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ASEAN Handbook

on International Legal Cooperation
in Trafficking in Persons Cases



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The development of this Handbook was supported by the Australian Agency for International Development, AusAID, through the Asia Regional Trafficking in Persons Project (ARTIP). The views expressed should not, however, be taken to reflect those of the Australian Government or of AusAID.

Foreword

Foreword by the Secretary-General of ASEAN

Over the past several years, there has been increasing awareness and recognition amongst ASEAN Member States, of the need for an effective and coordinated response to trafficking in persons (TIP). The crime of trafficking in this region, as in all others, is often transnational in both commission and effect. Suspects, victims and evidence can be located in two or more countries, further complicating the investigation and prosecution of an already complex crime. International and ASEAN standards are clear on the point that laws, policies and processes should ensure there are no safe havens for traffickers or their assets.

However, there are, at present, very few instances of legal cooperation requests being made or met in relation to TIP cases. Obstacles that have been identified by ASEAN practitioners include: unfamiliarity with the use and application of legal cooperation tools; unsuitability of some tools for TIP-related offences; lack of awareness of trafficking within relevant units / authorities; and differences in laws, standards and priorities between countries. It is generally acknowledged that more work needs to be done to address entrenched obstacles to effective legal cooperation and to identify ways of maximizing the practical utility and effectiveness of the major tools of cooperation. There is also growing recognition of the importance of well-developed bilateral and regional networks for prosecutors and central authority lawyers that are reinforced through regular meetings and exchanges of information, best practice and case-based discussions.

Here, I would like to pay a well deserved tribute to the ASEAN's Senior Officials Meeting on Transnational Crime (SOMTC) that has been active on the issue of TIP for some years, focusing particularly on the development of common standards and approaches within and between ASEAN Member States. In 2008 SOMTC endorsed the development of a *Handbook on International Legal Cooperation on Trafficking in Persons Cases*.

I am proud to introduce this unique Handbook, aimed at judicial officials, prosecutors and other criminal justice officials at national level, who are likely to be involved in informal or formal requests for regional international cooperation. The Handbook is based on international legal and criminal justice standards as they relate to trafficking in persons. It provides criminal justice officials with basic information on cooperation tools including mutual legal assistance and extradition as well as guidance on how these tools can be used most effectively in the specific context of regional and international cooperation in TIP cases. I am also mindful that this Handbook will set the high standards of achievement in ASEAN's response to transnational organized crime.

This Handbook forms part of a collection of tools and resources developed by and for the Member States of ASEAN, through the Asia Regional Project on Trafficking in Persons (ARTIP), aimed at strengthening national and regional responses to TIP. I take this opportunity to urge relevant officials of ASEAN Member States to familiarize themselves with these tools and resources, which now include a comprehensive series of training materials for criminal justice professionals including judges and prosecutors, investigators and front line law enforcement officials.

ASEAN is now recognized as a global leader in relation to criminal justice responses to trafficking. While we can be proud of our many achievements, it is essential to acknowledge that much remains to be done. In every part of the world, including our own, traffickers are rarely identified, prosecuted and convicted. This is a particular problem for countries of destination, where the most serious forms of exploitation usually take place. In addition, victims of trafficking rarely receive any form of justice or redress for the harms committed against them. These challenges should not give us cause for despair. For, we, in ASEAN, have shown a capacity to change, and an ability for innovation. I have no doubt that we can continue to work steadily towards our avowed goal of *ending impunity for traffickers and securing justice for those who have been wronged*.

On behalf of ASEAN, I take this opportunity to express our profound gratitude to the Australian Government for their commitment to ASEAN through the technical assistance rendered under the auspices of the Asia Regional Cooperation to Prevent People Trafficking (ARCPPT) and Asia Regional Trafficking in Persons (ARTIP) Projects, spanning the period of nearly a decade, and for providing the technical expertise required to bring this Handbook to fruition. My sincere appreciation also goes to the Expert Team of ARTIP for its dedication and commitment to ASEAN, and last but not least to the practitioners who contributed to ensuring the relevance of the Handbook for every ASEAN Member State.



Dr. Surin Pitsuwan
Secretary-General of ASEAN

Jakarta, 20 August 2010

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List of International and Regional Instruments

Abbreviation (as used in Handbook)	Instrument (in order of appearance in Handbook)
UNTOC	United Nations Convention against Transnational Organized Crime
UNCAC	United Nations Convention against Corruption
OECD Anti-Bribery Convention	OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions
UN Trafficking Protocol	Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime
ASEAN MLAT	Treaty on Mutual Legal Assistance in Criminal Matters among Like-Minded ASEAN Member Countries
ICCPR	International Covenant on Civil and Political Rights
Convention against Torture	Convention against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment
UN Migrant Smuggling Protocol	Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime
-	Statute of the International Court of Justice
European Trafficking Convention	Council of Europe Convention on Action against Trafficking in Human Beings
-	Convention on Preventing and Combating Trafficking in Women and Children for Prostitution [South Asian Association for Regional Cooperation]
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CRC	Convention on the Rights of the Child
-	[First] Optional Protocol to the International Covenant on Civil and Political Rights
-	International Covenant on Economic, Social and Cultural Rights

-	Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women
-	Convention on the Elimination of Racial Discrimination
CRC Optional Protocol on the Sale of Children	Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography
-	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
Refugee Convention	Convention relating to the Status of Refugees
-	Protocol relating to the Status of Refugees
ICC Statute	Rome Statute of the International Criminal Court
Forced Labour Convention	Convention Concerning Forced or Compulsory Labour (ILO No. 29)
Abolition of Forced Labour Convention	Convention Concerning the Abolition of Forced Labour (ILO No. 105)
Worst Forms of Child Labour Convention	Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (ILO No. 182)
Slavery Convention	Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention of 1926
-	Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery
-	African Union Convention on Preventing and Combating Corruption
-	Organisation of American States Inter-American Convention against Corruption
-	Council of Europe Criminal Law Convention on Corruption
-	Council of Europe Civil Law Convention on Corruption
-	Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty
-	United Nations Universal Declaration of Human Rights
-	European Convention on Mutual Assistance in Criminal Matters
-	Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union
-	Vienna Convention on the Law of Treaties
-	Council of Europe Additional Protocol to the European Convention on Extradition
-	Organisation of American States Inter-American Convention on Extradition
-	Economic Community of West African States Convention on Extradition

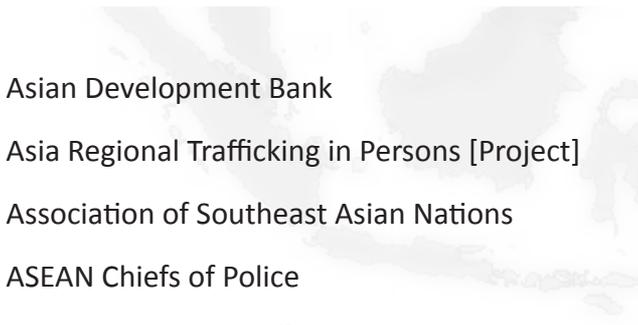
-	Council Framework Decision of 13 June 2002 on the European arrest warrant and surrender procedures between Member States 2002/584/JHA
-	Geneva Conventions of 1949

List of International and Regional Non-Treaty Instruments

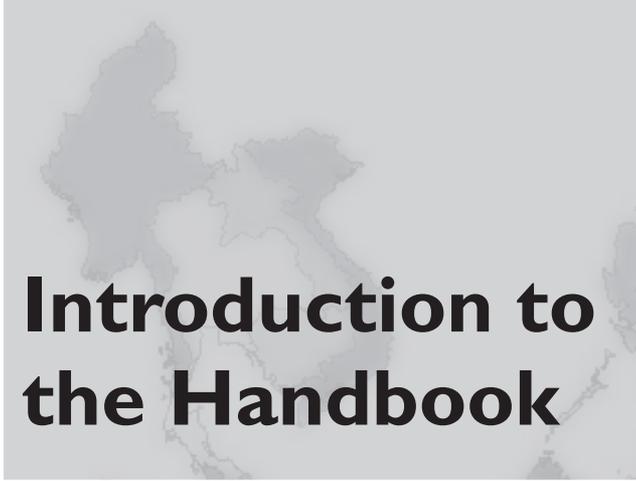
Abbreviation (as used in Handbook)	Instrument (in order of appearance in Handbook)
ASEAN Declaration Against Trafficking in Persons	ASEAN Declaration Against Trafficking in Persons Particularly Women and Children
UN Trafficking Principles and Guidelines	United Nations Recommended Principles and Guidelines on Human Rights and Human Trafficking
UNICEF Trafficking Guidelines	Guidelines on the Protection of Child Victims of Trafficking
-	Guidelines on International Protection: The application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked
-	Memorandum of Understanding on Cooperation against Trafficking in Persons in the Greater Mekong Sub-Region
ASEAN Practitioner Guidelines	ASEAN Practitioner Guidelines on Effective Criminal Justice Responses to Trafficking in Persons
-	Recommendations on an Effective Criminal Justice Response to Trafficking in Persons [Global Initiative to Fight Trafficking]
-	ASEAN Declaration on Transnational Crime
-	Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power [United Nations General Assembly]



Acronyms



ADB	Asian Development Bank
ARTIP	Asia Regional Trafficking in Persons [Project]
ASEAN	Association of Southeast Asian Nations
ASEANAPOL	ASEAN Chiefs of Police
ASLOM	ASEAN Senior Law Officials Meeting
CNA Directory	Competent National Authorities Directory
FATF	Financial Action Task Force on Money Laundering
FIU	Financial Intelligence Unit
GIFT	Global Initiative to Fight Trafficking
HSU	Heads of Specialist Trafficking Units
ICC	International Criminal Court
ILO	International Labour Organisation
INTERPOL	International Criminal Police Organisation
MLA	Mutual Legal Assistance
MLA Tool	Mutual Legal Assistance Request Writer Tool
OECD	Organisation for Economic Co-operation and Development
OHCHR	Office of the United Nations High Commissioner for Human Rights
SAARC	South Asian Association for Regional Cooperation
SOMTC	[ASEAN] Senior Officials Meeting on Transnational Crime
UN	United Nations
UNAFEI	United Nations Asia and Far East Institute
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Fund
UNODC	United Nations Office on Drugs and Crime



Introduction to the Handbook

The Challenge of International Cooperation

The crime of trafficking in persons is often transnational in both commission and effect. In contrast, criminal justice responses to trafficking in persons (criminal laws, law enforcement agencies, prosecution services and the courts) are typically structured and generally only operate within the confines of national borders. The disjuncture between the reality of transnational crime and the limits of national systems presents a significant challenge to the ability of countries to effectively respond to trafficking in persons.

There are numerous practical and political factors that can impede cooperation across borders in criminal investigations and prosecutions. These include the difficulties in communicating with counterparts who speak a different language; differences in legal, political and cultural traditions; political considerations; and even apprehension about cooperating with colleagues in another country. However, while there are many challenges, there are also important opportunities. Through national laws and international agreements, most countries have developed a range of tools that can be used by criminal justice agencies to facilitate cooperation across borders in criminal matters. These include the tools of mutual legal assistance (which incorporates a sub-set of tools that can assist with recovery of proceeds of crime) and extradition. An understanding of these tools and of how they work is an important first step in encouraging States to take a more proactive approach to international cooperation in trafficking in persons cases.

ASEAN Commitment to International Cooperation

Over the past several years, ASEAN and its Member States¹ have affirmed the importance of stronger and more effective regional and international cooperation in the area of trafficking in persons - recognizing that such cooperation is vital to successful domestic prosecutions as well as to eliminating safe havens for traffickers and their accomplices.² A number of instruments have been developed that support such cooperation. A treaty on mutual legal assistance in criminal matters, completed in 2006, is directly relevant to this issue. A set of guidelines on trafficking in persons, endorsed by the (ASEAN) Senior Officials Meeting on Transnational Crime (SOMTC) in 2007, provide detailed guidance to criminal justice practitioners on international cooperation as it relates to trafficking in persons cases. Instruments developed by other multilateral organisations such as the *United Nations Convention against Transnational Organized Crime*³ (UNTOC), the *United Nations Convention against Corruption*⁴ (UNCAC) and the *Organisation for Economic Co-operation and Development Convention on Combating Bribery of Foreign Public Officials in International*

¹ The Member States of the Association are Brunei Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, Philippines, Singapore, Thailand and Viet Nam.

² See, for example, Association of Southeast Asian Nations [ASEAN], *ASEAN Declaration Against Trafficking in Persons Particularly Women and Children*, Nov. 29, 2004 [hereinafter *ASEAN Declaration Against Trafficking in Persons*]; ASEAN, *ASEAN Responses to Trafficking in Persons: Ending Impunity for Traffickers and Securing Justice for Victims* (ASEAN, 2006 (Supplement and Update, 2007)).

³ *United Nations Convention against Transnational Organized Crime*, Dec. 12, 2000, UN Doc. A/RES/55/25 (Annex I), entered into force Sept. 29, 2003 [hereinafter UNTOC].

⁴ *United Nations Convention against Corruption*, Oct. 31, 2003, UN Doc. A/RES/58/422 (Annex), entered into force Dec. 14, 2005 [hereinafter UNCAC].

*Business Transactions*⁵ (OECD Anti-Bribery Convention), are also relevant in situations where trafficking offences are facilitated by related offences such as organized crime, corruption and money laundering. Most ASEAN Member States have signed or ratified one or more of these instruments.

ASEAN Mandate for the Handbook

The 2007 SOMTC Work Plan to implement the *ASEAN Declaration Against Trafficking in Persons Particularly Women and Children* (ASEAN Declaration Against Trafficking in Persons) commits ASEAN Member States to:

Strengthen[ing] the legal and policy framework around trafficking in order to promote more effective national responses as well as greater regional and international cooperation especially in relation to the investigation and prosecution of trafficking cases and the protection of victims.⁶

The Work Plan further encourages Member States to:

[C]onsider supporting a region-wide survey of trafficking related laws including those dealing with money laundering, mutual legal assistance and extradition with a view to identifying effective practices within and outside the region and supporting those countries that wish to strengthen their applicable legal frameworks. The survey could also include recommendations for strengthening of regional legal mechanisms in identified areas such as extradition.⁷

In June 2008, SOMTC proposed to implement this commitment by supporting development of an *ASEAN Handbook on International Cooperation*. The document was completed in draft form and submitted in mid-2009 to both the SOMTC (through its Working Group on Trafficking in Persons) and the ASEAN Senior Law Officials Meeting (ASLOM) for consideration and feedback. Shortly thereafter, SOMTC announced that the draft Handbook would be piloted at a regional Workshop, to be attended by practitioners from the ASEAN Member States. That Workshop was held in November 2009, with participants making contributions to the draft Handbook in plenary and small group sessions, as well as in written form after the Workshop.

Purpose of the Handbook

The purpose of this Handbook is to provide criminal justice officials within the ASEAN region with an introduction to the key tools of international cooperation, specifically mutual legal assistance and extradition and to provide guidance on how these tools might be relevant to the investigation and prosecution of trafficking in persons cases. The Handbook is aimed at criminal justice practitioners, primarily law enforcement officers, prosecutors, central authority lawyers, and others who may be involved in investigating and prosecuting trafficking in persons cases, or in processing or considering requests for assistance across borders.

The Handbook has been designed to both *encourage* and *enable* criminal justice officials within the ASEAN region to initiate and engage in the processes of mutual legal assistance and extradition where this would facilitate an investigation or prosecution of the crime of trafficking in persons or a related crime. An increase in willingness and capacity to collaborate across borders will assist ASEAN Member States to give practical effect to their cooperation obligations as set out in international, regional and bilateral agreements as well as in national laws. Ultimately, it is hoped that an increase in international cooperation in trafficking in persons cases, within a framework of respect for national and international law, will help to redress the level of impunity currently enjoyed by offenders, while also contributing to the ability of victims of this crime to seek and achieve justice for the wrongs committed against them.

While the Handbook is intended primarily for ASEAN countries, it addresses issues that are relevant to all countries engaged in combating trafficking in persons through a more effective criminal justice response.

⁵ Organisation for Economic Co-operation and Development [OECD] *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, Dec. 17, 1997, 37 ILM 1, entered into force Feb. 15, 1999 [hereinafter *OECD Anti-Bribery Convention*].

⁶ ASEAN Senior Officials Meeting on Transnational Crime [SOMTC], *2007-2009 Work Plan to Implement the ASEAN Declaration Against Trafficking in Persons, Particularly Women and Children*, section 1.2, endorsed by the 7th ASEAN SOMTC, Vientiane, Lao PDR, Jun. 27, 2007 [hereinafter *SOMTC, 2007-2009 Work Plan to Implement the ASEAN Declaration Against Trafficking in Persons*].

⁷ SOMTC, *2007-2009 Work Plan to Implement the ASEAN Declaration Against Trafficking in Persons*, section 1.2.2.

The Normative Framework

The information contained in the Handbook is primarily based on international legal standards as they relate to both trafficking in persons and the mechanisms of international cooperation. Of particular relevance in this regard are the UNTOC and its *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*⁸ (UN Trafficking Protocol) and the UNCAC. The Handbook also reflects norms and standards that have been developed at the regional level (e.g. *Treaty on Mutual Legal Assistance in Criminal Matters among Like-Minded ASEAN Member Countries*⁹ (ASEAN MLAT)) and through bilateral treaties. Frequent reference is made to key international human rights instruments, such as the *International Covenant on Civil and Political Rights*¹⁰ (ICCPR) and the *United Nations Convention against Torture*¹¹ (Convention against Torture), as these provide a normative framework for criminal justice systems and outcomes that respect the rights of all persons. Finally, the Handbook considers both accepted and emerging norms and standards that are contained in non-legal instruments such as policy documents of intergovernmental organisations, model laws and memoranda of understanding between States.

Organisation of the Handbook

The Handbook is divided into five chapters:

Chapter 1: provides information on trafficking in persons with an emphasis on the elements of the crime of trafficking in persons as it has been defined in international law (and in the national legislation of most ASEAN Member States). The chapter also provides an overview of the international legal framework around trafficking in persons with a particular focus on those instruments that are most directly relevant to international cooperation.

Chapter 2: provides an introduction to international cooperation in the investigation and prosecution of trafficking cases. It explains the importance of such cooperation; identifies the main forms of cooperation; and provides an overview of its legal basis. The chapter concludes with a note on the key issues of sovereignty, safeguards and human rights as these relate to international cooperation.

Chapter 3: considers the international cooperation tool of mutual legal assistance. It commences by identifying the key international and regional principles on mutual legal assistance; explaining the relevance of mutual legal assistance in trafficking cases; and summarizing the legal basis for mutual assistance. The chapter then identifies and considers the various principles and conditions attached to mutual legal assistance. Information is provided on how to prepare, transmit and respond to mutual assistance requests.

Chapter 4: follows on from the previous chapter by considering mutual legal assistance in the specific context of recovery of proceeds of trafficking crimes. It commences by identifying the key international and regional principles on mutual legal assistance in this situation; explaining the importance of pursuing the financial proceeds of trafficking crimes; and summarizing the legal basis for mutual assistance to recover trafficking proceeds. The chapter then identifies and considers the procedural and evidential requirements as well as additional considerations that may arise in the context of cross-border proceeds recovery.

Chapter 5: deals with extradition. It includes information on the nature of extradition; the importance of extradition as a tool in prosecuting trafficking cases; and the various legal bases that can be relied on to support a request for extradition. The chapter then considers the pre-conditions and safeguards that typically apply in extradition cases. It concludes with practical information on procedures that are typically followed in extradition cases and on how to prepare, transmit and respond to extradition requests.

⁸ *United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*, Dec. 12, 2000, UN Doc. A/RES/55/25 (Annex II), entered into force Dec. 25, 2003 [hereinafter *UN Trafficking Protocol*].

⁹ *Treaty on Mutual Legal Assistance in Criminal Matters among Like-Minded ASEAN Member Countries*, Nov. 29, 2004, done at Kuala Lumpur, Malaysia [hereinafter *ASEAN MLAT*].

¹⁰ *United Nations International Covenant on Civil and Political Rights*, Dec. 16, 1966, 999 UNTS 171, entered into force Mar. 23, 1976 [hereinafter *ICCPR*].

¹¹ *United Nations Convention Against Torture, and Other Cruel, Inhuman and Degrading Treatment or Punishment*, Dec. 10, 1984, 1465 UNTS 85, entered into force June 26, 1987 [hereinafter *Convention against Torture*].

The Handbook contains a number of important annexes. Annex 1 provides comprehensive country summaries of the legal and procedural framework relevant to international cooperation in each of the ten ASEAN Member States. Those country summaries have been organized in a way that tracks the structure of the present book.

Other annexes include full texts and extracts from the major international and regional treaties that provide a legal basis for extradition between ASEAN Member States.

Chapter 1:

Introduction to Trafficking in Persons and the Applicable International Legal Framework

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Overview of this Chapter:

The purpose of this Chapter is to introduce practitioners to the concept of ‘trafficking in persons’, the elements of the ‘trafficking in persons’ offence, and the relevant legal framework. This Chapter includes information about:

- the key legal definitions used in this Handbook including the definition of ‘trafficking in persons’;
- the international legal framework around ‘trafficking in persons’, including treaties and ‘soft law’ instruments.

1.1 Introduction: trafficking in persons

This Chapter introduces the key legal definitions used in this Handbook: specifically, the definitions of trafficking in persons (adults) and trafficking in children. It summarises the main aspects of these definitions and then considers how trafficking relates to – and differs from – other crimes such as migrant smuggling. The Chapter concludes with a short overview of trafficking patterns and trends.

1.1.1 Legal definition of trafficking in persons

The term ‘trafficking in persons’ is defined by Article 3 of the UN Trafficking Protocol:

(a) “Trafficking in persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;

(b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used; ...

The following table identifies the three elements that must all be present for a situation of trafficking in persons to exist.

Table 1: Key elements of the international legal definition of trafficking in persons

KEY ELEMENTS	
Action	Recruitment, transportation, transfer, harbouring or receipt of persons.
Means	Threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power or position of vulnerability, giving or receiving payments or benefits to achieve consent of a person having control over another.
Purpose	Exploitation (including, at a minimum, the exploitation of the prostitution of others, or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs).

1.1.2 Definition of trafficking in children

International law provides a significantly different definition for trafficking in children in that it is only necessary to show an ‘action’ such as recruitment, buying and selling, for the specific ‘purpose’ of exploitation.¹² In other words, trafficking will exist where the child was subject to an act such as recruitment or transportation the purpose of which is the exploitation of that child. Because it is unnecessary to show that force, deception or any other means were used, the identification of child victims of trafficking *and* the identification of their traffickers is likely to be easier than in cases involving adult victims.

¹² UN Trafficking Protocol, art. 3(c).

Table 2: Key elements of the international legal definition of trafficking in children

KEY ELEMENTS	
Action	Recruitment, transportation, transfer, harbouring or receipt of persons.
Purpose	Exploitation (including, at a minimum, the exploitation of the prostitution of others, or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs).

1.1.3 Key aspects of the international legal definition of trafficking in persons

Important aspects of the international legal definition include the following:

- trafficking takes place for a wide range of purposes not limited to, for example, sexual exploitation;
- women, men and children are trafficked;
- the elements of the crime of trafficking in children are different to the elements of the crime of trafficking in adults. The crime of trafficking in children does not require means such as force or deception;
- the crime of trafficking can be committed *prior* to exploitation: it is the intention to exploit, along with the other required element/s that constitute the offence;¹³
- the consent of the victim does not alter the offender's criminal liability;
- the offence must have been committed intentionally for there to be criminal liability;
- the offence does not, at the domestic level, require a 'transnational' element or the involvement of an organized criminal group.¹⁴

1.1.4 Distinguishing trafficking from migrant smuggling

When trafficking involves migrants or the crossing of an international border it may be confused with other crimes and migrant-related phenomena such as illegal migration. While trafficking across national borders may well involve a violation of immigration laws (with or without the knowledge or consent of the individual being trafficked), this fact is not relevant to a determination of whether or not a crime of trafficking has taken place.

Trafficking in persons is also legally different to migrant smuggling. The *Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime*¹⁵ (UN Migrant Smuggling Protocol) defines migrant smuggling as:

The procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or permanent resident.¹⁶

¹³ This point is made in the United Nations Office on Drugs and Crime [UNODC], *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto*, p. 268, para. 33 (New York, 2004) [hereinafter UNODC, *Legislative Guides to the Organized Crime Convention and its Protocols*]; and Council of Europe, *Explanatory Report on the Council of Europe Convention on Action against Trafficking in Human Beings*, para. 225, CETS No. 197, Warsaw, 16.V.2005 [hereinafter Council of Europe, *Explanatory Report to the European Trafficking Convention*].

¹⁴ This point is made in the UNODC, *Legislative Guides to the Organized Crime Convention and its Protocols*, p. 275, para. 45 as well as in UN General Assembly [UNGA], *Interpretive notes for the Official Records (Travaux Préparatoires) of the Negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto*, para. 59, UN Doc. A/55/383/Add.1 (Nov. 3, 2000) [hereinafter UNGA, *Interpretative Notes for the Official Records of the Organized Crime Convention and its Protocols*]. Note that application of the UN Trafficking Protocol at the international level would require a 'transnational' element or the involvement of an organized criminal group. See further, section 1.2.1, below.

¹⁵ *United Nations Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime*, Dec. 12, 2000, UN Doc. A/RES/55/25 (Annex III), entered into force, Jan. 28, 2004 [hereinafter *UN Migrant Smuggling Protocol*].

¹⁶ *UN Migrant Smuggling Protocol*, art. 3.

Under this definition, migrant smuggling refers only to the illegal movement of persons across international borders. Unlike trafficking in persons, migrant smuggling does not require an exploitative purpose or the elements of force, deception or fraud.

It is important to note however, that in practice, the distinction between migrant smuggling and trafficking in persons is not always easy to establish and maintain. Many trafficked persons may begin their journey as smuggled migrants – having contracted an individual or group to assist their illegal movement in return for financial benefit. In a classic migrant smuggling situation, the relationship between migrant and smuggler is a voluntary, short-term one – coming to an end upon the migrant’s arrival in the destination State. However, some smuggled migrants are compelled to continue this relationship in order to pay off large transportation costs. It is at this late stage that the exploitative end-purposes of trafficking (debt bondage, extortion, use of force, forced labour, forced criminality, forced prostitution) will become apparent.

The link between trafficking and migrant smuggling highlights one of the main obstacles to identification of trafficked persons. As explained above, trafficking involves the intention to exploit. In trafficking cases where the ‘action’ element involves some kind of movement, such intent will often not manifest itself until after the ‘movement’ phase is over. It may therefore be difficult or even impossible to identify a trafficked person as such until the victim is trapped in the very exploitative situation that ‘proves’ he / she is something other than a smuggled migrant.

1.1.5 Related crimes

Trafficking in persons invariably involves the commission of related crimes including forced or exploitative labour, deprivation of liberty, physical and sexual violence, child labour, sexual exploitation, forced marriage, illegal recruitment and debt bondage. Several of these offences are in fact identified in the international definition as end-purposes of trafficking. Related crimes can also include those with a typically strong transnational element such as involvement in organized crime, money laundering or the bribery of foreign officials.

Experience in a number of criminal jurisdictions has indicated that in some circumstances it may be easier to investigate and prosecute these more established and better understood offences rather than the complex crime of trafficking.¹⁷ States and others must, of course, remain vigilant to ensure that the use of alternative offences strengthens rather than detracts from the overall effectiveness of the criminal justice response including its ability to deliver justice to victims.¹⁸

1.1.6 Summary of trafficking patterns and trends

Trafficking patterns (i.e. *what* happens, *how* and to *whom*) vary significantly from place to place and even from time to time. While there are still significant gaps in our knowledge and understanding, it is possible to identify the major characteristics of current trafficking patterns in all regions of the world including South East Asia.

- Trafficking takes place for a wide range of end purposes including domestic service, forced marriage and forced labour (for example, on fishing vessels or in factories), as well as sexual exploitation.
- Trafficking occurs *within* as well as *between* States.
- Traffickers employ a variety of recruitment methods. Most use varying levels of fraud or deception, rather than outright force, to secure the initial cooperation of the trafficked person. A commonly reported situation involves an individual who is deceived about the cost (and repayment conditions) of the migration services being offered, the kind of work she or he will be doing and / or the

¹⁷ Anne Gallagher and Paul Holmes, *Developing an Effective Criminal Justice Response to Human Trafficking: Lessons from the Front Line*, 18(3) *International Criminal Justice Review* 318, p. 322 (2008) [hereinafter Gallagher and Holmes, *Developing an Effective Criminal Justice Response to Human Trafficking*].

¹⁸ This point is made in the Office of the United Nations High Commissioner for Human Rights [OHCHR], *Commentary to the United Nations Recommended Principles and Guidelines on Human Rights and Human Trafficking* (United Nations, forthcoming 2010) [hereinafter OHCHR, *Commentary to the Trafficking Principles and Guidelines*].

conditions under which she or he is expected to work. Child trafficking generally involves payment to a parent or guardian in order to achieve cooperation and this is often (but not always) accompanied by a measure of deception regarding the nature of the child's future employment or position.

- Victims of trafficking do not always need to be physically detained. Traffickers and their accomplices use a variety of methods to secure compliance or to prevent escape, including threats and use of force, intimidation, detention, isolation and withholding of personal documents.
- Trafficking is sustained and strengthened through public sector corruption, particularly the involvement and / or bribery of domestic and foreign police and immigration officials who play a key role in facilitating illegal entry and providing protection to trafficking operations.
- Not all persons trafficked across an international border enter and / or remain in the destination State illegally. Illegal entry increases a trafficked person's reliance on traffickers and serves as an effective deterrent to seeking outside help. However, a person can be both legally present in a State and nonetheless a victim of trafficking.
- Trafficking in persons is a complex criminal activity and traffickers are becoming increasingly organized. Criminal networks involved in trafficking may be informal groups of individuals linked by family or ethnic ties, or syndicates operating on a more sophisticated scale, working internationally and controlling every phase of the trafficking process.
- Human trafficking networks may be involved in other criminal activities, such as smuggling of migrants, drug and arms trafficking, extortion and corruption.

1.2 Overview of the relevant international legal framework around trafficking¹⁹

International law (sometimes referred to as public international law) is a body of rules and principles that govern the relations and dealings of States with each other. International law is the law of nations. It imposes specific obligations and rights on States, just as domestic law imposes them on individuals. There are several accepted 'types' or sources of international law.²⁰ The primary sources, in order of importance, are treaties, custom and general principles of law. Subsidiary sources include the decisions of international tribunals.

This section seeks to provide a brief overview of the international legal framework around trafficking, paying particular attention to treaties as the main source of international legal obligation on this issue. Consideration is also given to non-legal instruments such as declarations, principles and memoranda of understanding. While these instruments are not an independent source of legal obligation for States, they can be very important in helping to ascertain existing law and sometimes guiding future legal development. The present section also introduces and clarifies the relative position and significance of the various sources of obligation for States that will be referred to throughout this Handbook. Note that this Chapter deals specifically with trafficking in persons and not with the legal instruments of international cooperation that are considered in the following Chapter.

1.2.1 International treaties

A treaty is an agreement, almost always between two or more States that creates binding rights and obligations in international law. Treaties can be universal (open to as many States as want to join) or restricted to a smaller group of States. A treaty may go by many different names, such as 'convention', 'covenant' and 'protocol'. The obligations contained in a treaty are based on consent. States are bound because they agree

¹⁹ The information presented in this section is drawn from OHCHR, *Commentary to the Trafficking Principles and Guidelines*. For a detailed examination of all aspects of the international legal framework around trafficking see Anne Gallagher, *The International Law of Human Trafficking* (Cambridge University Press, forthcoming 2010) [hereinafter Gallagher, *The International Law of Human Trafficking*].

²⁰ The generally recognized 'sources' of international law are set out in Article 38(1) of the *Statute of the International Court of Justice*, Jun. 26, 1945, entered into force Oct. 24, 1945.

to be bound. Such agreement must comprise a formal act of ‘ratification’ or ‘accession’. A State that has only signed a treaty has not yet given its full consent to be bound. States that have agreed to be bound by a treaty are known as ‘States Parties’ to that treaty.

By becoming a party to a treaty, States undertake binding obligations in international law. In the case of most treaties relevant to trafficking in persons this means that States Parties undertake to ensure that their own national legislation, policies and practices meet the requirements of the treaty and are consistent with its standards.

Depending on their source, these obligations may be enforceable in international courts and tribunals with appropriate jurisdiction, such as the International Court of Justice, the International Criminal Court, or the European Court of Human Rights. Whether the obligations are enforceable in national courts is a separate question, to be determined by domestic law. In some States, legislation is required to incorporate treaties into domestic law, while in other States the constitution provides that treaties automatically have the status of domestic law.

Most multilateral treaties (involving more than just a few States) are concluded under the auspices of an international organisation such as the United Nations (UN), or a regional organisation such as the ASEAN or the European Union. Bilateral treaties or those developed between a smaller group of States are generally negotiated through the relevant foreign ministries without the involvement of an external or facilitating agency such as the UN. Bilateral treaties are common in technical areas covered by this Handbook such as extradition and mutual legal assistance.²¹

Trafficking in persons is a complex issue that cuts across many different areas of international law including: human rights, crime control and criminal justice, migration, and labour. This complexity is reflected in the wide range of relevant treaties that together comprise the codified (treaty-based) legal framework around trafficking. A small number of treaties, including several that have been concluded recently, deal exclusively with the issue of trafficking. Many more address one narrow aspect, such as an especially vulnerable group, or a particular manifestation of trafficking. As explored further in the following Chapter, international cooperation is similarly complex. Sometimes it is dealt with in the context of a broader treaty dealing with a particular issue such as organized crime or corruption. Other international cooperation agreements are much more general and seek to provide general principles of agreement that will cover cooperation in relation to a wide range of different subject areas.

The following paragraphs identify major international legal agreements that are relevant to trafficking.

International treaties on transnational organized crime and trafficking in persons

The two main international treaties of direct relevance to trafficking in persons in the broader context of transnational organized crime are the UNTOC and the UN Trafficking Protocol, both concluded in December 2000. Their major provisions are outlined in detail below. Note that additional information on the international legal cooperation aspects of these instruments is not provided here but instead set out in Chapters 3-5.

United Nations Convention against Transnational Organized Crime

UNTOC is the central instrument in a package of treaties developed to deal with transnational organized crime. The Protocols attached to UNTOC relate to trafficking in persons, smuggling of migrants, and illicit manufacturing of and trafficking in small arms.

The purpose of UNTOC is to promote inter-state cooperation in order to combat transnational organized crime more effectively. UNTOC seeks to eliminate ‘safe havens’ where organized criminal activities or the concealment of evidence or profits can take place by promoting the adoption of basic minimum measures.

²¹ For further discussion of the features of bilateral treaties in this context see UNODC, *Revised Manuals on the Model Treaty on Extradition and the Model Treaty on Mutual Assistance in Criminal Matters*, reviewed Dec. 6-8, 2002, [hereinafter UNODC, *Revised Manuals on the Model Treaty on Extradition and the Model Treaty on Mutual Assistance*].

Four offences (as well as the generic category of offence ‘serious crime’), whether committed by individuals or corporate entities, are covered: participation in an organized criminal group; money laundering; corruption; and obstruction of justice.²²

There are two main pre-requisites for application of UNTOC. First, the relevant offence must have some kind of transnational aspect. Second, it must involve an organized criminal group. Both elements are defined very broadly.²³ ‘Serious crime’ is defined in such a way as to include all significant criminal offences.²⁴ As a result, States are able to use the Convention to address a wide range of modern criminal activity including trafficking and related exploitation as well as migrant smuggling. This is especially important in view of the fact that States may become Parties to the Convention without having to ratify any or all of the Protocols and that ratification of the Convention must precede ratification of any of the Protocols.

The primary obligation of the Convention relates to criminalization of specific conduct. States Parties are required to criminalize:

- participation in an organized criminal group;²⁵
- laundering of the proceeds of crime;²⁶
- public sector corruption; and
- obstruction of justice.²⁷

These offences are also to be made subject to appropriate sanctions.²⁸

One of the principle obstacles to effective action against transnational organized crime, including trafficking in persons, has been the lack of communication and cooperation between national criminal justice agencies. UNTOC sets out a range of measures to be adopted by States Parties to enhance effective law enforcement cooperation. The practical application of these provisions is likely to be enhanced by the inclusion of a detailed legal framework on mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to applicable offences.²⁹ As explored in more detail below, States Parties are able to use the Convention to request mutual legal assistance for a range of purposes including the taking of evidence, effecting service of judicial documents, execution of searches, identification of the proceeds of crime and production of information and documentation.³⁰ States Parties are also encouraged to establish joint investigative bodies;³¹ come to formal agreement on the use of special investigative techniques;³² consider the transfer of criminal proceedings³³ and sentenced persons;³⁴ and facilitate extradition procedures for applicable offences.³⁵

²² UNTOC, arts. 3, 5, 6, 8, 23.

²³ UNTOC, art 3(2), defines a transnational offence as one which is committed in more than one State; or committed in one State but substantially planned, directed or controlled in another State; or committed in one State but involving an organized criminal group operating in more than one State; or committed in one State but having substantial effects on another State. Note that the threshold of transnationality is lower in relation to the Convention’s provisions on extradition and mutual legal assistance: Articles 16(1), 18(1). An organized criminal group is defined as “a structured group of three or more persons existing for a period of time and acting in concert 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.”: Article 2(a). Importantly, the Convention’s *travaux préparatoires* indicate that ‘financial or other benefit’ is to be understood broadly to include, for example, personal or sexual gratification, see UNGA, *Interpretative Notes for the Official Records of the Organized Crime Convention and its Protocols*, para. 3.

²⁴ ‘Serious crime’ refers to conduct constituting a criminal offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty, UNTOC, Article 2(b).

²⁵ UNTOC, art. 5.

²⁶ UNTOC, art. 6.

²⁷ UNTOC, art. 8.

²⁸ UNTOC, art. 6(1).

²⁹ UNTOC, art. 18.

³⁰ UNTOC, art. 14(2).

³¹ UNTOC, art. 19.

³² UNTOC, art. 15.

³³ UNTOC, art. 21.

³⁴ UNTOC, art. 17.

³⁵ UNTOC, art. 16.

UN Trafficking Protocol

The most important of all international treaties on trafficking is the UN Trafficking Protocol which entered into force in 2003. The Protocol requires States to criminalize trafficking in persons as defined in that instrument as well as related offences.

The purposes of the Protocol are:

- to prevent and combat trafficking in persons, paying particular attention to women and children;
- to assist the victims of such trafficking, with full respect for their human rights; and
- to promote cooperation among States Parties in order to meet those objectives.³⁶

The main obligations of States Parties to the Protocol are as follows:

- to criminalize ‘trafficking in persons’ as defined in the Protocol (see further at 1.1 above) and to impose penalties which take into account the grave nature of that offence;³⁷
- to protect, to the extent possible under domestic law, the privacy and identity of victims of trafficking in persons and to consider the provision of a range of social services to enable their recovery from trauma caused by their experiences;³⁸
- to ensure that the legal system contains measures that offer victims the possibility of obtaining compensation;³⁹
- to strengthen such border controls as might be necessary to prevent trafficking, without prejudice to other international obligations allowing the free movements of people;⁴⁰
- to ensure the integrity of national travel or identity documents and to act promptly in response to requests for verification of such documents;⁴¹
- to strengthen, as appropriate, cooperation with other States in exchange of information regarding identities, fraudulent use of documents, and means and methods employed by traffickers. The provision and / or strengthening of training for officials in the recognition and prevention of trafficking, including human rights awareness training, is also required;⁴²
- to consider allowing victims to remain in their territory, whether permanently or temporarily, taking into account humanitarian and compassionate factors;⁴³
- to accept the return of any victims of trafficking who are their nationals, or who had permanent residence in their territory at the time of entry to the receiving State. When returning a victim, due regard must be taken of their safety, with the return preferably being voluntary.⁴⁴

Because of its relationship with UNTOC, (see below), the direct application of the UN Trafficking Protocol at the international level is limited to situations of *international trafficking* involving an *organized criminal group*.⁴⁵ However, this restriction in scope refers only to the implementation of UNTOC *between* States Parties (including in the context of mutual legal assistance and extradition). When criminalising trafficking at the national level, States Parties *must not* incorporate elements concerning transnationality or an organized criminal group into domestic offence provisions.⁴⁶ This means, in effect, that such elements are not required for the invocation of victim protection provisions or even for the domestic prosecution of a trafficking case.

³⁶ UN Trafficking Protocol, art. 2.

³⁷ UN Trafficking Protocol, art. 5.

³⁸ UN Trafficking Protocol, art. 6.

³⁹ UN Trafficking Protocol, art. 6.

⁴⁰ UN Trafficking Protocol, art. 11.

⁴¹ UN Trafficking Protocol, art. 12.

⁴² UN Trafficking Protocol, art. 10.

⁴³ UN Trafficking Protocol, art. 7.

⁴⁴ UN Trafficking Protocol, art. 8.

⁴⁵ UNTOC, arts. 2, 3; UN Trafficking Protocol, art. 4. See also UNODC, *Legislative Guides to the Organized Crime Convention and its Protocols*, p. 258, para. 24.

⁴⁶ UNTOC, art. 34(2). See also UNODC, *Legislative Guides to the Organized Crime Convention and its Protocols*, p. 258, para. 25.

The relationship between UNTOC and the UN Trafficking Protocol

The following are the main principles that govern the relationship between the UNTOC and the UN Trafficking Protocol:

- as the Protocols were not intended to be independent treaties, States must ratify UNTOC before ratifying one or any of its protocols;⁴⁷
- UNTOC and the UN Trafficking Protocol must be interpreted together. In interpreting the UN Trafficking Protocol, its stated purpose must be considered which may result in modification to the meaning applied to UNTOC;⁴⁸
- the provisions of UNTOC apply, *mutatis mutandis*, to the Protocol. This means that in applying the Convention to the Protocol, modifications of interpretation or application should only be made when necessary and to the extent necessary;⁴⁹
- offences established by the UN Trafficking Protocol are to be regarded as offences established by UNTOC. This means that once a State ratifies the Protocol, its obligations under that instrument in relation to trafficking are supplemented by the general obligations set out in the Convention. For example, ratification of the Protocol will result in the State also being required to apply the Convention's provisions regarding mutual legal assistance, extradition, witness protection and money laundering to the crime of trafficking.⁵⁰

Regional trafficking-specific treaties

The international legal framework around trafficking includes specialist treaties that have been concluded between regional groupings of States. One very significant example is the 2005 *Council of Europe Convention on Action against Trafficking in Human Beings*⁵¹ (European Trafficking Convention) that entered into force in February 2008. This Convention has the potential to bind more than forty States of Western, Central and Eastern Europe to a much higher level of obligation, particularly with regard to victim protection, than that required by the UN Trafficking Protocol. Another, narrower, regional example is provided by the *Convention on Preventing and Combating Trafficking in Women and Children for Prostitution*⁵² concluded by the member States of the South Asian Association for Regional Cooperation (SAARC) in 2002. As its title implies, the scope of this Convention is limited to trafficking of women and children for prostitution.

While regional treaties only impose obligations on the States that are party to them, they can provide all States with a useful insight into evolving standards.

Human rights treaties

International human rights treaties form an important part of the applicable legal framework around trafficking. Two of the major international human rights treaties contain specific references to trafficking and related exploitation:

- *Convention on the Elimination of All Forms of Discrimination Against Women*⁵³ (CEDAW): Article 6 explicitly prohibits trafficking and exploitation of the prostitution of women;

⁴⁷ UNTOC, art. 37(2).

⁴⁸ UNTOC, art. 37(4); UN Trafficking Protocol, art. 1(1).

⁴⁹ UN Trafficking Protocol, art. 1(2). See also UNODC, *Legislative Guides to the Organized Crime Convention and its Protocols*, p. 254, para. 17, and UNGA, *Interpretative Notes for the Official Records of the Organized Crime Convention and its Protocols*, para. 62.

⁵⁰ UN Trafficking Protocol, art. 1(3). See also UNODC, *Legislative Guides to the Organized Crime Convention and its Protocols*, p. 254, para. 17.

⁵¹ *Council of Europe Convention on Action against Trafficking in Human Beings*, May 16, 2005, CETS No. 197, entered into force Feb. 1, 2008 [hereinafter *European Trafficking Convention*].

⁵² South Asian Association for Regional Cooperation, *Convention on Preventing and Combating Trafficking in Women and Children for Prostitution*, Jan. 5, 2002, entered into force Dec. 1, 2005.

⁵³ *Convention on the Elimination of All Forms of Discrimination Against Women*, Dec. 13, 1979, 1249 UNTS 13, entered into force Sept. 3, 1981.

- *Convention on the Rights of the Child*⁵⁴ (CRC): prohibits trafficking in children as well as sexual exploitation of children and forced or exploitative labour. This Convention also contains important protections for children who have been trafficked.

All ten ASEAN Member States are party to both CEDAW and CRC.

Other international human rights treaties prohibit certain behaviours or practices that have been linked to trafficking including: ethnic, racial and sex-based discrimination; slavery; forced labour and servitude; sexual exploitation of children; forced marriage; torture and inhuman treatment and punishment; and arbitrary detention.

International human rights treaties also identify and protect certain rights that are particularly important in the context of trafficking such as: the right to own and inherit property; the right to education; the right of opportunity to gain a living through work freely chosen or accepted; and the right to a remedy. The right to a fair trial is a core human right that is particularly important in the context of international cooperation including mutual legal assistance and extradition.

In addition to CEDAW and CRC, the following human rights treaties include provisions or protections that are relevant to trafficking:

- ICCPR;
- *First Optional Protocol to the International Covenant on Civil and Political Rights*⁵⁵ (which provides a right of individual complaint);
- *International Covenant on Economic, Social and Cultural Rights*;⁵⁶
- *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women*⁵⁷ (which provides a right of individual complaint and inquiry);
- *Convention on the Elimination of Racial Discrimination*;⁵⁸
- Convention against Torture;
- *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*;⁵⁹
- *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*;⁶⁰
- *Convention relating to the Status of Refugees* (Refugee Convention);⁶¹
- *Protocol relating to the Status of Refugees*.⁶²

Regional human rights agreements concluded in Africa, Europe and the Americas affirm and sometimes extend the rights contained in the international treaties, including rights that are directly and indirectly relevant to trafficking. There is not, as yet, a regional human rights treaty in Asia.

⁵⁴ *Convention on the Rights of the Child*, Nov. 20, 1989, 1577 UNTS 3, entered into force Sept. 2, 1990.

⁵⁵ *Optional Protocol to the International Covenant on Civil and Political Rights*, Dec. 16, 1966, 999 UNTS 171, entered into force Mar. 23, 1976.

⁵⁶ *International Covenant on Economic, Social and Cultural Rights*, Dec. 16, 1966, 993 UNTS 3, entered into force Jan. 3, 1976.

⁵⁷ *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women*, Oct. 6, 1999, 2131 UNTS 83, entered into force Dec. 22, 2000.

⁵⁸ *Convention on the Elimination of Racial Discrimination*, Mar. 7, 1966, 660 UNTS 195, entered into force Jan. 4, 1969.

⁵⁹ *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, May 25, 2000, UN Doc. A/RES/54/263, entered into force Jan. 18, 2002 [hereinafter *CRC Optional Protocol on the Sale of Children*].

⁶⁰ *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, Dec. 18, 1990, UN Doc. A/RES/45/158, entered into force Jul. 1, 2003.

⁶¹ *Convention relating to the Status of Refugees*, Jul. 28, 1951, 189 UNTS 137, entered into force Apr. 22, 1954.

⁶² *Protocol relating to the Status of Refugees*, Jan. 31, 1967, 606 UNTS 267, entered into force Oct. 4, 1967.

Criminal law / Crime control treaties

Over the past decade, a number of international treaties dealing with criminal matters (both generally and in specific relation to individual criminal responsibility) have been adopted. Those most relevant to trafficking include the UNTOC and the UN Trafficking Protocol, discussed in detail at 1.2.1, above. The UN Migrant Smuggling Protocol, adopted as part of the same package of treaties, is also relevant to trafficking for reasons explained in section 1.1.4, above.

The International Criminal Court (ICC), established by the 1998 *Rome Statute of the International Criminal Court* (ICC Statute), has jurisdiction over genocide, war crimes, crimes against humanity and the crime of aggression.⁶³ The jurisdiction of the ICC is limited to offences that form part of a widespread and systematic attack against a civilian population⁶⁴ and to situations where national systems fail to investigate or prosecute, or where they are ‘unable’ or ‘unwilling’ to do so genuinely.⁶⁵ The ICC Statute provides for individual criminal responsibility for persons who commit, attempt to commit, order, solicit, induce, aid, abet, assist or intentionally contribute to the commission of a crime within the Court’s jurisdiction.⁶⁶ The relevance of the ICC to the subject matter of this Handbook lies in the fact that the ICC Statute identifies trafficking and offences often associated with trafficking, including sexual slavery and enforced prostitution, as crimes against humanity when committed as part of a widespread, systematic attack against the civilian population.⁶⁷

The ICC Statute builds on a long history of opposition to the practices of slavery, forced labour and debt bondage. Key treaties on these issues include:

- ICCPR (prohibits slavery, the slave trade, servitude, and forced and compulsory labour);
- *Forced Labour Convention* (International Labour Organisation (ILO) Convention No. 29);⁶⁸
- *Abolition of Forced Labour Convention* (ILO Convention No. 105);⁶⁹
- *Worst Forms of Child Labour Convention* (ILO Convention No. 182);⁷⁰
- *Slavery Convention*;⁷¹
- *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*.⁷²

⁶³ *Rome Statute of the International Criminal Court*, art. 5(1), July 17, 1998, UN Doc. A/CONF.183/9*, entered into force July 1, 2002 [hereinafter *ICC Statute*]. Note that the crime of aggression is yet to be defined.

⁶⁴ *ICC Statute*, art. 7(1).

⁶⁵ *ICC Statute*, art. 17. Note that jurisdiction is also generally limited to cases where the offence was committed by a national or on the territory of a State Party to the *ICC Statute*: Article 12, and the offences were committed after the entry into force of the Statute or after the relevant State had acceded to the Statute: Article 11.

⁶⁶ *ICC Statute*, art. 25.

⁶⁷ The constituent acts of ‘crimes against humanity’ include: “[r]ape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity.”: Article 7(1)(g). Enslavement is also listed as a constituent act of crimes against humanity. The ICC Statute provides that ‘enslavement’ means “the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children.”: Article 7(2)(c). The key elements of the crime against humanity of sexual slavery (once again requiring commission as part of a widespread or systematic attack directed against the civilian population) are identified as including the definition of enslavement set out above including the reference to trafficking and “caus[ing] such person or persons to engage in one or more acts of a sexual nature.”: International Criminal Court [ICC], *Report of the Preparatory Commission for the International Criminal Court, Addendum, Part II, Finalized draft text of the Elements of Crimes*, art. 7(1)(g)-2, PCNICC/2000/1/Add.2, Nov. 2, 2000.

⁶⁸ *Convention Concerning Forced or Compulsory Labour* (ILO No. 29), Jun. 28, 1930, 39 UNTS 55, entered into force May 1, 1932.

⁶⁹ *Convention Concerning the Abolition of Forced Labour* (ILO No. 105), Jun. 25, 1957, 320 UNTS 291, entered into force Jan. 17, 1959.

⁷⁰ *Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour* (ILO No. 182), Jun. 17, 1999, 2133 UNTS 161, entered into force Nov. 19, 2000.

⁷¹ *Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention of 1926*, Sept. 25, 1926, 60 LNTS 253, entered into force Mar. 9, 1927.

⁷² *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, Sept. 7, 1956, 266 UNTS 3, entered into force Apr. 30, 1957.

Another important and recent treaty in the area of crime control and criminal justice is the UNCAC, which entered into force in 2005. Its substantive provisions are considered in more detail in the following Chapters.

The complex web of criminal law / crime control instruments that have been developed at the bilateral and regional levels to address specific issues such as mutual legal assistance and extradition are also considered in the following Chapters.

1.2.2 Non-treaty instruments

Not all international instruments relevant to trafficking (or indeed to the specific matter of international cooperation) are legally enforceable treaties. Declarations, codes, memoranda of understanding, ‘agreements’, UN resolutions, and ASEAN (non-treaty) instruments and decisions are all important sources of guidance in determining the substantive content of treaty-based rights and obligations. As ‘soft law’ these instruments can also help to contribute to the development of new legal norms and standards.⁷³

In the area of trafficking, the most significant non-legal international instrument is the 2002 *United Nations Recommended Principles and Guidelines on Human Rights and Human Trafficking* (UN Trafficking Principles and Guidelines).⁷⁴ Many aspects of the UN Trafficking Principles and Guidelines are based on international treaty law. However, parts of this document go further: using accepted international legal standards to develop more specific and detailed guidance for States in areas such as legislation, criminal justice responses, international cooperation, victim detention and victim protection and support.⁷⁵ Other relevant policy guidance developed by international agencies include the *Guidelines on the Protection of Child Victims of Trafficking* (UNICEF Trafficking Guidelines) that provide additional guidance on the specific issue of child victims;⁷⁶ and the *Guidelines on International Protection: The application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked*.⁷⁷

Important quasi-legal and non-legal instruments have also been developed at the regional level. As with their international equivalents, these instruments often reiterate and expand existing legal principles and sometimes go beyond what has been formally agreed between States. In the latter case however, they can help to ascertain the direction in which international law is moving with respect to a particular issue.

Within South East Asia, relevant ‘soft law’ instruments include the 2004 ASEAN Declaration Against Trafficking in Persons; a *Memorandum of Understanding on Cooperation against Trafficking in Persons in the Greater Mekong Sub-region* adopted in 2004 by the six States of that region;⁷⁸ the 2007 *ASEAN Practitioner Guidelines on Effective Criminal Justice Responses to Trafficking in Persons*⁷⁹ (ASEAN Practitioner Guidelines); and the 2007 Global Initiative to Fight Trafficking (GIFT) *Recommendations on an Effective Criminal Justice Response to Trafficking in Persons*.⁸⁰ Finally, bilateral ‘soft law’ instruments on trafficking can provide another source

⁷³ For an analysis of ‘soft law’ in the context of trafficking, including its contribution to normative development, see Gallagher, *The International Law of Human Trafficking*, Chapter 2.

⁷⁴ United Nations High Commissioner for Human Rights, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, delivered to the Economic and Social Council, UN Doc. E/2002/68/Add.1, May 20, 2002 [hereinafter *UN Trafficking Principles and Guidelines*].

⁷⁵ For a detailed analysis of this instrument, including those aspects that relate most directly to international cooperation, see OHCHR, *Commentary to the Trafficking Principles and Guidelines*.

⁷⁶ See further, UNICEF, *Guidelines on the Protection of Child Victims of Trafficking: UNICEF Technical Notes*, Sept. 2006 (UNICEF, 2006).

⁷⁷ United Nations High Commissioner for Refugees [UNHCR], *Guidelines on International Protection: The application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the status of refugees to victims of trafficking and persons at risk of being trafficked*, UN Doc. HCR/GIP/06/07 (7 April 2006). Ryszard Piotrowicz, *The UNHCR's Guidelines on Human Trafficking*, 20 *International Journal of Refugee Law* 242 (2008).

⁷⁸ Cambodia, China, Lao PDR, Myanmar, Thailand and Vietnam. *Memorandum of Understanding on Cooperation against Trafficking in Persons in the Greater Mekong Sub-Region*, Oct. 29, 2004.

⁷⁹ ASEAN, *Criminal Justice Responses to Trafficking in Persons: ASEAN Practitioner Guidelines*, June 2007 [hereinafter *ASEAN Practitioner Guidelines*].

⁸⁰ United Nations Global Initiative to Fight Trafficking – East Asia and the Pacific, *Recommendations on an Effective Criminal Justice Response to Trafficking in Persons*, Oct. 4, 2007.

of information and insight into accepted or evolving legal standards. One example of such an agreement is the Memorandum of Understanding concluded between Thailand and Cambodia on Bilateral Cooperation for Eliminating Trafficking in Children and Women and Assisting Victims of Trafficking.⁸¹

1.3 How different sources of law and authority are used in this Handbook

This Handbook seeks to explore the different legal and policy aspects of international cooperation in the specific context of trafficking in persons. In identifying obligations, trends and good practices, it generally follows the accepted hierarchy of sources whereby treaties are considered first. The treaties that are most relevant to the subject of the handbook include UNTOC, the UN Trafficking Protocol and the ASEAN MLAT. International human rights treaties are an important additional resource in respect of identifying obligations that may affect the practice of international cooperation. The ICCPR, which identifies the right to a fair trial and the elements of a fair trial, is especially relevant in this regard as is the Convention against Torture.

Non-treaty materials such as bilateral instruments, guidelines, resolutions of UN bodies and ASEAN, and codes and standards issued by international organisations including ASEAN are referred to frequently throughout the Handbook. As noted above, while these materials are not sources of direct legal obligation, they nevertheless have an extremely important role to play in fleshing out the substantive content of legal norms and in pointing the direction of accepted practice.

⁸¹ *Memorandum of Understanding between the Royal Government of the Kingdom of Cambodia and the Royal Government of the Kingdom of Thailand on Bilateral Cooperation for Eliminating Trafficking in Children and Women and Assisting Victims of Trafficking*, Cambodia-Thailand, May 31, 2003.

Chapter 2:

Introduction to International Cooperation in the Investigation and Prosecution of Trafficking in Persons

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Overview of this Chapter:

The purpose of this Chapter is to introduce practitioners to the basic concepts of international cooperation. This Chapter includes information about:

- the key tools of international cooperation: informal cooperation, mutual legal assistance and extradition;
- the legal framework that is relevant to understanding how international cooperation in criminal matters can be facilitated.

2.1 Introduction: the importance of international cooperation

It is possible for all elements of the crime of trafficking to take place within national borders and for offenders, victims and evidence to be found within the same State. However, trafficking cases are typically much more complicated than this. Alleged offenders, victims and evidence can be located in two or more States. The same fact situation can justify and give rise to criminal investigations and prosecutions in multiple jurisdictions. Informal cooperation mechanisms such as police-to-police cooperation, as well as legal tools such as extradition and mutual legal assistance, are important means of eliminating safe havens for traffickers and thereby ending the current high levels of impunity enjoyed by traffickers.

The importance of international cooperation has been recognized at the international level as well as at the regional level, including within ASEAN. Examples of this recognition include the following:

- international cooperation to prevent and combat transnational organized crime is a primary aim of the UNTOC;⁸²
- one of three basic purposes of the UN Trafficking Protocol is to promote international cooperation to prevent, suppress and punish trafficking in persons;⁸³
- other key international instruments, including UNCAC, highlight the central importance of international cooperation as a critical means of eliminating safe havens for criminals;⁸⁴
- ASEAN Member States have developed a strong legal framework that regulates the provision of mutual assistance through the ASEAN MLAT;
- the *ASEAN Declaration on Transnational Crime* and the *ASEAN Declaration Against Trafficking in Persons* both affirm that regional and international cooperation is vital to preventing and combating trafficking in persons.⁸⁵ This is further emphasised in the *UN Trafficking Principles and Guidelines*;⁸⁶
- the *ASEAN Practitioner Guidelines* affirm the practical importance of strong cooperation in ending impunity for traffickers and securing justice for victims.⁸⁷

2.2 The issue of jurisdiction in trafficking in persons cases⁸⁸

The rules related to the exercise of criminal jurisdiction are an important aspect of international cooperation. These rules identify the circumstances under which a State may, or is required to assert its criminal justice authority over a particular situation. The application of these rules to trafficking crimes may be more complicated than for many other crimes because of the fact that trafficking often involves the commission of multiple offences in two or more States.

The international legal rules on jurisdiction in trafficking situations are set out in the major international and regional treaties. Their objective is to reduce or eliminate jurisdictional safe havens for traffickers by ensuring that all parts of the crime can be punished wherever they took place.⁸⁹ Another concern is to ensure that coordination mechanisms are effective in cases where more than one State may have grounds to assert jurisdiction.⁹⁰ The main rules extracted from the major trafficking treaties are as follows:

- A State is *required* to establish jurisdiction over trafficking offences when the offence is committed in

⁸² UNTOC, art. 1.

⁸³ UN Trafficking Protocol, art. 2.

⁸⁴ UNCAC, art.1.

⁸⁵ Through the ASEAN, *Declaration on Transnational Crime*, Dec. 20, 1997, ASEAN Member States have undertaken to, amongst other things, strengthen their commitment to cooperate at the regional level in combating transnational crime, including trafficking in persons: Articles 1, 8; and to hold discussions with a view to signing mutual legal assistance agreements: Article 3. Through the ASEAN, *Declaration Against Trafficking in Persons*, ASEAN Member States have declared their commitment to, amongst other things, take measures to strengthen regional and international cooperation to prevent and combat trafficking in persons: Article 8.

⁸⁶ UN Trafficking Principles and Guidelines, Guideline 11 on Cooperation and coordination between States and regions.

⁸⁷ See further, *ASEAN Practitioner Guidelines*, Part Two – International Operational and Legal / Judicial Co-operation.

⁸⁸ This section draws on the analysis of jurisdictional issues relevant to trafficking set out in Gallagher, *The International Law of Human Trafficking*, Chapter 7.

⁸⁹ UNODC, *Legislative Guides to the Organized Crime Convention and its Protocols*, p. 104, para. 210.

⁹⁰ UNODC, *Legislative Guides to the Organized Crime Convention and its Protocols*, p. 104, para. 210.

the territory of that State or on board a vessel flying its flag or on an aircraft registered under its laws⁹¹ (the territoriality principle).

- A State *may* exercise jurisdiction over trafficking offences when such offences are committed outside the territorial jurisdiction of that State against one of its nationals⁹² (the principle of passive personality).
- A State *may* exercise jurisdiction over trafficking offences when such offences are committed outside the territorial jurisdiction of that State by one of its nationals⁹³ (the principle of nationality).
- A State *may* exercise jurisdiction over trafficking offences when such offences are committed outside the territorial jurisdiction of that State but are linked to serious crimes and money laundering planned to be conducted in the territory of that State.⁹⁴
- A State *shall* establish jurisdiction over trafficking offences when the offender is present in its territory and the State does not extradite the offender solely on grounds of nationality⁹⁵ (the principle of 'extradite or prosecute'⁹⁶).

The mandatory and optional schema set up under UNTOC regarding territorial and personality jurisdiction are based on what is generally allowable under different legal systems. Territorial jurisdiction is universally recognized. However, in common law States passive personality jurisdiction is generally not allowed, and therefore it was made optional under UNTOC.

Related treaties, such as those dealing with exploitation of children and trafficking in children for adoption generally reiterate these rules.⁹⁷ The importance of eliminating jurisdictional gaps has also been emphasised by intergovernmental organisations and other policy-making bodies.⁹⁸

As noted above, it is possible that more than one State will be in a position to assert jurisdiction over a particular trafficking case or even in respect of the same offenders. Consultation and cooperation are important from the outset in order to coordinate actions, and more specifically, to determine the most appropriate jurisdiction within which to prosecute a particular case.⁹⁹ In some cases, it will be most effective for a single State to prosecute all offenders, receiving support and assistance from other involved States. In other cases it may be preferable for one State to prosecute some participants, while one or more other States pursue the remainder. Issues such as nationality, the location of witnesses, the applicable legal framework, resource availability, and location of offender when apprehended, will need to be taken into consideration.¹⁰⁰ UNTOC provides that where several jurisdictions are involved, States Parties are to consider transferring the case to the best forum in the "interests of the proper administration of justice" and "with a view to concentrating the prosecution."¹⁰¹

⁹¹ UNTOC, art. 15(1); *European Trafficking Convention*, art. 31(1)(a)-(c).

⁹² UNTOC, art. 15(2)(a); *European Trafficking Convention*, art. 31(1)(e).

⁹³ UNTOC, art. 15(2)(b); *European Trafficking Convention*, art. 31(1)(d).

⁹⁴ UNTOC, art. 15(2)(c).

⁹⁵ UNTOC, arts. 15(3), 15(4); *European Trafficking Convention*, art. 31(3). Note that under the terms of UNTOC, if the State refuses extradition on grounds other than nationality, it *may* establish jurisdiction: Article 15(4). See also, Article 16(4) which recognizes and preserves the right of States to refuse extradition on certain grounds not related to nationality.

⁹⁶ For a full discussion of this rule, see Chapter 5, below.

⁹⁷ See, for example, *CRC Optional Protocol on the Sale of Children*, Article 4, which states that jurisdiction may be exercised over those accused of sale of children, child prostitution or child pornography by the territorial state; the state of registration of ship and aircraft where offences occurred; where the victim is national of or has habitual residence in the state; where the alleged perpetrator is a national; and where the alleged offender is present within the territory.

⁹⁸ For example, *ASEAN Practitioner Guidelines*, Part 2.B.2, note that: "where possible, extra-territorial provisions should be attached to trafficking in persons laws and related statutes as a further measure to remove safe havens for traffickers."

⁹⁹ Such consultation is required under UNTOC, Article 15(5) and the *European Trafficking Convention*, Article 31(4).

¹⁰⁰ Martin Polaine, *Improving Procedures of Mutual Legal Assistance and the Repatriation of Proceeds of Corruption*, in *Controlling Corruption in Asia and the Pacific: Papers Presented at the 4th Regional Anti-Corruption Conference of the Asian Development Bank [ADB] / Organisation for Economic Co-operation and Development [OECD] Anti-Corruption Initiative for Asia and the Pacific* 164, p. 167 (Asian Development Bank, 2004).

¹⁰¹ UNTOC, art. 21. The *ASEAN Practitioner Guidelines*, Part 2.C.3, reiterate this requirement: "In appropriate transnational cases where traffickers could be prosecuted in two or more States, alternative means at the international, regional or bilateral levels could be considered to assess and coordinate criminal proceedings and, where appropriate, consider the transfer of criminal proceedings to the most appropriate State in the interests of the proper administration of justice."

2.3 Forms of international cooperation relevant to trafficking in persons cases

There are various forms of international cooperation. These include informal processes such as police-to-police cooperation and formal processes such as mutual legal assistance and extradition. Each of these is relevant to cooperation in trafficking in persons cases and is summarized briefly below. A more extensive description and analysis of these various cooperation tools is provided in Chapters 3 to 5 of this Handbook.

2.3.1 Informal cooperation including police-to-police cooperation

The term ‘informal cooperation’ when used in this context refers to the exchange of information that occurs directly between law enforcement and regulatory agencies with their foreign counterparts. It is sometimes also referred to as ‘police-to-police’ and ‘agency-to-agency’ cooperation.

Informal cooperation is a separate, less rule-bound international crime cooperation tool, which is available outside the formal mutual assistance regime. Informal cooperation enables law enforcement and regulatory agencies (such as taxation and revenue authorities; companies and financial service regulators) to directly share information and intelligence with their foreign counterparts without any requirement to make a formal mutual assistance request. In this sense, informal cooperation complements mutual assistance regimes. This international cooperation tool can be used prior to an investigation becoming official and prior to the commencement of court proceedings, for example to conduct surveillance or take voluntary witness statements. In circumstances where coercive measures are not required, it is usually faster, cheaper and easier to obtain information or intelligence on an informal basis than via formal mutual assistance channels.

In the ASEAN region, ASEANAPOL, a regular meeting of Chiefs of Police of ASEAN Member States, provides an example of an arrangement for informal cooperation on matters that would include trafficking in persons. The Heads of Specialist Trafficking Units (HSU) process, which involves all ASEAN Member States as either members or observers, is another, even more relevant example.¹⁰² Various international instruments provide for ‘informal cooperation’ and the sharing of information between agencies without formal ‘letters of request’ in trafficking cases. These are considered further throughout this Handbook.

2.3.2 Formal cooperation: mutual legal assistance

Mutual legal assistance, which is sometimes called mutual assistance or judicial assistance is the process States use to request other States to provide information and evidence for the purpose of an investigation or prosecution. Mutual legal assistance is a formal cooperation tool, generally involving one State asking another State to exercise coercive powers on its behalf, and / or taking steps to obtain evidence that must be admissible in a criminal trial. For these reasons, it operates under different and much stricter rules than those that apply to less formal agency-to-agency or police-to-police cooperation.

Common types of mutual legal assistance include: taking evidence or statements from persons; locating and identifying witnesses and suspects; effecting service of judicial documents; executing searches and seizures; freezing assets; providing originals or certified copies of relevant documents and records; identifying, tracing, seizing and recovering proceeds of crime; facilitating the voluntary appearance of persons in the Requesting State; transfer of prisoners to give evidence; and video conferencing / recording.

2.3.3 Formal cooperation: extradition

The term ‘extradition’ refers to the process whereby one State (the Requesting State) asks another State (the Requested State) to return an individual to face prosecution or to serve a sentence in the Requesting State. Because of the nature of the trafficking in persons process, suspects wanted for prosecution in one State will

¹⁰² For an overview of law enforcement cooperation mechanisms relevant to trafficking, including the ASEAN Heads of Specialist Trafficking Units Process, see Gallagher and Holmes, *Developing an Effective Criminal Justice Response to Human Trafficking*, pp. 334-336.

often be present in another State. This may be because they are nationals of that other State or because they have deliberately taken steps to avoid prosecution or sentencing by fleeing to another State. Extradition will therefore sometimes be essential for the successful prosecution of trafficking cases.

Extradition is based on the principle that a person located in one State who is credibly accused of committing serious crimes that are able to be tried in another State, should be surrendered to that other State to answer for those alleged crimes.¹⁰³ However, the rules around extradition also seek to impose safeguards in order to ensure that the individual whose extradition is being sought will be protected from surrender in circumstances where the person would suffer injustice or oppression.¹⁰⁴ In this context, it is important to note that the extradition process is not one in which guilt or innocence is determined. It is the courts of the Requesting State that will ultimately make that determination.

2.3.4 The interdependence of cooperation tools

The various informal and formal means of international cooperation in criminal cases are interdependent. Investigators, prosecutors and Central Authority lawyers should consider their complementary roles and uses, for example:

- informal assistance can lay the foundation for subsequent formal mutual legal assistance requests;
- formal mutual legal assistance and informal agency-to-agency assistance can occur at the same time;
- mutual legal assistance often occurs after direct agency-to-agency cooperation;
- mutual legal assistance can complement extradition where both the alleged offender and the evidence of a crime are in a foreign State;
- mutual legal assistance can be used to obtain evidence to bolster a case where it is possible that a request for extradition will be made;
- in situations where a Requested State refuses to extradite a person (for example, because that person is a national of the Requested State), the Requesting State may subsequently provide mutual legal assistance support to the Requested State to enable it to investigate or prosecute the person sought.

Cooperation is as much of a way of thinking and working as it is a collection of 'tools' or processes. States that are committed to cooperation will generally find a myriad of opportunities, mechanisms and resources to help each other in the investigation and prosecution of trafficking offences.

2.4 The legal basis for international cooperation

It is essential to determine the legal basis for international cooperation. By establishing the legal basis of an action or intended action, the criminal justice official and his or her agency can be sure that authority is being exercised properly and that the results of the cooperation can be used in the way in which they are intended. Verification of legal basis will also usually provide important information on the scope and nature of the relevant cooperation tool.

2.4.1 Treaty-based cooperation

States and groups of States working through intergovernmental organisations have created a complex network of bilateral and multilateral treaties that provide a legal basis for international cooperation. There are practical and strategic advantages to treaty-based cooperation. First, a treaty obliges a Requested State to cooperate under international law. Provided the request comes within the terms of the treaty,

¹⁰³ See generally Clive Nicholls QC, Clare Montgomery QC, and Julian B. Knowles, *The Law of Extradition and Mutual Assistance* (Oxford University Press, Second Edition 2007) [hereinafter Nicholls et. al, *The Law of Extradition and Mutual Assistance*].

¹⁰⁴ *Knowles v Government of the United States of America* [2006] UKPC 38, para. 12, cited in Nicholls et. al, *The Law of Extradition and Mutual Assistance*, p. 3.

such cooperation is not optional. Second, treaties usually contain detailed provisions on the procedure and parameters of cooperation, thereby providing greater certainty and clarity than most non-treaty based arrangements. Finally, treaties may also provide for forms of cooperation that are otherwise unavailable.¹⁰⁵

Bilateral treaties

States often negotiate bilateral extradition and / or mutual legal assistance treaties. Bilateral treaties can be very useful because they can be tailored to precisely reflect the legal systems and specific needs of the two States. In comparison with multilateral agreements, bilateral treaties are easier to amend to meet future requirements.¹⁰⁶ However, negotiating bilateral treaties can be time-consuming and resource-intensive.¹⁰⁷ A State may need to conclude many such treaties in order to secure sufficient coverage of its potential interests.

