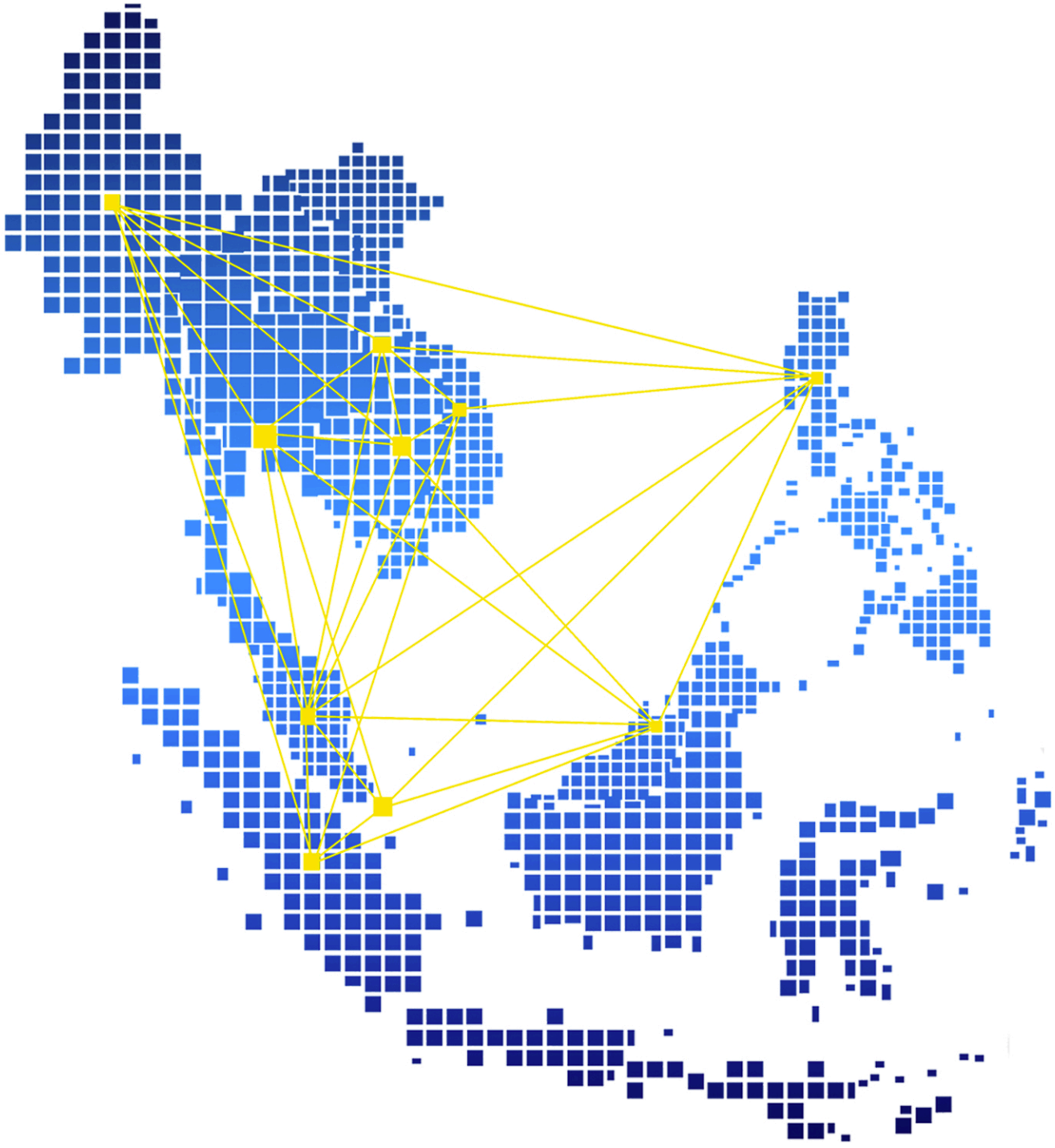
ASSOCIATION OF SOUTHEAST ASIAN NATIONS

ASEAN HANDBOOK
ON INTERNATIONAL LEGAL COOPERATION IN TRAFFICKING IN PERSONS CASES

2ND EDITION - 2018



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

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AAPTIP
AUSTRALIA - ASIA PROGRAM TO COMBAT TRAFFICKING IN PERSONS

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Acknowledgements

This is the second edition of a 2010 publication that was drafted by Pauline David, Fiona David and Anne Gallagher with technical support from the United Nations Office on Drugs and Crime (UNODC), the Organisation for Economic Co-operation and Development (OECD), and the Australian Attorney-General's Department. ASEAN Member States (AMS) contributed substantially to the first edition, most particularly through a regional ASEAN workshop convened in November 2009.

This second edition of the Handbook also benefited from close involvement of AMS through country level consultations and a regional workshop of practitioners, convened in May 2017. The outputs of a series of workshops to develop a global version of the Handbook convened by UNODC in May and November 2017 involving international experts, including those from several AMS, are also reflected throughout the Handbook. Both of these collaborative efforts contributed significantly to this edition and, in particular, to the case studies set out in the text boxes as well as a substantial expansion of the Chapter 2 section on informal cooperation. Special thanks are due to the Office of the Attorney General of the Kingdom of Thailand, whose experts provided ongoing advice and support for the completion of the second edition.

The development of both editions of the ASEAN Handbook on *International Legal Cooperation in Trafficking in Persons Cases* was supported by the Australian Government first through the Asia Regional Trafficking in Persons Project (ARTIP) and then its successor initiative, the Australia-Asia Program to Combat Trafficking in Persons Program (AAPTIP). The views expressed herein should not, however, be taken to reflect those of the Australian Government.

Note on revisions

The revisions that have been made to the 2010 edition of the *ASEAN Handbook on International Legal Cooperation in Trafficking in Persons Cases* include the following:

- Updating of country-level information to reflect developments in relevant law, policy and practice in all ten AMS; and
- Updating of other information and materials to reflect major changes in international laws and policies – such as the adoption and entry into force of the *ASEAN Convention Against Trafficking in Persons, Especially Women and Children* (ACTIP).

Other revisions respond to requests from ASEAN practitioners for the Handbook to provide additional and clearer guidance on the practical aspects of international legal cooperation in trafficking cases. This has been done through the inclusion of case studies,[1] as well as additional information on the relevant process in each country in relation to the areas covered by the Handbook. In response to practitioners' requests, the revisions also include substantial additional information on informal cooperation in trafficking cases.

Finally, the *Handbook* has also been revised and restructured to serve as the primary reference material for the *Model ASEAN Training Program on International Legal Cooperation in Trafficking in Persons Cases* (2018). It is expected that, while the Handbook itself can serve as a stand-alone resource, any training undertaken using the Program will require extensive use of – and cross-referencing to – the Handbook.

[1] Note that case studies draw on examples from within and outside the ASEAN region. Unless information on a case is publicly available, the involved countries are not identified.

Foreword to the 2010 Edition of the Handbook

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 the 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

Foreword to Present Edition

Foreword by the ASEAN Senior Officials Meeting on Transnational Crime (SOMTC) Voluntary Lead Shepherd on Trafficking in Persons and Chair of the SOMTC Working Group on Trafficking in Persons

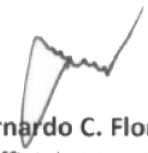
It is now more than eight years since the first edition of this important resource was published. During that time, we have seen many important changes in the field of anti-trafficking. Most significant for the ASEAN community was the 2017 entry into force of the ASEAN Convention Against Trafficking in Persons, Especially Women and Children. The Convention stands as a clear affirmation of a common goal, within ASEAN, to address the current high levels of impunity enjoyed by traffickers and to secure justice for the victims of this serious crime.

The decision taken by SOMTC in 2008 to focus attention on strengthening international cooperation in trafficking in persons cases has been well vindicated. Through experience, we have come to recognise that, without such cooperation, the apprehension, prosecution and conviction of traffickers is rendered much more difficult. International cooperation involving law enforcement, prosecutorial and judicial bodies is also essential to ensuring that victims of trafficking, particularly those in a position to cooperate with national authorities, are identified and protected. A number of high-profile cases in our region in recent years have shown the benefits of these actions. Through such cooperation, scores of victims have been identified and supported to become witnesses; evidence from one ASEAN Member State has been used to support the prosecution of traffickers in another. In a few instances, international cooperation has led to traffickers' assets being seized.

However, while we acknowledge significant progress, it is important to also accept that much remains to be done. As this revised Handbook shows, international cooperation between AMS in relation to trafficking in persons continues to be the exception, not the rule. Legal and procedural obstacles play a role but, in the end, the problem is very much about attitudes and incentives. More work needs to be done by ASEAN – and by individual Member States – to cultivate a *culture* of cooperation; to create systems that recognise and appreciate officials and agencies who are collaborating with their counterparts across national borders. An important part of this process is to acknowledge weaknesses, celebrate successes and show how things can be done differently. The present Handbook does each of these three things very well, and I commend it to all those committed to more and better cooperation in our Region.

On behalf of ASEAN, I thank the many practitioners, in all ten ASEAN Member States, who contributed to the revision of the Handbook. Thanks are also due to the expert practitioners from regions outside ASEAN who were involved in reviewing the text and in providing case studies. We also express our appreciation to UNODC, a partner in the development of the earlier edition of the Handbook, and a close collaborator in the revision process.

Finally, thanks are due to the Australian Government for its long-standing support of ASEAN efforts to develop more effective criminal justice responses to trafficking in persons. The Australia-Asia Program to Combat Trafficking in Persons (AAPTIP) team was instrumental in leading the revision process and ensuring the quality of the final product, for which we are most grateful.



Hon. Bernardo C. Florece Jr.
Senior Officials Meeting on Transnational Crime
Voluntary Lead Shepherd – Trafficking in Persons
Manila, Philippines
August 2018

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Treaty and Non-Treaty Instruments Referred to in the Handbook

List of International and Regional Instruments

Abbreviation (as used in Handbook)	Instrument (in order of appearance in Handbook)
ACTIP ("ASEAN TIP Convention")	ASEAN Convention Against Trafficking in Persons Especially Women and Children
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

Abbreviation (as used in Handbook)	Instrument (in order of appearance in Handbook)
-	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

Abbreviation (as used in Handbook)	Instrument (in order of appearance in Handbook)
-	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 Action Plan	ASEAN Regional Action Plan against Trafficking in Persons, Especially Women and Children
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]

Tables

Text Boxes

Acronyms

AAPTIP	Australia-Asia Program to Combat Trafficking in Persons
ADB	Asian Development Bank
AMS	ASEAN Member States
ARTIP	Asia Regional Trafficking in Persons [Project]
ASEAN	Association of Southeast Asian Nations
ASEANAPOL	ASEAN Chiefs of Police
ASLOM	ASEAN Senior Law Officials Meeting
AU	African Union
CNA Directory	Competent National Authorities Directory
FIU	Financial Intelligence Unit
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
SOMTC	[ASEAN] Senior Officials Meeting on Transnational Crime
TIP	Trafficking in Persons
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

Key terms

Asset recovery	A term used to describe efforts by governments to repatriate proceeds of crime hidden in foreign jurisdictions.
Central Authority	The body responsible for the transmission, receipt and handling of all requests for assistance on behalf of a State.
Dual/double criminality	The principle that 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.
Extradition	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.
Financial Intelligence Unit	A central national authority responsible for receiving, analysing and transmitting financial information to the competent authorities in support of efforts to combat money laundering and serious crimes.
Informal cooperation	The exchange of information that occurs directly between law enforcement and regulatory agencies with their foreign counterparts. Also referred to as 'police-to-police' and 'agency-to-agency' cooperation.
Letters rogatory	A request for assistance by a judge in one State to a judge in another State.
Money laundering	Any act or attempted act to disguise the source of money or assets derived from criminal activity, including concealing the origins and use of illegal assets. Money laundering is often used to disguise the proceeds of trafficking crimes as well as the proceeds of corruption linked to trafficking.
Mutual legal assistance	The process States use to request other States to provide information and evidence of the purpose of an investigation or prosecution.
Organised crime	A serious crime (such as trafficking in persons) committed by a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing such crimes in order to obtain a financial or other material benefit.
Parallel financial investigation	A financial investigation, by investigators and/or prosecutors, that is initiated alongside a criminal investigation.
Principle of reciprocity	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.
Proceeds of crime	Any property derived from or obtained (directly or indirectly) through the commission of an offence.

Key ASEAN Milestones

The following table summarises the significant achievements of ASEAN and its member States in relation to trafficking in persons and international legal cooperation.

	MILESTONE	IMPACT / RELEVANCE
2002	Philippines ratifies the UN Trafficking Protocol	First ASEAN Member State to join the Protocol. [Note: The Protocol (through its parent instrument, the Organized Crime Convention) obliges States to cooperate in TIP investigations and prosecutions. It may also be used as a legal basis for MLA and extradition].
2003	Lao PDR ratifies the UN Trafficking Protocol	Second ASEAN Member State to join the Protocol.
2004	Adoption of the *ASEAN Declaration against Trafficking in Persons, Particularly Women and Children*	The first ASEAN-wide instrument to address trafficking in persons: identified trafficking as a problem affecting all States of the region and committed States to cooperating in preventing trafficking, dealing with offenders and protecting victims.
2004	Myanmar accedes to the UN Trafficking Protocol	Third ASEAN Member State to join the Protocol.
2004	Adoption of the *Treaty on Mutual Legal Assistance in Criminal Matters among Like-Minded ASEAN Member Countries*	Legally binding instrument committing States Parties (as at 2015, all AMS) to a wide range of cooperative actions in relation to mutual legal assistance. The Treaty's coverage extends to all serious criminal offences (and thereby all trafficking cases).
2007	SOMTC adopts the *ASEAN Practitioner Guidelines on an Effective Criminal Justice Response to Trafficking in Persons*	First SOMTC-led instrument on trafficking in persons: acknowledges the need for cooperation between AMS and sets out basic principles and guidelines for informal police-to-police (cooperation as well as extradition and mutual legal assistance).
2007	Cambodia accedes to the UN Trafficking Protocol	Fourth ASEAN Member State to join the Protocol.
2009	Indonesia and Malaysia accede to the UN Trafficking Protocol	Fifth and sixth AMS to join the Protocol.
2010	SOMTC adopts the *ASEAN Handbook on International Legal Cooperation in Trafficking in Persons Cases*	Globally, this is the first comprehensive resource on the subject – has since been widely used within and outside the region.

	MILESTONE	IMPACT / RELEVANCE
2012	Viet Nam accedes to the UN Trafficking Protocol	Seventh ASEAN Member State to join the Protocol.
2013	Thailand accedes to the UN Trafficking Protocol	Eighth ASEAN Member State to join the Protocol.
2015	Work commences on development and piloting of the *ASEAN Training Program on International Legal Cooperation in Trafficking in Persons Cases*	Development and piloting led by Thai Office of the Attorney General in collaboration with Myanmar, Cambodia and Indonesia.
2015	Singapore accedes to the UN Trafficking Protocol	Ninth ASEAN Member State to join the Protocol.
2015	*ASEAN Convention on Trafficking in Persons, Especially Women and Children* (ACTIP) adopted by ASEAN Heads of State	ASEAN's first legally binding instrument on trafficking.
2016	ACTIP enters into force following ratification by Cambodia, Singapore, Thailand, Viet Nam, Myanmar and the Philippines	The Convention affirms obligation of cooperation (and application of AMLAT) in TIP cases and includes extensive provisions on extradition. May be used as a legal basis for extradition between States Parties in TIP cases.
2018	*ASEAN Training Program on International Legal Cooperation in Trafficking in Persons Cases* presented to AMS practitioners for review and finalization Revised *ASEAN Handbook on International Legal Cooperation in Trafficking in Persons Cases*	

Additional Resources

The following additional resources are available to supplement the information and guidance provided in this Handbook:

Association of South East Asian Nations. ASEAN Convention Against Trafficking in Persons, Especially Women and Children (2015), available at: http://asean.org/asean-convention-against-trafficking-in-persons-especially-women-and-children/

UNODC: *Manual on International Cooperation for the Purposes of Confiscation of Proceeds of Crime* (2012), available at: https://www.unodc.org/documents/congress/background-information/International_Cooperation_CM/Confiscation_Manual_Ebook_E.pdf

UNODC, Manual on Mutual Legal Assistance and Extradition (2012), available at: https://www.unodc.org/documents/organized-crime/Publications/Mutual_Legal_Assistance_Ebook_E.pdf

UNODC, Mutual legal Assistance Request Writer Tool (2018 edition), available at: https://www.unodc.org/mla/en/index.html

UNODC, *Handbook on the International Transfer of Sentenced Persons* (2012), available at: https://www.unodc.org/documents/organized-crime/Publications/Transfer_of_Sentenced_Persons_Ebook_E.pdf

World Bank, *Handbook for Practitioners on Asset Recovery under StAR Initiative* (2010), available at: https://star.worldbank.org/sites/star/files/asset_recovery_handbook_0.pdf

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 assistance (which incorporates a sub-set of tools that can assist with the 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 States[2] have affirmed the importance of stronger and more effective regional and international cooperation – recognizing that such cooperation is vital to successful domestic prosecutions as well as to eliminating safe havens for traffickers and their accomplices.[3] Several 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, provides 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*[4] (UNTOC), the *United Nations Convention against Corruption*[5] (UNCAC) and the *Organisation for Economic Co-operation and Development Convention on Combating Bribery of Foreign Public*

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

[3] 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)).

