

Formal and Informal International Cooperation in Criminal Matters

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by

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1. INTRODUCTION

It gives me pleasure to share information with you on formal and informal international cooperation in criminal matters.

It has long been accepted as a fact that the phenomenon of crime knows no borders; that it undermines and threatens the rule of law and international security. Transnational crime negates the gains for which our governments and communities strive.

Ills such as trafficking and dealing in drugs, trafficking in persons, illicit business ventures, fraud, corruption, money laundering, terrorism, environmental and other emerging crimes continue to cancerously eat the moral and economic fibre of our societies. When crime syndicates seem to reign with impunity, democracy is undermined, free markets are disrupted, national assets are drained and the development of stable societies is inhibited.

I believe that the pronouncement by the Supreme Court of Canada twenty-four years ago in the case of *United States of America v Cotroni*¹ is more relevant today than ever. In this case, the court held that:

“The investigation, prosecution and suppression of crime for the protection of the citizens and the maintenance of peace and public order is an important goal of all organised societies.”

The court went on to state that: *“The pursuit of that goal cannot realistically be confined within national boundaries.”*

Ladies and gentlemen, indeed, the advent of globalisation has brought with it the betterment of conditions and convenience for humanity. However, its vehicle, being factors such as technological advancement, international trade and ease of travel, laudable as they are, brought with them challenges for law enforcement.

Investigation of transnational crime and prosecution of trans-border offenders need collaborative endeavours by States. More than ever, prosecutors and investigators need to ascertain and make use of the available mechanisms for bridging the gaps.

¹ *United States of America v. Cotroni*; *United States of America v. El Zein* [1989] 1 S.C.R. 1469

Legal systems may differ but the goal is one – the administration of justice for better life and security for all.

Although the available means of cooperation in criminal matters provide a progressive step in the fight against crime, crimes and their trends keeps on evolving and in the same vain if not to the larger extent, should the law and its enforcement.

FORMAL INTERNATIONAL COOPERATION (IN CRIMINAL MATTERS)

Governments have long recognized that international cooperation in criminal matters is the cornerstone of efforts by States to prevent, prosecute and punish crime, in particular in its transnational forms. The world has evolved into a global village necessitating that States align themselves with international trends and obligations.

Mutual legal assistance (MLA) and extradition are indispensable mechanisms for overcoming the challenge of national boundaries in the fight against transnational crime. They are effective instruments for obtaining evidence and achieving the surrender of an offender by one sovereign to the other.

The South African perspective:

❖ **Mutual Legal Assistance**

MLA is used for gathering evidence for use in a criminal investigation and prosecution. It allows for a wide range of assistance between States in the production of evidence. MLA is generally rendered on the basis of a bilateral treaty, multilateral conventions, domestic legislation or other means of cooperation. The Director-General for Justice and Constitutional Development is the designed Central Authority for international cooperation in criminal matters.

Treaty-based assistance

Treaties are the best tools in that both the requesting and the requested State are bound by the provisions of the agreement. A further benefit is that they enable practitioners what form requests should take and what requirements are to be met for execution.

South Africa has entered into mutual legal assistance treaties (MLAT's) with a number of countries for the purpose of gathering and exchanging information for use in criminal investigations and prosecutions.

Bi-lateral relations for cooperation are also established by way of Memoranda of Understanding (MoU's) between countries. The Ministers of Justice of the Republic of South Africa and the Kingdom of Swaziland have signed a MoU in 2009. This agreement provides for broader assistance and cooperation including rendering MLA, secondment of official and capacity building.

Multilateral conventions as instruments of cooperation

As it is impossible for States to conclude treaties with every country in the world, conventions serve as additional means with which MLA can be achieved. Countries are able to use these instruments amongst fellow member States.

South Africa is party to a number of international and regional instruments of cooperation. Legal assistance can therefore be requested on the basis of *inter alia*:

- ❖ the Southern African Development Community (SADC) Protocol on Mutual Legal Assistance
- ❖ the Harare Scheme for the Commonwealth Countries²
- ❖ United Nations Convention against Corruption (UNCAC)
- ❖ OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.³

These instruments afford States greater measure of cooperation as they are usually complementary to the bilateral relations and domestic laws of the member countries,

National legislation

South Africa is able to provide legal assistance to other countries irrespective of absence of a treaty or applicable instrument in the form of a convention. A request for assistance is possible in terms of the provisions of the International Cooperation in Criminal Matters Act, Act 75 of 1996 (ICCMA). Approval by the Minister of Justice

² A scheme adopted by the Law Ministers of the Commonwealth in Harare, Zimbabwe 1986

³ Article 9 of the provides for Parties to use the Convention as the basis for rendering legal assistance to one another in the investigation of offences under the Convention

and Constitutional Development is a prerequisite for the execution of formal incoming requests.⁴

International principle of comity

South Africa provides MLA on the basis of the principle of comity or goodwill between States. In cases where there is no instrument for cooperation between South Africa and a foreign State, assistance can still be provided on the basis of the practical concepts of comity and reciprocity.