In response to the emergence of large numbers of bilateral treaties and the need to promote consistency and quality in drafting, the UN has developed model treaties on mutual legal assistance and extradition. Their purpose is to promote the development of such treaties and to provide guidance in their drafting. The model treaties are accompanied by an implementation manual which provides important background and guidance on a number of key issues that commonly arise.¹⁰⁸

Multilateral treaties

Multilateral treaties have always been important in the context of international legal cooperation. However, over the past decade there has been an increasing emphasis, by the international community, on developing multilateral frameworks of cooperation in relation to issues of global concern. Examples include terrorism, drug trafficking, corruption, trade, environmental protection and transnational crime. Trafficking in persons falls within several of these issue-areas and is therefore subject to the relevant cooperation regime. As noted in Chapter 1, trafficking has also been the focus of specialised legal agreements. The major international and regional treaties creating obligations for States with respect to international cooperation on the specific issue of trafficking in persons are described briefly below.

United Nations Convention against Transnational Organized Crime

The UNTOC is the main international instrument in the fight against transnational organized crime. It is supplemented by three Protocols, which target specific areas and manifestations of organized crime. The UN Trafficking Protocol is of central interest to the subject of this Handbook and considered further below. States must become party to the Convention itself before they can become party to any of the Protocols.

UNTOC represents a major step forward in the fight against transnational organized crime: a strong acknowledgement of the need to foster and enhance close international cooperation in order to tackle problems of transnational organized crime. States Parties to the Convention commit themselves to taking a series of measures against transnational organized crime, including the creation of domestic criminal offences: participation in an organized criminal group; money laundering; and corruption and obstruction of justice. States Parties also commit to new and detailed frameworks for extradition, mutual legal assistance and law enforcement cooperation. The following international cooperation issues are covered by UNTOC:

- international cooperation for the purposes of confiscation;¹⁰⁹
- jurisdiction;¹¹⁰

¹⁰⁵ ADB / OECD Anti-Corruption Initiative for Asia and the Pacific, *Mutual Legal Assistance, Extradition and Recovery of Proceeds of Corruption in Asia and the Pacific: Frameworks and Practices in 27 Asian and Pacific Jurisdictions*, p. 27, (ADB / OECD, 2007) [hereinafter ADB / OECD, *MLA, Extradition and Recovery of Proceeds of Corruption in Asia and the Pacific*].

¹⁰⁶ ADB / OECD, *MLA, Extradition and Recovery of Proceeds of Corruption in Asia and the Pacific*, p. 28.

¹⁰⁷ ADB / OECD, *MLA, Extradition and Recovery of Proceeds of Corruption in Asia and the Pacific*, p. 28.

¹⁰⁸ UNODC, *Revised Manuals on the Model Treaty on Extradition and the Model Treaty on Mutual Assistance*.

¹⁰⁹ *UNTOC*, art. 13.

¹¹⁰ *UNTOC*, art. 15.

- extradition;¹¹¹
- transfer of sentenced persons;¹¹²
- mutual legal assistance;¹¹³
- joint investigations;¹¹⁴
- special investigative techniques;¹¹⁵
- transfer of criminal proceedings;¹¹⁶
- establishment of criminal record;¹¹⁷
- law enforcement cooperation;¹¹⁸ and
- collection, exchange and analysis of information on the nature of organized crime.¹¹⁹

UNTOC creates binding obligations between States Parties to cooperate on a number of issues, including mutual legal assistance and extradition in relation to offences covered by the Convention and its Protocols. It does so by acting as a treaty between States Parties, while also leaving room for the continued operation of existing bilateral treaties and arrangements.

UN Trafficking Protocol

The UN Trafficking Protocol establishes a framework within which States can take legislative, policy and practical measures to assist victims of trafficking, apprehend, prosecute and penalize those responsible for trafficking, and prevent future trafficking. The Protocol also establishes the parameters of judicial cooperation and exchanges of information among States.

It is important to note that the UN Trafficking Protocol is a product of its parent instrument, the UNTOC. As noted above, States must first become party to the Convention before they can become party to the Protocol. Provisions of the Convention, including its extensive provisions on international cooperation, apply, *mutatis mutandis*, to the Protocol. For example, the extradition provisions of the Convention can be applied to trafficking in persons cases.¹²⁰

The UN Trafficking Protocol details a number of forms of cooperation that are considered particularly appropriate to trafficking in persons cases. These include:

- informal cooperation and information exchange between law enforcement, immigration and other relevant authorities for a range of purposes including identification of both victims and perpetrators;¹²¹
- cooperation to help establish information and insights into the means and methods used by organized criminal groups for the purposes of trafficking;¹²²
- cooperation among border control agencies including through establishment and maintenance of direct channels of communication;¹²³

¹¹¹ UNTOC, art. 16.

¹¹² UNTOC, art. 17.

¹¹³ UNTOC, art. 18.

¹¹⁴ UNTOC, art. 19.

¹¹⁵ UNTOC, art. 20.

¹¹⁶ UNTOC, art. 21.

¹¹⁷ UNTOC, art. 22.

¹¹⁸ UNTOC, art. 27.

¹¹⁹ UNTOC, art. 28.

¹²⁰ UNTOC, art. 16. See further, Chapter 5, below.

¹²¹ UN Trafficking Protocol, art. 10(1)(a).

¹²² UN Trafficking Protocol, art. 10(1)(c).

¹²³ UN Trafficking Protocol, art. 11(6).

- cooperation in the verification of travel and identity documents;¹²⁴ and
- (through UNTOC) cooperation to facilitate confiscation of proceeds of crime, property, equipment or other instrumentalities of crime.¹²⁵

United Nations Convention against Corruption

As noted in Chapter 1, trafficking is directly linked to corruption. To that extent the international cooperation regime that has been established around corruption through the UNCAC is relevant to trafficking. The UNCAC seeks to promote and strengthen measures to combat public sector and private corruption at both domestic and international levels.¹²⁶ It represents a broad international consensus on what is required with respect to prevention and criminalization of corruption as well as international cooperation and asset recovery. It applies to several forms of corruption as well as complicity in corruption. States Parties are required to establish specific corruption-related offences including: bribery of domestic and foreign public officials; embezzlement of funds; abuse of functions; trading in influence; and the concealment and ‘laundering’ of the proceeds of offences established in accordance with the UNCAC.¹²⁷ States Parties are also required to establish crimes of obstruction of justice in relation to proceedings for offences under the UNCAC,¹²⁸ and are required to put in place a range of preventive measures directed at both the public and private sectors.¹²⁹

UNCAC aims to promote strong international cooperation. States Parties are required to cooperate with one another in every aspect of the fight against corruption including prevention, investigation and prosecution of offenders. States are bound to render specific forms of mutual legal assistance in gathering and transferring evidence for use in prosecutions, to extradite offenders and to support the tracing, seizure and confiscation of the assets of corruption.¹³⁰

UNCAC builds on and reinforces a number of regional agreements on corruption including the African Union *Convention on Preventing and Combating Corruption*;¹³¹ the Organisation of American States *Inter-American Convention against Corruption*;¹³² the Council of Europe *Criminal Law Convention on Corruption*¹³³ (criminalizing acts of corruption); and the Council of Europe *Civil Law Convention on Corruption*¹³⁴ (providing for compensation for victims of corruption). In addition, the UNCAC and the OECD Anti-Bribery Convention mutually support and reinforce one another on the issue of the bribery of foreign public officials in international business transactions.

Treaty on Mutual Legal Assistance in Criminal Matters among Like-Minded ASEAN Member Countries

The ASEAN MLAT was developed to facilitate and enhance efforts to combat transnational crime in the ASEAN region. It provides a process by which States in the ASEAN region can request and give assistance to each other in the collection of evidence for criminal investigations and criminal proceedings. The Treaty is also intended to facilitate the implementation of ASEAN Member States’ obligations under mutual legal assistance in criminal matters regimes that have been established through international instruments such as UNTOC, UNCAC and the UN Counter-Terrorism Conventions.

¹²⁴ *UN Trafficking Protocol*, art. 13.

¹²⁵ *UNTOC*, art. 13.

¹²⁶ For a more detailed overview of the Convention and the provisions summarised here, see Rajesh Babu Ravindran, *The United Nations Convention Against Corruption: A Critical Overview* (Working Paper Series, March 1, 2006).

¹²⁷ *UNCAC*, arts. 16-19, 23, 24.

¹²⁸ Obstruction of justice is defined as the use of corrupt or coercive means to interfere with potential witnesses or to interfere with the actions of judicial and law enforcement officials: *UNCAC*, Article 25. Note that *UNTOC* Article 23 requires criminalisation of the obstruction of justice in a context that would directly cover proceedings related to trafficking in persons cases.

¹²⁹ *UNCAC*, Chapter II.

¹³⁰ *UNCAC*, Chapter IV, especially arts. 43, 44.

¹³¹ *African Union Convention on Preventing and Combating Corruption*, Jul. 11, 2003, Decision Assembly/at/Dec.22 (II) of the 2nd Ordinary Session of the Assembly of the Union, entered into force Aug. 5, 2006.

¹³² *Organisation of American States Inter-American Convention against Corruption*, Mar. 29, 1996, 3rd Plenary Session, entered into force Jun. 3, 1997.

¹³³ *Council of Europe Criminal Law Convention on Corruption*, Jan. 27, 1999, ETS No. 173, entered into force Jul. 1, 2002.

¹³⁴ *Council of Europe Civil Law Convention on Corruption*, Nov. 4, 1999, ETS No. 174, entered into force Nov. 1, 2003.

The ASEAN MLAT is intended to operate in conjunction with existing mutual legal assistance mechanisms, both formal and informal, and does not detract in any way from existing co-operative mechanisms such as that provided through the International Criminal Police Organisation (INTERPOL). It is further intended to enhance the existing cordial working relationships among the security and law enforcement agencies in the region by providing them with an additional and effective tool to combat transnational crime.

States Parties to the ASEAN MLAT are required to render “the widest possible measure of mutual legal assistance in criminal matters”¹³⁵ to other States Parties, in a form that is useable and admissible in the Requesting State. Other important features of the treaty include the following:

- except in situations of urgency, requests to and from the States Parties are to be channelled through a designated Central Authority in each State Party to facilitate the orderly, effective and timely execution of requests for mutual legal assistance in criminal matters;¹³⁶
- requests are to be executed in accordance with the domestic laws of the Requested State Party with due consideration for any specific procedural requirements of the Requesting State Party, to the extent that such procedural requirements are permitted by the domestic law of the Requested State Party;¹³⁷
- the requirements for the form and content of requests, the grounds for the grant and refusal of requests, and the certification and authentication of evidence are standardized for all States Parties and are as prescribed in the Treaty;¹³⁸
- the Treaty does not prevent the States Parties from providing assistance to each other pursuant to other treaties, arrangements or the provisions of their national laws.¹³⁹

Many of the provisions of the ASEAN MLAT are similar to those set out in the UNTOC. The ASEAN MLAT does not, however, include or provide a legal basis for extradition, transfer of persons in custody to serve sentences, or transfer of proceedings in criminal matters.¹⁴⁰

2.4.2 Non-treaty-based arrangements

International legal cooperation does not necessarily need to be based on treaties. By dispensing with the requirement for a treaty, States can speed up the international cooperation process and tailor it to the needs and requirements of individual cases. The following are examples of frameworks or mechanisms that can provide both authority and structure for legal cooperation between States.

Cooperation based on domestic law

Many States have passed national mutual legal assistance laws and / or national extradition laws that provide a basis for that State to cooperate with other States, even in situations where there is no pre-existing treaty or other arrangement with that other State. The application of these laws will vary; the laws of some States designate a list of specified foreign States to whom they will provide assistance; the laws of some other States provide that assistance can be provided to any State, on a case by case basis, provided that sufficient assurances are given of future reciprocal cooperation. Domestic legislation usually prescribes the procedure for sending, receiving, considering and executing requests and any mandatory or discretionary preconditions to the provision of that assistance.

It has been noted that international cooperation based upon domestic law can be faster and less expensive than treaty-based assistance.¹⁴¹ However, the domestic law of one State does not create binding relationships between it and another State in the same way that two States Parties to a treaty are bound to cooperate with each other. A State therefore cannot use its domestic laws to influence or shape the behaviour of other States.

¹³⁵ ASEAN MLAT, art. 1.

¹³⁶ ASEAN MLAT, arts. 4, 5.

¹³⁷ ASEAN MLAT, art. 7.

¹³⁸ ASEAN MLAT, arts. 3, 5, 6.

¹³⁹ ASEAN MLAT, art. 23.

¹⁴⁰ ASEAN MLAT, art. 2.

¹⁴¹ ADB / OECD, *MLA, Extradition and Recovery of Proceeds of Corruption in Asia and the Pacific*, p. 32.

Cooperation based on reciprocity

Reciprocity is a customary principle with a long and distinguished history in international law and diplomacy. It is essentially an assurance by the State making a request for assistance that it will comply with the same type of request and provide similar cooperation to the Requested State in a similar case in the future. Reciprocity is one expression of the broader customary principle of ‘comity’; the idea that actions and practices can be based on considerations of good will and mutuality rather than strict application and enforcement of rules. Cooperation based on reciprocity is considered further in Chapters 3 and 5, below.

Judicial assistance (letters rogatory)

A letter rogatory is a request for assistance by a judge in one State to a judge in another State. Like the principle of reciprocity, such judicial assistance is founded upon customary principles of courtesy and good will (‘comity’) between nations.¹⁴² It is one of the oldest means of formal international cooperation and can be useful if there is no treaty or other legal basis for cooperation. Note however, that letters rogatory are not always an informal mechanism: they can also be used in treaty-based arrangements.

Letters rogatory originate from civil law systems and enable judges in different jurisdictions to assist each other. Judges may also issue letters rogatory on behalf of a police officer or prosecutor. In French law the term ‘commission rogatoire’ is defined as “the official document by which a magistrate who has the power of jurisdiction entrusts another magistrate who has the same power, or a police officer, to carry out or to have carried out one or more specific enquiries in connection with preliminary referral to the court for which the delegating magistrate is acting.”¹⁴³

It has been noted that there are some significant drawbacks to letters rogatory, when compared to other tools of international cooperation.¹⁴⁴ The scope of assistance available is generally much more restricted, often limited to service of documents or obtaining testimony and documents from a witness. This limitation is even more acute if the Requested State is a common law State where judges are generally not involved in an investigation. Judicial assistance may also be unpredictable and time-consuming because it will likely involve applications to a court and / or transmission through diplomatic channels. Importantly, unlike a request under a treaty, a Requested State has no obligation to assist on the basis of a letter rogatory.

2.5 Sovereignty, safeguards and human rights

While recognizing the need for international cooperation to counter serious crimes such as trafficking in persons, international law upholds the sovereignty and territorial integrity of States. This is an important principle to keep in mind when considering permissible forms of cooperation, particularly in relation to law enforcement. For example, under current rules of international law, one State has no right to undertake law enforcement action in the territory of another State without the prior consent of that State. These principles are clearly re-stated in the major international cooperation treaties.¹⁴⁵ The exertion of pressure in a manner inconsistent with international law in order to obtain from a party “the subordination of the exercise of its sovereign rights” is also prohibited.¹⁴⁶

¹⁴² ADB / OECD, *MLA, Extradition and Recovery of Proceeds of Corruption in Asia and the Pacific*, p. 33.

¹⁴³ International Association of Prosecutors, *Mutual Legal Assistance (Best Practice Series No. 4)*, Chapter 1, p. 5 (International Association of Prosecutors, 2004).

¹⁴⁴ ADB / OECD, *MLA, Extradition and Recovery of Proceeds of Corruption in Asia and the Pacific*, p. 34.

¹⁴⁵ See for example, *ASEAN MLAT*, Article 2(2), which provides that “Nothing in this Treaty entitles a Party to undertake in the territory of another Party the exercise or jurisdiction and performance of functions that are reserved exclusively for the authorities of that other Party by its domestic laws.” See also, *UNTOC*, art. 4; *UNCAC*, art. 4.

¹⁴⁶ Matti Joutsen, *International Cooperation against Transnational Organized Crime: Extradition and Mutual Legal Assistance in Criminal Matters*, in 119th International Training Course Visiting Experts Papers: Tokyo, Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders [UNAFEI], Resource Material Series No. 59, pp. 363-393, 365 (2002), citing the Commentary to the *United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, 1988. See also, Manfred Nowak, *U.N. Covenant on Civil and Political Rights, CCPR Commentary* especially pp. 302-368 (NP Engel Publishers, 2nd rev. ed., 2005) [hereinafter Nowak, *U.N. Covenant on Civil and Political Rights*].

The boundaries of State sovereignty are not limitless. State action is subject to certain restraints imposed by international law, including human rights obligations and procedural guarantees set out in bilateral and multilateral treaties. These restraints are intended to protect all individuals from oppression and injustice, including those who are the subject of (or otherwise implicated in) requests for international cooperation.

For example, liberty of the person is one of the oldest basic rights. Under the ICCPR, all individuals have a right to liberty and security of the person. This is not an absolute right, as States are permitted, for example, to restrict individual liberty through mechanisms such as arrest, detention and imprisonment. However, international human rights law provides that in every case, any such restriction of liberty is only justifiable if the restriction is both lawful and not arbitrary. A leading expert has described this requirement as follows:

Cases of deprivation of liberty provided for by law must not be manifestly disproportionate, unjust or unpredictable, and the specific manner in which an arrest is made must not be discriminatory and must be able to be deemed appropriate and proportional in view of the circumstances of the case.¹⁴⁷

This requirement is directly relevant to any request for international cooperation that either will involve, or may lead to any person being deprived of their liberty, either in the Requested or Requesting State. Other rights that tend to be particularly relevant in the context of international cooperation include: the right to life; the right not to be subjected to torture or cruel, inhumane or degrading punishment; the right to equality before the law; the right to a fair and public hearing, legal representation and interpreters; the presumption of innocence; and the right to not be held guilty of retrospectively operative offences or penalties.¹⁴⁸

Treaties on international cooperation typically provide some measure of protection for individuals who are the subject of a request for international cooperation. The limits on cooperation that are typically found in such treaties are discussed in the following chapters. However, it is important to understand that the protections specified in international cooperation treaties do not exist in isolation. They have to be understood as part of a much larger system of human rights protections, which include the obligations in relevant treaties such as the ICCPR, the Refugee Convention and the Convention against Torture.

Some national courts have considered that they have limited capacity to inquire into the human rights situation in other States, on the basis of the 'doctrine of non-inquiry'.¹⁴⁹ This principle has traditionally operated to prevent the courts of one sovereign State from reviewing the internal government processes or the integrity of the judicial process of another sovereign State on the basis that such review would be an infringement of that State's sovereignty and a violation of the principle of comity. In some parts of the world, the notion of 'mutual trust' implied in the existence of a mutual legal assistance agreement is invoked as a rationale. In other States, the doctrine of non-inquiry is viewed as a consequence of the doctrine of separation of powers, whereby the executive, not the courts, is deemed responsible for considering the legitimacy of any acts of foreign authorities.¹⁵⁰

¹⁴⁷ Nowak, *U.N. Covenant on Civil and Political Rights*, p. 225.

¹⁴⁸ See *United Nations Universal Declaration of Human Rights*, arts. 5-11, GA Res. 217A (III), UN GAOR, 3rd Sess., 1st Plenary Mtg., UN Doc. A/810 (Dec. 12, 1948) [hereinafter *UN Universal Declaration of Human Rights*]; ICCPR, arts. 7, 9, 13, 14; *Convention against Torture*, art. 3. For a discussion of international human rights obligations and their application in the context of international cooperation in criminal matters see Robert J. Currie, *Human Rights and International Mutual Legal Assistance: Resolving the Tension*, 11 *Criminal Law Forum* (2000) and Joanna Harrington, *The Absent Dialogue: Extradition and the International Covenant on Civil and Political Rights*, 32 *Queens Law Journal* 82 (2006) [hereinafter Harrington, *The Absent Dialogue*]. For a more recent discussion of the intersection between human rights and criminal justice and its relevance to international cooperation, see UNGA, *Protection of Human Rights and Fundamental Freedoms While Countering Terrorism: Note by the Secretary General, delivered to the General Assembly*, UN Doc. A/63/223 (Aug. 6, 2008) [hereinafter UNGA, *Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*].

¹⁴⁹ For a discussion of the operation of the rule in the United States, see Matthew Murchison, *Extradition's Paradox: Duty, Discretion and Rights in the World of Non-Inquiry*, 43(2) *Stanford Journal of International Law* 295 (2007). For a critical analysis of the operation of this doctrine in an extradition case involving the United States and an ASEAN Member State, see Andrew J. Parmenter, *Death by Non-Inquiry: The Ninth Circuit Permits the Extradition of a U.S. Citizen Facing the Death Penalty for a Non-Violent Drug Offense [Prasoprat v. Benov, 421 F.3d 1009 (9th Cir. 2005)]*, 45 *Washburn Law Journal* 657 (2006).

¹⁵⁰ Auke A.H. Van Hoek and Michiel J.J.P. Luchtman, *Transnational Cooperation in Criminal Matters and the Safeguarding of Human Rights*, 1(2) *Utrecht Law Review* 1, pp. 2-4 (2005) [hereinafter Van Hoek and Luchtman, *Transnational Cooperation in Criminal Matters*].

The potential incompatibility between the doctrine of non-inquiry and the international human rights obligations of both Requested and Requesting States has long been acknowledged. It is argued by some that the doctrine is eroding in light of such incompatibility and growing awareness of potential and actual abuses of international cooperation tools.¹⁵¹ This erosion is certainly reflected in the daily practice and national laws of many States, where Central Authority lawyers and even the courts play a very active role in considering the human rights implications of agreeing to requests for international cooperation. At a minimum, application of the doctrine should be questioned if there are serious indications that human rights obligations have been or will be violated and the suspect's interests compromised as a result.

Violations of accepted human rights standards during investigations, prosecutions and adjudications have the potential not only to ruin individual cases, but also to diminish the preparedness of States to cooperate in the future. Accordingly, whilst the vigorous pursuit of transnational traffickers is encouraged, requests for international cooperation must be handled in a way that has full regard for the international criminal justice and human rights standards. This important issue is considered further in the following Chapters.

¹⁵¹ See Van Hoek and Luchtman, *Transnational Cooperation in Criminal Matters*. See also Charles Caruso, *Legal Challenges in Extradition and Suggested Solutions*, in *Denying Safe Haven to the Corrupt and the Proceeds of Corruption: Papers Presented at the 4th Master Training Seminar of the ADB / OECD Anti-Corruption Initiative for Asia and the Pacific* 57-68, p. 60 (ADB / OECD, 2006) [hereinafter Caruso, *Legal Challenges in Extradition and Suggested Solutions*].

Chapter 3:

Mutual Legal Assistance

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Overview of this Chapter:

The purpose of this Chapter is to provide practitioners with practical information that will assist them to either make or respond to a request for mutual legal assistance in the context of trafficking in persons investigations and prosecutions. The Chapter includes information on:

- the type of assistance that can be obtained from other governments to facilitate criminal investigations and prosecutions;
- the legal basis for mutual legal assistance, including national laws and treaties;
- the principles and pre-conditions that commonly apply to mutual legal assistance requests;
- preparing and transmitting a request for mutual legal assistance;
- responding to a request for mutual legal assistance.

Key International and Regional Principles

Domestic laws should support the provision of mutual legal assistance with regard to trafficking and related offences.¹⁵²

States should ensure that their legal frameworks support the provision of mutual legal assistance, including for trafficking and related offences. Given dual criminality and severity requirements, this will generally mean that States will need to ensure that trafficking and related crimes, as defined by international law, have been criminalized in domestic legislation, with a penalty of at least 12 months imprisonment.

States should cooperate to effectively investigate and prosecute trafficking and related crimes, including across borders.¹⁵³

Particularly where trafficking involves transnational elements, it will be very difficult to effectively investigate the crime without cross-border cooperation. This underscores the importance of States ensuring that they have effective mutual legal assistance regimes in place that apply to trafficking and related crimes.

States should provide one another with the widest possible forms of mutual legal assistance consistent with domestic and international laws.¹⁵⁴

This may include the traditional forms of assistance, such as executing powers of search and seizure, or examining objects and sites. However, it may also extend to the use of newer technologies, such as facilitating video conferencing for the taking of evidence.

Human rights must be respected in the mutual legal assistance process.¹⁵⁵

States are obliged to ensure that mutual legal assistance requests, procedures and outcomes do not violate established rights, including the prohibition of discrimination, the rights of suspects, the right to a fair trial, and the prohibition on torture and cruel, inhuman or degrading treatment or punishment.

Trafficking related requests must be prioritized and expedited.¹⁵⁶

States should accord high priority to and expedite mutual legal assistance requests that relate to trafficking in persons.

¹⁵² *UNTOC*, art. 18(1); *UN Trafficking Protocol*, art. 5; *European Trafficking Convention*, art. 18; *UN Trafficking Principles and Guidelines*, Principle 12; *ASEAN Practitioner Guidelines*, Part 1.A.1 and Part 2.B.3.

¹⁵³ *European Trafficking Convention*, art. 32; *UN Trafficking Principles and Guidelines*, Guideline 11.

¹⁵⁴ *UNTOC* Article 18(1) requires States Parties to afford one another “the widest measure of mutual legal assistance in investigations, prosecutions and adjudications” in relation to the offences covered by the Convention. Article 18(3) provides that mutual legal assistance can be requested for any of a number of listed purposes, along with “any other type of assistance that is not contrary to the domestic law of the requested State Party.”: Article 18(3)(i). *ASEAN MLAT*, provides that State Parties shall provide each other with the ‘widest possible measure’ of assistance, including listed forms of assistance and “the provision of such other assistance as may be agreed and which is consistent with the objects of this Treaty and the laws of the Requested Party.”: Article 1(2)(k).

¹⁵⁵ *ICCPR*, arts. 9, 14; *ASEAN MLAT*, art. 3(c)-(d); *UN Trafficking Principles and Guidelines*, Guideline 1.

¹⁵⁶ *UNTOC*, art. 18(24); *ASEAN Practitioner Guidelines*, Part 2.D.4.

3.1 Introduction

Mutual legal assistance is the process States use to provide and obtain formal government-to-government assistance in criminal investigations and prosecutions. Mutual legal assistance is sometimes also called ‘mutual assistance’ or ‘judicial assistance’. For consistency, the term mutual legal assistance is used throughout this Handbook.

The exact type of mutual legal assistance that States will provide to one another is subject to national law, treaties and other international arrangements. However, there are a number of common types of mutual legal assistance that States will often be prepared to provide to other States to facilitate their criminal investigations and prosecutions. These include the following:

- taking evidence or statements;
- locating and identifying witnesses and suspects;
- effecting service of judicial documents;
- executing searches and seizures of property;
- examining objects and sites;
- providing information, evidentiary items and expert evaluations;
- providing originals or certified copies of relevant documents and records;
- identifying or tracing proceeds of crime, freezing and seizing and confiscating proceeds of crime;
- facilitating the voluntary appearance of persons in the Requesting State;
- transfer of prisoners to give evidence;
- giving or taking of evidence through telecommunications technology;
- enforcement of foreign confiscation orders.

Treaties such as UNTOC provide a high degree of certainty as to precisely which means of assistance are available between the parties, and also preserve the right of ‘spontaneous transmission of information’ whereby authorities are permitted, even without a prior request, to pass on information to the competent authorities of another State.¹⁵⁷

From a legal perspective, mutual legal assistance is fundamentally different from more informal means of cooperation between government officials across borders. Law enforcement and other officials will frequently seek assistance from their foreign counterparts through informal channels. This kind of direct ‘police-to-police’ or ‘agency-to-agency’ cooperation can, as noted in Chapter 2, be very important and useful in trafficking in persons cases, particularly, for example, in relation to identification and rescue of victims. However, there are generally limits to what can be achieved lawfully through informal channels. For example, informal cooperation will usually not be sufficient where the required assistance involves coercive or compulsory measures.¹⁵⁸ In addition, evidence gathered through this method might not necessarily be admissible in criminal proceedings. For these reasons, it is essential that practitioners dealing with trafficking in persons cases understand not only what can be achieved through informal mechanisms but also through the more formal mutual legal assistance channels.

3.2 The relationship between formal and informal cooperation mechanisms

The process of seeking assistance through mutual legal assistance channels is often complex and slow. Accordingly, experts recommend that where possible, practitioners should give consideration to whether it may be possible to lawfully secure the desired outcome through informal cooperation mechanisms.

¹⁵⁷ Matti Joutsen, *International Instruments on Cooperation in Responding to Transnational Crime*, in Handbook on Transnational Crime and Justice (Philip Reichel ed., 2005) [hereinafter Joutsen, *International Instruments on Cooperation in Responding to Transnational Crime*].

¹⁵⁸ UNODC, *Revised Manuals on the Model Treaty on Extradition and the Model Treaty on Mutual Assistance*, p. 66.

If the assistance required *does not* involve coercive measures (such as search and seizure or obtaining testimony from an uncooperative witness), then informal police-to-police or agency-to-agency assistance might be faster, cheaper and more convenient.¹⁵⁹ In many cases, informal channels can be used at any early stage of an investigation or prosecution process, with the formal mutual legal assistance request being made at a later stage.¹⁶⁰ This may allow the rapid exchange of information at critical junctures, while also ensuring that information or evidence is properly sourced through the official channels. However, as Polaine has observed, the golden rule must be to ensure that any informal request is made and executed lawfully.¹⁶¹

Informal assistance can also be helpful to prepare and narrow down a formal mutual legal assistance request. For example, if a statement is necessary from an employee of a telephone company in another State, the Requesting State could make informal enquiries to identify the company, its address and any other information that will identify the particular employee.¹⁶² Clarifying as much information as possible in advance will assist the Requested State to provide the assistance sought and expedite the process.

In determining whether to make a formal request practitioners should consider the following:

- Could the same result be achieved through informal cooperation (for example, through telephoning a colleague in a foreign police service or financial intelligence unit)?
- Could relevant information be obtained from public records or other open source information?
- Will the information or evidence be admissible as evidence in court if it is not obtained through formal channels?
- Would obtaining background information through informal channels help to improve any subsequent mutual legal assistance request?
- Could the same result be achieved, without compromising the process or results, through other means such as asking the witness to come to the Requesting State to give evidence?

Some of the risks that may need to be considered when pursuing informal cooperation include the following:

- unnecessary, frivolous or time-consuming informal requests could be perceived as time wasting. This might limit the willingness of counterparts to assist in future requests;
- informal requests could lead to imprecise, unreliable facts and elements of proof if the most appropriate or highly trained person to access reliable information was not properly identified (as they presumably would have been, if identified through formal channels);¹⁶³
- informal requests could inadvertently compromise other on-going, or larger scale investigations if they are not handled with the requisite level of confidentiality.¹⁶⁴

3.3 Legal bases for mutual legal assistance

Where the desired outcome is beyond what can be achieved through informal measures, it will be necessary to look at what could be achieved through the formal mechanisms of mutual legal assistance. The principles of sovereign equality and territorial integrity prevent any State from exercising jurisdiction or undertaking actions in the territory of another State without the prior consent of that State.¹⁶⁵ Accordingly, where a

¹⁵⁹ UNODC, *Report: Informal Expert Working Group on Mutual Legal Assistance Casework Best Practice*, p. 9, Dec. 3-7, 2001 [hereinafter UNODC, *Report: Informal Expert Working Group on Mutual Legal Assistance*].

¹⁶⁰ UNODC, *UNODC Toolkit to Combat Trafficking in Persons, Global Programme Against Trafficking in Human Beings*, p. 61, UN Sales No. E.06.V.11 (2006) [hereinafter UNODC, *UNODC Toolkit to Combat Trafficking*].

¹⁶¹ Martin Polaine, *Transnational Bribery/Corruption Investigations: Some Practical Guidance on Improving Procedures for Mutual Assistance and Mutual Legal Assistance*, in *Making International Anti-Corruption Standards Operational: Asset Recovery and Mutual Legal Assistance*, Regional Seminar for Asia Pacific, p. 3, (ADB / OECD and Basel Institute on Governance, 2007) [hereinafter Polaine, *Transnational Bribery/Corruption Investigations*].

¹⁶² Polaine, *Transnational Bribery/Corruption Investigations*.

¹⁶³ Jean-Bernard Schmid, *Formal and informal paths to international legal assistance: Combining formal and informal mechanisms: ways for speeding up MLA*, in *Making International Anti-Corruption Standards Operational: Asset Recovery and Mutual Legal Assistance*, Regional Seminar for Asia Pacific, p. 6, (ADB / OECD and Basel Institute on Governance, 2007).

¹⁶⁴ Polaine, *Transnational Bribery/Corruption Investigations*.

¹⁶⁵ *UNTOC*, art. 4; *UNCAC*, art. 4; *ASEAN MLAT*, art. 2(2).

State requires evidence, information or other assistance with an investigation or prosecution from another State, such information or assistance will need to be requested from the State that is in possession of the information, in a position to render assistance, or otherwise has the relevant jurisdiction.

Before proceeding with any application for mutual legal assistance, it is important to identify the legal basis for that cooperation. The legal basis for mutual legal assistance may be found in bilateral or multilateral treaties, domestic law or a combination of these sources. Most, if not all ASEAN Member States have been able to identify relevant treaties and / or national laws that can be relied upon to support mutual legal assistance in trafficking in persons cases.¹⁶⁶ As such, while the web of coverage provided by the relevant treaties and laws in the region may not be perfect, the necessary legal basis for mutual legal assistance will almost certainly be available when the cooperation across borders is required with respect to trafficking cases.

3.3.1 Treaties

As a form of cooperation between States, mutual legal assistance is governed by a network of treaties that States have developed to provide a legal basis for, and to regulate such assistance. Some of these treaties are international (open to all States); some are regional (open to members of a particular regional grouping); and some are bilateral (concluded between two States). Some treaties focus only on mutual legal assistance and their provisions will apply generally to a wide range of criminal matters. An example of this kind of treaty is the *European Convention on Mutual Assistance in Criminal Matters*¹⁶⁷ that was concluded in 1959 and entered into force in 1962. A more contemporary example from the same region is the *Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union*, concluded in 2000.¹⁶⁸ The ASEAN MLAT provides a further example of this kind of treaty that applies to a wide range of criminal offences. Other treaties, (of which the UNTOC and UNCAC are both examples), are tied more specifically to a particular issue such as drugs, organized crime or corruption. In such cases, mutual legal assistance will usually be one of many matters addressed by the treaty.

Bilateral mutual legal assistance treaties

Bilateral treaties for mutual legal assistance are common, especially between States that share land borders or that have close ties or historical relations. By negotiating bilaterally, States are able to shape an agreement that matches their particular legal system and requirements, while also ensuring a higher degree of certainty and predictability. Bilateral treaties can also resolve legal complications between States with different legal traditions. Some States, for example, restrict assistance to judicial authorities rather than prosecutors, making it difficult for them to fully participate in multilateral mutual legal assistance regimes.¹⁶⁹ A number of States in the ASEAN region have negotiated and concluded bilateral mutual legal assistance treaties with various States (see table 1 below). Also, in some instances, mutual legal assistance will be available as part of extradition treaties.

Given the emergence of large numbers of bilateral treaties and the need to promote consistency and quality in drafting, the UN has developed a *Model Treaty on Mutual Assistance in Criminal Matters*. The purpose of the Model Treaty is to promote the development of such treaties and to provide guidance in their drafting. An implementation manual to the Model Treaty is available, providing important background and guidance on a number of key issues that commonly arise in the context of mutual legal assistance.¹⁷⁰ However, it has been

¹⁶⁶ Information provided by ASEAN Member State practitioners to the ASEAN Workshop on International Legal Cooperation in Trafficking in Persons Cases, Bangkok, November 2009.

¹⁶⁷ *European Convention on Mutual Assistance in Criminal Matters*, Apr. 20, 1959, ETS No. 30, entered into force Apr. 9, 1960.

¹⁶⁸ Note that this Convention aims to supplement and facilitate application of the 1959 Council of Europe Convention. It does not provide an independent legal basis for the making of a mutual legal assistance request, David McClean, *Transnational Organized Crime: A Commentary on the UN Convention and its Protocols*, p. 205, (Oxford University Press, 2007) [hereinafter McClean, *Transnational Organized Crime: A Commentary*].

¹⁶⁹ UNODC, *Legislative Guide for the Implementation of the United Nations Convention against Corruption*, p. 197, New York, 2006 [hereinafter UNODC, *Legislative Guide to UNCAC*].

¹⁷⁰ UNODC, *Revised Manuals on the Model Treaty on Extradition and the Model Treaty on Mutual Assistance*, p. 66.

noted that the Model Treaty does not contain many of the innovations that are a feature of later mutual legal assistance agreements such as the provisions contained in UNTOC.¹⁷¹

While bilateral treaties continue to be very important, they can be complex to negotiate and a State that wishes to create a sufficiently broad web of such treaties will generally need to conclude a significant number of them. As a practical matter, a bilateral treaty may not always be available with the particular States from which a State may require assistance. Today, within the ASEAN region as elsewhere, regional and multilateral alternatives (discussed below) are proving to be increasingly important in extending the coverage of treaty relations between States that want to cooperate across borders on criminal matters.

Table 1: ASEAN Member State’s bilateral MLA arrangements

ASEAN MEMBER STATE	MUTUAL LEGAL ASSISTANCE BILATERAL TREATY PARTNERS
Brunei Darussalam	-
Cambodia	-
Indonesia	Australia; PR China.
Lao PDR	Vietnam.
Malaysia	Australia; Hong Kong; United States of America.
Myanmar	-
Philippines	Australia; Hong Kong; PR China; Switzerland; United States of America.
Singapore	Hong Kong; India.
Thailand	Australia; Belgium; Canada; PR China; France; India; Korea; Norway; Peru; Poland; Sri Lanka; United Kingdom; United States of America.
Vietnam	Korea; Lao PDR; Mongolia; PR China.

Treaty on Mutual Legal Assistance in Criminal Matters among Like-Minded ASEAN Member Countries

While trafficking in persons was not the major impetus behind the ASEAN MLAT, which was completed in 2004, its provisions clearly apply to this crime type. It is also relevant to note that senior ASEAN officials working in this area have confirmed the importance of this instrument for ending impunity for traffickers.¹⁷²

Scope of application:

The ASEAN MLAT applies to ‘criminal matters’,¹⁷³ which potentially extends to a wide range of criminal offences, including trafficking in persons and related offences. The treaty is strictly limited to mutual legal assistance as that term has traditionally been understood. It does *not* apply to: the arrest or detention of a person with a view to extraditing that person; the enforcement in the Requested State Party of criminal judgments imposed in the Requesting State Party (except to the extent permitted by the domestic law of the Requesting State Party); the transfer of persons in custody to serve sentences; or the transfer of criminal proceedings.¹⁷⁴

Types of assistance available:

Mutual legal assistance to be provided by the States Parties under the terms of the ASEAN MLAT may include:

- taking of evidence or obtaining voluntary statements from persons;
- making arrangements for persons to give evidence or to assist in criminal matters;

¹⁷¹ McClean, *Transnational Organized Crime: A Commentary*, p. 205.

¹⁷² “The Treaty on Mutual Legal Assistance in Criminal Matters Among Like-Minded ASEAN Member States (MLAT) is a major step forward in ending impunity for traffickers and should be ratified by all ASEAN Member States as soon as possible.”: *ASEAN Practitioner Guidelines*, Part 2.D.1.

¹⁷³ *ASEAN MLAT*, art. 1(1).

¹⁷⁴ *ASEAN MLAT*, art. 2.

- effecting service of judicial documents;
- executing searches and seizures;
- examining objects and sites;
- providing original or certified copies of relevant documents, records and items of evidence;
- identifying or tracing property derived from the commission of an offence and instrumentalities of crime;
- the restraining of dealings in property or the freezing of property derived from the commission of an offence that may be recovered, forfeited or confiscated;
- the recovery, forfeiture or confiscation of property derived from the commission of an offence;
- locating and identifying witnesses and suspects.

The ASEAN MLAT also includes a ‘catch all’ provision, in that the treaty will cover “the provision of such other assistance as may be agreed and which is consistent with the objects of this Treaty and the laws of the Requested Party.”¹⁷⁵

Conditions on mutual legal assistance:

The following is a summary of the main conditions that apply under ASEAN MLAT. These are discussed in more detail at 3.4, below.

Mandatory grounds of refusal: The ASEAN MLAT specifies eleven grounds upon which States Parties must refuse a request for assistance.¹⁷⁶ This includes a number of situations where fulfilling the request would raise human rights concerns. For example, States must refuse assistance if there are substantial grounds for believing that the request was made for the purpose of investigating, prosecuting, punishing or otherwise causing prejudice to a person on account of their race, religion, sex, ethnic origin, nationality or political opinions;¹⁷⁷ or in situations where issues of double jeopardy arise. That is, States must refuse assistance if the request relates to an offence where the person has already been convicted, acquitted or pardoned by a competent court; or if the person has already undergone punishment in respect of that offence.¹⁷⁸ Under the terms of the Treaty, a lack of dual criminality is a mandatory ground of refusal unless the provision of assistance in the absence of dual criminality is permitted under the domestic laws of a Requested State Party.

Grounds of refusal under the ASEAN MLAT

The Requested Party shall refuse assistance if, in its opinion –

- a) The request relates to the investigation, prosecution or punishment of a person for an offence that is, or is by reason of the circumstances in which it is alleged to have been committed was committed, an offence of a political nature;
- b) The request relates to the investigation, prosecution or punishment of a person in respect of an act or omission that, if it had occurred in the Requested Party, would have constituted a military offence under the laws of the Requested Party which is not also an offence under the ordinary criminal law of the Requested Party;
- c) There are substantial grounds for believing that the request was made for the purpose of investigating, prosecuting, punishing or otherwise causing prejudice to a person on account of the person’s race, religion, sex, ethnic origin, nationality or political opinions;
- d) The request relates to the investigation, prosecution or punishment of a person for an offence in a case where the person -
 - i. has been convicted, acquitted or pardoned by a competent court or other authority in the Requesting or Requested Party; or

¹⁷⁵ ASEAN MLAT, art. 1(2)(k).

¹⁷⁶ ASEAN MLAT, art. 3(1)(a)-(k).

¹⁷⁷ ASEAN MLAT, art. 3(1)(c).

¹⁷⁸ ASEAN MLAT, art. 3(1)(d).

- ii. has undergone the punishment provided by the law of Requesting or Requested Party, in respect of that offence or of another offence constituted by the same act or omission as the first-mentioned offence;
- e) The request relates to the investigation, prosecution or punishment of a person in respect of an act or omission that, if it had occurred in the Requested Party, would not have constituted an offence against the laws of the Requested Party except that the Requested Party may provide assistance in the absence of dual criminality if permitted by its domestic laws;
- f) The provision of the assistance would affect the sovereignty, security, public order, public interest or essential interests of the Requested Party;
- g) The Requesting Party fails to undertake that it will be able to comply with a future request of a similar nature by the Requested Party for assistance in a criminal matter;
- h) The Requesting Party fails to undertake that the item requested for will not be used for a matter other than the criminal matter in respect of which the request was made and the Requested Party has not consented to waive such undertaking;
- i) The Requesting Party fails to undertake to return to the Requested Party, upon its request, any item obtained pursuant to the request upon completion of the criminal matter in respect of which the request was made;
- j) The provision of the assistance could prejudice a criminal matter in the Requested Party; or
- k) The provision of the assistance would require steps to be taken that would be contrary to the laws of the Requested Party.

ASEAN MLAT, Article 3.

Discretionary grounds of refusal: The ASEAN MLAT specifies three grounds upon which States Parties *may* refuse to assist: (i) where the Requesting State Party has, in respect of that request, failed to comply with any material terms of the treaty or other relevant arrangement; (ii) where the provision of assistance would likely prejudice the safety of any person; and (iii) where the provision of assistance would impose an excessive burden on the Requested State Party.¹⁷⁹

Prohibited grounds of refusal: In line with modern treaty practice, the ASEAN MLAT provides that States are not permitted to refuse assistance solely on the basis of bank secrecy, or that the offence is also considered to involve fiscal matters.¹⁸⁰

Procedural requirements: The ASEAN MLAT establishes a number of procedural requirements, including with regard to the form and content of requests. With the exception of urgent situations, requests are to be channelled through designated central authorities. States are obliged to ensure that requests for assistance are carried out promptly, in the manner provided for by the laws and practices of the Requested State Party.¹⁸¹

See further, section 3.4 below which discusses, amongst other things, procedural requirements under ASEAN MLAT.

United Nations Convention against Transnational Organized Crime and the UN Trafficking Protocol

The UN Trafficking Protocol does not specifically deal with the issue of mutual legal assistance. It is therefore necessary to turn to its parent instrument, UNTOC, to consider the provisions that would apply to States Parties in trafficking in persons cases.¹⁸² As noted above, the relevant provisions of the UNTOC are sufficiently

¹⁷⁹ ASEAN MLAT, art. 3(2)(a)-(c).

¹⁸⁰ ASEAN MLAT, art. 3(5).

¹⁸¹ See further ASEAN MLAT, arts. 6, 7.

¹⁸² Note that the mutual legal assistance provisions of UNTOC would apply to the crime of trafficking even in cases where the relevant State was not party to the UN Trafficking Protocol, provided the offence satisfied the criteria established in the Convention as set out under "Scope of application", above.

detailed to characterize them as a ‘mini-treaty’ (or a treaty within a treaty) that could (or, in cases where no alternative agreement is in place, should) be used by States Parties as the sole legal basis for mutual legal assistance in relation to the offences to which they apply.

The following is a summary of the main elements of the mutual legal assistance regime established by UNTOC. Note that issues such as conditions and procedural requirements are considered in greater detail at 3.4, below.

Scope of application:

The mutual legal assistance obligations in UNTOC apply to offences established in accordance with that Convention, that is:

- participating in an organized criminal group; laundering proceeds of crime; corruption; and obstruction of justice;
- any other ‘serious’ crime¹⁸³ (a catch-all provision that covers all conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty); and
- offences established by the Protocols, including trafficking in persons, and attempts, participating as an accomplice, ordering or directing.¹⁸⁴

The mutual legal assistance obligations in UNTOC will be activated in respect of such offences where the Requesting State Party has reasonable grounds to suspect that these offences are transnational in nature, including that the victims, witnesses, proceeds, instrumentalities or evidence of such offences are located in the Requested State, and that the offence involves an organized criminal group.¹⁸⁵

The mutual legal assistance obligations of UNTOC do not just concern individual suspects and offenders but also extend to situations where legal persons, such as companies or other corporate structures, are involved. Article 18(2) of UNTOC provides that States should provide mutual legal assistance to the fullest extent possible under relevant laws, treaties, agreements and arrangements, with respect to investigations, prosecutions and judicial proceedings, in relation to the offences for which legal persons may be held liable, in accordance with Article 10.¹⁸⁶

Types of assistance available:

Article 18(3) of UNTOC provides that State Parties can request mutual legal assistance from one another, in relation to offences established by the Convention, for any of the following purposes:

- taking evidence or statements from persons;
- effecting service of judicial documents;
- executing searches and seizures, and freezing;
- examining objects and sites;
- providing information, evidentiary items and expert evaluations;
- providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records;
- identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes;
- facilitating the voluntary appearance of persons in the Requesting State Party.

¹⁸³ UNTOC, art. 2(b).

¹⁸⁴ UN Trafficking Protocol, art. 1(3).

¹⁸⁵ UNTOC, art. 18(1).

¹⁸⁶ UNODC, *Legislative Guides to the Organized Crime Convention and its Protocols*, p. 222. UNTOC Article 10(1) provides that States Parties shall establish such measures as may be necessary, consistent with their legal principles, to establish the legal liability of legal persons for participation in serious crimes involving an organized criminal group and for the offences established in accordance with Articles 5, 6, 8 and 23 of that treaty.

Like the ASEAN MLAT, the Convention also includes a ‘catch-all’ provision enabling States Parties to request any other type of assistance that is not contrary to the domestic law of the Requested State Party.

Note that international cooperation for the purposes of confiscation is the subject of a separate article (Article 13). The provisions of that article are considered in detail in the following chapter, which deals with Proceeds of Crime.

Conditions on mutual legal assistance:

The mutual legal assistance regime established by UNTOC is intended to complement rather than replace any mutual legal assistance regimes that already exist by virtue of any other treaty, whether bilateral or multilateral.¹⁸⁷ At the same time, becoming a State Party to the UNTOC gives rise to separate obligations that States Parties must comply with amongst themselves. This includes the obligation to not decline a request for mutual legal assistance on the ground of bank secrecy.¹⁸⁸

Where there is an applicable mutual legal assistance treaty in place between two States Parties to UNTOC then those States Parties are to apply the terms of that treaty *unless* they specifically agree to follow the rules set out in Article 18 of UNTOC.¹⁸⁹ Where an alternative legal basis does exist, States Parties are strongly encouraged, but not obliged, to apply any of the terms of Article 18(9)-(29) if they facilitate cooperation to a greater extent than the terms of a mutual legal assistance treaty in force between them.¹⁹⁰

Where there is no applicable mutual legal assistance treaty in force between the two States Parties then the rules established under Article 18 of UNTOC will apply.¹⁹¹ These rules, which, as noted above, form a ‘treaty within a treaty’ address matters such as the content and form of mutual legal assistance requests, and grounds of refusal.

United Nations Convention against Corruption

As noted in Chapter 2 and explored further below, the UNCAC may be relevant to trafficking in persons cases involving corruption, particularly of public officials, and money laundering. The mutual legal assistance provisions of UNCAC are extensive and, like UNTOC, create a framework for such assistance that can either provide a separate legal basis for such assistance or supplement existing arrangements.

Scope of application:

States Parties to UNCAC are obliged to provide one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by the Convention. This includes the crimes of:

- corruption, such as bribery of officials, embezzlement of public funds, trading in influence,¹⁹² and
- laundering ‘proceeds of crime’.¹⁹³ This includes proceeds from *any* crime, which potentially includes the crime of trafficking in persons (assuming this has been criminalized in domestic law), and related crimes.

Like UNTOC, UNCAC obligates States Parties to establish criminal offences related to money laundering for the “widest range of predicate offences”.¹⁹⁴ In many States, this will mean that ‘trafficking in persons’ will be

¹⁸⁷ UNTOC Article 18(6) provides that “The provisions of this article shall not affect the obligations under any other treaty, bilateral or multilateral, that governs or will govern, in whole or in part, mutual legal assistance.” McClean argues that as a consequence of this provision, (i) where UNTOC requires the provision of a *higher* level of assistance than is required under other mutual legal assistance treaties that may already exist between States Parties, then its provisions will prevail; and (ii) conversely, where another treaty provides for a higher level of assistance from a Requested State then the provisions of that treaty will determine the extent of the Requested State’s obligations. McClean, *Transnational Organized Crime: A Commentary*, p. 214. But see UNTOC Article 18(7).

¹⁸⁸ UNTOC, art. 18(8).

¹⁸⁹ UNTOC, art. 18(7).

¹⁹⁰ UNTOC, art. 18(7).

¹⁹¹ UNTOC, art. 18(7).

¹⁹² UNCAC, arts. 15-22.

¹⁹³ UNCAC, art. 23.

¹⁹⁴ UNCAC, art. 23(2)(a).

designated as a predicate offence to the specific offence of ‘money laundering’ in national criminal laws. This will have flow-on effects for the provision of mutual legal assistance on this issue.

The mutual legal assistance obligations of UNCAC also extend to situations where legal persons, such as companies or other corporate structures, are involved. Under Article 46(2) of UNCAC, States are obliged to ensure that mutual legal assistance is provided to the fullest extent possible under relevant laws, treaties, agreements and arrangements with respect to investigations, prosecutions and judicial proceedings in relation to which a legal person may be held liable in accordance with Article 26.¹⁹⁵

Types of assistance available:

Under UNCAC, States can request assistance for any of the following purposes:

- taking evidence or statements from persons;
- effecting service of judicial documents;
- executing searches and seizures, and freezing;
- examining objects and sites;
- providing information, evidentiary items and expert evaluations;
- providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records;
- identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes;
- facilitating the voluntary appearance of persons in the Requesting State Party;
- identifying, freezing and tracing proceeds of crime in accordance with the provisions of Chapter V of UNCAC; and
- recovery of assets, in accordance with Chapter V of UNCAC.¹⁹⁶

The Convention also includes a ‘catch-all’ provision enabling States Parties to request any other type of assistance that is not contrary to the domestic law of the Requested State Party.¹⁹⁷

Note that two key forms of assistance – identification, freezing and tracing of proceeds of crime; and recovery of assets – are considered separately in this Handbook at Chapter 4 which deals with Proceeds of Crime.

Conditions on mutual legal assistance:

The mutual legal assistance regime established by UNCAC is similar to the regime established by UNTOC. In particular, the obligations in UNCAC are intended to complement rather than replace any mutual legal assistance regimes already in place, by virtue of any other treaty.¹⁹⁸ For example, in cases where any of the forms of cooperation listed above are not provided for in the relevant treaty, then the States Parties to UNCAC should consider such mutual legal assistance treaties as being automatically supplemented by those forms of cooperation. At the same time, becoming a State Party to the UNCAC gives rise to separate obligations that States Parties must comply with amongst themselves. As with UNTOC, this includes the obligation to ensure that cooperation is not refused solely on the ground of bank secrecy.¹⁹⁹

Similar to UNTOC, Article 46(7) of UNCAC provides that where there is no mutual legal assistance treaty in force between a State Party seeking cooperation and the State Party from whom cooperation is sought, the rules of mutual legal assistance set forth in Article 46, paragraphs 9–29 will apply. These address issues such as the content and form of mutual legal assistance requests and grounds of refusal. Where these provisions apply, States Parties are required to notify the Secretary General of the UN of the Central Authority designated for the purpose of receiving requests.²⁰⁰

¹⁹⁵ Under UNCAC Article 26(1), States Parties are also obliged to adopt such measures as may be necessary, consistent with their legal principles, to establish the liability of legal persons for participation in offences established in accordance with the Convention.

¹⁹⁶ UNCAC, art. 46(3).

¹⁹⁷ UNCAC, art. 46(3)(i).

¹⁹⁸ UNCAC, art. 46(6).

¹⁹⁹ UNCAC, art. 46(8).

²⁰⁰ UNCAC, art. 46(13).

Where another treaty is already in force between the States Parties concerned, then the rules of that treaty will apply instead (unless Parties specifically agree to apply the UNCAC rules).²⁰¹ States Parties are strongly encouraged, but not obliged, to apply any of the terms of Article 46(9)-(29) if they facilitate cooperation to a greater extent than the terms of a mutual legal assistance treaty in force between them.

Selecting the appropriate instrument of cooperation

The regimes of UNTOC and UNCAC are intended to operate alongside other regimes of international cooperation, such as the ASEAN MLAT and pre-existing bilateral treaties. Accordingly, it is very likely that where the Requested and Requesting State are parties to some or all of these treaties, there will be very little or even no inconsistency between the various obligations. However, if there is any apparent inconsistency between the treaties, this should be resolved by reference to the principles of treaty interpretation, elaborated in the *Vienna Convention on the Law of Treaties*.²⁰²

Where the Requested and Requesting State are both parties to the ASEAN MLAT then the obligations of that treaty will apply, alongside or in addition to any other obligations in UNTOC and UNCAC. In situations where one of the States is not party to the ASEAN MLAT then the parties will be governed by any applicable mutual legal assistance arrangement in force between them. In trafficking in persons cases, this is most likely to be the UNTOC, assuming both States are party to that treaty. As noted above, in trafficking in persons cases concentrated around corruption or money laundering, the UNCAC could be a suitable alternative. It is also possible that a bilateral treaty between the Requested and Requesting States is the most appropriate cooperation vehicle.

In cases where a choice of instrument is available, it is important to consider which one best meets the cooperation requirements of the circumstances at hand. For example, while UNTOC and the ASEAN MLAT are similar, there are important differences between the types of assistance available under the respective instruments as well as the limits and preconditions on that assistance. Such differences may, in a particular case, be sufficient grounds for preferring application of one treaty over another.

3.3.2 Domestic law

Many States have domestic laws that regulate the provision of mutual legal assistance. These laws usually specify the preconditions and the procedure for making, transmitting and executing incoming and outgoing requests. In most instances, such laws provide the domestic legal frameworks that are necessary to allow the State to give effect to its obligations under treaties. However, these laws may also be sufficient to support an application for mutual legal assistance, even without a treaty between the States in question. For example, Thailand's *Act on Mutual Assistance in Criminal Matters* provides that assistance may be given even if no mutual legal assistance treaty exists between Thailand and the Requesting State, provided that State commits itself to assist Thailand in a similar manner when requested.²⁰³ This is an example of the application of the principle of reciprocity, introduced in the previous chapter and discussed in more detail at 3.3.3 below. Similarly, Indonesia's *Law Concerning Mutual Legal Assistance in Criminal Matters* provides that in the absence of a treaty, assistance may be given based on a 'good relationship' under the reciprocity principles.²⁰⁴ In this context, a good relationship means a friendly relationship based on national interest and principles of equality, mutual benefit, and considering both domestic and international laws.²⁰⁵

Domestic laws will generally provide important information about the scope of assistance that can be provided and grounds for refusal. They will also usually specify preconditions that have to be met and procedures that should be followed. For example, Singapore's *Mutual Assistance in Criminal Matters Act (Chapter 190A)* establishes the framework for making and receiving requests for mutual legal assistance in

²⁰¹ UNODC, *Legislative Guide to UNCAC*, p. 203.

²⁰² *Vienna Convention on the Law of Treaties*, May 23, 1969, 1155 UNTS 331, entered into force Jan. 27, 1980. See especially Article 30 dealing with "Application of successive treaties relating to the same subject matter."

²⁰³ *Act on Mutual Assistance in Criminal Matters* BE 2535, section 9, (1992) (Thail.).

²⁰⁴ *Law Concerning Mutual Legal Assistance in Criminal Matters*, section 5, (Law No. 1 of 2006) (Indon.).

²⁰⁵ *Draft of Elucidation of Law Concerning Mutual Legal Assistance in Criminal Matters* (Law No. 1 of 2006) (Indon.).

criminal matters. The legislation establishes a number of procedural requirements, including (for example) that incoming mutual legal assistance requests should be made to the Attorney-General, and that these must include a range of information that is specified in the legislation itself.²⁰⁶ As there is considerable variation across legal regimes, it will be important for practitioners dealing with a request or wanting to make their own request to closely examine the relevant laws. Further detailed information for each of the ASEAN Member States is included in the country summaries annexed to this Handbook.

Domestic laws on mutual legal assistance can often be informed by international norms and principles. An example is provided by the *Scheme relating to Mutual Assistance in Criminal Matters within the Commonwealth* (the Harare Scheme). The Harare Scheme is not a treaty but rather a set of recommendations that provide guidance to participating States on a wide range of mutual legal assistance matters.²⁰⁷ It may therefore be used to supplement or reinforce domestic laws in this area.

Table 2: ASEAN Member State's national mutual legal assistance laws

ASEAN MEMBER STATE	NATIONAL MUTUAL LEGAL ASSISTANCE LAW
Brunei Darussalam	<i>Mutual Assistance in Criminal Matters Order</i> (2005)
Cambodia	No national mutual legal assistance law.
Indonesia	<i>Law Concerning Mutual Legal Assistance in Criminal Matters</i> (Law No. 1 of 2006)
Lao PDR	<i>Law on Criminal Procedure</i> (2004), Part XI
Malaysia	<i>Mutual Assistance in Criminal Matters Act 2002</i>
Myanmar	<i>Mutual Assistance in Criminal Matters Law</i> (Law No. 4/2004)
Philippines	No national mutual legal assistance law, however some mutual legal assistance provisions in the <i>Anti-Money Laundering Act 2001</i> .
Singapore	<i>Mutual Assistance in Criminal Matters Act (Chapter 190A)</i> (Act 12 of 2000, as amended)
Thailand	<i>Act on Mutual Assistance in Criminal Matters BE 2535</i> (1992)
Vietnam	<i>Law on Mutual Legal Assistance</i> (Law No. 08/2007/QH12)

3.3.3 The customary principle of reciprocity

As noted in the previous chapter, reciprocity is a customary principle with a long and distinguished history in international law and diplomacy. It is essentially an assurance by the State making a request for assistance that it will comply with the same type of request and provide similar cooperation to the Requested State in a similar case in the future.

National laws on mutual legal assistance often include a requirement that assistance will only be provided if an assurance of reciprocity is given. However, the principle of reciprocity may even be useful in instances where States want to cooperate, but there is no pre-existing legal basis for cooperation such as a treaty or relevant national law. In these instances, a Requested State may simply agree to provide assistance to the Requesting State, on the basis of an assurance of reciprocity, that is, that the Requesting State will provide similar assistance in future. As noted in Chapter 2, reciprocity is one expression of the broader customary principle of 'comity': the idea that actions and practices can be based on notions of good will and mutuality rather than strict application and enforcement of rules. In the present context, a State may decide to apply the principle of comity to another State by acceding to a request for assistance that may otherwise have no strict basis in law.

²⁰⁶ *Mutual Legal Assistance in Criminal Matters Act (Chapter 190A)*, section 19, (Act 12 of 2000, as amended) (Sing.).

²⁰⁷ Joutsen, *International Instruments on Cooperation in Responding to Transnational Crime*, p. 264, citing David McClean, *International Judicial Assistance* (Clarendon Press, 1992).

International cooperation has traditionally relied upon the goodwill and reciprocity of States. Assurances of reciprocity are a valuable addition to all requests, particularly those that are not made on the basis of treaty law (where there will be an explicit expectation of reciprocity). If the Requesting State is asking for some form or level of assistance that it will not be able to reciprocate, then this should be made clear in the request.

3.4 Mutual legal assistance principles and conditions

For a mutual legal assistance request to succeed, there are usually a number of principles that must be followed or preconditions that must be met. These generally reflect State practices that have developed over time in response to concerns about the need to safeguard the interests of both the Requested and Requesting States and to protect human rights in the criminal justice process. This section summarizes the major principles and conditions that apply to mutual legal assistance and provides specific examples drawn from both domestic law and the treaties considered above. Further detail of the specific requirements of ASEAN Member States is provided in the country summaries annexed to this Handbook.

3.4.1 Sufficiency of evidence

After concluding that there is a legal basis for seeking mutual legal assistance, it is necessary to determine, from the relevant law and / or treaty, what information will need to be provided of the alleged crime to support the request. The amount and quality of information required will vary depending upon the jurisdiction and the nature of the assistance sought. As a general rule, the more intrusive the assistance sought the more supporting information will be required to justify the request. For example, in the **ASEAN MLAT** the evidentiary test for the execution of a warrant for search and seizure is “reasonable grounds for believing that the documents, records or items are relevant to a criminal matter in the Requesting State.”²⁰⁸

3.4.2 Dual / double criminality

The principle of dual (double) criminality requires that the *conduct* that is the subject of the mutual legal assistance request be considered a criminal offence in both the Requesting and the Requested State. Dual criminality is a common requirement in the mutual legal assistance context. In practical terms, the principle is intended to ensure that States are only required to provide assistance in relation to conduct that they themselves recognize as being ‘criminal’. The principle of dual criminality provides a compelling reason for States to criminalize trafficking in persons as it has been defined in international law.²⁰⁹

Requirements around dual criminality vary between States and mutual legal assistance regimes. In the ASEAN context, the **ASEAN MLAT** provides that Requested States Parties shall refuse assistance if, in their opinion, the dual criminality requirement has not been fulfilled. However, the terms of the treaty do not prohibit States Parties from assisting in this event: the Requested State Party may still provide assistance in the absence of dual criminality if permitted by domestic law.²¹⁰

Article 18(9) of **UNTOC** provides that States Parties that are using the mutual legal assistance provisions of that instrument (through choice or through the absence of an alternative legal basis) *may* decline to render mutual legal assistance on the ground of absence of dual criminality. However, the Convention also provides that the Requested State Party may, if it deems appropriate, provide assistance to the extent it decides at its discretion, even if dual criminality is not satisfied.

The **UNCAC** is stronger than the UNTOC in terms of ensuring that dual criminality requirements do not operate to frustrate the broader purposes of that Convention. Article 46(9) of UNCAC provides that in responding to a request for mutual legal assistance in the absence of dual criminality, a State Party *must* take into account the purposes of the Convention.²¹¹ While States Parties retain the right to refuse cooperation in

²⁰⁸ *ASEAN MLAT*, art. 18.

²⁰⁹ OHCHR, *Commentary to the Trafficking Principles and Guidelines*, Principle 14 and related Guidelines, p. 222.

²¹⁰ *ASEAN MLAT*, art. 3(1)(e).

²¹¹ *UNCAC*, art. 46(9)(a).

the absence of dual criminality, a Requested State Party *shall*, where consistent with the basic concepts of its legal system, render assistance that does not involve coercive action.²¹²

Practitioners may also need to be aware of dual criminality requirements arising under national laws. Further detail of this aspect with regard to the ASEAN Member States is provided in the country summaries annexed to this Handbook.

If a Requested State does require dual criminality, practitioners should keep in mind that the test is whether the *conduct* giving rise to the investigation is criminal in both States, not whether the conduct is punishable as exactly the same offence in the two States.²¹³ If the Requested State does not have the same offence, then practitioners may need to explore whether the conduct can be linked to a different offence in the Requested State. In relation to trafficking in persons cases, ‘conduct’ could include, for example, detention, sexual assault, forced labour, child labour, forced marriage, document fraud and debt bondage.

Trafficking in persons offences and related crimes might be committed through or under the cover of companies, fake charitable organisations or other structures that hide the true ownership and identity of the traffickers.²¹⁴ Dual criminality can sometimes be problematic when the target of an investigation is a legal person such as a company, as some States have not yet taken legislative steps to recognize the liability of legal persons. If the liability of legal persons for trafficking offences has not yet been established by law, it may be necessary to rely on the illegal conduct that was committed by a particular natural person implicated in the case.²¹⁵ Again, the principle of dual criminality underscores the importance of ensuring the criminal liability of legal persons for trafficking and related offences.²¹⁶

The UN *Model Treaty on Mutual Assistance in Criminal Matters* states the following in relation to the issue of dual criminality:

Countries may wish, where feasible, to render assistance, even if the act on which the request is based is not an offence in the requested State (absence of dual criminality). Countries may also consider restricting the requirement of dual criminality to certain types of assistance, such as search and seizure.²¹⁷

3.4.3 Double jeopardy

A Requested State may deny cooperation if it relates to a crime for which a person has already been tried and acquitted or punished for the conduct underlying the request. This is known as the principle of ‘double jeopardy’ (*ne bis in idem*). The principle of double jeopardy is part of international law including international human rights law. Article 14(7) of the ICCPR provides as follows:

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

The principle of double jeopardy is expressed in different ways in various mutual legal assistance laws and treaties. For example, some laws and treaties seek to establish whether a person has been punished for the crime in the Requesting and / or Requested States. Other arrangements consider whether the person has been punished in a third State. Laws and treaties may also use different language: some require consideration of whether the person has been punished, while others look at whether the person has been tried and acquitted or convicted.²¹⁸

²¹² UNCAC, art. 46(9)(b).

²¹³ See further, Caruso, *Legal Challenges in Extradition and Suggested Solutions*, pp. 57-68, 58.

²¹⁴ UNODC, *UNODC Toolkit to Combat Trafficking*, p. 37.

²¹⁵ ADB / OECD, *MLA, Extradition and Recovery of Proceeds of Corruption in Asia and the Pacific*, p. 44.

²¹⁶ UNTOC Article 10 and UNCAC Article 26 require States Parties to adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in the offences established by these Conventions.

²¹⁷ United Nations *Model Treaty on Mutual Assistance in Criminal Matters*, note 6, GA Res. 45/117, Annex I, as amended by GA Res. 53/112, UN Doc. A/RES/45/117 (Dec. 14, 1990).

²¹⁸ Kimberly Prost, *Practical Solutions to Legal Obstacles in Mutual Legal Assistance, in Denying Safe Haven to the Corrupt and the Proceeds of Corruption: Papers Presented at the 4th Master Training Seminar of the ADB / OECD Anti-Corruption Initiative for Asia and the Pacific 32-37*, p. 35 (ADB / OECD, 2006) [hereinafter Prost, *Practical Solutions to Legal Obstacles in Mutual Legal Assistance*].

Complications may arise over whether an alleged ‘second prosecution’ is for the same offence or alleged criminal conduct, such that the double jeopardy principle should be invoked. This question will often come up if a later charge relates to the same conduct but the offence is categorized differently or if substantial new evidence has come to light. Implementation difficulties such as this can often be avoided through careful drafting of relevant legal instruments.

Double jeopardy is a mandatory ground for refusal under the **ASEAN MLAT**. Article 3(1)(d) provides that:

The Requested Party shall refuse assistance if, in its opinion –

- (d) the request relates to the investigation, prosecution or punishment of a person for an offence in a case where the person –
 - (i) has been convicted, acquitted or pardoned by a competent court or other authority in the Requesting or Requested Party; or
 - (ii) has undergone the punishment provided by the law of that Requesting or Requested Party, in respect of that offence or of another offence constituted by the same act or omission as the first mentioned offence; ...

3.4.4 Reciprocity

As noted above, international cooperation such as mutual legal assistance relies upon the goodwill and reciprocity of States. Many laws and treaties reflect the principle that assistance will only be provided on a reciprocal basis. For example, Article 3(1)(g) of the **ASEAN MLAT** provides that the Requested State Party shall refuse assistance if, in its opinion:

the Requesting Party fails to undertake that it will be able to comply with a future request of a similar nature by the Requested Party for assistance in a criminal matter.

States Parties to the ASEAN MLAT have also agreed that they shall, subject to their domestic laws, reciprocate any assistance granted in respect of an equivalent offence irrespective of the applicable penalty.²¹⁹

3.4.5 Speciality or use limitation

Traditionally, evidence that was provided to a Requesting State in response to a request for mutual legal assistance could only be used for the purpose stated in the request, unless the Requested State has specifically agreed otherwise. This concept is referred to as ‘speciality’, ‘specialty’ or ‘use limitation’. However, increasingly many treaties provide that such a ‘use limitation’ may be waived by the Requested State Party – or even that such a limitation will only exist if the Requested State specifically imposes one.

In the ASEAN context, the **ASEAN MLAT** provides that the Requested State Party shall refuse assistance if, in its opinion:

the Requesting Party fails to undertake that the item requested for will not be used for a matter other than the criminal matter in respect of which the request was made and the Requested Party has not consented to waive such undertaking.²²⁰

If States are using either **UNTOC** or **UNCAC** as the legal basis for their mutual legal assistance request, then the relevant treaties provide that the Requesting State shall not transmit or use information or evidence furnished by the Requested State for investigations, prosecutions, or judicial proceedings other than those stated in the request, without the prior consent of the Requested State Party.²²¹

Any speciality provision or use limitation should not extend to information or evidence that is *exculpatory* to an accused person (i.e. information or evidence that might justify or excuse that person’s actions or show they are not guilty). This proviso reflects a broader principle of criminal justice that recognizes it would be seriously improper for the prosecution to fail to disclose to the defence available material that may be of assistance to the defence.²²² In certain treaties, this important provision is specifically stated. For example, in relation

²¹⁹ ASEAN MLAT, art. 3(10).

²²⁰ ASEAN MLAT, art. 3(1)(h).

²²¹ UNTOC, art. 18(19); UNCAC, art 46(19).

²²² McClean, *Transnational Organized Crime: A Commentary*, p. 213.

to both **UNTOC** and **UNCAC**, the general rule of speciality must not prevent the Requesting State Party from disclosing in its proceedings, information or evidence that is exculpatory to an accused person.²²³ UNTOC places a similar condition with respect to Requested States.²²⁴

3.4.6 General human rights considerations

Human rights considerations are an important aspect of mutual legal assistance. Rights that may be particularly relevant in the context of mutual legal assistance include: the right to liberty and security of the person; the right to life; the right not to be subjected to torture or cruel, inhumane or degrading punishment; the right to equality before the law: the right to a fair and public hearing, legal representation and interpreters; the presumption of innocence; and the right to not be held guilty of retrospectively operative offences or penalties.²²⁵

Requested and Requesting States are required to be especially careful that nothing in a request constitutes an actual or potential infringement of the human rights of the subject of the request or of any third parties. As noted in Chapter 2, treaties on international cooperation typically provide some measure of protection for individuals who are the subject of a request for international cooperation. The rules against double jeopardy provide one example. Another example is provided by rules that incorporate the principle of non-discrimination. The **ASEAN MLAT** provides that the Requested State shall refuse assistance if, in its opinion:

there are substantial grounds for believing that the request was made for the purpose of investigating, prosecuting, punishing or otherwise causing prejudice to a person on account of the person's race, religion, sex, ethnic origin, nationality or political opinions.²²⁶

The protections specified in international cooperation treaties do not operate in isolation. They have to be understood and applied within the broader context of a States' human rights obligations as these are enshrined in treaty and customary law. Treaties such as the ICCPR, the Refugee Convention and the Convention against Torture are likely to be especially important in the context of mutual legal assistance and other forms of international cooperation such as extradition. Several of the most relevant human rights considerations, and their practical application in the context of mutual legal assistance, are discussed below.