[4] *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*].

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

Officials in International Business Transactions[6] (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 AMS have signed or ratified one or more of these instruments.

Text Box 1: ASEAN Developments that have Influenced International Legal Cooperation in Trafficking Cases

Adoption of the ASEAN Trafficking Convention: The ACTIP commits States Parties to cooperate with each other in the investigation and prosecution of trafficking cases. The Convention clearly affirms an obligation of cooperation among Parties with respect to both investigation (informal cooperation) and prosecution (legal cooperation) in trafficking cases. It also sets out very detailed provisions on extradition of persons suspected or convicted of trafficking crimes. Critically, the Convention can itself serve as the legal basis for an extradition request between States Parties.
Changes to national legal frameworks: Several AMS have adopted new laws on trafficking in persons or revised existing laws. These changes have generally brought national legislation in the region closer to the standards set out in the UN Trafficking Protocol and the ASEAN Trafficking Convention.
Stronger national legislation against money laundering: Throughout the region there has been a strengthening of legislative frameworks to deal with laundering of proceeds of crime. While some of these changes may have been motivated by other concerns (e.g. around terrorist financing), they have served to strengthen the capacity of States to pursue perpetrators of trafficking crimes and their assets.
Stronger regional legal framework around mutual legal assistance: The AMLAT is in operation between all ten AMS. While the Convention is not commonly used as a legal basis for MLA, it has been employed on several occasions to request assistance in a trafficking case.

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 AMS 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.[7]

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.[8]

In June 2008, SOMTC proposed to implement this commitment by supporting the 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

[6] *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*].

[7] 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*].

[8] SOMTC, *2007-2009 Work Plan to Implement the ASEAN Declaration against Trafficking in Persons*, section 1.2.2.

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 AMS. 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. The revised, finalised Handbook was endorsed by SOMTC in 2010. The following year, SOMTC approved the development of a regional training program to support more and better international legal cooperation in trafficking cases.

In 2016, SOMTC endorsed the development of a revised edition of the Handbook, to take account of changes in national and regional laws, policies and practices. A draft was prepared following Initial country level consultations. This was presented at a regional workshop of practitioners, convened in May 2017. A series of workshops to develop a global version of the Handbook, convened by UNODC in May and November 2017 and involving experts from several AMS, also contributed to the review process.

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 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 AMS 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 empowering victims to seek and obtain justice for the wrongs committed against them.

While the Handbook is primarily intended 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.

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 are the *United Nations Convention against Transnational Organized Crime* (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*[9] (UN Trafficking Protocol) and the UNCAC. The Handbook also reflects norms and standards that have been developed

[9] *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*].

at the regional level (e.g. *Treaty on Mutual Legal Assistance in Criminal Matters among Like-Minded ASEAN Member Countries*[10] (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*[11] (ICCPR) and the *United Nations Convention against Torture*[12] (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 an introduction to trafficking in persons and outlines the elements of the crime as defined in international law (and in the national legislation of most AMS). This Chapter also provides an overview of the international legal framework around trafficking in persons with a particular focus on those instruments that are directly relevant to international cooperation.

Chapter 2: introduces the reader to international cooperation in the investigation and prosecution of trafficking cases. It outlines its importance; identifies its main forms (with special reference to informal (or police-to-police) cooperation); and provides an overview of its legal basis. This Chapter concludes with a note on the key issues of sovereignty, safeguards and human rights as they relate to international cooperation.

Chapter 3: considers the tool of mutual assistance in the context of trafficking in persons crimes. It identifies the key international and regional principles on mutual assistance; explains the relevance of mutual assistance in trafficking cases; and summarizes its legal basis. This Chapter then identifies and considers the various principles and conditions attached to mutual assistance. The reader is provided with information on how to prepare, transmit and respond to mutual assistance requests. The chapter includes, at the end, several different resources (checklists, model forms and a guide to the UNODC Request Writer Tool) designed to support the development of effective mutual legal assistance requests.

Chapter 4: considers mutual assistance with specific reference to recovery of proceeds of trafficking crimes. It identifies the key international and regional principles; explains the importance of pursuing the financial proceeds of trafficking crimes; and summarizes its legal basis. 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 recovery of proceeds.

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. This Chapter then considers the preconditions and safeguards that typically apply in extradition cases. It concludes with practical information on procedures that are typically followed in extradition cases and provides guidance on how to prepare, transmit and respond

[10] *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*].
[11] *United Nations International Covenant on Civil and Political Rights*, Dec. 16, 1966, 999 UNTS 171, entered into force Mar. 23, 1976 [hereinafter *ICCPR*].
[12] *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*].

to extradition requests. This chapter includes, at the end, several checklists designed to support the development of extradition requests.

The Handbook contains an important Appendix: comprehensive, updated 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 Handbook, providing information on national requirements with respect to mutual legal assistance; cooperation in financial matters, and extradition.

Chapter 1: Introduction to Trafficking in Persons and the Applicable International Legal Framework

Contents of this Chapter:

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. This Chapter concludes with a brief overview of trafficking patterns and trends.

1.1.1 Legal definition of trafficking in persons

The term "trafficking in persons" is defined by the UN Trafficking Protocol and the ASEAN Trafficking Convention as follows:

(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 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 (UN Trafficking Protocol, Article 3(c)). 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.

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 the proof of 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]

[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.

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 irregular 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 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 in Article 3 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.

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 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.

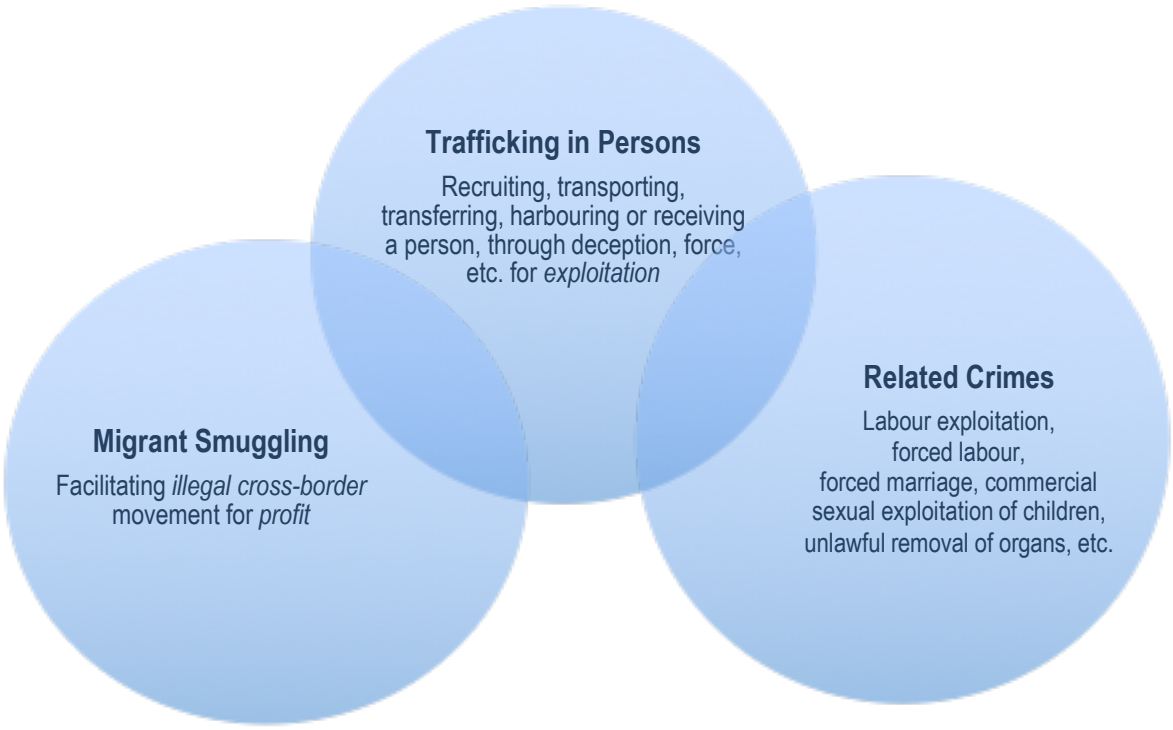
The link between trafficking and migrant smuggling highlights one of the main obstacles to identification of trafficked persons. As explained above, trafficking involves the intention to exploit. In trafficking cases where the 'action' element involves some kind of movement, such intent will often not 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 identified in the international definition as end-purposes of trafficking. Related crimes can also include those with a strong transnational element such as involvement in organized crime, money laundering or the bribery of foreign officials.

[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*].

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.[16] 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.[17]



A decision of one State to use alternative offences in a case of trafficking in persons should not obstruct or complicate its engagement in international cooperation (see further Chapter 2).

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, the following characteristics of current trafficking patterns have been identified 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, forced labour (for example, on farms, construction sites, fishing vessels and factories), and sexual exploitation.

[16] 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*].
[17] 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, 2010) [hereinafter OHCHR*, Commentary to the Trafficking Principles and Guidelines*].

- 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 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 are not always physically detained. Traffickers and their accomplices often use a variety of methods to secure compliance or to prevent escape, (including threats and the use of force, intimidation, detention, deception, debt bondage, the withholding of wages, isolation, and the withholding of personal documents).
- Trafficking is sustained and strengthened through public sector corruption, particularly through 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 a citizen of, or legally present in, a State and 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 trafficking[18]

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.[19] 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 obligations 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, which 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 to be bound. Such an 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 UN, or a regional organisation such as the European Union,

[18] 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, 2010) [hereinafter Gallagher*, The International Law of Human Trafficking*].

[19] 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.

the African Union (AU) or ASEAN. Bilateral treaties, or those developed between a small 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.[20]

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 recently concluded, 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 the 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, 4 and 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 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. Four specific offences (as well as the generic category of offence 'serious crime') are covered: participation in an organized criminal group; money laundering; corruption; and obstruction of justice. The offences can be committed by individuals and corporate entities (Articles 3, 5, 6, 8 and 23).

There are two principal prerequisites for the application of UNTOC. First, the relevant offence must have a transnational aspect. Second, it must involve an organized criminal group. Both elements are defined very broadly.[21] 'Serious crime' is defined to include all significant criminal offences (Article

[20] 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 Matter*, reviewed Dec. 6-8, 2002, [hereinafter UNODC*, Revised Manuals on the Model Treaty on Extradition and the Model Treaty on Mutual Assistance*].

[21] *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

2(b)). As a result, States can 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 because 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 (Article 5);
- laundering of proceeds of crime (Article 6);
- public sector corruption (Article 8); and
- obstruction of justice (Article 8).

These offences are also to be made subject to appropriate sanctions (Article 6(1)).

One of the principal 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 (Article 18).

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 proceeds of crime and production of information and documentation (Article 14(2)). States Parties are also encouraged to establish joint investigative bodies (Article 19); come to formal agreement on the use of special investigative techniques (Article 15); consider the transfer of criminal proceedings (Article 21) and sentenced persons (Article 17); and facilitate extradition procedures for applicable offences (Article 16).

UN Trafficking Protocol

The most important international treaty 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, as stated in Article 2, 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 to meet those objectives.

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

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.

- 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 (Article 5);
- 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 (Article 6);
- to ensure that the legal system contains measures that offer victims the possibility of obtaining compensation (Article 6(6));
- to strengthen such border controls as might be necessary to prevent trafficking, without prejudice to other international obligations allowing the free movements of people (Article 11);
- to ensure the integrity of national travel or identity documents and to act promptly in response to requests for verification of such documents (Article 12);
- 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 (Article 10);
- to consider allowing victims to remain in their territory, whether permanently or temporarily, taking into account humanitarian and compassionate factors (Article 7); and
- 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 (Article 8).

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*.[22] 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.[23] 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.

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 (Article 37(2));
- 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 (Article 37(4));
- 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 (Article 34(2));

[22] *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.
[23] *UNTOC*, art. 34(2). See also UNODC, *Legislative Guides to the Organized Crime Convention and its Protocols*, p. 258, para. 25.

- 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 (Article 1(3)).

Regional trafficking-specific treaties: the ASEAN Trafficking Convention

The international legal framework around trafficking includes specialist treaties that have been concluded between regional groupings of States in both Europe and South East Asia. The following table sets out the key provisions of this important legal agreement.

THE ASEAN CONVENTION AGAINST TRAFFICKING IN PERSONS ESPECIALLY WOMEN AND CHILDREN
KEY PROVISIONS / OBLIGATIONS OF STATES PARTIES

The purposes of the ASEAN Trafficking Convention are:	
To prevent and combat trafficking, paying particular attention to women and children and ensure just and effective punishment for traffickers; To protect and 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	Article 1
The key obligations of States Parties to the ASEAN Convention are:	
To **criminalize 'trafficking in persons'** as defined in the Convention and to provide for higher penalties in certain cases including where the offence involves a vulnerable victim or serious injury or death; or where the offence is committed by a public official	Article 5
To **criminalize corruption and obstruction of justice** associated with trafficking such as the giving or receiving of bribes; intimidation of witnesses / public officials	Articles 8,9
To establish **national guidelines or procedures for proper victim identification** and to respect the decisions of other States Parties with regard to victim identification	Article 14(1&2)
To consider **allowing victims to remain in their territory**, whether permanently or temporarily, taking into account humanitarian and compassionate factors	Article 14(4)
To provide for **physical safety** of victims within the territory	Article 14(5)
To protect victim **privacy and identity** to the extent possible under domestic law	Article 14(6)
To consider **not holding victims liable** for committing unlawful acts directly related to their trafficking	Article 14(7)
To **not unreasonably hold victims in detention or prison**	Article 14(8)
To **inform victims of their entitlements** to protection, assistance and support	Article 14(9)
To **provide care and support to** victims including **housing**; **counseling and information**; **medical, psychological and material assistance**; and **employment, education and training** and to **allocate appropriate funds** for the care and support of victims	Article 14(10),(14)
To ensure the law provides for the possibility of victims obtaining **compensation** for damage suffered	Article 14(13)
State Party of origin to **verify nationality** of victim; **issue necessary documentation**; and **accept return** without delay; return to be undertaken with due regard for **safety of victim and status of legal proceedings**; states of origin and destination to establish **repatriation programs** and assist in **reintegration** of victims	Article 14(11), Article 15
To ensure **law enforcement and prosecution authorities** are **equipped with appropriate skills and knowledge** including in relation to victim protection and to provide training for this purpose	Article 16(1)(6)
To cooperate in encouraging **victim-witnesses to voluntarily return to the country of destination to testify** or otherwise cooperate	Article 16(5)
To **protect victim-witnesses from intimidation** and harassment and punish such conduct	Article 16(7)

To afford each other the widest measure of **mutual legal assistance** in accordance with the AMLAT	Article 18
To establish all TIP offences as **extraditable offences** under national law and through bilateral treaties and to **cooperate** in extradition requests	Article 19
To **cooperate with each other in order to enhance the effectiveness of law enforcement action** including through exchange of information and responding to inquiries and requests for assistance; and to cooperate further for **purposes of confiscation of proceeds** of TIP crimes	Article 20

The figure below highlights the reasons why the ASEAN Trafficking Convention (ACTIP) is so significant.

Text Box 2: The ASEAN Trafficking Convention: Key Features

- **The first legally binding agreement on trafficking for ASEAN, making this the second region in the world (after Europe) to have put in place legal rules around trafficking**
- **Adopted November 2015 - entered into force among States Parties 2nd March 2017. As at that date, the Convention had been ratified by Cambodia, Singapore, Thailand, Viet Nam, Myanmar and the Philippines**
- **Affirms the key principles and rules set out in the major international treaty on trafficking (the UN Trafficking Protocol) and its 'parent' treaty, the UN Organized Crime Convention**
- **Extends those rules in certain key respects – especially around victim protection and support**
- **Once an ASEAN State ratifies the ACTIP, they are then legally obliged to comply with its provisions. They cannot use excuses such as conflicting national laws or practices or even lack of resources**
- **The ACTIP does not establish a formal body to monitor its implementation, but it is likely that some reporting mechanism will be set up and civil society can use the ACTIP to hold States Parties to account for weaknesses and failures in their national TIP response**

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*[24] (CEDAW): Article 6 explicitly prohibits trafficking and exploitation of the prostitution of women;
- *Convention on the Rights of the Child*[25] (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 AMS 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

[24] *Convention on the Elimination of All Forms of Discrimination Against Women*, Dec. 13, 1979, 1249 UNTS 13, entered into force Sept. 3, 1981.
[25] *Convention on the Rights of the Child*, Nov. 20, 1989, 1577 UNTS 3, entered into force Sept. 2, 1990.

certain rights that are particularly important in the context of trafficking. 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.

