooperation in criminal cases related to counter-terrorism (duration: three days)

Programme (1)

1. Opening of workshop
2. Presentation of working methods and participants
3. Mechanisms for international cooperation in criminal cases related to counter-terrorism:
 - a. General introduction: global legal framework for countering terrorism and extradition and mutual legal assistance mechanisms (UNODC) (first day)
 - b. Presentation of national legislation relating to extradition and mutual legal assistance, including bilateral and multilateral commitments of the country concerned (national experts) (first day)
 - c. Extradition and mutual legal assistance in practice: sharing of experience, case studies and discussion (UNODC and international experts) (second day)
 - d. Practices and tools developed by UNODC to facilitate extradition and legal mutual assistance (UNODC) (third day)
 - e. Role of INTERPOL in extradition and mutual legal assistance (INTERPOL) (third day)
4. Conclusions and closure of workshop

Programme (2)

1. Official opening of training event
2. Presentation of participants, training programme and aims
3. Session I: International cooperation in criminal cases related to counter-terrorism: general introduction, national and international legal framework (first day)
 - a. Introduction: What is international cooperation in criminal cases to combat terrorism? Why is it necessary? What role should judges play? (presentation by UNODC experts)
 - b. What is the legal framework against terrorism for magistrates and judges of (beneficiary country)? (presentation by experts on relevant national legislation and applicable bilateral and regional conventions)

- c. What legal tools are available in international law for magistrates and judges of (beneficiary country) to facilitate their cooperation with other countries (presentation by UNODC experts)
- 4. Session II: Formulation of extradition and mutual legal assistance requests (second day)
 - d. Practical exercise: drafting of extradition and mutual legal assistance requests (practical case with participants being divided into two groups, one of which is asked to draft an extradition request and the other a mutual legal assistance request, presentation of requests to the whole group, reactions and comments from each group)
 - e. Practical tools and guidance for the formulation of extradition and mutual legal assistance requests (presentation by UNODC experts)
- 5. Session III: Transmittal of extradition and mutual legal assistance requests (shared session commune with representatives of the Ministry of Foreign Affairs) (third day)
 - f. What is the legal framework for the transmittal of extradition and mutual legal assistance requests and for coordination between the Ministries of Foreign Affairs and of Justice? (presentation by the beneficiary country)
 - g. Taking stock: exchange of experience, discussions (participants)
 - h. Practical guidance for the effective transmittal of extradition and mutual legal assistance requests (presentation by UNODC experts)
 - i. Conclusions and recommendations for the most effective transmittal of requests
- 6. General conclusions and closure

Annex II: Example of the programme of a subregional training workshop for countries with different legal traditions

Training to strengthen international cooperation in criminal matters between civil-law and common-law African countries, organized jointly with the Commonwealth Secretariat (duration: three days)

Programme

1. Opening of the meeting
2. Presentation of participants, aims of the meeting and proposed working methods
3. Strengthening of international cooperation in criminal matters between civil-law and common-law African countries:
 - a. Comparative overview of civil-law and common-law systems and difficulties and legal challenges facing international cooperation in criminal matters: general presentation, discussion and sharing of experience (UNODC)
 - b. Facilitating cooperation between civil-law and common-law systems:
 - i. Writing extradition and mutual legal assistance requests to be addressed to civil-law and common-law countries — practical case (participants divided into working groups: one for civil law and the other for common law — moderation by UNODC and COMSEC experts)
 - ii. Strengthening cooperation among participating countries: familiarization with legal systems and practices of participating countries (presentation by each country on the basis of a questionnaire)
 - iii. Practical tools for formulating, transmitting and executing extradition and mutual legal assistance requests (UNODC and COMSEC)
4. Conclusions and closure of meeting

Annex III: Example of online training course

Training in international cooperation in criminal matters: key tool in action to combat terrorism, jointly drafted and designed by experts of the UNODC terrorism prevention unit and INTERPOL (duration: six weeks: one week for familiarization with the Internet tools and five weeks for the five thematic modules below)

Subjects covered

The course consists of the following five modules:

1. Introduction
 - a. Training objectives
 - b. Content of training
 - c. Resources
 - i. Overview of the roles played by the United Nations and INTERPOL
 - ii. Overview of the global legal framework for counter-terrorism action
2. Terrorism prevention measures
 - a. Preventive measures contained in Security Council resolutions
 - b. Preventive measures contained in the Treaties
3. Exchange of police information
 - a. General legal framework
 - b. INTERPOL counter-terrorism tools
4. Mutual legal assistance in criminal matters
 - a. Definition of mutual legal assistance
 - b. Legal bases of mutual legal assistance
 - c. Principles of mutual legal assistance
 - d. Procedure in the area of mutual legal assistance
5. Search for and extradition of terrorists
 - a. Search for terrorists
 - b. Extradition of alleged terrorist offenders