3.4.7 The rights of suspects and persons charged with criminal offences

International human rights law provides that every person who is arrested has certain rights, including the following:

Anyone who is arrested must be informed, at the time of arrest, of the reasons for the arrest and shall be promptly informed of any charges against him.²²⁷

Persons who have been charged with criminal offences also have certain rights. For example, the ICCPR provides that in the determination of any criminal charges, everyone is entitled to the following minimum rights:

- the right to be presumed innocent until proven guilty according to law;
- the right to be informed promptly and in detail of the nature and cause of the charges against him or her, in a language which they understand;
- the right to have adequate time and facilities to prepare a defence and to communicate with a lawyer of his / her own choosing;

²²³ UNTOC, art. 18(19); UNCAC, art. 46(19).

²²⁴ UNTOC, art. 18(5).

²²⁵ UN Universal Declaration of Human Rights, arts. 5-11; ICCPR, arts. 7, 9, 13, 14; Convention against Torture, art. 3. See further, Harrington, *The Absent Dialogue* for a discussion of international human rights obligations and their application in the context of international cooperation in criminal matters. For a recent discussion of the intersection between human rights and criminal justice and its relevance to international cooperation, see UNGA, *Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*.

²²⁶ ASEAN MLAT, art. 3(1)(c).

²²⁷ ICCPR, art. 9(2). A similar requirement is contained in the major regional human rights treaties.

- the right not to be compelled to testify against himself / herself or to confess guilt.²²⁸

Under many legal systems, a failure to respect these fundamental rights can result in case failure. Accordingly, many States have developed detailed procedures to ensure that officials understand these rights and can apply them in practice. Under most legal systems a person suspected or potentially implicated in a crime must be cautioned and advised of their rights (such as the right against self-incrimination and the right to legal counsel) before law enforcement officials can take or use statements from them.

Accordingly, where a mutual legal assistance request includes a request to interview people, it is important for a Requesting State to:

- inform the Requested State if it considers any of these persons to be suspects; and
- advise the Requested State regarding any particular caution or procedure that must be followed for suspects.

Clarifying this at the outset will avoid delays and problems arising from the failures to properly caution the person.

The **ASEAN MLAT** recognizes that States have different procedures and protections with regard to the right against self-incrimination / right to silence. Article 12 of the ASEAN MLAT provides that a person may decline to give sworn testimony or produce evidence if the law of either the Requesting or Requested State permits or requires a person to decline to do so, if similar proceedings were undertaken in that State. If a person claims this right, the Requesting State shall, if requested, provide a certificate as to the existence of that right. Note that the ASEAN MLAT also allows for witnesses to be interviewed directly by investigators and / or prosecutors from the Requesting State.²²⁹ This would allow investigators and prosecutors to ensure that necessary procedures (such as the provision of cautions) are followed.

3.4.8 Consideration of the likely severity of punishment, including torture and death penalty cases

The laws of many States, and various treaties specify that States retain the right to refuse the provision of mutual legal assistance where the punishment attached to the crime is either the death penalty, or a penalty that is considered a form of cruel, inhuman or degrading punishment or torture. This reflects national and international concerns regarding the protection of human rights, including during the mutual legal assistance process.

States that have ratified the *Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty* have agreed to take steps to abolish the death penalty in their own jurisdictions. Similarly, States that have ratified the Convention against Torture and / or any of the major regional human rights treaties have agreed to take effective action to prevent acts of torture, and other forms of cruel, inhuman or degrading treatment or punishment in their own jurisdictions. At the very least, it would be against the spirit of these Conventions for one State to materially assist another State to impose a punishment that it has sought to prohibit at home. Depending on the facts of the case, the provision of mutual legal assistance in these circumstances may even breach that State's international legal obligations.²³⁰

The issue of severity of punishment has always been an important consideration in relation to extradition. Increasingly Requested States are asking Requesting States to provide assurances that the evidence requested through mutual legal assistance will not lead to the death penalty or the imposition of cruel, inhuman or degrading punishment or torture against a person. If the severity of penalty is a basis for denying assistance, then the Requesting and Requested States should consult with each other to try to resolve the issue. For example, it may still be possible to cooperate if the Requesting State gives an assurance that the death penalty or other penalty of concern will not be imposed or carried out in this particular case.

²²⁸ ICCPR, arts. 9, 14. For a comprehensive analysis of these provisions, see Nowak, *U.N. Covenant on Civil and Political Rights*.

²²⁹ ASEAN MLAT, art. 12.

²³⁰ For a discussion of international human rights obligations and their application in the context of international cooperation in criminal matters see Van Hoek and Luchtman, *Transnational Cooperation in Criminal Matters*; and Harrington, *The Absent Dialogue*.

The practical application of this principle can be difficult in mutual legal assistance cases, as mutual legal assistance requests often occur at an early stage of a case when it is not always possible to clearly identify suspects, or the particular crime and applicable penalty.²³¹ Accordingly, it is important for practitioners to pro-actively consider the potential penalties that may apply when responding to a mutual legal assistance request. If there are concerns regarding possible severity of penalty, then assurances should be sought at an early stage.

3.4.9 Political offences

Mutual legal assistance is sometimes declined on the basis that the offence is of a political nature. Political offence exceptions have their basis in historical tolerance of armed struggle against anti-democratic, authoritarian regimes.²³² However, international tolerance for politically motivated violence has considerably waned in recent years. As a consequence, treaty provisions now generally exclude political violence from the political offence exception.²³³

The political offence exception is not absolute and it can be expected to further narrow as States develop stronger responses to crimes such as terrorism that often have a specific political dimension. Furthermore, extremely serious crimes such as genocide, crimes against humanity and war crimes are regarded by the international community as so heinous that perpetrators cannot be permitted to rely on the political offence exception.²³⁴

This narrowing of the political offence exception is already evident in treaty practice within the ASEAN region. For example, the **ASEAN MLAT** provides that none of the following can be considered as ‘offences of a political nature’ for the purposes of that treaty:

- an offence against the life or person of a Head of State, their family, or the Head of a central Government or Ministers of that Government; and
- an offence within the scope of any international convention to which both the Requested and Requesting States Parties are parties to and which impose on the Parties thereto an obligation either to extradite or prosecute.²³⁵

3.4.10 National or public interest

Some States deny cooperation on the basis that to provide such cooperation would prejudice their national or essential interest, which might include the following matters: security; economic interest; public interest; foreign affairs; public order; or prejudice to an ongoing investigation. Most multilateral treaties preserve such a discretion. For example, under the **ASEAN MLAT**, Requested States shall refuse assistance if, in their opinion:

the provision of the assistance would affect the sovereignty, security, public order, public interests or essential interests of the Requested Party.²³⁶

There is a similar provision in Article 18(21) of **UNTOC** and Article 46(21) of **UNCAC**, both of which apply in the absence of a pre-existing treaty on mutual legal assistance between the parties. Not all mutual legal

²³¹ Bernard Rabatel, *Legal Challenges in Mutual Legal Assistance, in Denying Safe Haven to the Corrupt and the Proceeds of Corruption: Papers Presented at the 4th Master Training Seminar of the ADB / OECD Anti-Corruption Initiative for Asia and the Pacific* 38-44, p. 43 (ADB / OECD, 2006) [hereinafter Rabatel, *Legal Challenges in Mutual Legal Assistance*].

²³² UNODC, *Revised Manuals on the Model Treaty on Extradition and the Model Treaty on Mutual Assistance*, p. 16.

²³³ UNODC, *Revised Manuals on the Model Treaty on Extradition and the Model Treaty on Mutual Assistance*, p. 16.

²³⁴ UNODC, *Revised Manuals on the Model Treaty on Extradition and the Model Treaty on Mutual Assistance*, p. 17. For example, Article 1 of the *Council of Europe Additional Protocol to the European Convention on Extradition* provides that for the purposes of the Convention, ‘political offences’ shall not include crimes against humanity specified in the Convention on the Prevention and Punishment of the Crime of Genocide, certain violations of the Geneva Conventions, and any comparable violations of the laws of war. *Council of Europe Additional Protocol to the European Convention on Extradition*, Oct. 15, 1975, ETS No. 86, entered into force Aug. 20, 1979 [hereinafter *COE Additional Protocol to the European Convention on Extradition*]. See also, Articles 6 to 8 of the ICC Statute, which define the crimes of genocide, crimes against humanity and war crimes.

²³⁵ *ASEAN MLAT*, art. 3(3).

²³⁶ *ASEAN MLAT*, art. 3(1)(f).

assistance treaties take this position. The OECD Anti-Bribery Convention, for example, specifically prohibits considerations of “national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved” in investigative and prosecutorial decision-making.²³⁷ What matters are considered to be in the ‘national’ or ‘public interest’ will vary from State to State. However, it is widely accepted that such provisions permitting consideration of these issues are not intended to encourage refusal of legitimate requests for mutual legal assistance. In the context of multilateral conventions, it would be appropriate for States to consider the broader purposes of the Convention in relation to a decision on whether or not to invoke such a ground.

Requests that are considered to be an excessive burden on the resources of the Requested State may also be refused on this basis. **ASEAN MLAT** provides that the Requested Party may refuse assistance if, in its opinion, the provision of assistance would impose an excessive burden on the resources of the Requested State Party.²³⁸

3.4.11 Bank secrecy and fiscal offences

Until recently, it was well accepted that States might reasonably refuse to provide mutual legal assistance on the basis that the information sought falls under bank secrecy laws and regulations or otherwise involves fiscal offences. That situation is changing and the international community is increasingly recognizing that bank secrecy and fiscal offences are not legitimate reasons for refusing mutual legal assistance.

The **ASEAN MLAT** considers bank secrecy and fiscal offences together. States Parties agree that:

Assistance shall not be refused solely on the ground of secrecy of banks and similar financial institutions or that the offence is also considered to involve fiscal matters.²³⁹

UNTOC specifically provides that:

State Parties shall not decline to render mutual legal assistance pursuant to this article on the ground of bank secrecy.²⁴⁰

This provision applies to all States Parties, irrespective of whether or not there is already a binding mutual legal assistance agreement between them and even if such an agreement permitted bank secrecy as grounds for refusal of assistance.²⁴¹ There is an identical provision in **UNCAC**, and an almost identical provision in the OECD Anti-Bribery Convention.²⁴² Where the relevant obligations apply between the parties, both UNTOC and UNCAC provide that State Parties may not refuse a request for mutual legal assistance on the sole ground that the offence is also considered to involve fiscal matters.²⁴³

Some States may invoke national laws in refusing to provide mutual legal assistance on the basis that the information sought falls under national bank secrecy laws and regulations. This can be a problem as many treaties, including UNTOC are inconsistent on this point; disallowing such a ground while also privileging national laws. In such cases, it has been argued that such an inconsistency should be resolved in favour of the much more specific provision that disallows invocation of bank secrecy as a ground for refusing assistance.²⁴⁴ When faced with such a challenge the Requesting State should carefully consider the provisions of the relevant treaties and also review the Requested States laws to ascertain whether the State’s claim for bank secrecy is justified.²⁴⁵

²³⁷ *OECD Anti-Bribery Convention*, art. 5.

²³⁸ *ASEAN MLAT*, art. 3(2)(c).

²³⁹ *ASEAN MLAT*, art. 3(5).

²⁴⁰ *UNTOC*, art. 18(8).

²⁴¹ In other words, this provision does not form part of the ‘mini mutual legal assistance treaty’ that is comprised of Article 18, paragraphs 9 to 29 of *UNTOC*, and that applies in the absence of any other international legal basis of cooperation between parties.

²⁴² *UNCAC*, art. 46(8); *OECD Anti-Bribery Convention*, art. 9(3).

²⁴³ *UNTOC*, art. 18(22); *UNCAC*, art. 46(22).

²⁴⁴ McClean, *Transnational Organized Crime: A Commentary*, p. 216.

²⁴⁵ Prost, *Practical Solutions to Legal Obstacles in Mutual Legal Assistance*, p. 34.

3.5 Preparing mutual legal assistance requests

The preparatory phase of making a request for mutual legal assistance is an important one. It is at this time that those involved in drafting the request should be considering preliminary issues such as communication. Understanding the minimum form and content requirements of a request, as well as the role of different officials in the process, are other important aspects of the preparatory phase. The main issues are considered further below.

The role of the prosecutor *vis a vis* the Central Authority

It will generally be the role of the prosecutor (together with the investigator) to initiate any request for mutual assistance, via the Central Authority. As the person who knows the case best, the prosecutor will have a clear understanding of what evidence is already available and what evidence is still required to support the case. For this reason, the prosecutor has an important role to play in assisting the Central Authority to draft the Letter of Request.

In addition, the prosecutor will know the time-lines, key dates and precisely what is needed for court. It is the prosecutor's job to communicate with the Central Authority about these issues, and to monitor compliance to make sure the request is complied with.²⁴⁶

The importance of preparation

Requesting States should prepare thoroughly before sending a formal Letter of Request. Preparation will always involve identification of the appropriate legal framework within which the mutual legal assistance is to operate. It could also usefully involve a consideration of the laws and procedures of the Requested State to ensure that the request is drafted correctly. Preparation can be important in ensuring that the Requested State receives as much information as possible, thereby enabling it to rapidly fulfil the request. For example, if a search is being requested, the Requesting State should gather together all available information about the search site, what is expected to be found and precisely where it may be located.

The importance of communication

Effective handling of requests requires close and continual communication between all those involved: Central Authority, prosecutors and investigators in the Requesting and the Requested State. It is essential that communication channels are opened early and maintained properly.²⁴⁷ Early liaison between the Requesting and Requested States will help to avoid misunderstandings and secure agreement on how best to achieve the outcomes for which the assistance is sought. In many cases, it will be mutually advantageous for such communication to be established even before a formal assistance request is made.

Effective communication with the Requested State will ensure that all avenues for achieving a certain outcome are explored. Failure to communicate can sometimes lead to 'self-censorship'. For example, a State may decide not to proceed with a worthy request because it incorrectly perceives obstacles that could in fact be overcome.²⁴⁸

States have different requirements and practices with regard to how requests are to be prepared. This process may involve any of the following persons:

- law enforcement officers involved in the investigation;

²⁴⁶ Adapted from Albert Moskowitz, *The Role of the Prosecutor in Mutual Legal Assistance*, paper presented at the ASEAN Workshop on International Legal Cooperation in Trafficking in Persons Cases, 23-25 November 2009, Thailand [hereinafter Moskowitz, *The Role of the Prosecutor in Mutual Legal Assistance*].

²⁴⁷ Secretariat of the ADB / OECD Anti-Corruption Initiative for Asia and the Pacific, *Overcoming practical challenges in mutual legal assistance and extradition*, in *Denying Safe Haven to the Corrupt and the Proceeds of Corruption: Papers Presented at the 4th Master Training Seminar of the ADB / OECD Anti-Corruption Initiative for Asia and the Pacific 73-78*, p. 74 (ADB / OECD, 2006) [hereinafter Secretariat of the ADB / OECD, *Overcoming practical challenges*]; UNODC, *Report: Informal Expert Working Group on Mutual Legal Assistance*, p. 10.

²⁴⁸ Rabatel, *Legal Challenges in Mutual Legal Assistance*, p.39.

- prosecutors;
- Central Authority personnel;
- diplomatic officials.

The domestic laws of some States, including Malaysia and Thailand, require outgoing requests be drafted by the investigator / prosecutor in consultation with the Central Authority officials. Other States require the Central Authority to approve the request and others also require the approval of the relevant Ministries. For example Malaysia requires approval from its Ministry of Internal Security and Thailand requires approval from its Ministry of Foreign Affairs.²⁴⁹

In order to facilitate communication, the request should clearly state contact details, including phone, fax and where available, email addresses, of investigators, prosecutors, Central Authority officials and others involved.

UNODC has an on-line directory, the Competent National Authorities Directory (CNA Directory) which provides information on the competent national authorities under the 1988 Drug Control Convention and under UNTOC. The Directory allows easy access to updated contact information with other competent national authorities in most States of the world, as well as means of communication. It also provides information on the legal requirements for cooperation. The CNA Directory currently contains the contact information of over 606 CNAs, by five thematic categories including mutual legal assistance and extradition. Access to the CNA Directory is password protected. However, Central Authority officials can request a password from UNODC, following a procedure detailed on the website. For more information contact: legal@unodc.org, or visit: <http://www.unodc.org/compath/en/index.html>.

The importance of anticipating legal and procedural differences

There are many differences between the legal systems of States, even within a defined geographical or political region such as ASEAN. While it is important to take account of these differences, they should not generally present a barrier to international cooperation. Many of the legal developments recounted earlier in this Chapter have addressed and, in most cases, largely resolved the problems of difference that have, in the past, complicated the mutual legal assistance process.

When preparing a mutual legal assistance request, it is important for the Requesting State to clearly identify if there are any domestic laws, procedures or time requirements that have to be met. It is equally important for the Requesting State to try to anticipate if the Requested State might experience difficulties meeting these requirements. This may be the case if, for example:

- the processes and procedures that are being requested are *prohibited* by the laws of the Requested State; or
- the processes and procedures that are being requested are *different* to the Requested State's usual processes and procedures.

If what is being requested is likely to be *prohibited* by the laws of the Requested State, there may be little point proceeding. However, if what is being requested is just *different* to the usual practice of the Requested State, then it may still be possible to secure cooperation. In this latter case, it is important to try to understand the differences, and to actively suggest a way forward. **UNTOC**, Article 18(17), provides as follows:

A request shall be executed in accordance with the domestic law of the requested State Party and, to the extent not contrary to the domestic law of the requested State Party and where possible, in accordance with the procedures specified in the request.

There is an equivalent provision in **UNCAC**, Article 46(17).

Investigative techniques available to law enforcement agencies vary between States and this is particularly so with respect to surveillance. For example, although some States permit telephone interception for intelligence purposes, the laws might prevent information obtained through telephone interception from being used in a court as evidence. Similarly, many States have laws that regulate when and how physical surveillance can be

²⁴⁹ ADB / OECD, *MLA, Extradition and Recovery of Proceeds of Corruption in Asia and the Pacific*, p. 42.

conducted. As a result, some forms of surveillance may be legal in one State, but not in another. Accordingly, it is important for States cooperating in this way to be aware of their respective rules and practices and to apply this knowledge to requests for assistance.

Minimum form and content requirements

Mutual legal assistance laws and relevant treaties will usually set out the minimum requirements for the form and content of any mutual legal assistance request. As a general rule, mutual legal assistance requests have to be made in writing (hereafter referred to as a 'Letter of Request').²⁵⁰ There are exceptions where urgent measures are required. For example, States Parties to **ASEAN MLAT** agree that:

Requests for assistance shall be made in writing or, where possible, by any means capable of producing a written record under conditions allowing the Requested Party to establish authenticity. In urgent situations and where permitted by the law of the Requested Party, requests may be made orally, but in such cases the requests shall be confirmed in writing within five days.²⁵¹

A number of laws and treaties specify a minimum set of information that must be included in any mutual legal assistance request. For example, mutual legal assistance requests made under ASEAN MLAT must include all information specified in Article 6(1), including:

- the name of the requesting office and the competent authority conducting the investigation or criminal proceeding to which the request relates;
- the purpose of the request and the nature of the assistance sought;
- a description of the nature of the criminal matter and its current status, and a statement setting out a summary of the relevant facts and laws;
- a description of the offence to which the request relates, including its maximum penalty;
- a description of the facts alleged to constitute the offence and a statement or text of the relevant laws;
- a description of the essential acts or omissions or matters alleged or sought to be ascertained;
- a description of the evidence, information or other assistance sought;
- the reasons for and details of any particular procedure or requirements that the Requesting State Party wishes to be followed;
- specification of any time limit within which compliance with the request is desired;
- any special requirements for confidentiality and the reasons for it;
- such other information or undertakings as may be required under the domestic laws of the Requested State Party or which is otherwise necessary for the proper execution of the request.

A Model Request Form has been developed for ASEAN MLAT. See Attachment 2 to this Chapter.

For States Parties that are using the mutual legal assistance provisions of **UNTOC** (because they have elected to do so or in the absence of an alternative legal basis), Article 18(15) of that Treaty provides that a request for mutual legal assistance shall contain:

- the identity of the authority making the request;
- the subject matter and nature of the investigation, prosecution or judicial proceeding to which the request relates and the name and functions of the authority conducting the investigation, prosecution and judicial proceeding;
- a summary of the relevant facts, except in relation to requests for the service of judicial documents;
- a description of the assistance sought and details of any particular procedures that the Requesting State Party wishes to be followed;

²⁵⁰ See, for example, *UNTOC*, art. 18(14).

²⁵¹ *ASEAN MLAT*, art. 5(1).

- where possible, the identity, location and nationality of any person concerned;
- the purpose for which the evidence, information or action is sought.²⁵²

The requirements under **UNCAC** are identical to those set out above.²⁵³

Generally, the more coercive or intrusive the type of assistance requested, the more detailed the information may need to be in the request.

3.5.1 Effective drafting of requests

Drafting a request for mutual legal assistance requires consideration of many issues. However, a meeting of international experts on this issue has noted that being overly concerned about detail could result in the request being too lengthy, or so prescriptive that it inhibits the Requested State from resorting to alternative methods of securing the desired outcome.²⁵⁴ Accordingly, the expert group recommend that those involved in preparing requests should apply the following principles:

- be very specific in presentation;
- link the existing investigation or prosecution to the assistance sought;
- specify the precise assistance sought; and
- where possible, focus on the end-result and not on the method of securing the end result.²⁵⁵

To assist in the application of these principles, the expert group prepared a number of checklists that can be used, in the preparation of requests. These are included at the end of this Chapter.

There are, in addition, various forms and checklists that have been developed specifically to assist in preparing requests made under the **ASEAN MLAT**. These are also included as attachments to this Chapter.²⁵⁶ It should be also noted that some States make available, (generally on the website of the agency that acts as Central Authority), detailed information on their requirements for incoming mutual legal assistance requests. For example:

- Brunei Darussalam: Forms available at http://www.agc.gov.bn:81/index.php?option=com_content&view=article&id=128&Itemid=1
- Singapore: Forms available at http://www.agc.gov.sg/criminal/mutual_legal_asst.htm

Where model forms / checklists are available for an ASEAN Member State, this is noted in the country summaries annexed to this Handbook.

UNODC has recently developed a Mutual Legal Assistance Request Writer Tool (MLA Tool) to help practitioners draft effective requests, receive more useful responses and streamline the process. The MLA Tool, which was developed by practitioners, for practitioners, can be used to help write a request, as it guides the practitioner through the request writing process, step by step. The MLA Tool can be used for all serious offences in a State, not just those covered by the international crime conventions. The tool, which is free of charge, can be downloaded at: <http://www.unodc.org/mla/en/index.html>.

Some of the issues that are relevant to the drafting process are briefly explored below.

Formalities and authority

The Letter of Request should be a stand-alone document that provides the Requested State with all the information necessary to determine whether assistance should be given and to provide that assistance.²⁵⁷

²⁵² *UNTOC*, art. 18(15).

²⁵³ *UNCAC*, art. 48(15).

²⁵⁴ UNODC, *Report: Informal Expert Working Group on Mutual Legal Assistance*, p. 10.

²⁵⁵ UNODC, *Report: Informal Expert Working Group on Mutual Legal Assistance*, p. 10.

²⁵⁶ The Model Request Form, for use with *ASEAN MLAT* attached to this chapter, is also available from the Secretariat website http://www.agc.gov.my/agc/sec/form/model_request_form.pdf. The checklist to assist in preparing requests under the *ASEAN MLAT* is available from http://www.agc.gov.my/agc/sec/form/model_checklist.pdf.

²⁵⁷ Polaine, *Transnational Bribery/Corruption Investigations*, p. 4.

There is no internationally agreed pro-forma of a request for mutual legal assistance. However, there are many good practice examples including those contained in the resources cited above. An example of a cover note that could be used for mutual legal assistance requests is included at the end of this Chapter.²⁵⁸ Some national laws will include forms that should be used.

Requests are generally addressed to the ‘competent legal authority’. The competent authority of States will vary between States and may be the Attorney General’s Office, the Ministry of Foreign Affairs or the Ministry of Justice. In some cases, the relevant authority can be identified in advance by the Requesting State. In other cases, it is the Requested State that will determine which of its national authorities is competent to receive and consider the request. Some treaties, for example the **ASEAN MLAT**, require the identification of a Central Authority that will handle requests for assistance.²⁵⁹ Contact details for the Central Authority are held on the Secretariat website.²⁶⁰

Clearly state the legal basis for the request

The legal basis for the request should be stated in the body of the Letter of Request.²⁶¹ If the Requested State is under a legal obligation to assist then this obligation should be identified and asserted at the outset. If a treaty is being relied upon, it is essential that the applicable treaty is named and any specific provisions being relied upon are identified.

Clearly state any mandatory procedural requirements

In many States, there are processes and procedures that *must* be followed, before evidence will be admissible in court. Furthermore, the evidence might need to be provided in a particular format or language. The Requested State must be informed of these requirements in very clear terms. This will be especially important in relation to several types of mutual legal assistance that are carefully regulated such as the taking of witness statements. Similarly, in some States financial records will only be admissible as evidence in court if accompanied by a formal certificate that verifies the authenticity of the documents. Such a requirement should be explicitly stated in the assistance request, accompanied, if possible, by a template or copy of the certificate to be completed.

Clearly state the assistance required and end-result sought

It is essential that the Requesting State is clear and precise about the assistance it is seeking.²⁶² For example, if company records are required, it will be useful for the Requesting State to specify that it requires company records for “X company, between the dates 1 January 2009 - 1 January 2010”. This will assist the Requested State to fulfil the request without the unnecessary burden that might accompany a request simply for ‘all company records’ for a particular company. The Requested State should also, as noted above, be alerted to any special or particular requirements relating to the admissibility of evidence.

More generally, the Requested State should be provided with a clear idea of the end-result sought to be achieved. That State will often be in the best position to determine the most effective way of securing the desired result. For example it may be possible for the Requested State to obtain the evidence requested by means of a production or other court order, rather than more intrusive means such as a search warrant.²⁶³

²⁵⁸ This cover note is extracted from UNODC, *Report: Informal Expert Working Group on Mutual Legal Assistance*, with the permission of UNODC.

²⁵⁹ *ASEAN MLAT*, art. 4.

²⁶⁰ See <http://www.agc.gov.my/agc/sec/sec.htm>.

²⁶¹ Polaine, *Transnational Bribery/Corruption Investigations*, p.3.

²⁶² Sean Mowbray, *Trends in the practice of MLA in Asia-Pacific, in Denying Safe Haven to the Corrupt and the Proceeds of Corruption: Papers Presented at the 4th Master Training Seminar of the ADB / OECD Anti-Corruption Initiative for Asia and the Pacific 79*, p. 79 (ADB / OECD, 2006).

²⁶³ UNODC, *Report: Informal Expert Working Group on Mutual Legal Assistance*, p.10.

Link the assistance sought to the investigation or prosecution

It is important that the Letter of Request clearly states the link between the facts of the case as detailed in the request and the assistance requested. If the request is for evidence believed to exist in the Requested State, the request should indicate why and how that evidence is considered to be relevant to the investigation or prosecution.

The description of facts should include as much relevant information as possible including the names and dates of birth of the persons involved in the case and also the names of family and associates. A clear description of the modus operandi should be included together with details of any significant and relevant dates of any events and / or transactions.

Avoid technical or specialist language

It is important to avoid using overly specialized or technical language that may not be understood, or may have a different meaning in another jurisdiction. This is especially relevant in situations where two States are communicating in a third language or are subjecting their requests or replies to translation. (See: “Language”, below). Examples of terms that may not be understood the same way by Requesting and Requested States include: ‘affidavit’, ‘business record’, ‘testimony’ or ‘process verbal’. These terms should be avoided or clearly explained. It may be preferable to give a simple explanation of the assistance sought. For example, rather than requesting an ‘affidavit’, the Requesting State can simply request a statement that is sworn or affirmed by the person giving it.²⁶⁴

Provide any assurances

It is good practice to try to anticipate and provide any assurances that may ultimately be required. For example, assurances of reciprocity should be included in all requests as a matter of routine. Other important assurances relate to confidentiality and human rights matters such as those concerning penalties. A thorough understanding of the relevant legal basis and the laws and procedures of the Requested State will be important in this regard.

Identify key personnel

It is helpful to identify the key personnel involved in investigating or prosecuting the case such as the investigators at the relevant specialist anti-trafficking unit or other investigating, prosecution or judicial authority working on the actual case. It is also helpful to include information on the status of the case. For example, is the matter at the investigation stage or has it progressed to the prosecution stage? This enables the Requested State to ask questions for clarification from the most direct contact point.

Note any prior contact with officials

The Letter of Request should advise of any previous contact (informal and formal) on the matter to ensure that the Requested State can coordinate its efforts properly.²⁶⁵ The Requesting State should include as much information about this as possible to enable the Requested State to undertake effective and timely coordination.

Clearly specify and explain time limitations

Any Requesting State deadlines must be stated clearly on the request along with the reasons for those deadlines. Time constraints might include: statutory limitation periods, impending court dates or restrictions

²⁶⁴ Kimberly Prost, *Breaking Down the Barriers: Inter-national Cooperation in Combating Transnational Crime* (1998), online article, available from http://www.oas.org/JURIDICO/mla/en/can/en_can_prost.en.html [hereinafter Prost, *Breaking Down the Barriers*].

²⁶⁵ UNODC, *Report: Informal Expert Working Group on Mutual Legal Assistance*, p. 9.

on the time for service of prosecution evidence. Although urgent requests will sometimes be unavoidable, the Requesting State should make all efforts to ensure that it prepares its requests in a timely manner and enables the Requested State sufficient time to execute the request.

Confidentiality

Information included in a mutual legal assistance request – and documents attached to such a request - will generally be open to judicial, and possibly even public scrutiny. Confidentiality can however sometimes be essential to the success of the entire cooperation exercise.²⁶⁶ If confidentiality is required in the execution of the request, the reasons for this should be stated clearly. Requested States cannot always provide confidentiality without an authorisation of a court so it is critical to make clear the reasons for the confidentiality, so these can be provided to the court if necessary. If a Requested State cannot provide assurances of confidentiality it should inform the Requesting State accordingly.²⁶⁷

Most treaties include obligations to protect confidentiality. For example, under **ASEAN MLAT**, States Parties have agreed that the Requested State shall, subject to its domestic laws, take all appropriate measures to keep confidential the request for assistance, its contents and its supporting documents, the act of granting of such assistance and any action taken pursuant to the request. States Parties have further agreed that if the request cannot be executed without breaching confidentiality requirements, the Requested State must inform the Requesting State, which will then determine whether the request should nevertheless be executed.²⁶⁸

In situations where the States Parties to **UNTOC** are not bound by a treaty of mutual legal assistance or have decided to apply its provisions, the confidentiality clause of that instrument will apply. Article 18(20) of UNTOC provides that the Requesting State may require that the Requested State keep confidential the fact and subject of the request, except to the extent necessary to execute the request. If the Requested State Party cannot comply with the requirement of confidentiality, it is required to promptly inform the Requested State Party. There is a similar obligation in **UNCAC**.²⁶⁹

Language

Requests for assistance must be made in a language that is acceptable and can be understood by the Requested State officials. Some Requested States require that the request be translated into their official language. Communication in an official language is often necessary if courts will be involved in fulfilling the request. Languages accepted by States Parties to the **UNTOC** can be found in UNODC's CNA Directory.²⁷⁰

As a practical matter, States are increasingly drafting and accepting requests in English. Under **ASEAN MLAT** States Parties have agreed that all requests, supporting documents and other communications made pursuant to the treaty must be in the English language, and if necessary, will be accompanied by a translation into the language of the Requested State Party or another language acceptable to the Requested State Party.²⁷¹ It is often easier for Requesting States to find qualified persons to translate their documents from their official language into English and for Requested States to find qualified persons to translate the request from English to their official language.²⁷² Translations must be of a high quality and if they are not, there is a risk that the request might be delayed, misunderstood or rejected.²⁷³

²⁶⁶ McClean, *Transnational Organized Crime: A Commentary*, p. 229.

²⁶⁷ UNODC, *Report: Informal Expert Working Group on Mutual Legal Assistance*, p. 11.

²⁶⁸ **ASEAN MLAT**, art. 9.

²⁶⁹ **UNCAC**, art. 46(20).

²⁷⁰ UNODC, 'The Competent National Authorities (CNAs) on-line Directory', available from <http://www.unodc.org/compath/en/index.html>. Access to the CNA Directory is password protected. However, Central Authority officials can request a password from UNODC, following a procedure detailed on the website.

²⁷¹ **ASEAN MLAT**, art 6(3).

²⁷² ADB / OECD, *MLA, Extradition and Recovery of Proceeds of Corruption in Asia and the Pacific*, pp. 62-63.

²⁷³ Charles Caruso, *Working together and intensifying actions to strengthen the extradition process*, in Denying Safe Haven to the Corrupt and the Proceeds of Corruption: Papers Presented at the 4th Master Training Seminar of the ADB / OECD Anti-Corruption Initiative for Asia and the Pacific 86-95, p. 90 (ADB / OECD, 2006) [hereinafter Caruso, *Working together and intensifying actions to strengthen the extradition process*].

3.6 Transmitting mutual legal assistance requests

Transmission is a key phase in the mutual legal assistance process. In order to avoid delays it is essential to ensure that the transmission channel is correctly identified. It will be necessary in each case to determine how the request should be transmitted (or provided) to the Requested State. This will depend upon the legal basis for making the request. Customary law and older treaties usually required transmission through ‘diplomatic channels’. More recent treaty agreements, including **ASEAN MLAT**, provide for communication between the designated ‘competent authorities’, often referred to as the Central Authority. See further below under ‘Central authorities’.

Diplomatic channels

The diplomatic channel is the traditional method of transmitting mutual legal assistance requests, and is the channel to be used where there is no other agreed channel between relevant States. Generally this involves officials in the Requesting State preparing the request, and passing it to their Ministry of Foreign Affairs who will then pass on the request to their counterparts overseas, under cover of a diplomatic note. The Requested State diplomatic authorities will then pass it on to the appropriate Requested State law enforcement or prosecution authority for execution.²⁷⁴

The diplomatic channel can be slow and highly sensitive to political intervention. Furthermore, such requests are often not prioritised, particularly when the diplomatic authority has a heavy workload and limited resources. To expedite the process, even in non-urgent cases, practitioners may consider seeking permission to also send an informal copy of the request directly to the authorities in the Requested State. This would enable those responsible for executing the request to begin preparations, while waiting for formal transmission of the relevant documentation.²⁷⁵

Cambodia, Lao PDR and Malaysia require all requests to be sent through diplomatic channels. Myanmar and Thailand also require requests to be sent through diplomatic channels if there is no treaty with the Requesting State. Indonesia permits requests to be submitted either directly or through diplomatic channels.

Central authorities

In many States, central authorities have now replaced the diplomatic channel route for mutual legal assistance and related requests. Central authorities are responsible for the transmission, receipt and handling of all requests for assistance on behalf of a State. In most States that have created such a mechanism, the Central Authority is located in the Ministry of Justice or Law, Ministry of International Affairs, Ministry of Foreign Affairs, Attorney General’s Office or prosecuting authority. It should be noted that in a few States, different bodies may have been nominated as the central or competent authority for different treaties.

Central authorities that have been designated as responsible for all mutual legal assistance requests provide a visible point of contact for States seeking assistance and advice about international cooperation matters and can generally more easily handle incoming and outgoing requests. For the Requesting State in particular, channelling a request through a Central Authority is usually quicker and more efficient than using the diplomatic channel because the authority can either execute the request itself immediately, or readily identify the body that should execute the request. Central authorities can be an important asset in the preparation of a request for assistance and in the providing advice and assistance to officials involved in the preparation of requests.

ASEAN MLAT requires States Parties to designate a Central Authority to make and receive MLA requests.²⁷⁶ Similarly, for UN Conventions such as **UNTOC** and **UNCAC**, States Parties are required to identify their Central Authority and notify the UN accordingly. Information about central authorities in relation to these two

²⁷⁴ ADB / OECD, *MLA, Extradition and Recovery of Proceeds of Corruption in Asia and the Pacific*, p. 63.

²⁷⁵ Rabatel, *Legal Challenges in Mutual Legal Assistance*, p. 40.

²⁷⁶ *ASEAN MLAT*, art. 4.

treaties can be found in the CNA Directory, available online.²⁷⁷ In addition, with regard to the ASEAN Member States, contact details for the various central authorities are included in the country summaries annexed to this Handbook.

Urgent request procedures

Mutual legal assistance laws and treaties often make provision for urgent requests for assistance. Generally, in urgent cases, requests can be made orally or through fax or e-mail with subsequent written confirmation through formal channels. Urgent cases are usually those where there is a serious risk that:

- the safety of a known or potential victim or witness or their family will be compromised;
- the suspect will flee;
- vital evidence will be lost or destroyed; or
- the ability to trace and freeze trafficking proceeds will be compromised.²⁷⁸

It is relevant to note that trafficking in persons is often an extremely violent crime and that victims, particularly those cooperating with law enforcement, can be under serious risk of intimidation and retaliation. The safety of victims and victim-witnesses may be an important consideration in deciding whether to activate an urgent request for assistance.

ASEAN MLAT provides that in urgent situations and where permitted by national law, requests may be made orally, but in such cases the request must be confirmed in writing within five days.²⁷⁹ ASEAN MLAT also provides that while central authorities should deal with the transmission of all requests, in urgent situations and where permitted by law, requests and any communications related to these may be transmitted through INTERPOL or ASEANAPOL.²⁸⁰

Where these provisions apply between the parties, both Article 18(14) of **UNTOC** and Article 46(18) of **UNCAC** provide that while requests should ordinarily be made in writing, in urgent circumstances and where agreed by the parties, requests can be made orally and confirmed later in writing. While requests should ordinarily be transmitted through the Central Authority, both treaties allow for the possibility of transmission through INTERPOL in urgent circumstances.²⁸¹

3.7 Handling of incoming requests

While drafting is important, the fate of a mutual legal assistance request lies very much with the way in which it is handled by the Requested State. This section identifies key issues in the handling process and then considers the details of effective consideration of and response to requests.

The importance of communication

Contact between concerned Requesting and Requested States officials is critically important at every stage in the mutual legal assistance process. In most States, an incoming request will be initially reviewed by the central or other competent authority for compliance with treaty requirements and laws. After this initial review, the request is passed on to the appropriate agency for execution. The executing agency will vary depending upon the nature of the matter and may include law enforcement, prosecution agencies or judicial authorities.

²⁷⁷ UNODC, 'The Competent National Authorities (CNAs) on-line Directory', available from <http://www.unodc.org/comppath/en/index.html>. Access to the CNA Directory is password protected. However, Central Authority officials can request a password from UNODC, following a procedure detailed on the website.

²⁷⁸ UNODC, *UNODC Toolkit to Combat Trafficking*, p. 62.

²⁷⁹ ASEAN MLAT, art. 5(1).

²⁸⁰ ASEAN MLAT, art. 5(2).

²⁸¹ UNTOC, art. 18(13); UNCAC, art. 46(13).

Prioritising the execution of trafficking related requests

The international community has identified trafficking as a criminal offence and human rights violation requiring the urgent attention of all States and a high level of cooperation between States. It is widely accepted that requests for assistance relating to trafficking in persons cases should be prioritized by the Requested State. The ASEAN Practitioner Guidelines, prepared by officials directly involved in such matters, are clear on the need for such prioritization and the importance of avoiding delay.²⁸²

Requested States must ensure that incoming requests are examined by the central or competent authority without delay, and transmitted to the executing authorities as a matter of priority. In many instances, prompt and efficient handling will be necessary to meet obligations that States have themselves accepted under treaty arrangements. For example, under **ASEAN MLAT**, States Parties have agreed that requests for assistance will be carried out promptly.²⁸³ A similar obligation is contained in **UNTOC** and **UNCAC**.²⁸⁴

In all cases, it is recommended that Requested States try to ensure that mutual legal assistance requests are treated with the same priority as similar domestic investigations or proceedings.²⁸⁵ As noted above, follow up and on-going communication with the Requesting State is critical.

Coordinate in cases with multiple jurisdiction

In transnational trafficking in persons cases, jurisdictional issues can arise. Often, more than one State will have jurisdiction over individuals suspected to have been involved in criminal activities. This can lead to multiple requests for assistance in relation to the same situation. In such cases, it will be necessary for the Requesting and Requested States to closely consult in order to avoid confusion and needless duplication of effort.²⁸⁶

Ensuring investigators / prosecutors from the Requesting State are involved when the request is executed

The investigators and / or prosecutors working on the case in the Requesting State will have the most knowledge about the case, and they will be best placed to know precisely what evidence is required. For these reasons, wherever possible, it is important to provide the investigators / prosecutors actually working on the case with an opportunity to be involved in executing the request for assistance. Note that such involvement, particularly if it involves Requesting State officials coming into the territory of the Requested State, will always be at the discretion of the Requested State.

ASEAN MLAT, Article 11(2), provides that:

Where sworn or affirmed testimony is to be taken under this Article, the parties to the relevant criminal proceedings in the Requesting Party or their legal representatives may, subject to the domestic laws of the Requested Party, appear and question the person giving that evidence.

In other words, where a request for assistance relates to a request to conduct an interview, the investigator or prosecutor in the Requesting State can actually seek permission from the Requested State to conduct the interview themselves. Involving the investigators and prosecutors from the Requesting State in this way is important: they will know the case best and the case is their priority.²⁸⁷

If the request is to interview a victim of trafficking it is particularly important for the Requesting State investigating and / or prosecuting case officers to personally take part (or at least be present) in the interview at the earliest opportunity. This will enable them to begin to establish the relationship of trust with the victim

²⁸² *ASEAN Practitioner Guidelines*, Part 2.D.4. Note also, *UNTOC*, art. 18(24) and *ASEAN MLAT*, art. 7(1).

²⁸³ *ASEAN MLAT*, art. 7(1).

²⁸⁴ *UNTOC*, art. 18(13), 18(24); *UNCAC*, art. 46(13), 46(24). Where these obligations are applied between the States Parties, central authorities are obliged to ensure the “speedy and proper execution or transmission of the requests received.”: *UNTOC*, Article 18(3). States Parties have also agreed that Requested States will execute requests for mutual legal assistance ‘as soon as possible’, taking account of any deadlines suggested by the Requesting State Party.

²⁸⁵ UNODC, *Report: Informal Expert Working Group on Mutual Legal Assistance*, p. 8.

²⁸⁶ UNODC, *Report: Informal Expert Working Group on Mutual Legal Assistance*, p. 12.

²⁸⁷ Adapted from Moskowitz, *The Role of the Prosecutor in Mutual Legal Assistance*.

that is so important in the investigation and prosecution of trafficking in persons cases. Note that there are detailed protocols to be followed by criminal justice officials in the interviewing of victims and witnesses in trafficking cases and it is essential that all parties are aware of these protocols and implement them effectively.²⁸⁸

If the case involves the execution of a search warrant, the involvement of Requesting State case officers may well be advantageous. These case officers will likely have the best understanding of the relevance of particular evidence that might be located in the search. Provisions in legislation that provide that officers executing search warrants can ‘obtain such assistance as is necessary and reasonable in the circumstances’ might arguably enable the involvement of case officials in such situations.

Execute request in accordance with required procedures

To ensure that mutual legal assistance requests achieve their intended purpose, it is vital that Requested States make every effort to comply with formal evidentiary / admissibility or other procedural requirements of the Requesting State. Where this is not possible (for example, because of conflict with domestic law), the Requested State should consult with the Requesting State at the earliest possible stage.²⁸⁹

This matter is addressed in several treaties. **ASEAN MLAT** provides that subject to domestic laws, the Requested State shall carry out the request in the manner specified by the Requesting Party.²⁹⁰ Both **UNTOC** and **UNCAC** provide that:

A request shall be executed in accordance with the domestic law of the Requested State Party and, to the extent not contrary to the domestic law of the Requested State Party and where possible, in accordance with the procedures specified in the request.²⁹¹

Interpret legal requirements fairly and flexibly

Given the many differences in laws, systems and procedures, Requested States may need to be flexible in order to fulfil the underlying intention of facilitating international cooperation, while also ensuring compliance with domestic laws. Unnecessary or overly rigid insistence on adherence to a State’s own domestic practices in circumstances where an alternative approach is both required by the Requesting State and *not prohibited* by the laws of the Requested State, may frustrate mutual legal assistance requests and hinder the prosecution of transnational criminals. For example, in relation to dual criminality, it has been recommended that States adopt a ‘flexible and creative’ approach to try and minimize the circumstances where assistance must be refused on this basis.²⁹² It is important for States to examine whether their current frameworks for providing assistance create unnecessary impediments to cooperation and, where possible, reduce or eliminate impediments.²⁹³

Note that flexible interpretation of legal requirements should never operate to the detriment of the legal rights of any individual involved in the process including suspects and accused persons.

Preserve confidentiality

The importance of confidentiality in relation to mutual legal assistance requests has been noted at 3.5.1, above and is reflected in the major legal instruments. For the reasons noted above, it is vital for a Requested

²⁸⁸ *UN Trafficking Principles and Guidelines*, Guidelines 2, 5; *ASEAN Practitioner Guidelines*, Parts 1.C, 1.D, 1.E. See also Cathy Zimmerman and Charlotte Watts, *WHO Ethical and Safety Recommendations for Interviewing Trafficked Women* (World Health Organisation, 2003); the *ASEAN Training Program on Trafficking in Persons for Judges and Prosecutors* includes detailed information, guidance and protocols on effective interviewing of victims of trafficking: *ASEAN Training Program on Trafficking in Persons for Judges and Prosecutors*, incorporating the *ASEAN Awareness Program on Trafficking in Persons for Judges and Prosecutors* (ASEAN, 2008) and the *ASEAN Skills Program on Trafficking in Persons for Specialist Prosecutors* (forthcoming, ASEAN, 2010).

²⁸⁹ UNODC, *Report: Informal Expert Working Group on Mutual Legal Assistance*, p. 11.

²⁹⁰ *ASEAN MLAT*, art. 7(1).

²⁹¹ *UNTOC*, art. 18(17); *UNCAC*, art. 46(17).

²⁹² UNODC, *Report: Informal Expert Working Group on Mutual Legal Assistance*, p. 11.

²⁹³ UNODC, *Report: Informal Expert Working Group on Mutual Legal Assistance*, p. 10.

State to closely examine any confidentiality requirements specified in any incoming requests, and to assess whether or not these requirements can be met. If they cannot be met, this should be communicated immediately to the Requesting State. This allows the Requesting State to make an informed decision as to whether it wants to continue with the request, knowing that confidentiality cannot be granted, or withdraw the request, if confidentiality is indeed vital.

Use grounds for refusal sparingly and consult with Requesting State

States should limit the use of the grounds for refusal to those cases where the principles and protections being preserved through refusal are fundamental to the Requested State and / or to the upholding of international law including international human rights law. Refusal should not be routine. Each request should be considered individually on its merits and with a view to the broader policy issues at stake. Before refusing or postponing a request of mutual legal assistance the Requested State should consider whether assistance may be granted subject to certain conditions which might be acceptable, for example by way of an assurance. If the request is refused because of prejudice to ongoing investigation it might be preferable to postpone the execution of the request until after the relevant proceedings have been finalized.

It is customary that if a request must be refused, reasons for the refusal are given by the Requested State. The major treaties considered in this Handbook also specify the need to provide reasons for refusal of requests.²⁹⁴ Such feedback provides important information to the Requesting State and can help to facilitate future cooperation.

Consultation can be an important way of getting around refusals - or of exploring whether the desired result, or some part of it, can be achieved in some other way.²⁹⁵ This is recognized in **UNTOC**. In situations where States Parties are using the mutual legal assistance provisions of that treaty, the Requested State Party is *required* to consult with the Requesting State Party in order to consider whether it may be possible to provide the requested assistance under certain conditions.²⁹⁶

Costs

Many treaties provide that the Requested State will bear the ordinary costs of executing the request, while also providing that the Requesting State should also bear extraordinary costs. Where it appears that a request will involve extraordinary costs, the Requesting and Requested States should consult with each other to determine who will bear the cost and how best to execute the requests to minimize the costs.

The **ASEAN MLAT** provides that the Requested State Party should bear the ordinary expenses of fulfilling the request, but the Requesting State Party will pay:

- fees of counsel retained at the request of the Requesting State Party;
- fees and expenses of expert witnesses;
- costs of translation, interpretation and transcription;
- expenses associated with conveying any persons to or from the Requested State Party;
- expenses associated with conveying custodial or escorting officers;
- costs for establishing video, television or other communication links.²⁹⁷

If it becomes apparent during the execution of the request that expenses of an extraordinary or substantial nature are required to fulfil the request, the parties are obliged to consult to determine the terms and conditions under which the execution of the request is to be effected or continued.²⁹⁸

²⁹⁴ *UNTOC*, art. 18(23); *UNCAC*, art. 46(23); *ASEAN MLAT*, art. 3(9).

²⁹⁵ McClean, *Transnational Organized Crime: A Commentary*, p. 233.

²⁹⁶ *UNTOC*, art. 18(26).

²⁹⁷ *ASEAN MLAT*, art. 25.

²⁹⁸ *ASEAN MLAT*, art. 25(3).

Where either Article 18(28) of **UNTOC** or Article 46(28) of **UNCAC** are being applied between the parties, the ordinary costs of executing requests are to be paid by the Requested State Party, unless otherwise agreed by the parties concerned. If expenses of a substantial or extraordinary nature are or will be required to fulfil the request, the States Parties are obliged to consult to determine the terms and conditions under which the request will be executed, as well as the manner in which the costs will be paid.²⁹⁹

²⁹⁹ *UNTOC*, art. 18(28); *UNCAC*, art. 46(28).

Chapter 3: Attachments

Attachment 1: Checklist for preparing Mutual Legal Assistance requests under the Treaty on Mutual Legal Assistance in Criminal Matters among Like-Minded ASEAN Member Countries³⁰⁰

Attachment 2: Model Request Form for the Treaty on Mutual Legal Assistance in Criminal Matters among Like-Minded ASEAN Member Countries³⁰¹

Attachment 3: Model Checklists³⁰² and Forms³⁰³ for Good Practice in Requesting Mutual Legal Assistance, from the UNODC Informal Expert Working Group on Mutual Legal Assistance Casework Best Practice

³⁰⁰ This Model Checklist, to assist in preparing requests under the *Treaty on Mutual Legal Assistance in Criminal Matters among Like-Minded ASEAN Member Countries*, is available from the Secretariat website http://www.agc.gov.my/agc/sec/form/model_checklist.pdf.

³⁰¹ This Model Request Form, for use with the *Treaty on Mutual Legal Assistance in Criminal Matters among Like-Minded ASEAN Member Countries*, is available from the Secretariat website http://www.agc.gov.my/agc/sec/form/model_request_form.pdf.

³⁰² This Checklist is extracted from UNODC, *Report: Informal Expert Working Group on Mutual Legal Assistance Casework Best Practice*, pp. 17-21, Dec. 3-7, 2001, available from http://www.unodc.org/pdf/lap_mlaeg_report_final.pdf.

³⁰³ These Forms are extracted from UNODC, *Report: Informal Expert Working Group on Mutual Legal Assistance Casework Best Practice*, pp. 22-23, Dec. 3-7, 2001, available from http://www.unodc.org/pdf/lap_mlaeg_report_final.pdf.

As at 12 July 2005

**MODEL CHECKLIST OF THE CONTENT OF A REQUEST FOR
MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS UNDER
THE TREATY ON MUTUAL LEGAL ASSISTANCE IN CRIMINAL
MATTERS**

Note:

1. This Model Checklist is intended as a guide and a reference only. The requirements may be modified as necessary to meet the requirements of the domestic law and practice of individual Parties.
2. The proposed Model Checklist also takes into account the Model Checklist being developed under the auspices of the Regional Ministerial Meeting on Counter-Terrorism 2004 (Bali Process) and the work of the Legal Issues Working Group established thereunder.

CHECKLIST FOR INCOMING REQUESTS¹

1. A request for assistance should be submitted in writing² through the designated channels and should include the following:
 - (a) the name of the person or authority executing the request³;
 - (b) the name of the requesting office and the competent authority conducting the investigation or criminal proceedings to which the request relates;
 - (c) the purpose of the request and the nature of the assistance sought;

1 Unless stated otherwise, items listed are based on Article 6 of the Treaty on Mutual Legal Assistance in Criminal Matters.

2 In urgent cases, requests may be made orally, but to be confirmed in writing within 5 days.

3 From Bali Process checklist.

- (d) a description of the nature of of the criminal matter and its current status, and a statement setting out a summary of the relevant facts and laws;
 - (e) a description of the offence to which the request relates, including its maximum penalty;
 - (f) a description of the facts alleged to constitute the offence and a statement or text of the relevant laws;
 - (g) a description of the essential acts or omissions or matters alleged or sought to be ascertained;
 - (h) a description of the evidence, information or other assistance sought;
 - (i) the reasons for and details of any particular procedure or requirement that the Requesting Party wishes to be followed;
 - (j) specification of any time limit within which compliance with the request is desired;
 - (k) any special requirements for confidentiality and the reasons for it; and
 - (l) such other information or undertakings as may be required under the domestic laws of the Requested Party or which is otherwise necessary for the proper execution of the request.
2. When appropriate and to the extent necessary, a request may also include the following:
- (a) [where possible, the name,]⁴ the identity, nationality, location [and description]⁵ of the person or persons who are the subject of the investigation or criminal

4 From Bali Process checklist.

5 From Bali Process checklist.

proceedings [or who may have information relevant to or who are related to assistance being sought]⁶;

- (b) the identity and location of any person from whom evidence is sought;
- (c) the identity and location of a person to be served, that person's relationship to the [investigation, prosecution or]⁷ criminal proceedings, and the manner in which service is to be made [effected]⁸;
- (d) information on the identity and whereabouts of a person to be located;
- (e) [in the case of requests for the taking of evidence or search and seizure, a statement indicating the basis for belief that evidence may be found in the jurisdiction of the Requested Party;]⁹
- (f) a description of the manner in which any testimony or statement is to be taken and recorded;
- (g) a list of questions to be asked of a witness;
- (h) a description of the documents, records or items of evidence to be produced as well as a description of the appropriate person to be asked to produce them and, to the extent not otherwise provided for, the form in which they should be reproduced and authenticated;
- (i) a statement as to whether sworn or affirmed evidence or statements are required;
- (j) a statement as to whether live video or live television links or other appropriate communications facilities will be

6 From Bali Process checklist.

7 From Bali Process checklist.

8 From Bali Process checklist.

9 From Bali Process checklist.

required and an undertaking to reimburse the Requested Party for costs incurred¹⁰;

- (k) a description of the property, asset or article to which the request relates, including its identity and location;
- (l) any court order relating to the assistance requested and a statement relating to the finality of the order;
- (m) information as to the allowances and expenses to which a person appearing in the Requesting Party will be entitled¹¹;
- (n) in the case of making a detained person available, the person or the authority who will have custody during the transfer, the place to which the detained person is to be transferred and the date of that person's return¹²;
- (j) any other information which may be brought to the attention of the Requested Party to facilitate its execution of the request¹³.

¹⁰ Based on Articles 14, 15 and 25 of the Treaty on Mutual Legal Assistance in Criminal Matters.

¹¹ From Bali Process checklist.

¹² From Bali Process checklist.

¹³ From Bali Process checklist.

FORM 1
MODEL REQUEST FORM¹

To:

[name of Central Authority of Requested Party]

From:

[name of Central Authority of Requesting Party]

[Through diplomatic channels]²

REQUEST FOR MUTUAL ASSISTANCE IN A CRIMINAL MATTER
RE: *(insert particulars)*

INTRODUCTION

1. I,, the *(name of agency/office designated as Central Authority)*, being the designated Central Authority under Article 4 of the Treaty on Mutual Legal Assistance in Criminal Matters among like-minded ASEAN Member Countries (after this referred to as “the Treaty”) to make and receive requests for mutual legal assistance in criminal matters on behalf of *(name of country)*, present this request to the Central Authority of *(name of Requested Party)* pursuant to the Treaty.³

AUTHORITY FOR REQUEST

2. This request is made under the Treaty.

NATURE OF REQUEST

3.1 This request relates to a *(criminal matter)*⁴ concerning *(describe subject of criminal matter)*.

3.2 The personal details of the subject of the request are as follows:

Name/Description:

Date of birth:

Age:

¹ This Model Request Form is intended as a guide and a reference only. The requirements may be modified as necessary to meet the requirements of the domestic law and practice of individual Parties.

²This may be deleted where the request is not made through diplomatic channels. Modification suggested by the Philippines *vide* letter dated 25 August 2005.

³ Modified as suggested by the Philippines *vide* letter dated 25 August 2005.

⁴ State whether it is an investigation, prosecution or an ancillary criminal matter relating to the restraining of dealing with property or the enforcement or satisfaction of a forfeiture order.

Occupation:
 Nationality:
 Passport No.
 Address/Location:

3.3 The details of the property to be traced/restrained/forfeited are as follows⁵:

Description:
 Location:
 Other relevant details:

3.4 The reasons for suspecting that the person/property is in (*name of Requested Party*) are as follows⁶:

3.5 The authority having the conduct of the criminal matter is (*describe authority in Requesting Party concerned with the criminal matter*).

STATEMENT OF FACTS

4. (*Describe the material facts of the criminal matter including, in particular, those facts necessary to establish circumstances connected to evidence sought in the Requested Party and the relevance of the evidence from the Requested Party to the criminal matter in the Requesting Party.*)

CRIMINAL OFFENCES/APPLICABLE LEGISLATION/PENALTIES

EITHER:

5.1 (*Name of suspects/defendants*) are (*suspected of having/alleged to have*) committed/have been charged with the commission of the following offences, namely -

- (*describe offences and provisions of the legislation contravened*)

The maximum penalties for the above offences, which are the subject of this (*investigation/prosecution*) are:

- (*specify maximum penalty for each offence and applicable law*)⁷.

OR:

⁵ Applicable where request relates to restraint of property or enforcement of a forfeiture order.

⁶ Applicable where request relates to restraint of property or enforcement of a forfeiture order.

⁷ Applicable where request relates to an investigation or prosecution.

- 5.1 A forfeiture order (*has been/may be*) made in proceedings in (*name of Requested Party*). (*State basis for any statement that a forfeiture order may be made.*)

The forfeiture order is connected with (*state the relevant offences*) in (*name of Requested Party*) the maximum penalties for which are (*specify maximum penalty for the offence and applicable law*)⁸.

- 5.2 A copy/extract of the relevant legislation is attached and marked as "Attachment A" to this request.

PURPOSE OF THE REQUEST

6. By this request it is intended to (*state purpose: e.g. secure admissible evidence for the purpose of the criminal proceedings against the defendants, enforce the abovementioned forfeiture order, etc.*)

MANDATORY UNDERTAKINGS

7. [*Insert relevant undertakings, if any*]⁹

DESCRIPTION OF ASSISTANCE REQUESTED

8. The (*appropriate authority of the Requested Party*) is requested to take such steps as are necessary to give effect to the following:

- (a) examination on oath or affirmation of a witness before (*relevant judicial authority of Requested Party*);

(e.g.) Mr. X
ABC Co., Ltd.
(address)

to be orally examined on oath or affirmation on the following matters:

- (*specify clearly the relevant issues/areas relating to the subject-matter of the criminal proceedings/investigation on which evidence of the witness is sought and/or provide a list of the relevant questions*)

Note:

Specify form in which statement is to be obtained e.g. witness statement or affidavit. Samples forms to be attached.

⁸ Applicable where request relates to restraint of property or enforcement of a forfeiture order.

⁹ Requesting Party to insert such undertakings as may be relevant. Modification suggested by the Philippines *vide* letter dated 25 August 2005.

- (b) production of documents, records or items before a court [and obtaining of oral evidence of the witness producing such material for the purpose of identifying and proving the material produced]¹⁰;

(e.g.) Director
ABC Co., Ltd.
(address)

to be required to produce (*describe the form of evidence e.g. "certified copies"*) of the following documents, records or items for the period (*state relevant time frame*):

- (*specify documents, records or items or classes thereof*).

The above witness to be orally examined on oath or affirmation on the following matters for the purpose of identifying and proving the documents, records or items produced:

- (*state relevant particulars*).

(e.g.)

- to provide confirmation as to his position in a company/office and that he is responsible for keeping/maintaining/holding the documents, records or items in relation to the subject-matter of the investigation
- that he is authorised by the relevant law of the Requested Party to make the affidavit
- to confirm that he has access to the documents, records or items kept in relation to the subject-matter of the investigation in the normal course of his duties
- to confirm the authenticity of the copies of the documents, records or items supplied
- to confirm that the documents, records or items were created in the ordinary course of business

Note:

Specify form in which statement is to be obtained e.g. witness statement or affidavit. Samples forms to be attached.

- (c) search of person or premises for documents, records or items;

(e.g.) The premises of ABC Co., Ltd.
(address)

¹⁰ Include this part if it is deemed necessary for the purposes of admissibility of the documents, records or items in evidence.

to be searched under a search warrant for the seizure of the following from the company:

- *(provide details of the documents, records or items sought to be searched for and seized).*
- *(support any request for originals of documents, records or items seized with reasons).*

(d) production of documents, records or items through production orders;

(e.g.) Manager
ABC Bank Ltd.
(address)

to be required to produce copies of the following documents, records or items under a production order:

- *(describe particulars of material required to be produced and where located).*
- *(state grounds for believing that the material sought is likely to be of substantial value to the criminal matter in Malaysia).*
- *(support any request for the production of originals of documents with reasons).*

(e) arrangement of travel of person/prisoner from (*name of Requested Party*) to assist in a criminal matter;

(e.g.) Arrangements to be made for Mr. X
(address)

to travel to (*name of Requesting Party*) to give assistance in a (*criminal matter*)¹¹ by rendering the following assistance:

- *(specify the assistance sought).*
- *(provide the undertakings required by the law of (name of Requested Party)).*
- *(provide details of the allowances to which the person will be entitled, and of the arrangements for security and accommodation for the person, while the person is in (name of Requesting Party) pursuant to the request).*

(f) enforcement of a forfeiture order/request to assist in the restraining of dealing in property;

¹¹ State whether it is an investigation or criminal proceedings of an offence in the Requesting Party or an ancillary criminal matter.

- *(state particulars of the forfeiture order to be enforced, or the property to be restrained and present state of related proceedings).*
- (g) assistance in locating/identifying and locating a person who is suspected to be involved in/to have benefited from the commission of a serious offence;
 - (e.g.) Arrangements to be made to locate/identify and locate Mr. X who is believed to be in *(name of Requested Party)* with the last known address at *(address)*.
 - *(state particulars of person concerned).*
- (h) assistance in tracing property suspected to be connected to a serious offence;
 - (e.g.) Arrangements to be made to trace *(description of property)* believed to be in *(name of Requested Party)*.
 - *(state particulars of property concerned).*
- (i) service of process.
 - (e.g.) Mr. X
(address)
 - to be served with the following documents:
 - *(describe documents to be served).*
 - *(specify manner of service and period within which documents to be served).*
 - *(specify required proof of service).*

EXECUTION OF REQUEST

(A) CONFIDENTIALITY

- [9.1. It is requested that the fact that this request has been made and the execution of the request be kept entirely confidential except to the extent necessary to execute the request as *(state reasons e.g. the likelihood of interference with witnesses and /or destruction of evidence, etc.)*]¹²
- [9.2. It is also requested that the evidence of the witness be taken *in camera* as there exist reasonable grounds for believing that it is in the interests of the witness to give evidence *in camera* because *(state reasons)* and the

¹² Necessary if confidentiality is requested.

criminal matter would be substantially prejudiced if the examination was conducted in open court because (*state reasons*).]¹³

(B) PARTICULAR PROCEDURES TO BE FOLLOWED

10. It is requested that the following procedures be observed in the execution of the request:

- (*state details of manner and form in which evidence is to be taken and transmitted to Requesting Party, if relevant.*)

(e.g.)

- In relation to the evidence obtained on examination on oath/affirmation of a witness, please provide the statement in admissible form. To be admissible, the statement must be made in the form of an affidavit except when recorded in writing by a judicial authority. If documents and records are referred to or are otherwise enclosed, the documents and records must be accompanied by an attestation of authenticity. Copies of the prescribed form for the affidavit and attestation of authenticity are attached to this request and marked as Attachment B and Attachment C respectively.
- In relation to the evidence of (*name of relevant witness(es)*), please arrange for the evidence to be given in a court in (*name of Requesting Party*) via live video or live television link (or other appropriate communications facilities) from (*name of Requested Party*).

- (*state any special requirements as to certification/authentication of documents.*)

(e.g.)

In relation to evidence to be provided by affidavit-

- (a) the affidavit should be made before a judicial officer or other officer who is authorised to administer oaths or affirmations in (*name of Requested Party*). When the affidavit has been sworn or affirmed, the affidavit should be sealed with an official or public seal of (*name of Requested Party*) to ensure compliance with (*specify relevant provisions of the relevant legislation of Requesting Party*), a copy of which is attached to this request and marked as Attachment D;
- (b) if the affidavit runs for more than one page, each page other than the last should be initialed both by the person who makes the affidavit and by the person before whom the affidavit is made; and
- (c) each page of each attachment should be initialed both by the person who makes the affidavit and by the person before whom the affidavit is made.

(e.g.)

¹³ Applicable if the request relates to the taking of evidence before a court for the purposes of an investigation in Requesting Party.

In relation to documents produced by computers, or a statement contained in such document, the document or statement, as the case may be, is admissible as evidence of any fact stated therein if the document was produced by the computer in the course of its ordinary use, whether or not the person tendering the same is the maker of such document or statement. A certificate signed by a person who either before or after the production of the document by the computer is responsible for the management of the operation of that computer or for the conduct of the activities for which that computer was used must be tendered to the court to prove that a document was produced by a computer in the course of its ordinary use.

An extract of the relevant legislation, (*specify relevant provisions of the relevant legislation of Requesting Party*) is attached and marked as "Attachment E" to this request.

- (*state if attendance by representative of appropriate authority of Requesting Party at examination of witnesses/execution of request is required and, if so, the title of the office held by the proposed representative.*)

(e.g.)

Permission is requested for an officer of (*name of appropriate authority in Requesting Party*) to travel to (*name of Requested Party*) to assist in the execution of this request.

(C) PERIOD OF EXECUTION

11. It is requested that the request be executed urgently/within (*state period giving reasons i.e. specify likely trial or hearing dates or any other dates/reasons relevant to the execution of the request*).

(D) TRANSMISSION OF REQUESTED MATERIAL

- 12.1 Any documents, records, items, statements or information obtained in response to this request should be sent to the (*Central Authority of Requesting Party*) at the following address:

[*Provide full address and other contact details such as name of contact officer, telephone and facsimile numbers and email address*]

- 12.2 The (*Central Authority of Requesting Party*) will forward the material to (*name of authority in Requesting Party concerned with the criminal matter*), being the relevant requesting authority in this matter.

(E) DETAILS OF ALLOWANCES, ARRANGEMENTS FOR SECURITY AND ACCOMODATION¹⁴

13.1 The allowances to which (*name of person*) will be entitled are as follows:

(*State details of allowances*)

13.2 The arrangements for the security of (*name of person*) are as follows:

(*State details of security arrangements*)

13.3 The arrangements for the accommodation of (*name of person*) are as follows:

(*State details of accommodation arrangements*)

(F) UNDERTAKING ON EXPENSES FOR USE OF LIVE VIDEO LINK¹⁵

14. The Government of (*name of Requesting Party*) undertakes to reimburse the Government of (*name of Requested Party*) for the cost of establishing the live video or television link or other appropriate communications facilities, the costs related to the servicing of the live video or television link or other appropriate communications facilities, the remuneration of interpreters provided by (*name of Requested Party*) and allowances to witnesses and their traveling expenses in (*name of Requested Party*).¹⁶

LIAISON

15.1 The officers of the (*Central Authority of Requesting Party*) handling this request are:

(*state name of officer(s)*)
(*address*)

Telephone Number:
Facsimile Number:
Electronic mail address:

15.2 The case officer of (*name of authority in Requesting Party concerned with the criminal matter*) is:

¹⁴ If the request involves a person travelling from the Requested Party to the Requesting Party.

¹⁵ If the request involves a person travelling from the Requested Party to the Requesting Party.

¹⁶ If the request involves the giving of evidence by live video or live television link or other appropriate communications facilities, unless the Parties mutually agree otherwise.

(name of officer of authority in Requesting Party concerned with the criminal matter, telephone and facsimile numbers and e-mail address)

- 15.3 The following officer/*s of *(name of appropriate authority in Requested Party)* *has/*have knowledge of this matter:

*(name of officer/*s of appropriate authority in Requested Party, telephone and facsimile numbers and e-mail addresses).*

- 15.4 If permission is given for an officer of *(name of authority in Requesting Party concerned with the criminal matter)* to travel to *(name of Requested Party)*, the officer is likely to be *(name of officer of authority in Requesting Party concerned with the criminal matter)*.

SUPPLEMENTARY REQUEST

16. The *(Central Authority of Requesting Party)* may wish to make supplementary requests for assistance in this matter if necessary.

RECIPROCITY UNDERTAKING

17. The Government of *(name of Requesting Party)* assures the Government of *(name of Requested Party)* that the Government of *(name of Requesting Party)* would, subject to its laws, comply with a request by the Government of *(name of Requested Party)* to *(name of Requesting Party)* for assistance of this kind in respect of an equivalent offence.

CONCLUSION¹⁷

18. I, _____, the *(Central Authority of Requesting Party)*, pursuant to *(specify relevant provisions of the relevant legislation of Requesting Party)*, and at the instance of *(name of authority in Requesting Party concerned with the criminal matter)*, being satisfied that there are reasonable grounds for believing that there is evidence in *(name of Requested Party)* that would be relevant to an investigation/criminal proceedings in *(name of Requesting Party)*, make this request to *(Central Authority of Requested Party)* for assistance in relation to this criminal matter.

OR:

18. I, *(name of person)*, an officer of the *(Central Authority of Requesting Party)*, acting in reliance on a delegation by the *(Central Authority of*

¹⁷ Modified as suggested by Singapore *vide* email dated 8 August 2005.

Requesting Party) under (specify relevant provisions of the relevant legislation of Requesting Party) and on the authority of the (Central Authority of Requesting Party) in the exercise of the executive powers under (specify relevant provisions of the relevant legislation of Requesting Party) to make requests to foreign States for assistance in criminal matters, and at the instance of (name of authority in Requesting Party concerned with the criminal matter), make this request to (name of appropriate authority of Requested Party) for assistance in relation to this criminal matter.

Signed by

Name: _____

Office: _____

Date: _____

Attachment 3

MODEL CHECKLISTS AND FORMS FOR GOOD PRACTICE IN REQUESTING MUTUAL LEGAL ASSISTANCE

EXPLANATORY NOTE

The following General and supplemental Checklists are intended to provide general guidance in the preparation of requests for international mutual legal assistance in criminal matters.

The General Checklist deals with the basic content of all mutual legal assistance requests. The Supplemental Checklists deal with additional content needed for the effective execution of requests for search and seizure, production of documents, taking witness statements/evidence, temporary transfer of prisoners to give evidence, pre-judgment seizure/freezing, or post-judgment confiscation

Requirements as to the form and content of requests can vary significantly depending on the law of the Requested State and applicable mutual legal assistance treaties (MLATs); in particular cases, they may be greater or less than indicated here. When in doubt, officials preparing mutual legal assistance requests are advised to contact the central authority of the Requested State for more detailed information.

Forms I, and II were developed by others and re-produced with permission⁹.

⁹ Form I **COVER NOTE FOR ROGATORY LETTERS** (Joint Action of 29 June 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on good practice in mutual legal assistance in criminal matters *Official Journal L191, 07/07/1998 p. 0001-0003*). Form II **APOSTILLE** to the Hague Convention Abolishing the Requirement of Legalization of Foreign Public Documents of 5 October 1961.