In contrast with extradition, South Africa does not require dual criminality for the execution of a request for mutual legal assistance.

❖ **Extradition**

If it were impossible to prosecute persons who commit crimes in one State then taking refuge in another, the notion of administration of criminal justice as we know it would be incomprehensible. Extradition is lawful mechanism for the surrender by one State, at the request of another, of a person who is being accused or has been convicted of an offence committed abroad. It is the oldest known form of international cooperation. The concept as we know it originated from the ancient Egyptian, Chinese and Babylonian societies. The first recorded extradition treaty was signed between Egypt and the Hittites⁵ in about 1280 B.C.

Practical Problems of extradition

Practitioners are faced with a number of practical challenges when dealing with requests for extradition. To the extent allowed by this paper, I will highlight the following two as examples:-

EVIDENTIARY REQUIREMENTS

After concluding that there is a basic extradition relationship between States involved, any authority seeking the extradition of an accused person for trial is faced with a fundamental question as to what material must be provided to the foreign State in support of the request.

⁴ Section 7(4)

⁵ M Cherif Bassioun, International Extradition, United States Law and Practice

While a seemingly simplistic question, this issue has been a critical problem in extradition, particularly between civil and common law countries. The problem is simple, but the solution is not when evidence should be adduced to meet an unknown standard in a completely foreign format. Meeting the demands for evidence often proves to be one of the greatest challenges for the requesting authorities.

NON-EXTRADITION OF NATIONALS

By law or practice, some States do not extradite their nationals. In this instance, countries usually have domestic jurisdiction to prosecute nationals for offences committed in a territory of a foreign State.

Most extradition treaties reflect the principle that, where extradition is refused on the basis of nationality, the case should be referred to competent authorities in the requested State with a view to prosecution. The international law principle of *aut dedere aut judicare*⁶ also finds application in this way.

The practice of prosecuting nationals in this regard is a progressive and commendable step. However, it is not without its share of challenges. There are significant practical problems relating to domestic prosecution of offences committed outside the country. These challenges include the difficulty and costs of obtaining evidence from the requesting State; low priority assigned to such prosecutions due to over-burdened requested States and serious burdens imposed by such trials on victims, witnesses and other persons. These challenges were noted by the United Nations Expert Working Group on Extradition.⁷

Some countries forged ways to alleviate these practical problems. A good example is found in the extradition treaty between the Netherlands and the United States of America. In this treaty, the parties have agreed to the extradition of nationals provided

⁶ Duty to extradite or prosecute

⁷ Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948 78 U N T S 277

the two States are bound by a *prisoner transfer treaty*, which would allow for the return of the person for service of any sentence imposed.⁸

The South African perspective

What has been said above in relation to the bases for MLA applies *mutatis mutandis* to extradition. South Africa has concluded extradition agreements with a number of countries and is also a party to regional and international instruments of cooperation.⁹

Therefore, South Africa can extradite to other States in terms of bilateral agreements, conventions or on the basis of national legislation, namely the Extradition Act, Act 67 of 1962.¹⁰

In the absence of a bilateral agreement or an applicable convention, extradition from South Africa is still possible:-

- (a) to a designated State;¹¹
- (b) with the Presidential consent;¹² and
- (c) on the basis old agreements between UK and foreign States.¹³

REQUIREMENTS

The following requirements should be met for extradition:-

- (i) *Dual criminality* is an absolute pre-requisite for extradition.¹⁴
- (ii) *The rule of specialty*.
- (iii) Only a person accused of having committed an extraditable crime in the territory of the foreign State or convicted of such a crime can be extradited.

⁸ Such approach allow temporary transfer of a person for trial only

⁹ e.g. the SADC Protocol on Extradition, the European Convention on Extradition, the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the Multilateral Convention Against Transnational Organized Crime.

¹⁰ A new Bill is being finalised and it is hoped that it will become law in the mere future.

¹¹ RSA has to date designated Namibia, Zimbabwe, United Kingdom and Northern Ireland in terms of section 2(1)(b) of the Extradition Act

¹² Section 3(2) of the Extradition Act (Presidential consent does not mean that the President make a decision on the fugitive's liability to be surrendered).