Criminal law/Crime control treaties

Over the past decade, several international treaties dealing generally with criminal matters or specifically relating 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. Another important and recent treaty in the area of crime control and criminal justice is the UN *Convention against Corruption* (UNCAC), which entered into force in 2005 and is considered further 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.[26]

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).[27] 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.[28] 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,[29] 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*.[30]

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[26] 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.

[27] 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*].

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

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

[30] 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*

Important quasi-legal and non-legal instruments have also been developed at the regional level. Like 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, 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;[31] the 2007 *ASEAN Practitioner Guidelines on Effective Criminal Justice Responses to Trafficking in Persons*[32] (ASEAN Practitioner Guidelines); the *ASEAN Plan of Action against Trafficking in Persons, especially Women and Children* (adopted alongside the ACTIP); and the ACWC *Gender Sensitive Guidelines for Handling Women Victims of Trafficking in Persons*.

Finally, bilateral 'soft law' instruments on trafficking can provide another source of information and insight into accepted or evolving legal standards. Within the ASEAN region there is a web of such bilateral instruments. One example is the agreement between the Kingdom of Cambodia and the People's Republic of China on Strengthening Cooperation in Counter Trafficking in Persons,[33] and similar agreements Cambodia has concluded with Viet Nam and Thailand.[34]

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* (2008) 20 International Journal of Refugee Law 242.

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

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

[33] *Agreement between the Government of the Kingdom of Cambodia and the Government of the People's Republic of China on Strengthening Cooperation in Counter Trafficking in Persons,* Cambodia-China, October 13, 2016.

[34] *Agreement Between the Royal Government of Cambodia and The Government of the Socialist Republic of Viet Nam on Bilateral Cooperation for Eliminating Trafficking in women and Children and Assisting Victim of Trafficking* (28 September 2012); *MOU Between the Government of the Kingdom of Cambodia and the Government of the Kingdom of Thailand on Bilateral Cooperation for Eliminating Trafficking in Persons and Protecting Victims of Trafficking* (30th October 2014).

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 frequently referred to 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.

Finally, it is important to acknowledge that the international legal framework around trafficking in persons is still incomplete. For example, the exact parameters of the obligation on states to 'assist' and 'protect' victims are not yet agreed upon. Moreover, other critical questions (for example, whether a State is ever entitled to compel the cooperation of a victim) remain unsettled.

Chapter 2: Introduction to International Cooperation in the Investigation and Prosecution of Trafficking in Persons

Contents of this Chapter:

Overview of this Chapter:

The purpose of this Chapter is to introduce practitioners to the basic concepts of international cooperation, with specific reference to its use in trafficking in persons cases, while also providing a practice-based explanation of its value and limitations. This Chapter includes information about:

- why international cooperation is *important* and – despite challenges and limitations – worth pursuing in trafficking cases;
- why international cooperation is *different* in trafficking cases;
- factors to consider when *deciding* whether to pursue international cooperation;
- the concepts of *jurisdiction* and *sovereignty* as they relate to international cooperation;
- the legal framework that is relevant to understanding how international cooperation in criminal matters can be facilitated; and
- the key tools of international cooperation (informal cooperation, mutual legal assistance and extradition) and how these can work together.

2.1 Introduction: international cooperation in trafficking cases – a reality check

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. Trafficking cases are, however, 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 and thereby ending the current high levels of impunity enjoyed by traffickers. International cooperation also offers a valuable opportunity to disrupt the chain of trafficking, extending from recruitment to exploitation.

The importance of international cooperation has been recognized at the international and regional level. Examples of this recognition include the following:

- international cooperation to prevent and combat transnational organized crime is a primary aim of the UNTOC (Article 1);
- one of three basic purposes of the UN Trafficking Protocol is to promote international cooperation to prevent, suppress and punish trafficking in persons (Article 2);
- other key international instruments, including UNCAC, highlight the central importance of international cooperation as a critical means of eliminating safe havens for criminals (Article 1);
- AMS have developed a strong legal framework that regulates the provision of mutual assistance through the ASEAN MLAT;
- The *ASEAN Practitioner Guidelines* affirm the practical importance of strong cooperation in ending impunity for traffickers and securing justice for victims; [35] and
- the *ASEAN Trafficking Convention* (ACTIP) strongly affirms that regional and international cooperation is vital to preventing and combating trafficking in persons.[36] This is further emphasised in the *ASEAN Plan of Action*.

Experience has shown that international cooperation can facilitate many aspects of trafficking investigations and prosecutions. For example, informal police-to-police cooperation has been used to identify and rescue victims of trafficking and to apprehend suspects. Mutual legal assistance has been used to secure vital evidence that has made possible or strengthened prosecutions. The tools of extradition have also been employed to ensure that suspects are returned to the appropriate jurisdiction to stand trial for trafficking-related offences.

Barriers to – and limitations of – international cooperation

While affirming the importance of international cooperation in trafficking cases, it is also necessary to flag the limits of such cooperation and the many obstacles that prevent cooperation from taking place or securing its desired outcome. Despite widespread acknowledgement of its *value*, international cooperation – whether formal or informal – is often very difficult to secure in practice. In many situations, the criminal justice response will be focused solely on the national aspects of the case, even when there are strong indications of cross-border criminality.

[35] See further, *ASEAN Practitioner Guidelines*, Part Two – International Operational and Legal / Judicial Co-operation.
[36] In addition to substantive provisions on informal cooperation, MLA and extradition, the ASEAN Trafficking Convention identifies promotion of international cooperation as one of the three objectives of the instrument and, in its preamble, recognises: "that cooperation is imperative to the successful investigation, prosecution and elimination of safe havens for the perpetrators and accomplices of trafficking in persons and for the effective protection of, and assistance to, victims of trafficking".

Practitioners often report the following constraints:

- differences in legal systems and impediments to cooperation in domestic legal frameworks;
- language barriers;
- lack of a culture of cooperation in one or both countries;
- lack of relationships necessary to facilitate such cooperation;
- low levels of trust;
- lack of supporting infrastructure (avenues, systems and procedures, a functioning Central Authority, etc.) in one or both countries concerned;
- lack of awareness of international cooperation tools by practitioners; and
- resource and time constraints.

These constraints (together or separately) often contribute to a general reluctance of agencies and individual officials to engage in international cooperation. This may extend to reluctance to request cooperation or to respond usefully (or at all) upon receiving a request from another country.

Why international cooperation is important – and different – in trafficking cases

The obstacles and constraints referred to above typically apply to the full range of cases in which international cooperation may be sought or provided. In that sense, trafficking in persons is not different to other crimes. However, there are several features of trafficking cases that will influence both the *why* and the *how* of international cooperation.

First, international cooperation will often be necessary to prosecute the full range of crimes – and criminals – involved in a trafficking operation. While trafficking can occur within the borders of a single country, it most often involves the commission **of multiple offences in two or more States**, and frequently involves **transnational organised criminal groups**. Without international cooperation, prosecutions in such cases cannot target all crimes or all involved offenders.

Second, the identification of victims and their removal from harm is often the focus of international cooperation in cases of trafficking in persons. States may also seek to cooperate to secure victim testimony in trafficking prosecutions. Despite the growing use of special investigation techniques, such as controlled deliveries and interception of telecommunications, **victims remain the most powerful source of evidence** in many cases.

Victim-related issues that need to be considered – and victim-related challenges that may complicate international legal cooperation – include the following:

- victims are often **not identified** correctly, promptly or at all. This can mean that those who *are* identified are under significant pressure to cooperate in the prosecution of their exploiters;
- even when they are identified and available to cooperate, victims' testimony is often fragile and needs to be supported by **corroborative evidence**. Evidence other than victims' testimony is also needed to reveal the chain of trafficking, of which victims may not be aware;
- trafficking cases invariably involve **highly traumatised and vulnerable victims,** including children. Their involvement in the criminal justice response to trafficking is often fraught and sometimes comes at considerable personal cost and risk;
- victims of trafficking have **rights and entitlements** that must be respected and upheld, even when these do not align with prosecutorial goals. For example, victims should be encouraged, but not compelled, to participate in the prosecution of their exploiters, especially where their safety and wellbeing cannot be guaranteed. In addition, victims have the right to receive (and decline) protection and support, including legal assistance. They should not be routinely detained – including for the purposes of facilitating an investigation or prosecution;

- victims of trafficking are **protected from prosecution for crimes related to their trafficking** (such as immigration and work offences). However, this can be complicated in cases where there is evidence of criminal conduct that was not part of their trafficking;
- victims are **entitled to return home without unreasonable delay and cannot be prevented from returning home** if they wish to. Return should preferably be voluntary and conducted in a way that ensures the victim's safety and well-being both during and after return;
- in some national and regional systems, victims who are cooperating with criminal justice agencies are granted **special legal status to remain** – either for the duration of their involvement or sometimes even permanently;
- before, during and after their involvement in the criminal justice process, **victims should be provided appropriate information, assistance and support**, including protection from re-traumatisation. Child victims in the criminal justice process have special needs that must be met and additional rights that must be respected; and
- victims of trafficking are entitled to **remedies** for the harms committed against them. In some countries, prosecutions and convictions will be linked to victim compensation.

International cooperation approaches and techniques may need to be adapted or modified to uphold the rights and interests of victims. For example, it has been recognised that:

- international cooperation may **exacerbate risks to the safety and well-being of victims**. Agencies requesting or receiving a request for cooperation in trafficking cases should consider such risks in deciding whether and how to cooperate; and
- use of **alternatives to direct testimony**, such as pre-trial depositions and video-link, is becoming more common in trafficking cases and must be factored into decisions around international cooperation (See the case study below).

Deciding whether to engage in international cooperation

International cooperation will always be an 'extra' in the conduct of investigations and prosecutions; not all trafficking cases will benefit. In particular, destination countries should carefully consider whether the elements of the crime can be competently established before embarking on a request for cooperation.

Of course, a decision of whether to proceed with international cooperation will always be case-specific and will inevitably depend on weighing up multiple factors. The following questions should be asked prior to any decision or action:

Is sufficient evidence available locally to support an investigation/strong prosecution?

If yes, seeking international cooperation may waste time and resources. It may also compromise the prosecution case and, through inevitable delays, cause unnecessary harm to the victim.

If sufficient information/evidence to support an investigation/strong prosecution is <u>not</u> available locally:

- How time-sensitive is the case? For example, can it be expected that victim-witnesses will continue to be available after the inevitable lengthy delays?
- Is there an appropriate legal basis for the proposed cooperation?
- Does the Requesting State have sufficient information to produce a request that can be acted upon? If not, it may be necessary to engage informal cooperation channels to secure the necessary information.
- Are there reasonable grounds to presume that the required information/evidence could be secured through international cooperation?

- Are the necessary structures and relationships in place to enable this information/evidence to be secured without: (i) imposing an undue burden on persons or agencies involved; or (ii) causing unreasonable delay that would compromise the case? (For example, the lack of a functioning Central Authority in the proposed country of request could be a strongly relevant factor in weighing the feasibility of a request being dealt with adequately and in a timely manner);
- Is it reasonable to foresee that the international cooperation which is being sought will present a serious risk to the safety and well-being of any involved witnesses?

Another relevant factor is ***whether there is a reasonable alternative to international legal cooperation***. In other words, criminal justice authorities may be able to find an alternative means by which to secure the same result without the inevitable delays and uncertainties of requesting another country's cooperation. Text Box 3 provides an example of a provision in Thailand's law which allows a foreign victim-witness to return home **after** giving testimony, rather than **before**. This procedural tool provides an alternative to having to resort to ILC in order to bring a victim-witness back for trial, which inconveniences the victim-witness, can incur significant costs, and presents a substantial risk of delay and non-compliance for the prosecutor.

Text Box 3: Practice Note: Use of Depositions to Avoid the Use of International Legal Cooperation and to Allow Victims to Return Home after Giving Evidence

The following case example illustrates an alternative approach to ILC, which could be considered by prosecutors in deciding whether to use ILC in appropriate cases. The advantages of pursuing this strategy are noted above. Practitioners should also be aware of possible disadvantages; specifically, the loss of live testimony of an important witness at trial, and the possibility that the defence may successfully argue that he or she had insufficient information or opportunity to adequately cross-examine the victim or witness at the deposition.

In Thailand, the police rescued a group of workers who had been recruited from Myanmar to work in a shrimp-peeling factory where they were compelled to work under poor conditions for long hours and for little or no pay. A high fence staffed by security guards surrounded the factory. The owners of the factory routinely threatened and punished the workers if they complained about conditions or threatened to quit.

After their rescue, the victims were placed in a state-run shelter near Bangkok where the victims were not allowed to leave pending the resolution of the prosecution.

Due to the complexity of the case, the investigation took many months to complete before charges were filed, and the case was not scheduled for trial for many months after that. During this waiting period, the victims became increasingly unhappy in the state shelter and repeatedly expressed a desire to return home. The prosecutor became concerned that the victims might escape from the shelter or lose interest in testifying at the trial. At the same time, the prosecutor did not want to lose the testimony of the victims by sending them back to Myanmar before the trial.
In response to these concerns and competing interests, the prosecutor invoked a provision in the national TIP Law and Criminal Procedure Code that allowed pretrial depositions of victims in TIP cases. Pursuant to that law and the Criminal Procedure Code, depositions could be presented at trial as substantive evidence in place of live testimony if the statements were taken under oath, before a judge and in the presence of defence counsel who was given an adequate opportunity to cross-examine the witness.

The prosecutor scheduled about twenty victim depositions with the court. These depositions were taken over several months in accordance with the law: under oath before a judge and in the presence of both the accused and their counsel who vigorously cross-examined each victim. The testimony was recorded word-for-word by the court reporter.

At the conclusion of the depositions, the victims were repatriated back to Myanmar. Many months later, the case went to trial. At the trial, the prosecutor presented the depositions of the victims in place of their live testimony. The Court accepted these depositions as substantive evidence, noting that the defence had sufficient information and opportunity to confront and question the victim-witnesses. The prosecution ended successfully with convictions and substantial sentences against the accused [later reversed on appeal on unrelated grounds].

Note: It should be pointed out that the use of depositions to preserve the testimony of victims may not be available in some countries where the accused's right to confrontation is fundamental (like the US) or where neither the TIP law nor criminal procedure code provide for depositions or limit their use to a very narrow set of circumstances (unlike Thailand) which have to be established as a prerequisite to invoking the deposition process.

It might also be noted that defence counsel may object to the introduction of a properly deposed statement as evidence by arguing that there was insufficient information at the time the deposition was taken to conduct a thorough cross-examination of the witness and that therefore the witness must be produced at the trial to face further questioning. In the face of such an argument, the judge may require defence counsel to explain in detail the nature of the new information he claims was unavailable at the time of the deposition and list additional questions that he would now like to ask the witness. If the explanation is unconvincing either because the information was previously available or is irrelevant to the issues in the case, the objection should be overruled, and the deposition admitted into evidence, as it was in the above case.

Source: UNODC – Thailand (2018)

It should be noted that, even in cases where a decision is made to *not* proceed with international cooperation, agencies may still wish to share their findings with their counterpart agency in the other country involved. For example, a country of destination may have secured sufficient evidence locally to establish the crime of trafficking. However, during the investigation/prosecution process, information may have come to light that would be helpful in prosecuting recruitment for purposes of trafficking in the country of origin. In such a case, it may be appropriate for authorities in the country of destination to share that information with counterpart agencies in a manner and form that is in accordance with relevant laws.

When sharing information, it will always be necessary to consider potential risks to the victim (e.g. of prosecution by authorities, of persecution and intimidation by exploiters) and to balance these risks against the expected benefits.

2.2 Jurisdiction and sovereignty in trafficking cases[37]

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 restated in the major international cooperation treaties.[38] The exertion of pressure in a manner inconsistent with international law to obtain from a party "the subordination of the exercise of its sovereign rights" is also prohibited.[39] By their very existence, the rules and norms of international cooperation reflect and reinforce the principle of State sovereignty.

Jurisdiction refers to the right to prescribe and enforce rules against others. 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 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.[40] Another concern is to ensure that coordination mechanisms are effective in cases where more than one State may have grounds to assert jurisdiction.[41] The main rules extracted from the UN Trafficking Protocol (via the UNTOC) and the ASEAN Trafficking Convention are as follows:

- A State is *required* to establish jurisdiction over trafficking offences when the offence is committed in the territory of that State or on board a vessel flying its flag or on an aircraft registered under its laws. (The territoriality principle: UNTOC, Article 15(1); ACTIP, Article 10(1)).
- A State *may* exercise jurisdiction over trafficking offences when such offences are committed outside the territorial jurisdiction of that State against one of its nationals. (The principle of passive personality: UNTOC Article 15 (2) (a); ACTIP, Article 10(2)(a)).
- A State *may* exercise jurisdiction over trafficking offences when such offences are committed outside the territorial jurisdiction of that State by one of its nationals (The principle of nationality: UNTOC Article 15(2)(b); ACTIP, Article 10(2)(b)).

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

[38] 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.

[39] 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*].