General Checklist for Requesting Mutual Legal Assistance

The request should include the following:

- Identification**
Identification of the office/authority presenting or transmitting the request and the authority conducting the investigation, prosecution or proceedings in the requesting State, including contact particulars for the office/authority presenting or transmitting the request and, unless inappropriate, the contact particulars of the relevant investigating officer/prosecutor and/or judicial officer (form I)
- Prior contact**
Details of any prior contact between officers in the Requesting and Requested States pertaining to the subject matter of the request
- Use of other channels**
Where a copy of the request has been or is being sent through other channels, this should be made clear in the request
- Acknowledgement of the request**
A cover sheet incorporating the acknowledgement for completion and return to the Requesting State (see Form I)
- Indication of urgency and/or time limit**
A prominent indication of any particular urgency or applicable time limit within which compliance with the request is required and the reason for the urgency or time limit
- Confidentiality**
A prominent indication of any need for confidentiality and the reason therefor and the requirement to consult with the Requesting State, prior to the execution if confidentiality cannot be maintained
- Legal basis for the request**
A description of the basis upon which the request is made, eg, bilateral treaty, multilateral convention or Scheme or, in the absence thereof, on the basis of reciprocity
- Summary of the relevant facts**
A summary of the relevant facts of the case including, to the extent possible, full identification details of the alleged offender(s)
- Description of the offence and applicable penalty**
A description of the offence and applicable penalty, with an excerpt or copy of the relevant parts of the law of the requesting State
- Description of the evidence/assistance requested**
A description in specific terms of the evidence or other assistance requested
- Clear link between proceeding(s) and evidence/assistance sought**
A clear and precise explanation of the connection between the investigation, prosecution or proceedings and the assistance sought (i.e., a description of how the evidence or other assistance sought is relevant to the case)
- Description of the procedures**
A description of the procedures to be followed by the Requested State's authorities in executing the request to ensure that the request achieves its purpose, including any special procedures to enable any evidence obtained to be admissible in the Requesting State, and reasons why the procedures are required
- Presence of officials from the Requesting State in execution of request**
An indication as to whether the Requesting State wishes its officials or other specified persons to be present at or participate in the execution of the request and the reason why this is requested
- Language**
All requests for assistance should be made in or accompanied by a certified translation into a language as specified by the Requested State

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

Supplemental Checklist for Specific Types of Mutual Legal Assistance Requests

SEARCH AND SEIZURE

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

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

PRODUCTION OF DOCUMENTS

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

- Since a court order is generally required, it is particularly important to provide as specific a description as possible of the documents to be produced, and their relevance to the investigation
- An identification of the location and/or custodian of the required documents
- Check with Requested State as some may have additional requirements for the production of documents
- In cases involving requests for the production of computer records, the risks of deletion or destruction should be considered in consultation with the Requested State. In such a case an expedited, secure means of preservation may be required, e.g. special preservation order, or search and seizure
- An indication as to whether a copy or certified copy of the documents will suffice and if not, the reason why the original documents are required
- If certification or authentication is required, specify the form of certification/authentication, using an attached pro-forma certificate (see Form II) if possible
- An indication as to whether it is likely that any of the documents might be subject to any claim of privilege, e.g. legal professional privilege

TAKING OF WITNESS STATEMENTS/EVIDENCE

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

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

TEMPORARY TRANSFER OF PRISONERS TO GIVE EVIDENCE

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

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

PRE-JUDGMENT SEIZURE/FREEZING OR POST-JUDGMENT CONFISCATION

In the case of a request for pre-judgment seizure/freezing, or for post-judgment confiscation:

- ❑ Determine the specific procedural and substantive requirements of the Requested State's law to enable execution of the Requesting State's request for pre-judgment freezing/seizure or post-judgment confiscation, such as whether the Requested State can directly enforce orders of the Requesting State, whether it must institute domestic proceedings for an order on behalf of the Requesting State, or whether a criminal conviction will be required prior to conviction
- ❑ If the Requested State must institute domestic proceedings, determine what evidence is needed to permit the Requested State to obtain its own freezing/seizure order to preserve the assets on behalf of the Requesting State, or to permit the Requested State to obtain its own post-judgment order of confiscation of the assets. In particular, the Requesting State should determine the extent to which the Requested State requires a connection between the property to be frozen/seized or confiscated and an offence, or between the property and the accused or convicted property owner (as the case may be), and the evidence it must provide under the Requested State's law to establish such connection
- ❑ A point of contact in the Requesting State who may be consulted with as to legal requirements, strategic or logistical issues

Where the Requested State can directly enforce an order of the Requesting State, the request should include the following:

- ❑ A copy of the order in a form acceptable to the Requested State, or such other information as it may seek
- ❑ In the case of a confiscation order, a description of the proceedings in the Requesting State that resulted in the issue of the order, the parties involved, and an assurance that the order is final
- ❑ Any information as to third parties who may have an interest in the property sought to be frozen/seized or confiscated

Where the Requested State cannot directly enforce an order of the Requesting State and is requested to obtain seizure/freezing and confiscation through domestic proceedings, the request should include the following:

- ❑ As specific a description as possible of the property to be seized, frozen or confiscated;
- ❑ Specific information providing the reasonable grounds to believe that either (depending on the law of the Requested State) the property:
 - ❑ belongs to a person accused or convicted of a crime; or
 - ❑ was used in, or derived directly or indirectly, from the commission of an offence
- ❑ Any information as to third parties who may have an interest in the property sought to be frozen/seized or confiscated

Form I

COVER NOTE FOR ALL MUTUAL LEGAL ASSISTANCE REQUESTS

REQUEST

(To be filled in by Requesting Authority)

Case:

Case number: Name(s) of suspect(s):

Authority who can be contacted regarding the request:

Organisation:	Place:	Country:
Name:	Function:	Spoken language:
Telephone number:	Fax Number:	E-mail:

Deadline:

- This request is urgent.
- Please execute this request before: (date)

Reasons for deadline:

Date: **Signature:**

ACKNOWLEDGEMENT OF REQUEST

(To be filled in by the Requested Authority)

Registration

Registration number: Date:

Authority receiving the request

Organisation:	Place:	Country:
Name:	Function:	Spoken language:
Telephone number:	Fax number:	E-mail:

Authority who can be consulted on the execution of the request

- Same as above
- Other:

Organisation:	Place:	Country:
Name:	Function:	Spoken language:
Telephone number:	Fax number:	E-mail:

Deadline

The deadline will probably

- Be met
- Not be met. Reason:

Date: **Signature:**

PLEASE FILL IN THIS FORM ON RECEIPT AND FAX IT TO:

Fax #:

Form II

APOSTILLE	
(Convention de La Haye du 5 octobre 1961)	
1.	Country: _____
	This public document
2.	has been signed by _____
3.	acting in the capacity of _____
4.	bears the seal/stamp of _____
	<u>certified</u>
5.	at _____
	6. the _____
7.	by _____
8.	N° _____
9.	Seal/stamp: _____
	10. Signature: _____

Note: In cases where authentication of foreign public documents is required, the Hague Convention of 5 October 1961 abolishing the requirement of legalization for foreign public documents, to which currently 74 States¹⁰ are parties, provides for a simplified and speedy way of certifying such authentication by means of the “apostille” attached to that Convention.

¹⁰ At present, the following States are Parties to the Convention: Andorra, Antigua and Barbuda, Argentina, Armenia, Australia, Austria, Bahamas, Barbados, Belarus, Belgium, Belize, Bosnia and Herzegovina, Botswana, Brunei Darussalam, Bulgaria, China (Hong Kong Special Administrative Region and Macau Special Administrative Region only), Colombia, Croatia, Cyprus, Czech Republic, El Salvador, Estonia, Fiji, Finland, The former Yugoslav Republic of Macedonia, France, Germany, Greece, Grenada, Hungary, Ireland, Israel, Italy, Japan, Kazakhstan, Latvia, Lesotho, Liberia, Liechtenstein, Lithuania, Luxembourg, Malawi, Malta, Marshall Islands, Mauritius, Mexico, Namibia, Netherlands, New Zealand, Niue, Norway, Panama, Portugal, Romania, Russian Federation, Saint Kitts and Nevis, Samoa, San Marino, Seychelles, Slovakia, Slovenia, South Africa, Spain, Suriname, Swaziland, Sweden, Switzerland, Tonga, Trinidad and Tobago, Turkey, United Kingdom, United States, Venezuela, Yugoslavia.

Chapter 4:

Mutual Legal Assistance to Recover Proceeds of Trafficking Crimes

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Overview of this Chapter:

The purpose of this Chapter is to provide practitioners with practical information that will assist them to recover the proceeds of trafficking crimes through a mutual legal assistance process. This Chapter includes information about:

- the importance of pursuing the proceeds of trafficking crimes;
- the practical aspects of tracing, seizing, freezing and confiscating proceeds of crime at the national level;
- the practical aspects of asking another State for assistance to trace, seize, freeze, confiscate and potentially repatriate proceeds of crime back to the Requesting State.

There are some specific laws, procedures and issues that apply in cross border proceeds of crime recovery cases that do not generally apply in other types of mutual legal assistance. These are covered below. However, many of the principles and procedures that apply generally to mutual legal assistance will also apply to recovery of proceeds of crime. Accordingly, this Chapter should be read in conjunction with Chapter 3 on Mutual Legal Assistance.

Key International and Regional Principles

States should ensure national laws allow the identification, tracing, freezing and seizing and confiscation of proceeds of trafficking in persons and related crimes.³⁰⁴

The recovery of proceeds of crime denies criminals the opportunity to profit from their crime.

States should cooperate across borders to assist one another in the identification, seizure, confiscation and return of proceeds of trafficking in persons and related crimes.³⁰⁵

International cooperation contributes to the elimination of safe havens for traffickers, thereby contributing to ending impunity for offenders and securing justice for those who have been trafficked.

States should consider ensuring, to the extent possible, that confiscated assets are used to support and compensate victims of trafficking.³⁰⁶

The linking of a criminal justice measure such as confiscation of proceeds to victim support is recognized as an important step forward in ending impunity and securing justice for those who have been trafficked.

³⁰⁴ See, for example, *ASEAN Practitioner Guidelines*, Part 2.D.6: “Consideration should be given to amending domestic legislation to ensure that measures are taken to identify, trace and freeze or seize proceeds of crime derived from trafficking in persons for the purpose of eventual confiscation.”

³⁰⁵ *UNTOC*, art. 13; *UNCAC*, art. 51; *ASEAN MLAT*, arts. 1(2)(g), 1(2)(i), 22. See also, Financial Action Task Force [FATF], *The Forty Recommendations*, Recommendation 3, Financial Action Taskforce on Money Laundering (2003) [hereinafter FATF, *The Forty Recommendations*].

³⁰⁶ *UNTOC*, art. 14(2); *European Trafficking Convention*, art. 15(4); *UN Trafficking Principles and Guidelines*, Principle 16, Guideline 4.4; *ASEAN Practitioner Guidelines*, Part 1.A.4.

4.1 The importance of pursuing proceeds of trafficking crimes

The crime of trafficking in persons can often be relatively low risk and high profit. It is of course possible to increase the business risks associated with trafficking through more effective law enforcement strategies and the prosecution and conviction of those responsible for trafficking crimes. However, it is also important to focus attention on identifying, seizing and confiscating the financial profits or proceeds of trafficking crimes. This will help to undermine the profit motive that drives trafficking, and will also redress the perception that this crime type ‘pays’.³⁰⁷ Also, when proceeds of crime are recovered, these can be used for public good: for example, to fund compensation schemes and services for victims of trafficking and related exploitation.

Unfortunately, experience suggests that while criminals are often able to transfer proceeds of crime (money/property) outside of the State of origin quickly and easily, it is usually much more difficult for States to trace these proceeds and cooperate with each other in organizing for their seizure, confiscation and repatriation. In recent years, States have worked together to develop legal agreements that will support their cooperation on these issues. While specific obligations vary, all relevant treaties, including the ASEAN MLAT, UNTOC and UNCAC seek to ensure that:

- national laws of each State Party enable proceeds of crime to be traced, seized and frozen, and also potentially confiscated through legal procedures; and
- mechanisms are in place to allow States to work together to trace, seize and freeze and confiscate proceeds of crime wherever they may be located, and to seek repatriation of the proceeds back to the State where the proceeds were originally generated.³⁰⁸

Most ASEAN Member States already have the basic legal infrastructure in place that will allow them to trace, seize and freeze and confiscate proceeds of crime at the national level. Most ASEAN Member States are also party to one or more treaties that require them to assist other States Parties, on request, with regard to tracing, seizing, freezing and confiscating proceeds of crime on their behalf.

This Chapter begins by explaining what is meant by ‘proceeds’ of trafficking related crimes. It then outlines how recovery of proceeds works at the national level before concluding with a detailed consideration of the legal and practical aspects involved in requesting another State to provide mutual legal assistance with the recovery of proceeds of crime.

4.1.1 What are ‘proceeds’ of trafficking related crimes?

From a legal perspective, it is important to be clear about exactly what is covered by the terminology of ‘proceeds of crime’. The term ‘proceeds of crime’ generally refers to any property that is derived from criminal activity. Sometimes reference is also made, in this context, to the ‘instrumentalities’ of crime. This term refers to property or equipment that is used in the commission of an offence. In this chapter, the term ‘proceeds’ can generally be taken to include instrumentalities. In relation to trafficking, proceeds of crime could potentially include:

- profits from the services and exploitation of the victim;
- costs paid by victims (for example, agents fees paid for obtaining passports, visas or transportation);
- vehicles used to transport victims;
- premises, such as factories, brothels or boats, where the exploitation took place;
- profits from the ‘sale’ of a person from one trafficker to another;
- value of unpaid salaries, which would have otherwise have been paid to the persons exploited;
- bribes paid to government officials to facilitate trafficking.

³⁰⁷ UNODC, *Legislative Guides to the Organized Crime Convention and its Protocols*, p. 141.

³⁰⁸ UNTOC, arts. 12-13; UNCAC, arts. 53-55.

Some national laws define proceeds of crime to include property that is *indirectly* derived from the crime, whereas other laws restrict proceeds of crime to property that is *directly* related to the crime. Some regimes are *property-based*, which allows direct confiscation of the actual property that is found to be proceeds or instrumentalities of crime. Others regimes are *value-based*, a system that provides for determination of the value of proceeds and instrumentalities of crime, and the confiscation of an equivalent value. Some States allow for value-based confiscation under certain conditions, for example, where the proceeds have been used, destroyed or hidden by the offender.³⁰⁹ For example, the amount of unpaid wages of the victim of trafficking could be included in a value-based system. Some confiscation regimes provide for both *property-based* and *value-based* confiscation.

4.2 Recovering proceeds of crime at the national level

The goal of recovering proceeds of crime is to deny criminals the opportunity to profit from their crime. When a crime has been committed in one State but profits have been shifted offshore, international cooperation measures may be required to trace, seize and freeze and confiscate those proceeds, with a view to their eventual repatriation. However, any form of international cooperation in this regard depends not only on the efficiency of international cooperation frameworks, but also on the existence of national laws to enable recovery of proceeds of crime in the Requested State. As such, it is important to have a basic understanding of the mechanics of tracing, freezing and seizing and confiscating proceeds of crime at the national level, before seeking international cooperation in this regard.

The recovery and return of proceeds of crime typically involves a series of steps:

- first, the proceeds of crime must be traced and identified;
- once located, the assets will need to be quickly frozen or seized to prevent their liquidation / removal;
- this will generally be followed by a more lengthy legal process, through which the assets are confiscated;
- where these steps are taken as part of an international cooperation process, a further step may be taken with regard to repatriation of the assets to the Requesting State.³¹⁰

4.2.1 Tracing and identification of proceeds of crime

As noted above, the first step in recovering proceeds of crime is to locate the proceeds in question. In most situations the task of tracing the proceeds of crime will likely be undertaken by a financial intelligence unit (FIU). A FIU is a government unit or agency responsible for dealing with the issue of money laundering. Most States have some form of FIU that is generally responsible for the collection and analysis of financial intelligence and its dissemination to domestic law enforcement agencies that use the information in the course of their investigations. Some FIUs also have an investigation function in addition to an intelligence function. FIUs generally have extensive powers to gather financial information. Depending on the content of relevant domestic laws and sub-legal agreements such as memoranda of understanding, it may be possible for a FIU to quickly exchange information with financial institutions, law enforcement agencies, and prosecutorial authorities both domestically and internationally. FIUs are therefore an important and useful information resource.

³⁰⁹ UNODC, *Legislative Guides to the Organized Crime Convention and its Protocols*, p. 141.

³¹⁰ For a more detailed description of each of these steps see ADB / OECD, *MLA, Extradition and Recovery of Proceeds of Corruption in Asia and the Pacific*, p. 81.

Table 1: Financial Intelligence Units of ASEAN Member States

ASEAN MEMBER STATE	FINANCIAL INTELLIGENCE UNIT AND CONTACT DETAILS
Brunei Darussalam	<p>Financial Intelligence Unit Financial Institutions Division Level 7, Ministry of Finance, Commonwealth Drive Bandar Seri Bagawan, BB3910 BRUNEI DARUSSALAM</p> <p>Phone: (+673) 2382 253 Facsimile: (+673) 2382 215 Email: fid@mof.gov.bn</p>
Cambodia	<p>Cambodia Financial Intelligence Unit National Bank of Cambodia 22-24 Norodom Blvd, Phnom Penh, CAMBODIA</p> <p>Phone: (+855-23) 722 563, 722 221 Facsimile: (+855-23) 426 117 Email: info@nbc.org.kh</p>
Indonesia	<p>Indonesian Financial Transaction Reports and Analysis Centre Jl.Ir. H. Juanda No. 35, Jakarta 10120 INDONESIA</p> <p>Phone: (+62-21) 3850 455, 3853 922 Facsimile: (+62-21) 3856 809, 3856 826 Email: contactus@ppatk.go.id</p>
Lao PDR	<p>Anti-Money Laundering Intelligence Unit Bank of Lao PDR, P.O Box 19, Yonnet Road, Ban Xieng Gneun, Chanthaboury District, Vientiane LAO PDR</p> <p>Phone/Facsimile: (+856-21) 264 624, 213 109 Email: bol@bol.gov.la</p>
Malaysia	<p>Financial Intelligence Unit (Unit Perisikan Kewangan) (UPWBNM) 4th Floor, Block C Bank Negara Malaysia Jalan Dato' Onn, 50480 Kuala Lumpur, MALAYSIA</p> <p>Phone: (+60-03) 2698 8044 ext 8745 Facsimile: (+60-03) 2691 6108 Email: fiu@bnm.gov.my</p>

Myanmar

Financial Investigation Unit

Myanmar Police Force
 Ministry of Home Affairs
 Nay Pyi Taw, MYANMAR

Phone: (+95) 067 412 493
 Facsimile: (+95) 067 412 492, 067 412 494
 E-mail: mfiu@mpf.gov.mm

Philippines

The Anti Money Laundering Council

5th Floor, EDPC Building
 Bangko Sentral ng Pilipinas (BSP) Complex
 Mabini corner Vito Cruz Street, Malate, Manila
 PHILIPPINES

Phone: (+63-2) 524 7011
 Facsimile: (+63-2) 524 6085
 Email: secretariat@amlc.gov.ph / amlc@bsp.gov.ph

Singapore

Suspicious Transaction Reporting Office (STRO)

Commercial Affairs Department
 391 New Bridge Road #06-701
 Police Cantonment Complex Block D
 SINGAPORE 088762

Phone: (+65) 1800 325 0000
 Facsimile: (+65) 6223 3171
 Email: SPF_CADWebmaster@spf.gov.sg

Thailand

Anti Money Laundering Office

422 Phyathai Road, Wangmai District,
 Pathumwan, Bangkok 10330
 THAILAND

Phone: (+66-2) 219 3600
 Facsimile: (+66-2) 219 3700
 Email: mail@amlo.go.th

Vietnam

The Anti-Money Laundering Information Centre

3rd floor, Block E, Vuong Dao,
 Phu Thuong, Ha Noi
 VIETNAM

Phone: (+84-2) 2239 446 (Director),
 (+84-2) 2239 451 (Research Department),
 (+84-2) 2239 447 (Intelligence Analysis Department)
 Facsimile: (+84-2) 2239 441 to 449
 Email: trungtampcrt@vnn.vn

Tracing proceeds of crime may not need to involve any special mutual legal assistance procedures and can be as simple as gathering relevant documents,³¹¹ such as certificates of ownership. However, tracing proceeds of crime can also require the use of more complex, coercive mechanisms. While there will be variation in national laws on this issue, the following are some of the types of court orders that may be available to assist in tracing proceeds of crime:

- **Production orders:** These compel persons or organisations, (public and private) upon whom they are served, to provide information in relation to the property of a suspect and his or her financial affairs. Production orders are usually directed to financial institutions to produce account information.
- **Monitoring orders:** These require financial institutions to monitor the activity of nominated accounts and inform the specified law enforcement agency of transactions conducted through these nominated accounts over the time specified in the order. Monitoring orders are primarily aimed at obtaining financial information relating to a person prior to the charging of a person with an offence.
- **Compulsory examinations orders:** These enable approved examiners to examine (usually as sworn testimony) persons who may have information relating to property that has been restrained.
- **Search warrants:** These can empower law enforcement agencies to obtain 'property tracking documents' in the same way that search warrants are generally used to locate and seize documents and evidence.

In the context of international cooperation to recover proceeds of crime, the Requested State may seek assistance from the Requesting State to secure one or more of these orders, where available.

4.2.2 Freezing and seizure

Once the proceeds of crime have been traced and identified, prompt preservation of identified proceeds of crime is essential. Given the speed with which assets can be transferred from one State to another, the importance of taking steps to quickly seize and freeze assets, prior to the finalisation of any final forfeiture orders, cannot be overemphasized.

The purpose of freezing and seizing assets is to preserve those assets and their value for possible forfeiture. It is vital to:

- restrain / seize the target assets early as this limits their dissipation;
- limit the judicial tendency to postpone making such orders until after disposition of the related criminal case as this may be too late - the assets may have disappeared by that time;
- consider appointing experienced private receivers to take control and manage the assets to ensure their value is preserved. For example, particular expertise will be required to keep the value of the asset where this is a company or share portfolio;
- prevent criminals from simply recovering their assets by, for example, prohibiting them and their nominees from taking part in auctions of confiscated property.³¹²

While national laws vary, there are typically two major forms of orders relevant to preservation of proceeds of crime:

- **Restraining orders:** These enable law enforcement authorities to temporarily seize, control and preserve property pending the outcome of any final court proceedings, so as to prevent its disposal by the criminal, or the reduction of its value by other means.

³¹¹ ADB / OECD, *MLA, Extradition and Recovery of Proceeds of Corruption in Asia and the Pacific*, pp. 81-88.

³¹² Candice Welsch, *International Cooperation for the Purposes of Confiscation*, presentation delivered at the ASEAN Workshop on International Cooperation in Trafficking in Persons Cases, Bangkok, November 2009 [hereinafter Welsch, *International Cooperation for the Purposes of Confiscation*].

- **Freezing orders:** These are similar to restraining orders but the term is usually used in relation to assets and monies held by financial institutions. These orders temporarily block accounts and prohibit the transfer, conversion, disposition or movement of property or funds pending the finalisation of investigations and confiscation proceedings.

Under some national laws, courts will allow applications for orders to freeze to be dealt with *ex parte* (in the absence of the party against whom the order is sought) so as to ensure that the account holder does not know and cannot remove the asset prior to the order being made. The account holder will then be notified that the freezing order is made and the substantive confiscation proceedings may begin after that.

4.2.3 Confiscation of assets

The next step in the process of recovering proceeds of crime is the confiscation of the property to the State. While national laws vary, there are several key types of orders that may be relevant to confiscation of proceeds of crime:

- **Confiscation or forfeiture orders:** These provide for the permanent deprivation of property deemed to be proceeds of crime.
- **Automatic or statutory forfeiture orders:** These are statutory provisions that allow for the automatic forfeiture of restrained property where a person is unable to prove that the restrained property was lawfully acquired. The onus of proving the lawful acquisition is on the person claiming ownership of the property. The forfeiture will usually happen automatically after the lapse of the time referred to in the statute, or upon conviction.
- **Exclusion orders:** These exclude certain property from a restraining or forfeiture order on the basis that the property or part of it was not proceeds of crime. These orders are particularly important if, for example, a third party has a legitimate claim to part of the proceeds of crime. For example, a jointly owned house might be partially paid for with legitimate funds from an innocent third party who did not know about and was not associated with the criminal activity.
- **Seizure orders:** These orders empower investigators to take possession and restrain property for use as evidence during investigations and criminal proceedings.
- **Pecuniary penalty orders:** These are orders against a defendant in respect of benefits derived as a result of the commission of a crime.
- **Proceeds assessment orders:** These are orders requiring persons to pay to the court (or other specified body) an amount assessed by the court as the value of proceeds of crimes derived from illegal activity. In trafficking cases, the calculated value of proceeds would likely be determined with reference to the profit made by the trafficker from trafficking-related exploitation.

National regimes for confiscation of proceeds of crime tend to be either *conviction based* (the assets are only confiscated after a guilty conviction) or *non-conviction based* (the assets can be confiscated even without a guilty conviction). More particularly:

- Under **conviction based** regimes, confiscation follows a criminal conviction against the person, and is directed at the convicted person.
- **Non-conviction based** regimes, often referred to as *in rem* or civil forfeiture regimes, are not dependent on a criminal conviction. The action is against the property not the person.

Conviction based regimes require a criminal trial and conviction. The *standard of proof* for proving the principal offence is of course the criminal standard, such as 'beyond a reasonable doubt'. Sometimes, a lower standard of proof is applied to the court's consideration of confiscation after conviction. For example, the standard applied may be 'the balance of probabilities'.³¹³

³¹³ Welsh, *International Cooperation for the Purposes of Confiscation*.

Conviction based regimes can be *object based* - that is, the prosecutor must prove that the assets are proceeds or instrumentalities of the crime; or *value based*, that is the criminal will forfeit the value of the benefit of the crime. In the latter case there is no need to prove that the actual property being confiscated is tainted.³¹⁴

Non-conviction based confiscation is a judicial action against the property itself and not the person. Proceedings will be conducted separately to any criminal proceedings. Generally, the *standard of proof* is lower than the criminal standard, for example, 'the balance of probabilities'. The owner of the property is a third party to the proceedings who has the right to defend their property in the action. Under these schemes, *it is the object itself that is forfeited, not its value*. Examples of States that have non-conviction based confiscation regimes include: Australia, Canadian provinces, Ireland, Italy, Malaysia, Slovenia, South Africa, Switzerland, United Kingdom and United States of America.³¹⁵

It is important to be aware that confiscation actions may affect the interests of third parties who may have a legitimate interest in any property that has been identified as proceeds of crime. For example the owner of motor vehicle that is used to transport trafficking victims may not know that his or her vehicle has been used in this way. The owner of a factory building may not know that the lessee is a trafficker who is exploiting workers in the business conducted in that factory. National law will generally provide the procedures for how the merits of claims by third parties will ultimately be determined.

4.3 International cooperation to recover proceeds of crime

Recovery of proceeds of crime across international borders is a form of mutual legal assistance. As such, the laws, principles, preconditions and procedures that apply to mutual legal assistance will also apply to recovery of proceeds of crime. Accordingly, the information in Chapter 3 on Mutual Legal Assistance is relevant to requests for assistance to recover proceeds of crime. However, there are some additional requirements and considerations that arise specifically in relation to international cooperation to recover proceeds of crime. These are discussed below.

4.3.1 International cooperation to recover proceeds of crime: ASEAN MLAT

Internationally, many States have agreed to work together to recover proceeds of crime, through a network of bilateral, regional and international treaties. Within the ASEAN region, one of the most significant agreements in this regard is the ASEAN MLAT.

Under the terms of the ASEAN MLAT, States Parties have agreed to assist one another to:

- identify or trace property derived from the commission of an offence and instrumentalities of crime. (For the purposes of this instrument, the expression 'instrumentalities of crime' means property used in connection with the commission of an offence or the equivalent value of such property);³¹⁶
- restrain dealings in property or freeze property derived from the commission of an offence that may be recovered, forfeited or confiscated;
- recover, forfeit or confiscate property derived from the commission of an offence.³¹⁷

The ASEAN MLAT applies to 'criminal matters', which potentially extends to a wide range of criminal offences, including trafficking in persons and related offences.³¹⁸

³¹⁴ Welsch, *International Cooperation for the Purposes of Confiscation*.

³¹⁵ Welsch, *International Cooperation for the Purposes of Confiscation*.

³¹⁶ ASEAN MLAT, art. 1(4).

³¹⁷ ASEAN MLAT, art. 1.

³¹⁸ ASEAN MLAT, art. 1(1).

Article 22 contains the key obligation in the ASEAN MLAT with regard to recovery of proceeds of crime:

The Requested State shall, subject to its domestic laws, endeavour to locate, trace, restrain, freeze, seize, forfeit or confiscate property derived from the commission of an offence and instrumentalities of crime for which such assistance can be given provided that the Requesting Party provides all information which the Requested Party considers necessary.

Given the caveat in Article 22 that cooperation is subject to domestic law, it is vital that all ASEAN Member States ensure that they have effective domestic regimes in place to facilitate the tracing, restraint, seizure, forfeiture and confiscation of proceeds of crime. Without strong national legislative frameworks, any efforts to build effective cooperation in this regard between ASEAN Member States or internationally will face continuing difficulties.

Requests made under Article 22 of the ASEAN MLAT must be accompanied by either an original signed order from a court in the Requesting State or an authenticated copy of the original order. Requests for assistance can only relate to orders and judgements that are made after the coming into force of the treaty.

4.3.2 International cooperation to recover proceeds of crime: UNTOC

States Parties to UNTOC have agreed to extensive obligations of cooperation with regard to recovering proceeds of crime.

As noted in the previous chapter, the mutual legal assistance provisions of UNTOC apply to offences established in accordance with that Convention and its Protocols (such as trafficking in persons and related crimes), where these crimes involve an organized criminal group and there are reasonable grounds to suspect that victims, witnesses, proceeds, instrumentalities or evidence of such offences are located in the Requested State Party.³¹⁹

Article 18 of UNTOC enables States Parties to seek assistance from each other for a wide range of purposes, including several of direct relevance to recovery of proceeds:

- executing searches, seizures and freezing (that is, temporarily prohibiting the transfer, conversion, disposition or movement of property);
- providing originals or certified copies of relevant document and records, including government, bank, financial, corporate or business records;
- identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes.

Under Article 12 of UNTOC, States Parties are obliged to take certain steps at the national level to ensure they have the capacity to:

- confiscate proceeds of crime derived from offences established in accordance with the Convention;
- confiscate property, equipment or other instrumentalities used in or destined to be used in offences established in accordance with the Convention;
- identify, trace, freeze or seize the proceeds of crime or instrumentalities for the purposes of eventual confiscation.

In addition, States Parties are required to empower their courts or other competent authorities to order that bank, financial or commercial records be made available or seized. States Parties are not permitted to fail to act on this obligation on the ground of bank secrecy.³²⁰

³¹⁹ UNTOC Article 18(1) requires the provision of mutual legal assistance where the Requesting State Party has reasonable grounds to suspect that the offence is transnational in nature and that the offence involves an organized criminal group. The Legislative Guide to UNTOC notes that the mere fact that victims, witnesses, proceeds, instrumentalities or evidence of such offences are located in the Requested State Party constitutes a reasonable ground to suspect that the offence is transnational: UNODC, *Legislative Guides to the Organized Crime Convention and its Protocols*, p. 221.

³²⁰ UNTOC, art. 12(7).

Article 13(1) of UNTOC specifically concerns international cooperation with regard to confiscation of proceeds of crime. Under this Article, when a State Party receives a request from another State Party having jurisdiction over an offence covered by UNTOC for confiscation of proceeds of crime, property, equipment or other instrumentalities, the Requested State Party must, to the greatest extent possible within its domestic legal system, either:

- submit the request to its competent authorities for the purposes of obtaining an order of confiscation; or
- submit to its competent authorities an order of confiscation obtained in the Requesting State (that is, seek enforcement of a foreign order).

The on-line Competent National Authorities Directory provides contact information and other details of the competent national authority for States Parties to UNTOC. This is a password protected website. Relevant officials can obtain a password for access to this site, and the instructions for this process are provided on the website itself. See: <http://www.unodc.org/compauth/en/index.html>.

Article 13(2) of UNTOC obliges States Parties, on request from another State Party having jurisdiction over an offence covered by UNTOC (or its Protocols), to take measures to identify, trace and freeze or seize proceeds of crime, property, equipment or other instrumentalities of crime, for the purpose of eventual confiscation to be ordered either by the Requesting State Party or by the Requested State Party. Note that while this provision requires the ‘taking of measures’ it does not require the enforcement in one State Party of a freezing or restraint order made in another.³²¹

The obligations to assist other States Parties with regard to confiscation orders, and also with regard to identification, tracing, seizing and freezing are subject to the general caveat contained in Article 13(4) that a State Party is not obligated to do something not permitted under its domestic law.³²² Note also that the grounds on which a State Party may refuse a request for such assistance are the same as those that apply to any other mutual legal assistance request.³²³

Requests for assistance made under Article 13 of UNTOC (International cooperation in confiscation) must comply with the requirements of Article 18 (Mutual legal assistance), as set out in Chapter 3.³²⁴ In addition, requests made under Article 13 must include certain information:

- if a court order is being sought in the Requested State (under Article 13(1)(a)), then the request must include: a description of the property to be confiscated and a statement of the facts relied upon by the Requesting State Party sufficient to enable the Requested State Party to seek that order under its domestic law;
- if the Requesting State is seeking to enforce one of its orders in the Requested State (under Article 13(1) (b)), then the request must include: a legally admissible copy of the order of confiscation and a statement of the facts and information as to the extent to which execution of the order is Requested;
- if the request relates to identifying, tracing, freezing or seizing proceeds of crime (under Article 13(2)) then the request must include: a statement of the facts relied upon by the Requesting State Party and a description of the actions requested.

³²¹ McClean, *Transnational Organized Crime: A Commentary*, p. 157.

³²² UNTOC, art. 13(4).

³²³ McClean, *Transnational Organized Crime: A Commentary*, p. 154 referencing UNTOC, art. 13(3).

³²⁴ *Mutatis mutandis*, UNTOC, art. 13(3).

4.3.3 International cooperation to recover proceeds of crime: UNCAC

States Parties to UNCAC are obliged to provide one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by the Convention. This includes the crimes of:

- corruption, such as bribery of officials, embezzlement of public funds and trading in influence;³²⁵ and
- laundering 'proceeds of crime'.³²⁶ This includes proceeds from *any* crime, which potentially includes the crime of trafficking in persons, or related crimes.

The mutual legal assistance obligations of UNCAC also extend to situations where legal persons, such as companies or other corporate structures, are involved. States Parties to UNCAC have agreed that asset recovery is a fundamental principle of the Convention, and to afford one another the widest measure of cooperation and assistance in this regard.³²⁷

States Parties to UNCAC can seek mutual legal assistance for a wide variety of purposes, including several of direct relevance to recovery of proceeds:

- executing searches and seizures and freezing (that is, temporarily prohibiting the transfer, conversion, disposition or movement of property);
- providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records;
- identifying or tracing proceeds of crime, property, instrumentalities of crime or other things for evidentiary purposes;
- identifying, freezing and tracing the proceeds of crime for the purposes of asset recovery, pursued under Chapter V of UNCAC.³²⁸

States Parties to UNCAC are obliged to take various measures at the national level to establish domestic regimes to enable:

- confiscation of proceeds of crime derived from the offences established in accordance with UNCAC;
- confiscation of property, equipment or other instrumentalities used in or destined to be used in offences established in accordance with the Convention;
- the identification, tracing, freezing or seizure of proceeds of crime or instrumentalities for the purposes of eventual confiscation.³²⁹

Under the terms of the UNCAC, these domestic measures must operate to facilitate international cooperation. This includes obligations to ensure that national authorities have the powers necessary to either:

- recognize and give effect to confiscation orders issued by a court of another State Party (in other words, a foreign order); or
- make the appropriate orders themselves, by adjudication of an offence of money laundering or other offence.

Similarly, States Parties are required to take measures to permit their competent authorities to freeze or seize property either on the basis of:

- a foreign order, provided the request provides a reasonable basis for the Requested State to believe there are sufficient grounds for taking such action and that the property will eventually be subject to an order of confiscation; or

³²⁵ UNCAC, arts. 15-22.

³²⁶ UNCAC, art. 23.

³²⁷ UNCAC, art. 51.

³²⁸ UNCAC, art. 46.

³²⁹ UNCAC, art. 31.

- a request that provides a reasonable basis for the Requested State to believe that there are sufficient grounds for taking such actions and that the property would eventually be subject to such a confiscation order.³³⁰

Article 55 of UNCAC builds on the general obligations regarding mutual legal assistance, established by Article 46 of that treaty (discussed in Chapter 3). Under Article 55, a State Party that has received a request from another State Party having jurisdiction over an offence established in accordance with the Convention for confiscation of proceeds of crime, property, equipment or instrumentalities of crime, shall, to the greatest extent possible within its domestic legal system:

- submit the request to its competent authorities for the purposes of obtaining an order of confiscation; or
- submit the request with a view to giving effect to an order of confiscation issued by a court in the Requesting State.³³¹

Similarly, following a request made by another State Party having jurisdiction over an offence established by the Convention, the Requested State Party is obliged to take measures to identify, trace and freeze or seize proceeds of crime, property, equipment or other instrumentalities, for the purposes of eventual confiscation to be ordered either by the Requested or the Requesting State.³³²

Requests for assistance made under Article 55 of UNCAC must comply with the general procedural requirements regarding requests for mutual legal assistance.³³³ There are also a number of specific requirements for requests specified in Article 55(3):

- if a court order is being sought in the Requested State (under Article 53(1)(a)), then the request must include: a description of the property to be confiscated, including to the extent possible the location, and where relevant, the estimated value of the property; and a statement of the facts relied upon by the Requesting State Party sufficient to enable the Requested State Party to seek that order under its domestic law;
- if the Requesting State is seeking to enforce one of its orders in the Requested State (under Article 55(1) (b)), then the request must include: a legally admissible copy of the order of confiscation upon which the request is based; a statement of the facts and information as to the extent to which execution of the order is requested; a statement specifying the measures taken by the Requesting State Party to provide adequate notification to bona fide third parties and to ensure due process; and a statement that the order is final;
- if the request relates to identifying, tracing, freezing or seizing proceeds of crime (under Article 55(2)) then the request must include: a statement of the facts relied upon by the Requesting State Party; a description of the actions requested; and, where available, a legally admissible copy of an order on which the request is based.

Cooperation through bilateral treaties

Bilateral mutual legal assistance treaties can expressly provide for mutual legal assistance to recover proceeds of crime. There are some examples of such treaties within the ASEAN region. For example, Vietnam has entered into a bilateral treaty with Korea on mutual legal assistance in criminal matters.³³⁴ Under this Treaty, the Parties have agreed to provide one another with assistance including tracing, restraining, forfeiting and confiscating the proceeds and instrumentalities of crime.³³⁵ The Parties are obliged, upon request, to endeavour to ascertain whether any proceeds of crime are located within its jurisdiction and to notify the

³³⁰ UNCAC, art. 54.

³³¹ UNCAC, art. 55(1).

³³² UNCAC, art. 55(2).

³³³ UNCAC Article 55(3) provides that the provisions of Article 46 apply to Article 55.

³³⁴ *Treaty between the Republic of Korea and the Socialist Republic of Vietnam on Mutual Legal Assistance in Criminal Matters*, S. Korea- Vietnam, Sept. 15, 2003, entered into force April 19, 2005 [hereinafter *Korea-Vietnam MLA Treaty*].

³³⁵ *Korea-Vietnam MLA Treaty*, art. 1(3)(g).

other Party of the results of its inquiry. Where suspected proceeds of crime are found, the Requested State Party is required to take such measures as are permitted by its law to restrain or confiscate such proceeds. This treaty adopts a broad definition of ‘proceeds of crime’, which includes any property suspected, or found by a court to be property directly or indirectly derived or realized as a result of the commission of an offence, or to represent the value of property and other benefits derived from the commission of an offence, including property that is used to commit or to facilitate the commission of an offence.³³⁶

While existing bilateral mutual legal assistance treaties can be important in the context of recovering proceeds of crime, it has been noted that the network of coverage provided by bilateral treaties in the region is far from complete. For example, a recent survey of 27 States in the Asia-Pacific region identified only 27 bilateral mutual legal assistance treaties in force between those States.³³⁷ Only some of these treaties make detailed provision for recovery of proceeds of crime that can be applied in the trafficking context. The limited coverage provided by this ‘web’ of bilateral treaties underscores the importance of multilateral alternatives, such as the ASEAN MLAT, UNTOC and UNCAC.

National laws regulating international cooperation to recover proceeds of crime

The provision of mutual legal assistance to recover proceeds of crime is regulated by national laws in many States. For example, under Thailand’s *Act on Mutual Assistance in Criminal Matters*, Thailand will consider requests from other States for various forms of assistance, including ‘forfeiture of property’ and ‘other proceedings relating to criminal matters’. The legislation provides that upon receipt of a request for assistance to forfeit or seize property in Thailand, the competent authorities can apply to the relevant court for a judgement requiring forfeiture or seizure.³³⁸ Another example, Indonesia’s *Act on Mutual Assistance*, provides that such assistance can be sought or provided for a number of purposes, including: the forfeiture of proceeds of crime; the recovery of pecuniary penalties in respect of crime; restraining dealings in property, locating and freezing property that may be recovered or confiscated or that may be needed to satisfy pecuniary penalties imposed in respect of the crimes; and “other assistance in accordance with this law”.³³⁹

In some States, there may be additional avenues for mutual legal assistance as a result of anti-money laundering legislation. For example, the *Philippines Anti-Money Laundering Act 2001* regulates the provision of mutual legal assistance with regard to the investigation and prosecution of ‘money laundering offences’. Under the Act, the Philippines Anti-Money Laundering Council is empowered to execute a request for assistance from a foreign State by: tracking down, freezing, restraining, and seizing assets alleged to be proceeds of any unlawful activity; giving information needed by the foreign State; and applying for an order of forfeiture of any monetary instrument or property in the court. These powers can be applied, provided the crime falls within one of the listed categories of specified ‘unlawful activities’. This list does not specifically include trafficking in persons offences. However, it does include “felonies or offences of a similar nature that are punishable under the penal laws of other States.”³⁴⁰ As another regional example, Indonesia’s *Law Concerning the Crime of Money Laundering* establishes the crime of money laundering and authorizes the provision of mutual legal assistance in the context of the prevention and eradication of the crime of money laundering.³⁴¹ Under the Act, mutual legal assistance can be undertaken with other States where there is a treaty or on the basis of reciprocity.³⁴²

³³⁶ *Korea-Vietnam MLA Treaty*, art. 16.

³³⁷ William Y.W. Loo, *Trends in MLA and Asset Recovery in Asia and the Pacific*, in *Making international anti-corruption standards operational: Asset recovery and mutual legal assistance*, Background paper presented at the Regional Seminar for Asia Pacific, p. 1, (ADB / OECD and Basel Institute on Governance, 2007) [hereinafter Loo, *Trends in MLA and Asset Recovery in Asia and the Pacific*].

³³⁸ *Act on Mutual Assistance in Criminal Matters* BE 2535, sections 32-35, (1992) (Thail.).

³³⁹ *Law Concerning Mutual Legal Assistance in Criminal Matters*, art. 3(2), (Law No. 1 of 2006) (Indon.).

³⁴⁰ See further, *Anti-Money Laundering Act*, section 3(4)(i), (Republic Act 9160 of 2001) (Phil.), which defines ‘unlawful activity’ to include a range of offences.

³⁴¹ *Law Concerning the Crime of Money Laundering*, (Law No. 15 of 2002), as amended by Law No. 25 of 2003, (Indon.) [hereinafter *Law Concerning Money Laundering* (Indon.)]. For a further example, see the laws of Lao Peoples’ Democratic Republic, *Decree on Anti-Money Laundering 2006*, arts. 28-31, (Lao PDR), which establish a regime for international cooperation with regard to money laundering.

³⁴² *Law Concerning Money Laundering* (Indon.), art. 44.

Table 2: National laws within ASEAN that regulate mutual legal assistance to recover proceeds of crime

ASEAN MEMBER STATE	NATIONAL LAW ON MUTUAL LEGAL ASSISTANCE FOR PROCEEDS OF CRIME
Brunei Darussalam	<i>Mutual Assistance In Criminal Matters Order</i> (2005); and <i>Criminal Conduct (Recovery of Proceeds) Order</i> (2000), Part III
Cambodia	No national mutual legal assistance law
Indonesia	<i>Law Concerning the Crime of Money Laundering</i> (Law No. 15 of 2002), Chapter VIII; and <i>Law Concerning Mutual Legal Assistance in Criminal Matters</i> (Law No. 1 of 2006)
Lao PDR	<i>Decree on Anti-Money Laundering 2006</i> ; and <i>Law on Criminal Procedure</i> , Part XI
Malaysia	<i>Mutual Assistance in Criminal Matters Act</i> (Act. 621 of 2002); and <i>Anti-Money Laundering Act 2001</i> (Act 613)
Myanmar	<i>Mutual Assistance in Criminal Matters Law</i> (Law No. 4/2004)
Philippines	<i>Anti-Money Laundering Act</i> (Republic Act 9160 of 2001)
Singapore	<i>Mutual Assistance in Criminal Matters Act</i> (Act 12 of 2000, as amended); and <i>Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act</i> (Chapter 65A)
Thailand	<i>Act on Mutual Assistance in Criminal Matters BE 2535</i> (1992)
Vietnam	<i>Law on Mutual Legal Assistance</i> (Law No. 08/2007/QH12)

4.4 Issues arising in international cooperation to recover proceeds of crime

Many of the issues arising in international cooperation to recover proceeds of crime will be the same as for any other mutual legal assistance application. Key considerations will include the importance of communication with counterparts, ensuring Letters of Request are complete and well drafted, and anticipating any likely objections to the request. For more detail on these issues, see Chapter 3.

The steps in the process for securing the return of proceeds of crime across international borders reflect the same procedures taken at a domestic level:

- first, the proceeds of crime must be traced and identified in the Requested State;
- once located, the assets will generally need to be quickly frozen or seized to prevent their removal;
- this will generally be followed by a more lengthy legal process, in which the assets are confiscated by the Requested State;
- finally, the assets may be repatriated to the Requesting State.³⁴³

The points raised under 4.2 above in relation to each of these steps at the domestic level are relevant to cases of international cooperation with respect to recovery of proceeds. Additional issues that arise particularly in the context of international cooperation are identified below.

³⁴³ This process is described in detail in ADB / OECD, *MLA, Extradition and Recovery of Proceeds of Corruption in Asia and the Pacific*, pp. 81-88.

4.4.1 Identification, tracing, freezing and seizing proceeds

The **ASEAN MLAT**, **UNTOC** and **UNCAC** provide that decisions and actions regarding measures to identify, trace, freeze and seize proceeds of crime, property and instrumentalities, pursuant to mutual legal assistance requests, shall be taken by the Requested State in accordance with its domestic laws or any relevant treaty arrangements.³⁴⁴

In some States, the identification and tracing of proceeds of crime may be possible through informal cooperation, with formal processes only being required at the point of freezing or seizing the proceeds. In other states, a formal request will be required even to identify the assets.

4.4.2 Confiscation of assets to the Requested State

Once the assets have been identified, and frozen or seized, the next step in the process of recovering proceeds of crime is the confiscation of the property to the Requested State. There are generally two ways that confiscation of proceeds of crime can be achieved:

- on receipt of a formal request from the Requesting State, the Requested State seeks a confiscation order through an application in its courts; or
- on receipt of a formal request from the Requesting State, a foreign order, obtained in the Requesting State, is *registered* in the courts of the Requested State. It can then be enforced in the Requested State in the same way as a domestic court order.³⁴⁵

It has been noted that legislation which permits direct enforcement of foreign confiscation orders by registration with a local court makes the process of recovering proceeds of crime much more efficient. Such direct enforcement of foreign orders reduces delay by eliminating the need to apply for a second confiscation order in the jurisdiction where the proceeds are located.³⁴⁶ However, as the laws in each State will vary, in participating in any request for mutual legal assistance to recover proceeds of crime, it will be necessary to ascertain which option or options are available under the relevant domestic legal systems.

4.4.3 Repatriation of proceeds to the Requesting State

Once money or property has been confiscated by the Requested State, the final step is to ensure that the proceeds of crime are repatriated to the Requested State. As explored further below, repatriation of confiscated proceeds of crime is not always assured and it may depend on national law and / or relevant treaty obligations. These are matters that, as far as possible, should be discussed and agreed upon at the outset between the Requesting and the Requested State.

Under the **ASEAN MLAT**, property forfeited or confiscated pursuant to a mutual legal assistance request may accrue to the Requesting State Party, unless otherwise agreed in each particular case.³⁴⁷ Requested States Parties are obliged, subject to domestic law and pursuant to any agreement with the Requesting State Party, to transfer the agreed share of the property recovered, subject to payment of costs and expenses incurred in enforcing the forfeiture order.³⁴⁸

Under **UNTOC**, proceeds of crime or property confiscated are to be disposed of in accordance with a State Party's domestic laws and administrative procedures. However, when proceeds are confiscated on the basis of a request from another State Party, the Requested State is obliged, to the extent permitted by domestic law and if requested, to give priority consideration to returning the confiscated proceeds of crime or property to the Requesting State Party, so that it can give compensation to the victims of crime or return proceeds or property to their legitimate owners.³⁴⁹ This issue is considered further below.

³⁴⁴ *UNTOC*, art. 13(4); *UNCAC*, art. 55(4); *ASEAN MLAT*, art. 22(1).

³⁴⁵ ADB / OECD, *MLA, Extradition and Recovery of Proceeds of Corruption in Asia and the Pacific*, p. 84.

³⁴⁶ Loo, *Trends in MLA and Asset Recovery in Asia and the Pacific*, p. 4.

³⁴⁷ *ASEAN MLAT*, art. 22(4).

³⁴⁸ *ASEAN MLAT*, art. 22(5).

³⁴⁹ *UNTOC*, art. 14(2).

UNCAC makes special provision for return of embezzled funds, confiscated pursuant to a mutual legal assistance request.³⁵⁰ Where funds are confiscated pursuant to a mutual legal assistance request under Article 55 for other types of crimes established by UNCAC, the Requested State Party is obliged to return the funds to the Requesting State Party provided it can reasonably establish its prior ownership of such property, or when the Requested State Party recognizes damage to the Requesting State Party as a basis for returning the confiscated property. In all other cases, the Requested State Party is to give priority consideration to returning confiscated property to the Requesting State Party, returning property to its legitimate owners, or compensating the victims of crime.³⁵¹ UNCAC also makes provision for deduction of reasonable expenses incurred in the investigation, prosecution or judicial proceeding leading to the return or disposition of confiscated property.³⁵²

4.4.4 Use of proceeds to support or compensate victims of trafficking³⁵³

As noted above, States generally regulate the disposal of confiscated assets through domestic law and administrative procedures. The linking of a criminal justice measure such as confiscation of proceeds to victim support is an important step forward in integrating a victim-centred and rights-based approach to trafficking. It finds considerable support in relevant treaty law. While **UNTOC** does not contain any mandatory provisions with respect to disposal of confiscated proceeds or property, States Parties are nevertheless required to consider specific disposal options. Victim compensation should be considered as a priority option. Under the terms of the Convention, when a State Party has responded to a request from another State Party with regard to asset confiscation, then the Requested State shall, if requested and legally able, “give priority to returning the confiscated proceeds or property to the Requesting State Party so that it can give compensation to the victim of the crime or return such proceeds of crime or property to their legitimate owners.”³⁵⁴

Prioritizing victim compensation is in accordance with the letter and spirit of the **UN Trafficking Protocol**. In one of its few mandatory victim support provisions, the Protocol requires States Parties to ensure that their domestic legal systems contain measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered.³⁵⁵ This provision does not amount to an obligation to provide remedies as States only need offer the legal possibility of compensation.³⁵⁶ According to the Legislative Guide, the Protocol’s requirement in this regard would be satisfied by the State establishing one or more of three options: provisions allowing victims to sue offenders for civil damages; provisions allowing criminal courts to award criminal damages (paid by offenders) or to impose orders for compensation or restitution against persons convicted of trafficking offences; or provisions establishing dedicated funds or schemes to allow victims to claim compensation from the State for injuries or damages.³⁵⁷

The **UN Trafficking Principles and Guidelines** request States to consider ensuring, to the extent possible, that confiscated assets are used to support and compensate victims of trafficking.³⁵⁸ This instrument further requests that legislative provision be made for the confiscation of the instruments and proceeds of trafficking and related offences, specifying, where possible: “that the confiscated proceeds of trafficking will be used for the benefit of victims of trafficking. Consideration should be given to the establishment of a compensation fund for victims of trafficking and the use of confiscated assets to finance such a fund.”³⁵⁹

³⁵⁰ UNCAC, art. 57(3)(e).

³⁵¹ UNCAC, art. 57(3)(c).

³⁵² UNCAC, art. 57(4).

³⁵³ This section is drawn from Gallagher, *The International Law of Human Trafficking*, Chapter 7.

³⁵⁴ UNTOC, art. 14(2). Other options proposed under Article 14 include contributing proceeds or property to a special UN fund for use against organized crime and sharing confiscated funds with other States Parties in order to encourage enhanced cooperation among law enforcement agencies.

³⁵⁵ UN Trafficking Protocol, art. 6(6). See also, UNTOC, art. 25(2) and UNODC, *Legislative Guides to the Organized Crime Convention and its Protocols*, Part 1, paras. 368-371 for the text and commentary on the equivalent, and almost identical, provision.

³⁵⁶ UNODC, *Legislative Guides to the Organized Crime Convention and its Protocols*, Part 1, para. 368.

³⁵⁷ UNODC, *Legislative Guides to the Organized Crime Convention and its Protocols*, Part 1, para. 294.

³⁵⁸ UN Trafficking Principles and Guidelines, Principle 16.

³⁵⁹ UN Trafficking Principles and Guidelines, Guideline 4.4. Further on these provisions see OHCHR, *Commentary to the Trafficking Principles and Guidelines*.

International policy instruments provide additional evidence of a growing acceptance of the idea that proceeds of trafficking crimes confiscated by States should be returned, in some form or another, to the victims whose exploitation has made such profits possible.³⁶⁰ The **ASEAN Practitioner Guidelines**, for example, state that:

As far as possible, confiscated assets should be used to fund both victim compensation claims and, where appropriate, other forms of counter-trafficking initiatives.³⁶¹

It has been noted, however, that such measures are not generally sustainable and should only ever be considered an adjunct to an institutionalized, adequately funded victim support and protection program.³⁶²

³⁶⁰ See, for example, UNGA, *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, Part 4(h), UN Doc. A/RES/40/34, Nov. 29, 1985: “[States are encouraged] to co-operate with other States, through mutual judicial and administrative assistance, in such matters as the detection and pursuit of offenders, their extradition and the seizure of their assets, to be used for restitution to the victims.”

³⁶¹ *ASEAN Practitioner Guidelines*, Part 1.A.4.

³⁶² Gallagher and Holmes, *Developing an Effective Criminal Justice Response to Human Trafficking*, p. 330.

Chapter 5:

Extradition

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Overview of this Chapter:

The purpose of this Chapter is to provide practitioners working on trafficking in persons cases with practical information that will assist them to engage in the extradition process. The Chapter includes information about:

- the nature of extradition;
- the various legal bases that can be relied upon to support a request for extradition;
- the pre-conditions and safeguards that typically apply in extradition cases;
- procedures that are typically followed in extradition cases;
- how to make and respond to extradition requests.

Key International and Regional Principles

Trafficking and related crimes must be extraditable offences.³⁶³

States are obliged to ensure that the applicable legal framework enables extradition for trafficking related offences.

States should ensure the widest possible jurisdiction for trafficking offences.

States should consider extending jurisdiction to cover trafficking related offences committed by or against their nationals.³⁶⁴

States should extradite or prosecute (*aut dedere aut judicare*).³⁶⁵

States that do not extradite their nationals for trafficking related offences or that refuse extradition on other grounds should prosecute alleged offenders.

Human rights must be respected in the extradition process.³⁶⁶

States must ensure that extradition requests, procedures and outcomes do not violate established rights including the principle of *non-refoulement*; the prohibition on discrimination; the right to a fair trial; and the prohibition on torture and cruel, inhuman or degrading treatment or punishment.

Trafficking-related extradition requests should be expedited.³⁶⁷

States should accord high priority to and expedite extradition requests that relate to trafficking.

³⁶³ UNTOC, art. 16; *European Trafficking Convention*, art. 23(1); *UN Trafficking Principles and Guidelines*, Principle 14; *ASEAN Practitioner Guidelines*, Guideline 1.A.5.

³⁶⁴ UNTOC, art. 15(1)-(2).

³⁶⁵ UNTOC, arts. 15(3), 16(10); *European Trafficking Convention*, art. 31(3); *ASEAN Practitioner Guidelines*, Guidelines 1.A.4, 2.B.1.

³⁶⁶ UNTOC, art. 16(13); *UN Trafficking Principles and Guidelines*, Principle 14. Confirmed by regional extradition treaties such as *Organisation of American States Inter-American Convention on Extradition*, art. 16.1, Feb. 25, 1981, done at Caracas, entered into force Mar. 28, 1992; *Economic Community of West African States Convention on Extradition*, arts. 5, 14, Aug. 6, 1994, A/P.1/8/94, entered into force Aug. 1995; *Council Framework Decision of 13 June 2002 on the European arrest warrant and surrender procedures between Member States 2002/584/JHA*, Preamble para. 12, OJL 190 of Jul. 18, 2002. See also, *ICCPR*, arts. 7, 9, 13, 14; *Convention against Torture*, art. 3. See further, Harrington, *The Absent Dialogue*.

³⁶⁷ UNTOC, art. 16(8); *UN Trafficking Principles and Guidelines*, Guideline 11(9).

5.1 Introduction

Extradition is the formal name given to the process whereby one State (the Requesting State) asks another State (the Requested State) to return an individual to face criminal charges or punishment in the Requesting State. Extradition is an important component of an effective criminal justice response to trafficking in persons. Because of the nature of this crime, suspects wanted for prosecution in one State will often be in another State. This may be because they are nationals of that other State, or because they have deliberately taken steps to avoid prosecution or sentencing by fleeing to another State. Extradition will therefore sometimes be essential for the successful prosecution of trafficking cases.³⁶⁸

Extradition is based on the principle that a person located in one State who is credibly accused of committing serious crimes triable in another State, should be surrendered to that other State to answer for those alleged crimes.³⁶⁹ However, the rules around extradition also seek to impose safeguards in order to ensure that the individual whose extradition is being sought will be protected from surrender in circumstances where the person would suffer injustice or oppression.³⁷⁰ In this context, it is important to note that the extradition process is not one in which guilt or innocence is determined. It is the Courts of the Requesting State that will ultimately make such a determination.

Extradition is one of the oldest tools of international cooperation in criminal matters. The practice of extradition has developed and expanded rapidly in recent times along with the internationalization of crime and the growing mobility of offenders. It can be expected that extradition will become an increasingly important aspect of national and international criminal justice.

5.2 Legal basis for extradition

Traditionally the practice of extradition was based upon pacts, courtesy or goodwill between Heads of States.³⁷¹ This customary principle of reciprocity continues to be an important basis for such cooperation. However, it is necessary to acknowledge that under international law, no State is *obliged* to extradite to another State in the absence of an applicable treaty obligation to that effect.³⁷²

Today, the legal basis for extradition will usually be a bilateral or multilateral treaty or, in the absence of a treaty, the domestic law of the respective States. In all cases it is essential to accurately determine the legal basis for extradition. By establishing the legal basis, the criminal justice official and agency – in either the Requesting or the Requested State – can be sure that authority is being exercised properly and that cooperation will have the intended result. Verification of legal basis will also usually provide important information on the scope and nature of extradition.

5.2.1 Treaties

States, often working through intergovernmental organisations, have created a complex network of treaties that provide a legal basis for extradition. Some extradition treaties are multilateral – open to all States or to Members of a particular regional grouping or organisation such as the European Union. Some treaties focus only on extradition and their provisions will apply generally to a full range of criminal matters. Other treaties are tied more specifically to a particular issue such as drugs, organized crime or corruption. In such cases, extradition will be one of many matters addressed by the treaty.

As noted previously, there are important advantages to treaty-based cooperation as compared to reliance on domestic law or customary principles of reciprocity. Most importantly, a treaty creates obligations between

³⁶⁸ OHCHR, *Commentary to the Trafficking Principles and Guidelines*, Principle 14 and related Guidelines, p. 222.

³⁶⁹ See generally, Nicholls et. al, *The Law of Extradition and Mutual Assistance*.

³⁷⁰ *Knowles v Government of the United States of America* [2006] UKPC 38, para. 12 cited in Nicholls et. al, *The Law of Extradition and Mutual Assistance*, p. 3.

³⁷¹ UNODC, *Report: Informal Expert Working Group on Effective Extradition Casework Practice*, p. 5, Dec. 12-16, 2004 [hereinafter UNODC, *Report: Informal Expert Working Group on Effective Extradition Casework Practice*].

³⁷² McClean, *Transnational Organized Crime: A Commentary*, p. 179.

States that are recognized under international law. Second, treaties usually contain detailed provisions on the procedure and parameters of cooperation that will apply between States Parties, thereby providing greater certainty and clarity than most non-treaty based arrangements. Finally, treaties may also provide for forms of cooperation that are otherwise unavailable.³⁷³

Bilateral extradition treaties

Many States have negotiated and concluded bilateral extradition treaties. Bilateral treaties have the great advantage that they can be designed to meet the specific needs of the signatories. Such agreements are often therefore much more detailed and precise than their multilateral equivalents. They are also much easier to amend. However, bilateral extradition treaties can be complex to negotiate and a State that wishes to create a sufficiently broad web of such treaties will generally need to conclude a significant number of them.³⁷⁴ As a practical matter, a bilateral treaty may not always be available with the particular States from where a Requesting State is seeking extradition of a suspect or fugitive.

In response to the trend towards bilateral treaties and the need to promote consistency and quality in drafting, the UN developed a *Model Treaty on Extradition*.³⁷⁵ The purpose of the Model Treaty is to promote the development of extradition treaties and to provide guidance in their drafting. An implementation manual to the Model Treaty is available, providing important background and guidance on a number of key issues that commonly arise in the extradition context.³⁷⁶

As noted above, several States in the ASEAN region have negotiated and concluded bilateral extradition treaties with a limited range of States. For example, Indonesia and the Philippines have a longstanding bilateral extradition treaty.³⁷⁷ The treaty covers extradition of those who are being proceeded against, or who have been charged with, found guilty or convicted of a range of crimes, including several that are relevant in the trafficking context: rape; indecent assault; unlawful sexual acts with or upon minors; abduction, kidnapping; illegal or arbitrary detention; slavery; servitude; forgery; and perjury. The treaty clearly sets out the conditions of extradition, including several mandatory and discretionary grounds of refusal, along with the procedures for making extradition requests.

While there are important bilateral treaties already in existence, most States in the ASEAN region have negotiated and concluded a fairly limited network of bilateral extradition treaties. As a result, the coverage provided by this 'web' of bilateral treaties is far from complete. Increasingly, the gaps in this web are being closed as more States ratify the major UN crime conventions, particularly UNTOC, the UN Trafficking Protocol and UNCAC. For example, both the Philippines and Indonesia have ratified UNCAC. As a result, their bilateral extradition treaty is deemed to extend to offences established in accordance with that Convention. Indonesia's recent ratification of UNTOC and the UN Trafficking Protocol, means that its bilateral extradition treaty with the Philippines (also a State Party to UNTOC and the UN Trafficking Protocol) has been automatically extended to 'trafficking in persons'. Ultimately, the remaining gaps can only be closed once all States in the region are party to these treaties. This underscores the continuing importance of all States in the region continuing to move towards ratification of the major multilateral crime conventions.

³⁷³ ADB / OECD, *MLA, Extradition and Recovery of Proceeds of Corruption in Asia and the Pacific*, p. 28.

³⁷⁴ ADB / OECD, *MLA, Extradition and Recovery of Proceeds of Corruption in Asia and the Pacific*, p. 28.

³⁷⁵ *United Nations Model Treaty on Extradition*, GA Res. 45/116, as amended by GA Res. 52/88, UN Doc. A/RES/45/116 (Dec. 14, 1990) [hereinafter *UN Model Treaty on Extradition*].

³⁷⁶ UNODC, *Revised Manuals on the Model Treaty on Extradition and the Model Treaty on Mutual Assistance*.

³⁷⁷ *Extradition Treaty between the Republic of the Philippines and the Republic of Indonesia*, Philippines-Indonesia, Feb. 10, 1976.

Table 1: ASEAN Member States: matrix of bilateral extradition arrangements

ASEAN MEMBER STATE	Brunei Darussalam	Cambodia	Indonesia	Lao PDR	Malaysia	Myanmar	Philippines	Singapore	Thailand	Vietnam
Brunei Darussalam	-	x	x	x	x	x	x	x	x	x
Cambodia	x	-	x	✓	x	x	x	x	✓	x
Indonesia	x	x	-	x	✓	x	✓	x	✓	x
Lao PDR	x	✓	x	-	x	x	x	x	✓	x
Malaysia	x	x	✓	x	-	x	x	x	✓	x
Myanmar	x	x	x	x	x	-	x	x	x	x
Philippines	x	x	✓	x	x	x	-	x	✓	x
Singapore	x	x	x	x	x	x	x	-	x	x
Thailand	x	✓	✓	✓	✓	x	✓	x	-	x
Vietnam	x	x	x	x	x	x	x	x	x	-

Regional treaties

While ASEAN Member States have recently concluded a detailed treaty on mutual legal assistance there is no comparable instrument dealing with extradition. The possible future development of such a treaty is currently under consideration.

Multilateral treaties

Some of the earliest treaties that addressed the issue of extradition were developed in the context of humanitarian law (the laws of war). For example, the various humanitarian law instruments commonly referred to as the Geneva Conventions of 1949 place an obligation on States to either prosecute or extradite alleged offenders of war crimes, applying the principle of *aut dedere aut judicare* ('extradite or prosecute').³⁷⁸ More recently, in recognition of the transnational nature of many serious crimes, including trafficking in persons, a number of multilateral treaties have been developed which establish frameworks to facilitate extradition in the criminal context. As noted above, some legal instruments, such as the decision establishing the *European Arrest Warrant*³⁷⁹, focus on the specific issue of extradition across a broad range of criminal offences. Other treaties, such as the UNTOC, deal with extradition as one aspect of international cooperation on a specific issue. This treaty, along with the UNCAC, is considered further below.

United Nations Convention against Transnational Organized Crime and the UN Trafficking Protocol

The UN Trafficking Protocol does not specifically deal with the issue of extradition and it is therefore necessary to turn to its parent instrument, the UNTOC. The following is a summary of the requirements under UNTOC.

³⁷⁸ M. C. Bassiouni and E. Wise, *Aut Dedere aut Judicare, The Duty to Extradite or Prosecute in International Law* (Martinus Nijhoff, 1995).

³⁷⁹ Council Framework Decision of 13 June 2002 on the European arrest warrant and surrender procedures between Member States 2002/584/JHA, OJL 190 of Jul. 18, 2002. The Framework Decision entered into force Nov. 1, 1993.

Scope of application:

The extradition obligations under UNTOC apply to offences established in accordance with that Convention, that is:

- Participating in an organized criminal group; laundering proceeds of crime; corruption; and obstruction of justice;
- Any other ‘serious crime’³⁸⁰ (a catch-all provision that covers conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or more serious penalty); and
- Offences established by the Protocols, including trafficking in persons, and attempts, participating as an accomplice, ordering or directing trafficking in persons offences.³⁸¹

The extradition obligations in UNTOC will be activated in respect of such offences where these involve an organized criminal group and the person who is the subject of the request for extradition is located in the territory of the Requested State Party.³⁸²

In relation to both categories of offences, the extradition obligation will apply provided that the offence for which extradition is sought is punishable under the domestic law of both the Requesting and Requested States Parties. This dual criminality requirement will automatically be fulfilled in respect of conduct that the Convention requires States Parties to criminalize in the same way, provided both parties have given effect to these obligations.³⁸³

Nature of the obligation:

UNTOC provides the legal basis for extradition in three ways. First, all of the offences to which the Convention applies are *deemed* to be included as extraditable offences in any extradition treaty already existing between States Parties.³⁸⁴ States Parties are also obliged to include such offences as extraditable offences in every future extradition treaty.³⁸⁵ This provision has the effect of amending, as a matter of public international law, prior bilateral and multilateral extradition arrangements between States Parties to include within their scope the offences referred to in the previous sub-section.³⁸⁶ Second, if a State Party requires a treaty as a precondition to extradition, it may consider UNTOC as the requisite treaty.³⁸⁷ Third, if a State Party does *not* require a treaty as a precondition to extradition, it shall consider the offences in the UNTOC as extraditable offences.³⁸⁸

Conditions to extradition:

General conditions: UNTOC provides that extradition shall be subject to the conditions provided for by the domestic law of the Requested State Party or by applicable extradition treaties. This would include grounds for refusal and minimum penalty required for an offence to be considered extraditable. States Parties are obliged, subject to their domestic laws, to endeavour to expedite extradition proceedings and to simplify evidentiary requirements in respect of all Convention offences.³⁸⁹

The Convention sets out a number of minimum requirements that States Parties must implement as part of their extradition arrangements. These include requirements relating to the processes that should be followed

³⁸⁰ UNTOC, art. 2(b).

³⁸¹ UN Trafficking Protocol, art. 1(3).

³⁸² UNTOC, art. 16(1).

³⁸³ The dual criminality requirement will be automatically satisfied with respect to offences established under Articles 6, 8 and 23 of the Convention (money laundering, corruption, obstruction of justice) but not necessarily in relation to offences established under Article 5 (criminalization of participation in an organized criminal group) or ‘serious crime’ where States Parties are not required to criminalise exactly the same conduct: UNODC, *Legislative Guides to the Organized Crime Convention and its Protocols*, p. 200, para. 417.

³⁸⁴ UNTOC, art. 16(3).

³⁸⁵ UNTOC, art. 16(3).

³⁸⁶ McClean, *Transnational Organized Crime: A Commentary*, p. 179.

³⁸⁷ UNTOC, art. 16(4). States Parties for which a treaty basis is a pre-requisite for extradition are required to notify the United Nations as to whether or not they will permit the UNTOC to be used as a treaty basis for extradition: UNTOC, art. 16(5).

³⁸⁸ UNTOC, art. 16(6).

³⁸⁹ UNTOC, art. 16(8).

where the extradition of nationals is sought, limitations on the permitted grounds of refusal and human rights protections for persons who are the subject of an extradition request. The major requirements are considered further below.

Nationality: In relation to nationality, if a State Party will not extradite an alleged offender, solely on the ground that he or she is a national, then it must, at the request of the State Party seeking extradition, submit the case without undue delay to its competent authorities for the purposes of prosecution.³⁹⁰ This article enshrines the principle of ‘extradite or prosecute’ (*aut dedere aut judicare*) identified and discussed above. UNTOC recognizes that domestic prosecutions of this kind are likely to be time-consuming and resource intensive because the crime will normally have been committed in another State.³⁹¹ It therefore requires States Parties, in such cases, to cooperate with each other, in particular in procedural and evidentiary aspects, to ensure the efficiency of such prosecutions.³⁹²

Note that the Convention provides an alternative method for States Parties to discharge their ‘extradite or prosecute’ obligation. Under a procedure sometimes referred to as ‘conditional extradition’, the Requested State Party may choose to temporarily surrender the fugitive to the Requesting State Party for the sole purpose of conducting the trial, on the condition that any sentence will be served in the Requested State.³⁹³ Furthermore, if extradition sought for purpose of enforcing a sentence is refused on grounds of nationality, then the Requested State Party may, upon application from the Requesting State Party, consider enforcement of that sentence under its own domestic law.³⁹⁴

Prohibition on denial for fiscal offences: UNTOC provides that extradition cannot be refused on the sole ground that the offence is also considered to involve fiscal matters.³⁹⁵ States Parties are, therefore, required to ensure that no such ground for refusal may be invoked under its extradition laws or treaties.³⁹⁶

Requirement of consultation prior to refusal: In situations where a State Party is considering refusing extradition, it should (where appropriate) consult with the Requesting State Party to provide it with ample opportunity to present its opinions and provide information relevant to its allegations.³⁹⁷ This provision reflects the strong cooperation theme of the Convention. It recognizes that the Requesting State may well have information available to it that could result in a different outcome. Note that the obligation of prior consultation is not absolute and the Requested State retains a measure of discretion in this regard.³⁹⁸ However, there is a clear expectation of cooperation and consideration of the need to bring offenders to justice, including through extradition.³⁹⁹

Fair treatment and non discrimination: Article 16(3) requires States Parties to ensure that all persons who are subject to extradition proceedings in connection with any of the relevant offences must be guaranteed fair treatment at all stages of the proceedings. In addition, the obligation to extradite under UNTOC does not apply to situations where the Requested State Party has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of their sex, race, religion, nationality, ethnic origin or political opinions, or that compliance with the extradition request would prejudice that person’s position for any one of those reasons (Article 16(14)). While this does not amount to an obligation to refuse extradition under such circumstances, it does provide the Requested State with complete discretion to refuse a request on such grounds.⁴⁰⁰

³⁹⁰ UNTOC, art. 16(10).