¹³ In terms of Section 2(4) of Extradition Act, old agreements between UK and other countries in the period 1870 to 1906 are deemed to be in force in 1961".

¹⁴ The conduct in question should be an extraditable crime in both countries being substantially the same although not categorized in a similar way.

- (iv) The level of punishment for such an offence should at least be less than six months imprisonment.¹⁵
- (v) There must be *prima facie* evidence.¹⁶
- (vi) The *non bis in idem* principle must be complied with.¹⁷
- (vii) The offence for which the fugitive is sought should not have prescribed.
- (viii) The offence should not be motivated by factors such as politics, race or religious views.
- (ix) The requesting authority must have jurisdiction

CHANNEL

Extradition requests are made to the Minister of Justice and Constitutional Development *via* the diplomatic channels by a person recognized by the Minister as a diplomatic or consular representative of the requesting State or by any Minister of that State. The Minister's approval for the execution of a request for extradition should be obtained before the competent authorities can start with the necessary processes for the surrender of a wanted person.¹⁸

EVIDENCE

Regarding the problem of **evidentiary requirement** stated above, South Africa has made fundamental progress.

The requirement is that there should be sufficient evidence against a fugitive who is accused of having committed a crime in a foreign State and whose extradition is sought.¹⁹

In order to overcome the challenge of evidentiary burden stated above, the courts accepts as conclusive proof a certificate²⁰ issued by an appropriate prosecuting

¹⁵ The Extradition Act requires that the offence be punishable with imprisonment for period of at least six months (some agreements raise the level of punishment to the period of twelve months imprisonment).

¹⁶ See footnotes 19 and 20.

¹⁷ The accused person should not be prosecuted for the offence for which he or she has already been convicted or acquitted (the principle of double jeopardy or the in-peril doctrine).

¹⁸ Section 5 of the Extradition Act

¹⁹ Section 10(1) of the Extradition Act

authority in the requesting State stating that it has sufficient evidence at its disposal to warrant the prosecution of the person concerned.

EXTRADITION OF NATIONALS

Provided all requirements are met, anybody including South African citizens can be extradited from South Africa.

The principle of *extradite or prosecute* has been applied between South Africa and other countries. The recent prosecution of a Nigerian national²¹ is one of the examples. Further, a few years ago an offender was prosecuted successfully in Mozambique after having committed serious offences in South Africa and his extradition was refused.²²

Although a difficult²³ process, it was a worthwhile exercise because at the end justice was served as the accused was convicted.

THE EXTRADITION ENQUIRY

The only aspect to be adjudicated upon in an extradition enquiry is whether the fugitive is liable to be surrendered. The court is not called upon to determine the guilt or innocence of the person sought. The fundamental question is whether there is sufficient evidence to warrant prosecution in the requesting State. The foreign State is represented by an official of the prosecuting authority in an extradition enquiry.

Once a magistrate²⁴ has found that a person is liable to be surrendered, the fugitive is committed to prison pending the decision of the Minister²⁵.

²⁰ In terms of section 10(2) of the Extradition Act provides that – *“For the purposes of satisfying himself or herself that there is sufficient evidence to warrant a prosecution in the foreign State the magistrate shall accept as conclusive proof a certificate which appears to him or her to be issued by an appropriate authority in charge of prosecution in the foreign State concerned, stating that it has sufficient evidence at its disposal to warrant the prosecution of the person concerned.”*

²¹ State v Henry Okah

²² State v Louis Camilo – the accused had committed robbery with aggravating circumstances, kidnapping, attempted murder, rape and illegal possession of firearm and ammunition.

²³ See footnote 7 above.

A fugitive has an automatic right of appeal to be exercised within 15 days of the court's finding.²⁶

The prosecuting authority may on behalf of the requesting State, also appeal against the finding of a magistrate in accordance with the usual appeal mechanisms.

Some extradition agreements provide for waiver by the person sought. In practice a waiver is formally finalized in court.

Associated State

The recent development in the field of international cooperation in criminal matters relating to the practice of mutual recognition of warrants at the regional level and among countries with similar legal traditions and systems²⁷ is a positive step. South African law is in line with this development as it makes provision for the endorsement and execution of foreign warrants on reciprocal basis.²⁸

International cooperation for the purposes of confiscation

The main motivation for the commission of crime is illegal profit. Therefore proceeds of crime and instrumentalities should be taken away from syndicates. The ICCMA makes provision for requesting and the rendering of assistance to foreign States relating to confiscation and transfer of proceeds of crime.²⁹

²⁴ In the South African context, a magistrate refers to a judicial officer adjudicating in a lower court

²⁵ Section 11 of the Extradition Act

²⁶ Section 13 of the Extradition Act

²⁷ See Discussion guide for the Thirteenth United Nations Congress on Crime Prevention and Criminal Justice, A/CONF.xxx/PM.1, para. 34.