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

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

- 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 (UNTOC Article 15(2)(c); ACTIP, Article 10(2)(c)).
- 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 nationality[42] (The principle of 'extradite or prosecute' UNTOC Article 15(3); ACTIP, Article 10(3)).[43]

Related treaties, such as those dealing with exploitation of children and trafficking in children for adoption, generally reiterate these rules.[44] The importance of eliminating jurisdictional gaps has also been emphasised by intergovernmental organisations and other policy-making bodies.[45] It is important to note that many States have passed anti-trafficking legislation expanding the jurisdictional reach of the relevant offences beyond what may be usual.

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 to coordinate actions and, more specifically, to determine the most appropriate jurisdiction within which to prosecute a particular case.[46] 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.[47]

The 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" (Article 21).[48]

The ASEAN Trafficking Convention provides that:

> If a Party exercising its jurisdiction … has been notified, or has otherwise learned, that one or more other Parties are conducting an investigation, prosecution or judicial proceeding in respect of the same conduct, the competent authorities of those Parties shall, as appropriate, consult one another with a view to coordinating their actions (ACTIP, Article 10(5)).

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[42] Note that under the terms of both instruments, if the State refuses extradition on grounds other than nationality, it *may* establish jurisdiction: UNTOC Article 15(4); ACTIP, Article 10(4).

[43] For a full discussion of this rule, see Chapter 5, below.

[44] 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.

[45] 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."

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

[47] 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).

[48] 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 Informal cooperation including police-to-police cooperation

In this Handbook, 'informal cooperation' refers to the exchange of information that occurs directly between law enforcement and regulatory agencies with their foreign counterparts. It is sometimes 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.

The process of seeking assistance through formal channels is often complex and slow. Accordingly, experts recommend that, where possible, practitioners should consider whether it may be possible to lawfully secure the desired outcome through informal cooperation mechanisms. This can have other benefits: for example, shortening the time that victim-witnesses are required to be available.

Of most relevance to this Handbook is the important role of informal cooperation in ***supporting and/or complementing more formal methods of cooperation, specifically mutual legal assistance and extradition***. In many cases, informal channels can be used at an early stage of an investigation or prosecution process, with the formal mutual legal assistance or extradition request being made at a later stage.[49] This may enable the rapid exchange of information at critical junctures, while also ensuring that information or evidence is properly sourced through official channels. For example, informal cooperation can be used prior to an investigation becoming official and prior to the commencement of court proceedings 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. [50]

Informal assistance can also be helpful to prepare and narrow down a formal mutual legal assistance or extradition 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.[51] Clarifying as much information as possible in advance will assist the Requested State to provide the assistance sought and expedite the process.

Informal cooperation can also be an invaluable resource for the Requesting State in tracking the progress of a request for mutual legal assistance. Police in the Requesting State may, for example, ask their colleagues in the Requested State to make informal inquiries about the status of a request including whether the provision of additional information could speed up the process.

[49] 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*].
[50] 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*].
[51] Polaine, *Transnational Bribery/Corruption Investigations*.

Text Box 4: The Challenges and Opportunities of Police-to-Police Cooperation

Cooperation between national police forces has a long history, although the imperative of cooperation has been felt more strongly in recent years as States struggle to address transnational crimes such as human trafficking. The following excerpt provides a useful summary of the challenges and opportunities inherent in such cooperation:

> Though the need for international cooperation is apparent, bringing about successful cooperative schemes is a difficult process. Nations differ in the structure and procedures associated with their justice systems; in effect, they have differing standards and rules for how their justice systems work. Nations have different cultural values regarding human rights, civil liberties, the role of government in the lives of the citizenry, and the nature of police operations and interactions with the public. Nations have varied political systems for creating and enforcing laws. Nations have varying levels of professionalisms within their policing systems and differing economic capacities to fund public safety and national security operations. At the most fundamental level, nations at times differ in what behaviours constitute a violation of criminal law. All of these factors complicate developing effective international cooperation among nations, even when there is a predisposition to unite. The challenges are further enhanced by the introduction of nationalism, historical regional conflicts, and the varying personalities and egos of those charged with representing the policing interests of their respective nations. Despite these many obstacles, there are examples of effective efforts by nations and police forces to cooperate in the furtherance of law enforcement and national security objectives.

Source: J. Schafer, International Police Cooperation, Oxford Bibliographies

2.3.1 Legal and policy basis for informal cooperation in trafficking cases

The need for law enforcement agencies to work together, through the exchange of information and the provision of mutual support to trafficking investigations, is widely recognized, including within the ASEAN region. The following table sets out the key provision of the *ASEAN Trafficking Convention* concerning this form of cooperation in the context of trafficking in persons cases. Note that the provision replicates, almost exactly, Article 27 of the *UN Organized Crime Convention.*

Text Box 5: Law Enforcement Cooperation (ASEAN Trafficking Convention)

1. States Parties shall cooperate 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 the 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 and quantities of substances for analytical or investigative purposes;

d) To facilitate effective cooperation 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, the 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. The Parties shall endeavour to cooperate within their means to respond to transnational organized crime committed through the use of modern technology.

The ASEAN Plan of Action on Trafficking in Persons also deals with informal, police-to-police cooperation. While not legally binding on States, the Plan of Action affirms the commitments set out in Article 20 of the ASEAN Trafficking Convention and provides important guidance on implementation. For example, the Plan of Action recognises, as common challenges, throughout the region:

- The need to enhance direct communication and coordination between and among competent authorities of AMS; and
- The lack of effective regional legal and other mechanisms to further international cooperation in combatting trafficking in persons.

Other relevant provisions of the Plan of Action are set out in the text box below.

Text Box 6: Law Enforcement Cooperation (ASEAN Plan of Action)

AMS are encouraged to:

Strengthen the information-sharing, investigation and prosecution processes for cases of trafficking in persons, including the setting up of specialized enforcement teams, encouraging joint enforcement between domestic agencies, fast-tracking the investigation and prosecution of serious or aggravated cases, especially at the regional level (IV.C.I)

Strengthen the operational cooperation between AMS, in accordance with their domestic laws and bilateral or multilateral agreements, joint investigation teams to be put together by the concerned AMS, where appropriate (IV.D.d)

Strengthen capacity building activities for the purposes of improving the preparation and receiving of requests relating to mutual legal assistance, extradition and cross-border law enforcement cooperation to prevent and combat trafficking in persons (IV.D.e)

> Strengthen and enhance collaboration and coordination among the ASEAN platforms dedicated to facilitating cooperation among AMS in combating trafficking in persons, including the Senior Officials Meeting on Transnational Crime (SOMTC) Working Group on Trafficking in Persons and the HSU Meeting (IV.D.h)
>
> Identify focal points to facilitate communication, data sharing and exchange of information on trafficking in persons to strengthen prevention and protection policies and programmes among AMS (IV.D.k (i))

2.3.2 Institutional and other arrangements for informal cooperation in trafficking cases

As noted above, informal channels of cooperation are generally used for exchanging any information that will not be used directly in a judicial proceeding. Consequently, there are a wide variety of channels which may be used. It is important to note that, even when such an information exchange takes place through informal channels, it should by no means be considered an "unofficial" exchange.

In its simplest form, informal cooperation can take place through the use of personal contacts. Law enforcement officers, prosecutors, and Government officials often have contact with counterparts in neighbouring countries, and such counterparts can be useful channels through which cooperation can take place because there is an existing degree of familiarity between the two sides. The weakness of this approach is, however, connected to its temporal limitations – over time, these personal contacts move on, change contact details, and are no longer able to provide the required level of support. Approaches to cross border information exchange which are heavily dependent on individual officers will require constant renewal to compensate for such changes.

Across the ASEAN region, other, more stable, approaches to informal cooperation have been developing over several years. Regional Coordination Mechanisms, such as the Heads of Specialist Units (HSU), which sits under the umbrella of the SOMTC Working Group on TIP, provide a structured and stable platform through which informal cooperation between member states can take place. The HSU was originally attended exclusively by law enforcement officers but has recently grown to include officials working in policy-related areas as well. The HSU meets at least once per year, usually coincidentally with the SOMTC, and provides a mechanism through which all AMS can share information concerning trafficking trends, policy developments, and occasionally information of an operational or tactical nature.

In addition, the ASEAN region has invested considerable time and effort into the development and establishment of trafficking 'focal points'. Currently only existing among police officers, these focal points are operational officers working within the anti-trafficking specialist unit of the national police agency. These officers are able to respond to requests for assistance and receive and pass on information from and to other jurisdictions. Contact details of all focal points are held on a single list which is shared with all national anti-trafficking units in the region, and when officers on the list leave their positions (for whatever reason) they are replaced and new contact details are circulated. This approach overcomes the limitations experienced by reliance on personal contacts.

Finally, the International Criminal Police Organisation, or Interpol, has a network of National Central Bureaus in every country in the ASEAN region and, as well as being a significant source of information for member states, can act as a secure channel through which exchanges of information can take place.

2.3.3 Forms and purposes of informal cooperation in trafficking in persons cases

While informal cooperation will often be a pre-requisite – or co-requisite – for a formal request, not all informal cooperation in trafficking cases will be aimed at – or result in – a formal request for cooperation. The following sub-sections highlight several areas where cooperation between law enforcement agencies is especially important.

Informal cooperation related to the identification and return of presumed victims

Informal cooperation can be useful in establishing the identity of presumed victims and thereby determining the appropriate path for investigation and prosecution. For example, Thailand has used informal cooperation channels with Lao PDR to secure documentation aimed at establishing the real age of persons who may be victims of trafficking – and thereby whether it is possible to charge for trafficking in children. If the documents indicate that the victims are, or were, under 18 years of age, Thailand will make a formal MLA request for the certified documents so that these can be used at trial.

Across the ASEAN region, there is increased interest in sharing information between police agencies concerning the repatriation of persons who may be victims of trafficking but who have not been formally identified as such. In many instances, such persons have declined to cooperate with police following their discovery at a site of exploitation, instead preferring to return to their home countries as expeditiously as possible. While this unwillingness to engage in the criminal justice process is understandable, given the widespread lack of trust and incentives, it impedes the investigator's ability to take action against the exploiters.

Moreover, because repatriation under such circumstances invariably takes place under the direction of the immigration authorities of the destination country, returnees are seldom brought to the attention of anti-trafficking bodies in the country of origin during the repatriation procedure. This prevents victims from accessing the assistance to which they are entitled and may urgently need. From a criminal justice perspective, investigators in the source country are unable to collect information that would allow them to identify recruiters and transporters working at the start of the trafficking process. The entire trafficking network thus remains hidden from sight.

Within the ASEAN region, there has been some recognition of the value of cross-border cooperation aimed at encouraging returned persons who are or may be victims of trafficking to speak to their own national police officers about their experiences. Ideally, this would happen though the carefully planned and supported return of persons who may be victims and the placing of them in direct contact with specialist officers and appropriate counsellors. Information gained through this process can be passed on, informally, to investigators in the country of destination to assist them in identifying and apprehending exploiters. Such a process should form part of the victim identification process in countries of origin, allowing national authorities to put in place appropriate support measures for persons who are identified as having been trafficked.

There are several examples within the region where such approaches are already being tested. Although systematic advance notification of repatriation of presumed victims is not yet widespread, it is to be expected that, as the benefits of such cooperation become clearer, this kind of cooperation will become both more common and will deepen.

Text Box 7: Practice Note: Identification and Repatriation of Presumed Victims

Malaysia: Malaysia is primarily a destination country for nationals from other AMS including Indonesia, the Philippines and Viet Nam. Malaysian authorities frequently encounter persons who may be victims of trafficking but who do not feel in a position to talk openly about their experiences. The inability of authorities to secure victim testimony compromises criminal justice outcomes and also means that Malaysian police are unable to provide source countries with information about recruiters and transporters.

To overcome these problems, Malaysia has entered into agreements with other AMS to provide advance notification of potential victims of trafficking to anti-trafficking units in source countries, so that anti-trafficking specialists can provide support to these potential victims on arrival and offer them a further opportunity to describe their experiences. While these arrangements are still in their early stages of implementation, there are already signs that the increased informal cooperation is beginning to bear fruit. For example, there has been a marked increase in intelligence sharing between Malaysia and Viet Nam and between Malaysia and the Philippines, and much of this informal exchange concerns victims and repatriation details.

In connection with this example it is important to note that authorities are under an obligation to assess risks to victim safety and wellbeing at all times. For example, victims may have good reason to avoid authorities in their home country. Any contact between national authorities that could reveal the identity of the victim should, therefore, only occur *after* the victim has been fully informed and agreed.

Elsewhere in the region, a web of bilateral agreements has been concluded governing the safe return and reintegration of victims of trafficking from the country of destination to the country of origin. These agreements also mandate the informal exchange of basic information on the situation of victims and their return. However, because they are administered by the respective social affairs ministries of each country, there is little opportunity, at present, for criminal justice agencies to utilise this information in their investigations.

Informal cooperation related to returned/returning victim-witnesses

In the ASEAN region, as in all other parts of the world, persons who are formally recognized as victims of trafficking and provided with the appropriate support and entitlements are more likely to cooperate effectively as witnesses in the prosecution of their exploiters.

Victim-witnesses will often return to their country of origin: either while criminal proceedings are on-going, or after they have been completed. Criminal justice agencies are increasingly turning to informal cooperation as a means of ensuring the safe and expeditious return of victim-witnesses to their home countries.

The first goal of such cooperation is **protection**: victims of trafficking, especially those who have been cooperating with criminal justice agencies (and their families) should be protected from reprisals, intimidation and other forms of re-victimization. (Protection may also be required of victims who have returned home and have or will be testifying remotely). An interdisciplinary approach is vital in ensuring such protection – especially when informal cooperation between the State of origin and the State of destination is involved. For example, victim support agencies in both countries will usually be involved in the logistics of return and reintegration – while law enforcement agencies are required to be engaged in identifying and managing any risks that are criminal in nature.

The second goal is to **maintain the value of the victim-witness who may be required to return**. While, in the ASEAN region, increasing consideration is being given to allowing victims of trafficking to return to their homes early in the criminal justice process, and to give trial testimony at a later date via video link, not all countries in the region have laws which will allow that. The laws of such countries require that victims, as witnesses for the prosecution, attend court during the trial to give evidence-in-chief.

Even when the use of video link is permissible under the law, prosecutors and judges continue to maintain a strong preference for in-person testimony.

If it is likely – or even possible – that the victim will be required to return to the country of destination to give evidence, informal cooperation between investigators should aim to support the victims in ways that will ensure they can return safely and be effective witnesses. At a minimum this will involve close communication between the two law enforcement agencies to conduct a pre-return risk assessment. The respective prosecutorial offices may also be required to be involved, along with immigration authorities in relation to entry and stay formalities. Consideration should also be given to the victim's needs after she or he has given evidence and gone back home.

Informal and well-coordinated cooperation in such cases serves to support the need of victims to return home as quickly as possible, while helping to ensure both the security of those victims and the integrity of the criminal justice responses to trafficking.

The following Practice Note illustrates that informal cooperation in trafficking cases can involve prosecutors as well as police.

Text Box 8: Practice Note: Informal Prosecutor-to-Prosecutor Cooperation in Support of Mutual Legal Assistance

Two nationals of a South American country were trafficked to another country in the region and subject to forced labour in a garment factory. Several suspects were apprehended and prosecuted. However, the prosecution was unable to locate the victims who had returned home, severely weakening their case against the suspects. Prosecutors contacted their counterparts in the country of origin, asking for them to open an urgent file in advance of a formal request; locate the victims and prepare them for testimony via videoconference. The MLA request was quickly prepared, invoking both a regional convention and the UN Organized Crime Convention. The MLA request was quickly processed and, owing to the prior preparation, the victims were able to testify in a timely manner.

Source: UNODC (2018)

Examples of informal cooperation in the ASEAN region in relation to returned and returning victim-witnesses have increased in recent years. In the following case, traffickers from Indonesia were successfully prosecuted through the evidence provided by victims from Myanmar whose return to Indonesia to testify was made possible through informal cooperation between the two countries.

Text Box 9: Practice Note: Informal Cooperation to Secure Return of Victims to Give Testimony

Indonesia / Myanmar: During early 2015, authorities in Indonesia became aware of a group of Myanmar nationals who had suffered extreme exploitation within the fishing industry (Benjina case). Over 750 men were subsequently returned to Myanmar. Most were interviewed by Myanmar's National Police and the information obtained was shared with Indonesia. Indonesia's Victim and Witness Protection Agency (LPSK) subsequently entered into informal discussions with the authorities of Myanmar to arrange for 13 victims who had been identified by Myanmar as potential witnesses to return to Indonesia in order to give evidence in the trial of a number of suspected traffickers in the case.

Representatives of LPSK travelled to Myanmar to meet with officials there and secured the support of Myanmar authorities to locate the victims, who had all since returned to their homes. As the requesting party, LPSK secured the agreement of an international organization to cover transportation, subsistence, and interpretation costs for the 13 victims.

The victims all agreed to return to Indonesia to give evidence against their exploiters. During the trial they were accommodated in an LPSK shelter and in a hotel for a short period, and then returned to Myanmar once the trial was completed. The victims were provided with protection for the duration of their stay in Indonesia.

With the support of the evidence provided by the victims, 8 Indonesian and Thai nationals were found guilty of trafficking offences and sentenced to imprisonment for 3 years.