³⁹¹ UNODC, *Legislative Guides to the Organized Crime Convention and its Protocols*, p. 202, para. 428.

³⁹² UNTOC, art. 16(10).

³⁹³ UNTOC, art. 16(11).

³⁹⁴ UNTOC, art. 16(12).

³⁹⁵ UNTOC, art. 16(15).

³⁹⁶ UNODC, *Legislative Guides to the Organized Crime Convention and its Protocols*, p. 204, para. 434.

³⁹⁷ UNTOC, art. 16(16).

³⁹⁸ UNODC, *Legislative Guides to the Organized Crime Convention and its Protocols*, p. 204, para. 436.

³⁹⁹ UNODC, *Legislative Guides to the Organized Crime Convention and its Protocols*, p. 204, para. 436, citing the Convention’s interpretative notes (A/55/383/Add.1, para 35) on this point.

⁴⁰⁰ McClean, *Transnational Organized Crime: A Commentary*, p. 187.

Conclusion of new agreements and arrangements: The Convention calls on States Parties to seek to conclude bilateral and multilateral agreements or arrangements to carry out or enhance the effectiveness of extradition.⁴⁰¹

United Nations Convention against Corruption

Scope of application:

The extradition obligations under UNCAC apply to all the offences established in accordance with the Convention, providing that the person who is subject to the request is present in the territory of the Requested State Party and dual criminality is established.⁴⁰² These offences include: bribery of national and foreign public officials; embezzlement; misappropriation or other diversion of property by a public official; trading in influence; abuse of functions; illicit enrichment; bribery in the private sector; laundering of proceeds of crime; and obstruction of justice, which includes interfering with witnesses. It is likely that many of these crime types will feature in trafficking activity. In these situations, UNCAC could provide a separate legal basis for extradition.

Nature of the obligation:

UNCAC establishes a legal basis for extradition in three ways, similar to UNTOC.⁴⁰³ First, the Convention provides that each of the offences to which the Convention applies are deemed to be included as extraditable offences in any extradition treaty already existing between States Parties.⁴⁰⁴ They are also obliged to include such offences as extraditable offences in every future extradition treaty.⁴⁰⁵ Second, if a State Party requires a treaty as a precondition to extradition, it may consider UNCAC as the requisite treaty.⁴⁰⁶ Third, if a State Party does not require a treaty as a precondition to extradition, it shall consider the offences in the UNCAC as extraditable offences, between itself and other parties to UNCAC.⁴⁰⁷

Conditions of extradition:

Like UNTOC, the UNCAC stipulates a number of minimum requirements that States Parties are obliged to implement in the extradition context. These include requirements relating to the extradition or prosecution of nationals; certain grounds on which States Parties are not permitted to refuse extradition; and human rights protections. These are considered in more detail below.

Extradition of nationals: If a State Party refuses to extradite solely on the ground that the alleged offender is a national, then it is obliged, on the request of the State Party seeking extradition, to submit the case without undue delay to its competent authorities for prosecution.⁴⁰⁸ As noted in respect of UNTOC, this provision is a re-statement of the 'extradite or prosecute' obligation.

No refusal of extradition: Under UNCAC, States Parties have agreed that there are certain grounds on which they will not refuse extradition. In particular, States Parties have agreed that:

- where they are using the Convention as the basis of extradition, they will not consider any of the offences that have been established in accordance with UNCAC as political offences;⁴⁰⁹ and
- they will not refuse a request for extradition on the sole ground that the offence is also considered to involve fiscal matters.⁴¹⁰

⁴⁰¹ UNTOC, art. 16(17).

⁴⁰² UNCAC, art. 44(1).

⁴⁰³ ADB / OECD, *MLA, Extradition and Recovery of Proceeds of Corruption in Asia and the Pacific*, p. 15.

⁴⁰⁴ UNCAC, art. 44(4).

⁴⁰⁵ UNCAC, art. 44(4).

⁴⁰⁶ UNCAC, art. 44(5).

⁴⁰⁷ UNCAC, art. 44(7).

⁴⁰⁸ UNCAC, art. 44(11).

⁴⁰⁹ UNCAC, art. 44(4).

⁴¹⁰ UNCAC, art. 44(16).

Human rights and non-discrimination: UNCAC requires States Parties to meet certain minimum human rights protections. All persons who are the subject of an extradition request are required to be guaranteed fair treatment at all stages of the proceeding.⁴¹¹ Also, the obligation to extradite does not apply to situations where 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 their sex, race, religion, nationality, ethnic origin or political opinions, or if compliance with that request would cause prejudice to that person's position for any one of these reasons.⁴¹²

Requirement of consultation prior to refusal: In situations where a State Party is considering refusing extradition, it should (where appropriate) consult with the Requesting State Party to provide it with ample opportunity to present its opinions and provide information relevant to its allegations.⁴¹³

5.2.2 Domestic law

International law leaves every State free to make provision for extradition, even when there is no treaty with the Requesting State.⁴¹⁴ Extradition based on domestic law is increasingly common. Some States today use domestic law exclusively as their basis for extradition, meaning that extradition can proceed in the absence of a treaty relationship. Other States have adopted a blended system in which extradition is permitted by domestic law, if there is a treaty between the Requesting and Requested States.

For example, in Malaysia, the *Extradition Act 1992* provides the legal basis for extradition to and from that State. Extradition can proceed either pursuant to an extradition treaty (which includes multilateral treaties), or a Special Direction of the Minister charged with responsibility for fugitive criminals.⁴¹⁵ Where a request for extradition or provisional arrest is made by a State that does not have a treaty with Malaysia, the relevant Minister may, if he / she deems it fit to do so, issue a Special Direction to enable the request to be executed in accordance with the Act.⁴¹⁶

Because it gives effect to international obligations, Malaysia's *Extradition Act* has to be read alongside its treaty obligations. Malaysia is party to UNTOC.⁴¹⁷ As discussed below, this considerably extends the application of the Malaysian extradition regime where the Requesting State is also a party to UNTOC.⁴¹⁸ Malaysia has concluded bilateral extradition treaties with a number of States including Australia, Indonesia, Hong Kong SAR, Thailand and the United States of America. As each bilateral treaty specifies the range of offences to which it will apply, it is important that practitioners examine not only the legislation but also the terms of the relevant treaties. For example, the treaty with Indonesia specifically applies to a number of offences that might be relevant in the trafficking context including: rape; abduction and kidnapping; causing bodily hurt; wrongful confinement; buying or disposing of any person as a slave or habitually dealing in slaves; offences punishable under the laws relating to women and girls; forgery and related offences; bribery and corruption; perjury; and giving, fabricating and using false evidence.⁴¹⁹ Much more importantly, Malaysia's adherence to UNTOC means that the offences established under that Convention (including trafficking) are deemed to be included as an extraditable offence in each of these treaties where the other party to the treaty is also party to UNTOC.⁴²⁰

⁴¹¹ UNCAC, art. 44(14).

⁴¹² UNCAC, art. 44(15).

⁴¹³ UNCAC, art. 44(17).

⁴¹⁴ McClean, *Transnational Organized Crime: A Commentary*, p. 179.

⁴¹⁵ *Extradition Act 1992*, sections 1-2, (Act No. 479) (Malay.) [hereinafter *Extradition Act* (Malay.)]. For further information, see the website of the Malaysian Attorney-General's Chambers: <http://www.agc.gov.my/agc/agc/int/EU/Exrln.htm>.

⁴¹⁶ *Extradition Act* (Malay.), section 3. This section provides that "Where a country in respect of which no order has been made under section 2 makes a request for the extradition thereto of a fugitive criminal, the Minister may personally, if he deems it fit to do so, give a special direction in writing that the provisions of this Act shall apply to that country in relation to the extradition thereto of that particular fugitive criminal."

⁴¹⁷ Malaysia ratified UNTOC on September 24, 2004 and UNCAC on September 24, 2008.

⁴¹⁸ See the discussion below on UNTOC and how it provides a legal basis for extradition, under Article 16.

⁴¹⁹ *Korea-Vietnam MLA Treaty*, Annex referred to in Article 2 (List of Extraditable Crimes).

⁴²⁰ UNTOC, art. 16(3).

The Malaysian *Extradition Act* also makes special arrangements for ‘simplified extradition’ with regard to neighbouring Singapore and Brunei. Under the Act, where a judicial authority in either Brunei or Singapore has issued a warrant authorising the arrest of a person accused or convicted of an offence, and that person is believed to be in Malaysia, a magistrate in Malaysia can endorse the warrant which can then be executed in Malaysia, as if it were a warrant issued under the Malaysian *Criminal Procedure Code*.⁴²¹

Another example from the ASEAN region is Singapore’s *Extradition Act (Chapter 103)*, which provides the legal basis for extradition to and from Singapore. Under the Act, Singapore can extradite fugitives to declared Commonwealth States as well as States with which Singapore has an extradition treaty in force, in accordance with the provisions of the Act and the applicable treaty.⁴²² Like Malaysia, Singapore has ratified UNTOC. As noted above and discussed further below, this considerably extends the application of its extradition regime where the Requesting State is also a party to UNTOC.⁴²³ Singapore’s *Extradition Act* also makes special provision for magistrates to endorse warrants of arrest that have been issued in Malaysia.⁴²⁴

The existence of arrangements for ‘simplified extradition’ in the domestic laws of Brunei, Malaysia and Singapore reflects an international trend towards such streamlined arrangements. In the European context, the *European Arrest Warrant* has now replaced extradition between all European Union Member States. Such a warrant, which is valid throughout the entire European Union, may be issued by the relevant national judicial authority if the person whose return is sought is accused of an offence for which the maximum penalty is at least a year in prison, or if he or she has been sentenced to a prison term of at least four months. The purpose of the warrant is to eliminate lengthy extradition proceedings. This is achieved by imposing strict timelines, clear procedures, and ensuring that the process is entirely judicial, thereby removing the possibility of political interference in the process.

The *European Arrest Warrant* is based on the principle of mutual recognition of judicial decisions. This means that the decision by the judicial authority of a Member State to require the arrest and return of a person should be recognized and executed as quickly and easily as possible in other European Union Member States.⁴²⁵ While the scheme itself was negotiated and made possible through a treaty process (a ‘Framework Decision’), it must actually be implemented at the national level through domestic legislation. Under the Framework Decision, the Member States of the European Union were required to introduce legislation to bring the *European Arrest Warrant* into force by 1 January 2004.⁴²⁶

⁴²¹ See further, *Extradition Act* (Malay.), Part V, sections 25-28.

⁴²² *Extradition Act*, (Chapter 103, 2000 Revised Edition) (Sing.) [hereinafter *Extradition Act* (Sing.)].

⁴²³ See the discussion below on UNTOC and how it provides a legal basis for extradition, under Article 16.

⁴²⁴ See further, *Extradition Act* (Sing.), sections 32-39. More detailed information, including a copy of the law itself, is available from <http://www.agc.gov.sg/criminal/extradition.htm>.

⁴²⁵ Information extracted from ‘Extradition and surrender procedures across the EU’, available at http://ec.europa.eu/justice_home/fsj/criminal/extradition/fsj_criminal_extradition_en.htm. The *European Arrest Warrant* was introduced following the adoption by the European Union Council of Ministers of a *Council Framework Decision on the European arrest warrant and surrender procedures between Member States* on 13 June 2002.

⁴²⁶ For a detailed consideration of the operation of the *European Arrest Warrant* in the domestic context, see Franco Impalà, *The European Arrest Warrant in the Italian Legal System: Between Mutual Recognition and Mutual Fear within the European Area of Freedom, Security and Justice*, 1(2) *Utrecht Law Review* 56 (2005).

Table 2: ASEAN Member States: national extradition laws

ASEAN MEMBER STATE	NATIONAL LAW ON EXTRADITION	EXTRADITION WITHOUT TREATY?
Brunei Darussalam	<i>Extradition Order (2005)</i>	✓
	<i>Extradition (Malaysia and Singapore) Act (Chapter 154) and Rules</i>	✓
Cambodia	<i>Criminal Procedure Code (Chapter 2, Part 1)</i>	✓
Indonesia	<i>Law on Extradition (Law No. 1 of 1979)</i>	✓
Lao PDR	<i>Law on Criminal Procedure (2004), Part XI</i>	✓
Malaysia	<i>Extradition Act 1992</i>	✓
Myanmar	<i>Burma Extradition Act 1904 (Note: This law is no longer in use)</i>	Case by case basis
Philippines	<i>Extradition Law 1977 (Presidential Decree 1069)</i>	✗
Singapore	<i>Extradition Act (Chapter 103)</i>	✗ (except to 'declared Commonwealth countries')
Thailand	<i>Extradition Act B.E. 2551 (2008)</i>	✓
Vietnam	<i>Law on Mutual Legal Assistance (Law No. 08/2007/QH12)</i>	✓

5.2.3 The customary principle of reciprocity

As noted elsewhere in this Handbook, reciprocity is a customary principle with a long and distinguished history in international law and diplomacy. Reciprocity is basically an assurance by the State making a request that it will comply with the same type of request and provide similar cooperation to the Requested State in a similar case in the future. The principle of reciprocity is often reflected in domestic laws, many of which make extradition conditional on an assurance of reciprocity from the Requesting State. As such, assurances of reciprocity are a valuable addition to all extradition requests. If the Requesting State is asking for some form or level of assistance that it will not be able to reciprocate, then this should be made clear in the request.

In situations where there is no pre-existing legal basis for extradition, the Requested State may nonetheless decide to agree to an extradition request, generally on the basis of an assurance of reciprocity.

5.3 Extradition principles and pre-conditions

Having established the legal basis to support a request for extradition, it is then important to consider if there are any principles or pre-conditions that must be met for the application to succeed. Such principles or pre-conditions will generally be specified in either the relevant treaty or domestic legislation. The following are some of the more common requirements that may be covered by the various regimes and that have, in part, already been introduced in the discussion of relevant multilateral treaties, above.

5.3.1 Extraditable offence

The first prerequisite for extradition is that the offence is an *extraditable offence* in the Requested State. This is the principal question to be decided by the judge at the extradition hearing. The governing law of whether an offence is extraditable is the law of the Requested State including any bilateral or multilateral treaties to which that State is party. In short: the question will be whether the offence is one, accordingly to the law of the Requested State, for which the subject person can be extradited.⁴²⁷

In most cases, extradition laws and treaties will either list the offences to which they apply or will provide a formula that can be applied more generally, to decide which offences are extraditable. It has been noted that much modern international treaty practice in the field of extradition defines extraditable offences in terms of severity of punishment.⁴²⁸ For example, legislation might provide that extraditable offences include all offences that carry a term of imprisonment in excess of a certain period of time ('penalty test'), such as imprisonment for one year.⁴²⁹

Where extradition is sought for several offences, under some domestic laws and treaties, it may be enough if *one* of the offences is considered to be an extraditable offence. For example, **UNTOC** provides that if a request includes several separate offences, so long as at least one offence is extraditable under the treaty, the Requested State may grant extradition for all offences not covered by UNTOC.⁴³⁰ This provision seeks to ease the practical operation of extradition proceedings by acknowledging that some 'serious crimes' as defined in Article 2 of UNTOC will fall outside the scope of the extradition provision because they do not satisfy the corresponding requirement that an organized criminal group was involved. This provision gives States Parties the discretion to deal with all alleged offences, involving the same offender, under the same procedure.⁴³¹

The test under **UNCAC** is slightly different but with similar effect. Article 44(3) of UNCAC provides that if extradition is sought in relation to several offences, at least some of which are extraditable under this Article but some of which are not by reason of the period of imprisonment but are nonetheless related to offences created by the Convention, then the Requested State Party can apply this article also in respect of those offences.

5.3.2 Evidentiary tests

Many extradition arrangements require the Requesting State to produce sufficient evidence of the alleged crime to support the request for cooperation. For example, it may be necessary to demonstrate that the evidence is sufficient to support a '*prima facie case*'. The purpose of evidentiary tests is to protect individuals from being extradited on groundless allegations and from requests made in bad faith. Accordingly, after concluding that there is a legal basis for extradition, it will be necessary for both Requesting and Requested States to consider what evidence is required to support the request.

⁴²⁷ Caruso, *Legal Challenges in Extradition and Suggested Solutions*, p. 58.

⁴²⁸ McClean, *Transnational Organized Crime: A Commentary*, p. 181. This is the approach taken by both the *UN Model Treaty on Extradition* and the *Council Framework Decision establishing the European Arrest Warrant*.

⁴²⁹ Joutsen, *International Cooperation against Transnational Organised Crime*, p. 366.

⁴³⁰ *UNTOC*, art. 16(2).

⁴³¹ McClean, *Transnational Organized Crime: A Commentary*, p. 178.

The exact requirements regarding the evidentiary test that must be met will generally be found in the relevant legal instrument (law or treaty). Accordingly, there will be some variation between States. The most common approaches or ‘tests’ are as follows:

- **No evidence** test – information required for the extradition request does not need to include actual evidence of the alleged offence. Rather, the Requesting State is required to provide: statements of the offence and applicable penalty; the warrant for the arrest of the person; and a statement setting out the alleged conduct constituting the offence for which extradition is being sought.
- **Probable cause evidence** test – this approach requires sufficient information as would provide reasonable grounds to suspect that the person sought for extradition has committed the offence.
- **Prima facie evidence** test – this very common approach requires the existence and presentation of evidence that would justify a person being required to stand trial had the conduct been committed in the Requested State.

Different legal traditions tend to favour different approaches. In many civil law States, for example, evidence of the issuance of a warrant for arrest by a judicial authority of a Requesting State (which itself would have considered the issue of sufficiency of evidence) will provide sufficient evidentiary basis to support a request for extradition. However, common law States have traditionally required evidence in addition to such a warrant.⁴³²

It has been noted that evidential requirements can cause difficulties and delay. For example, a Requesting State may experience great difficulty in producing sufficient admissible evidence if it is trying to provide that evidence to a legal system that has very different rules relating to admissibility.⁴³³ Variance in evidentiary and procedural requirements can also be a major obstacle to extradition between States with similar legal traditions. The extradition process may involve a lengthy examination of the foreign law and evidence requirements of the Requesting State concerning extradition, and also related appeals.

Reflecting these practical difficulties, both **UNTOC** and **UNCAC** require States Parties to simplify evidentiary requirements in relation to offences that are covered by the extradition obligations.⁴³⁴ Many States have now passed laws that eliminate or lower the threshold requirement for evidence in some extradition cases. As noted above, some extradition arrangements require little or no evidence of the underlying offence (although information about the offence may still be necessary). Jurisdictions that use a system of endorsing warrants may also dispense with evidentiary tests and in those circumstances the Requesting State needs only to provide certain documents, such as a copy of a valid warrant, and materials concerning the identity of the person sought together with some information about the conduct constituting the offence.⁴³⁵

In addition to the Requesting State having to meet certain evidentiary thresholds, the laws of some States also permit the person who is the subject of the extradition request to tender evidence to challenge the allegations and evidence adduced by the Requesting State.⁴³⁶ It has been noted that States in the Asia Pacific region take different approaches to this issue. For example, Thai laws allow the subject of an extradition request to tender evidence relevant to technical matters such as identity but not to challenge the allegations against him or her. Malaysian legislation obliges the extradition court to receive a variety of evidence. In some circumstances, this will include evidence that is tendered by the subject to show that he or she “did not do or omit to do the act alleged to have been done or omitted”.⁴³⁷ As there are likely to be many such differences between national laws and practice, it is important for practitioners to try to understand the particular requirements of the Requested State.

⁴³² Prost, *Breaking Down the Barriers*, p. 9.

⁴³³ ADB / OECD, *MLA, Extradition and Recovery of Proceeds of Corruption in Asia and the Pacific*, p. 46.

⁴³⁴ *UNTOC*, art. 16(8); *UNCAC*, art. 44(9).

⁴³⁵ See, for example, *Extradition Act* (Sing.), sections 33-39; and *Extradition Act* (Malay.), Part V. These laws allow for endorsement of warrants issued by Malaysia; and Singapore and Brunei respectively.

⁴³⁶ ADB / OECD, *MLA, Extradition and Recovery of Proceeds of Corruption in Asia and the Pacific*, pp. 47, 97.

⁴³⁷ ADB / OECD, *MLA, Extradition and Recovery of Proceeds of Corruption in Asia and the Pacific*, p. 47. Under the Malaysian *Extradition Act*, the procedure is different if the relevant Minister has already given a special direction. In this circumstance, the court has less powers of review. See further, *Extradition Act* (Malay.), sections 19 and 20.

5.3.3 Dual criminality

Extradition laws and regimes require that the conduct constituting the extradition offence be recognized as a criminal offence in both the Requesting and the Requested State. This is often referred to as the dual (or double) criminality principle. The requirement of dual criminality in relation to trafficking offences can be satisfied by States both ratifying the **UNTOC** and **UN Trafficking Protocol**, which stipulate and define the relevant offences, and by ensuring that domestic legislation incorporates these offences and definitions.

Legal difficulties can arise with respect to dual criminality if the Requested State expects the legislative provisions of both the Requested and Requesting States to be worded similarly. Insistence on such a requirement can be unrealistic and counter-productive. It is now generally accepted that when the laws of both the Requesting and the Requested State “appear to be directed to the same basic evil” this is sufficient to form the basis of dual criminality.⁴³⁸

Modern extradition treaties and practice have confirmed this trend by adopting the ‘conduct based test’ for dual criminality. **UNCAC**, for example, specifically stipulates that dual criminality shall be established “irrespective of whether the laws of the requested State Party place the offence within the same category of offence or denominate the offence by the same terminology as the requesting State Party”⁴³⁹ as long as the conduct underlying the offence is a criminal offence in both States.

The *UN Model Treaty on Extradition* takes a similar approach: proposing that the test be whether the conduct alleged against the fugitive would constitute a criminal offence in the Requested State, regardless of whether the offences in the two States carry a different name or have different elements.⁴⁴⁰

Many treaties now contain a provision setting out the test for whether an offence is extraditable and whether it satisfies the requirement of dual criminality in the following terms:

- the foreign offence is considered to be a serious offence (that is, punishable by imprisonment or other deprivation of liberty for a minimum period of at least [x] years (usually 1, 2 or 3 years) or a more severe penalty in the Requesting State); and
- the conduct constituting the foreign offence, had it taken place locally, would have constituted an offence under local law (however described).⁴⁴¹

As noted above, the dual criminality requirement highlights the importance of all States ensuring that they have criminalized ‘trafficking in persons’ and other related crimes as these have been defined in international law. If the Requested State does not have an identical or very similar offence, officials may need to consider the broader test of whether the underlying conduct would ‘fit’ into a relevant offence category in the Requested State. For example, focusing on elements of a trafficking offence (such as violence, fraud or one of the stipulated end purposes of trafficking such as forced labour or sexual exploitation) might assist practitioners to fit the trafficking conduct into another offence category, thereby meeting the dual criminality requirements.

When making requests where dual criminality arises, the following are important points to keep in mind:

- the focus of dual criminality should be on the substantive underlying conduct and not on the technical terms or definitions;
- the laws of the Requesting and the Requested State generally only need be substantially similar as to the harm they seek to prevent and the activity they intend to punish;
- if the law of one State is broader than the other in scope, so long as the conduct for which extradition is sought could be included under both laws, then it is an extraditable offence;
- purely jurisdictional elements of statutes need not be replicated under both systems in order for the conduct to be an extraditable offence.⁴⁴²

⁴³⁸ Caruso, *Legal Challenges in Extradition and Suggested Solutions*, pp. 57-68, p. 58 referring to *Shapiro v Ferrandina*, 478 F.2d 894, 908 (2nd Cir.), cert. dismissed, 414 US 884 (1973).

⁴³⁹ *UNCAC*, art. 43(2).

⁴⁴⁰ See *UN Model Treaty on Extradition* as referred to in Prost, *Breaking Down the Barriers*, p. 9.

⁴⁴¹ UNODC, *Report: Informal Expert Working Group on Effective Extradition Casework Practice*, p. 10.

⁴⁴² Caruso, *Legal Challenges in Extradition and Suggested Solutions*, p. 58.

Another question that may arise is whether dual criminality should be assessed at the time of the commission of the offence or at the time of the extradition request. Complications can arise if extradition is sought for a person with regard to conduct that was not criminal in the Requested State at the time of the conduct, but that has subsequently been criminalized. This could well be a consideration in trafficking in persons cases as many States are currently in the process of amending their laws or developing new laws to criminalize this particular offence.

5.3.4 Double jeopardy

A Requested State may deny cooperation if the person sought has already been tried and acquitted or punished for the conduct underlying the extradition request. This is known as the principle of double jeopardy (*ne bis in idem*). The principle of double jeopardy is part of international law including international human rights law. Article 14(7) of the ICCPR provides as follows:

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

While the principle of double jeopardy is of long standing, debates on its application are frequent. The most common issue concerns whether an alleged 'second prosecution' is for the same offence or cause of action, such that the double jeopardy principle should be invoked. This question will often arise if a later charge relates to the same conduct but the offence is categorized differently or if substantial new evidence has come to light. As noted in the previous discussion of double jeopardy in the context of mutual legal assistance, implementation difficulties such as this can often be avoided through careful drafting of relevant legal instruments. The UN *Model Treaty on Extradition*, for example, recommends that in preparing legislation to give effect to the double jeopardy principle:

States may wish to consider what criteria and evidentiary information are appropriate and necessary to measure whether a second prosecution is for the same offence, particularly in complex and continuing group crimes.⁴⁴³

Other sources note that under some extradition arrangements, cooperation might be denied if there are ongoing proceedings or investigations relating to the conduct in question, and the Requested State considers that the request might interfere with this process. Also, in some rarer instances, some States may refuse extradition on the basis that they considered the issue of whether to prosecute the person in question, and decided not to.⁴⁴⁴

In all such situations, close and *prior* consultation between States will be vital to avoid unnecessarily raising the issue of double jeopardy in extradition proceedings:

Where a criminal group may be carrying out activities in more than one State simultaneously, as part of an overall enterprise, all States may have legitimate law enforcement interests to vindicate. Accordingly it can be beneficial for States to consult in advance of prosecution so that the charges brought by one State do not unnecessarily increase the likelihood that a subsequent extradition request will be precluded by the principle of *ne bis in idem*.⁴⁴⁵

5.3.5 Speciality

The rule of speciality (also known as specialty) provides that the Requesting State must specify the offence or offences for which it seeks the person's return and that upon the subject's return, the Requesting State will only try that person for the offence(s) covered in the request and the treaty authorising that request.⁴⁴⁶

Applying the rule of speciality, the Requesting State must not, without the consent of the Requested State, try or punish the suspect for an offence not referred to in the extradition request and alleged to have been committed before the person was extradited. Speciality supports the rule of double jeopardy and prevents abuse of the extradition process by States that might otherwise secure the extradition of a person for

⁴⁴³ UNODC, *Revised Manuals on the Model Treaty on Extradition and the Model Treaty on Mutual Assistance*, p. 19.

⁴⁴⁴ ADB / OECD, *MLA, Extradition and Recovery of Proceeds of Corruption in Asia and the Pacific*, p. 53.

⁴⁴⁵ UNODC, *Revised Manuals on the Model Treaty on Extradition and the Model Treaty on Mutual Assistance*, p. 19.

⁴⁴⁶ Caruso, *Legal Challenges in Extradition and Suggested Solutions*, p. 59.

one offence and then prosecute him or her for another. Nonetheless, there may be some flexibility in the application of the rule of speciality. For example, the rule does not prevent amendment of charges. If the facts of the case warrant a reassessment of the charges, this is permissible so long as the facts of the case are the ones referred to in the request for extradition.⁴⁴⁷ Also, the rule does not eliminate all possibilities of bringing an offender to justice for offences not referred to in the request – this is still possible but it will require separate consent from the Requested State.⁴⁴⁸ The rule of specialty will also not bar the subsequent prosecution of a person who has voluntarily remained in or returned to the Requesting State.

It has been noted that most extradition treaties in the Asia region require speciality but only a few specify how it can actually be met. For example, it is Thailand's practice that the requirement can be satisfied through an undertaking provided by the Attorney-General or equivalent of the Requesting State.⁴⁴⁹

5.3.6 Non-extradition of nationals

Many States will not extradite their nationals. Refusal on these grounds is sometimes provided for in treaties and often in domestic laws. It is also enshrined within the constitutions of some States. Depending on the relevant legal framework, refusal of extradition on the basis of nationality may be mandatory or discretionary. Both **UNTOC** and **UNCAC** acknowledge the existence of this principle.

The right of States to refuse extradition of their nationals has traditionally been considered an essential aspect of their sovereignty and independence. On a practical level, States refusing to extradite their nationals have cited the right of persons to live in and be tried by judges of their own State, as well as the duty of the State to protect its own citizens, including from unfair trials or proceedings.⁴⁵⁰

Civil law States have generally refused to extradite their nationals. As a result, their systems enable the exercise of jurisdiction over nationals for offences committed abroad. Common law States have traditionally been more willing to extradite, partly because they have not usually asserted jurisdiction over their nationals for offences committed abroad and thereby have a direct interest ensuring offenders can be brought to justice.⁴⁵¹ Many States that do not extradite their nationals have enacted laws to prosecute nationals for offences committed in the territory of a foreign State (extra-territoriality).⁴⁵²

Under some laws and treaties, if a State refuses to extradite an individual because of nationality, then the Requested State must prosecute the person in their own jurisdiction. This is known as the 'extradite or prosecute' principle (*aut dedere aut judicare*). The principle of extradite or prosecute is, as noted in Chapter 2, a fundamental principle of international law and one that has been widely recognized by States and the international community. It is enshrined in both **UNCAC** and **UNTOC**. States Parties to these treaties can invoke this principle in respect of the actions of another State Party.

While the nationality exception to extradition is widely practiced, there is growing understanding among States that the interests of justice may be better served by extraditing their nationals to face trial elsewhere, particularly if this is where the offence actually occurred. One important consideration is that in trafficking cases, as in many other crimes, it will usually be easier to locate evidence, including witnesses, close to the scene of the crime. In recognition of this important reality, some treaties and other extradition arrangements now provide for 'conditional extradition' and other mechanisms.⁴⁵³ For example:

- States can agree to extradite nationals on the condition that they will be returned to serve any sentence imposed in the foreign State in their own State,⁴⁵⁴ or

⁴⁴⁷ Joutsen, *International Cooperation against Transnational Organised Crime*, p. 368.

⁴⁴⁸ Joutsen, *International Cooperation against Transnational Organised Crime*, p. 369.

⁴⁴⁹ ADB / OECD, *MLA, Extradition and Recovery of Proceeds of Corruption in Asia and the Pacific*, p. 48.

⁴⁵⁰ Isidoro Zanotti, *Extradition in Multilateral Treaties and Conventions* (Martinus Nijhoff, 2006), p. ix.

⁴⁵¹ UNODC, *Revised Manuals on the Model Treaty on Extradition and the Model Treaty on Mutual Assistance*, p. 24.

⁴⁵² UNODC, *Revised Manuals on the Model Treaty on Extradition and the Model Treaty on Mutual Assistance*, p. 24. See also, UNODC, *Report: Informal Expert Working Group on Effective Extradition Casework Practice*, p. 11.

⁴⁵³ Caruso, *Legal Challenges in Extradition and Suggested Solutions*, p. 61.

⁴⁵⁴ See, for example, **UNTOC**, art. 16(11); **UNCAC**, art. 44(12).

- if a Requested State refuses extradition of a national to serve a sentence, then it may be obliged to consider requests by a Requesting State to enforce that sentence.⁴⁵⁵

If these options are used, the obligation to extradite or prosecute will be considered as satisfied.⁴⁵⁶

If the nationality issue proves to be an obstacle, the prosecuting authorities in the Requesting State will have to make a decision whether to press for prosecution in the foreign State or await an opportunity for the person sought to travel to a State from where extradition may be possible.⁴⁵⁷

5.3.7 Political offence exception

International law has traditionally accepted that States are entitled to decline to extradite a person on the basis that the request relates to a 'political offence'. The widespread and long-standing acceptance of the political offence exception has been based on the following considerations:

- recognition of the legitimacy of political dissent;
- acknowledgement of the need to ensure protection for the rights of the accused;
- protection of the Requesting and the Requested States.⁴⁵⁸

The UNODC Manual for the UN *Model Treaty on Extradition* provides some insight into the principle that States have a right to refuse to extradite for a purely political offence. It notes that:

Extradition for a non-violent, "pure" political offence, such as prohibited criminal slander of the Head of State by a political opponent or banned political activity, might embroil the Requested State in the domestic politics of the State requesting extradition, where today's dissidents may be tomorrow's governing class. Values of political tolerance and free speech may make a government reluctant to grant extradition for such offences. The community of nations has generally accepted without undue complaint a refusal to extradite for such non-violent purely military or political offences, pursuant to treaties or domestic legislation.⁴⁵⁹

However, the Manual goes on to note that:

The same degree of international acceptance cannot be found with respect to refusals to extradite based upon the political offence exception when the conduct in question is violence committed for asserted political goals, and which therefore contains all of the elements of common crimes such as bombing and murder.⁴⁶⁰

The political offence exception is not absolute and it can be expected to further narrow as States develop more rigorous responses to crimes such as terrorism that often have a strong political dimension. This tendency is already reflected in more recent extradition treaties that commonly exclude political violence (sometimes simply referred to as crimes prohibited in multilateral conventions) from the political offence exception.⁴⁶¹ Furthermore, violent crimes such as genocide, crimes against humanity and war crimes are regarded by the international community as so heinous that perpetrators cannot be permitted to rely on the political offence exception.⁴⁶² At the international level, the political offence exception has also been removed in relation to prosecutions for corruption.⁴⁶³

⁴⁵⁵ See, for example, *UNTOC*, art. 16(12); *UNCAC*, art. 44(13).

⁴⁵⁶ Caruso, *Legal Challenges in Extradition and Suggested Solutions*, p. 62.

⁴⁵⁷ Prost, *Breaking Down the Barriers*, p. 12.

⁴⁵⁸ Caruso, *Legal Challenges in Extradition and Suggested Solutions*, p. 60.

⁴⁵⁹ UNODC, *Revised Manuals on the Model Treaty on Extradition and the Model Treaty on Mutual Assistance*, p. 22.

⁴⁶⁰ UNODC, *Revised Manuals on the Model Treaty on Extradition and the Model Treaty on Mutual Assistance*, p. 16.

⁴⁶¹ UNODC, *Revised Manuals on the Model Treaty on Extradition and the Model Treaty on Mutual Assistance*, p. 16.

⁴⁶² UNODC, *Revised Manuals on the Model Treaty on Extradition and the Model Treaty on Mutual Assistance*, p. 17. For example, the *Additional Protocol to the European Convention on Extradition* provides that for the purposes of the Convention, 'political offences' shall not include crimes against humanity specified in the *Convention on the Prevention and Punishment of the Crime of Genocide*, certain violations of the Geneva Conventions of 1949, and any comparable violations of the laws of war: *COE Additional Protocol to the European Convention on Extradition*, art. 1. See also *ICC Statute*, Articles 6 to 8, which define the crimes of genocide, crimes against humanity and war crimes.

⁴⁶³ If a country uses *UNCAC* as the legal basis for extradition, it shall not consider any of the offences established in accordance with *UNCAC* to be a political offence. See *UNCAC*, art. 44(4).

5.3.8 Military offences

It is a recognized principle of international law that extradition is not available for military crimes that are not otherwise subject to criminal sanction.⁴⁶⁴ This ground of refusal is found in various laws and treaties and the approach taken to this issue in the *UN Model Treaty on Extradition* gives some indication of accepted good practice. Under the Model Treaty, requests to extradite for offences that are *only* offences against military law (such as desertion and insubordination) must be refused. However, where the offence in question is both an offence under military law but is also an extraditable offence under the non-military, civilian laws, then extradition should not be refused.⁴⁶⁵ Under such an approach, military personnel could be extradited in respect of trafficking in persons offences and related crimes if those offences are extraditable.

5.3.9 Human rights considerations: unfair trial

International law and international criminal justice standards require that in relation to any crime, including trafficking, the human rights of suspects and offenders be respected and protected. This requirement extends to the extradition process. International law, including international human rights law, provides clear guidance on the right to a fair trial. The fact that these obligations apply at all times and under all conditions – even in situations where the matter involves serious transnational organized crime or corruption – is explicitly confirmed in the **UNTOC** and **UNCAC**.⁴⁶⁶

The following principles and rights, enshrined in international law,⁴⁶⁷ must be upheld throughout the extradition process:

- all persons are considered equal before courts and tribunals;
- everyone is entitled to and receives a fair and public hearing by a competent, independent and impartial tribunal established by law; and
- all accused persons are presumed innocent until proven guilty according to law.⁴⁶⁸

More specifically, in the determination of any criminal charges, all accused persons have and enjoy the following rights:

- to be informed promptly and in detail of the nature and cause of the charge against him / her;
- to be given adequate time and facilities for preparation of defence and to communicate in private with counsel of his / her choosing;
- to be tried without undue delay;
- to be tried in his / her presence;
- to be provided legal assistance where required by interests of justice;
- to be able to examine or have examined the witnesses against him / her and to obtain the attendance and examination of witnesses on his / her behalf under the same conditions as witnesses against him / her;
- to be provided services of an interpreter if required; and
- not to be compelled to testify against him or herself or to confess guilt.⁴⁶⁹

⁴⁶⁴ UNODC, *Revised Manuals on the Model Treaty on Extradition and the Model Treaty on Mutual Assistance*, p. 18.

⁴⁶⁵ Article 3(c) of the *UN Model Treaty on Extradition*, discussed in UNODC, *Revised Manuals on the Model Treaty on Extradition and the Model Treaty on Mutual Assistance*, p. 18.

⁴⁶⁶ *UNTOC*, Article 16(14), provides that a State Party is not obliged to extradite if it has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's sex, race, religion, nationality, ethnic origin or political opinions or if compliance with the request would cause prejudice to that person's position for any one of these reasons. A similar obligation is found in *UNCAC* Article 44(15).

⁴⁶⁷ Human rights protections in the criminal justice process are set out in *ICCPR* Articles 9, 14, 15 and 16. All major regional treaties affirm these protections.

⁴⁶⁸ See further, *ICCPR*, art. 14(1)-(2).

⁴⁶⁹ See further, *ICCPR*, art. 14(3). See also, Nowak, *U.N. Covenant on Civil and Political Rights*, pp. 302-357.

A request for extradition could be refused on the basis that the individual concerned may not receive the minimum guarantees in criminal proceedings set out above. Requested States will be entitled and may even be obliged to refuse to extradite if there are reasonable grounds for them to believe the request has been made for the purpose of persecution of the person sought or that the person would not receive a fair trial.⁴⁷⁰ The doctrine of non-enquiry, considered in detail in Chapter 2, above, is directly relevant to this issue.

It has been recommended that when preparing legislative extradition schemes, States should think through the practicalities of how an individual might be able to raise human rights and / or procedural concerns, and what processes might be put in place to allow the State to respond to these concerns. For example:

- How can a person whose extradition is requested seek and secure consideration of claims about possible unfairness in the trial process? What means of proof would they need to advance to support the claim?
- In practical and procedural terms, how could a Requesting State respond to such allegations?
- In practical terms, how would the Requested State or its judicial authorities obtain information relevant to the merits of such a claim? What evidence should be considered by the authority that will decide the issue? Would responsibility for deciding the issue reside with the executive or with the judiciary?
- Should there be a presumption of 'regularity' in connection with any request for assistance, unless this is contested by the person to be extradited? What criteria should be followed in determining when that presumption should be overcome?⁴⁷¹

If extradition is resisted on this basis, the Requesting State should consider whether the provision of appropriate assurances might enable extradition while providing an acceptable degree of protection.⁴⁷²

5.3.10 Human rights considerations: persecution and *non-refoulement*

The obligation of *non-refoulement* (non-return) is a key rule of international law that prevents States from returning an individual to another State where there are substantial grounds for believing that the person in question would be subjected to persecution or other forms of unlawful treatment or punishment. The relevance of this principle to the issue of extradition is considered further at 5.3.12, below. (Note that while the UN Trafficking Protocol and the European Trafficking Convention both refer to the principle of *non-refoulement*, those references relate to refugee law and are directed towards those victims of trafficking who are entitled to seek and receive asylum from persecution).

5.3.11 Human rights considerations: death penalty cases

Extradition may be refused where the offence for which extradition is being sought carries the death penalty. Most commonly, the issue arises between States that permit the death penalty and those that do not. However, difficulties can also present in situations where both the Requesting and Requested State have and use the death penalty.⁴⁷³

So as to ensure that serious criminals do not evade justice, it is preferable that Requested States that refuse requests for extradition in relation to death penalty cases work with the Requesting State to find a solution that meets both human rights and criminal justice objectives. For example, the Requested State could:

- seek an appropriate assurance from the Requesting State that it will not impose or carry out the death penalty;
- in cases where domestic jurisdiction exists, prosecute the case in its own jurisdiction in lieu of extradition;
- if satisfied that the suspect will be given a fair trial in accordance with internationally recognized

⁴⁷⁰ UNGA, *Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, p. 6, para. 8.

⁴⁷¹ UNODC, *Revised Manuals on the Model Treaty on Extradition and the Model Treaty on Mutual Assistance*, p. 17.

⁴⁷² UNODC, *Revised Manuals on the Model Treaty on Extradition and the Model Treaty on Mutual Assistance*, p. 19.

⁴⁷³ Caruso, *Legal Challenges in Extradition and Suggested Solutions*, p. 62.

standards, then allow the extradition on the condition that the suspect, if convicted, will be returned to the Requested State for enforcement of an appropriate sentence.⁴⁷⁴

The concept of death penalty assurances (whereby the Requesting State provides the Requested State with an assurance that the death penalty will not be sought or imposed or if imposed, will not be carried out) is well established in extradition law.⁴⁷⁵ States accepting death penalty assurances will have different requirements or processes regarding what type of assurances are sufficient or available. For example, Indonesia requires an assurance in the form of a sworn statement by the highest judicial authority in the Requesting State. In contrast, where cooperation is refused with the Philippines on the basis that the death penalty might be invoked, the President of the Philippines can provide the required assurances.⁴⁷⁶ In Thailand, national laws give authority to the executive branch to make the necessary assurances in death penalty cases.⁴⁷⁷

The UNODC Manual notes the importance of putting mechanisms in place to give effect to death penalty assurances. In the context of implementing the *UN Model Treaty on Extradition*, the manual notes that one option is for States to ensure that domestic legislation incorporates a provision that assigns legal authority (and thus binding force as against the judicial authorities) to the conditions laid down by the Requested State and agreed to by the executive of the Requesting State.⁴⁷⁸

5.3.12 Human rights considerations: torture, etc.

International law is clear on the point that extradition should be refused if it would result in the extradited individual being subjected to torture or cruel, inhuman or degrading treatment or punishment. This ground of refusal reflects long standing and widely accepted human rights obligations, enshrined in the *Universal Declaration of Human Rights* and affirmed in the ICCPR and the Convention against Torture.⁴⁷⁹

The Convention against Torture provides clear guidance on the application of this ground of refusal. Article 3 of that instrument declares that no State Party shall expel, return or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture.⁴⁸⁰ The Convention provides that for the purpose of determining whether there are such grounds, the competent authorities should take account of all relevant considerations including, where applicable, the “existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.”⁴⁸¹ Under this treaty, a State Party is also obliged to prevent, in any territory under its jurisdiction, other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture.⁴⁸² Many States, the Committee against Torture and the UN Human Rights Committee, have interpreted this obligation as including an obligation not to extradite a person from their territory in these circumstances.⁴⁸³

⁴⁷⁴ See further, UNODC, *Revised Manuals on the Model Treaty on Extradition and the Model Treaty on Mutual Assistance*, pp. 24-27.

⁴⁷⁵ UNODC, *Revised Manuals on the Model Treaty on Extradition and the Model Treaty on Mutual Assistance*, p. 26.

⁴⁷⁶ ADB / OECD, *MLA, Extradition and Recovery of Proceeds of Corruption in Asia and the Pacific*, p. 57. The Philippines does not have domestic legislation on extradition. The current extradition scheme is governed by *Presidential Decree No. 1069*, enacted by President Ferdinand Marcos in 1977, and relevant treaties. Various draft laws (bills) have been introduced into Parliament in an effort to replace the Presidential Decree with legislation.

⁴⁷⁷ *Extradition Act*, B.E. 2551 (2008) (Thail.), section 29.

⁴⁷⁸ UNODC, *Revised Manuals on the Model Treaty on Extradition and the Model Treaty on Mutual Assistance*, p. 27.

⁴⁷⁹ *UN Universal Declaration of Human Rights*, art. 5; *ICCPR*, art. 7; *Convention against Torture*, arts. 3, 16.

⁴⁸⁰ For the purposes of the Convention against Torture, ‘torture’ is defined as: “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”: *Convention against Torture*, art. 1(1). ‘Lawful sanctions’ is a concept which itself implies consistency with human rights obligations.

⁴⁸¹ *Convention against Torture*, art. 3(2).

⁴⁸² *Convention against Torture*, art. 16(1).

⁴⁸³ See further *General Comment 31, Report of the Human Rights Committee*, UN GAOR, 59th Session, Supp. No. 40, UN Doc. A/59/40, vol.1 (2004) annex III (views adopted 29 March 2004), cited in Harrington, *The Absent Dialogue*, para. 119. See also, Nowak, *U.N. Covenant on Civil and Political Rights*, pp. 185-188.

Under that interpretation, an extradition request *should* be refused if there are reasonable grounds to conclude that the extradited person would be subject to torture *or* cruel, inhuman or degrading treatment or punishment.

This ground of refusal might also arise in other situations, including where the punishment is for an indeterminate period of time (such as “imprisonment for ‘life’”⁴⁸⁴) or where the penalty includes corporal punishment.

International legal obligations including those related to human rights should not be put aside for short-term criminal justice objectives. To that end, States should take active measures to ensure that their acquiescence to an extradition request does not lead to or result in unlawful treatment of suspects or offenders. Requested States should, however, take the opportunity of a request in relation to which such issues arise, to engage with the Requesting State in an effort to find a solution that meets both human rights and criminal justice objectives. For example, the Requested State could:

- undertake its own inquiries and / or seek an appropriate assurance from the Requesting State regarding the nature of the punishment that could or will be imposed;
- in cases where domestic jurisdiction exists, prosecute the case in its own jurisdiction in lieu of extradition;
- if satisfied that the suspect will be given a fair trial in accordance with internationally recognized standards and with its own obligations under international law, then allow the extradition on the condition that the suspect, if convicted, will be returned to the Requested State for enforcement of an appropriate sentence.⁴⁸⁵

5.3.13 National and public interest

It has been noted that several jurisdictions in the ASEAN region may deny cooperation in extradition on the basis that such cooperation would prejudice their ‘essential interests’.⁴⁸⁶ While the meaning of ‘essential interests’ is not always well defined, the term might include matters such as sovereignty, security, national interest, economic interest, defence, foreign affairs, public order or personal safety. Requests that are considered to be an excessive burden on the resources of the Requested State may also be refused on this basis.⁴⁸⁷ The lack of a clear definition of ‘essential interests’ is problematic and obstructs the general recognition of ‘essential interests’ as an accepted ground for refusing extradition.

5.3.14 Fiscal offences

Traditionally, many extradition treaties precluded extradition for fiscal offences: that is, offences against laws relating to taxation, customs duties, foreign exchange control or other revenue matters. It was considered that these were matters for the State responsible for imposing such obligations upon its citizens.⁴⁸⁸ However with the increase in transnational crime, money laundering, corruption and the infiltration of criminal proceeds into national economies, there is a clear trend away from this ground of refusal. Many modern treaties specifically provide that extradition cannot be refused solely on the basis that the offence in question is a fiscal offence.⁴⁸⁹ This approach is reflected in the *UN Model Treaty on Extradition*.⁴⁹⁰ Both **UNTOC** and **UNCAC** provide that extradition may not be refused on the ground that an offence is fiscal or involves fiscal matters.⁴⁹¹

⁴⁸⁴ Sentences of life imprisonment have been held to constitute inhuman punishment by national courts. Mexico, which permits only a sentence of finite years under its constitution, has demanded assurances from the United States of America that fugitives extradited back to it will not be imprisoned for life. See Caruso, *Legal Challenges in Extradition and Suggested Solutions*, p. 65.

⁴⁸⁵ UNODC, *Revised Manuals on the Model Treaty on Extradition and the Model Treaty on Mutual Assistance*, pp. 26-27.

⁴⁸⁶ ADB / OECD, *MLA, Extradition and Recovery of Proceeds of Corruption in Asia and the Pacific*, pp. 49-51.

⁴⁸⁷ ADB / OECD, *MLA, Extradition and Recovery of Proceeds of Corruption in Asia and the Pacific*, p. 50.

⁴⁸⁸ UNODC, *Revised Manuals on the Model Treaty on Extradition and the Model Treaty on Mutual Assistance*, p. 11.

⁴⁸⁹ UNODC, *Revised Manuals on the Model Treaty on Extradition and the Model Treaty on Mutual Assistance*, p. 11.

⁴⁹⁰ *UN Model Treaty on Extradition*, art. 2(3).

⁴⁹¹ *UNTOC*, art. 16(15); *UNCAC*, art. 44(16).

5.4 Multiple jurisdiction and competing requests

Where a person is sought by more than one State for the same or different offences, a Requested State may be faced with competing requests for extradition from two or more States. Some treaties and domestic laws provide guidance on how best to resolve this issue. The approach taken in the UN *Model Treaty on Extradition* is that the Requested State should, at its discretion, determine to which of the Requesting States the person is to be extradited. In connection with this Model Treaty, it has been noted that it is important to develop criteria that can be used to guide the application of discretion in these circumstances. The following have been identified as relevant considerations in this context:

- whether either or both requests were made pursuant to a treaty;
- the possibility of subsequent extradition between the Requesting States;
- the respective interests of the Requesting States;
- if the request relates to different offences, then the relative seriousness of the respective offences;
- the time and place of commission of each offence;
- the respective dates of the requests;
- the nationality of the person and the victims;
- the chronological order in which the requests were received.⁴⁹²

It has been noted that some States in the Asia Pacific region may also refuse extradition if the conduct constitutes an offence committed wholly or partly in their territory. Under some existing arrangements, the Requested State must undertake to prosecute the person if it refuses to extradite on this basis.⁴⁹³

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Problems with prosecuting instead of extraditing:

- crime committed in another State: most evidence will need to be obtained from abroad;
- evidence must be in a form that can be introduced in the courts of the prosecuting State;
- mutual legal assistance laws or treaties will be needed to obtain the evidence from abroad;
- some States may not have necessary extra-territorial jurisdiction to allow prosecution of an offence committed outside of its territory;
- lack of interest by prosecutors if crime committed elsewhere.

Source: Presentation by Dr Jayampathy Wickramaratne, *Extradition*, ASEAN Workshop on International Legal Cooperation in Trafficking in Persons Cases, Bangkok, November 2009.

5.5 'Informal' alternatives to extradition

International practice has traditionally included 'informal' but otherwise legal alternatives to extradition, such as the luring of suspects or offenders to a place where extradition is either possible or unnecessary. Deportation, usually on the basis of provisions contained in national immigration and / or citizenship laws is another way of securing the objective of extradition outside formal cooperation.

Informal means of extradition, in particular those undertaken through deportation regimes, can be appropriate and justified. For example, coordination and communication between immigration agencies could avoid a situation in which a suspect subject to deportation is caught up in protracted extradition proceedings. However, as is the case with extradition, the use of informal alternatives must comply with international law, including international human rights obligations.⁴⁹⁴ In this regard, States should very carefully consider their obligations under international human rights regarding the right of all persons to liberty and security,

⁴⁹² UNODC, *Revised Manuals on the Model Treaty on Extradition and the Model Treaty on Mutual Assistance*, p. 61.

⁴⁹³ ADB / OECD, *MLA, Extradition and Recovery of Proceeds of Corruption in Asia and the Pacific*, pp. 55-56.

⁴⁹⁴ See further, UNGA, *Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*.

the prohibition on torture and the obligation of *non-refoulement*.⁴⁹⁵ The possibility that inappropriate or unlawful use or over-use of informal means could undermine the effectiveness of extradition regimes, and also create serious challenges during the trial process itself, should also be considered in weighing up whether to use such measures when more formal means are available.

Finally, it is important to acknowledge that transfers of suspects from one State to another may sometimes take place outside the law. This process, commonly known as ‘rendition’ or ‘rendition to justice’ generally implies that transferred suspects have no access to the judicial system of the sending State to challenge their transfer. Over the past decade, controversy has arisen over allegations and proven cases of renditions carried out in order that harsh interrogation techniques (torture) prohibited under the sending State’s laws may be applied to the suspect in another State where the laws or their enforcement are less strict. Such transfers, commonly known as ‘extraordinary renditions’, can be expected to violate a range of international and national laws.⁴⁹⁶

5.6 Preparing extradition requests

Preparation of extradition requests can be difficult and time-consuming. However, careful preparation will ensure that delays and obstacles are minimized. The present section identifies key issues for consideration.

5.6.1 Locating and identifying the person sought

As a first step, it is necessary to establish the location of the person sought for extradition. When seeking assistance in this regard (for example, through informal police to police cooperation) it is vital to ensure that the correct person is located. For this reason, it is important that authorities involved in locating the person are provided with as much relevant information as possible, including any photographs, fingerprints, relevant descriptions or other information, that will assist both in locating and accurately identifying the person sought for extradition. The use of fingerprint evidence can minimize the potential for arguments that the person located is not the person sought.⁴⁹⁷

Where appropriate, the assistance of INTERPOL should be sought. INTERPOL is mandated to “ensure and promote the widest possible mutual legal assistance between all criminal police authorities within the limits of the laws existing in the different States”.⁴⁹⁸ INTERPOL can issue a ‘Red Notice’, effectively allowing information about the wanted person to be circulated world-wide, with a request to its national offices that they be arrested with a view to extradition. There are two types of Red Notice: the first type is based on an arrest warrant, and is issued for a person wanted for prosecution. The second type is based on a court decision for a person wanted to serve a sentence.⁴⁹⁹ To avoid the risks that a person will be arrested in a State where extradition is not possible, those requesting the services of INTERPOL should provide clear instructions as to their preference: either to locate then notify the Requesting State or to locate and arrest and then notify the Requesting State.⁵⁰⁰

⁴⁹⁵ In the expulsion or deportation context, it is also relevant to note the obligation in *ICCPR*, Article 13: “An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with the law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.”

⁴⁹⁶ See generally, Laura Barnett, *Extraordinary Rendition: International Law and the prohibition on Torture* (Library of Parliament, Canada, Parliamentary Research and Information Service, 2008); and Centre for Human Rights and Global Justice, *Torture by Proxy: International Law Applicable to Extraordinary Renditions* (New York University School of Law, 2005).

⁴⁹⁷ Candice Welsch, *Extradition: International Legal Framework*, presentation delivered at the ASEAN Workshop on International Legal Cooperation in Trafficking in Persons Cases, Bangkok, November 2009.

⁴⁹⁸ INTERPOL Constitution, Article 2, cited in, UNODC, *Report: Informal Expert Working Group on Effective Extradition Casework Practice*, p.16.

⁴⁹⁹ See further, <http://www.interpol.int/Public/Wanted/Default.asp>.

⁵⁰⁰ UNODC, *Report: Informal Expert Working Group on Effective Extradition Casework Practice*, p. 16.

5.6.2 Provisional arrest

Many treaties and national laws permit and even encourage ‘provisional arrest’ or detention pending extradition. For example, Article 16(9) of **UNTOC** provides that:

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

Depending on the operational conditions, it may be expedient to request provisional arrest as a first step, rather than delaying arrest until the ‘full order’ extradition request has been completed.⁵⁰¹ A provisional arrest request is an urgent measure that enables a person sought to be arrested and detained prior to the full extradition request being made. These requests should only be made in cases where there is a real risk of flight or a likelihood of the person sought committing other offences. After the person sought has been provisionally arrested, the Requesting State must still make a full extradition request and provide all of the necessary supporting documentation within a certain time period.⁵⁰²

If provisional arrest is sought, it will be vital for the Requesting State to be in a position to follow up with a full order request within the time period stipulated by the Requested State. If the Requesting State cannot meet these deadlines, then the Requested State may be required to release the person sought. If there is not a real risk of flight, for example because the person sought has well established roots in the Requested State, then it is usually preferable to prepare all of the documentation and make a full extradition request at the outset.⁵⁰³

Some States will accept an INTERPOL Red Notice as equivalent to a request for provisional arrest. However, in other States, the authorities will not be able to act until an actual request for provisional request is received. In Singapore for example, an INTERPOL Red Notice is not sufficient legal basis for making a provisional arrest. However, in urgent cases, it is possible for Singapore to act on an INTERPOL Red Notice if the conditions under the *Extradition Act* are met, and on the understanding that the formal extradition request will follow.⁵⁰⁴

Table 3: ASEAN Member States: INTERPOL Red Notice a legal basis for provisional arrest

ASEAN MEMBER STATE	Brunei Darussalam	Cambodia	Indonesia	Lao PDR	Malaysia	Myanmar	Philippines	Singapore	Thailand	Vietnam
INTERPOL RED NOTICE A LEGAL BASIS FOR PROVISIONAL ARREST	✓	x	✓	x	✓	x	✓	✓	x	✓

⁵⁰¹ Bernard Rabatel, *FAQs on the extradition process*, in *Denying Safe Haven to the Corrupt and the Proceeds of Corruption: Papers Presented at the 4th Master Training Seminar of the ADB / OECD Anti-Corruption Initiative for Asia and the Pacific 80-85*, p. 81 (ADB / OECD, 2006) [hereinafter, Rabatel, *FAQs on the extradition process*].

⁵⁰² UNODC, *Report: Informal Expert Working Group on Effective Extradition Casework Practice*, p. 16.

⁵⁰³ UNODC, *Report: Informal Expert Working Group on Effective Extradition Casework Practice*, pp. 16-17.

⁵⁰⁴ Information provided by representative, Criminal Investigation Department, Singapore, 31 December 2009.

5.6.3 Key issues in the preparation of requests

There are several preliminary matters that should be considered prior to the drafting of any extradition request. These include: the nature and extent of preparation required to understand the legal and procedural framework; communication; and whether to seek full order or provisional arrest of the person in question. These issues are considered below.

The importance of preparation

Requesting States should prepare thoroughly before sending any formal Letter of Request for extradition. Preparation will always involve identification of the appropriate legal framework within which extradition is to proceed. It may also involve a consideration of the laws and procedures of the Requested State to ensure that time limits and any procedural requirements are understood, and to ensure the request is drafted correctly. Preparation must include ensuring that sufficient information has been gathered, to enable the completion of an appropriately detailed and complete extradition request. This will need to involve consideration of the relevant standard of proof necessary for the request to be approved.

Prior to making the request it is also advisable for the concerned States to establish the actual dates that any formal, procedural or evidentiary requirements are due and ensure that they have plans in place for compliance.

The importance of communication

The effective handling of extradition requests will invariably require early, close and on-going personal contact between the Central Authority, prosecutors and investigators in the Requesting and the Requested State.⁵⁰⁵ Misunderstandings can often be avoided by officials from each State liaising at the earliest opportunity, preferably even before a formal extradition request is made.⁵⁰⁶ Prosecutors and investigators should consider sending a draft of the extradition request to the Requesting State for comment. They should also make every effort to maintain communication throughout the process. Contact information for the central national authorities of States Parties to UNTOC are available on the UNODC Competent National Authorities Directory (CNA Directory).⁵⁰⁷

Internal communication is also essential to ensure that any request fully meets the needs of the criminal justice agencies involved in a case. Accordingly, it is important to consider who should be involved in preparing the request. Ideally, there should be a mix of skills and knowledge: both about the specifics of the case, but also about how to actually prepare extradition requests. With this in mind, it may be useful to involve a combination of the following persons:

- the law enforcement officers who are investigating the case;
- prosecutors who are investigating the case or are conducting the prosecution;
- Central Authority personnel who have expertise in extradition and contact with the proposed Requested State;
- diplomatic officials who can advise on political matters.

5.6.4 Effective drafting of requests

A well-drafted and complete extradition request is a pre-requisite to effective extradition. The information contained in the request documents must be sufficiently detailed and complete to allow the Requested State to decide if its pre-conditions to extradition have been met.

⁵⁰⁵ Secretariat of the ADB / OECD, *Overcoming practical challenges*, p. 74.

⁵⁰⁶ UNODC, *Report: Informal Expert Working Group on Effective Extradition Casework Practice*, p. 17.

⁵⁰⁷ UNODC, 'The Competent National Authorities (CNAs) on-line Directory', available from <http://www.unodc.org/compath/en/index.html>. Access to the CNA Directory is password protected. However, Central Authority officials can request a password from UNODC, following a procedure detailed on the website.

In 2004, a group of international experts developed model checklists that could be used as a general guide for Requesting States in preparing extradition requests. Note that the checklists, appended to this Chapter, are very general – reflecting the fact that there are still substantial differences between States in their domestic legislation and practice in extradition requests.⁵⁰⁸

The actual drafting process requires consideration of many issues, the most important of which are identified and briefly explored below.

Provide information about the offender, the conduct and relevant laws

The extradition request must include information about the person wanted for extradition, along with a clear description of the conduct that constitutes the relevant offences and information about relevant laws in the Requesting State. While there is no set list of what information to include, commentators have noted that the following information is important:

- documents or statements and other information that describe the identity and possible location of the person;
- the names of the individuals involved in the case and their dates of birth;
- dates of key events, locations and amounts of transactions;
- a clear and complete description of the *modus operandi*;
- full details of relevant provisions of the criminal code or other law, including penalties;
- a copy of a warrant or order of arrest issued by Requesting State judge or other competent authority;
- a copy of the charging document or record of conviction if seeking enforcement of a sentence.⁵⁰⁹

This information will assist the Requested State to decide, amongst other things, if the conduct in question constitutes an extraditable offence, and whether the various extradition preconditions, such as dual criminality, have been met.

Provide sufficient evidence

The level and type of information that is provided in the extradition request must be sufficient to meet the evidential standard that is set out in the relevant treaty and / or domestic law. Evidentiary requirements will, as noted above, vary from State to State. Some States following the ‘no evidence’ approach simply examine the warrants and related documentation. Other States require evidence to meet certain standards of proof, either to a *prima facie* or the probable cause test. It is important to ascertain what is required at an early stage, so that an appropriate level of information can be included in the extradition request.

As a practical matter, it can be difficult to know exactly what level of detail about the offence to provide. However, it has been suggested that, as a general rule, the Requesting State should submit as much of its file – particularly sworn documents and those filed in court – as security allows.⁵¹⁰

It is important to check with the Requested State to make sure that any documents that are being provided as evidence will comply with that State’s formal procedural requirements. The court considering the extradition hearing may need documents to be provided in a particular format (for example, as a ‘deposition’ or ‘affidavit’); and there may also be certain procedural requirements that have to be met (for example, documents may need to be ‘bound and sealed’ or ‘signed by a specified officer’). Such requirements are typically set out in bilateral treaties, however, early consultation with relevant officials in the Requested State will assist in this regard.

⁵⁰⁸ UNODC, *Report: Informal Expert Working Group on Effective Extradition Casework Practice*, p. 4.

⁵⁰⁹ Caruso, *Working together and intensifying actions to strengthen the extradition process*, pp. 89-90.

⁵¹⁰ Caruso, *Working together and intensifying actions to strengthen the extradition process*, p. 90.

Legal basis for request

Extradition requests should clearly state the legal basis that the Requesting State is seeking to rely upon. If the Requested State is under a legal obligation to either extradite or prosecute, then this obligation should be identified and asserted at the outset. If a treaty is being relied upon, it is essential that the applicable treaty is named and any specific provisions being relied upon are identified.

Status of proceedings

Any extradition request should include information about the status of any proceedings for which the person sought is requested. For example, it is useful to specify whether a person is sought for prosecution or sentencing. The officials of the Requested State may ask for particulars of the status of the case proceedings in the Requesting State so it is important to keep up to date with all developments.

If the person is wanted for sentencing, issues may arise as to whether or not the person was tried *in absentia* (in their absence). If the conviction was obtained in these circumstances, the extradition request should note this as well as explain the circumstances of the trial, *in absentia*, and explain what legal procedures will apply if the person is extradited (for example, if the person will have the automatic right to a *trial de novo* or fresh trial, or appeal).⁵¹¹ Furthermore, some States may require information to confirm that a convicted person sought for sentencing is ‘unlawfully at large’ before they will cooperate.⁵¹²

Provide information relevant to bail / conditional release

In some States, bail (or other forms of conditional release) may be granted pending the outcome of the extradition hearings. The issue of bail will be decided by the relevant authority in the Requested State on the basis of the evidence available to it. Accordingly, if the Requesting State has concerns or objections to bail being granted, the extradition request must include clear reasons and facts upon which to base those objections. This might need to include a full personal and financial profile of the person sought, including information about issues such as:

- the person’s immigration status;
- family and community ties to the host State;
- aliases;
- criminal record;
- flight history;
- whether the person has multiple passports, assets abroad or access to forged documents;
- availability of acceptable sureties.

It is important for practitioners to note that there may be different or additional ‘tests’ and considerations for a bail application in an extradition matter as compared to a criminal proceeding.

Assurances

It is good practice to anticipate and provide any assurances that may be necessary in the extradition request (for example that the person will not be sentenced to life imprisonment or the death penalty). As noted previously, different States will have different requirements for the nature and format of assurances. Accordingly, it is important to understand these requirements in advance, so that steps can be taken to ensure they can be met.

⁵¹¹ Rabatel, *FAQs on the extradition process*, p. 83.

⁵¹² Rabatel, *FAQs on the extradition process*, p. 82.

Specify relevant time limits

If any time limitations apply to the offence (for example, statutory bars on prosecution after a period of time) then the Requesting State should include an explanation of what these time limits are in the extradition request, along with information about how these time limits are calculated. This will assist the Requested State to understand and comply with these time limitations.

Language requirements

Language requirements are generally stipulated in either the relevant domestic legislation or treaty. Information about the language requirements of States Parties to **UNTOC** is available in the UNODC Competent National Authorities Directory (CNA Directory).⁵¹³ Poor and / or partial translations can cause delays and compromise an extradition request. If a document is poorly translated it may not be understood correctly.⁵¹⁴

Many treaties now provide that the documents can be in English. This facilitates the process as most Requesting and Requested States are able to translate documents into or from the English language with relative ease.⁵¹⁵

Requesting States should consider having not only the request itself translated in advance, but also any relevant laws or other materials that the Requested State may need to consider, as part of deciding whether to agree to the extradition request.

Expose draft requests for feedback

The Requesting State should consider sending out a 'draft' extradition request before finalising and transmitting the official draft. This may bring to light potential problems, recent changes in the Requested State laws, or specific documentary requirements that need to be met. Any identified issues can then be addressed at an early stage and so avoid unnecessary delays once extradition proceedings have begun and avoid the possible refusal of the extradition request.⁵¹⁶

Supplementary requests

If the Requested State considers that the information provided in the extradition request is deficient, then it should provide the Requesting State with an opportunity to supplement the request with further information prior to refusing the request. This is reflected in both **UNTOC** and **UNCAC**, which provide that:

Before refusing extradition, the Requested State Party shall, where appropriate, consult with the Requesting State Party to provide it with ample opportunity to present its opinions and to provide information relevant to its allegations.⁵¹⁷

5.6.5 Transmitting extradition requests

It will be necessary in each case to determine how the request should be transmitted (or provided) to the Requested State. This will depend on the relevant legal basis, and also whether a 'full order' request is being made, or a request for provisional arrest. 'Full order' requests for extradition are usually transmitted through the Central Authority (sometimes referred to as the 'competent national authority') or through diplomatic channels. Some arrangements allow for requests for a 'provisional warrant' to be made via INTERPOL or the Central Authority.

⁵¹³ UNODC, 'The Competent National Authorities (CNAs) on-line Directory', available from <http://www.unodc.org/compath/en/index.html>. Access to the CNA Directory is password protected. However, Central Authority officials can request a password from UNODC, following a procedure detailed on the website.

⁵¹⁴ Rabatel, *FAQs on the extradition process*, p. 84.

⁵¹⁵ ADB / OECD, *MLA, Extradition and Recovery of Proceeds of Corruption in Asia and the Pacific*, pp. 20, 62-63.

⁵¹⁶ UNODC, *Report: Informal Expert Working Group on Effective Extradition Casework Practice*, p. 17.

⁵¹⁷ *UNTOC*, art. 16(16); *UNCAC*, art. 44(17).

‘Full order’ requests: The diplomatic channel is the traditional conduit for extradition requests in many States and regions, including Asia.⁵¹⁸ Generally, the actual request will be prepared by prosecutors / the Central Authority in the Requesting State, and they will send the request to the diplomatic authorities of their State. The Requesting State diplomatic authority then sends it to the diplomatic authorities of the Requested State. The Requested State then passes on the request to the appropriate law enforcement or prosecution authority for execution. Central Authorities are used as the channel for the transmission of extradition in some States, but the Central Authority channel is more common in mutual legal assistance than it is in extradition.⁵¹⁹ There is, however, a clear trend, particularly in treaties, towards utilizing central authorities as a conduit for extradition requests as this process can greatly expedite extradition proceedings.

Provisional arrest: In some extradition arrangements, transmission of requests for provisional warrants will occur outside the diplomatic channels, such as through INTERPOL or the Central Authority of a State.

5.7 The extradition process

The formality of extradition is evident in the complex and often lengthy processes that are generally required. The key aspects of those processes are outlined below.

5.7.1 Extradition hearings

The extradition hearing is not one in which the guilt or innocence of the person sought is determined. These are matters for ultimate determination by the Requesting State courts if the person is extradited. Accordingly, only matters that relate to the proper determination of the extradition and the safeguards provided for in extradition arrangements and the laws should be considered. Issues that might be considered at extradition hearings would likely include:

- identity;
- existence and applicability of an extradition arrangement;
- dual criminality;
- extradition objections (for example consideration of issues such as nationality, human rights concerns or the political nature of the offence);
- authenticity of the request;
- sufficiency of the supporting evidence (where required).⁵²⁰

The extradition process generally proceeds in two consecutive phases. In the first phase, the person sought is brought before the court to determine whether the conditions of extradition are met. If the conditions are not met then the person sought is released. If the conditions are met then the person will be held (in custody or on bail) to await surrender.

The second phase of the extradition process generally involves the executive branch of Requested State government deciding whether the individual (in relation to which the conditions of extradition have been met) *should* be surrendered. While the first phase requires consideration of legal issues the second phase may involve political and humanitarian considerations as well as legal ones. This process, and the matters that will be considered by either the courts or the executive of States, will vary.

Both the decision of the extradition judge and of the government executive may be the subject of appeal. Depending on the particular legal system, this might include any or all of the following:

- appeal by the person sought against the decision of the Requested State extradition judge;
- appeal by the Requesting State of the decision of the Requested State judge to deny extradition; and
- appeal by the person sought against an executive government decision to order surrender.

⁵¹⁸ ADB / OECD, *MLA, Extradition and Recovery of Proceeds of Corruption in Asia and the Pacific*, p. 63.

⁵¹⁹ ADB / OECD, *MLA, Extradition and Recovery of Proceeds of Corruption in Asia and the Pacific*, p. 64.

⁵²⁰ UNODC, Report: Informal Expert Working Group on Effective Extradition Casework Practice, p. 20.

Appeals provide important safeguards that are in the interests of justice. However, they can also add to the length of time that is involved in the extradition process. It is important for Requesting States and Requested States to understand each other's systems and to coordinate throughout any appeal process.