²⁸ Section 6 of the Extradition Act

²⁹ Chapter 4 of the ICCMA

INFORMAL INTERNATIONAL COOPERATION (IN CRIMINAL MATTERS)

Though the formal mechanisms for cooperation are necessary for the production of evidence, the lengthy processes and cost implications associated with them are often a cause for concern. The informal ways can be used in cases where no coercive measures are called for.

It is often necessary to first ascertain the availability of information or persons in a foreign State before a formal request is transmitted. Some information can easily be ascertained and obtained on a police-to-police basis. Interpol is of assistance in this regard. As a way of facilitating formal requests or assisting with investigations, custom officials can provide valuable information regarding the commission of crime

THE NEED FOR CONSTANT DIALOGUE WITH A VIEW TO ENHANCING COOPERATION

Practitioners need to engage in frequent dialogue so as to deal with practical issues thus fostering synergy in the field of international cooperation.

It is incumbent upon us to engage in a fruitful dialogue with a view to seeking solutions to problems associated with:-

- the non-extradition of nationals;
- the interpretation and application of the dual criminality principle;
- grounds for refusal of extradition requests; and
- the length and costs of extradition processes.

Such dialogues can enable us to share experiences on practices with the goal of simplifying processes.

Regarding MLA's, we may want to look at:

- factors that breed inflexibility and (un)necessary delays in the execution of mutual legal assistance with a view to finding solutions
- sharing national experiences on the exchange of evidence or information;
- ways and means of facilitating the assistance and participation of witnesses in investigations and legal proceedings;
- good practices for accelerating processes;
- enabling the timelines for responses; and
- clarifying grounds for refusal of MLA requests.

Other practical approaches to cooperation could be considered. These can include:

- the spontaneous transmission of information in the absence of a request;
- taking advantage of mechanisms provided by the AU for the achieving synergy in the field of cooperation within the African continent;
- the establishment of direct contacts between practitioners and the role of central authorities;
- the networks of central authorities in facilitating direct contacts;
- the use of video-conferencing for obtaining the testimony of witnesses and experts;
- the transfer of criminal proceedings;³⁰
- the transfer of sentenced persons;³¹
- joint investigations;³²
- law enforcement cooperation;³³
- cooperation for conducting special investigative techniques, including controlled delivery;³⁴
- measures to combat money-laundering;³⁵ and
- inter-State cooperation for the protection of witnesses³⁶.

³⁰ 1988 Convention, art. 8; UNCAC, art. 47; UNTOC, art. 21.

³¹ UNCAC, art. 45; UNTOC, art. 17.

³² UNCAC, art. 49; UNTOC, art. 19.

³³ 1988 Convention, art. 9; UNCAC, art. 48; UNTOC, art. 27.

³⁴ 1988 Convention, art. 11; UNCAC, art. 50; UNTOC, art. 20.

³⁵ UNTOC, art. 7.

Furthermore, considering the intangible and often short-lived nature of digital evidence and the need for timely assistance, we need to share challenges we encounter and solutions developed in delivering assistance in cases involving new technologies.

The use of existing regional and sub-regional networks has proven useful in connecting national contact points through which countries can offer one another valuable information about legal systems and contact details of competent authorities. These networks can be useful in facilitating the transmittal of requests.

CONCLUSION

Gatherings such this attest to the fact that syndicates continue to put the criminal justice system on its toes and at times they seem to be a step ahead of us. We should forge ways to effectively deal with them thus ensuring that they are not above the law. We can win against crime if systems are in place which enable us-

- to pursue the evidence wherever it happens to be;
- to pursue perpetrators of crime wherever they may be hiding; and
- to pursue the proceeds of crime and instrumentalities wherever they manifest.

As gate-keepers of the criminal justice system, we are collectively duty-bound to seek solutions and to engage relevant structures in our respective governments with a view to improving the machinery of international cooperation.

To this end it seems like James Baldwin, an African-American author, has written with this subject matter in mind when he appropriately wrote - *“The moment we cease to hold each other, the moment we break faith with one another, the sea engulfs us and the light goes out.”*

Standing together against crime is our strength.

I thank you and may God bless Africa.

³⁶ UNCAC, art. 32(2); UNTOC, art. 24(3).