2.4 International legal cooperation: mutual legal assistance and extradition

International legal cooperation refers to formal processes of cooperation between two countries. There are two forms of international cooperation: mutual legal assistance and extradition. Each of these processes is summarized below. A more extensive description and analysis is provided in the following chapters.

2.4.1 Mutual legal assistance

Mutual legal assistance, which is sometimes called mutual assistance or judicial assistance, is the process States use to request that other States 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 to take steps to obtain evidence that would 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; organizing the transfer of prisoners to give evidence; and video conferencing / recording.

2.4.2 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. Due to the nature of the trafficking process, suspects wanted for prosecution in one State will 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 to 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.[52] However, the rules around extradition also seek to impose safeguards 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.[53] 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.

52 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].

53 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.

2.4.3 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, noting that:

- 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; and
- 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.

2.5 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.

2.5.1 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, 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.[54]

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.[55] However, negotiating bilateral treaties can be time-consuming and resource-intensive.[56] A State may need to conclude many treaties to secure sufficient coverage of its potential interests. Viet Nam, for example, has concluded bilateral MLA treaties with the Czech Republic, the Slovak Republic, Cuba, Hungary, Bulgaria, Poland, Russia, Ukraine, Belarus, China, North Korea, South Korea, India, the United Kingdom, Algeria, Indonesia, Australia, Spain, Lao PDR and Mongolia.

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.[57]

Note that **Chapter 3** provides a table of bilateral treaties on mutual legal assistance concluded by or between AMS. **Chapter 5** provides a table of bilateral extradition treaties concluded by or between AMS.

[54] 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*].
[55] ADB / OECD, *MLA, Extradition and Recovery of Proceeds of Corruption in Asia and the Pacific,* p. 28.
[56] ADB / OECD, *MLA, Extradition and Recovery of Proceeds of Corruption in Asia and the Pacific,* p. 28.
[57] UNODC, *Revised Manuals on the Model Treaty on Extradition and the Model Treaty on Mutual Assistance*.

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. Note that other treaties, not specifically dealt with, may also be relevant. For example, the international cooperation regime that has been established around corruption through the *United Nations Convention against Corruption* (UNCAC) may be a useful tool in transnational trafficking cases involving official complicity or other forms of corruption. For example, under this treaty, 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.[58]

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; 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 (Article 13)
- jurisdiction (Article 15)
- extradition (Article 16)
- transfer of sentenced persons (Article 17)
- mutual legal assistance (Article 18)
- joint investigations (Article 19)
- special investigative techniques (Article 20)
- transfer of criminal proceedings (Article 21)
- establishment of criminal record (Article 22)
- law enforcement cooperation (Article 27)
- collection, exchange, and analysis of information on the nature of organized crime (Article 28)

[58] *UNCAC*, Chapter IV, especially arts. 43, 44.

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 (Article 16).

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 (Article 10(1)(a));
- cooperation to help establish information and insights into the means and methods used by organized criminal groups for the purposes of trafficking (Article 10(1)(c));
- cooperation among border control agencies including through establishment and maintenance of direct channels of communication (Article 11(6));
- cooperation in the verification of travel and identity documents (Article 13); and
- (through UNTOC) cooperation to facilitate confiscation of proceeds of crime, property, equipment, or other instrumentalities of crime (Article 13).

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 AMS' 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.

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 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" to other States Parties, in a form that is useable and admissible in the Requesting State (Article 1). 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 (Articles 4 and 5);
- 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 (Article 7);
- 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 (Articles 3, 5 and 6);
- 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 (Article 23).

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 (Article 2).

2.5.2 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.[59] 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. This points to the critical importance of reciprocity, discussed further below.

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

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

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.[60] 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. Letters rogatory are not, however, 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: [61]

> …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.

It has been noted that there are some significant drawbacks to letters rogatory, when compared to other tools of international cooperation. [62] 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.

Despite these drawbacks, letters rogatory continue to be an important tool of international legal cooperation in some systems and in relation to certain kinds of transnational offences including terrorism.[63]

2.5.3 Dealing with different legal systems

The UNODC Handbook on Mutual Legal Assistance and Extradition (2012) deals extensively with the differences between legal systems (most particularly, between the common law and civil law traditions) and how these differences can impact on the conduct of international legal cooperation. It identifies the following as key differences between civil and common law countries, with respect to the requesting and provision of mutual legal assistance or extradition:

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

[60] ADB / OECD, *MLA, Extradition and Recovery of Proceeds of Corruption in Asia and the Pacific*, p. 33.
[61] International Association of Prosecutors, *Mutual Legal Assistance (Best Practice Series No. 4)*, Chapter 1, p. 5 (International Association of Prosecutors, 2004).
[62] ADB / OECD, *MLA, Extradition and Recovery of Proceeds of Corruption in Asia and the Pacific*, p. 34.
[63] Peter Swire & Justin D. Hemmings, *Mutual Legal Assistance in an Era of Globalized Communications: The Analogy to the Visa Waiver Program* (2016).

- **Role and functions of competent authorities:** throughout the procedure, there may be a lack of understanding of such roles and functions, in particular those of the *juge d'instruction* (investigating judge) in civil law systems and the police, lawyers, prosecutors and judges in common law systems.
- **Criminal terminology and the elements of the offence:** this may cause problems of interpretation of the double or dual criminality principle (e.g. conspiracy/*association de malfaiteurs*).
- **Law surrounding non-extradition of nationals:** the law in civil law countries is often misunderstood by common law practitioners. It is important to note that, unlike common law countries, countries that do not extradite nationals often establish their jurisdiction on the basis of the 'active nationality' principle in compensation for that fact. This principle allows those countries to apply their domestic criminal law to offences committed by their nationals abroad.
- **Confidentiality:** civil law practitioners may lack awareness of the fact that common law States are often not in a position to maintain the confidentiality of requests. As a consequence, the contents of mutual legal assistance requests may be disclosed and prejudice the proceedings.
- **Judgements in absentia:** traditionally, common law countries rejected the possibility of judging a person who was not personally present at trial, whereas civil law countries accept judgments in absentia.

The Handbook notes that both systems provide a measure of flexibility which accommodates both the sending and receiving of requests for legal assistance. It highlights the following quote as relevant to how differences between systems should be approached and managed: [64]

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

Text Box 10: Differences between Legal Systems: Evidentiary Considerations

The UNODC *Handbook on Mutual Legal Assistance and Extradition* (2012) addresses the challenges that arise with respect to rules around evidence that is gathered in one country for the purposes of being tendered in the courts of another.
Different legal traditions and legal systems require different procedures and requirements for obtaining evidence during an investigation and using that same type of evidence at trial. These procedural and evidentiary rules can prove to be a challenge within the realm of mutual legal assistance and extradition. Some legal systems will require less evidence in order to obtain a certain result, while others will require considerably more. The lesson to be remembered is to not assume that matters will be dealt with in the same manner as they are in the Requesting State's jurisdiction. Reports must be made by the authorities of the Requesting State to educate themselves on what can be expected by speaking with authorities of the Requested State. The Requesting State's own evidentiary requirements must also be made clear to avoid the following observation made by Kimberly Prost: "Requested States must bear in mind that evidence inadmissible in the Requesting State is equivalent to no evidence at all."

[64] Bernard Rabatel, *Legal Challenges in Mutual Legal Assistance,* in Denying Safe Haven to the Corrupt and 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 (ADB/OECD, 2006).

2.6 Safeguards and human rights

International cooperation in relation to transnational crimes such as trafficking in persons can have direct implications for human rights.[65] The following summary is supplemented by more detailed consideration at several points throughout this Handbook.

The importance of respecting State sovereignty in relation to all aspects of international cooperation has been noted at 2.2, above. However, 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. [66]

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.[67]

The right to a fair trial (which necessarily extends to investigatory and evidentiary matters as well as the determination of criminal charges) is highly relevant in the present context. The *United Nations Principles and Guidelines on Human Rights and Human Trafficking* affirms that traffickers can never be pursued at the expense of international rules governing the administration of justice. These rules guarantee, to all persons, the right to receive a fair and public hearing by a competent, independent and impartial tribunal established by law. Suspects in a criminal procedure involving international cooperation can be at a distinct disadvantage. Most relevant is the potential lack of 'equality of arms': an imbalance in their situation caused by the fact that, unlike the prosecution, they cannot access the

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[65] See further: Robert J. Currie, "The Protection of Human Rights in the Suppression of Transnational Crime", in Neil Boister & Robert J. Currie, eds, *Routledge Handbook of Transnational Criminal Law* (2015).

[66] Nowak, *U.N. Covenant on Civil and Political Rights*, p. 225.

[67] 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*].

tools of international cooperation for their defence.[68] That imbalance can be exacerbated through, for example, the selective admission of foreign evidence that has been secured via processes that do not meet the standards of the Requesting State; or an inability to confront witnesses who give evidence abroad rather than appearing in person to testify.

Some treaties on international cooperation explicitly affirm that implementation is subject to existing rules of human rights.[69] More often, these instruments will 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'.[70] 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.[71]

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.[72] 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.

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[68] Equality of arms requires that each party be given a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage vis-à-vis his or her opponent. See European Court of Human Rights, 1997, *Niderost-Huber v Switzerland*, appl. no. 18990/91, Para. 23.

[69] For example, the preamble to the Framework Decision on the European arrest warrant, states that "This Framework Decision respects fundamental rights and observes the principles recognised by [the major European human rights instruments particularly with regard to the right to a fair trial / fair hearing]: Official Journal of the European Communities, *Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures between Member States* (2002/584/JHA) at [12].

[70] 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).

[71] 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*].

[72] 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 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*].

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 Chapter.

Chapter 3: Mutual Legal Assistance

Contents of this Chapter:

Overview of this Chapter:

This chapter seeks to guide criminal justice practitioners in using the tool of mutual legal assistance to secure strong and safe prosecutions in trafficking in persons cases. This Chapter includes information, accompanied by case examples, about:

- the factors that should be considered when deciding whether to seek mutual legal assistance in a trafficking case;
- the type of assistance that can be obtained from other governments to facilitate criminal investigations and prosecutions;
- special considerations that may apply in trafficking cases;
- the legal basis for mutual legal assistance in trafficking cases;
- the principles and preconditions that commonly apply to mutual legal assistance requests;
- the steps in a successful request: preparation, transmission, follow-up; and
- 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[73]

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[74]

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 form of mutual legal assistance consistent with domestic and international laws[75]

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[76]

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[77]

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

[73] UNTOC, art 18(1); UN Trafficking Protocol, art. 5; UN Trafficking Principles and Guidelines, Principle 12; ASEAN Practitioner Guidelines, Part 1.A.1 and Part 2.B.3.
[74] UN Trafficking Principles and Guidelines, Guideline 11.
[75] ACTIP Article 18(1) and UNTOC Article 18(1) both require 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. UNTOC 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).
[76] ICCPR, arts. 9, 14; ASEAN MLAT, art. 3(c)-(d); UN Trafficking Principles and Guidelines, Guideline 1.
[77] UNTOC, art. 18(24); ASEAN Practitioner Guidelines, Part 2.D.4.

Questions for Criminal Justice Officials Considering Mutual Legal Assistance in Trafficking Cases

When considering whether to seek mutual legal assistance:

- Is it possible to prosecute trafficking effectively without resorting to international legal cooperation?
- Would the case be stronger as to one or more accused with evidence obtained through MLA?
- What is the likelihood that the evidence sought can be realistically secured through MLA?
- Is significant delay likely to occur in seeking evidence through MLA?
- What impact would significant delay have on the prosecution's case with respect to witnesses and the victim(s)?
- Is the risk of delay or inadequate compliance worth taking to try to obtain evidence through MLA?
- What is the appropriate legal basis for a mutual legal assistance request?
- Which instruments are available (i.e. are both States party to the UNTOC or is there a bilateral or regional MLA agreement in force)?
- If no instruments are available, has cooperation previously been provided by the Requesting State to enable invocation of the principle of reciprocity?
- In cases where a choice of instrument is available, which one best meets the cooperation requirements of the circumstances at hand? (e.g. types of assistance available, limits and preconditions etc).

3.1 Introduction: mutual legal assistance and its importance in trafficking cases

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 several 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 reports;
- identifying or tracing proceeds of crime, freezing and seizing and confiscating proceeds of crime;
- facilitating the voluntary appearance of persons in the Requesting State;
- facilitating the transfer of prisoners to give evidence;
- facilitating the giving or taking of evidence through telecommunications technology; and
- enforcing foreign confiscation orders.

The following Practice Notes provide examples of varied ways in which mutual legal assistance can be used in trafficking in persons cases.

Text Box 11: Practice Note: Use of MLA to Allow Investigators from one Country to Directly Interview a TIP Victim located in Another Country

Third party interviews of TIP victims are often not effective. It is often essential that the victim be interviewed by the investigator or prosecutor who is most familiar with the facts of the case and who needs to gain the confidence of the victim to secure full and truthful testimony at trial.

Note that at least one AMS permits the practice described below: whereby investigators from another jurisdiction are permitted to interview a victim-witness, provided that an 'observer' is present. Note further the need to clarify the legal situation with regard to any resulting statement. In many jurisdictions only a statement signed by a serving official of the country can be presented to the court of that country.

The victim was recruited from a Central European country ('country of origin') on the promise of a good job in a country of Western Europe ('country of destination') but when she arrived was forced into sex work. She was rescued by the authorities but refused to provide a detailed account of what happened to her. She did not trust the police in the country of destination.

Investigators from the country of origin who were developing a case against the traffickers in that country, tried to persuade the victim to return to give a statement to the investigators and to testify at the trial, but the victim refused, explaining that she was afraid of retaliation from her exploiters.

Investigators in the victim's country of origin realized that they needed to fully debrief her before proceeding to trial. While investigators in the country of destination were willing to question the victim, the victim would not cooperate. Moreover, the investigators from her country knew that they had to build trust to persuade her to give a full and truthful account in court and that this could only be done in a face-to-face interview by those who were intimately familiar with all the facts in the case.

The country of origin investigators reached out to their counterparts in the country of destination on an informal basis to determine whether they would allow them to interview the victim directly. The authorities of the country of destination agreed on condition that they would be present during the interview and that all costs would be borne by the country of origin.

Based on this informal understanding, a MLA request was drafted by Central Authority Lawyers in the country of origin, specifically requesting permission for two investigators to travel to the country of destination to interview the victim in connection with their ongoing investigation into TIP violations, the details of which were set forth in the MLA request.

The destination country authorities approved the request and arrangements were made for the two investigators to travel. Upon their arrival, they made contact with their local counterparts and discussed details of how and where the interview would be conducted. It was decided that the country of origin investigators would take the lead in questioning the victim since they were more familiar with the facts of the case, and spoke the victim's language, making it more likely that a full account could be secured.

The interview took two days to conduct, as the victim was initially reluctant to talk about her ordeal. Ultimately, the country of origin investigators earned her trust and she provided a detailed account of how she was recruited, deceived and exploited. She also agreed to testify at the trial via video link from the country of origin's embassy.

Source: UNODC (2018)

Text Box 12: Practice Note: Use of MLA to Secure Bank Documents relating to Trafficking in Persons

Assistance between the Philippines and Scotland

A shipping company recruited a number of foreign nationals and brought them to the United Kingdom with an offer of employment on its vessels. The seamen were allegedly debt-bonded through a recruitment agency in the Philippines. The seamen claimed that upon their arrival in the UK, their passports and seaman's books were taken from them. They also narrated how they were poorly treated prior to being taken on board the vessels – they were housed in cramped and dirty conditions in caravans in the compound of a warehouse; had limited access to water and sanitation facilities; fed inadequately with expired food; and locked within the compound of the warehouse overnight.

The witnesses collectively described appalling living conditions while at sea as they were subjected to repeated threats of violence, an inadequate health and safety regime, physical injuries, a denial of medical treatment and were forced to operate machinery they were not qualified to handle. They were also forced to work in excess of 20 hours every day, denied adequate rest and were undernourished. Their salaries were also not paid.

Pursuant to the several MLAT requests in connection with the investigation being conducted by the Scottish Police for the alleged trafficking of people for exploitation, slavery, servitude and forced or compulsory labour, employment of an adult subject to immigration control, and money laundering, the AMLC filed an application for and conducted bank inquiry into the accounts subject of the request. Upon collection of all the requested documents, they were turned over to Scottish authorities.

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 be very important and useful in trafficking in persons cases, particularly in relation to the identification and rescue of victims.

However, there are limits to what can be achieved lawfully through informal channels. For example, informal cooperation will not usually be sufficient where the required assistance involves coercive or compulsory measures, unless the request for assistance triggers a domestic investigation based on the disclosures contained in the request.[78] 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 the value and utility of both informal mechanisms and formal mutual legal assistance channels.

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

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 consider whether it may be possible to lawfully secure the desired outcome through informal cooperation mechanisms.