More generally, Requesting and Requested States should collaborate closely during all stages of the extradition hearings. It will also be necessary for the Requesting State to ascertain from the Requested State the arrangements for representation of the Requesting State in extradition proceedings, and any expectations regarding cost.

5.7.2 Simplified extradition

Endorsement of warrants

Under some simplified extradition schemes, extradition is based on the endorsement of warrants.⁵²¹ This process involves the Requesting State sending the warrant for the arrest of the person sought to the Requested State. The Requested State judge simply endorses the original arrest warrant issued in the Requesting State, which is then executed in the same way as a locally issued arrest warrant would be executed. This means that the Requesting State does not have to send a full extradition request and all the evidence that is usually required in most extradition proceedings. Under this simplified scheme there is no second phase process in which the executive branch of government decides whether to surrender the person sought. Recent European experience suggests that these simplified schemes can lead to considerable reductions in the length of time that it takes to extradite a person. A recent evaluation of the *European Arrest Warrant* scheme (a system involving endorsement of warrants instead of extradition, across the European Union) noted that the average time taken to execute a warrant has fallen from more than nine months to 43 days.⁵²²

As discussed above, the domestic laws of both Singapore and Malaysia allow for the endorsement of warrants in some circumstances. For example, under the Singapore *Extradition Act*, where a court, judge or magistrate or an officer of a court in Malaysia has issued a warrant for the apprehension of a person accused or convicted of an offence against the law of Malaysia and the person is, or is suspected of being, in or on his or her way to Singapore, a Singapore magistrate may, if the warrant is duly authenticated, make an endorsement on the warrant authorizing its execution in Singapore. A warrant so endorsed is then sufficient authority to all police officers in Singapore to execute the warrant.⁵²³

States utilizing simplified extradition schemes should be mindful of the need to ensure appropriate protections are in place for those who are sought for extradition. Often, key protections will be found in the relevant legal basis for the simplified extradition. For example, under Singapore's *Extradition Act*, once a person is apprehended, they must be brought before a magistrate who has the power to order their release (either completely or on bail), if he or she is satisfied that the offence in question is trivial; or the accusation was not made in good faith or in the interests of justice; or that release is necessary given the passage of time.⁵²⁴ Persons who are detained under these simplified extradition provisions retain a right to apply to the High Court for a review of the order. The review is effectively a rehearing, and the court can consider any evidence in addition to or in substitution of the evidence given in the making of the order. The High Court can confirm or vary the order, or quash the order and substitute a new order in its place.⁵²⁵ The Act also imposes strict time limits, ensuring that suspects do not remain in detention indefinitely. More specifically, if a suspect who has been ordered to be surrendered to Malaysia has not been conveyed out within one month, the High Court can order their release.⁵²⁶

⁵²¹ See, for example, *Extradition Act* (Sing.), sections 33-39; and *Extradition Act* (Malay.), Part V. These laws allow for judges in Singapore to endorse warrants issued by Malaysia; and for Malaysian judges to endorse warrants issued by Singapore and Brunei respectively.

⁵²² Commission of the European Communities, *Report from the Commission Based on Article 34 of the Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures between Member States*, {SEC (2005) 267}, para. 2.2.2, p. 5.

⁵²³ See further, *Extradition Act* (Sing.), section 33.

⁵²⁴ *Extradition Act* (Sing.), section 36.

⁵²⁵ *Extradition Act* (Sing.), section 37.

⁵²⁶ *Extradition Act* (Sing.), section 38.

Consent extradition

The extradition process can be simplified if the relevant treaty or law provides for 'consent extradition'. This system is applied if the person sought waives their right to have an extradition hearing and / or consents to their surrender and return to the Requesting State. Some people sought for extradition want to avoid the time and expense of contesting their extradition. In these circumstances the person sought will be returned to the Requesting State without further formal intervention and delays. In some circumstances the person sought may agree to allow the judge to certify that they are extraditable without further court appearances but with preservation of their rights (for example, with regard to specialty).

Consent extradition saves time and costs and eliminates the need for the full extradition hearing and / or the second phase of the extradition process where a State makes a decision (usually at the executive or ministerial level) about whether to surrender the person sought. In order to ensure the interests of justice are met, it is important that prior to the person signing a waiver to enable consent extradition, the process is fully explained to them by a judge, prosecutor or their lawyer.⁵²⁷

5.7.3 Attending extradition hearings

If permitted, arrangements may be made for Requesting State officials to attend extradition proceedings. During the extradition proceedings the lawyers for the person sought may raise issues of law and facts not readily known by Requested State officials, but which a case officer from the Requesting State could readily address. It has been noted that Requesting States should carefully plan their attendance at hearings, particularly if their officials may later be called upon as defence witnesses at a trial in the Requesting State.⁵²⁸

5.7.4 Understanding and meeting time requirements

In many cases, Requested States will have to comply with various domestic procedural requirements, such as time limits, or requirements relating to certification, authentication or surrender of persons. Any failure of the Requesting State to ensure that they meet these requirements can result in the judicial or executive discharge of the person sought on procedural grounds, notwithstanding the substantive merits of the case.

Extradition laws often specifically provide for time limits (specified days, 'reasonable time' or as 'soon as practicable') in which certain steps are to be taken. Generally limits apply to:

- time for the hearing of the extradition after the arrest;
- time for the person sought to appeal decision of the extradition judge;
- time to order surrender;
- time to effect surrender.

Accordingly, it is important to understand and take steps to meet these time limits.

5.8 Surrender and transit

Once surrender is granted the Requested State should notify the Requesting State immediately so that transit and escort arrangements can be made within the stipulated time frame.⁵²⁹ The transit stage must be well planned so that there are no avoidable delays and risks and to ensure that all travel authorisations are obtained in advance.

Transit through a third State (by surface or air if the aircraft stops for any period in that third State) means that the Requesting State will need to have that third State's permission to transfer the person through that

⁵²⁷ Caruso, *Working together and intensifying actions to strengthen the extradition process*, p. 92; UNODC, *Report: Informal Expert Working Group on Effective Extradition Casework Practice*, p. 9.

⁵²⁸ UNODC, *Report: Informal Expert Working Group on Effective Extradition Casework Practice*, p. 20.

⁵²⁹ UNODC, *Report: Informal Expert Working Group on Effective Extradition Casework Practice*, p. 20.

State. This may be provided for in domestic laws of the third State or in a treaty between the Requesting State and the third party. If there is no transit permission, the escorting officer will have no power and will not be able to seek assistance from local police, for example, in the event of an unscheduled landing.⁵³⁰ Equally, it is important that the transit State has the power to detain the person. For this reason, under the UN *Model Treaty on Extradition*, States Parties agree to ensure that their domestic legislation enables the detention of persons in custody in the event that transit is requested and subsequently occurs.⁵³¹

⁵³⁰ UNODC, *Revised Manuals on the Model Treaty on Extradition and the Model Treaty on Mutual Assistance*, p. 58.

⁵³¹ UNODC, *Revised Manuals on the Model Treaty on Extradition and the Model Treaty on Mutual Assistance*, p. 57.

Summary: Key questions for criminal justice officials considering extradition

1. Is the offence extraditable?

1.1 Legal basis might be bilateral or regional extradition treaties; UNTOC, UNCAC, reciprocity, domestic law.

Extraditable offences under UNTOC include:

- participation in an organized criminal group;
- laundering of proceeds of crime;
- corruption;
- obstruction of justice;
- other 'serious crimes' attracting penalty of at least four years imprisonment;
- Protocol offences (trafficking in persons; smuggling of migrants; attempts, participating, organizing or directing others).

PROVIDED THAT: the offence involves (a) an organized criminal group; and (b) the person is located in the territory of the Requested State Party.

1.2 Is there dual criminality?

Be flexible: look at the elements of the conduct in question, not the particular names given to the conduct in various national laws.

1.3 Under UNTOC, all of the Convention offences (including trafficking in persons) are deemed to be included in older bilateral and multilateral extradition treaties.

2. Is provisional arrest an option?

This may involve a simplified request (basic facts, identifying information) that can be completed and processed quickly. Note however, there are usually time limits on how long provisional arrest can last, before a formal request has to be submitted.

3. What are the possible grounds of refusal? Anticipate, adjust, provide assurances.

3.1 If under extradition treaty, consider:

- nature of the offence - political / military offences may be excluded;
- characteristics of the offence / sentence - death penalty, persecution concerns, unjust or oppressive circumstances?
- procedural grounds - double jeopardy; lapse of time?

3.2 If under UNTOC, consider:

- discrimination clause;
- no exclusion for fiscal offences;
- extradite or prosecute own nationals.

3.3 If under domestic law, consider:

- constitutional limits;
- criminal procedure law;
- criminal law.

Source: Adapted from presentation by Candice Welsch, *Extradition: International Legal Framework*, ASEAN Workshop on International Legal Cooperation in Trafficking in Persons Cases, Bangkok, November 2009.

Chapter 5: Attachments

- Attachment 1: Checklist for Outgoing Extradition Casework Planning, from the UNODC Informal Expert Working Group on Effective Extradition Casework Practice⁵³²
- Attachment 2: Checklist for the Content of Extradition Requests, Required Supporting Documents and Information, from the UNODC Informal Expert Working Group on Effective Extradition Casework Practice⁵³³

⁵³² This Checklist is extracted from UNODC, *Report: Informal Expert Working Group on Effective Extradition Casework Practice*, p. 25, Dec. 12-16, 2004, available from: http://www.unodc.org/pdf/ewg_report_extraditions_2004.pdf.

⁵³³ This Checklist is extracted from UNODC, *Report: Informal Expert Working Group on Effective Extradition Casework Practice*, pp. 26-27, Dec. 12-16, 2004, available from: http://www.unodc.org/pdf/ewg_report_extraditions_2004.pdf.

ANNEX B - CHECKLIST FOR OUTGOING EXTRADITION CASEWORK PLANNING ⁴³

<input type="checkbox"/>	<i>Earliest contact with Requested State</i>	Where the location of the person sought is known, communicate informally before making the request for provisional arrest and/or extradition to know all the requested States relevant requirements and acceptable fast communication/transmission channels.
<input type="checkbox"/>	<i>Concurrent requests</i>	Check for them at earliest stage. If there are any, ensure the case for priority is prepared, communicated and negotiated soonest.
<input type="checkbox"/>	<i>Legal basis</i>	Check whether an extradition request can be made to the proposed Requested State.
<input type="checkbox"/>	<i>Arrest, search and seizure</i>	Check legal preconditions and limitations of the Requested State for each and pre-empt potential problems Check whether conditional release/bail is possible. If so supply (before arrest if possible) all relevant information on the issue.
<input type="checkbox"/>	<i>Time Limits</i>	Check the time limits for receipt of the request in the Requested State following arrest and ensure the time limits will be met.
<input type="checkbox"/>	<i>Format of documents and any evidentiary requirements</i>	Always check with the Requested State to make sure documents are in the correct format. Where evidentiary rules apply, check for evidentiary requirements in the Requested State, particularly as to the standard of proof required and the types of evidence needed, check whether they are in deposition or affidavit format, with one signed/sworn by correct officer of the State/judicial authority, are sealed together, etc, to ensure that they will be admissible in the Requested State.
<input type="checkbox"/>	<i>Potential grounds for refusal</i>	The Requesting and Requested States should communicate at the outset of the process to identify any issues, which could be raised as potential grounds for refusal.
<input type="checkbox"/>	<i>In absentia proceedings</i>	Warn the Requested State in advance if the proposed extradition request relates to such proceedings. Check the requirements of the Requested State for extradition in such a case, and ensure justifiable requirements will be capable of being met.
<input type="checkbox"/>	<i>Rule of Specialty</i>	Ensure you identify <u>all</u> offences for which extradition will be sought, whether extraditable offences or not (this may not be possible for non-extraditable offences under domestic law). This avoids later problems with seeking waiver of the rule of specialty from the Requested State because you want to prosecute for another prior offence.
<input type="checkbox"/>	<i>Language of request</i>	The request and accompanying documents should be made in or accompanied by a certified translation into a language as specified by the Requested State.
<input type="checkbox"/>	<i>Submit a draft request for feedback</i>	Consider doing this, particularly if you are not familiar with the requirements of the Requested State, or the case is complex.
<input type="checkbox"/>	<i>Hearings – Presence of Representatives</i>	Check whether police, legal/liaison representatives, consular officials may be present at foreign extradition proceedings to assist if needed. If so, ensure it is arranged and monitor the proceedings.
<input type="checkbox"/>	<i>Transit arrangements</i>	Responsibility should be clearly fixed as to what authority will secure the necessary transit authorizations and care should be taken to avoid unnecessary risk factors. Ensure it is effectively planned, organized, conducted and monitored.
<input type="checkbox"/>	<i>Surrender arrangements</i>	Check time limits and precise last day in the Requested State date by which the person must be surrendered. Calculate the local time and date equivalents. Organize and ensure entry of escorts to remove the person from the Requested State before that date.

⁴³ This is not an exhaustive guide. Due to the wide range of differences between States in their domestic legislation and practice in extradition requests, the EWG did not attempt to create universal checklists.

ANNEX C – CHECKLIST FOR THE CONTENT OF EXTRADITION REQUESTS, REQUIRED SUPPORTING DOCUMENTS AND INFORMATION⁴⁴

Mandatory content/document requirements for all requests:

<input type="checkbox"/> <i>Identity of the person sought</i>	A description of the person sought and optionally all other information, which may help to establish that person’s identity, nationality and location (including for example: fingerprints, photo, DNA material).
<input type="checkbox"/> <i>Facts and procedural history of the case</i>	An overview of the facts and procedural history of the case, including the applicable law of the Requesting State and the criminal charges against the person sought.
<input type="checkbox"/> <i>Legal provisions</i>	A description of the offence and applicable penalty, with an excerpt or copy of the relevant parts of the law of the Requesting State.
<input type="checkbox"/> <i>Statute of Limitation</i>	Any relevant limitation period beyond which prosecution of a person cannot lawfully be brought or pursued.
<input type="checkbox"/> <i>Legal basis</i>	A description of the basis upon which the request is made, e.g., national legislation, a relevant extradition treaty or arrangement or, in the absence thereof, by virtue of comity.

If the person sought is accused of an offence (but not yet convicted)⁴⁵

<input type="checkbox"/> <i>Warrant of Arrest</i>	The original or certified copy of a warrant issued by a competent judicial authority for the arrest of that person, or other documents having the same effect.
<input type="checkbox"/> <i>Statement of the offence(s)</i>	A statement of the offence(s) for which extradition is requested ⁴⁶ and a description of the acts or omissions constituting the alleged offence(s), including as accurate as possible an indication of the time and place of the commission given the status of the proceedings at that time, maximum sentences for each offence, the degree of participation in the offence by the person sought and all relevant limitation periods.
<input type="checkbox"/> <i>Evidence</i>	Identity evidence is always required. Check whether sworn evidence is required. If so, check whether the witness must depose that he or she both knows the person sought and knows that the person engaged in the relevant acts or omissions constituting the relevant offence(s). Suspicion of guilt for every offence for which extradition is sought must be substantiated by evidence. Check in advance whether it must take the form of sworn or unsworn evidence of witnesses, or whether a sworn or unsworn statement of the case will suffice. If a statement of the case will suffice, check whether it has to contain particulars of every offence. Where sworn evidence is required, check if this has to show <i>prima facie</i> evidence of every offence for which extradition is sought. If so, clarify what is required and admissible to establish that or any lesser test. Ensure all is provided in the form required.

If the person sought is convicted of an offence

(convicted, sentenced)	An original or a certified/authenticated copy of the original conviction/detention order, or other documents having the same effect, to establish that the sentence is immediately enforceable. The request should also include a statement establishing to what extent the sentence has already been carried out.
(convicted, sentenced <i>in absentia</i>)	A statement indicating that the person was summoned in person or otherwise informed of the date and place of hearing leading to the decision or was legally represented throughout the proceedings against him or her, or specifying the legal means available to him to prepare his defence or to have the case retried in his/her presence.
(convicted, no sentence imposed yet)	A document setting out the conviction and a statement affirming that there is an intention to impose a sentence.

⁴⁴ This is not an exhaustive guide. Due to the wide range of differences between States in their domestic legislation and practice in extradition requests, the EWG did not attempt to create universal checklists.

⁴⁵ Some States also require an affidavit establishing probable cause that the person sought committed the crime in question.

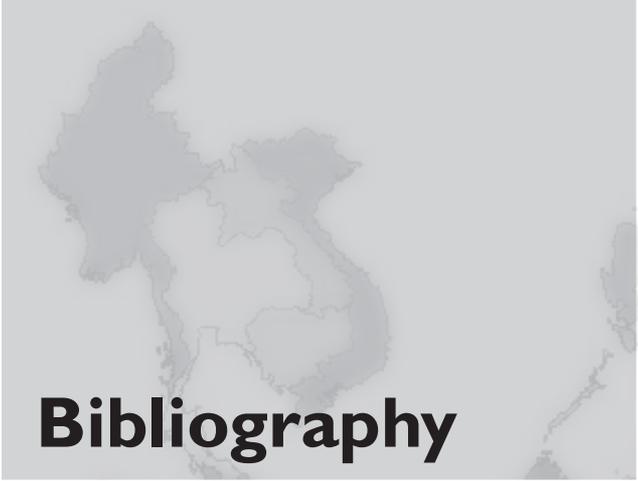
⁴⁶ Identify all offences for which extradition is sought, in order to avoid difficulties and delays (principle of speciality).

Signature of documents, assembly of request and attachments:

- | | |
|---|--|
| <input type="checkbox"/> <i>Arrest warrants and Conviction/detention orders</i> | Check in each case whether the warrant or order must be signed by a judge, magistrate or other judicial officer, or Officer of State. Check whether the Officer of State must also sign each separate document. |
| <input type="checkbox"/> <i>Assembly of request</i> | Check whether all the documents included in the request and attachment must be bundled together, and what if any seals are required to prevent later arguments that documents have been added or removed. |
| <input type="checkbox"/> <i>Transmission of the request</i> | Ensure the request and attachments are transmitted by the channel agreed with the Requested State (not necessarily the diplomatic channel). Monitor the transmission and delivery to ensure crucial time limits are met. |

Optional additional content / documents:

- | | |
|---|---|
| <input type="checkbox"/> <i>Identity of Authority</i> | Identification of the office/authority requesting the provisional arrest / extradition. |
| <input type="checkbox"/> <i>Prior communication</i> | Details of any prior contact between officers in the Requesting and Requested States. |
| <input type="checkbox"/> <i>Presence of officials</i> | An indication as to whether the Requesting State wishes its officials or other specified persons to be present at or participate in the execution of the extradition request and the reason why this is requested. |
| <input type="checkbox"/> <i>Indication of urgency and/or time limit</i> | An indication of any particular urgency or applicable time limit within which compliance with the request is required and the reason for the urgency or time limit. |
| <input type="checkbox"/> <i>Use of other channels</i> | Where a copy of the request has been or is being sent through other channels, this should be made clear in the request. |
| <input type="checkbox"/> <i>Language</i> | The request and accompanying documents should be made in or accompanied by a certified translation (of whole, not only part of the documents) in a language specified by the Requested State (or if that State permits more than one, the preferred language indicated after consultation). |
| <input type="checkbox"/> <i>Supplementary documents</i> | If the documents provided do not suffice after checking in advance of the request with the Requested State, provide the needed supplementary information/documents. |



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International Labour Organisation Convention Concerning the Abolition of Forced Labour (ILO No. 105), Jun. 25, 1957, 320 UNTS 291, entered into force Jan. 17, 1959.

International Labour Organisation Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (ILO No. 182), Jun. 17, 1999, 2133 UNTS 161, entered into force Nov. 19, 2000.

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Statute of the International Court of Justice, Jun. 26, 1945, entered into force Oct. 24, 1945.

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United Nations Convention against Transnational Organized Crime, Dec. 12, 2000, UN Doc. A/RES/55/25 (Annex I), entered into force Sept. 29, 2003.

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United Nations Convention on the Elimination of Racial Discrimination, Mar. 7, 1966, 660 UNTS 195, entered into force Jan. 4, 1969.

United Nations Convention on the Rights of the Child, Nov. 20, 1989, 1577 UNTS 3, entered into force Sept. 2, 1990.

United Nations Convention relating to the Status of Refugees, Jul. 28, 1951, 189 UNTS 137, entered into force Apr. 22, 1954.

United Nations International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171, entered into force Mar. 23, 1976.

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United Nations International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Dec. 18, 1990, UN Doc. A/RES/45/158, entered into force Jul. 1, 2003.

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United Nations Optional Protocol to the Convention on the Rights of the Child on the Sale of children, child prostitution and child pornography, May 25, 2000, UN Doc. A/RES/54/263, entered into force Jan. 18, 2002.

United Nations Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171, entered into force Mar. 23, 1976.

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United Nations Protocol relating to the Status of Refugees, Jan. 31, 1967, 606 UNTS 267, entered into force Oct. 4, 1967.

United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, Dec. 12, 2000, UN Doc. A/RES/55/25 (Annex II), entered into force Dec. 25, 2003.

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Annexes

- Annex 1** Country Summaries
- Annex 2** Treaty on Mutual Legal Assistance in Criminal Matters Among Like-Minded ASEAN Member Countries
- Annex 3** United Nations Convention against Transnational Organized Crime (Extracts: Articles 12-21 and 27)
- Annex 4** Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime
- Annex 5** United Nations Convention against Corruption (Extracts: Chapters IV, V and VI)
- Annex 6** Council of Europe Convention on Action against Trafficking in Human Beings and Explanatory Report (Extracts: Chapters I and VI (Convention) and Chapter VI (Explanatory Report))

Annex I

Country Summaries

This section provides detailed summaries of the legal and procedural framework of each ASEAN Member State as it relates to the matters covered by the present Handbook. Each country summary is organized as follows:

- A. Legal response to trafficking in persons
- B. Legal and procedural framework around mutual legal assistance
- C. Legal and procedural framework around mutual legal assistance for recovery of proceeds of crime
- D. Legal and procedural framework around extradition

The information contained in each summary is largely based on that provided by participants in the ASEAN Workshop on International Legal Cooperation in Trafficking in Persons Cases, held in Bangkok in November 2009. Further information received from ASEAN Member States after the workshop has been incorporated. Member States are requested to notify the ASEAN Secretariat of any required additions or modifications to ensure their inclusion in subsequent editions of the Handbook.

Brunei Darussalam

A. LEGAL RESPONSE TO TRAFFICKING IN PERSONS

- a) **UN Protocols:** Brunei Darussalam is not a party to the UN Trafficking Protocol or the Migrant Smuggling Protocol.
- b) **Domestic Legislation:** The *Trafficking and Smuggling of Persons Order* (2004) criminalises the offence of people trafficking in **Sec. 4**, and the offence of trafficking in children in **Sec. 5**.

B. MUTUAL LEGAL ASSISTANCE

a) Mutual Legal Assistance Treaties

- i) *Multilateral:* Brunei Darussalam is a party to UNTOC, UNCAC and to the ASEAN MLAT.
- ii) *Bilateral:* Brunei Darussalam has not concluded any bilateral treaties concerning mutual legal assistance in criminal matters.

b) National Law on Mutual Legal Assistance

The national law on mutual legal assistance is the *Mutual Assistance in Criminal Matters Order* of 2005 ("MACMO"). This Order comprehensively sets out the requirements and restrictions for mutual legal assistance requests made both by and to Brunei Darussalam. Assistance under this Order may be provided in relation to any criminal matter, including any criminal investigation, criminal proceedings or ancillary matter relating to a trafficking offence.

i) Requirements

- **Evidentiary Test:** Where there is a request for the taking of evidence or production of documents, articles or other things in Brunei Darussalam, the Attorney General is to be satisfied that:
 - *the request relates to a criminal matter in that country; and*
 - *there are reasonable grounds for believing that the evidence can be taken or ... the documents, articles or other things can be produced in Brunei Darussalam - Sec. 27.*

Further, where a production order is sought, the Court is to be satisfied that the requested production of the document, article or other thing is necessary or desirable for the purposes of the criminal matter to which the request relates - **Sec. 29**.

- **Dual Criminality:** A request may be refused if the relevant act or omission would not have constituted an offence in Brunei Darussalam - **Sec. 24(2)(c)**.
- **Reciprocity:** There is no reciprocity provision.
- **Specialty:** A request shall be refused if the Requesting State has failed to undertake that the article or thing requested will not be used, except with the consent of the Attorney General, for a matter other than the criminal matter in respect of which the request was made - **Sec. 24(1)(g)**.

ii) Restrictions and Exceptions

- **Double Jeopardy / Ongoing Proceedings:** A request shall be refused if the provision of assistance could prejudice a criminal matter in Brunei Darussalam - **Sec. 24(1)(j)**.
- **Human Rights:** A request shall be refused if there are substantial grounds for believing that the request was made for the purpose of prosecuting, punishing or otherwise causing prejudice to the person on account of his/her colour, race, ethnic origin, sex, religion, nationality or political opinions - **Sec. 24(1)(c)**.
- **Death Penalty:** There is no death penalty exception.

- **Political / Military Offence:** There is no political or military offence exception.
- **National / Public Interest:** A request for assistance shall be refused if it would be contrary to the interests of the public and prejudicial to the sovereignty, security or national interests - **Sec. 24(1)(e)**.
- **Bank Secrecy / Fiscal Measures:** There is no bank secrecy or fiscal measures exception.

iii) *Procedure*

- **Form:** Requirements for the form of the request are set out in **Sec. 23**. Sample forms are also available at: http://www.agc.gov.bn:81/index.php?option=com_content&view=article&id=128&Itemid=1
- **Language:** Under **Sec. 23(a)** requests must be submitted in English.
- **Urgent Procedures:** In urgent circumstances a request may be made orally under **Sec. 23(b)** but must be subsequently confirmed in writing.
- **Attendance of Officials:** There are no provisions regarding attendance of officials.

c) **Transmission of Requests**

- i) *Under ASEAN MLAT and UNCAC:* The designated Central Authority under the ASEAN MLAT and UNCAC is the Attorney General. Contact details are as follows:

*Attorney General of Brunei Darussalam
The Attorney General's Chambers
The Law Building
Km1, Jalan Tutong
Bandar Seri Begawan
BA 1910
NEGARA BRUNEI DARUSSALAM

Telephone No. : 673 - 2244 872
Facsimile No. : 673 - 2223 100*

- ii) *Under UNTOC:* [Information not available]

- iii) *Under National Law:* Under **Sec. 21** of the MACMO, all requests made under the Act are to be made to the Attorney General (contact details above).

C. MUTUAL LEGAL ASSISTANCE TO RECOVER PROCEEDS OF CRIME

a) **Treaties**

- i) *Multilateral:* Brunei Darussalam is a party to UNTOC, UNCAC and the ASEAN MLAT, which provide for mutual legal assistance to identify and recover proceeds of crime.
- ii) *Bilateral:* Brunei Darussalam has not concluded any bilateral treaties concerning mutual legal assistance to recover proceeds of crime.

b) **National Law**

Within Brunei Darussalam the recovery of proceeds of crime are dealt with under the *Criminal Conduct (Recovery of Proceeds) Order* (2000) (the "CCRPO"). The provision of mutual legal assistance in the recovery of proceeds of crime is covered in Part III of this Order, as well as in the *Mutual Assistance In Criminal Matters Order* (2005). Under the MACMO, assistance may be provided in relation to "ancillary criminal matters", including the restraining, seizure, forfeiture and confiscation of property.

- **Definition of Proceeds of Crime:** Under **Sec. 5(3)** of the CCRPO a person benefits from an offence if he / she obtains property as a result of or in connection with its commission, and his / her benefit is the value of the property so obtained.

- **Identification and Tracing:** Under the MACMO, assistance may be provided in relation to “ancillary criminal matters”, including the restraining, seizure, forfeiture and confiscation of property. Available assistance includes obtaining evidence, requiring production of documents or other items, and issuing warrants for search and seizure.
- **Freezing and Seizure:** The schedule to the *Criminal Conduct (Recovery of Proceeds) Order* (2000) contains provisions which allow for the restraint of the offender’s property where proceedings have been instituted in a designated country¹ and either a confiscation order has been made or it is reasonable to think that it may be made. Under **Sec. 6** of the Schedule the court may make an order that prohibits any person from dealing with “realisable property”. The court may also appoint a receiver to take possession of such property or to manage or otherwise deal with the property. Such property may also be seized by police to prevent its removal from Brunei Darussalam. The Court may also make a “charging order” on realisable property under **Sec. 11**, which imposes a charge for securing the payment of money under a confiscation order.
- **Confiscation:** Under **Sec. 32**, the Court may register an external confiscation order made by a court in a designated country, upon application by the Attorney General on behalf of the government of the designated country.
- **Repatriation of Funds:** There are no provisions regarding repatriation of funds to the Requesting State.

D. EXTRADITION

a) Extradition Treaties

- i) *Multilateral:* Brunei Darussalam is a party to UNTOC and UNCAC.
- ii) *Bilateral:* Brunei Darussalam has not concluded any bilateral extradition treaties.

b) National Law on Extradition

Extradition to and from Brunei Darussalam is provided for in the *Extradition Order* (2005). In the case of arrest warrants issued in Singapore and Malaysia, the *Extradition (Malaysia and Singapore) Act* (Chapter 154) also provides for such warrants to be endorsed and executed as if they were warrants issued in Brunei Darussalam, and for the person in custody to be transferred to the relevant court in either Singapore or Malaysia.

An offence of people or child trafficking under **Sec. 4 or 5** of the *Trafficking and Smuggling of Persons Order* (2004) is an “extradition offence” under **Sec. 3** *Extradition Order* (2005), as it is an offence which has a maximum penalty of more than one year imprisonment.

i) Requirements

- **Evidentiary Test:** There is no evidence test in most cases, though supporting documentation must be provided in accordance with **Sec. 15**. However in the case of extradition to Commonwealth countries a “*prima facie*” test may be applied and a “record of the case” may be required.
- **Dual Criminality:** Dual criminality is required under **Sec. 3**.
- **Specialty:** The Attorney General may refuse to surrender the person under **Sec. 17** if the requesting country has not given a specialty undertaking.

ii) Restrictions and Exceptions

- **Double Jeopardy / Ongoing Proceedings:** There is an extradition objection under **Sec. 4(g)** if the person has already been acquitted or punished for the offence in either

¹ A designated country is a country or territory outside of Brunei Darussalam to whose external confiscation orders and procedures the Minister of Finance has ordered that the CCRPO will apply.

Brunei Darussalam or in the requesting country. Surrender may also be refused under **Sec. 17(e)** if a prosecution is pending in Brunei Darussalam for the offence for which extradition is sought.

- **Citizen:** The Attorney General may refuse the surrender of a citizen - **Sec. 17(d)**.
- **Political / Military Offence:** There is an extradition objection under **Sec. 4(a)** if the offence is of a political nature, and under **Sec. 4(d)** if it is purely a military offence.
- **Human Rights:** There is also an extradition objection if there are substantial grounds for believing that the request was made for the purpose of prosecuting, punishing or otherwise causing prejudice to the person on account of his / her race, religion, nationality, political opinions, sex or status, or if his / her trial would be prejudiced for these reasons. Surrender may also be refused under **Sec. 17(i)** if the person has been tortured or subjected to cruel, inhuman or degrading treatment or punishment in the requesting country.
- **Death Penalty:** There is no death penalty exception.
- **Jurisdiction:** Surrender may be refused under **Sec. 17(g)** on the basis that the offence was committed wholly or partly within the territory of Brunei Darussalam.

iii) Procedure

- **Provisional Arrest:** A provisional arrest warrant is available under **Sec. 6**.
- **Form and Contents:** The requirements for a request for provisional arrest are set out in **Sec. 6**. The documents required to be produced to a Magistrate for a surrender determination are set out in **Sec. 15**.
- **Language:** There are no provisions which prescribe the language of the request.
- **Transmission:** An extradition request should be made to the Attorney General by a diplomatic officer, consular officer, or Minister of the Requesting State.
- **Consent:** A person may consent to their surrender under **Sec. 11**.
- **Time Limits:** Where a person has been remanded in custody, they are to be released under **Sec. 8** after 60 days unless an “authority to proceed” has been issued by the Attorney General, or will be issued within the next 60 days.

Cambodia

A. LEGAL RESPONSE TO TRAFFICKING IN PERSONS

- a) **UN Protocols:** Cambodia is a party to both the UN Trafficking Protocol and the Migrant Smuggling Protocol.
- b) **Domestic Legislation:** The *Law on the Suppression of Human Trafficking and Sexual Exploitation* criminalises various forms of trafficking in persons, and some trafficking related offences.

B. MUTUAL LEGAL ASSISTANCE

a) Mutual Legal Assistance Treaties

- i) *Multilateral:* Cambodia is a party to UNTOC, UNCAC and to the ASEAN MLAT.
- ii) *Bilateral:* Cambodia has not concluded any bilateral treaties regarding mutual legal assistance.

- b) **National Law on Mutual Legal Assistance:** Cambodia does not have a national law concerning mutual legal assistance.

c) Transmission of Requests

- i) *Under ASEAN MLAT:* The Central Authority under the ASEAN MLAT is the Minister of Justice of the Kingdom of Cambodia. Contact details are as follows:

*Minister of Justice of the Kingdom of Cambodia
General Department of Research and Judicial Development
Ministry of Justice
No. 14, St Samdach Sothearos
Sangkat Chey Chumneas
Khan Daun Penh
Phnom Penh
KINGDOM OF CAMBODIA

Telephone No. : (855)-(23)-219-570
Facsimile No. : (855)-(23)-219-570*

- ii) *Under UNCAC:* [Information not available]
- iii) *Under UNTOC:* There is no Competent National Authority specified under UNTOC.
- iv) *Under National Law:* All requests are to be transmitted through diplomatic channels to the Ministry of Foreign Affairs.

C. MUTUAL LEGAL ASSISTANCE TO RECOVER PROCEEDS OF CRIME

a) Treaties

- i) *Multilateral:* Cambodia is a party to UNTOC, UNCAC and to the ASEAN MLAT, which provide for mutual legal assistance to identify and recover proceeds of crime.
- ii) *Bilateral:* Cambodia is not a party to any bilateral treaties governing the provision of mutual legal assistance to recover proceeds of crime.

b) National Law

There is no specific national law concerning the provision of mutual legal assistance to recover proceeds of crime. However there are some provision under national law that deal with the proceeds of crime, and which may be applicable to cases in which mutual legal assistance is sought.

- **Definition of Proceeds of Crime:** There is no definition.
- **Identification and Tracing:** Mutual legal assistance in the identification and tracing of proceeds of crime may be undertaken informally on a police to police basis, and does not require the existence of criminal proceedings.
- **Freezing and Seizure:** **Art. 30** of the *Anti-Money Laundering and Combating of Financing of Terrorism Act* provides that in proceedings for an offence of money laundering under the *Penal Code*, all property that is related or suspected to be related to the offence may be frozen or restrained from being transferred.
- **Confiscation:** **Art. 48** of the *Law on Suppression of Human Trafficking and Sexual Exploitation* (NS/RKM/0208/005) provides that for an offence under that law, the Court may order the confiscation of “*the proceeds or the properties earned by or which resulted from the offence*”. Funds used in the offence or generated by the offence of money laundering under the *Penal Code* (**Arts. 448** and **453**) may also be confiscated as an additional penalty.
- **Repatriation of Funds:** There are no provisions for the repatriation of confiscated funds to the Requesting State.

D. EXTRADITION

a) Extradition Treaties

- Multilateral:* Cambodia is a party to UNTOC and UNCAC.
- Bilateral:* Cambodia has concluded bilateral extradition treaties with PR China, Korea, Lao PDR and Thailand.

b) National Law on Extradition

Book 9, Chapter 2 of the *Criminal Procedure Code* sets out the extradition process in Cambodia. This Chapter makes provision for the extradition of foreign nationals only, and only permits extradition to a Requesting State if the offence was committed in that State or if the person sought is a citizen of that State (**Art. 572**). Extradition for an offence of trafficking in persons may be executed under this Chapter, as it is an offence under the laws of Cambodia.

i) Requirements

- **Evidentiary Test:** There are no provisions regarding an evidentiary test.
- **Dual Criminality:** Under **Art. 569** the acts charged must be an offence under the laws of both the Requesting State and Cambodia.
- **Specialty:** Under **Art. 577** the Requesting State must undertake not to prosecute the person for any offence other than that specified in the extradition request, except with the approval of Cambodia.

ii) Restrictions and Exceptions

- **Double Jeopardy / Ongoing Proceedings:** Extradition will not be permitted under **Art. 574** if the offence was committed and tried in Cambodia. Further, if the person has been charged with an offence in Cambodia, extradition will be postponed under **Art. 578** during prosecution of that offence.
- **Citizens:** There is no provision for the extradition of a citizen of Cambodia.
- **Political / Military Offence:** Extradition will not be permitted under **Art. 573** if the offence is political, however a political offence is not one which causes danger to life, physical integrity or individual freedom.
- **Human Rights:** There are no human rights exceptions.

- **Death Penalty:** There is no death penalty exception.
- **Jurisdiction:** There is no general exception when Cambodia has jurisdiction over the offence, except where the offence is both committed and tried in Cambodia (**Art. 574**).

iii) Procedure

- **Provisional Arrest:** Under **Art. 581** “pre-trial” (or provisional) arrest may be made in cases of emergency, prior to the receipt of the formal request.
- **Form and Contents:** The requirements for form and contents are contained in **Art. 579**.
- **Language:** Under **Art. 579** the request and supporting documents must be in Khmer, English or French, or a translation in one of these languages must be provided.
- **Transmission:** The request is to be transmitted through diplomatic channels to the Minister of Foreign Affairs, who shall refer the request to the Minister of Justice under **Art. 580**.
- **Consent:** The person may agree to be extradited under **Art. 588**.
- **Time Limits:** A person who is arrested under **Art. 581** may be released under **Art. 582** if the extradition request is not received within 2 months.

Indonesia

A. LEGAL RESPONSE TO TRAFFICKING IN PERSONS

- a) **UN Protocols:** Indonesia is a party to the UN Trafficking Protocol and the Migrant Smuggling Protocol.
- b) **Domestic Legislation:** Trafficking in persons is criminalised in the *Law on the Eradication of the Criminal Act of Human Trafficking* (Law No. 21/2007).

B. MUTUAL LEGAL ASSISTANCE

a) Mutual Legal Assistance Treaties

- i) *Multilateral:* Indonesia is a party to UNTOC, UNCAC and to the ASEAN MLAT.
- ii) *Bilateral:* Indonesia has concluded bilateral mutual legal assistance treaties with Australia and PR China, and has signed but not yet ratified a treaty with Korea.

b) National Law on Mutual Legal Assistance

The Law Concerning Mutual Legal Assistance in Criminal Matters (Law No. 1 of 2006) is the national law on mutual legal assistance in Indonesia. Under this law, assistance may be provided in relation to “criminal matters”, including investigations and prosecutions for offences of trafficking in persons.

i) Requirements

- **Evidentiary Test:** There is no evidentiary test.
- **Dual Criminality:** Under **Art. 7(a)** a request may be refused if the offence committed is not a crime in Indonesia.
- **Reciprocity:** There is no reciprocity requirement.
- **Specialty:** Under **Art. 6(f)** a request shall be refused if the foreign state does not assure that the items requested will not be used for a matter other than the criminal matter in respect to which the request was made.

ii) Restrictions and Exceptions

- **Double Jeopardy / Ongoing Proceedings:** Under **Art. 6(b)** a request shall be refused if the person has already been acquitted, awarded clemency, or served the penalty. Under **Art. 7(d)** a request may be refused if it would be harmful for an investigation, prosecution and examination before the court in Indonesia.
- **Human Rights:** Under **Art. 6(d)** a request shall be refused if the prosecution is based on a person’s race, gender, religion, nationality, or political belief.
- **Death Penalty:** Under **Art. 7(c)** a request may be refused if the relevant offence is subject to capital punishment.
- **Political / Military Offence:** Under **Art. 6(a)** a request shall be refused if it relates to a political offence or a military offence.
- **National / Public Interest:** Under **Art. 6(e)** a request shall be refused if its approval would be harmful to the sovereignty, security, interests, and national law of Indonesia.
- **Bank Secrecy / Fiscal Measures:** There are no bank secrecy or fiscal measures exceptions.

iii) Procedure

- **Form:** The form and content requirements for requests are set out in **Art. 28**.

- **Language:** Under **Art. 28**, the request may be in English or in the language of the Requesting State, but a translation into Indonesian shall be made.
- **Urgent Procedures:** There are no urgent procedures provisions.
- **Attendance of Officials:** There is no provision for attendance of officials from the Requesting State.

c) Transmission of Requests

- i) *Under ASEAN MLAT:* The Central Authority under the ASEAN MLAT is the Minister of Law and Human Rights of the Republic of Indonesia. Contact details are as follows:

*Minister of Law and Human Rights of Republic of Indonesia
Department of Law and Human Rights
Jl. H.R. Rasuna Said
Kav. 6-7
Jakarta 12940
REPUBLIC OF INDONESIA
(Attn: Director General for Legal Administrative Affairs)

Telephone No. : (+62-21) 520 2391
Facsimile No. : (+62-21) 526 1082*

- ii) *Under UNCAC:* [Information not available]
- iii) *Under UNTOC:* [Information not available]
- iv) *Under National Law:* Under **Art. 27** of *The Law Concerning Mutual Legal Assistance in Criminal Matters* a request may be sent directly to the Government (through the Minister of Law and Human Rights of Republic of Indonesia) or through diplomatic channels.

C. MUTUAL LEGAL ASSISTANCE TO RECOVER PROCEEDS OF CRIME

a) Treaties

- i) *Multilateral:* Indonesia is a party to UNTOC, UNCAC and the ASEAN MLAT, which provide for mutual legal assistance to identify and recover proceeds of crime.
- ii) *Bilateral:* The *Treaty between Australia and the Republic of Indonesia on Mutual Assistance in Criminal Matters* specifically addresses the provision of mutual legal assistance in the identification and recovery of proceeds of crime, in **Art. 18**.

b) National Law

Mutual legal assistance in the identification and recovery of proceeds of crime is specifically provided for in both the *Law Concerning Mutual Legal Assistance in Criminal Matters* and the *Law Concerning the Crime of Money Laundering* (Law No. 15 of 2002 as amended).

- **Definition of Proceeds of Crime:** “Proceeds of crime” is defined in **Art. 1(7)** of the *Law Concerning Mutual Legal Assistance in Criminal Matters* as:

“any property derived directly or indirectly from a crime, including the property into which any property derived or realized directly from the crime was later successively converted, transformed or intermingled, including income, capital or other economic gains derived from such property at any time since the crime”.
- **Identification and Tracing:** Under **Art. 44A** of the *Law Concerning the Crime of Money Laundering*, mutual legal assistance includes:
 - a. Collecting material evidence and statements from a person, including the implementation of a rogatory letter requesting the examination of a person under oath;

- b. Providing material evidence in the form of documents and other notes;
- c. Identifying and locating a person;
- d. Executing a warrant to search for and seize material evidence;
- e. Searching for, freezing, and confiscating the proceeds of crime;
- f. Obtaining the agreement of persons to testify or provide assistance to an investigation in the requesting state;
- g. Other assistance in accordance with the purpose of mutual legal assistance that is not unlawful.

- **Freezing and Seizure:** Under **Art. 42** of the *Law Concerning Mutual Legal Assistance in Criminal Matters* a warrant may be issued for the search and seizure of articles and assets allegedly obtained from or the proceeds of crime under the law of the Requesting State.
- **Confiscation:** Under **Art. 51** of the *Law Concerning Mutual Legal Assistance in Criminal Matters* the Requesting State may request assistance in the confiscation and forfeiture of assets, imposition of a penalty or payment of compensation.
- **Repatriation of Funds:** Under **Art. 53** of the above law, the Minister of Law and Human Rights shall negotiate with the Requesting State and arrange the delivery of the result of the seizure under **Arts. 51-52**.

D. EXTRADITION

a) Extradition Treaties

- i) *Multilateral:* Indonesia is a party to UNTOC and UNCAC.
- ii) *Bilateral:* Indonesia has concluded bilateral extradition treaties with Australia, PR China, Hong Kong, Korea, Malaysia, Philippines and Thailand. A bilateral treaty with Singapore has been signed but not yet ratified.

b) National Law on Extradition

Extradition to and from Indonesia is governed by the *Law on Extradition* (Law No. 1 of 1979). Under this law, a person may be extradited for an offence of trafficking in persons.

i) Requirements

- **Evidentiary Test:** There is no evidentiary test.
- **Dual Criminality:** State Gazette No. 2/1979 (Elucidation of Law no. 1/1979 on Extradition) confirms that dual criminality is required for extradition.
- **Specialty:** Under **Art. 15** an extradition request shall be rejected if the person requested for extradition will be prosecuted for a crime other than the crime for which he / she is extradited.

ii) Restrictions and Exceptions

- **Double Jeopardy / Ongoing Proceedings:** An extradition request shall be refused under **Art. 11** if the person has already been acquitted or has completed serving the sentence for the relevant offence. An extradition request may also be refused under **Art. 9** if the person is already being prosecuted for the same offence in Indonesia.
- **Citizen:** Extradition of an Indonesian citizen will not be permitted under **Art. 7** unless it is determined that the citizen should be tried in the Requesting State having regard to the interests of the State, law and justice.
- **Political / Military Offence:** Extradition for a political offence (**Art. 5**) or a military offence (**Art. 6**) is not permissible, unless otherwise stated in an agreement between Indonesia and the Requesting State.

- **Human Rights:** Under **Art. 14** an extradition request shall be refused if there is a strong indication that the person will be prosecuted or punished by reason of his / her religion, political views, or citizenship, or for being the member of certain race or group.
- **Death Penalty:** Under **Art. 13** an extradition request shall be refused if the offence is subject to capital punishment in the Requesting State but not in Indonesia, unless the Requesting State has given an assurance that the death penalty will not be imposed.
- **Jurisdiction:** An extradition request may be refused under **Art. 8** if the offence was committed wholly or partly within the jurisdiction of Indonesia.

iii) Procedure

- **Provisional Arrest:** Available under **Art. 25**.
- **Form and Contents:** The form and document requirements are listed in **Art. 22**.
- **Language:** There are no provisions which prescribe the language of the request.
- **Transmission:** Under **Art. 22(2)** the formal extradition request must be submitted in writing through diplomatic channels to the Minister of Justice to be forwarded to the President.
- **Consent:** There are no provisions for consent to surrender.
- **Time limits:** Detention is for a period of 30 days, and may be extended in certain circumstances by a further 30 days under **Art. 35**.

Lao PDR

A. LEGAL RESPONSE TO TRAFFICKING IN PERSONS

- a) **UN Protocols:** Lao PDR is a party to the UN Trafficking Protocol and the Migrant Smuggling Protocol.
- b) **Domestic Legislation:** Trafficking in persons is criminalised in **Art. 134** of the *Penal Law*.

B. MUTUAL LEGAL ASSISTANCE

a) Mutual Legal Assistance Treaties

- i) *Multilateral:* Lao PDR is a party to UNTOC, UNCAC and ASEAN MLAT.
- ii) *Bilateral:* Lao PDR has concluded a bilateral mutual legal assistance treaty with Vietnam.

b) National Law on Mutual Legal Assistance

There is no dedicated mutual legal assistance legislation in Lao PDR. However Part XI of the *Law on Criminal Procedure* (2004) contains a number of provisions concerning the provision of mutual legal assistance in criminal matters. This law does not specify the offences to which it applies.

Section IV of the *Decree on Anti-Money Laundering* also provides for the provision of mutual legal assistance specifically to assist in combating and deterring money laundering.

i) Requirements

- **Evidentiary Test:** There is no evidentiary test.
- **Dual Criminality:** There is no dual criminality provision.
- **Reciprocity:** There is no reciprocity provision, however assistance is to be provided on the basis of “mutual cooperation” where there is no treaty.
- **Specialty:** There is no specialty provision.

ii) Restrictions and Exceptions

- **Double Jeopardy / Ongoing Proceedings:** There are no double jeopardy / ongoing proceedings provisions.
- **Human Rights:** There are no human rights provisions.
- **Death Penalty:** There are no death penalty provisions.
- **Political / Military Offence:** There are no political or military offences provisions.
- **National Interest:** Under **Art. 120** of the *Law on Criminal Procedure* and **Art. 34** of the *Decree on Anti-Money Laundering*, assistance may be refused if it would affect the sovereignty, security or stability of the nation, or any important interest of Lao PDR.
- **Bank Secrecy / Fiscal Measures:** There are no bank secrecy / fiscal measures provisions.

iii) Procedure

- **Form:** There are no general form requirements under the *Law on Criminal Procedure*. However **Art. 30** of the *Decree on Anti-Money Laundering* does specify the documents and information which must be contained within a request for assistance concerning a money laundering offence.
- **Language:** There is no provision regarding the language of requests.
- **Urgent Procedures:** There are no urgent procedure provisions.
- **Attendance of Officials:** There are no provisions regarding attendance of officials.

c) Transmission of Requests

- i) *Under ASEAN MLAT:* The Central Authority for Lao PDR is the Minister of Justice. Contact details are as follows:

*Minister of Justice
Ministry of Justice
P.O. Box 08
Lane Xang Avenue, Vientiane
LAO PEOPLE'S DEMOCRATIC REPUBLIC
Telephone No. : (856) 21-414-101
Facsimile No. : (856) 21-414-102*

- ii) *Under UNCAC:* [Information not available]
- iii) *Under UNTOC:* The Competent National Authority under UNTOC is the Ministry of Public Security.
- iv) *Under National Law:* MLA requests are submitted through diplomatic channels to the Ministry of Foreign Affairs.

C. MUTUAL LEGAL ASSISTANCE TO RECOVER PROCEEDS OF CRIME

a) Treaties

- i) *Multilateral:* Lao PDR is a party to UNTOC, UNCAC and the ASEAN MLAT, which provide for mutual legal assistance to identify and recover proceeds of crime.
- ii) *Bilateral:* Lao PDR has concluded a bilateral mutual legal assistance treaty with Vietnam, which makes limited provisions for mutual legal assistance regarding proceeds of crime.

b) National Law

Section IV of the *Decree on Anti-Money Laundering* concerns the provision of mutual legal assistance in combating and deterring money laundering, which is likely to include at least the identification and tracing of proceeds of crime. There are no other specific provisions in the law of Lao PDR regarding the recovery of proceeds of crime, or the provision of mutual legal assistance to recover proceeds of crime, however cooperation may be provided informally on a police to police basis.

- **Definition of Proceeds of Crime:** There is no definition.
- **Identification and Tracing:** There are no provisions regarding identification and tracing, however this may be undertaken upon an informal request from a foreign authority.
- **Freezing and Seizure:** There are no specific provisions regarding freezing and seizure, however this may be undertaken on the basis of a formal mutual legal assistance request from a foreign authority.
- **Confiscation:** There are no provisions regarding confiscation, and this cannot be undertaken upon request of a foreign authority.
- **Repatriation of Funds:** There are no provisions regarding repatriation of funds.

D. EXTRADITION

a) Extradition Treaties

- i) *Multilateral:* Lao PDR is a party to UNTOC and UNCAC. However Lao PDR has lodged a declaration under UNCAC to the effect that it does not consider UNCAC to be a legal basis for extradition. Instead it declares that bilateral agreements will be the basis for extradition between the Lao PDR and other States Parties in respect of any offences.

- ii) *Bilateral*: Lao PDR has concluded bilateral extradition treaties with Cambodia, PR China and Thailand. The mutual legal assistance treaty with Vietnam also contains provisions on extradition.

b) National Law on Extradition

There is no specific national law on extradition in Lao PDR. The only provision concerning extradition is in **Art. 119** of the *Law on Criminal Procedure*, which provides that mutual legal assistance may have the objective of extradition or exchange of prisoners.

- i) *Requirements*: There are no specific requirements for an extradition request under national law.
- ii) *Restrictions and Exceptions*: There are no restrictions or exceptions specified under national law, however extradition may be refused as a form of mutual legal assistance under **Art. 120** of the *Law on Criminal Procedure* if it would affect the sovereignty, security or stability of the nation, or any important interest of the Lao PDR.
- iii) *Procedure*
- **Form and Content**: The extradition request should include the identity / location of the accused; nature of the offence; details of the offence; details of conviction (if any); possible penalty; what evidence is available; and purpose of request.
 - **Language**: There are no provisions regarding the language of the request.
 - **Transmission**: Requests are to be transmitted through diplomatic channels to the Ministry of Foreign Affairs.
 - **Time Limits**: Initial 2 days detention with an option to extend for 2 months for preventive measures.

Malaysia

A. LEGAL RESPONSE TO TRAFFICKING IN PERSONS

- a) **UN Protocols:** Malaysia is a party to the UN Trafficking Protocol but is not a party to the Migrant Smuggling Protocol.
- b) **Domestic Legislation:** Trafficking in persons, together with a range of trafficking related offences, is criminalised in the *Anti-Trafficking in Persons Act 2007*.

B. MUTUAL LEGAL ASSISTANCE

a) Mutual Legal Assistance Treaties

- i) *Multilateral:* Malaysia is a party to UNTOC, UNCAC and to the ASEAN MLAT.
- ii) *Bilateral:* Malaysia has concluded bilateral mutual legal assistance treaties with Australia, Hong Kong SAR and the United States of America.

b) National Law on Mutual Legal Assistance

Malaysia's national law on mutual legal assistance is the *Mutual Assistance in Criminal Matters Act* (Act. 621 of 2002). Under this Act, assistance may be provided to a State with which Malaysia has a mutual legal assistance agreement and which is declared to be a "prescribed foreign State". Assistance under this Act may also be provided to other States upon a direction being given by the Minister responsible for legal affairs.

Assistance may be provided under this Act in relation to an offence of trafficking in persons, as this is a "serious offence" with a maximum penalty of more than one year imprisonment.

i) Requirements

- **Evidentiary Test:** There is no general evidentiary test. However a search warrant under **Sec. 36** will only be given if there are reasonable grounds for believing that the person committed or benefited from a serious foreign offence, and that the thing sought is likely to be of substantial value to the criminal matter.
- **Dual Criminality:** A request shall be refused under **Sec. 20(1)(f)** if the relevant act or omission, if committed in Malaysia, would not have been an offence.
- **Reciprocity:** There are no provisions requiring reciprocity.
- **Specialty:** A request shall be refused under **Sec. 20(1)(j)** if the requesting State fails to undertake that the thing requested will not be used for a matter other than the criminal matter in respect of which the request was made, unless the Attorney General consents under **Sec. 20(2)**.

ii) Restrictions and Exceptions

- **Double Jeopardy / Ongoing Proceedings:** A request shall be refused under **Sec. 20(1)(e)** if the person has already been convicted, acquitted or pardoned, or has undergone punishment in the foreign state, for the same offence.
- **Human Rights:** A request shall be refused under **Sec. 20(1)(d)** if there are substantial grounds for believing that the request was made for the purpose of investigating, prosecuting, punishing or otherwise persecuting the person on the grounds of race, religion, sex, ethnic origin, nationality or political opinions.
- **Death Penalty:** There is no provision for a death penalty exception.

- **Political / Military Offence:** A request shall be refused under **Sec. 20(1)(b)** if it relates to an offence of a political nature, and under **Sec. 20(1)(c)** if it relates to a military offence. **Sec. 21** further lists a number of offences which will not be regarded as political offences.
- **National / Public Interest:** A request shall be refused under **Sec. 20(1)(i)** if its provision would affect the sovereignty, security, public order, or other essential public interest of Malaysia.
- **Bank Secrecy / Fiscal Measures:** There are no bank secrecy / fiscal measures provisions.

iii) *Procedure*

- **Form:** The form and contents requirements for requests are contained in **Sec. 19(3)**.
- **Language:** There is no provision which prescribes the language of the request.
- **Urgent Procedures:** There are no urgent procedure provisions.
- **Attendance of Officials:** There are no provisions for attendance of officials from the Requesting State.

c) **Transmission of Requests**

- i) *Under ASEAN MLAT:* The Central Authority under the ASEAN MLAT is the Attorney General. Contact details are as follows:

*Attorney General of Malaysia
c/o International Affairs Division
Attorney General's Chambers
Level 6, Block C3
Federal Government Administrative Centre
62512 Putrajaya
MALAYSIA*

Telephone No. :603-8885 5000

Facsimile No. :603-8888 3518

- ii) *Under UNCAC:* [Information not available]
- iii) *Under UNTOC:* [Information not available]
- iv) *Under National Law:* Under **Sec. 19** of the *Mutual Assistance in Criminal Matters Act* a request for assistance shall be made to the Attorney General through diplomatic channels.

C. **MUTUAL LEGAL ASSISTANCE TO RECOVER PROCEEDS OF CRIME**

a) **Treaties**

- i) *Multilateral:* Malaysia is a party to UNTOC, UNCAC and the ASEAN MLAT, which provide for mutual legal assistance to identify and recover proceeds of crime.
- ii) *Bilateral:* Mutual assistance to identify and recover the proceeds of crime is provided for in **Art. 20** of the *Treaty between the Government of Malaysia and the Government of Australia on Mutual Assistance in Criminal Matters* (2006), and in **Art. 19** of the *Treaty between the Government of Malaysia and the Government of the Hong Kong Special Administrative Region of the People's Republic of China Concerning Mutual Legal Assistance in Criminal Matters*.

b) **National Law**

The *Mutual Assistance in Criminal Matters Act* contains a number of provisions specifically relating to the identification and recovery of proceeds of crime.

- **Definition of Proceeds of Crime:** “Proceeds of crime” is defined in **Sec. 2** as:

“...any property suspected, or found by a court, to be property directly or indirectly derived or realised as a result of the commission of an offence or to represent the value of property and other benefits derived from the commission of an offence”.
- **Identification and Tracing: Sec. 3(h)** states that the object of the Act is for Malaysia to provide and obtain international assistance in criminal matters, including in the identification and tracing of proceeds of crime. This assistance may be provided informally on a police to police basis.²
- **Freezing and Seizure:** Under **Sec. 31(1)(b)** a foreign State may request assistance in the restraining of property which may become the subject of a foreign forfeiture order. Under **Sec. 35** assistance may also be provided to conduct search and seizure.
- **Confiscation:** Requests for enforcement of a foreign forfeiture order may be made under **Sec. 31(1)(a)**. A foreign forfeiture order must be registered by application to the High Court in accordance with **Sec. 32** of the Act.
- **Repatriation of Funds:** There are no provisions regarding the repatriation of funds to the Requesting State.

NOTE: Trafficking in persons is intended to be added as a predicate offence under the *Anti-Money Laundering Act 2001*. This will enliven the provisions of that Act in relation to the identification, tracing, freezing, seizure and confiscation of the proceeds of a trafficking in persons offence.

D. EXTRADITION

a) Extradition Treaties

- i) *Multilateral:* Malaysia is a party to UNTOC and UNCAC.
- ii) *Bilateral:* Malaysia has bilateral extradition treaties with Australia, Hong Kong SAR, Indonesia, Thailand, and the United States of America.

b) National Law on Extradition

The law governing extradition to and from Malaysia is contained within the *Extradition Act 1992* (Act No. 492). Part V of this Act also specifically provides for the enforcement of warrants issued in Brunei Darussalam and Singapore as if they were warrants issued in Malaysia, and the transfer of the person in custody to the relevant court in Brunei Darussalam or Singapore.

Under the Act, an offence of trafficking in persons is an extradition offence, as it is an offence punishable in Malaysia by more than one year imprisonment.

i) Requirements

- **Evidentiary Test:** Under **Sec. 19(4)** a prima facie case must be established, unless dispensed with in an agreement between Malaysia and the Requesting State (**see Sec.4**).
- **Dual Criminality:** Under **Sec. 6(2)** an extradition offence must be punishable in both the Requesting State and in Malaysia.
- **Specialty:** Under **Sec. 8(e)** a person will not be surrendered unless provision is made in the law of the Requesting State or in the extradition agreement, which prevents the person being prosecuted for other offences. Under **Sec. 10**, consent must be sought from the Minister for Home Affairs where a person has been returned to the requesting country and that country intends to prosecute him / her for an offence other than the offence for which the person was extradited.

² Information provided by ASEAN Member State practitioners to the ASEAN Workshop on International Legal Cooperation in Trafficking in Persons Cases, Bangkok, November 2009.

ii) *Restrictions and Exceptions*

- **Double Jeopardy / Ongoing Proceedings:** There are no double jeopardy or ongoing proceedings provisions.
- **National:** Under **Sec. 49(1)(a)** the Minister for Home Affairs has a discretion to refuse surrender if the person is a Malaysian citizen.
- **Political / Military Offence:** Under **Sec. 8(a)** a person shall not be surrendered if the relevant offence is a political offence. **Section 9** lists offences which are not to be regarded as political offences.
- **Human Rights:** Under **Sec. 8(b)** and **(c)** a person shall not be surrendered if the request is made for the purpose of prosecuting or punishing the person on account of his / her race, religion, nationality or political opinions, or if the person would be prejudiced in his / her trial for these reasons.
- **Death Penalty:** There is no provision for a death penalty exception.
- **Jurisdiction:** Under **Sec. 49(1)(b)** the Minister for Home Affairs has a discretion to refuse surrender if Malaysian courts have jurisdiction to prosecute the extradition offence.

iii) *Procedure*

- **Provisional Arrest:** A provisional arrest warrant may be issued under **Sec. 13(b)** if the Magistrate considers that it is warranted.
- **Form and Contents:** The documentary requirements for an extradition request are contained in **Sec. 12(2)**.
- **Language:** There is no provision prescribing the language of the request.
- **Transmission:** Under **Sec. 12(1)** a request for extradition is to be made to the Minister for Home Affairs by a diplomatic representative of the Requesting State.
- **Consent:** A person may consent to waiver of extradition proceedings under **Sec. 22**.
- **Time Limits:** No time limit is specified, however under **Sec. 16(1)** the Magistrate must fix a time of “reasonable” period for remand, during which the request must be received.

Myanmar

A. LEGAL RESPONSE TO TRAFFICKING IN PERSONS

- a) **UN Protocols:** Myanmar is a party to both the UN Trafficking Protocol and the Migrant Smuggling Protocol.
- b) **Domestic Legislation:** Trafficking in persons is criminalised in the *Anti-Trafficking in Persons Law of 2005*.

B. MUTUAL LEGAL ASSISTANCE

a) Mutual Legal Assistance Treaties

- i) *Multilateral:* Myanmar is a party to UNTOC and to the ASEAN MLAT and has signed but not yet ratified UNCAC.
- ii) *Bilateral:* Myanmar has not entered into any bilateral treaties on mutual legal assistance.

b) National Law on Mutual Legal Assistance

The national law on the provision of mutual legal assistance in Myanmar is the *Mutual Assistance in Criminal Matters Law* (Law No. 4/2004). Under this law, assistance may be provided in relation to an offence of trafficking in persons, as it is an offence punishable by more than one year imprisonment.

i) Requirements

- **Evidentiary Test:** There is no evidentiary test provision.
- **Dual Criminality:** Dual criminality is required under **Sec. 3(a)**.
- **Reciprocity:** Under **Sec. 16** a reciprocity undertaking may be required if the requesting State is not a party to a treaty with Myanmar.
- **Specialty:** There is no provision requiring specialty.

ii) Restrictions and Exceptions

- **Double Jeopardy / Ongoing Proceedings:** If the Central Authority is of the opinion that a request would interfere with an ongoing investigation, prosecution or proceeding in Myanmar, it may postpone the request in whole or in part under **Sec. 17**.
- **Human Rights:** A request may be refused under **Sec. 18(c)** if there is cause to believe that the race, sex, religion, nationality, ethnic origin, political opinion or personal standing of any individual “is being encroached”.
- **Death Penalty:** There is no provision for a death penalty exception.
- **Political / Military Offence:** A request may be refused under **Sec. 18(e)** if it is a military offence.
- **National / Public Interest:** A request may be refused under **Sec. 18(b)** if it encroaches on the sovereignty, security, law and order or public interests of Myanmar.
- **Bank Secrecy / Fiscal Measures:** The Act specifically states in **Sec. 18** that requests shall not be refused on the ground of bank and financial institutions secrecy.

iii) Procedure

- **Form:** The form and contents requirements for a request are contained in **Sec. 12**.
- **Language:** Under **Sec. 12**, the request must be in either the English or Myanmar language.

- **Urgent Procedures:** Under **Sec. 13** the Requesting State may, in urgent circumstances, make the request orally by telephone, facsimile or electronic mail. A formal letter of request must follow “without delay”.
- **Attendance of Officials:** There are no provisions regarding attendance of officials.

c) Transmission of Requests

- i) *Under ASEAN MLAT:* The Central Authority under the ASEAN MLAT is the Attorney General. Contact details are as follows:

*Attorney General of Myanmar
c/o Office of the Attorney General
Union of Myanmar
Building No. C25
Naypyitaw
UNION OF MYANMAR
Telephone No. : +95-67-404 054
Facsimile No. : +95-67-404 146*

- ii) *Under UNCAC:* [Information not available]

- iii) *Under UNTOC:* The Competent National Authority under UNTOC is the Ministry for Home Affairs. Contact details are as follows:

*Ministry of Home Affairs
Office Building No.8, Administrative Zone
Naypyitaw
UNION OF MYANMAR
Telephone No. : +95-1-412-135
Facsimile No. : +95-1- 412-015*

- iv) *Under National Law:* The Central Authority is established under Chapter III of the *Mutual Assistance in Criminal Matters Law*, and is chaired by the Minister for Home Affairs. Under **Sec. 10** States which are parties to multilateral or bilateral treaties with Myanmar may send their requests directly to the Central Authority. States which do not have a treaty with Myanmar must send their requests to the Central Authority through diplomatic channels.

C. MUTUAL LEGAL ASSISTANCE TO RECOVER PROCEEDS OF CRIME

a) Treaties

- i) *Multilateral:* Myanmar is a party to both UNTOC and the ASEAN MLAT, which provide for mutual legal assistance to identify and recover proceeds of crime.
- ii) *Bilateral:* Myanmar has not entered into any bilateral treaties on mutual legal assistance to recover proceeds of crime.

b) National Law

Under Chapter V of the *Mutual Assistance in Criminal Matters Law*, assistance may be provided to search, seize, control, issue a restraining order or confiscate material in conformity with the existing laws.

The *Control of Money Laundering Law* also states that its objectives include “to co-operate with international organizations, regional organizations, and neighbouring countries for controlling money and property obtained by illegal means” (**Art. 4(d)**). This Act provides for the foundation of an Investigation Body to conduct investigations into money laundering. However there are no specific provisions in this law relating to mutual legal assistance in the identification and recovery of proceeds of crime.

D. EXTRADITION

a) Extradition Treaties

- i) *Multilateral*: Myanmar is a party to UNTOC, however has made a reservation to the effect that it will not be bound by Article 16 concerning extradition. Myanmar has signed but not yet ratified UNCAC.
- ii) *Bilateral*: Myanmar has not entered into any bilateral extradition treaties.

b) National Law on Extradition³

The *Burma Extradition Act* 1904 has been suspended in Myanmar. Requests for extradition are considered on a case-by-case basis. Citizens will not be extradited, and extradition for a military offence may also be refused on a case-by-case basis. A request is to be transmitted through diplomatic channels to the Chair of the Central Authority.

The information required includes:

- The name and designation of the authority making the request;
- A statement setting out a summary and the nature of the case relevant to the request;
- The identity, address and nationality of the person concerned;
- Procedures for rendering assistance in obtaining evidence;
- Time period within which request is to be complied with;
- Information and evidence to be obtained;
- Any confidentiality requirements;
- Extract of relevant law, rules and procedures in the Requesting State regarding assistance requested;
- Name, function and responsibility of the person conducting the investigation, prosecution or judicial proceeding in the Requesting State;
- Any other necessary information.

³ Information provided by ASEAN Member State practitioners to the ASEAN Workshop on International Legal Cooperation in Trafficking in Persons Cases, Bangkok, November 2009.

Philippines

A. LEGAL RESPONSE TO TRAFFICKING IN PERSONS

- a) **UN Protocols:** The Philippines is a party to both the UN Trafficking Protocol and the Migrant Smuggling Protocol.
- b) **Domestic Legislation:** Trafficking in persons is criminalised in the *Anti-Trafficking in Persons Act of 2003* (Republic Act No. 9208).

B. MUTUAL LEGAL ASSISTANCE

a) Mutual Legal Assistance Treaties

- i) *Multilateral:* The Philippines is a party to UNTOC, UNCAC and to the ASEAN MLAT.
- ii) *Bilateral:* The Philippines has concluded bilateral treaties on mutual legal assistance with Australia, PR China, Hong Kong SAR, Switzerland and the United States of America.

b) National Law on Mutual Legal Assistance

There is no dedicated national law on mutual legal assistance in the Philippines. There are some provisions relating to the provision of mutual legal assistance in detecting and combating money laundering contained within the *Anti-Money Laundering Act* (2001), however trafficking in persons is not currently a predicate offence for an offence of money laundering under this Act.

c) Transmission of Requests

- i) *Under ASEAN MLAT:* The Central Authority under the ASEAN MLAT is the Secretary for Justice. Contact details are as follows:

*Secretary for Justice
c/o Department of Justice
Padre Faura St., Ermita
1000 Manila
REPUBLIC OF THE PHILIPPINES

Telephone No. : +63-2-525-0764
Facsimile No. : +63-2-525-2218*

- ii) *Under UNCAC:* The declared Central Authority under UNCAC is the Department of Justice (contact details above).
- iii) *Under UNTOC:* The Competent National Authority under UNTOC is the Office of the Chief State Counsel in the Department of Justice (contact details above).
- iv) *Under National Law:* Requests for assistance under the *Anti-Money Laundering Act* (2001) are made to the Anti-Money Laundering Committee established under that Act. Contact details for the Anti-Money Laundering Committee are as follows:

*Anti-Money Laundering Committee
5th Floor, EDPC Building
Bangko Sentral ng Pilipinas (BSP) Complex
Mabini corner Vito Cruz Street, Malate
Manila, PHILIPPINES

Phone: +63-2-524-7011
Facsimile: +63-2-524-6085
Email: secretariat@amlc.gov.ph / amlc@bsp.gov.ph*

C. MUTUAL LEGAL ASSISTANCE TO RECOVER PROCEEDS OF CRIME

a) Treaties

- i) *Multilateral*: The Philippines is a party to UNTOC, UNCAC and the ASEAN MLAT, which provide for mutual legal assistance to identify and recover proceeds of crime.
- ii) *Bilateral*: The Philippines has concluded bilateral treaties on mutual legal assistance with Australia, PR China, Hong Kong SAR, Switzerland and the United States of America.

b) National Law

Section 13 of the *Anti-Money Laundering Act (2001)* provides for the making of mutual assistance requests both by the Philippines and to the Philippines, in the investigation or prosecution of money laundering offences. Under this section a request may be refused where the action sought contravenes any provision of the *Constitution of the Republic of the Philippines*, or the execution of a request is likely to prejudice the national interest of the Philippines. The form and content requirements of a request are listed in **Sec.13(e)(2)**.

- **Definition of Proceeds of Crime:** Under **Sec. 3(f)** "Proceeds" refers to an amount derived or realized from an unlawful activity.
- **Identification and Tracing / Freezing and Seizure:** Under **Sec. 13(b)(1)** the Anti-Money Laundering Committee may execute a request for assistance by tracking down, freezing, restraining and seizing assets alleged to be the proceeds of any unlawful activity.
- **Confiscation:** Under **Sec. 13(b)(3)** the Anti-Money Laundering Committee may execute a request for assistance by applying for an order of forfeiture of any monetary instrument or property.
- **Repatriation of Funds:** There are no provisions regarding the repatriation of funds to the Requesting State.

D. EXTRADITION

a) Extradition Treaties

- i) *Multilateral*: The Philippines is a party to UNTOC and UNCAC, however has lodged a declaration under UNCAC to the effect that it does not consider UNCAC to be a legal basis for extradition.
- ii) *Bilateral*: The Philippines has concluded bilateral extradition treaties with Australia, Canada, PR China, Hong Kong SAR, Indonesia, Korea, Switzerland, Thailand, and the United States of America.

b) National Law on Extradition

The national law on extradition is the *Philippine Extradition Law* (Presidential Decree No. 1069). This law provides for extradition only where there is an applicable treaty or convention. Under this law, trafficking in persons will be an extraditable offence if it is punishable by imprisonment under the laws of the Requesting State, as it is punishable by imprisonment in the Philippines, and if it is an extraditable offence in accordance with the applicable treaty.

i) Requirements

- **Evidentiary Test:** Under **Sec. 10**, a *prima facie* case must be shown.
- **Dual Criminality:** Under **Sec. 3(a)** the extradition offence must be punishable by imprisonment under the laws both of the Requesting State and the Philippines.
- **Specialty:** There is no provision requiring specialty.

ii) *Restrictions and Exceptions*: There are no restrictions or exceptions under the *Philippine Extradition Law*, however the restrictions and exceptions under the relevant treaty will apply.

iii) Procedure

- **Provisional Arrest**: Under **Sec. 20** a provisional arrest of the accused pending receipt of the request may be made in cases of urgency. A request for provisional arrest shall be sent to the Director of the National Bureau of Investigation, Manila, either directly or through diplomatic channels.
- **Form and Contents**: The form and content requirements are set out in **Sec. 4(2)**.
- **Language**: There is no provision prescribing the language of the request.
- **Transmission**: Under **Sec. 4(2)** the request is to be transmitted through diplomatic channels to the Secretary of Foreign Affairs.
- **Consent**: There are no provisions for consent to extradition.
- **Time Limits**: If the request is not received within 20 days of the provisional arrest of the accused, the accused may be released under **Sec. 20(d)**.

Singapore

A. LEGAL RESPONSE TO TRAFFICKING IN PERSONS

- a) **UN Protocols:** Singapore is not a party to either the UN Trafficking Protocol or the Migrant Smuggling Protocol.
- b) **Domestic Legislation:** Trafficking of women and girls is criminalised in the *Women's Charter* (Chapter 353). The use of slaves, forced labour, and other trafficking related offences are criminalised in the *Penal Code* (Chapter 224), the *Prevention of Corruption Act* (Chapter 241) and the *Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act* (Chapter 65A).

B. MUTUAL LEGAL ASSISTANCE

a) Mutual Legal Assistance Treaties

- i) *Multilateral:* Singapore is a party to UNTOC, UNCAC and to the ASEAN MLAT.
- ii) *Bilateral:* Singapore has concluded bilateral mutual legal assistance treaties with Hong Kong SAR and India.

b) National Law on Mutual Legal Assistance

The *Mutual Assistance in Criminal Matters Act* (Chapter 190A) governs the provision of mutual legal assistance in Singapore. Assistance under this Act may be provided in relation to foreign offences where the relevant conduct would constitute a "serious offence" listed in the Second Schedule to the *Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act* (Chapter 65A) ("the Confiscation of Benefits Act"). Trafficking in women and girls under the *Women's Charter*, and a number of trafficking-related offences under the *Penal Code*, are listed in the Schedule and therefore may be the subject of a mutual legal assistance request.

i) Requirements

- **Evidentiary Test:** A request shall be refused under **Sec. 20(1)(h)** if the thing requested for is of insufficient importance to the investigation. Where production orders (**Sec. 22**) or a search warrant (**Sec. 34**) are requested, the court must be satisfied that there are reasonable grounds to suspect that a person has carried on or benefited from a "serious offence", and that the material sought is likely to be of substantial value to the case.
- **Dual Criminality:** A request shall be refused under **Sec. 20(1)(f)** if the relevant act or omission would not constitute an offence if committed in Singapore. A request will also be refused under **Sec. 20(1)(l)** if the provision of the assistance could prejudice a criminal matter in Singapore.
- **Reciprocity:** Under **Sec. 16**, a Requesting State that does not have a mutual legal assistance agreement with Singapore may be provided with assistance if the appropriate authority of that State gives an undertaking to the Attorney-General of Singapore that the Requesting State will comply with a future request by Singapore for similar assistance in a criminal matter involving a similar offence.
- **Specialty:** A request shall be refused under **Sec. 20(1)(j)** if the appropriate authority from the Requesting State fails to undertake that the thing requested will not be used for a matter other than the criminal matter in respect of which the request was made, except with the consent of the Attorney-General.

ii) *Restrictions and Exceptions*

- **Double Jeopardy / Ongoing Proceedings:** A request shall be refused under **Sec. 20(1)(e)** if the person has already been convicted, acquitted, pardoned or undergone punishment in the foreign country for the relevant offence.
- **Human Rights:** A request shall be refused under **Sec. 20(1)(d)** if there are substantial grounds for believing that the request was made for the purpose of investigating, prosecuting, punishing or otherwise causing prejudice to a person on account of the person's race, religion, sex, ethnic origin, nationality or political opinions.
- **Death Penalty:** There is no death penalty exception.
- **Political / Military Offence:** A request shall be refused under **Sec. 20(1)(b)** if the relevant offence is of a political character, and under **Sec. 20(1)(c)** if it is a military offence.
- **National / Public Interest:** A request shall be refused under **Sec. 20(1)(i)** if it is contrary to public interest to provide the assistance.
- **Bank Secrecy / Fiscal Measures:** There are no bank secrecy / fiscal measures provisions.

iii) *Procedure*

- **Form:** The form and contents requirements for requests are contained in **Sec. 19(2)**. Model forms are available at http://www.agc.gov.sg/criminal/mutual_legal_asst.htm
- **Language:** There is no statutory provision which prescribes the language of the request. Nonetheless, the request should be in English or a translation into English should be attached with the request.
- **Urgent Procedures:** There are no urgent procedure provisions.
- **Attendance of Officials:** There are no provisions for attendance of officials from the Requesting State.

c) **Transmission of Requests**

- i) *Under UNTOC, UNCAC and ASEAN MLAT:* The Central Authority is the Attorney-General. Contact details are as follows:

*Criminal Justice Division
The Attorney-General's Chambers
The Adelphi
1 Coleman St, #10-00 Singapore 179803,
REPUBLIC OF SINGAPORE*

*Telephone No. : +(65)- 6336 1411
Facsimile No. : +(65)-6332 5984*

For further information on mutual legal assistance in Singapore, please refer to the following website - www.agc.gov.sg/criminal/mutual_legal_asst.htm

- ii) *Under National Law:* Under **Sec. 19(1)** of the *Mutual Assistance in Criminal Matters Act*, all requests for assistance must be made to the Attorney-General.

C. MUTUAL LEGAL ASSISTANCE TO RECOVER PROCEEDS OF CRIME

a) **Treaties**

- i) *Multilateral:* Singapore is a party to UNTOC, UNCAC and the ASEAN MLAT, which provide for mutual legal assistance to identify and recover proceeds of crime.
- ii) *Bilateral:* Singapore has concluded bilateral mutual legal assistance treaties with Hong Kong SAR, and with India. These treaties state that assistance shall include tracing, restraining, forfeiting and confiscating the proceeds and instrumentalities of criminal activities.

b) National Law

The national law in Singapore regarding the recovery of proceeds of crime is the *Confiscation of Benefits Act*. This Act applies to offences listed in the Second Schedule to the Act, including trafficking in women and girls under the *Women's Charter* and trafficking related offences under the *Penal Code*, *Prevention of Corruption Act* and *Confiscation of Benefits Act*, and further applies to foreign offences where the relevant conduct would constitute an offence listed in the Schedule.

Section 3 of the *Mutual Assistance in Criminal Matters Act* ("MACMA") also states that the object of the Act is to facilitate the provision and obtaining, by Singapore, of international assistance in criminal matters, including the recovery, forfeiture or confiscation of property and the restraining of dealings in property, or the freezing of assets.

- **Definition of Proceeds of Crime:** Under **Sec. 8** of the *Confiscation of Benefits Act*, the benefits derived by any person from criminal conduct, shall be any property or interest (including income accruing from such property or interest) held by the person at anytime, being property or interest that is disproportionate to his / her known sources of income, and the holding of which cannot be explained to the satisfaction of the court.
- **Identification and Tracing:** Orders for production of documents or other items may be sought under **Sec. 22** of MACMA. Searches may be carried out upon request under **Secs. 33-34** of MACMA.
- **Freezing and Seizure:** Freezing and seizure of proceeds of crime may be carried out upon request under **Secs. 29, 33-35** of MACMA.
- **Confiscation:** Under **Sec. 30** of MACMA, the High Court may register an external confiscation order made by a court in the Requesting State, upon application by the Attorney-General on behalf of the government of the Requesting State.
- **Repatriation of Funds:** The appropriate authority of a Requesting State may make a request under **Sec. 29** of MACMA to assist in the enforcement and satisfaction of a foreign confiscation order made in any judicial proceedings instituted in that State against any property that is reasonably believed to be located in Singapore.

D. EXTRADITION

a) Extradition Treaties

- i) Multilateral:* Singapore is a party to UNTOC and UNCAC, however has lodged a declaration under UNCAC to the effect that it does not consider UNCAC to be a legal basis for extradition.
- ii) Bilateral:* Singapore has concluded an extradition treaty with Hong Kong SAR. It also has extradition arrangements with Germany, the United States of America, and 40 other Commonwealth countries, as well as reciprocal arrangements with Malaysia and Brunei for the backing of warrants issued in the respective countries. Both Singapore and Indonesia have signed but not yet ratified a bilateral extradition treaty.

b) National Law on Extradition

The national law on extradition is the *Extradition Act* (Chapter 103). Under this Act, extradition is only available to "foreign States" with which Singapore has an extradition treaty, or to "declared Commonwealth countries". However Part V of this law also specifically provides for extradition to Malaysia through the execution of arrest warrants issued in Malaysia and endorsed by a Magistrate in Singapore.

Offences for which extradition is permitted are listed in **Schedule 1** to the Act, and include "*Procuring, or trafficking in, women or young persons for immoral purposes*", kidnapping, abduction, false imprisonment, "*dealing in slaves*", and abetment and criminal conspiracy "*to commit a serious crime, where the serious crime is transnational in nature and involves an organized criminal group*". (The expressions "serious crime", "organized criminal group" and "transnational" have the meanings given to those expressions in UNTOC).

i) Requirements

- **Evidentiary Test:** Under **Sec. 11** (for foreign States) and **Sec. 25** (for declared Commonwealth countries) such evidence must be produced as would justify a trial in Singapore if the act or omission constituting that crime had taken place in, or within the jurisdiction of Singapore.
- **Dual Criminality:** Under **Sec. 2** an “extradition crime” must be an offence under the law of the Requesting State, and the relevant conduct must also, firstly, if it had taken place in Singapore or within the jurisdiction of Singapore, constitute an offence under the law of Singapore, and secondly, be described in the First Schedule to the Extradition Act.
- **Specialty:** Under **Sec. 7(2)** (for foreign States) and **Sec. 22(3)** (for declared Commonwealth countries) a person shall not be surrendered unless there is provision in the law of the Requesting State or in the relevant extradition treaty or agreement, or the Requesting State has given an undertaking to Singapore, to ensure that the person is not detained and tried in the Requesting State for an offence other than the extradition offence, and is not extradited to a third country.

ii) Restrictions and Exceptions

- **Double Jeopardy / Ongoing Proceedings:** Under **Sec. 7(3)** (for foreign States) and **Sec. 21(2)** (for declared Commonwealth countries) a person who is held in custody, or has been admitted to bail, or is undergoing a sentence for a conviction in Singapore, shall not be surrendered. Further, under **Sec. 7(4)** (for foreign States) and **Sec. 21(3)** (for declared Commonwealth countries) a person shall not be surrendered if he / she has been acquitted, pardoned, or has undergone the punishment for the extradition offence or another offence constituted by the same conduct.
- **Citizens:** There is no exception for the extradition of citizens.
- **Political / Military Offence:** Under **Sec. 7(1)** (for foreign States) and **Sec. 21(1)** (for declared Commonwealth countries) a person shall not be surrendered if the extradition offence is of a political character.
- **Human Rights:** Under **Sec. 8(1)** (for foreign States) and **Sec. 22(1)** (for declared Commonwealth countries) a request shall be refused if there are substantial grounds for believing that it was made for the purpose of prosecuting or punishing the person on account of race, religion, nationality or political opinions, or if the person’s trial would be prejudiced for these reasons.
- **Death Penalty:** There is no death penalty exception.
- **Jurisdiction:** There is no exception on the basis of Singapore having jurisdiction to prosecute the offence.

iii) Procedure

- **Provisional Arrest:** Under **Sec. 10** (for foreign States) and **Sec. 24** (for declared Commonwealth countries) a provisional arrest warrant may be issued if justified.
- **Form and Contents:** There are no form and content provisions.
- **Language:** There is no provision prescribing the language of the request. Nonetheless, request should be in English or a translation into English should be attached with the request.
- **Consent:** There are no provisions allowing the person to consent to extradition.
- **Time Limits:** Under **Sec. 11(2)** (for foreign States) and **Sec. 25(2)** (for declared Commonwealth countries), a Magistrate may remand a person brought before him / her, either in custody or on bail, for a period or periods not exceeding 7 days at any one time. If notice of an extradition request is not issued within “reasonable” time the person may be released: **Sec. 11(6)** (for foreign States) and **Sec. 25(6)** (for declared Commonwealth countries).

Thailand

A. LEGAL RESPONSE TO TRAFFICKING IN PERSONS

- a) **UN Protocols:** Thailand has signed but not yet ratified both the UN Trafficking Protocol and the Migrant Smuggling Protocol.
- b) **Domestic Legislation:** Trafficking in persons is criminalised in the *Anti-Trafficking in Persons Act B.E. 2551*.

B. MUTUAL LEGAL ASSISTANCE

a) Mutual Legal Assistance Treaties

- i) *Multilateral:* Thailand has signed but not yet ratified UNTOC, UNCAC and the ASEAN MLAT.
- ii) *Bilateral:* Thailand has concluded bilateral mutual legal assistance treaties with the following countries: Australia, Belgium, Canada, PR China, France, India, Korea, Norway, Peru, Poland, Sri Lanka, United Kingdom, and the United States of America.

b) National Law on Mutual Legal Assistance

In Thailand the national law on mutual legal assistance is the *Act on Mutual Assistance in Criminal Matters BE 2535*. Assistance under this Act may be provided in relation to an offence of trafficking in persons, as this is an offence punishable under the laws of Thailand.

i) Requirements

- **Evidentiary Test:** There is no general evidentiary test, however under **Sec. 23** there must be “reasonable grounds” for search and seizure.
- **Dual Criminality:** Under **Sec. 9(2)** the act which is the cause of a request must be an offence punishable under Thai laws, unless otherwise provided in the applicable mutual legal assistance treaty.
- **Reciprocity:** Under **Sec. 9(1)** reciprocity is required if the Requesting State does not have a mutual assistance treaty with Thailand.
- **Specialty:** There are no provisions requiring specialty.

ii) Restrictions and Exceptions

- **Double Jeopardy / Ongoing Proceedings:** Under **Sec. 11** the execution of a request may be postponed if it would interfere with an investigation, inquiry, prosecution or other criminal proceedings in Thailand.
- **Human Rights:** There are no human rights exceptions.
- **Death Penalty:** There is no provision for a death penalty exception.
- **Political Offence:** A request may be refused under **Sec. 9(3)** if the offence is a political offence. Under **Sec. 9(4)** assistance will not be provided in relation to a military offence.
- **National / Public Interest:** A request may be refused under **Sec. 9(3)** if it would affect national sovereignty or security, or other crucial public interests of Thailand.
- **Bank Secrecy / Fiscal Measures:** There is no bank secrecy / fiscal measures provision.

iii) Procedure

- **Form:** Under **Sec. 37** the request must be in line with the forms, rules, means, and conditions defined by the Central Authority (the Attorney General). Part 1 of the *Regulation of the Central Authority on Providing and Seeking Assistance Under the Act on Mutual Assistance in Criminal Matters BE 2537* sets out the requirements for a request from a foreign state.

- **Language:** Under **Art. 5** of the *Regulation of the Central Authority on Providing and Seeking Assistance Under the Act on Mutual Legal Assistance in Criminal Matters 1994*, the request must be translated into the Thai or English language .
- **Urgent Procedures:** There are no urgent procedures provisions.
- **Attendance of Officials:** There is no provision for the attendance of officials from the Requesting State.

c) Transmission of Requests

- Under ASEAN MLAT:* Thailand has not yet ratified the ASEAN MLAT and so has not designated a Central Authority under this treaty. However, under Thai national law the Attorney General is the Central Authority for all requests for mutual legal assistance in criminal matters, and therefore the Central Authority under the ASEAN MLAT will be the Attorney General.
- Under UNCAC and UNTOC:* Thailand has signed but not yet ratified UNCAC and UNTOC , and therefore has not designated a Competent National Authority under these treaties.
- Under National Law:* **Sec. 10** of the *Act on Mutual Assistance in Criminal Matters* provides that requests made under a treaty may be submitted directly to the Central Authority (the Attorney General). All other requests must be submitted through diplomatic channels. The contact details for the Office of the Attorney General are as follows:

*The Attorney General,
Central Authority,
Office of the Attorney General,
Na-Hupphoei Road,
Bangkok 10200,
THAILAND*

C. MUTUAL LEGAL ASSISTANCE TO RECOVER PROCEEDS OF CRIME

a) Treaties

- Multilateral:* Thailand has signed but has not ratified UNTOC, UNCAC and the ASEAN MLAT, and is therefore not bound by the provisions of those treaties regarding mutual legal assistance to identify and recover proceeds of crime.
- Bilateral:* Thailand has bilateral mutual legal assistance treaties with the following countries: Australia, Belgium, Canada, PR China, France, India, Korea, Norway, Peru, Poland, Sri Lanka, United Kingdom, and the United States of America.

b) National Law

Part 9 of the *Act on Mutual Assistance in Criminal Matters* makes provision for mutual assistance in the forfeiture or seizure of properties in Thailand.

- **Definition of Proceeds of Crime:** There is a definition of proceeds of crime in the *Money Laundering Control Act 1999* as follows:
“Assets related to an offense” means
 - 1) *money or assets derived from a predicate offense, or from supporting or assisting in the commission of a predicate offense;*
 - 2) *money or assets derived from the sale, distribution, or transfer in any manners the money or assets in (1); or*
 - 3) *Yields of the money and properties in (1) and (2).*

Notwithstanding that the money and assets in (1), (2), or (3) have been sold, distributed, transferred, or irrespective of whoever has possession thereof, or to whomever possession has been transferred, or under whose ownership the money or assets are registered.

- **Identification and Tracing:** A request for search and seizure may be executed under **Sec. 23**, and in accordance with the procedures in the *Criminal Procedure Code*. The *Criminal Procedure Code* provides that a search warrant may be obtained to search and seize any article that has been unlawfully obtained.
- **Freezing and Seizure / Forfeiture:** Under **Sec. 32** a request for forfeiture or seizure of property may only be executed where an order for forfeiture has been made by a Court in the Requesting State. In such a case, an application is made by Thai authorities to the Thai court with jurisdiction to make an order for forfeiture or seizure.
- **Repatriation of Funds:** There is no provision for the repatriation of funds. **Sec. 35** provides that the properties forfeited shall become the properties of the State (the Requested State). However, the law is under the revision process to amend this point.

D. EXTRADITION

a) Extradition Treaties

- i) *Multilateral:* Thailand has signed but has not yet ratified UNTOC and UNCAC.
- ii) *Bilateral:* Thailand has concluded bilateral extradition treaties with the following countries: Australia, Bangladesh, Belgium, Cambodia, PR China, Indonesia, Korea, Lao PDR, Malaysia, Philippines, United Kingdom, and the United States of America. Thailand also has treaty relations with a number of Commonwealth countries as a result of the *Extradition Treaty Between Great Britain and Siam 1911* (e.g. Australia, Canada, Malaysia, New Zealand, Singapore, Hong Kong and India).

b) National Law on Extradition

The Thai national law on extradition is the *Extradition Act B.E. 2551*. Trafficking in persons is an extraditable offence under this Act.

i) Requirements

- **Evidentiary Test:** Under **Sec. 19(2)** there must be reasonable grounds established on which the matter would be committed for trial if the offence had occurred in Thailand.
- **Dual Criminality:** Under **Sec. 7** the extradition offence must be an offence in both the requesting State and in Thailand.
- **Reciprocity:** If there is no treaty between Thailand and the Requesting State, a reciprocity undertaking must be given.
- **Specialty:** Under **Sec. 11** the person extradited cannot be prosecuted in the Requesting State for any offence other than the extradition offence, except in specified circumstances.

ii) Restrictions and Exceptions

- **Double Jeopardy / Ongoing Proceedings:** Under **Sec. 10** a person will not be extradited if they have already been prosecuted in either Thailand or the requesting State, and has been acquitted or convicted and served the penalty, or pardoned. Under **Sec. 24** the surrender of a person may be postponed if they have been charged or are serving a sentence for an offence in Thailand.
- **Citizens:** Under **Sec. 12** extradition of a Thai citizen may occur (1) where there is an extradition treaty with the requesting State; (2) if the person agrees; and (3) if the extradition is pursuant to a reciprocal condition between Thailand and the Requesting State.
- **Political / Military Offence:** Extradition for political or military offences is not permitted under **Sec. 9(1)**.

- **Human Rights:** There is no provision for a human rights exception.
- **Death Penalty:** Under **Sec. 29** where an extradition request is made by Thailand for an offence punishable by the death penalty in Thailand but not in the Requested State, a sentence of life imprisonment will be imposed instead.
- **Jurisdiction:** There is no exception to extradition in cases where Thailand has jurisdiction to prosecute.

iii) Procedure

- **Provisional Arrest:** In urgent cases, provisional arrest may be sought under **Sec. 15** pending the delivery of the extradition request.
- **Form and Contents:** Under **Sec. 8**, the request for extradition must conform to the requirements prescribed in the *Extradition Act of 2008*.
- **Language:** Under **Sec. 8** a request for extradition and supporting documents must be translated into the Thai language.
- **Transmission:** States which have an extradition treaty with Thailand may submit requests directly to the Central Authority (the Attorney General). States who do not have a treaty with Thailand must submit the request through diplomatic channels.
- **Consent:** Under **Sec. 28** a person may consent to their extradition.
- **Time Limits:** If the request is not received within 60 days of the provisional arrest (or within a different time period set by the court, but less than 90 days) the person shall be released under **Sec. 16**.

Vietnam

A. LEGAL RESPONSE TO TRAFFICKING IN PERSONS

- a) **UN Protocols:** Vietnam is not a party to the UN Trafficking Protocol or the Migrant Smuggling Protocol.
- b) **Domestic Legislation:** Trafficking in persons is criminalised in Art. 119 of the *Penal Code* (No. 15/1999/QH10).

B. MUTUAL LEGAL ASSISTANCE

a) Mutual Legal Assistance Treaties

- i) *Multilateral:* Vietnam is a party to the UNCAC and ASEAN MLAT and has signed but not yet ratified UNTOC.
- ii) *Bilateral:* Vietnam has concluded bilateral treaties on mutual legal assistance with PR China, Korea, Lao PDR and Mongolia.

b) National Law on Mutual Legal Assistance

The *Law on Mutual Legal Assistance* (Law No. 08/2007/QH12) provides for the mutual legal assistance in both civil and criminal matters. Assistance under this law may be given in relation to an offence of trafficking in persons, as this is an offence under the *Penal Code*.

i) Requirements

- **Evidentiary Test:** There is no general evidentiary test, however in a request for search and seizure the Requesting State must provide grounds for believing that the material sought is in Vietnam.
- **Dual Criminality:** A request will be refused under **Art. 21(1)(e)** if the relevant conduct does not constitute a criminal offence under the *Penal Code of Vietnam*.
- **Reciprocity:** There is no provision requiring reciprocity.
- **Specialty:** **Art. 27(1)** requires information or evidence provided by agencies in Vietnam to be used only for the purposes specified in the request.

ii) Restrictions and Exceptions

- **Double Jeopardy / Ongoing Proceedings:** A request will be refused under **Art. 21(1)(c)** if it is for prosecution of a person for criminal conduct for which that person has been convicted, acquitted or granted a general or special reprieve in Vietnam. Execution of a request may also be postponed under **Art. 21(2)** if it would cause obstacles to an investigation, prosecution, trial, or the enforcement of a judgment in Vietnam.
- **Human Rights:** There is no provision for a human rights exception.
- **Death Penalty:** There is no provision for a death penalty exception.
- **Political Offence:** There is no provision for a political offence exception.
- **National / Public Interest:** Under **Art. 21(1)(b)** a request will be refused if it may jeopardize the sovereignty or national security of Vietnam.
- **Bank Secrecy / Fiscal Measures:** There are no bank secrecy / fiscal measures provisions.

iii) Procedure

- **Form:** Under **Art. 7** the request must be in writing. The form and content requirements for a request are set out in **Art. 17** and **18**.

- **Language:** Under **Art. 5**, the request is to be in the language specified in the applicable treaty, or if no treaty exists, is to be translated into the language of the Requested State (i.e. Vietnam).
- **Urgent Procedures:** There are no urgent procedure provisions.
- **Attendance of Officials:** There are no provisions for the attendance of officials from the Requesting State.

c) Transmission of Requests

- i) *Under ASEAN MLAT:* The Central Authority under the ASEAN MLAT is the Minister of Public Security. Contact details are as follows:

*Ministry of Public Security
International Cooperation Department
No. 60 Nguyen Du , Hanoi
VIETNAM*

*Telephone No. : (+84) - 4694 0197
Facsimile No. : (+84) - 43942 4381*

- ii) *Under UNCAC:* Vietnam has designated the Ministry of Justice, Ministry of Security and the Supreme People's Procuracy as the national authorities which may receive requests for mutual legal assistance.

- iii) *Under UNTOC:* The Competent National Authority under UNTOC is the Ministry of Public Security (contact details above).

- iv) *Under National Law:* The Central Authority under national law is the Supreme People's Procuracy. Contact details are as follows:

*Supreme People Procuracy
44 Ly Thuong Kiet street
Hoan Kiem district, Hanoi
VIETNAM*

*Telephone No. : (+84) - 43825 5058
Facsimile No. : (+84) - 43825 5400*

C. MUTUAL LEGAL ASSISTANCE TO RECOVER PROCEEDS OF CRIME

a) Treaties

- i) *Multilateral:* Vietnam is a party to UNCAC and the ASEAN MLAT, which provide for mutual legal assistance to identify and recover proceeds of crime.
- ii) *Bilateral:* Vietnam has concluded bilateral treaties on mutual legal assistance with PR China, Korea and Lao PDR.

b) National Law

There is no national law which specifically concerns the provision of mutual legal assistance to identify or recover proceeds of crime. However there are provisions in the *Criminal Procedure Code* (No. 19/2003/QH11) and *Penal Code* concerning the restraining and confiscation of proceeds of crime, which may be applicable to a request for assistance.

- **Definition:** **Art. 41** of the Penal Code identifies the property to which confiscation procedures apply as including: "*Objects or money acquired through the commission of crime or the trading or exchange of such things*".
- **Identification and Tracing:** There are no provisions regarding identification or tracing.
- **Freezing and Seizure:** Under **Art. 146** of the *Criminal Procedure Code* property which may be the subject of a confiscation order may be restrained.

- **Confiscation:** Under **Arts. 40** and **41** of the *Penal Code*, property confiscation will apply to persons sentenced for offences with a maximum penalty of more than three years imprisonment.
- **Repatriation of Funds:** There are no provisions for the repatriation of funds to the Requesting State.

D. EXTRADITION

a) Extradition Treaties

- i) Multilateral:* Vietnam is a party to UNCAC but has declared that it does not consider UNCAC to be a legal basis for extradition. Instead, Vietnam has declared that extradition shall be conducted in accordance with Vietnamese law, on the basis of treaties on extradition and the principle of reciprocity.

Vietnam has also signed but not yet ratified UNTOC.

- ii) Bilateral:* Vietnam has concluded an extradition treaty with PR China. The mutual legal assistance treaty with Lao PDR also contains provisions on extradition.

b) National Law on Extradition

The national law on extradition is contained within Chapter IV of the *Law on Mutual Legal Assistance* (Law No. 08/2007/QH12). Trafficking in persons may be an extraditable offence, as it is punishable in Vietnam by imprisonment for more than one year.

i) Requirements

- **Evidentiary Test:** There is no evidentiary test provision.
- **Dual Criminality:** Under **Art. 33** extraditable offences must be punishable under the criminal laws of both Vietnam and the Requesting State.
- **Specialty:** Under **Art. 34** extradition shall be granted only if the Requesting State assures that it shall not prosecute the person sought or extradite that person to a third country for any other offence committed before surrender.

ii) Restrictions and Exceptions

- **Double Jeopardy / Ongoing Proceedings:** Under **Sec. 35(1)(c)** a request will be refused if the person whose extradition is sought has already been convicted by a Vietnamese court for the conduct to which the request relates, or the case has been suspended. A request may also be refused under **Sec. 35(2)(b)** if the person whose extradition is sought is being prosecuted in Vietnam for the offence for which extradition is requested.
- **Citizens:** A Vietnamese citizen cannot be extradited (**Sec. 35(1)(a)**).
- **Political / Military Offence:** There is no exception for political or military offences.
- **Human Rights:** Under **Sec. 35(1)(d)** a request will be refused if there are reasonable grounds to believe that it has been made with a view to prosecuting or punishing the person sought by reason of race, religion, sex, nationality, social status, or political opinion.
- **Death Penalty:** There is no provision for a death penalty exception.
- **Jurisdiction:** There is no exception where Vietnam has jurisdiction to prosecute the relevant offence.

iii) Procedure

- **Provisional Arrest:** There is no provision for provisional arrest.
- **Form and Contents:** The form and content requirements for a request are contained within **Arts. 36** and **37**.

- **Language:** Under **Art. 5**, the request is to be in the language specified in the applicable treaty, or if no treaty exists, is to be translated into the language of the Requested State (i.e. Vietnam).
- **Consent:** There is no provision for the person to consent to extradition.
- **Time Limits:** Under **Art. 40** the Provisional People's Court must consider the request for extradition within 10 days of receipt.

A faint, light-colored map of Southeast Asia is visible in the background of the top section of the page, showing the outlines of the region's countries.

Annex 2

A faint, light-colored map of the ASEAN member states is visible in the background of the middle section of the page, showing the outlines of the ten member countries.

Treaty on Mutual Legal Assistance in Criminal Matters Among Like-Minded ASEAN Member Countries, 29 November 2004, done at Kuala Lumpur, Malaysia

**TREATY
ON
MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS**

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TREATY
ON
MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS

The Governments of Brunei Darussalam, the Kingdom of Cambodia, the Republic of Indonesia, the Lao People's Democratic Republic, Malaysia, the Republic of the Philippines, the Republic of Singapore and the Socialist Republic of Vietnam (hereinafter referred to singularly as "the Party" and collectively as "the Parties"):

DESIRING to improve the effectiveness of the law enforcement authorities of the Parties in the prevention, investigation and prosecution of offences through cooperation and mutual legal assistance in criminal matters,

HAVE AGREED as follows:

ARTICLE 1
SCOPE OF ASSISTANCE

1. The Parties shall, in accordance with this Treaty and subject to their respective domestic laws, render to one another the widest possible measure of mutual legal assistance in criminal matters, namely investigations, prosecutions and resulting proceedings.
2. Mutual assistance to be rendered in accordance with this Treaty may include:
 - (a) taking of evidence or obtaining voluntary statements from persons;
 - (b) making arrangements for persons to give evidence or to assist in criminal matters;
 - (c) effecting service of judicial documents;

- (d) executing searches and seizures;
 - (e) examining objects and sites;
 - (f) providing original or certified copies of relevant documents, records and items of evidence;
 - (g) identifying or tracing property derived from the commission of an offence and instrumentalities of crime;
 - (h) the restraining of dealings in property or the freezing of property derived from the commission of an offence that may be recovered, forfeited or confiscated;
 - (i) the recovery, forfeiture or confiscation of property derived from the commission of an offence;
 - (j) locating and identifying witnesses and suspects; and
 - (k) the provision of such other assistance as may be agreed and which is consistent with the objects of this Treaty and the laws of the Requested Party.
3. This Treaty applies solely to the provision of mutual assistance among the Parties. The provisions of this Treaty shall not create any right on the part of any private person to obtain, suppress or exclude any evidence or to impede the execution of any request for assistance.
4. For the purposes of this Treaty, the expression "instrumentalities of crime" means property used in connection with the commission of an offence or the equivalent value of such property.

**ARTICLE 2
NON-APPLICATION**

1. This Treaty does not apply to -
 - (a) the arrest or detention of any person with a view to the extradition of that person;
 - (b) the enforcement in the Requested Party of criminal judgements imposed in the Requesting Party except to the extent permitted by the law of the Requested Party;
 - (c) the transfer of persons in custody to serve sentences; and
 - (d) the transfer of proceedings in criminal matters.

2. Nothing in this Treaty entitles a Party to undertake in the territory of another Party the exercise of jurisdiction and performance of functions that are reserved exclusively for the authorities of that other Party by its domestic laws.

**ARTICLE 3
LIMITATIONS ON ASSISTANCE**

1. The Requested Party shall refuse assistance if, in its opinion -
 - (a) the request relates to the investigation, prosecution or punishment of a person for an offence that is, or is by reason of the circumstances in which it is alleged to have been committed or was committed, an offence of a political nature;

- (b) the request relates to the investigation, prosecution or punishment of a person in respect of an act or omission that, if it had occurred in the Requested Party, would have constituted a military offence under the laws of the Requested Party which is not also an offence under the ordinary criminal law of the Requested Party;
- (c) there are substantial grounds for believing that the request was made for the purpose of investigating, prosecuting, punishing or otherwise causing prejudice to a person on account of the person's race, religion, sex, ethnic origin, nationality or political opinions;
- (d) the request relates to the investigation, prosecution or punishment of a person for an offence in a case where the person -
 - (i) has been convicted, acquitted or pardoned by a competent court or other authority in the Requesting or Requested Party; or
 - (ii) has undergone the punishment provided by the law of that Requesting or Requested Party,in respect of that offence or of another offence constituted by the same act or omission as the first-mentioned offence;
- (e) the request relates to the investigation, prosecution or punishment of a person in respect of an act or omission that, if it had occurred in the Requested Party, would not have constituted an offence against the laws of the Requested Party except that the Requested Party may provide assistance in the absence of dual criminality if permitted by its domestic laws;

- (f) the provision of the assistance would affect the sovereignty, security, public order, public interest or essential interests of the Requested Party;
 - (g) the Requesting Party fails to undertake that it will be able to comply with a future request of a similar nature by the Requested Party for assistance in a criminal matter;
 - (h) the Requesting Party fails to undertake that the item requested for will not be used for a matter other than the criminal matter in respect of which the request was made and the Requested Party has not consented to waive such undertaking;
 - (i) the Requesting Party fails to undertake to return to the Requested Party, upon its request, any item obtained pursuant to the request upon completion of the criminal matter in respect of which the request was made;
 - (j) the provision of the assistance could prejudice a criminal matter in the Requested Party; or
 - (k) the provision of the assistance would require steps to be taken that would be contrary to the laws of the Requested Party.
2. The Requested Party may refuse assistance if, in its opinion -
- (a) the Requesting Party has, in respect of that request, failed to comply with any material terms of this Treaty or other relevant arrangements;

- (b) the provision of the assistance would, or would be likely to prejudice the safety of any person, whether that person is within or outside the territory of the Requested Party; or
 - (c) the provision of the assistance would impose an excessive burden on the resources of the Requested Party.
3. For the purposes of subparagraph 1 (a), the following offences shall not be held to be offences of a political nature:
- (a) an offence against the life or person of a Head of State or a member of the immediate family of a Head of State;
 - (b) an offence against the life or person of a Head of a central Government, or of a Minister of a central Government;
 - (c) an offence within the scope of any international convention to which both the Requesting and Requested Parties are parties to and which imposes on the Parties thereto an obligation either to extradite or prosecute a person accused of the commission of that offence; and
 - (d) any attempt, abetment or conspiracy to commit any of the offences referred to in subparagraphs (a) to (c).
4. The Requested Party may restrict the application of any of the provisions made under paragraph 3 according to whether the Requesting Party has made similar provision in its laws.

5. Assistance shall not be refused solely on the ground of secrecy of banks and similar financial institutions or that the offence is also considered to involve fiscal matters.
6. The Requested Party may postpone the execution of the request if its immediate execution would interfere with any ongoing criminal matters in the Requested Party.
7. Before refusing a request or postponing its execution pursuant to this Article, the Requested Party shall consider whether assistance may be granted subject to certain conditions.
8. If the Requesting Party accepts assistance subject to the terms and conditions imposed under paragraph 7, it shall comply with such terms and conditions.
9. If the Requested Party refuses or postpones assistance, it shall promptly inform the Requesting Party of the grounds of refusal or postponement.
10. The Parties shall, subject to their respective domestic laws, reciprocate any assistance granted in respect of an equivalent offence irrespective of the applicable penalty.

ARTICLE 4
DESIGNATION OF CENTRAL AUTHORITIES

1. Each Party shall designate a Central Authority to make and receive requests pursuant to this Treaty.

2. The designation of the Central Authority shall be made at the time of the deposit of the instrument of ratification, acceptance, approval or accession to this Treaty.
3. Each Party shall expeditiously notify the others of any change in the designation of its Central Authority.
4. The Central Authorities shall communicate directly with one another but may, if they choose, communicate through the diplomatic channel.

ARTICLE 5 FORM OF REQUESTS

1. Requests for assistance shall be made in writing or, where possible, by any means capable of producing a written record under conditions allowing the Requested Party to establish authenticity. In urgent situations and where permitted by the law of the Requested Party, requests may be made orally, but in such cases the requests shall be confirmed in writing within five days.
2. Central Authorities shall deal with the transmission of all requests and any communication related thereto. In urgent situations and where permitted by the law of the Requested Party, requests and any communication related thereto may be transmitted through the International Criminal Police Organization (INTERPOL) or the Southeast Asian Police Organization (ASEANAPOL).

ARTICLE 6
CONTENTS OF REQUESTS

1. A request for assistance in criminal matters shall contain such information as the Requested Party requires to execute the request, including -
 - (a) the name of the requesting office and the competent authority conducting the investigation or criminal proceedings to which the request relates;
 - (b) the purpose of the request and the nature of the assistance sought;
 - (c) a description of the nature of the criminal matter and its current status, and a statement setting out a summary of the relevant facts and laws;
 - (d) a description of the offence to which the request relates, including its maximum penalty;
 - (e) a description of the facts alleged to constitute the offence and a statement or text of the relevant laws;
 - (f) a description of the essential acts or omissions or matters alleged or sought to be ascertained;
 - (g) a description of the evidence, information or other assistance sought;
 - (h) the reasons for and details of any particular procedure or requirement that the Requesting Party wishes to be followed;

- (i) specification of any time limit within which compliance with the request is desired;
 - (j) any special requirements for confidentiality and the reasons for it; and
 - (k) such other information or undertakings as may be required under the domestic laws of the Requested Party or which is otherwise necessary for the proper execution of the request.
2. Requests for assistance may also, to the extent necessary, contain the following information:
- (a) the identity, nationality and location of the person or persons who are the subject of the investigation or criminal proceedings;
 - (b) the identity and location of any person from whom evidence is sought;
 - (c) the identity and location of a person to be served, that person's relationship to the criminal proceedings, and the manner in which service is to be made;
 - (d) information on the identity and whereabouts of a person to be located;
 - (e) a description of the manner in which any testimony or statement is to be taken and recorded;
 - (f) a list of questions to be asked of a witness;

- (g) a description of the documents, records or items of evidence to be produced as well as a description of the appropriate person to be asked to produce them and, to the extent not otherwise provided for, the form in which they should be reproduced and authenticated;
 - (h) a statement as to whether sworn or affirmed evidence or statements are required;
 - (i) a description of the property, asset or article to which the request relates, including its identity and location; and
 - (j) any court order relating to the assistance requested and a statement relating to the finality of that order.
3. Requests, supporting documents and other communications made pursuant to this Treaty shall be in the English language and, if necessary, accompanied by a translation into the language of the Requested Party or another language acceptable to the Requested Party.
4. If the Requested Party considers that the information contained in the request is not sufficient to enable the request to be dealt with, the Requested Party may request additional information. The Requesting Party shall supply such additional information as the Requested Party considers necessary to enable the request to be fulfilled.

ARTICLE 7 EXECUTION OF REQUESTS

1. Requests for assistance shall be carried out promptly, in the manner provided for by the laws and practices of the Requested Party. Subject to

its domestic laws and practices, the Requested Party shall carry out the request in the manner specified by the Requesting Party.

2. The Requested Party shall, if requested to do so and subject to its domestic laws and practices, make all necessary arrangements for the representation of the Requesting Party in the Requested Party in any criminal proceedings arising out of a request for assistance and shall otherwise represent the interests of the Requesting Party.
3. The Requested Party shall respond as soon as possible to reasonable inquiries by the Requesting Party concerning progress toward execution of the request.
4. The Requested Party may ask the Requesting Party to provide information in such form as may be necessary to enable it to execute the request or to undertake any steps which may be necessary under the laws and practices of the Requested Party in order to give effect to the request received from the Requesting Party.

ARTICLE 8

LIMITATIONS ON USE OF EVIDENCE OBTAINED

1. The Requesting Party shall not, without the consent of the Requested Party and subject to such terms and conditions as the Requested Party considers necessary, use or disclose or transfer information or evidence provided by the Requested Party for purposes other than those stated in the request.
2. Notwithstanding paragraph 1, in cases where the charge is amended, the information or evidence provided may be used, with the prior consent of

the Requested Party, in so far as the offence, as charged, is an offence in respect of which mutual legal assistance could be provided under this Treaty, and which is made out by the facts on which the request was made.

ARTICLE 9
PROTECTION OF CONFIDENTIALITY

1. The Requested Party shall, subject to its domestic laws, take all appropriate measures to keep confidential the request for assistance, its contents and its supporting documents, the fact of granting of such assistance and any action taken pursuant to the request. If the request cannot be executed without breaching confidentiality requirements, the Requested Party shall so inform the Requesting Party, which shall then determine whether the request should nevertheless be executed.

2. The Requesting Party shall, subject to its domestic laws, take all appropriate measures to -
 - (a) keep confidential information and evidence provided by the Requested Party, except to the extent that the evidence and information is needed for the purposes described in the request; and

 - (b) ensure that the information and evidence is protected against loss and unauthorized access, use, modification, disclosure or other misuse.

ARTICLE 10
OBTAINING VOLUNTARY STATEMENTS

Where a request is made to obtain a statement from a person for the purpose of a criminal matter in the Requesting Party, the Requested Party shall endeavor, with the consent of that person, to obtain that statement.

ARTICLE 11
OBTAINING OF EVIDENCE

1. The Requested Party shall, subject to its domestic laws, arrange to have evidence, including sworn or affirmed testimony, documents or records taken or obtained from witnesses for the purpose of a criminal matter for transmission to the Requesting Party.
2. Where sworn or affirmed testimony is to be taken under this Article, the parties to the relevant criminal proceedings in the Requesting Party or their legal representatives may, subject to the domestic laws of the Requested Party, appear and question the person giving that evidence.
3. Nothing in this Article shall prevent the use of live video or live television links or other appropriate communications facilities in accordance with the laws and practices of the Requested Party for the purpose of executing this Article if it is expedient in the interests of justice to do so.

ARTICLE 12
RIGHT TO DECLINE TO GIVE EVIDENCE

1. A person who is required to give sworn or affirmed testimony or produce documents, records or other evidence under Article 11 of this Treaty in the

Requested Party pursuant to a request for assistance may decline to do so where -

- (a) the law of the Requested Party permits or requires that person to decline to do so in similar circumstances in proceedings originating in the Requested Party; or
 - (b) the law of the Requesting Party permits or requires that person to decline to do so in similar circumstances in proceedings originating in the Requesting Party.
2. If the person claims that there is a right to decline to give sworn or affirmed testimony or produce documents, records or other evidence under Article 11 of this Treaty under the law of the Requesting Party, the Requesting Party shall, if so requested, provide a certificate to the Requested Party as to the existence or otherwise of that right.

ARTICLE 13

PROVISION OF PUBLICLY AVAILABLE DOCUMENTS AND OTHER RECORDS

1. The Requested Party shall provide to the Requesting Party copies of publicly available documents or records in the possession of government departments and agencies.
2. The Requested Party may, subject to its domestic laws and practices, provide the Requesting Party with copies of any documents or records in the possession of government departments and agencies that are not publicly available. The Requested Party may in its discretion deny, entirely or in part, a request pursuant to this paragraph.

ARTICLE 14
ATTENDANCE OF PERSON IN THE REQUESTING PARTY

1. The Requested Party may, subject to its domestic laws and practices, assist in arranging the attendance of a person in the Requested Party, subject to his consent, in the Requesting Party-
 - (a) to assist in the investigations in relation to a criminal matter in the Requesting Party; or
 - (b) to appear in proceedings in relation to a criminal matter in the Requesting Party unless that person is the person charged.
2. The Requested Party shall, if satisfied that satisfactory arrangements for that person's safety will be made by the Requesting Party, invite the person to give or provide evidence or assistance in relation to a criminal matter in the Requesting Party. The person shall be informed of any expenses or allowances payable.
3. The Requested Party shall promptly inform the Requesting Party of the person's response and, if the person consents, take any steps necessary to facilitate the person's attendance in the Requesting Party.
4. Nothing in this Article shall prevent the use of live video or live television links or other appropriate communications facilities in accordance with the laws and practices of the Requested Party if it is expedient in the interests of justice to do so.

ARTICLE 15**ATTENDANCE OF PERSON IN CUSTODY IN THE REQUESTING PARTY**

1. The Requested Party may, subject to its domestic laws and practices, agree to allow a person in custody in the Requested Party, subject to his consent, to be temporarily transferred to the Requesting Party to give evidence or to assist in the investigations.
2. While the person transferred is required to be held in custody under the law of the Requested Party, the Requesting Party shall hold the person in custody and shall return that person in custody to the Requested Party at the conclusion of the matter in relation to which transfer was sought or at such earlier time as the person's presence is no longer required.
3. Where the Requested Party advises the Requesting Party that the transferred person is no longer required to be held in custody, that person shall be released from custody and be treated as a person referred to in Article 14 of this Treaty.
4. The Requesting Party shall not require the Requested Party to initiate extradition proceedings for the return of the person transferred.
5. The period during which such person was under the custody of the Requesting Party shall count towards the period of his imprisonment or detention in the Requested Party.
6. No transfer under this Article shall be effected unless the Requesting Party gives an undertaking -
 - (a) to bear and be responsible for all the expenses of the transfer of custody;

- (b) to keep the person under lawful custody throughout the transfer of his custody; and
 - (c) to return him into the custody of the Requested Party immediately upon his attendance before the competent authority or court in the Requesting Party is dispensed with.
7. Nothing in this Article shall prevent the use of live video or live television links or other appropriate communications facilities in accordance with the laws and practices of the Requested Party if it is expedient in the interests of justice to do so.

ARTICLE 16
SAFE CONDUCT

1. Subject to paragraph 2, where a person is present in the Requesting Party pursuant to a request made under Article 14 or 15 of this Treaty -
- (a) that person shall not be detained, prosecuted, punished or subjected to any other restriction of personal liberty in the Requesting Party in respect of any acts or omissions or convictions for any offence against the law of the Requesting Party that is alleged to have been committed, or that was committed, before the person's departure from the Requested Party;
 - (b) that person shall not, without that person's consent, be required to give evidence in any criminal matter in the Requesting Party other than the criminal matter to which the request relates; or

- (c) that person shall not be subjected to any civil suit in respect of any act or omission of the person that is alleged to have occurred, or that had occurred, before the person's departure from the Requested Party.
2. Paragraph 1 shall cease to apply if that person, being free and able to leave, has not left the Requesting Party within a period of 15 consecutive days after that person has been officially told or notified that his presence is no longer required or, having left, has voluntarily returned.
3. A person who attends before a competent authority or court in the Requesting Party pursuant to a request made under Article 14 or 15 of this Treaty shall not be subject to prosecution based on such testimony except that that person shall be subject to the laws of the Requesting Party in relation to contempt of court and perjury.
4. A person who does not consent to attend in the Requesting Party pursuant to a request made under Article 14 or 15 of this Treaty shall not by reason only of such refusal or failure to consent be subjected to any penalty or liability or otherwise prejudiced in law notwithstanding anything to the contrary in the request.

ARTICLE 17

TRANSIT OF PERSONS IN CUSTODY

1. The Requested Party may, subject to its domestic laws and practices, authorize the transit through its territory of a person held in custody, by the Requesting Party or a third State, whose personal appearance has been requested by the Requesting Party in a criminal matter.

2. Where the aircraft, vessel or train by which the person is being transported lands or calls or stops in the Requested Party, the custodial or escorting officers of the Requesting Party or, if applicable, the third State that is assisting the Requesting Party to facilitate the transfer shall continue to be responsible for the custody of the person being transported while he is on transit in the Requested Party, unless otherwise agreed by the Requested Party.
3. Without prejudice to paragraph 2 and where the Requested Party agrees, the person being transported may be kept temporarily in the custody of a competent authority of the Requested Party until his transportation is continued.
4. Where a person is being held in custody in the Requested Party on transit and the person's transportation is not continued within a reasonable time, the Requested Party may direct that the person be transported in custody to the State from which the person was first transported.
5. All costs and expenses incurred by the Requested Party in respect of paragraphs 3 and 4 shall be reimbursed by the Requesting Party.

ARTICLE 18

SEARCH AND SEIZURE

1. The Requested Party shall, subject to its domestic laws, execute a request for the search, seizure and delivery of any documents, records or items to the Requesting Party if there are reasonable grounds for believing that the documents, records or items are relevant to a criminal matter in the Requesting Party.

2. The Requesting Party shall observe any conditions imposed by the Requested Party in relation to any seized documents, records or items which may be delivered to the Requesting Party that are considered necessary by the Requested Party to protect the documents, records or items to be transferred.
3. The Requested Party shall as soon as practicable inform the Requesting Party of the result of any search, the place and circumstances of seizure, and the subsequent custody of the documents, records or items seized.

ARTICLE 19
RETURN OF EVIDENCE

1. The Requesting Party shall at the conclusion of the criminal matter in respect of which the request for assistance was made return to the Requested Party any documents, records or items provided to the Requesting Party pursuant to a request under this Treaty.
2. Notwithstanding paragraph 1, the Requesting Party shall at any time, upon request, temporarily return to the Requested Party any documents, records or items provided to the Requesting Party pursuant to a request under this Treaty if these are needed for a criminal matter in the Requested Party.

ARTICLE 20
LOCATION OR IDENTIFICATION OF PERSONS

The Requested Party shall, subject to its domestic laws, use its best endeavors to ascertain the location or identity of a person specified in the request and who is reasonably believed to be within its territory.

ARTICLE 21
SERVICE OF DOCUMENTS

1. The Requested Party shall, subject to its domestic laws, use its best endeavors to effect service of any document in respect of a criminal matter issued by any court in the Requesting Party.
2. The Requesting Party shall transmit any request for the service of a document which requires a response or appearance in the Requesting Party not later than thirty days before the scheduled response or appearance.
3. The Requested Party shall return a proof of service in the manner mutually agreed by the Parties concerned.
4. For the purposes of paragraph 3, the expression "proof of service" includes information in the form of an affidavit on when and how the document was served and, where possible, a receipt signed by the person on whom it was served and if the serving officer has not been able to cause the document to be served, that fact and the reason for the failure.

ARTICLE 22
ASSISTANCE IN FORFEITURE PROCEEDINGS

1. The Requested Party shall, subject to its domestic laws, endeavor to locate, trace, restrain, freeze, seize, forfeit or confiscate property derived from the commission of an offence and instrumentalities of crime for which such assistance can be given provided that the Requesting Party provides all information which the Requested Party considers necessary.

2. Where a request is made under paragraph 1, the request shall be accompanied by the original signed order, or a duly authenticated copy of it.
3. A request for assistance under this Article shall be made only in respect of orders and judgements that are made after the coming into force of this Treaty.
4. Subject to the domestic laws of the Requested Party, property forfeited or confiscated pursuant to this Article may accrue to the Requesting Party unless otherwise agreed in each particular case.
5. The Requested Party shall, subject to its domestic laws, pursuant to any agreement with the Requesting Party transfer to the Requesting Party the agreed share of the property recovered under this Article subject to the payment of costs and expenses incurred by the Requested Party in enforcing the forfeiture order.

ARTICLE 23

COMPATIBILITY WITH OTHER ARRANGEMENTS

Nothing in this Treaty shall prevent the Parties from providing assistance to each other pursuant to other treaties, arrangements or the provisions of their national laws.

ARTICLE 24

CERTIFICATION AND AUTHENTICATION

1. Each Party shall, upon request, authenticate any documents or other material to be transmitted to the other Party under this Treaty.

2. A document is duly authenticated for the purposes of this Treaty if -
 - (a) it purports to be signed or certified by a judge, magistrate, or officer in or of the Party transmitting the document duly authorized by the law of that Party; and
 - (b) either -
 - (i) it is verified by the oath or affirmation of a witness, or of an officer of the government of that Party; or
 - (ii) it purports to be sealed with an official or public seal of that Party or of a Minister of State, or of a department or officer of the government, of that Party.
3. Nothing in this Article shall prevent the proof of any matter or the admission in evidence of any document in accordance with the law of the Requesting Party.
4. Subject to the domestic laws of each Party -
 - (a) a document signed with a digital or electronic signature in accordance with the laws of the Party concerned shall be as legally binding as a document signed with a handwritten signature, an affixed thumb-print or any other mark; and
 - (b) a digital or electronic signature created in accordance with the laws of the Party concerned shall be deemed to be a legally binding signature.

ARTICLE 25
COSTS

1. The Requested Party shall assume all ordinary expenses of fulfilling the request for assistance except that the Requesting Party shall bear -
 - (a) the fees of counsel retained at the request of the Requesting Party;
 - (b) the fees and expenses of expert witnesses;
 - (c) the costs of translation, interpretation and transcription;
 - (d) the expenses associated with conveying any person to or from the territory of the Requested Party and the fees, allowances and expenses payable to the person concerned while that person is in the Requesting Party pursuant to a request made under Article 14 or 15 of this Treaty; and
 - (e) the expenses associated with conveying custodial or escorting officers.
2. The cost of establishing live video or television links or other appropriate communications facilities, the costs related to the servicing of live video or television links or other appropriate communications facilities, the remuneration of interpreters provided by the Requested Party and allowances to witnesses and their traveling expenses in the Requested Party shall be refunded by the Requesting Party to the Requested Party, unless the Parties mutually agree otherwise.
3. If during the execution of the request it becomes apparent that expenses of an extraordinary or substantial nature are required to fulfill the request,

the Parties shall consult to determine the terms and conditions under which the execution of the request is to be effected or continued.

ARTICLE 26 CONSULTATION

1. The Central Authorities of the Parties shall consult, at times mutually agreed upon by them, to promote the most effective use of this Treaty.
2. The Parties may develop such practical measures as may be necessary to facilitate the implementation of this Treaty.

ARTICLE 27 AMENDMENT

1. This Treaty may be modified or amended at any time by mutual written consent of the Parties. Such modification or amendment will enter into force on such date as may be mutually agreed upon by the Parties and will form part of this Treaty.
2. Any modification or amendment will be without prejudice to the rights and obligations arising from or based on this Treaty before or up to the date such modification or amendment enters into force.

ARTICLE 28 SETTLEMENT OF DISPUTES

Any difference or dispute between the Parties arising from the interpretation or implementation of the provisions of this Treaty shall be settled amicably through consultation or negotiation between the Parties through diplomatic channels or

any other peaceful means for the settlement of disputes as agreed between the Parties.

**ARTICLE 29
RESERVATIONS**

This Treaty shall not be subject to reservations.

**ARTICLE 30
SIGNATURE, RATIFICATION, ACCESSION, DEPOSIT AND REGISTRATION**

1. This Treaty shall be subject to ratification, acceptance, approval or accession in accordance with the constitutional procedure of the signatory States.
2. Any State may accede to this Treaty upon consensus by the original Parties.
3. The instruments of ratification, acceptance, approval or accession shall be deposited with the Government of Malaysia which is designated as the Depositary State.
4. The Depositary State shall inform the other States that are Parties to this Treaty on the deposit of instruments of ratification, acceptance, approval or accession.
5. The Depositary State shall register this Treaty pursuant to Article 102 of the Charter of the United Nations.

ARTICLE 31
ENTRY INTO FORCE, APPLICATION AND TERMINATION

1. This Treaty shall enter into force for each Party ratifying, accepting, approving or acceding to it on the date of the deposit of its instrument of ratification, acceptance, approval or accession.
2. This Treaty shall apply to requests presented after the date of its entry into force for both the Parties concerned whether the relevant acts or omissions constituting the offence occurred before or after that date.
3. Any Party may denounce this Treaty by written notification to the Depositary State. Denunciation shall take effect six months following the date on which notification is received by the Depositary State.
4. Denunciation of this Treaty shall be without prejudice to the rights and obligations arising from or based on this Treaty and to the completion of any requests made pursuant to this Treaty before or up to the date of denunciation.
5. The denunciation of this Treaty shall have effect only as regards the Party that has notified it. The Treaty shall remain in force for the other Parties.

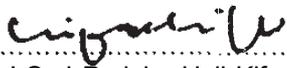
ARTICLE 32
DEPOSITARY OF TREATY

The original of this Treaty shall be deposited with the Depositary State which shall send certified copies of it to all the Parties.

IN WITNESS WHEREOF the undersigned, being duly authorized thereto by their respective Governments, have signed this Treaty.

Done at Kuala Lumpur on this 29th day of November 2004 in one original copy in the English language.

FOR THE GOVERNMENT OF
BRUNEI DARUSSALAM



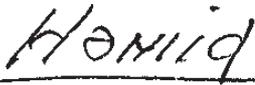
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Dato' Seri Paduka Haji Kifrawi
Dato' Paduka Haji Kifli
Attorney General

FOR THE GOVERNMENT OF THE
KINGDOM OF CAMBODIA



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Ang Vong Vathana
Minister of Justice

FOR THE GOVERNMENT OF THE
REPUBLIC OF INDONESIA



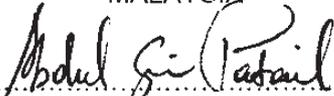
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Dr. Hamid Awaludin
Minister of Law and Human Rights

FOR THE GOVERNMENT OF THE
LAO PEOPLE'S DEMOCRATIC
REPUBLIC



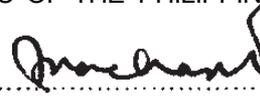
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Kham Ouane Boupna
Minister of Justice

FOR THE GOVERNMENT OF
MALAYSIA --



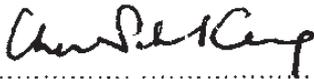
.....
Tan Sri Abdul Gani Patail
Attorney General

FOR THE GOVERNMENT OF THE
REPUBLIC OF THE PHILIPPINES



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Macabangkit Lanto
Undersecretary, Department of Justice

FOR THE GOVERNMENT OF THE
REPUBLIC OF SINGAPORE



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Chan Sek Keong
Attorney General

FOR THE GOVERNMENT OF THE
SOCIALIST REPUBLIC OF VIETNAM



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Le The Tiem
Vice Minister of Public Security

Annex 3

United Nations Convention against Transnational Organized Crime,
opened for signature 12 December 2000, UN Doc.A/RES/55/25 (Annex I), entered
into force 29 September 2003

(Extracts: Articles 12-21 and 27)

*Article 12.
Confiscation and seizure*

1. States Parties shall adopt, to the greatest extent possible within their domestic legal systems, such measures as may be necessary to enable confiscation of:

(a) Proceeds of crime derived from offences covered by this Convention or property the value of which corresponds to that of such proceeds;

(b) Property, equipment or other instrumentalities used in or destined for use in offences covered by this Convention.

2. States Parties shall adopt such measures as may be necessary to enable the identification, tracing, freezing or seizure of any item referred to in paragraph 1 of this article for the purpose of eventual confiscation.

3. If proceeds of crime have been transformed or converted, in part or in full, into other property, such property shall be liable to the measures referred to in this article instead of the proceeds.

4. If proceeds of crime have been intermingled with property acquired from legitimate sources, such property shall, without prejudice to any powers relating to freezing or seizure, be liable to confiscation up to the assessed value of the intermingled proceeds.

5. Income or other benefits derived from proceeds of crime, from property into which proceeds of crime have been transformed or converted or from property with which proceeds of crime have been intermingled shall also be liable to the measures referred to in this article, in the same manner and to the same extent as proceeds of crime.

6. For the purposes of this article and article 13 of this Convention, each State Party shall empower its courts or other competent authorities to order that bank, financial or commercial records be made available or be seized. States Parties shall not decline to act under the provisions of this paragraph on the ground of bank secrecy.

7. States Parties may consider the possibility of requiring that an offender demonstrate the lawful origin of alleged proceeds of crime or other property liable to confiscation, to the extent that such a requirement is consistent with the principles of their domestic law and with the nature of the judicial and other proceedings.

8. The provisions of this article shall not be construed to prejudice the rights of bona fide third parties.

9. Nothing contained in this article shall affect the principle that the measures to which it refers shall be defined and implemented in accordance with and subject to the provisions of the domestic law of a State Party.

Article 13.

International cooperation for purposes of confiscation

1. A State Party that has received a request from another State Party having jurisdiction over an offence covered by this Convention for confiscation of proceeds of crime, property, equipment or other instrumentalities referred to in article 12, paragraph 1, of this Convention situated in its territory shall, to the greatest extent possible within its domestic legal system:

(a) Submit the request to its competent authorities for the purpose of obtaining an order of confiscation and, if such an order is granted, give effect to it; or

(b) Submit to its competent authorities, with a view to giving effect to it to the extent requested, an order of confiscation issued by a court in the territory of the requesting State Party in accordance with article 12, paragraph 1, of this Convention insofar as it relates to proceeds of crime, property, equipment or other instrumentalities referred to in article 12, paragraph 1, situated in the territory of the requested State Party.

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

3. The provisions of article 18 of this Convention are applicable, *mutatis mutandis*, to this article. In addition to the information specified in article 18, paragraph 15, requests made pursuant to this article shall contain:

(a) In the case of a request pertaining to paragraph 1 (a) of this article, a description of the property to be confiscated and a statement of the facts relied upon by the requesting State Party sufficient to enable the requested State Party to seek the order under its domestic law;

(b) In the case of a request pertaining to paragraph 1 (b) of this article, a legally admissible copy of an order of confiscation upon which the request is based issued by the requesting State Party, a statement of the facts and information as to the extent to which execution of the order is requested;

(c) In the case of a request pertaining to paragraph 2 of this article, a statement of the facts relied upon by the requesting State Party and a description of the actions requested.

4. The decisions or actions provided for in paragraphs 1 and 2 of this article shall be taken by the requested State Party in accordance with and subject to the provisions of its domestic law and its procedural rules or any bilateral or multilateral treaty, agreement or arrangement to which it may be bound in relation to the requesting State Party.

5. Each State Party shall furnish copies of its laws and regulations that give effect to this article and of any subsequent changes to such laws and regulations or a description thereof to the Secretary-General of the United Nations.

6. If a State Party elects to make the taking of the measures referred to in paragraphs 1 and 2 of this article conditional on the existence of a relevant treaty, that State Party shall consider this Convention the necessary and sufficient treaty basis.

7. Cooperation under this article may be refused by a State Party if the offence to which the request relates is not an offence covered by this Convention.

8. The provisions of this article shall not be construed to prejudice the rights of bona fide third parties.

9. States Parties shall consider concluding bilateral or multilateral treaties, agreements or arrangements to enhance the effectiveness of international cooperation undertaken pursuant to this article.

Article 14.

Disposal of confiscated proceeds of crime or property

1. Proceeds of crime or property confiscated by a State Party pursuant to articles 12 or 13, paragraph 1, of this Convention shall be disposed of by that State Party in accordance with its domestic law and administrative procedures.

2. When acting on the request made by another State Party in accordance with article 13 of this Convention, States Parties shall, to the extent permitted by domestic law and if so requested, give priority consideration to returning the confiscated proceeds of crime or property to the requesting State Party so that it can give compensation to the victims of the crime or return such proceeds of crime or property to their legitimate owners.

3. When acting on the request made by another State Party in accordance with articles 12 and 13 of this Convention, a State Party may give special consideration to concluding agreements or arrangements on:

(a) Contributing the value of such proceeds of crime or property or funds derived from the sale of such proceeds of crime or property or a part thereof to the account designated in accordance with article 30, paragraph 2 (c), of this Convention and to intergovernmental bodies specializing in the fight against organized crime;

(b) Sharing with other States Parties, on a regular or case-by-case basis, such proceeds of crime or property, or funds derived from the sale of such proceeds of crime or property, in accordance with its domestic law or administrative procedures.

Article 15.

Jurisdiction

1. Each State Party shall adopt such measures as may be necessary to establish its jurisdiction over the offences established in accordance with articles 5, 6, 8 and 23 of this Convention when:

(a) The offence is committed in the territory of that State Party; or

(b) The offence is committed on board a vessel that is flying the flag of that State Party or an aircraft that is registered under the laws of that State Party at the time that the offence is committed.

2. Subject to article 4 of this Convention, a State Party may also establish its jurisdiction over any such offence when:

(a) The offence is committed against a national of that State Party;

(b) The offence is committed by a national of that State Party or a stateless person who has his or her habitual residence in its territory; or

(c) The offence is:

(i) One of those established in accordance with article 5, paragraph 1, of this Convention and is committed outside its territory with a view to the commission of a serious crime within its territory;

(ii) One of those established in accordance with article 6, paragraph 1 (b) (ii), of this Convention and is committed outside its territory with a view to the commission of an offence established in accordance with article 6, paragraph 1 (a) (i) or (ii) or (b) (i), of this Convention within its territory.

3. For the purposes of article 16, paragraph 10, of this Convention, each State Party shall adopt such measures as may be necessary to establish its jurisdiction over the offences covered by this Convention when the alleged offender is present in its territory and it does not extradite such person solely on the ground that he or she is one of its nationals.

4. Each State Party may also adopt such measures as may be necessary to establish its jurisdiction over the offences covered by this Convention when the alleged offender is present in its territory and it does not extradite him or her.

5. If a State Party exercising its jurisdiction under paragraph 1 or 2 of this article has been notified, or has otherwise learned, that one or more other States Parties are conducting an investigation, prosecution or judicial proceeding in respect of the same conduct, the competent authorities of those States Parties shall, as appropriate, consult one another with a view to coordinating their actions.

6. Without prejudice to norms of general international law, this Convention does not exclude the exercise of any criminal jurisdiction established by a State Party in accordance with its domestic law.

Article 16.

Extradition

1. This article shall apply to the offences covered by this Convention or in cases where an offence referred to in article 3, paragraph 1 (a) or (b), involves an organized criminal group and the person who is the subject of the request for extradition is located in the territory of the requested State Party, provided that the offence for which extradition is sought is punishable under the domestic law of both the requesting State Party and the requested State Party.

2. If the request for extradition includes several separate serious crimes, some of which are not covered by this article, the requested State Party may apply this article also in respect of the latter offences.

3. Each of the offences to which this article applies shall be deemed to be included as an extraditable offence in any extradition treaty existing between States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.

4. If a State Party that makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention the legal basis for extradition in respect of any offence to which this article applies.

5. States Parties that make extradition conditional on the existence of a treaty shall:

(a) At the time of deposit of their instrument of ratification, acceptance, approval of or accession to this Convention, inform the Secretary-General of the United Nations whether they will take this Convention as the legal basis for cooperation on extradition with other States Parties to this Convention; and

(b) If they do not take this Convention as the legal basis for cooperation on extradition, seek, where appropriate, to conclude treaties on extradition with other States Parties to this Convention in order to implement this article.

6. States Parties that do not make extradition conditional on the existence of a treaty shall recognize offences to which this article applies as extraditable offences between themselves.

7. Extradition shall be subject to the conditions provided for by the domestic law of the requested State Party or by applicable extradition treaties, including, inter alia, conditions in relation to the minimum penalty requirement for extradition and the grounds upon which the requested State Party may refuse extradition.

8. States Parties shall, subject to their domestic law, endeavour to expedite extradition procedures and to simplify evidentiary requirements relating thereto in respect of any offence to which this article applies.

9. Subject to the provisions of its domestic law and its extradition treaties, the requested State Party may, upon being satisfied that the circumstances so warrant and are urgent and at the request of the

requesting State Party, take a person whose extradition is sought and who is present in its territory into custody or take other appropriate measures to ensure his or her presence at extradition proceedings.

10. A State Party in whose territory an alleged offender is found, if it does not extradite such person in respect of an offence to which this article applies solely on the ground that he or she is one of its nationals, shall, at the request of the State Party seeking extradition, be obliged to submit the case without undue delay to its competent authorities for the purpose of prosecution. Those authorities shall take their decision and conduct their proceedings in the same manner as in the case of any other offence of a grave nature under the domestic law of that State Party. The States Parties concerned shall cooperate with each other, in particular on procedural and evidentiary aspects, to ensure the efficiency of such prosecution.

11. Whenever a State Party is permitted under its domestic law to extradite or otherwise surrender one of its nationals only upon the condition that the person will be returned to that State Party to serve the sentence imposed as a result of the trial or proceedings for which the extradition or surrender of the person was sought and that State Party and the State Party seeking the extradition of the person agree with this option and other terms that they may deem appropriate, such conditional extradition or surrender shall be sufficient to discharge the obligation set forth in paragraph 10 of this article.

12. If extradition, sought for purposes of enforcing a sentence, is refused because the person sought is a national of the requested State Party, the requested Party shall, if its domestic law so permits and in conformity with the requirements of such law, upon application of the requesting Party, consider the enforcement of the sentence that has been imposed under the domestic law of the requesting Party or the remainder thereof.

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

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

15. States Parties may not refuse a request for extradition on the sole ground that the offence is also considered to involve fiscal matters.

16. Before refusing extradition, the requested State Party shall, where appropriate, consult with the requesting State Party to provide it with ample opportunity to present its opinions and to provide information relevant to its allegation.

17. States Parties shall seek to conclude bilateral and multilateral agreements or arrangements to carry out or to enhance the effectiveness of extradition.

Article 17.

Transfer of sentenced persons

States Parties may consider entering into bilateral or multilateral agreements or arrangements on the transfer to their territory of persons sentenced to imprisonment or other forms of deprivation of liberty for offences covered by this Convention, in order that they may complete their sentences there.

Article 18.

Mutual legal assistance

1. States Parties shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by this Convention as provided for in article 3 and shall reciprocally extend to one another similar assistance where the requesting

State Party has reasonable grounds to suspect that the offence referred to in article 3, paragraph 1 (a) or (b), is transnational in nature, including that victims, witnesses, proceeds, instrumentalities or evidence of such offences are located in the requested State Party and that the offence involves an organized criminal group.

2. Mutual legal assistance shall be afforded to the fullest extent possible under relevant laws, treaties, agreements and arrangements of the requested State Party with respect to investigations, prosecutions and judicial proceedings in relation to the offences for which a legal person may be held liable in accordance with article 10 of this Convention in the requesting State Party.

3. Mutual legal assistance to be afforded in accordance with this article may be requested for any of the following purposes:

- (a) Taking evidence or statements from persons;
- (b) Effecting service of judicial documents;
- (c) Executing searches and seizures, and freezing;
- (d) Examining objects and sites;
- (e) Providing information, evidentiary items and expert evaluations;
- (f) Providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records;
- (g) Identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes;
- (h) Facilitating the voluntary appearance of persons in the requesting State Party;
- (i) Any other type of assistance that is not contrary to the domestic law of the requested State Party.

4. Without prejudice to domestic law, the competent authorities of a State Party may, without prior request, transmit information relating to criminal matters to a competent authority in another State Party where they believe that such information could assist the authority in undertaking or successfully concluding inquiries and criminal proceedings or could result in a request formulated by the latter State Party pursuant to this Convention.

5. The transmission of information pursuant to paragraph 4 of this article shall be without prejudice to inquiries and criminal proceedings in the State of the competent authorities providing the information. The competent authorities receiving the information shall comply with a request that said information remain confidential, even temporarily, or with restrictions on its use. However, this shall not prevent the receiving State Party from disclosing in its proceedings information that is exculpatory to an accused person. In such a case, the receiving State Party shall notify the transmitting State Party prior to the disclosure and, if so requested, consult with the transmitting State Party. If, in an exceptional case, advance notice is not possible, the receiving State Party shall inform the transmitting State Party of the disclosure without delay.

6. The provisions of this article shall not affect the obligations under any other treaty, bilateral or multilateral, that governs or will govern, in whole or in part, mutual legal assistance.

7. Paragraphs 9 to 29 of this article shall apply to requests made pursuant to this article if the States Parties in question are not bound by a treaty of mutual legal assistance. If those States Parties are bound by such a treaty, the corresponding provisions of that treaty shall apply unless the States Parties agree to apply paragraphs 9 to 29 of this article in lieu thereof. States Parties are strongly encouraged to apply these paragraphs if they facilitate cooperation.

8. States Parties shall not decline to render mutual legal assistance pursuant to this article on the ground of bank secrecy.