As noted in the previous chapter, 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.[79] 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.[80] This may allow the rapid exchange of information at critical junctures, while also ensuring that information or evidence is properly sourced through official channels. However, as Polaine has observed, the golden rule must be to ensure that any informal request is made and executed lawfully.[81]

Text Box 13: Practice Note: Using Informal Cooperation to Strengthen a MLA Request

When preparing a MLA request, it is advisable for prosecutors to work with police officers to establish informal cross-border cooperation to verify the accuracy of the information on which the request will be based. For example, if part of the request will involve the search of property, informal cooperation prior to the request can help to establish that the property physically exists, and that the address held by the requesting party is correct. If the request will require the interviewing of a witness, it should be possible to establish prior to making the request that the witness' details are correct, and that the person is physically present in the territory of the requested party, using informal cooperation as a means. The requesting party can use informal channels to establish what other evidence might be available in the territory of the Requested State and use that information to shape the subsequent MLA request. Finally, informal cooperation can be an invaluable resource for the Requesting State in tracking the progress of a request for mutual legal assistance.

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 through public records or another open source?
- 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?

[79] 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*].
[80] UNODC, UNODC Toolkit to Combat Trafficking, 61.
[81] 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].

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); [82]
- informal requests could inadvertently compromise other ongoing, or larger scale, investigations if they are not handled with the requisite level of confidentiality.[83]

[82] 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).
[83] Polaine, Transnational Bribery/Corruption Investigations.

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 can 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.[84] Accordingly, where a 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, AMS 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.[85] 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 cooperation across borders is required with respect to trafficking cases.

Text Box 14: Practice Note: Selecting the Most Appropriate Legal Basis for an MLA Request

In selecting the legal basis to include in the formal MLA request, many practitioners have found it most helpful to list all relevant treaties, agreements or legislation that apply, in order of preference. This practice increases the opportunity for applicability: since the types of assistance and potential reasons for refusal vary from treaty to treaty, the request may be acceptable under one legal basis and not under another. The list should be in order of preference and a bilateral treaty is generally the best option, followed by a multilateral treaty (both jurisdictions must be States Parties) as it fits better the legal traditions and options of the two contracting jurisdictions, as opposed to a "one size fits all" approach of the multilateral treaties. The relevant treaties would then be followed by any domestic legislation (if available) and the promise of reciprocity.

Source: World Bank, *Handbook for Practitioners on Asset Recovery under StAR Initiative* (2010)

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 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 generally apply to a wide range of criminal matters. The ASEAN MLAT provides an example of this kind of treaty. Other treaties (of which the UNTOC and UNCAC are both examples) are tied more specifically to an 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.

[84] UNTOC, art. 4; UNCAC, art. 4; ASEAN MLAT, art. 2(2).

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

Bilateral mutual legal assistance treaties

Bilateral treaties for mutual legal assistance are common, especially between States that share borders or that have close or historical ties. By negotiating bilaterally, States can 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 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.[86] Several States in the ASEAN region have negotiated and concluded bilateral mutual legal assistance treaties with various States. In some instances, mutual legal assistance will be available as part of extradition treaties.

Text Box 15: Practice Note: Use of a Bilateral MLA Treaty to Secure Information from a Witness located in Another State

This note demonstrates that a prosecuting state can request and quickly obtain critical information from an interview of a witness located in another state. In this case, the prosecuting state was the state of origin of the trafficking victims and the Requested State – which located the witness and interviewed him – was the State of residence of a witness thought to have knowledge of the trafficking operation. Neither State was the one in which the exploitation occurred. The witness agreed to a voluntary interview.

In 2015, Country A received a request under a bilateral mutual legal assistance treaty (MLAT) from Country B asking that Country A assist with its investigation of a luxury resort in a third country. In the third country, prostitution was not illegal, but the investigation concerned whether female nationals from Country B were subjected to forced prostitution in that resort. The request included a statement of the criminal facts and requested that Country A conduct an interview of a person living in Country A who was thought to have material information about the target of the investigation, as the witness was a frequent guest in the luxury resort and acquainted with the target. Country A tasked that request to its law enforcement agents, who after several efforts were able to locate the person wanted for questioning, to contact him and to obtain his cooperation in responding to the questions provided by the requesting Country. In 2016, a transcript of the answers was provided to Country B.

Source: UNODC (2018)

To accommodate the increase in the number 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 several key issues that commonly arise in the context of mutual legal assistance.[87] However, it has been 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.[88]

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, it may not always be possible to conclude a bilateral treaty with a particular State. Regional and multilateral alternatives (discussed below) are proving to

[86] UNODC, *Legislative Guide for the Implementation of the United Nations Convention against Corruption*, p. 197, New York, 2006 [hereinafter UNODC, Legislative Guide to UNCAC].
[87] UNODC, *Revised Manuals on the Model Treaty on Extradition and the Model Treaty on Mutual Assistance*, p. 66.
[88] McClean, David, *Transnational Organized Crime: A Commentary on the UN Convention and its Protocols* (Oxford University Press, 2007) 205.

be increasingly important in extending the coverage of treaty relations between States that want to cooperate across borders on criminal matters.

Table 3: AMS' Bilateral MLA Arrangements

ASEAN Member State	Mutual Legal Assistance Bilateral Treaty Partners
Brunei Darussalam	-
Cambodia	Viet Nam (signed, not ratified); Russia (signed, not ratified)
Indonesia	Australia; PR China
Lao PDR	Thailand; Viet Nam
Malaysia	Australia; Hong Kong; India; United Kingdom and Northern Ireland; PR China; Republic of Korea; Ukraine; United States of America
Myanmar	-
Philippines	Australia; Hong Kong SAR; PR China; Republic of Korea; Spain; Switzerland; United States of America; United Kingdom
Singapore	Hong Kong; India
Thailand	Australia; Belgium; Canada; PR China; France; India; Republic of Korea; Norway; Peru; Poland; Sri Lanka; United Kingdom; United States of America
Viet Nam	Algeria, Australia; Belarus; Bulgaria; Cuba; Czech Republic; Democratic People's Republic of Korea; Hungary; Indonesia; India, Lao PDR; Mongolia; Poland; PR China; Republic of Korea; Russia; Slovakia; Spain; Ukraine; United Kingdom

Treaty on Mutual Legal Assistance in Criminal Matters among Like-Minded AMS

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 to ending impunity for traffickers.[89] The ASEAN Trafficking Convention specifically refers to the AMLAT: requiring States Parties to carry out their obligation to: "afford one another the widest measure of mutual legal assistance in criminal investigations or criminal proceedings in relation to [trafficking] offences" in accordance with that instrument (Article 18(2)).

Scope of application

The ASEAN MLAT applies to 'criminal matters' (Article 1(1)), 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 (Article 2).

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

Types of assistance available

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

- taking evidence or obtaining voluntary statements from persons;
- arranging for persons to give evidence or to assist in criminal matters;
- 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;
- restraining dealings in property or freezing 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 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)).

Conditions on mutual legal assistance

The following is a summary of the main conditions that apply under the 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 (Article 3(1)). This includes situations in which fulfilling the request would raise human rights concerns. For example, a State 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 (Article 3(1)(c)); 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 received punishment for that offence (Article 3(1)(d)). 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.

Text Box 16: 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 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 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.

Source: ASEAN MLAT, Art. 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 (Article 3(2)(a)-(c)).

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 (Article 3(5)).

Procedural requirements: the ASEAN MLAT establishes several 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 (Articles 6 and 7).

UNTOC and the 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.[90] As noted above, the relevant provisions of the UNTOC are sufficiently detailed to characterise 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.

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.[91]

UNTOC has been used, on several occasions, as the legal basis for cooperation in trafficking cases. The following text box provides one example.

Text Box 17: Practice Note: Use of UNTOC as the Basis for Cooperation in a TIP Case

Dutch authorities detected signs of potential labour exploitation in residence applications for Philippine nationals being recruited to work as seamen on ships used for inland navigation in the Netherlands. Subsequent investigation by the Health and Safety Inspectorate confirmed massive underpayment of wages and overwork as well as other indicators of exploitation related to trafficking including deception, fraud, withholding of passports and other abuses of the victims' vulnerability.

Dutch authorities transmitted a request for assistance to the authorities of the Philippines, seeking their help in questioning a witness located in the Philippines who would be able to provide information on the recruitment process and certain financial aspects as well as the role of the two suspects in custody in the Netherlands. Philippines authorities were able to comply with the request, the legal basis for which was the UN *Organized Crime Convention*.

Source: UNODC – Philippines and the Netherlands (2018)

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.

[90] 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.

[91] 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*].

Scope of application

The mutual legal assistance obligations in UNTOC apply to offences established in accordance with that Convention. That includes:

- participation in an organized criminal group;
- laundering proceeds of crime;
- corruption;
- obstruction of justice;
- any other 'serious crime' (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, attempts, participating as an accomplice, ordering or directing.

The mutual legal assistance obligations in UNTOC will be activated where the Requesting State Party has reasonable grounds to suspect that these offences are transnational in nature (i.e. where victims, witnesses, proceeds, instrumentalities or evidence of such offences are located in the Requested State, and the offence involves an organized criminal group) (Article 18(7)).

The mutual legal assistance obligations contained in UNTOC do not just concern individual suspects and offenders. They 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.[92]

Text Box 18: Types of Assistance Available under UNTOC

Article 18(3) of UNTOC provides that States 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.

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.

It should also be noted 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.

[92] 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.

Conditions on mutual legal assistance

Becoming a State Party to UNTOC gives rise to certain obligations. This includes an obligation to not decline a request for mutual legal assistance on the ground of bank secrecy (Article 18(8)). The mutual legal assistance regime established by UNTOC is intended to complement, rather than to replace, any mutual legal assistance regime already in existence.[93] Where there is an applicable mutual legal assistance treaty in place between two States Parties to the UNTOC, 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 the UNTOC.

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 (Article 18(7)). Where there is no applicable mutual legal assistance treaty in force between the two States Parties, the rules established under Article 18 of the UNTOC will apply. These rules, which form a 'treaty within a treaty', address matters such as content and the form of mutual legal assistance requests, and grounds of refusal.

Selecting the appropriate instrument of cooperation

The UNTOC regime is intended to operate alongside other regimes of international cooperation, such as that established under the ASEAN MLAT and through 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*.[94]

Where the Requested and Requesting State are both parties to the ASEAN MLAT, the obligations of that treaty will apply, alongside or in addition to any other obligations in UNTOC. In situations where one of the States is not party to the ASEAN MLAT, 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. In trafficking in persons cases concentrated around corruption or money laundering, the UN Corruption Convention could be a suitable alternative. It is also possible that a bilateral treaty between the Requested and Requesting States is the most appropriate vehicle for cooperation.

In cases where a choice of instrument is available, it is important to consider which instrument 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.

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[93] *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).

[94] *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."

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 and the rule of double criminality is applied.[95] 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.[96] 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.[97]

Domestic laws will generally provide important information about the scope of assistance that can be provided and the 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 criminal matters. The legislation establishes several 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.[98] 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 AMS 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.[99] It may, therefore, be used to supplement or reinforce domestic laws in this area.

Table 4: AMS' National Mutual Legal Assistance Laws

ASEAN Member State	National Mutual Legal Assistance Law
Brunei Darussalam	*Mutual Assistance in Criminal Matters Order* (2005) *Criminal Asset Recovery Order 2012*

[95] *Act on Mutual Assistance in Criminal Matters BE 2535 (1992), Section 9 and Section 14/1,* amended by the *Act on Mutual Assistance in Criminal Matters (2nd version) BE 2559* (2016) Section 5 (Thail.).
[96] *Law Concerning Mutual Legal Assistance in Criminal Matters*, section 5, (Law No. 1 of 2006) (Indon.).
[97] *Draft of Elucidation of Law Concerning Mutual Legal Assistance in Criminal Matters* (Law No. 1 of 2006) (Indon.).
[98] *Mutual Legal Assistance in Criminal Matters Act* (Cap 190A, 2001 Rev Ed), s 19 (Sing.).
[99] Joutsen, *International Instruments on Cooperation in Responding to Transnational Crime*, p. 264, citing David McClean, *International Judicial Assistance* (Clarendon Press, 1992).

ASEAN Member State	National Mutual Legal Assistance Law
Cambodia	National mutual legal assistance law is currently being drafted. Some mutual legal assistance provisions in the following: 1. *Law on Anti-Corruption* (2010) 2. *Law on the Control of Drugs* (2013) 3. *Law on Terrorism* (2007)
Indonesia	*Law Concerning Mutual Legal Assistance in Criminal Matters* (Law No. 1 of 2006)
Lao PDR	*Law on Criminal Procedure* (as amended in 2012), Part XIV
Malaysia	*Mutual Assistance in Criminal Matters Act 2002* *Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007* (as amended)
Myanmar	*Mutual Assistance in Criminal Matters Law* (Law No 4/2004)
Philippines	No national mutual legal assistance law, however some mutual legal assistance provisions in the Republic Act (RA No 9160), otherwise known as the *Anti-Money Laundering Act of 2001* as amended by RA No 10365
Singapore	*Mutual Assistance in Criminal Matters Act* (Cap 190A, 2001 Rev Ed)
Thailand	*Act on Mutual Assistance in Criminal Matters BE 2535 (1992)*, amended by the *Act on Mutual Assistance in Criminal Matters* (2nd version, BE 2559, 2016)
Viet Nam	*Law on Mutual Legal Assistance* (Law No 08/2007/QH12) *Criminal Procedure Code* (Code No. 101/2015/QH13)

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 the 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.

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, 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 several 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 AMS 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 to support the request. The amount and quality of the 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, Article 18 of the ASEAN MLAT provides that 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".

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.[100]

Requirements around dual criminality vary between States and mutual legal assistance regimes. However, it is evident that there is a clear trend *away* from a strict interpretation of the rule.

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; the Requested State Party may still provide assistance in the absence of dual criminality if permitted by domestic law (Article 3(1)(e)).

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.

[100] OHCHR, Commentary to the Trafficking Principles and Guidelines, Principle 14 and related Guidelines, p. 222.

Practitioners may also need to be aware of dual criminality requirements arising under national laws. Further detail of this aspect with regard to the AMS 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.[101] 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.

Text Box 19: Practice Note: Establishing Dual Criminality

Focus on the conduct: practitioners should keep in mind that the substantive question 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. 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. It is important to note that differences between the requesting and Requested State in respect of how trafficking in persons is defined under the national law should not operate to prevent the establishment of dual criminality.

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.[102] 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 natural person implicated in the case.[103] The principle of dual criminality underscores the importance of ensuring the criminal liability of legal persons for trafficking and related offences.[104]

The UN *Model Treaty on Mutual Assistance in Criminal Matters* states the following in relation to the issue of dual criminality:[105]

> 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.

[101] See further, Caruso, *Legal Challenges in Extradition and Suggested Solutions*, pp. 57-68, 58.
[102] UNODC, *UNODC Toolkit to Combat Trafficking*, p. 37.
[103] ADB / OECD, *MLA, Extradition and Recovery of Proceeds of Corruption in Asia and the Pacific*, p. 44.
[104] *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.
[105] 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).

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.[106]

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 substantial new evidence has come to light. There is not yet sufficient practice in the area of trafficking in persons offences to determine how the principle of double jeopardy might operate – particularly in relation to offenders who are found to have participated in different stages of a trafficking operation.

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… 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 relies upon the goodwill and reciprocity of States. In addition to being a basis for cooperation, reciprocity can also be a condition of cooperation, with many laws and treaties reflecting 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.

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[106] Kimberly Prost, *Practical Solutions to Legal Obstacles in Mutual Legal Assistance*, *in* Denying Safe Haven to the Corrupt and 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*].

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 (Article 3(10)).

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 had specifically agreed otherwise. This concept is referred to as 'speciality', 'specialty' or 'use limitation'. Increasingly, however, 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 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.

If States are using UNTOC as the legal basis for their mutual legal assistance request, 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 (Article 18(19)).

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 provision reflects a broader principle of criminal justice that recognizes that it would be seriously improper for the prosecution to fail to disclose available material of assistance to the defence. In certain treaties, this important provision is specifically stated. For example, in relation to UNTOC, the general rule of speciality must not prevent either the Requesting or the Requested State Party from disclosing in its proceedings, information or evidence that is exculpatory to an accused person (Article 18(5) – Article 18(19)).

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.[107]

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

[107] 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.

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. Article 3(1)(c) of 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.

The protections specified in international cooperation treaties do not operate in isolation. They must be understood and applied within the broader context of a States' human rights obligations, as 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 (Article 9(2)):

> 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.

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 (Articles 9 and 14):

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

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. In 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 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 regarding the protection 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. The ASEAN MLAT also allows for witnesses to be interviewed directly by investigators and/or prosecutors from the Requesting State (Article 12). 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 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.[108]

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 the penalty is a basis for denying assistance, 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.

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, the crime or the applicable penalty.[109] Accordingly, it is important for practitioners to proactively consider the potential penalties that may apply when responding to a mutual legal assistance request. If there are concerns regarding the possible severity of penalty, assurances should be sought at an early stage.

[108] 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*.
[109] Rabatel, *Legal Challenges in Mutual Legal Assistance*, 43.

3.4.9 Additional considerations/grounds of refusal

The following are additional grounds for refusal of assistance that, while less likely to arise in trafficking in persons cases, are included for completeness.

- **Political offences:**

Mutual legal assistance is sometimes declined on the grounds that the offence is of a political nature. Political offence exceptions have their basis in a historical tolerance of armed struggle against anti-democratic, authoritarian regimes.[110] However, international tolerance for politically motivated violence has considerably waned in recent years. Consequently, treaty provisions generally exclude political violence from the political offence exception.[111]

The political offence exception is certainly 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 being so heinous that perpetrators cannot be permitted to rely on the political offence exception.[112]

This narrowing of the political offence exception is already evident in treaty practice within the ASEAN region. For example, Article 3(3) of the ASEAN MLAT provides that the following cannot 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.

- National or public interest

Some States deny cooperation on the basis that to provide such cooperation would prejudice their national or essential interest. The following matters may be relevant: security; economic interest; public interest; foreign affairs; public order; and prejudice to an ongoing investigation. Most multilateral treaties preserve such a discretion. For example, Article 3(1)(f) of the ASEAN MLAT provides that 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.

What matters are considered to be in the 'national' or 'public interest' will vary from State to State. However, it is widely accepted that provisions permitting consideration of these issues are not

[110] UNODC, *Revised Manuals on the Model Treaty on Extradition and the Model Treaty on Mutual Assistance*, p. 16.
[111] UNODC, *Revised Manuals on the Model Treaty on Extradition and the Model Treaty on Mutual Assistance*, p. 16.
[112] 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.

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 determining whether 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. Article 3(2)(c) of the 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.

- **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 to provide mutual legal assistance. For example, UNTOC provides, at Article 18(22) that States Parties *may not* refuse an MLA request on the sole ground that the offence is also considered to involve fiscal matters. And Article 18(8) of UNTOC specifically provides that "States Parties shall not decline to render mutual legal assistance pursuant to this article on the ground of bank secrecy".

The ASEAN MLAT considers bank secrecy and fiscal offences together. Article 3(5) provides 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".

3.5 Practical aspects of mutual legal assistance requests

The success of mutual legal assistance in a trafficking in persons case will depend significantly upon the manner in which the request is prepared, finalised, transmitted and followed up. The possibility of causing significant delay to the investigation, or trial, must be considered. This section provides a brief, practice-orientated overview of each of these steps. It also highlights the valuable resources that are available to assist practitioners in drafting effective and compliant requests.

Text Box 20: Practice Note: The Importance of National Central Authorities to Effective International Legal Cooperation

In addition to their core functions of sending and receiving requests, many Central Authorities also facilitate the process of international cooperation through the following: the provision of information on national laws and procedures to other States prior to the formal submission of a request; the exercise of quality control over incoming and outgoing requests; the practice of double-checking procedural requirements, as well as those related to the certification and authentication of supporting documents; and the provision of advisory services to competent authorities, both domestically and internationally. In addition, the Central Authority, as a possible single focal point for incoming and outgoing requests, may act as a collector and provider of statistical information relating to requests.
Communication and consultations between the Requested and Requesting States can best be supported through Central Authorities entrusted with the task of receiving and transmitting extradition requests. Direct communication between those authorities has the potential to enhance the effectiveness or relevant arrangements and avoid confusion and delays in cooperation.

Source: Conference of Parties to the United Nations Convention on Transnational Organized Crime, Working Group on International Cooperation, *Discussion of Challenges faced in the course of Extradition Proceedings*, UN Doc. CTOC/COP/WG.3/2018/2 (2018)

3.5.1 Before finalising the request

Requesting States should prepare thoroughly before sending a formal Letter of Request. As a very first step, it is important to ask whether the assistance is necessary and whether alternatives to a request might be available. As noted earlier in this chapter, the complexity of mutual legal assistance means that its use should be restricted to situations in which the desired result cannot otherwise be obtained.

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 all available information about the search site, what is expected to be found and precisely where it may be conducted.

Text Box 21: Practice Note: The Prosecutor and the Central Authority

The role of the prosecutor *vis à 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 in drafting the Letter of Request. In addition, the prosecutor will know the timelines, 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.

The effective handling of requests requires close and continual communication between all those involved: the Central Authority; prosecutors; and investigators in the Requesting and the Requested State. During the investigation, it is good practice for prosecutors to maintain close contact with investigators to identify evidence to be secured through MLA as early as possible. This will allow investigators, Central Authority Lawyers and, in appropriate circumstances, prosecutors to initiate informal contact with counterparts in the Requested State to begin a dialogue about what evidence is needed, what information must be provided to secure that evidence, and how quickly an appropriate response can be expected. It is essential that communication channels are opened early and maintained properly.[113] Early liaison between the Requesting and Requested States will help to establish relationships of trust, avoid misunderstandings and secure agreement on how to best achieve the outcomes for which the assistance is sought. In many cases, it will be mutually advantageous for such communication to take place even before a formal assistance request is made.

Text Box 22: Practice Note: The Importance of Informal Contact Prior to Making a Request

Informal cooperation can be invaluable in preparing for a future mutual legal assistance request, most often by helping to establish the existence and availability of probative evidence located in foreign jurisdictions. Pre-MLA cooperation helps to avoid the situation in which much effort and time is invested in a MLA request, only to later discover that the requested evidence does not exist – or that details in the letter of request are incorrect. Informal cooperation can also, as shown in the example below, ensure that delays which might occur because information is not provided – or is provided in incorrect form – are avoided.

Dutch authorities arrested a number of individuals suspected to be involved in a large-scale human trafficking operation that involved bringing Nigerian girls to Europe for sexual exploitation. The Netherlands was being used as a reception and transit point for many of these girls who were being sent on to countries in Southern Europe. In addition to the fact of their exploitation, the victims were subject to extreme coercion that was aimed at compelling them to remain in their situation and pay back the 'debt' accrued through their recruitment. Using the UN *Organised Crime Convention* as the legal basis, Dutch authorities issued a request for assistance to Nigerian authorities to identify, detain and extradite one of the main suspects in this operation. Dutch authorities subsequently reported that the success of the request was due, at least in part, to the establishment of informal contacts with Nigerian counterparts prior to the formal issuing of the request aimed at ensuring the final request was in the appropriate form and contained all information that Nigeria would require to execute it successfully.

Source: UNODC – Netherlands and Nigeria (2018)

[113] 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 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.

Prosecutors in the Requesting and Requested States play an especially important role in the preparation phase of a trafficking case: informally communicating with each other to lay the groundwork for a formal request to be quickly and thoroughly dealt with. Effective communication between prosecutors will ensure that all avenues for achieving a certain outcome are explored. Personal contact, either by phone or email, can create a relationship of mutual understanding, encouraging cooperation in prioritizing the request and making sure that the response is timely and complete. Failure to communicate at this early stage presents the risk that the request, once received, will be assigned a low priority or will be misunderstood, resulting in a slow or inappropriate response. This can also lead to a form of '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.[114]

Text Box 23: Practice Note: Posting of Liaison Officers

The practice of posting liaison officers in one country to facilitate cooperation with the Central Authorities of other countries has repeatedly been indicated as a good practice for achieving better operational results.

Source: Conference of Parties to the United Nations Convention on Transnational Organized Crime, Working Group on International Cooperation, *Discussion of Challenges faced in the course of Extradition Proceedings*, UN Doc. CTOC/COP/WG.3/2018/2 (2018)

[114] Rabatel, *Legal Challenges in Mutual Legal Assistance*, p.39.

3.5.2 Effective drafting of requests

Drafting a request for mutual legal assistance requires the consideration of many issues. Fortunately, a large number of resources are available to support the drafting process.

Chief among these is the UNODC **Mutual Legal Assistance Request Writer Tool (MLA Tool)**, which was produced 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.

Text Box 24: Practice Note: UNODC's Request Writer Tool

The Mutual Legal Assistance Request Writer Tool (MLA Tool) has been designed to assist States to draft requests with a view to facilitate and strengthen international cooperation.

The MLA tool:

- Requires virtually no prior knowledge or experience with drafting mutual legal assistance requests;
- Helps to avoid incomplete requests for mutual legal assistance and therefore minimizes the risk of delay or refusal;
- Is easily adjustable to any country's substantive and procedural law;
- Enables the user to retrieve key information on treaties and national legislation;
- Features an integrated case-management tracking system for incoming and outgoing requests;
- Step by step, the MLA Tool guides the casework practitioner through the request process for each type of mutual assistance, using a series of templates. Before progressing from one screen to the next, the drafter is prompted if essential information has been omitted; and
- Consolidates all data entered and automatically generates a correct, complete and effective request for final editing and signature.

The MLA Tool is currently available in multiple languages including English and French. UNODC is available to support translation into other languages.

The tool, which is free of charge, can be downloaded from: https://www.unodc.org/mla/en/index.html

A number of other resources are available to support the effective drafting of requests. These include checklists prepared in connection with the major international and regional conventions, such as UNTOC and the regional MLA treaties. In addition, as detailed in the text box below, States will often provide their own guidance as to how a Requesting State should formulate a request for legal assistance.

Text Box 25: Country-specific Resources to Support the Effective Drafting of Requests

Country-level guidance

Some States make available detailed information on their requirements for incoming mutual legal assistance requests. For example:

- Brunei Darussalam: Forms available at http://www.agc.gov.bn/AGC%20Site%20Pages/MLA%20Secretariat.aspx
- Singapore: Forms available at: https://www.agc.gov.sg/our-roles/international-law-advisor/mutual-Legal-assistance

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

A step-by-step guide to requesting mutual legal assistance from G20 countries has also been produced by the G20 Anti-Corruption Working Group. It is available for download at: http://www.bmjv.de/SharedDocs/Downloads/EN/G20/Requesting%20Mutual%20Legal%20Assistance%20in%20Criminal%20Matters%20from%20G20%20Countries%20-%20A%20step-by-step%20guide.pdf?__blob=publicationFile&v=1

As noted above, the drafting of requests implicates many different and sometimes complex issues. Experience has confirmed the value of the following basic principles:[115]

- 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.

Note that the domestic laws of some States require outgoing requests be drafted by the requesting agencies, i.e. by the investigator/ prosecutor/other agencies in consultation with the Central Authority officials. In Thailand, the requesting agencies do not need to make a draft of the request, instead, they must prepare all the necessary information, such as a list of questions if the request is for witness statements and the translation into English or the language of the receiving country. Other States require the Central Authority to approve the request and others also require the approval of the relevant Ministries.

Text Box 26: Practice Note: Formulating a Letter of Request

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. 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.

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.

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.

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. 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 2017 - 1 January 2018". The Requested State should be provided with a clear idea of the end-result sought to be achieved so that it can 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.

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.

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

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.

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.

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.

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.

Clearly specify and explain time limitations: Any Requesting State deadlines must be stated clearly on the request along with the reasons for those deadlines.

Request acknowledgement of receipt: and that the Requesting State be notified of the entity to which the request has been passed for action.

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. If confidentiality is required in the execution of the request, the reasons for this should be stated clearly.

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. As a practical matter, States are increasingly drafting and accepting requests in English. 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. 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. Note that in the present context, there are particular risks in this regard, for example, confusion between the legal concepts of “trafficking in persons” and “smuggling of migrants”.

See further:
UNODC: Request Writer Tool
UNODC Manual on Mutual Legal Assistance and Extradition

Electronic evidence – for example records from bank accounts, social media accounts, etc. are becoming an increasingly important source of evidence in trafficking in persons cases and, thereby, the subject of requests for assistance. The case studies set out in the text box below both refer to situations in which electronic evidence was requested to pursue a prosecution for trafficking and related offences.

Text Box 27: Practice Note: MLA Requests for Electronic Information

These two case notes concern MLA requests for electronic information. In both cases the Requested State needed to secure a court order so as to obtain the requested information. In both cases, the request was complied with in a timely manner and provided the evidence necessary to secure a successful prosecution for trafficking offences.

Case 1:
In 2016, Country A's Central Authority received a request from Country B's Central Authority under a bilateral MLAT requesting information be obtained and conveyed within six months to assist in preparing for a criminal trial scheduled to commence nine months after the request was made. The defendants were prosecuted for transnational human trafficking, forced labour and related crimes. The request advised that in this conspiracy, the criminals were alleged to have organized the travel from a third country to Country B of individuals they subjected to forced labour; the criminals kept the victims' wages, housed them in poor conditions and threatened and used violence against them. The MLA request was for content and IP evidence from an internet service provider. The request provided detailed information about the relevance of the sought material; for example, at least one of the defendants in the case had produced evidence from the internet which he asserted demonstrated a friendship with a person who had claimed to be a victim of this exploitation and the IT evidence was sought to show that the trafficker had had access to posting on that cite. Country B stipulated that this information had to be gathered without allowing the subjects to know about it, in order to prevent the destruction or alteration of the material at issue. The request was sent from Country A's Central Authority to the prosecutor in the relevant jurisdiction, noting that there was an obligation under a bilateral MLA treaty to assist in this matter and requesting that the prosecutor apply to the court for authority to execute the request, citing a domestic statute that provides prosecutors and judges with domestic authority to execute qualifying foreign government requests received under MLA treaties. The information was obtained by court order for a search warrant and provided to Country B within the time frame required by the request.

Case 2:
Country A sought assistance from Country B in its investigation of an individual suspected of facilitating the sex trafficking of children. The suspect owned a website that posted classified advertisements for escort and prostitution services, including explicit photographs of the purported escorts, including children. As the internet server was based in Country B, Country A requested under a bilateral MLAT that Country B obtain records from the internet server. Country B responded quickly to the request, sought a court order allowing it to obtain the requested records, and provided them to Country A three months after the request was made, subject to a sealing order.

Source: UNODC (2018)

In the following text box, expert practitioners have provided tips for investigators and prosecutors seeking to obtain electronic evidence through mutual legal assistance channels.

Text Box 28: Practice Note: Securing Electronic Evidence through MLA

Basic tips for investigators and prosecutors for requesting electronic/digital data/evidence from foreign jurisdictions.

- Prior to sending any request to a foreign country, make sure you have exhausted all internal/national sources of obtaining the required electronic data/evidence. Note that this data/evidence can be obtained, among other things, from open sources (i.e. publicly available information) and/or directly from Internet Service Providers (ISPs) established/registered in your country as affiliate companies of foreign-based ISPs.
- Consider the gravity of the offence when request assistance as some countries will not execute foreign requests with regard to minor cases due to the certain limitations established by laws or practices (e.g. the U.S. will generally decline to execute any request involving less than USD 5,000 in damages).
- Take steps to preserve electronic/digital data/evidence prior to sending the request for its disclosure as, unlike traditional evidence, various types of electronic/digital data/evidence can be deleted permanently in a short time. For example, currently, laws of the U.S. and the majority of countries of Western Europe do not require Internet Service Providers (ISPs) to retain data for a certain time. Once deleted, data generally cannot be retrieved from an ISP. If your country and a requested country are members of the 24/7 Network (set up in accordance with article 35 of the Budapest Convention), send the request for data preservation via your country official contact of the 24/7 Network. If your country is not a member of the 24/7 Network, send a request to a relevant investigative/prosecutorial body of the requested country. Consult with contacts of the CASC network and/or foreign liaison law enforcement officers located in your country regarding the entity to which the request should be sent, the procedure/channels (i.e. informal 'police-to-police' or formal Mutual Legal Assistance channel), and the content of the request. Be ready to provide (i) very basic facts of the investigation, (ii) a precise description of the data to be preserved (i.e. specific account/Internet Protocol (IP) address/website, all associated dates and times including time zones used, etc.), (iii) an explanation as to why/how the evidence sought (data to be preserved) is relevant to the investigation, and (iv) a statement that a MLA request for the data disclosure will be sent after the data is preserved.
- Given that some ISPs can accept requests for data preservation directly from foreign law enforcement/prosecutorial authorities, verify directly with the ISP in question and with the above contacts whether it is possible, and if so, send the request directly to the ISP and send a copy of the request to the above investigative/prosecutorial body of the requested country. Note that some ISPs are not 'law enforcement friendly.' Therefore, consult with the authorities of the requested country before sending a request directly to an unknown ISP.
- Verify with the requested authority whether an account holder may learn about the preservation request (either because of the ISPs' technical design built into their servers or because the ISP notifies clients) and consider your investigative strategy accordingly.
- Consult with your cybercrime unit about the technical aspects of the request.
- Following data preservation, prepare your MLA request promptly. When/if available, study/use check-lists/guidance for obtaining MLA drafted by the requested country.
- Consult with the requested authority/authorities about the possibility of initiating/opening their own criminal investigation. Some countries won't be able to satisfy your MLA request with regard to certain types of assistance if they don't open their own investigations. For example, "...currently, U.S. law does not permit real time interception of the content of telecommunications or computer messages pursuant to a request for assistance concerning a purely foreign offense. Interception of communications is available only in the context of a U.S. investigation.... If U.S. and foreign authorities are investigating the same matter, it may be possible that U.S. authorities can share communications intercepted in their own investigation with foreign authorities."