9. States Parties may decline to render mutual legal assistance pursuant to this article on the ground of absence of dual criminality. However, the requested State Party may, when it deems appropriate,

provide assistance, to the extent it decides at its discretion, irrespective of whether the conduct would constitute an offence under the domestic law of the requested State Party.

10. A person who is being detained or is serving a sentence in the territory of one State Party whose presence in another State Party is requested for purposes of identification, testimony or otherwise providing assistance in obtaining evidence for investigations, prosecutions or judicial proceedings in relation to offences covered by this Convention may be transferred if the following conditions are met:

- (a) The person freely gives his or her informed consent;
- (b) The competent authorities of both States Parties agree, subject to such conditions as those States Parties may deem appropriate.

11. For the purposes of paragraph 10 of this article:

(a) The State Party to which the person is transferred shall have the authority and obligation to keep the person transferred in custody, unless otherwise requested or authorized by the State Party from which the person was transferred;

(b) The State Party to which the person is transferred shall without delay implement its obligation to return the person to the custody of the State Party from which the person was transferred as agreed beforehand, or as otherwise agreed, by the competent authorities of both States Parties;

(c) The State Party to which the person is transferred shall not require the State Party from which the person was transferred to initiate extradition proceedings for the return of the person;

(d) The person transferred shall receive credit for service of the sentence being served in the State from which he or she was transferred for time spent in the custody of the State Party to which he or she was transferred.

12. Unless the State Party from which a person is to be transferred in accordance with paragraphs 10 and 11 of this article so agrees, that person, whatever his or her nationality, shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in the territory of the State to which that person is transferred in respect of acts, omissions or convictions prior to his or her departure from the territory of the State from which he or she was transferred.

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

14. Requests shall be made in writing or, where possible, by any means capable of producing a written record, in a language acceptable to the requested State Party, under conditions allowing that State Party to establish authenticity. The Secretary-General of the United Nations shall be notified of the language or languages acceptable to each State Party at the time it deposits its instrument of ratification, acceptance or approval of or accession to this Convention. In urgent circumstances and where agreed by the States Parties, requests may be made orally, but shall be confirmed in writing forthwith.

15. A request for mutual legal assistance shall contain:

- (a) The identity of the authority making the request;

(b) The subject matter and nature of the investigation, prosecution or judicial proceeding to which the request relates and the name and functions of the authority conducting the investigation, prosecution or judicial proceeding;

(c) A summary of the relevant facts, except in relation to requests for the purpose of service of judicial documents;

(d) A description of the assistance sought and details of any particular procedure that the requesting State Party wishes to be followed;

(e) Where possible, the identity, location and nationality of any person concerned; and

(f) The purpose for which the evidence, information or action is sought.

16. The requested State Party may request additional information when it appears necessary for the execution of the request in accordance with its domestic law or when it can facilitate such execution.

17. A request shall be executed in accordance with the domestic law of the requested State Party and, to the extent not contrary to the domestic law of the requested State Party and where possible, in accordance with the procedures specified in the request.

18. Wherever possible and consistent with fundamental principles of domestic law, when an individual is in the territory of a State Party and has to be heard as a witness or expert by the judicial authorities of another State Party, the first State Party may, at the request of the other, permit the hearing to take place by video conference if it is not possible or desirable for the individual in question to appear in person in the territory of the requesting State Party. States Parties may agree that the hearing shall be conducted by a judicial authority of the requesting State Party and attended by a judicial authority of the requested State Party.

19. The requesting State Party shall not transmit or use information or evidence furnished by the requested State Party for investigations, prosecutions or judicial proceedings other than those stated in the request without the prior consent of the requested State Party. Nothing in this paragraph shall prevent the requesting State Party from disclosing in its proceedings information or evidence that is exculpatory to an accused person. In the latter case, the requesting State Party shall notify the requested State Party prior to the disclosure and, if so requested, consult with the requested State Party. If, in an exceptional case, advance notice is not possible, the requesting State Party shall inform the requested State Party of the disclosure without delay.

20. The requesting State Party may require that the requested State Party keep confidential the fact and substance of the request, except to the extent necessary to execute the request. If the requested State Party cannot comply with the requirement of confidentiality, it shall promptly inform the requesting State Party.

21. Mutual legal assistance may be refused:

(a) If the request is not made in conformity with the provisions of this article;

(b) If the requested State Party considers that execution of the request is likely to prejudice its sovereignty, security, *ordre public* or other essential interests;

(c) If the authorities of the requested State Party would be prohibited by its domestic law from carrying out the action requested with regard to any similar offence, had it been subject to investigation, prosecution or judicial proceedings under their own jurisdiction;

(d) If it would be contrary to the legal system of the requested State Party relating to mutual legal assistance for the request to be granted.

22. States Parties may not refuse a request for mutual legal assistance on the sole ground that the offence is also considered to involve fiscal matters.

23. Reasons shall be given for any refusal of mutual legal assistance.

24. The requested State Party shall execute the request for mutual legal assistance as soon as possible and shall take as full account as possible of any deadlines suggested by the requesting State Party

and for which reasons are given, preferably in the request. The requested State Party shall respond to reasonable requests by the requesting State Party on progress of its handling of the request. The requesting State Party shall promptly inform the requested State Party when the assistance sought is no longer required.

25. Mutual legal assistance may be postponed by the requested State Party on the ground that it interferes with an ongoing investigation, prosecution or judicial proceeding.

26. Before refusing a request pursuant to paragraph 21 of this article or postponing its execution pursuant to paragraph 25 of this article, the requested State Party shall consult with the requesting State Party to consider whether assistance may be granted subject to such terms and conditions as it deems necessary. If the requesting State Party accepts assistance subject to those conditions, it shall comply with the conditions.

27. Without prejudice to the application of paragraph 12 of this article, a witness, expert or other person who, at the request of the requesting State Party, consents to give evidence in a proceeding or to assist in an investigation, prosecution or judicial proceeding in the territory of the requesting State Party shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in that territory in respect of acts, omissions or convictions prior to his or her departure from the territory of the requested State Party. Such safe conduct shall cease when the witness, expert or other person having had, for a period of fifteen consecutive days or for any period agreed upon by the States Parties from the date on which he or she has been officially informed that his or her presence is no longer required by the judicial authorities, an opportunity of leaving, has nevertheless remained voluntarily in the territory of the requesting State Party or, having left it, has returned of his or her own free will.

28. The ordinary costs of executing a request shall be borne by the requested State Party, unless otherwise agreed by the States Parties concerned. If expenses of a substantial or extraordinary nature are or will be required to fulfil the request, the States Parties shall consult to determine the terms and conditions under which the request will be executed, as well as the manner in which the costs shall be borne.

29. The requested State Party:

(a) Shall provide to the requesting State Party copies of government records, documents or information in its possession that under its domestic law are available to the general public;

(b) May, at its discretion, provide to the requesting State Party in whole, in part or subject to such conditions as it deems appropriate, copies of any government records, documents or information in its possession that under its domestic law are not available to the general public.

30. States Parties shall consider, as may be necessary, the possibility of concluding bilateral or multilateral agreements or arrangements that would serve the purposes of, give practical effect to or enhance the provisions of this article.

*Article 19:
Joint investigations*

States Parties shall consider concluding bilateral or multilateral agreements or arrangements whereby, in relation to matters that are the subject of investigations, prosecutions or judicial proceedings in one or more States, the competent authorities concerned may establish joint investigative bodies. In the absence of such agreements or arrangements, joint investigations may be undertaken by agreement on a case-by-case basis. The States Parties involved shall ensure that the sovereignty of the State Party in whose territory such investigation is to take place is fully respected.

*Article 20:
Special investigative techniques*

1. If permitted by the basic principles of its domestic legal system, each State Party shall, within its possibilities and under the conditions prescribed by its domestic law, take the necessary measures to allow

for the appropriate use of controlled delivery and, where it deems appropriate, for the use of other special investigative techniques, such as electronic or other forms of surveillance and undercover operations, by its competent authorities in its territory for the purpose of effectively combating organized crime.

2. For the purpose of investigating the offences covered by this Convention, States Parties are encouraged to conclude, when necessary, appropriate bilateral or multilateral agreements or arrangements for using such special investigative techniques in the context of cooperation at the international level. Such agreements or arrangements shall be concluded and implemented in full compliance with the principle of sovereign equality of States and shall be carried out strictly in accordance with the terms of those agreements or arrangements.

3. In the absence of an agreement or arrangement as set forth in paragraph 2 of this article, decisions to use such special investigative techniques at the international level shall be made on a case-by-case basis and may, when necessary, take into consideration financial arrangements and understandings with respect to the exercise of jurisdiction by the States Parties concerned.

4. Decisions to use controlled delivery at the international level may, with the consent of the States Parties concerned, include methods such as intercepting and allowing the goods to continue intact or be removed or replaced in whole or in part.

Article 21:

Transfer of criminal proceedings

States Parties shall consider the possibility of transferring to one another proceedings for the prosecution of an offence covered by this Convention in cases where such transfer is considered to be in the interests of the proper administration of justice, in particular in cases where several jurisdictions are involved, with a view to concentrating the prosecution.

.....

Article 27:

Law enforcement cooperation

1. States Parties shall cooperate closely with one another, consistent with their respective domestic legal and administrative systems, to enhance the effectiveness of law enforcement action to combat the offences covered by this Convention. Each State Party shall, in particular, adopt effective measures:

(a) To enhance and, where necessary, to establish channels of communication between their competent authorities, agencies and services in order to facilitate the secure and rapid exchange of information concerning all aspects of the offences covered by this Convention, including, if the States Parties concerned deem it appropriate, links with other criminal activities;

(b) To cooperate with other States Parties in conducting inquiries with respect to offences covered by this Convention concerning:

(i) The identity, whereabouts and activities of persons suspected of involvement in such offences or the location of other persons concerned;

(ii) The movement of proceeds of crime or property derived from the commission of such offences;

(iii) The movement of property, equipment or other instrumentalities used or intended for use in the commission of such offences;

(c) To provide, when appropriate, necessary items or quantities of substances for analytical or investigative purposes;

(d) To facilitate effective coordination between their competent authorities, agencies and services and to promote the exchange of personnel and other experts, including, subject to bilateral agreements or arrangements between the States Parties concerned, the posting of liaison officers;

(e) To exchange information with other States Parties on specific means and methods used by organized criminal groups, including, where applicable, routes and conveyances and the use of false identities, altered or false documents or other means of concealing their activities;

(f) To exchange information and coordinate administrative and other measures taken as appropriate for the purpose of early identification of the offences covered by this Convention.

2. With a view to giving effect to this Convention, States Parties shall consider entering into bilateral or multilateral agreements or arrangements on direct cooperation between their law enforcement agencies and, where such agreements or arrangements already exist, amending them. In the absence of such agreements or arrangements between the States Parties concerned, the Parties may consider this Convention as the basis for mutual law enforcement cooperation in respect of the offences covered by this Convention. Whenever appropriate, States Parties shall make full use of agreements or arrangements, including international or regional organizations, to enhance the cooperation between their law enforcement agencies.

3. States Parties shall endeavour to cooperate within their means to respond to transnational organized crime committed through the use of modern technology.

A faint, light-colored map of Southeast Asia is visible in the background of the top section of the page, showing the outlines of countries like Thailand, Vietnam, and the Philippines.

Annex 4

Protocol to Prevent, Suppress and Punish Trafficking in Persons,
Especially Women and Children, supplementing the United Nations Convention
against Transnational Organized Crime, opened for signature 12 December 2000,
UN Doc.A/RES/55/25 (Annex II), entered into force 25 December 2003

Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime

Preamble

The States Parties to this Protocol,

Declaring that effective action to prevent and combat trafficking in persons, especially women and children, requires a comprehensive international approach in the countries of origin, transit and destination that includes measures to prevent such trafficking, to punish the traffickers and to protect the victims of such trafficking, including by protecting their internationally recognized human rights,

Taking into account the fact that, despite the existence of a variety of international instruments containing rules and practical measures to combat the exploitation of persons, especially women and children, there is no universal instrument that addresses all aspects of trafficking in persons,

Concerned that, in the absence of such an instrument, persons who are vulnerable to trafficking will not be sufficiently protected,

Recalling General Assembly resolution 53/111 of 9 December 1998, in which the Assembly decided to establish an open-ended intergovernmental ad hoc committee for the purpose of elaborating a comprehensive international convention against transnational organized crime and of discussing the elaboration of, inter alia, an international instrument addressing trafficking in women and children,

Convinced that supplementing the United Nations Convention against Transnational Organized Crime with an international instrument for the prevention, suppression and punishment of trafficking in persons, especially women and children, will be useful in preventing and combating that crime,

Have agreed as follows:

I. General provisions

Article 1

Relation with the United Nations Convention against Transnational Organized Crime

1. This Protocol supplements the United Nations Convention against Transnational Organized Crime. It shall be interpreted together with the Convention.

2. The provisions of the Convention shall apply, *mutatis mutandis*, to this Protocol unless otherwise provided herein.

3. The offences established in accordance with article 5 of this Protocol shall be regarded as offences established in accordance with the Convention.

Article 2

Statement of purpose

The purposes of this Protocol are:

(a) To prevent and combat trafficking in persons, paying particular attention to women and children;

(b) To protect and assist the victims of such trafficking, with full respect for their human rights; and

(c) To promote cooperation among States Parties in order to meet those objectives.

Article 3

Use of terms

For the purposes of this Protocol:

(a) “Trafficking in persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;

(b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;

(c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered “trafficking in persons” even if this does not involve any of the means set forth in subparagraph (a) of this article;

- (d) "Child" shall mean any person under eighteen years of age.

Article 4

Scope of application

This Protocol shall apply, except as otherwise stated herein, to the prevention, investigation and prosecution of the offences established in accordance with article 5 of this Protocol, where those offences are transnational in nature and involve an organized criminal group, as well as to the protection of victims of such offences.

Article 5

Criminalization

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in article 3 of this Protocol, when committed intentionally.

2. Each State Party shall also adopt such legislative and other measures as may be necessary to establish as criminal offences:

(a) Subject to the basic concepts of its legal system, attempting to commit an offence established in accordance with paragraph 1 of this article;

(b) Participating as an accomplice in an offence established in accordance with paragraph 1 of this article; and

(c) Organizing or directing other persons to commit an offence established in accordance with paragraph 1 of this article.

II. Protection of victims of trafficking in persons

Article 6

Assistance to and protection of victims of trafficking in persons

1. In appropriate cases and to the extent possible under its domestic law, each State Party shall protect the privacy and identity of victims of trafficking in persons, including, inter alia, by making legal proceedings relating to such trafficking confidential.

2. Each State Party shall ensure that its domestic legal or administrative system contains measures that provide to victims of trafficking in persons, in appropriate cases:

(a) Information on relevant court and administrative proceedings;

(b) Assistance to enable their views and concerns to be presented and considered at appropriate stages of criminal proceedings against offenders, in a manner not prejudicial to the rights of the defence.

3. Each State Party shall consider implementing measures to provide for the physical, psychological and social recovery of victims of trafficking in persons, including, in appropriate cases, in cooperation with non-governmental organizations, other relevant organizations and other elements of civil society, and, in particular, the provision of:

- (a) Appropriate housing;
- (b) Counselling and information, in particular as regards their legal rights, in a language that the victims of trafficking in persons can understand;
- (c) Medical, psychological and material assistance; and
- (d) Employment, educational and training opportunities.

4. Each State Party shall take into account, in applying the provisions of this article, the age, gender and special needs of victims of trafficking in persons, in particular the special needs of children, including appropriate housing, education and care.

5. Each State Party shall endeavour to provide for the physical safety of victims of trafficking in persons while they are within its territory.

6. Each State Party shall ensure that its domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered.

Article 7

Status of victims of trafficking in persons in receiving States

1. In addition to taking measures pursuant to article 6 of this Protocol, each State Party shall consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases.

2. In implementing the provision contained in paragraph 1 of this article, each State Party shall give appropriate consideration to humanitarian and compassionate factors.

Article 8

Repatriation of victims of trafficking in persons

1. The State Party of which a victim of trafficking in persons is a national or in which the person had the right of permanent residence at the time of entry into the territory of the receiving State Party shall facilitate and accept, with due regard for the safety of that person, the return of that person without undue or unreasonable delay.

2. When a State Party returns a victim of trafficking in persons to a State Party of which that person is a national or in which he or she had, at the time of entry into the territory of the receiving State Party, the right of permanent residence, such return shall be with due regard for the safety of that person and for the status of any legal proceedings related to the fact that the person is a victim of trafficking and shall preferably be voluntary.

3. At the request of a receiving State Party, a requested State Party shall, without undue or unreasonable delay, verify whether a person who is a victim of trafficking in persons is its national or had the right of permanent residence in its territory at the time of entry into the territory of the receiving State Party.

4. In order to facilitate the return of a victim of trafficking in persons who is without proper documentation, the State Party of which that person is a national or in which he or she had the right of permanent residence at the time of entry into

the territory of the receiving State Party shall agree to issue, at the request of the receiving State Party, such travel documents or other authorization as may be necessary to enable the person to travel to and re-enter its territory.

5. This article shall be without prejudice to any right afforded to victims of trafficking in persons by any domestic law of the receiving State Party.

6. This article shall be without prejudice to any applicable bilateral or multilateral agreement or arrangement that governs, in whole or in part, the return of victims of trafficking in persons.

III. Prevention, cooperation and other measures

Article 9

Prevention of trafficking in persons

1. States Parties shall establish comprehensive policies, programmes and other measures:

- (a) To prevent and combat trafficking in persons; and
- (b) To protect victims of trafficking in persons, especially women and children, from revictimization.

2. States Parties shall endeavour to undertake measures such as research, information and mass media campaigns and social and economic initiatives to prevent and combat trafficking in persons.

3. Policies, programmes and other measures established in accordance with this article shall, as appropriate, include cooperation with non-governmental organizations, other relevant organizations and other elements of civil society.

4. States Parties shall take or strengthen measures, including through bilateral or multilateral cooperation, to alleviate the factors that make persons, especially women and children, vulnerable to trafficking, such as poverty, underdevelopment and lack of equal opportunity.

5. States Parties shall adopt or strengthen legislative or other measures, such as educational, social or cultural measures, including through bilateral and multilateral cooperation, to discourage the demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking.

Article 10

Information exchange and training

1. Law enforcement, immigration or other relevant authorities of States Parties shall, as appropriate, cooperate with one another by exchanging information, in accordance with their domestic law, to enable them to determine:

(a) Whether individuals crossing or attempting to cross an international border with travel documents belonging to other persons or without travel documents are perpetrators or victims of trafficking in persons;

(b) The types of travel document that individuals have used or attempted to use to cross an international border for the purpose of trafficking in persons; and

(c) The means and methods used by organized criminal groups for the purpose of trafficking in persons, including the recruitment and transportation of victims, routes and links between and among individuals and groups engaged in such trafficking, and possible measures for detecting them.

2. States Parties shall provide or strengthen training for law enforcement, immigration and other relevant officials in the prevention of trafficking in persons. The training should focus on methods used in preventing such trafficking, prosecuting the traffickers and protecting the rights of the victims, including protecting the victims from the traffickers. The training should also take into account the need to consider human rights and child- and gender-sensitive issues and it should encourage cooperation with non-governmental organizations, other relevant organizations and other elements of civil society.

3. A State Party that receives information shall comply with any request by the State Party that transmitted the information that places restrictions on its use.

Article 11

Border measures

1. Without prejudice to international commitments in relation to the free movement of people, States Parties shall strengthen, to the extent possible, such border controls as may be necessary to prevent and detect trafficking in persons.

2. Each State Party shall adopt legislative or other appropriate measures to prevent, to the extent possible, means of transport operated by commercial carriers from being used in the commission of offences established in accordance with article 5 of this Protocol.

3. Where appropriate, and without prejudice to applicable international conventions, such measures shall include establishing the obligation of commercial carriers, including any transportation company or the owner or operator of any means of transport, to ascertain that all passengers are in possession of the travel documents required for entry into the receiving State.

4. Each State Party shall take the necessary measures, in accordance with its domestic law, to provide for sanctions in cases of violation of the obligation set forth in paragraph 3 of this article.

5. Each State Party shall consider taking measures that permit, in accordance with its domestic law, the denial of entry or revocation of visas of persons implicated in the commission of offences established in accordance with this Protocol.

6. Without prejudice to article 27 of the Convention, States Parties shall consider strengthening cooperation among border control agencies by, inter alia, establishing and maintaining direct channels of communication.

Article 12

Security and control of documents

Each State Party shall take such measures as may be necessary, within available means:

(a) To ensure that travel or identity documents issued by it are of such quality that they cannot easily be misused and cannot readily be falsified or unlawfully altered, replicated or issued; and

(b) To ensure the integrity and security of travel or identity documents issued by or on behalf of the State Party and to prevent their unlawful creation, issuance and use.

Article 13

Legitimacy and validity of documents

At the request of another State Party, a State Party shall, in accordance with its domestic law, verify within a reasonable time the legitimacy and validity of travel or identity documents issued or purported to have been issued in its name and suspected of being used for trafficking in persons.

IV. Final provisions

Article 14

Saving clause

1. Nothing in this Protocol shall affect the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention³ and the 1967 Protocol⁴ relating to the Status of Refugees and the principle of non-refoulement as contained therein.

2. The measures set forth in this Protocol shall be interpreted and applied in a way that is not discriminatory to persons on the ground that they are victims of trafficking in persons. The interpretation and application of those measures shall be consistent with internationally recognized principles of non-discrimination.

Article 15

Settlement of disputes

1. States Parties shall endeavour to settle disputes concerning the interpretation or application of this Protocol through negotiation.

2. Any dispute between two or more States Parties concerning the interpretation or application of this Protocol that cannot be settled through negotiation within a reasonable time shall, at the request of one of those States Parties, be submitted to arbitration. If, six months after the date of the request for arbitration, those States Parties are unable to agree on the organization of the arbitration, any one of those States Parties may refer the dispute to the International Court of Justice by request in accordance with the Statute of the Court.

3. Each State Party may, at the time of signature, ratification, acceptance or approval of or accession to this Protocol, declare that it does not consider itself bound by paragraph 2 of this article. The other States Parties shall not be bound by paragraph 2 of this article with respect to any State Party that has made such a reservation.

³ United Nations, *Treaty Series*, vol. 189, No. 2545.

⁴ *Ibid.*, vol. 606, No. 8791.

4. Any State Party that has made a reservation in accordance with paragraph 3 of this article may at any time withdraw that reservation by notification to the Secretary-General of the United Nations.

Article 16

Signature, ratification, acceptance, approval and accession

1. This Protocol shall be open to all States for signature from 12 to 15 December 2000 in Palermo, Italy, and thereafter at United Nations Headquarters in New York until 12 December 2002.

2. This Protocol shall also be open for signature by regional economic integration organizations provided that at least one member State of such organization has signed this Protocol in accordance with paragraph 1 of this article.

3. This Protocol is subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations. A regional economic integration organization may deposit its instrument of ratification, acceptance or approval if at least one of its member States has done likewise. In that instrument of ratification, acceptance or approval, such organization shall declare the extent of its competence with respect to the matters governed by this Protocol. Such organization shall also inform the depositary of any relevant modification in the extent of its competence.

4. This Protocol is open for accession by any State or any regional economic integration organization of which at least one member State is a Party to this Protocol. Instruments of accession shall be deposited with the Secretary-General of the United Nations. At the time of its accession, a regional economic integration organization shall declare the extent of its competence with respect to matters governed by this Protocol. Such organization shall also inform the depositary of any relevant modification in the extent of its competence.

Article 17

Entry into force

1. This Protocol shall enter into force on the ninetieth day after the date of deposit of the fortieth instrument of ratification, acceptance, approval or accession, except that it shall not enter into force before the entry into force of the Convention. For the purpose of this paragraph, any instrument deposited by a regional economic integration organization shall not be counted as additional to those deposited by member States of such organization.

2. For each State or regional economic integration organization ratifying, accepting, approving or acceding to this Protocol after the deposit of the fortieth instrument of such action, this Protocol shall enter into force on the thirtieth day after the date of deposit by such State or organization of the relevant instrument or on the date this Protocol enters into force pursuant to paragraph 1 of this article, whichever is the later.

Article 18

Amendment

1. After the expiry of five years from the entry into force of this Protocol, a State Party to the Protocol may propose an amendment and file it with the Secretary-General of the United Nations, who shall thereupon communicate the

proposed amendment to the States Parties and to the Conference of the Parties to the Convention for the purpose of considering and deciding on the proposal. The States Parties to this Protocol meeting at the Conference of the Parties shall make every effort to achieve consensus on each amendment. If all efforts at consensus have been exhausted and no agreement has been reached, the amendment shall, as a last resort, require for its adoption a two-thirds majority vote of the States Parties to this Protocol present and voting at the meeting of the Conference of the Parties.

2. Regional economic integration organizations, in matters within their competence, shall exercise their right to vote under this article with a number of votes equal to the number of their member States that are Parties to this Protocol. Such organizations shall not exercise their right to vote if their member States exercise theirs and vice versa.

3. An amendment adopted in accordance with paragraph 1 of this article is subject to ratification, acceptance or approval by States Parties.

4. An amendment adopted in accordance with paragraph 1 of this article shall enter into force in respect of a State Party ninety days after the date of the deposit with the Secretary-General of the United Nations of an instrument of ratification, acceptance or approval of such amendment.

5. When an amendment enters into force, it shall be binding on those States Parties which have expressed their consent to be bound by it. Other States Parties shall still be bound by the provisions of this Protocol and any earlier amendments that they have ratified, accepted or approved.

Article 19

Denunciation

1. A State Party may denounce this Protocol by written notification to the Secretary-General of the United Nations. Such denunciation shall become effective one year after the date of receipt of the notification by the Secretary-General.

2. A regional economic integration organization shall cease to be a Party to this Protocol when all of its member States have denounced it.

Article 20

Depositary and languages

1. The Secretary-General of the United Nations is designated depositary of this Protocol.

2. The original of this Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS WHEREOF, the undersigned plenipotentiaries, being duly authorized thereto by their respective Governments, have signed this Protocol.

Annex 5

United Nations Convention against Corruption, opened for signature 31 October 2003, UN Doc. A/RES/58/422 (Annex), entered into force 14 December 2005

(Extracts: Chapters IV, V and VI)

Chapter IV International cooperation

Article 43

International cooperation

1. States Parties shall cooperate in criminal matters in accordance with articles 44 to 50 of this Convention. Where appropriate and consistent with their domestic legal system, States Parties shall consider assisting each other in investigations of and proceedings in civil and administrative matters relating to corruption.

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

Article 44

Extradition

1. This article shall apply to the offences established in accordance with this Convention where the person who is the subject of the request for extradition is present in the territory of the requested State Party, provided that the offence for which extradition is sought is punishable under the domestic law of both the requesting State Party and the requested State Party.

2. Notwithstanding the provisions of paragraph 1 of this article, a State Party whose law 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.

3. If the request for extradition includes several separate offences, at least one of which is extraditable under this article and some of which are not extraditable by reason of their period of imprisonment but are related to offences established in accordance with this Convention, the requested State Party may apply this article also in respect of those offences.

4. Each of the offences to which this article applies shall be deemed to be included as an extraditable offence in any extradition treaty existing between States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.

A State Party whose law so permits, in case it uses this Convention as the basis for extradition, shall not consider any of the offences established in accordance with this Convention to be a political offence.

5. If a State Party that makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention the legal basis for extradition in respect of any offence to which this article applies.

6. A State Party that makes extradition conditional on the existence of a treaty shall:

(a) At the time of deposit of its instrument of ratification, acceptance or approval of or accession to this Convention, inform the Secretary-General of the United Nations whether it will take this Convention as the legal basis for cooperation on extradition with other States Parties to this Convention; and

(b) If it does not take this Convention as the legal basis for cooperation on extradition, seek, where appropriate, to conclude treaties on extradition with other States Parties to this Convention in order to implement this article.

7. States Parties that do not make extradition conditional on the existence of a treaty shall recognize offences to which this article applies as extraditable offences between themselves.

8. Extradition shall be subject to the conditions provided for by the domestic law of the requested State Party or by applicable extradition treaties, including, *inter alia*, conditions in relation to the minimum penalty requirement for extradition and the grounds upon which the requested State Party may refuse extradition.

9. States Parties shall, subject to their domestic law, endeavour to expedite extradition procedures and to simplify evidentiary requirements relating thereto in respect of any offence to which this article applies.

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

11. A State Party in whose territory an alleged offender is found, if it does not extradite such person in respect of an offence to which this article applies solely on the ground that he or she is one of its nationals, shall, at the request of the State Party seeking extradition, be obliged to submit the case without undue delay to its competent authorities for the purpose of prosecution. Those authorities shall take their decision and conduct their proceedings in the same manner as in the case of any other offence of a grave nature under the domestic law of that State Party. The States Parties concerned shall cooperate with each other, in particular on procedural and evidentiary aspects, to ensure the efficiency of such prosecution.

12. Whenever a State Party is permitted under its domestic law to extradite or otherwise surrender one of its nationals only upon the condition that the person will be returned to that State Party to serve the sentence imposed as a result of the trial or proceedings for which the extradition or surrender of the person was sought and that State Party and the State Party seeking the extradition of the person agree with this option and other terms that they may deem appropriate, such conditional extradition or surrender shall be sufficient to discharge the obligation set forth in paragraph 11 of this article.

13. If extradition, sought for purposes of enforcing a sentence, is refused because the person sought is a national of the requested State Party, the requested State Party shall, if its domestic law so permits and in conformity with the requirements of such law, upon application of the requesting State Party, consider the enforcement of the sentence imposed under the domestic law of the requesting State Party or the remainder thereof.

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

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

16. States Parties may not refuse a request for extradition on the sole ground that the offence is also considered to involve fiscal matters.

17. Before refusing extradition, the requested State Party shall, where appropriate, consult with the requesting State Party to provide it with ample opportunity to present its opinions and to provide information relevant to its allegation.

18. States Parties shall seek to conclude bilateral and multilateral agreements or arrangements to carry out or to enhance the effectiveness of extradition.

Article 45

Transfer of sentenced persons

States Parties may consider entering into bilateral or multilateral agreements or arrangements on the transfer to their territory of persons sentenced to imprisonment or other forms of deprivation of liberty for offences established in accordance with this Convention in order that they may complete their sentences there.

Article 46

Mutual legal assistance

1. States Parties shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by this Convention.

2. Mutual legal assistance shall be afforded to the fullest extent possible under relevant laws, treaties, agreements and arrangements of the requested State Party with respect to investigations, prosecutions and judicial proceedings in relation to the offences for which a legal person may be held liable in accordance with article 26 of this Convention in the requesting State Party.

3. Mutual legal assistance to be afforded in accordance with this article may be requested for any of the following purposes:

- (a) Taking evidence or statements from persons;
- (b) Effecting service of judicial documents;
- (c) Executing searches and seizures, and freezing;
- (d) Examining objects and sites;
- (e) Providing information, evidentiary items and expert evaluations;
- (f) Providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records;
- (g) Identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes;

- (h) Facilitating the voluntary appearance of persons in the requesting State Party;
- (i) Any other type of assistance that is not contrary to the domestic law of the requested State Party;
- (j) Identifying, freezing and tracing proceeds of crime in accordance with the provisions of chapter V of this Convention;
- (k) The recovery of assets, in accordance with the provisions of chapter V of this Convention.

4. Without prejudice to domestic law, the competent authorities of a State Party may, without prior request, transmit information relating to criminal matters to a competent authority in another State Party where they believe that such information could assist the authority in undertaking or successfully concluding inquiries and criminal proceedings or could result in a request formulated by the latter State Party pursuant to this Convention.

5. The transmission of information pursuant to paragraph 4 of this article shall be without prejudice to inquiries and criminal proceedings in the State of the competent authorities providing the information. The competent authorities receiving the information shall comply with a request that said information remain confidential, even temporarily, or with restrictions on its use. However, this shall not prevent the receiving State Party from disclosing in its proceedings information that is exculpatory to an accused person. In such a case, the receiving State Party shall notify the transmitting State Party prior to the disclosure and, if so requested, consult with the transmitting State Party. If, in an exceptional case, advance notice is not possible, the receiving State Party shall inform the transmitting State Party of the disclosure without delay.

6. The provisions of this article shall not affect the obligations under any other treaty, bilateral or multilateral, that governs or will govern, in whole or in part, mutual legal assistance.

7. Paragraphs 9 to 29 of this article shall apply to requests made pursuant to this article if the States Parties in question are not bound by a treaty of mutual legal assistance. If those States Parties are bound by such a treaty, the corresponding provisions of that treaty shall apply unless the States Parties agree to apply paragraphs 9 to 29 of this article in lieu thereof. States Parties are strongly encouraged to apply those paragraphs if they facilitate cooperation.

8. States Parties shall not decline to render mutual legal assistance pursuant to this article on the ground of bank secrecy.

9. (a) A requested State Party, in responding to a request for assistance pursuant to this article in the absence of dual criminality, shall take into account the purposes of this Convention, as set forth in article 1;

(b) States Parties may decline to render assistance pursuant to this article on the ground of absence of dual criminality. However, a requested State Party shall, where consistent with the basic concepts of its legal system, render assistance that does not involve coercive action. Such assistance may be refused when requests involve matters of a *de minimis* nature or matters for which the cooperation or assistance sought is available under other provisions of this Convention;

(c) Each State Party may consider adopting such measures as may be necessary to enable it to provide a wider scope of assistance pursuant to this article in the absence of dual criminality.

10. A person who is being detained or is serving a sentence in the territory of one State Party whose presence in another State Party is requested for purposes of identification, testimony or otherwise providing assistance in obtaining evidence for investigations, prosecutions or judicial proceedings in relation to offences covered by this Convention may be transferred if the following conditions are met:

- (a) The person freely gives his or her informed consent;

(b) The competent authorities of both States Parties agree, subject to such conditions as those States Parties may deem appropriate.

11. For the purposes of paragraph 10 of this article:

(a) The State Party to which the person is transferred shall have the authority and obligation to keep the person transferred in custody, unless otherwise requested or authorized by the State Party from which the person was transferred;

(b) The State Party to which the person is transferred shall without delay implement its obligation to return the person to the custody of the State Party from which the person was transferred as agreed beforehand, or as otherwise agreed, by the competent authorities of both States Parties;

(c) The State Party to which the person is transferred shall not require the State Party from which the person was transferred to initiate extradition proceedings for the return of the person;

(d) The person transferred shall receive credit for service of the sentence being served in the State from which he or she was transferred for time spent in the custody of the State Party to which he or she was transferred.

12. Unless the State Party from which a person is to be transferred in accordance with paragraphs 10 and 11 of this article so agrees, that person, whatever his or her nationality, shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in the territory of the State to which that person is transferred in respect of acts, omissions or convictions prior to his or her departure from the territory of the State from which he or she was transferred.

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

14. Requests shall be made in writing or, where possible, by any means capable of producing a written record, in a language acceptable to the requested State Party, under conditions allowing that State Party to establish authenticity. The Secretary-General of the United Nations shall be notified of the language or languages acceptable to each State Party at the time it deposits its instrument of ratification, acceptance or approval of or accession to this Convention. In urgent circumstances and where agreed by the States Parties, requests may be made orally but shall be confirmed in writing forthwith.

15. A request for mutual legal assistance shall contain:

(a) The identity of the authority making the request;

(b) The subject matter and nature of the investigation, prosecution or judicial proceeding to which the request relates and the name and functions of the authority conducting the investigation, prosecution or judicial proceeding;

(c) A summary of the relevant facts, except in relation to requests for the purpose of service of judicial documents;

(d) A description of the assistance sought and details of any particular procedure that the requesting State Party wishes to be followed;

(e) Where possible, the identity, location and nationality of any person concerned; and

(f) The purpose for which the evidence, information or action is sought.

16. The requested State Party may request additional information when it appears necessary for the execution of the request in accordance with its domestic law or when it can facilitate such execution.

17. A request shall be executed in accordance with the domestic law of the requested State Party and, to the extent not contrary to the domestic law of the requested State Party and where possible, in accordance with the procedures specified in the request.

18. Wherever possible and consistent with fundamental principles of domestic law, when an individual is in the territory of a State Party and has to be heard as a witness or expert by the judicial authorities of another State Party, the first State Party may, at the request of the other, permit the hearing to take place by video conference if it is not possible or desirable for the individual in question to appear in person in the territory of the requesting State Party. States Parties may agree that the hearing shall be conducted by a judicial authority of the requesting State Party and attended by a judicial authority of the requested State Party.

19. The requesting State Party shall not transmit or use information or evidence furnished by the requested State Party for investigations, prosecutions or judicial proceedings other than those stated in the request without the prior consent of the requested State Party. Nothing in this paragraph shall prevent the requesting State Party from disclosing in its proceedings information or evidence that is exculpatory to an accused person. In the latter case, the requesting State Party shall notify the requested State Party prior to the disclosure and, if so requested, consult with the requested State Party. If, in an exceptional case, advance notice is not possible, the requesting State Party shall inform the requested State Party of the disclosure without delay.

20. The requesting State Party may require that the requested State Party keep confidential the fact and substance of the request, except to the extent necessary to execute the request. If the requested State Party cannot comply with the requirement of confidentiality, it shall promptly inform the requesting State Party.

21. Mutual legal assistance may be refused:

(a) If the request is not made in conformity with the provisions of this article;

(b) If the requested State Party considers that execution of the request is likely to prejudice its sovereignty, security, *ordre public* or other essential interests;

(c) If the authorities of the requested State Party would be prohibited by its domestic law from carrying out the action requested with regard to any similar offence, had it been subject to investigation, prosecution or judicial proceedings under their own jurisdiction;

(d) If it would be contrary to the legal system of the requested State Party relating to mutual legal assistance for the request to be granted.

22. States Parties may not refuse a request for mutual legal assistance on the sole ground that the offence is also considered to involve fiscal matters.

23. Reasons shall be given for any refusal of mutual legal assistance.

24. The requested State Party shall execute the request for mutual legal assistance as soon as

possible and shall take as full account as possible of any deadlines suggested by the requesting State Party and for which reasons are given, preferably in the request. The requesting State Party may make reasonable requests for information on the status and progress of measures taken by the requested State Party to satisfy its request. The requested State Party shall respond to reasonable requests by the requesting State Party on the status, and progress in its handling, of the request. The requesting State Party shall promptly inform the requested State Party when the assistance sought is no longer required.

25. Mutual legal assistance may be postponed by the requested State Party on the ground that it interferes with an ongoing investigation, prosecution or judicial proceeding.

26. Before refusing a request pursuant to paragraph 21 of this article or postponing its execution pursuant to paragraph 25 of this article, the requested State Party shall consult with the requesting State Party to consider whether assistance may be granted subject to such terms and conditions as it deems necessary. If the requesting State Party accepts assistance subject to those conditions, it shall comply with the conditions.

27. Without prejudice to the application of paragraph 12 of this article, a witness, expert or other person who, at the request of the requesting State Party, consents to give evidence in a proceeding or to assist in an investigation, prosecution or judicial proceeding in the territory of the requesting State Party shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in that territory in respect of acts, omissions or convictions prior to his or her departure from the territory of the requested State Party. Such safe conduct shall cease when the witness, expert or other person having had, for a period of fifteen consecutive days or for any period agreed upon by the States Parties from the date on which he or she has been officially informed that his or her presence is no longer required by the judicial authorities, an opportunity of leaving, has nevertheless remained voluntarily in the territory of the requesting State Party or, having left it, has returned of his or her own free will.

28. The ordinary costs of executing a request shall be borne by the requested State Party, unless otherwise agreed by the States Parties concerned. If expenses of a substantial or extraordinary nature are or will be required to fulfil the request, the States Parties shall consult to determine the terms and conditions under which the request will be executed, as well as the manner in which the costs shall be borne.

29. The requested State Party:

(a) Shall provide to the requesting State Party copies of government records, documents or information in its possession that under its domestic law are available to the general public;

(b) May, at its discretion, provide to the requesting State Party in whole, in part or subject to such conditions as it deems appropriate, copies of any government records, documents or information in its possession that under its domestic law are not available to the general public.

30. States Parties shall consider, as may be necessary, the possibility of concluding bilateral or multilateral agreements or arrangements that would serve the purposes of, give practical effect to or enhance the provisions of this article.

Article 47

Transfer of criminal proceedings

States Parties shall consider the possibility of transferring to one another proceedings for the prosecution of an offence established in accordance with this Convention in cases where such transfer is considered to be in the interests of the proper administration of justice, in particular in cases where several jurisdictions are involved, with a view to concentrating the prosecution.

Article 48
Law enforcement cooperation

1. States Parties shall cooperate closely with one another, consistent with their respective domestic legal and administrative systems, to enhance the effectiveness of law enforcement action to combat the offences covered by this Convention. States Parties shall, in particular, take effective measures:

(a) To enhance and, where necessary, to establish channels of communication between their competent authorities, agencies and services in order to facilitate the secure and rapid exchange of information concerning all aspects of the offences covered by this Convention, including, if the States Parties concerned deem it appropriate, links with other criminal activities;

(b) To cooperate with other States Parties in conducting inquiries with respect to offences covered by this Convention concerning:

(i) The identity, whereabouts and activities of persons suspected of involvement in such offences or the location of other persons concerned;

(ii) The movement of proceeds of crime or property derived from the commission of such offences;

(iii) The movement of property, equipment or other instrumentalities used or intended for use in the commission of such offences;

(c) To provide, where appropriate, necessary items or quantities of substances for analytical or investigative purposes;

(d) To exchange, where appropriate, information with other States Parties concerning specific means and methods used to commit offences covered by this Convention, including the use of false identities, forged, altered or false documents and other means of concealing activities;

(e) To facilitate effective coordination between their competent authorities, agencies and services and to promote the exchange of personnel and other experts, including, subject to bilateral agreements or arrangements between the States Parties concerned, the posting of liaison officers;

(f) To exchange information and coordinate administrative and other measures taken as appropriate for the purpose of early identification of the offences covered by this Convention.

2. With a view to giving effect to this Convention, States Parties shall consider entering into bilateral or multilateral agreements or arrangements on direct cooperation between their law enforcement agencies and, where such agreements or arrangements already exist, amending them. In the absence of such agreements or arrangements between the States Parties concerned, the States Parties may consider this Convention to be the basis for mutual law enforcement cooperation in respect of the offences covered by this Convention. Whenever appropriate, States Parties shall make full use of agreements or arrangements, including international or regional organizations, to enhance the cooperation between their law enforcement agencies.

3. States Parties shall endeavour to cooperate within their means to respond to offences covered by this Convention committed through the use of modern technology.

Article 49
Joint investigations

States Parties shall consider concluding bilateral or multilateral agreements or arrangements whereby, in relation to matters that are the subject of investigations, prosecutions or judicial proceedings in one or more States, the competent authorities concerned may establish joint investigative bodies. In the absence of such agreements or arrangements, joint investigations may be undertaken by agreement

on a case-by-case basis. The States Parties involved shall ensure that the sovereignty of the State Party in whose territory such investigation is to take place is fully respected.

Article 50

Special investigative techniques

1. In order to combat corruption effectively, each State Party shall, to the extent permitted by the basic principles of its domestic legal system and in accordance with the conditions prescribed by its domestic law, take such measures as may be necessary, within its means, to allow for the appropriate use by its competent authorities of controlled delivery and, where it deems appropriate, other special investigative techniques, such as electronic or other forms of surveillance and undercover operations, within its territory, and to allow for the admissibility in court of evidence derived therefrom.

2. For the purpose of investigating the offences covered by this Convention, States Parties are encouraged to conclude, when necessary, appropriate bilateral or multilateral agreements or arrangements for using such special investigative techniques in the context of cooperation at the international level. Such agreements or arrangements shall be concluded and implemented in full compliance with the principle of sovereign equality of States and shall be carried out strictly in accordance with the terms of those agreements or arrangements.

3. In the absence of an agreement or arrangement as set forth in paragraph 2 of this article, decisions to use such special investigative techniques at the international level shall be made on a case-by-case basis and may, when necessary, take into consideration financial arrangements and understandings with respect to the exercise of jurisdiction by the States Parties concerned.

4. Decisions to use controlled delivery at the international level may, with the consent of the States Parties concerned, include methods such as intercepting and allowing the goods or funds to continue intact or be removed or replaced in whole or in part.

Chapter V

Asset recovery

Article 51

General provision

The return of assets pursuant to this chapter is a fundamental principle of this Convention, and States Parties shall afford one another the widest measure of cooperation and assistance in this regard.

Article 52

Prevention and detection of transfers of proceeds of crime

1. Without prejudice to article 14 of this Convention, each State Party shall take such measures as may be necessary, in accordance with its domestic law, to require financial institutions within its jurisdiction to verify the identity of customers, to take reasonable steps to determine the identity of beneficial owners of funds deposited into high-value accounts and to conduct enhanced scrutiny of accounts sought or maintained by or on behalf of individuals who are, or have been, entrusted with prominent public functions and their family members and close associates. Such enhanced scrutiny shall be reasonably designed to detect suspicious transactions for the purpose of reporting to competent authorities and should not be so construed as to discourage or prohibit financial institutions from doing business with any legitimate customer.

2. In order to facilitate implementation of the measures provided for in paragraph 1 of this article, each State Party, in accordance with its domestic law and inspired by relevant initiatives of regional, interregional and multilateral organizations against money-laundering, shall:

(a) Issue advisories regarding the types of natural or legal person to whose accounts financial institutions within its jurisdiction will be expected to apply enhanced scrutiny, the types of accounts and transactions to which to pay particular attention and appropriate account-opening, maintenance and recordkeeping measures to take concerning such accounts; and

(b) Where appropriate, notify financial institutions within its jurisdiction, at the request of another State Party or on its own initiative, of the identity of particular natural or legal persons to whose accounts such institutions will be expected to apply enhanced scrutiny, in addition to those whom the financial institutions may otherwise identify.

3. In the context of paragraph 2 (a) of this article, each State Party shall implement measures to ensure that its financial institutions maintain adequate records, over an appropriate period of time, of accounts and transactions involving the persons mentioned in paragraph 1 of this article, which should, as a minimum, contain information relating to the identity of the customer as well as, as far as possible, of the beneficial owner.

4. With the aim of preventing and detecting transfers of proceeds of offences established in accordance with this Convention, each State Party shall implement appropriate and effective measures to prevent, with the help of its regulatory and oversight bodies, the establishment of banks that have no physical presence and that are not affiliated with a regulated financial group. Moreover, States Parties may consider requiring their financial institutions to refuse to enter into or continue a correspondent banking relationship with such institutions and to guard against establishing relations with foreign financial institutions that permit their accounts to be used by banks that have no physical presence and that are not affiliated with a regulated financial group.

5. Each State Party shall consider establishing, in accordance with its domestic law, effective financial disclosure systems for appropriate public officials and shall provide for appropriate sanctions for non-compliance. Each State Party shall also consider taking such measures as may be necessary to permit its competent authorities to share that information with the competent authorities in other States Parties when necessary to investigate, claim and recover proceeds of offences established in accordance with this Convention.

6. Each State Party shall consider taking such measures as may be necessary, in accordance with its domestic law, to require appropriate public officials having an interest in or signature or other authority over a financial account in a foreign country to report that relationship to appropriate authorities and to maintain appropriate records related to such accounts. Such measures shall also provide for appropriate sanctions for non-compliance.

Article 53

Measures for direct recovery of property

Each State Party shall, in accordance with its domestic law:

(a) Take such measures as may be necessary to permit another State Party to initiate civil action in its courts to establish title to or ownership of property acquired through the commission of an offence established in accordance with this Convention;

(b) Take such measures as may be necessary to permit its courts to order those who have committed offences established in accordance with this Convention to pay compensation or damages to another State Party that has been harmed by such offences; and

(c) Take such measures as may be necessary to permit its courts or competent authorities,

when having to decide on confiscation, to recognize another State Party's claim as a legitimate owner of property acquired through the commission of an offence established in accordance with this Convention.

Article 54

Mechanisms for recovery of property through international cooperation in confiscation

1. Each State Party, in order to provide mutual legal assistance pursuant to article 55 of this Convention with respect to property acquired through or involved in the commission of an offence established in accordance with this Convention, shall, in accordance with its domestic law:

(a) Take such measures as may be necessary to permit its competent authorities to give effect to an order of confiscation issued by a court of another State Party;

(b) Take such measures as may be necessary to permit its competent authorities, where they have jurisdiction, to order the confiscation of such property of foreign origin by adjudication of an offence of money-laundering or such other offence as may be within its jurisdiction or by other procedures authorized under its domestic law; and

(c) Consider taking such measures as may be necessary to allow confiscation of such property without a criminal conviction in cases in which the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases.

2. Each State Party, in order to provide mutual legal assistance upon a request made pursuant to paragraph 2 of article 55 of this Convention, shall, in accordance with its domestic law:

(a) Take such measures as may be necessary to permit its competent authorities to freeze or seize property upon a freezing or seizure order issued by a court or competent authority of a requesting State Party that provides a reasonable basis for the requested State Party to believe that there are sufficient grounds for taking such actions and that the property would eventually be subject to an order of confiscation for purposes of paragraph 1 (a) of this article;

(b) Take such measures as may be necessary to permit its competent authorities to freeze or seize property upon a request that provides a reasonable basis for the requested State Party to believe that there are sufficient grounds for taking such actions and that the property would eventually be subject to an order of confiscation for purposes of paragraph 1 (a) of this article; and

(c) Consider taking additional measures to permit its competent authorities to preserve property for confiscation, such as on the basis of a foreign arrest or criminal charge related to the acquisition of such property.

Article 55

International cooperation for purposes of confiscation

1. A State Party that has received a request from another State Party having jurisdiction over an offence established in accordance with this Convention for confiscation of proceeds of crime, property, equipment or other instrumentalities referred to in article 31, paragraph 1, of this Convention situated in its territory shall, to the greatest extent possible within its domestic legal system:

(a) Submit the request to its competent authorities for the purpose of obtaining an order of confiscation and, if such an order is granted, give effect to it; or

(b) Submit to its competent authorities, with a view to giving effect to it to the extent requested, an order of confiscation issued by a court in the territory of the requesting State Party in accordance with articles 31, paragraph 1, and 54, paragraph 1 (a), of this Convention insofar as it relates to proceeds of crime, property, equipment or other instrumentalities referred to in article 31,

paragraph 1, situated in the territory of the requested State Party.

2. Following a request made by another State Party having jurisdiction over an offence established in accordance with this Convention, the requested State Party shall take measures to identify, trace and freeze or seize proceeds of crime, property, equipment or other instrumentalities referred to in article 31, paragraph 1, of this Convention for the purpose of eventual confiscation to be ordered either by the requesting State Party or, pursuant to a request under paragraph 1 of this article, by the requested State Party.

3. The provisions of article 46 of this Convention are applicable, *mutatis mutandis*, to this article. In addition to the information specified in article 46, paragraph 15, requests made pursuant to this article shall contain:

(a) In the case of a request pertaining to paragraph 1 (a) of this article, a description of the property to be confiscated, including, to the extent possible, the location and, where relevant, the estimated value of the property and a statement of the facts relied upon by the requesting State Party sufficient to enable the requested State Party to seek the order under its domestic law;

(b) In the case of a request pertaining to paragraph 1 (b) of this article, a legally admissible copy of an order of confiscation upon which the request is based issued by the requesting State Party, a statement of the facts and information as to the extent to which execution of the order is requested, a statement specifying the measures taken by the requesting State Party to provide adequate notification to bona fide third parties and to ensure due process and a statement that the confiscation order is final;

(c) In the case of a request pertaining to paragraph 2 of this article, a statement of the facts relied upon by the requesting State Party and a description of the actions requested and, where available, a legally admissible copy of an order on which the request is based.

4. The decisions or actions provided for in paragraphs 1 and 2 of this article shall be taken by the requested State Party in accordance with and subject to the provisions of its domestic law and its procedural rules or any bilateral or multilateral agreement or arrangement to which it may be bound in relation to the requesting State Party.

5. Each State Party shall furnish copies of its laws and regulations that give effect to this article and of any subsequent changes to such laws and regulations or a description thereof to the Secretary-General of the United Nations.

6. If a State Party elects to make the taking of the measures referred to in paragraphs 1 and 2 of this article conditional on the existence of a relevant treaty, that State Party shall consider this Convention the necessary and sufficient treaty basis.

7. Cooperation under this article may also be refused or provisional measures lifted if the requested State Party does not receive sufficient and timely evidence or if the property is of a *de minimis* value.

8. Before lifting any provisional measure taken pursuant to this article, the requested State Party shall, wherever possible, give the requesting State Party an opportunity to present its reasons in favour of continuing the measure.

9. The provisions of this article shall not be construed as prejudicing the rights of bona fide third parties.

Article 56
Special cooperation

Without prejudice to its domestic law, each State Party shall endeavour to take measures to permit it to forward, without prejudice to its own investigations, prosecutions or judicial proceedings, information on proceeds of offences established in accordance with this Convention to another State Party without prior request, when it considers that the disclosure of such information might assist the receiving State Party in initiating or carrying out investigations, prosecutions or judicial proceedings or might lead to a request by that State Party under this chapter of the Convention.

Article 57
Return and disposal of assets

1. Property confiscated by a State Party pursuant to article 31 or 55 of this Convention shall be disposed of, including by return to its prior legitimate owners, pursuant to paragraph 3 of this article, by that State Party in accordance with the provisions of this Convention and its domestic law.

2. Each State Party shall adopt such legislative and other measures, in accordance with the fundamental principles of its domestic law, as may be necessary to enable its competent authorities to return confiscated property, when acting on the request made by another State Party, in accordance with this Convention, taking into account the rights of bona fide third parties.

3. In accordance with articles 46 and 55 of this Convention and paragraphs 1 and 2 of this article, the requested State Party shall:

(a) In the case of embezzlement of public funds or of laundering of embezzled public funds as referred to in articles 17 and 23 of this Convention, when confiscation was executed in accordance with article 55 and on the basis of a final judgement in the requesting State Party, a requirement that can be waived by the requested State Party, return the confiscated property to the requesting State Party;

(b) In the case of proceeds of any other offence covered by this Convention, when the confiscation was executed in accordance with article 55 of this Convention and on the basis of a final judgement in the requesting State Party, a requirement that can be waived by the requested State Party, return the confiscated property to the requesting State Party, when the requesting State Party reasonably establishes its prior ownership of such confiscated property to the requested State Party or when the requested State Party recognizes damage to the requesting State Party as a basis for returning the confiscated property;

(c) In all other cases, give priority consideration to returning confiscated property to the requesting State Party, returning such property to its prior legitimate owners or compensating the victims of the crime.

4. Where appropriate, unless States Parties decide otherwise, the requested State Party may deduct reasonable expenses incurred in investigations, prosecutions or judicial proceedings leading to the return or disposition of confiscated property pursuant to this article.

5. Where appropriate, States Parties may also give special consideration to concluding agreements or mutually acceptable arrangements, on a case-by-case basis, for the final disposal of confiscated property.

Article 58
Financial intelligence unit

States Parties shall cooperate with one another for the purpose of preventing and combating the transfer of proceeds of offences established in accordance with this Convention and of promoting ways and means of recovering such proceeds and, to that end, shall consider establishing a financial

intelligence unit to be responsible for receiving, analysing and disseminating to the competent authorities reports of suspicious financial transactions.

Article 59

Bilateral and multilateral agreements and arrangements

States Parties shall consider concluding bilateral or multilateral agreements or arrangements to enhance the effectiveness of international cooperation undertaken pursuant to this chapter of the Convention.

Chapter VI

Technical assistance and information exchange

Article 60

Training and technical assistance

1. Each State Party shall, to the extent necessary, initiate, develop or improve specific training programmes for its personnel responsible for preventing and combating corruption. Such training programmes could deal, inter alia, with the following areas:

(a) Effective measures to prevent, detect, investigate, punish and control corruption, including the use of evidence-gathering and investigative methods;

(b) Building capacity in the development and planning of strategic anticorruption policy;

(c) Training competent authorities in the preparation of requests for mutual legal assistance that meet the requirements of this Convention;

(d) Evaluation and strengthening of institutions, public service management and the management of public finances, including public procurement, and the private sector;

(e) Preventing and combating the transfer of proceeds of offences established in accordance with this Convention and recovering such proceeds;

(f) Detecting and freezing of the transfer of proceeds of offences established in accordance with this Convention;

(g) Surveillance of the movement of proceeds of offences established in accordance with this Convention and of the methods used to transfer, conceal or disguise such proceeds;

(h) Appropriate and efficient legal and administrative mechanisms and methods for facilitating the return of proceeds of offences established in accordance with this Convention;

(i) Methods used in protecting victims and witnesses who cooperate with judicial authorities; and

(j) Training in national and international regulations and in languages.

2. States Parties shall, according to their capacity, consider affording one another the widest measure of technical assistance, especially for the benefit of developing countries, in their respective plans and programmes to combat corruption, including material support and training in the areas referred to in paragraph 1 of this article, and training and assistance and the mutual exchange of relevant experience and specialized knowledge, which will facilitate international cooperation between States Parties in the areas of extradition and mutual legal assistance.

3. States Parties shall strengthen, to the extent necessary, efforts to maximize operational and training activities in international and regional organizations and in the framework of relevant bilateral and multilateral agreements or arrangements.

4. States Parties shall consider assisting one another, upon request, in conducting evaluations, studies and research relating to the types, causes, effects and costs of corruption in their respective countries, with a view to developing, with the participation of competent authorities and society, strategies and action plans to combat corruption.

5. In order to facilitate the recovery of proceeds of offences established in accordance with this Convention, States Parties may cooperate in providing each other with the names of experts who could assist in achieving that objective.

6. States Parties shall consider using subregional, regional and international conferences and seminars to promote cooperation and technical assistance and to stimulate discussion on problems of mutual concern, including the special problems and needs of developing countries and countries with economies in transition.

7. States Parties shall consider establishing voluntary mechanisms with a view to contributing financially to the efforts of developing countries and countries with economies in transition to apply this Convention through technical assistance programmes and projects.

8. Each State Party shall consider making voluntary contributions to the United Nations Office on Drugs and Crime for the purpose of fostering, through the Office, programmes and projects in developing countries with a view to implementing this Convention.

Article 61

Collection, exchange and analysis of information on corruption

1. Each State Party shall consider analysing, in consultation with experts, trends in corruption in its territory, as well as the circumstances in which corruption offences are committed.

2. States Parties shall consider developing and sharing with each other and through international and regional organizations statistics, analytical expertise concerning corruption and information with a view to developing, insofar as possible, common definitions, standards and methodologies, as well as information on best practices to prevent and combat corruption.

3. Each State Party shall consider monitoring its policies and actual measures to combat corruption and making assessments of their effectiveness and efficiency.

Article 62

Other measures: implementation of the Convention through economic development and technical assistance

1. States Parties shall take measures conducive to the optimal implementation of this Convention to the extent possible, through international cooperation, taking into account the negative effects of corruption on society in general, in particular on sustainable development.

2. States Parties shall make concrete efforts to the extent possible and in coordination with each other, as well as with international and regional organizations:

(a) To enhance their cooperation at various levels with developing countries, with a view to strengthening the capacity of the latter to prevent and combat corruption;

(b) To enhance financial and material assistance to support the efforts of developing countries to prevent and fight corruption effectively and to help them implement this Convention successfully;

(c) To provide technical assistance to developing countries and countries with economies in transition to assist them in meeting their needs for the implementation of this Convention. To that end, States Parties shall endeavour to make adequate and regular voluntary contributions to an account specifically designated for that purpose in a United Nations funding mechanism. States Parties may also

give special consideration, in accordance with their domestic law and the provisions of this Convention, to contributing to that account a percentage of the money or of the corresponding value of proceeds of crime or property confiscated in accordance with the provisions of this Convention;

(d) To encourage and persuade other States and financial institutions as appropriate to join them in efforts in accordance with this article, in particular by providing more training programmes and modern equipment to developing countries in order to assist them in achieving the objectives of this Convention.

3. To the extent possible, these measures shall be without prejudice to existing foreign assistance commitments or to other financial cooperation arrangements at the bilateral, regional or international level.

4. States Parties may conclude bilateral or multilateral agreements or arrangements on material and logistical assistance, taking into consideration the financial arrangements necessary for the means of international cooperation provided for by this Convention to be effective and for the prevention, detection and control of corruption.

Annex 6

Council of Europe Convention on Action against Trafficking in Human Beings and Explanatory Report (Extracts)

Council of Europe Convention on Action against Trafficking in Human Beings, opened for signature 16 May 2005, CETS No. 197, entered into force 1 February 2008

(Extracts: Chapters I and VI)

Chapter I – Purposes, scope, non-discrimination principle and definitions

Article 1 – Purposes of the Convention

1 The purposes of this Convention are:

- a to prevent and combat trafficking in human beings, while guaranteeing gender equality;
- b to protect the human rights of the victims of trafficking, design a comprehensive framework for the protection and assistance of victims and witnesses, while guaranteeing gender equality, as well as to ensure effective investigation and prosecution;
- c to promote international cooperation on action against trafficking in human beings.

2 In order to ensure effective implementation of its provisions by the Parties, this Convention sets up a specific monitoring mechanism.

Article 2 – Scope

This Convention shall apply to all forms of trafficking in human beings, whether national or transnational, whether or not connected with organised crime.

Article 3 – Non-discrimination principle

The implementation of the provisions of this Convention by Parties, in particular the enjoyment of measures to protect and promote the rights of victims, shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Article 4 – Definitions

For the purposes of this Convention:

- a “Trafficking in human beings” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the

giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;

b The consent of a victim of “trafficking in human beings” to the intended exploitation in subparagraph (a) have been used;

c The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered “trafficking in human beings” even if this does not involve any of the means set forth in subparagraph (a) of this article;

d “Child” shall mean any person under eighteen years of age;

e “Victim” shall mean any natural person who is subject to trafficking in human beings as defined in this article.

Chapter VI – International co-operation and co-operation with civil society

Article 32 – General principles and measures for international co-operation

The Parties shall co-operate with each other, in accordance with the provisions of this Convention, and through application of relevant applicable international and regional instruments, arrangements agreed on the basis of uniform or reciprocal legislation and internal laws, to the widest extent possible, for the purpose of:

- preventing and combating trafficking in human beings;
- protecting and providing assistance to victims;
- investigations or proceedings concerning criminal offences established in accordance with this Convention.

Article 33 – Measures relating to endangered or missing persons

1 When a Party, on the basis of the information at its disposal has reasonable grounds to believe that the life, the freedom or the physical integrity of a person referred to in Article 28, paragraph 1, is in immediate danger on the territory of another Party, the Party that has the information shall, in such a case of emergency, transmit it without delay to the latter so as to take the appropriate protection measures.

2 The Parties to this Convention may consider reinforcing their co-operation in the search for missing people, in particular for missing children, if the information available leads them to believe that she/he is a victim of trafficking in human beings. To this end, the Parties may conclude bilateral or multilateral treaties with each other.

Article 34 – Information

1 The requested Party shall promptly inform the requesting Party of the final result of the action taken under this chapter. The requested Party shall also promptly inform the requesting Party of any circumstances which render impossible the carrying out of the action sought or are likely to delay it significantly.

2 A Party may, within the limits of its internal law, without prior request, forward to another Party information obtained within the framework of its own investigations when it considers that the disclosure of such information might assist the receiving Party in initiating or carrying out

investigations or proceedings concerning criminal offences established in accordance with this Convention or might lead to a request for co-operation by that Party under this chapter.

3 Prior to providing such information, the providing Party may request that it be kept confidential or used subject to conditions. If the receiving Party cannot comply with such request, it shall notify the providing Party, which shall then determine whether the information should nevertheless be provided. If the receiving Party accepts the information subject to the conditions, it shall be bound by them.

4 All information requested concerning Articles 13, 14 and 16, necessary to provide the rights conferred by these articles, shall be transmitted at the request of the Party concerned without delay with due respect to Article 11 of the present Convention.

Article 35 – Co-operation with civil society

Each Party shall encourage state authorities and public officials, to co-operate with non-governmental organisations, other relevant organisations and members of civil society, in establishing strategic partnerships with the aim of achieving the purpose of this Convention.

Council of Europe Convention on Action against Trafficking in Human Beings (CETS No. 197) Explanatory Report

(Extracts: Chapter VI)

Chapter VI – International cooperation and cooperation with civil society

335. Chapter VI sets out the provisions on international cooperation between Parties to the Convention. The provisions are not confined to judicial cooperation in criminal matters. They are also concerned with cooperation in trafficking prevention and in victim protection and assistance.

336. As regards judicial cooperation in the criminal sphere, the Council of Europe already has a substantial body of standard-setting instruments. Mention should be made here of the *European Convention on Extradition* [ETS No.24], the *European Convention on Mutual Assistance in Criminal Matters* [ETS No.30], the protocols to these [ETS Nos.86, 98, 99 and 182] and the *Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime* [ETS No.141]. These treaties are cross-sector instruments applying to a large number of offences, not to one particular type of crime.

337. The drafters opted not to reproduce in the present convention provisions identical to those in cross-sector instruments like the aforementioned ones. They took the view that the latter are better adapted to harmonisation of standards and can be revised to achieve better cooperation between Parties. They had no wish to set up a separate general system of mutual assistance which would take the place of other relevant instruments or arrangements. They took the view that it would be more convenient to have recourse generally to the arrangements set up under the mutual assistance and extradition treaties already in force, enabling mutual assistance and extradition specialists to use the instruments and arrangements they were familiar with and avoiding any confusions that might arise from setting up competing systems. This chapter therefore comprises only those provisions which offer special added value in relation to existing conventions. The Convention (Article 32) nonetheless requires Parties to cooperate to the widest extent possible under the existing instruments. As the Convention provides for a monitoring mechanism (Chapter VII), which, among other things, is to be responsible for monitoring the implementation of Article 32, the manner in which such cross-sector instruments are applied to combating trafficking in human beings is likewise to be monitored.

Article 32 – General principles and measures for international cooperation

338. Article 32 sets out the general principles which are to govern international cooperation.

339. Firstly the Parties must cooperate with one another “to the widest extent possible”. This principle requires them to provide extensive cooperation to one another and to minimise impediments to the smooth and rapid flow of information and evidence internationally.

340. Then, Article 32 contains the general part of the obligation to cooperate: cooperation must include the prevention of and combat against trafficking in human beings (first indent), the protection of and assistance to victims (second indent) and to investigations or proceedings concerning criminal offences established in accordance with this Convention (third indent), ie. the offences established in conformity with Articles 18, 20 and 21. Taking into account the dual criminality principle, this cooperation can take place as regards the offence contained in Article 19 only between those Parties which criminalise in their internal law the acts contained in this article. The application of the dual criminality principle will limit this cooperation, as regards the offence established in Article 19 of this Convention, to the Parties having included such an offence in their internal law.

341. Lastly, cooperation is to be provided in accordance with relevant international and regional instruments, arrangements agreed on the basis of uniform or reciprocal legislation, and domestic law. The general principle is thus that the provisions of Chapter VI neither cancel nor replace the provisions of relevant *international* instruments. Reference to such instruments or arrangements is not confined to instruments in force at the time the present convention comes into force but also applies to any instruments adopted subsequently. In relation to this Convention, relevant general agreements and instruments should have precedence in matters of judicial cooperation.

342. Parties also have to cooperate with each other, in accordance with the provisions of this Convention. Thus, as regards international cooperation to protect and assist victims, Article 33 provides for special measures relating to endangered persons. Article 34(4) refers to transmission of any information necessary for providing the rights conferred by Articles 13, 14 and 16 of the Convention.

343. As regards international cooperation in criminal matters for the purposes of investigations or proceedings, the general principle is that the provisions of Chapter VI neither cancel nor replace the provisions of relevant international or regional instruments on mutual legal assistance and extradition, reciprocal arrangements between Parties to such instruments and relevant provisions of domestic law concerning international cooperation. In this area, the relevant international instruments include the *European Convention on Extradition* [ETS No.24], the *European Convention on Mutual Assistance in Criminal Matters* [ETS No.30] and the protocols to these [ETS Nos.86, 98, 99 and 182]. In the case of European Union member states, the European arrest warrant introduced by the *Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member states* is likewise relevant. As regards cooperation to seize the proceeds of trafficking, and in particular to identify, locate, freeze and confiscate assets associated with trafficking in human beings and its resultant exploitation, the *Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime* [ETS No.141] is relevant.

344. It follows that international cooperation in criminal matters must continue to be granted under these instruments and other bilateral or multilateral treaties on extradition and mutual assistance applying to criminal matters.

345. Mutual assistance may also stem from arrangements on the basis of uniform or reciprocal legislation. This concept exists in other Council of Europe conventions, in particular the *European Convention on Extradition* [ETS No.24], which used it to allow Parties which had an extradition system based on “uniform laws”, i.e. the Scandinavian countries, or Parties with a system based on reciprocity, i.e. Ireland and the United Kingdom, to regulate their mutual relations on the sole basis of that system. That provision had to

be adopted because those countries did not regulate their relations in extradition matters on the basis of international agreements but did so or do so by agreeing to adopt uniform or reciprocal domestic laws.

Article 33 – Measures relating to endangered or missing persons

346. This provision requires a Party to warn another Party if it has information that suggests that a person referred to in Article 28(1) (a victim, a witness, a person cooperating with the judicial authorities or a relative of such a person) is in immediate danger in the territory of the other Party. Such information might, for example, come from a victim reporting pressures or threats from traffickers against members of the victim's family in the country of origin. The Party receiving such information is required to take appropriate protection measures as provided for in Article 28.

Article 34 – Information

347. Article 34 deals with supply of information. It has to do with all the types of cooperation dealt with in Chapter VI, i.e. not just international cooperation in criminal matters but also cooperation to prevent and combat trafficking in human beings and protect and assist victims.

348. Article 34(1) places a duty on a requested Party to inform the requesting Party of the final result of action taken further to a request for international cooperation. It also requires that the requested Party inform the requesting Party promptly if circumstances make it impossible to meet the request or are liable to significantly delay meeting it.

349. Paragraphs 2 and 3 are concerned with information spontaneously provided for purposes of cooperation in criminal matters. This article is derived from provisions in earlier Council of Europe instruments, such as Article 10 of the *Convention on the Laundering, Search, Seizure and Confiscation of the Proceeds from Crime* [ETS No.141], Article 28 of the *Criminal Law Convention on Corruption* [ETS No.173] and Article 26 of the *Convention on Cybercrime* [ETS No.185]. It is an increasingly frequent occurrence for a Party to possess valuable information that it believes may assist another Party in a criminal investigation or proceedings, and which the Party conducting the investigation or proceedings is not aware exists. In such cases no request for mutual assistance will be forthcoming. This provision empowers the country in possession of the information to forward it to the other country without a prior request, within the limit of its internal law. The provision was thought useful because, under the laws of some countries, such a positive grant of legal authority is needed in order to provide assistance in the absence of a request. A Party is not under any obligation to spontaneously forward information to another Party; it has full discretion to do so in the light of the circumstances of the particular case. In addition, spontaneous disclosure of information does not preclude the disclosing Party from investigating or instituting proceedings in relation to the facts disclosed if it has jurisdiction.

350. Paragraph 3 addresses the fact that in some circumstances a Party will only forward information spontaneously if sensitive information is kept confidential or other conditions can be imposed on use of the information. In particular, confidentiality will be an important consideration in cases where important interests of the providing state could be endangered if the information is made public, e.g. where it is necessary not to reveal how the information was obtained or that a criminal group is being investigated. If advance enquiry reveals that the receiving Party cannot comply with a condition made by the providing Party (e.g. it cannot comply with a confidentiality condition because the information is needed as evidence at a public trial), the receiving Party must advise the providing Party, which then has the option of not providing the information. If the receiving Party agrees to the condition, however, it must honour it. It is foreseen that conditions imposed under this article would be consistent with those that a providing Party could impose further to a request for mutual assistance from the receiving Party.

351. To guarantee the effectiveness of the rights established in Articles 13, 14 and 16 of the Convention, paragraph 4 requires Parties to transmit without delay, subject to compliance with Article 11 of the Convention, requested information necessary for granting the entitlements conferred by these articles.

Article 35 – Cooperation with civil society

352. The strategic partnership referred to in this article, between national authorities and public officials and civil society means the setting up of cooperative frameworks through which State actors-fulfil their obligations under the Convention, by coordinating their efforts with civil society.

353. Such strategic partnerships may be achieved by regular dialogue through the establishment of Round-table discussions involving all actors. Practical implementation of the purposes of the convention may be formalised through, for instance, the conclusion of memoranda of understanding between national authorities and non-governmental organisations for providing protection and assistance to victims of trafficking.