- The content of your MLA request depends on the types of assistance sought (i.e. electronic evidence requested), and the coercive measures needed to be taken in the requested country. Legal requirements for satisfying foreign requests for obtaining electronic evidence vary in different countries. Generally, the more intrusive the coercive measures, the more evidence you will need to satisfy a foreign MLA request. For example, if you need to obtain the content (e.g. email messages) in an email account, you would, as a general rule, have to provide more evidence to satisfy your MLA request than you would if you only needed to obtain subscriber information. Consult with the requested authority about the justification/grounds for your request and the circumstances under which you can obtain data/evidence (including when you request data/evidence in emergency situations).
  - Indicate the need for confidentiality.
  - Explain the need for urgency if you ask for an urgent execution of your request.
  - Explain whether the evidence needs to be certified to make it admissible in your court, and, if so, how it needs to be certified.
  - Ensure the quality of the translation of your request.
  - Maintain communication with your counterpart(s) in the requested country while your request is being executed.
  - Provide contact details – for both informal and formal communication – in your request.
  - Be specific and proportionate. Ask only for what is really needed.
  - Send/discuss a draft request before sending it via official channels.
  - Ask for confirmation of the receipt of your request.
  - Don't leave your request unanswered – follow-up and check with the requested authority the reasons for not responding to you.

Source: UNODC "CASC" initiative Establishing/Reinforcing the Network of Prosecutors and Central Authorities from Source, Transit and Destination Countries in response to Transnational Organized Crime in Central Asia and Southern Caucasus (2014)

UNODC provides 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.

Text Box 29: Practice Note: UNODC's Request Writer Tool

The Mutual Legal Assistance Request Writer Tool (MLA Tool) has been designed to assist States to draft requests with a view to facilitate and strengthen international cooperation.

The MLA tool:

- Requires virtually no prior knowledge or experience with drafting mutual legal assistance requests;
- Helps to avoid incomplete requests for mutual legal assistance and therefore minimizes the risk of delay or refusal;
- Is easily adjustable to any country's substantive and procedural law;
- Enables the user to retrieve key information on treaties and national legislation;
- Features an integrated case-management tracking system for incoming and outgoing requests;
- Step by step, the MLA Tool guides the casework practitioner through the request process for each type of mutual assistance, using a series of templates. Before progressing from one screen to the next, the drafter is prompted if essential information has been omitted; and
- Consolidates all data entered and automatically generates a correct, complete and effective request for final editing and signature.

The MLA Tool is currently available in multiple languages including English and French. UNODC is available to support translation into other languages.
The tool, which is free of charge, can be downloaded from: https://www.unodc.org/mla/en/index.html

3.6 Transmitting and following up mutual legal assistance requests

Transmission is a key phase in the mutual legal assistance process. 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 require transmission through 'diplomatic channels'. 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's diplomatic authorities will then pass it on to the appropriate Requested State law enforcement or prosecution authority for execution. The diplomatic channel can be highly sensitive to political intervention. It is also usually very slow, and for this reason would usually be unsuitable for transmission of an MLA request relating to trafficking, unless no other avenue was available.

Lao PDR and Malaysia require all requests to be sent through diplomatic channels. Cambodia currently requires all requests to be sent through diplomatic channels; however, Cambodia's draft law on mutual legal assistance will require all requests to be sent to the Central Authority. 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. The Philippines also permits requests to be submitted directly unless a treaty designates that the request be transmitted through diplomatic channels.

More recent treaty agreements, including all those cited in this chapter, provide for communication between the designated 'competent authorities', often referred to as the Central Authority. In fact, most of these agreements require States Parties to designate a Central Authority to make and receive MLA requests. This is the case for UNTOC and well as for AMLAT. Information about Central Authorities in relation to these two treaties can be found in the Competent National Authorities Directory (CNA Directory), available online. Contact details for the various Central Authorities for the AMS are also included in the country summaries annexed to this Handbook.

Text Box 30: Practice Note: Where to Send a Request? Locating the Competent National Authority

UNODC has an online 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/compauth/en/index.html

Central Authorities act as the focal point for requests for mutual legal assistance: they are responsible for the transmission, receipt and handling of all requests for assistance on behalf of a State. Where a request is granted, the Central Authority must ensure that the body required to implement the order (for example, the policing authority) carries out the order from the trial court. The Central Authority must also keep the Requesting State informed about how the request for mutual assistance is proceeding and the outcome of the request.

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, 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 also be an important asset in the preparation of a request for assistance and in the provision of advice and assistance to officials involved in the preparation of requests.

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, however, be noted that in a few States, different bodies may have been nominated as the central or competent authority for different treaties.

Text Box 31: Practice Note: Urgent Requests in Trafficking Cases

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 email 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.

Trafficking in persons is often an extremely violent crime and victims, particularly those cooperating with law enforcement, can be under serious risk of intimidation and retaliation. However, the nature and immediacy of the risks means that even urgent request for formal assistance are unlikely to be fast enough to prevent harm to victims. Where victim safety is at issue, practitioners should revert to faster methods of informal cooperation.

It is important to note that in some jurisdictions, victims are required to remain in the country of exploitation, and sometimes in a situation of detention, until they have given evidence in the prosecution of their exploiters. This situation is unsatisfactory from the position of victim rights and wellbeing and should provide justification for an urgent request.

Note that the 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 (Article 5(1)). The 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 (Article 5(2)).

3.7 Handling incoming requests

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

Communication and prioritisation

Contact between Requesting and Requested States officials is critically important at every stage of 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.

Text Box 32: Practice Note: 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.

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 UNTOC and UNCAC, States Parties have agreed that requests for assistance will be carried out promptly.

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. As noted above, follow up and ongoing communication with the Requesting State is critical.

Coordinate in cases with multiple jurisdictions

In transnational trafficking in persons cases, jurisdictional issues can arise. It is often the case that 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 being made in relation to the same situation. In such cases, it will be necessary for the Requesting and Requested States to closely consult to avoid confusion and needless duplication of effort.[116]

Ensure that 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 those investigators/prosecutors with an opportunity to be involved in executing the request for assistance. It should be noted that such

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

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.

Article 11(2) of the ASEAN MLAT 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 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.[117]

Text Box 33: Practice Note: Request to Interview a Victim of Trafficking

If the request is to interview a victim of trafficking, special considerations apply. The extended timeframe and multiple evidential dimensions that are characteristic in TIP cases makes the interviewing of victims extremely challenging and complex. Moreover, case experience shows that it is important that the interviewer is able to develop a rapport and degree of trust with the victim.

The Requesting State investigating and/or prosecuting case officers should 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 that is so important in the investigation and prosecution of trafficking cases and to ensure that all crucial evidential issues are fully covered.

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.[118]

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 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 requests 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 a conflict with domestic law), the Requested State should consult with the Requesting State at the

[117] Adapted from 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.

[118] *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).

earliest possible stage.[119] This matter is addressed in several treaties. Both UNTOC and UNCAC provide that: [120]

> 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.

Interpret legal requirements fairly and flexibly

Given the many differences in laws, systems and procedures, Requested States may need to be flexible 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 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. 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 such impediments.[121]

It should be noted that the 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 has been noted above and is reflected in the major legal instruments. For the reasons explained, and in particular in trafficking cases, it is vital for a Requested State to closely examine any confidentiality requirements specified in any incoming requests, and to assess whether these requirements can be met. If they cannot be met, this should be communicated to the Requesting State immediately and prior to taking any action that may compromise the request for confidentiality. 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 the 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, for example by way of an assurance. If the request is refused because of prejudice to an ongoing investigation, it might be preferable to postpone the execution of the request until after the relevant proceedings have been finalized.

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[119] UNODC, *Report: Informal Expert Working Group on Mutual Legal Assistance*, p. 11.
[120] *UNTOC*, art. 18(17); *UNCAC*, art. 46(17).
[121] UNODC, Report: Informal Expert Working Group on Mutual Legal Assistance, p. 11.

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.[122] 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. 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 to consider whether it may be possible to provide the requested assistance under certain conditions (Article 18(26)).

Costs

Article 25 of 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; and
- costs for establishing video, television or other communication links.

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 costs.

Text Box 34: Practice Note: Sharing of Costs in Trafficking Cases

In some trafficking cases, the Requested State may have difficulty meeting the ordinary costs of executing a request for mutual legal assistance. In such situations, mutual legal assistance may be viable only if the Requesting State contributes financially to the execution of the request. The Requesting State and the Requested State should discuss this situation upon the submission of the request.

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

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 Countries[123]

Attachment 2: Model Request Form, from the Treaty on Mutual Legal Assistance in Criminal Matters among Like-Minded ASEAN Member Countries[124]

Attachment 3: Model Checklists[125] and Forms[126] for Good Practice in Requesting Mutual Legal Assistance, from the UNODC Informal Expert Working Group on Mutual Legal Assistance Casework Best Practice

[123] 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 http://aseanmlatsec.agc.gov.my/uploads/files/Form/model_checklist.pdf

[124] 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 http://aseanmlatsec.agc.gov.my/uploads/files/Form/model_checklist.pdf

[125] 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 .

[126] 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.

ATTACHMENT 1: CHECKLIST FOR PREPARING MUTUAL LEGAL ASSISTANCE REQUESTS UNDER THE TREATY ON MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS AMONG LIKE-MINDED ASEAN MEMBER COUNTRIES

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 REQUESTS[1]

1. A request for assistance should be submitted in writing[2] through the designated channels and should include the following:

   (a) the name of the person or authority executing the request[3];

   (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;

   (d) 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;

   (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;

[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.

(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 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;

[4] From Bali Process checklist.
[5] From Bali Process checklist.
[6] From Bali Process checklist.
[7] From Bali Process checklist.
[8] From Bali Process checklist.
[9] From Bali Process checklist.

(j) a statement as to whether live video or live television links or other appropriate communications facilities will be required and an undertaking to reimburse the Requested Party for costs incurred;

(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 entitled;

(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 return;

(o) any other information which may be brought to the attention of the Requested Party to facilitate its execution of the request.

ATTACHMENT 2: MODEL REQUEST FORM, FROM THE TREATY ON MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS AMONG LIKE-MINDED ASEAN MEMBER COUNTRIES

Revised - As at 28 October 2005

FORM 1

MODEL REQUEST FORM[1]

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.
[2] This 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 follows[5]:

Description:
Location:
Other relevant details:

3.4 The reasons for suspecting that the person/property is in (*name of Requested Party*) are as follows[6]:

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:

o (*specify maximum penalty for each offence and applicable law*).[7]

OR:

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

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.

(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:

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

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

- (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)

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;
- o (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.
(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).
- (e.g.) Mr. X

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

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 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 initialled both by the person who makes the affidavit and by the person before whom the affidavit is made; and

[12] Necessary if confidentiality is requested.

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

(c) each page of each attachment should be initialled both by the person who makes the affidavit and by the person before whom the affidavit is made.

(e.g.)

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 ACCOMMODATION[14]

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 LINK[15]

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

5.3 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.

[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.

CONCLUSION[17]

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 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: _____

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

ATTACHMENT 3: MODEL CHECKLISTS AND FORMS FOR GOOD PRACTICE IN REQUESTING MUTUAL LEGAL ASSISTANCE[127]

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 permission.[1]

[1] 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.

[127] Extracted from the UNODC informal expert working group on mutual legal assistance casework best practice.

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 therefore and the requirement to consult with the Requesting State, prior to the execution if confidentiality cannot be maintained
- ❑ **Legal basis for the request**
  A description of the basis upon which the request is made, e.g., bilateral treaty, multilateral convention or Scheme or, in the absence thereof, on the basis of reciprocity
- ❑ **Summary of the relevant facts**
  A summary of the relevant facts of the case including, to the extent possible, full identification details of the alleged offender(s)
- ❑ **Description of the offence and applicable penalty**
  A description of the offence and applicable penalty, with an excerpt or copy of the relevant parts of the law of the Requesting State
- ❑ **Description of the evidence/assistance requested**
  A description in specific terms of the evidence or other assistance requested
- ❑ **Clear link between proceeding(s) and evidence/assistance sought**
  A clear and precise explanation of the connection between the investigation, prosecution or proceedings and the assistance sought (i.e., a description of how the evidence or other assistance sought is relevant to the case)
- ❑ **Description of the procedures**
  A description of the procedures to be followed by the 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 the Requested State as some may have additional requirements for the production of documents
- ❑ In cases involving requests for the production of computer records, the risks of deletion or destruction should be considered in consultation with the Requested State. In such a case an expedited, secure means of preservation may be required, e.g. special preservation order, or search and seizure
- ❑ 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 confiscation.
- ❑ 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 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_____

certified

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 States are parties, provides for a simplified and speedy way of certifying such authentication by means of the “apostille” attached to that Convention.

Chapter 4: Mutual Legal Assistance to Recover Proceeds of Trafficking Crimes

Contents of this Chapter:

Overview of this Chapter:

The purpose of this Chapter is to provide practitioners with practical information that will assist them in applying financial investigation techniques to TIP-related offences, through cross-border cooperation and formal mutual legal assistance processes, to:

- identify, secure, and utilise financial evidential material on a transnational basis, thereby strengthening the prosecution of traffickers, irrespective of the place of prosecution; and
- use the same evidential material to support mutual legal assistance requests for the restraint, confiscation, and eventual repatriation of proceeds of TIP crime located outside the prosecuting jurisdiction.

This Chapter includes information about:

- the importance of pursuing proceeds of trafficking crimes;
- the rationale for the use of parallel financial investigation techniques in TIP-related cases and the basic investigative framework to implement this approach;
- the practical aspects of tracing, seizing, freezing, and confiscating proceeds of crime at the national level; and
- the practical aspects of requesting assistance from another State in tracing, seizing, freezing, confiscating and potentially repatriating proceeds of crime back to the Requesting State.

There are specific laws and procedures that apply, and issues that arise, in cross-border proceeds of crime recovery cases that do not generally apply to other types of mutual legal assistance. These are addressed below. However, many of the principles and procedures that apply generally to mutual legal assistance will also apply to the 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 that national laws allow the identification, tracing, freezing, seizing and confiscation of proceeds of trafficking in persons and related crimes

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 (if appropriate) the return of proceeds of trafficking in persons and related crimes

International cooperation on the financial aspects of trafficking crimes 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

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

Key Questions for Practitioners

Practitioners considering engaging in international cooperation in the context of a parallel financial investigation connected to a trafficking case should consider the following:

- What is the objective of the planned cooperation: to strengthen the prosecution; trace, freeze and confiscate TIP-related proceeds and/or instruments; to execute an existing confiscation or forfeiture order; to establish additional offences related to proceeds of TIP-related crimes; or a combination of all of the above?
- Is transnational cooperation necessary: can the objective(s) be achieved by means other than resorting to transnational cooperation? How critical is securing the evidence to the attainment of the objectives?
- What is the legislative situation in the Requested State in respect of TIP-related offences: are confiscation and forfeiture powers available; are TIP-related crimes predicate offences; are coercive powers available to obtain financial evidence; are there any admissibility or disclosure issues that may affect the request?
- What form of transnational cooperation is required: informal practitioner-to-practitioner or formal MLA provisions, or a combination?
- Is there sufficient accurate information available to enable the request: is there sufficient precise and comprehensive information available to enable the tracing and securing of access to financial evidence, especially if coercive powers will be required to obtain it, or to support applications for freeze or confiscation orders or similar?
- Who is the appropriate counterpart: is there a specialist TIP response capacity; do police have financial investigation powers or are these vested in a separate agency; is there a Financial Investigation Unit; is there a functioning Central Authority?
- Timing: depending on the objective(s), are simultaneous and parallel financial investigation techniques required; is urgency required to prevent the flight of suspects, destruction of evidence

or disposal of proceeds; is there a need to synchronise the arrest of suspects with the freezing of proceeds in the Requested State?

- Risk assessment: does the proposed cooperation pose any degree of risk to the safety of any individual, the security of ongoing investigations, the admissibility of evidence or confidentiality of sensitive sources and/or evidence?
- What would be the most appropriate legal basis for formal MLA cooperation: bilateral or regional treaties such as the AMLAT, UNTOC or domestic law? If not, would the reciprocity principle be operative?
- What impact would the use of MLA have on the prosecution: what is the likelihood that the evidence sought can be realistically secured through the use of MLA; to what extent would it delay the prosecution; what would be the consequences of any such delay on the viability of the prosecution?
- Recovery of proceeds: if confiscation and/or forfeiture are objectives, what happens to the value of confiscation and/or forfeitures – can they be repatriated or made available in any way to fund the payment of restitution and/or compensation to victims?

4.1 The importance of pursuing proceeds of trafficking crimes

International practice in the investigation and prosecution of trafficking in persons is increasingly confirming the value of financial investigation in prosecuting trafficking crimes and securing justice for victims. This section introduces the concepts of 'proceeds' and 'parallel financial investigation', as they relate to trafficking crimes. It examines the reasons why this tool is especially relevant and valuable in cases of trafficking in persons and why, thus far, it is still being underutilized.

Text Box 35: Practice Note: Towards Successful Financial Investigation of a Trafficking in Persons Case

Practitioners have identified the following steps as crucial to a successful financial investigation in a trafficking case (in this instance, involving trafficking for forced labour):

1. Conduct a Financial Investigation as part of every investigation into trafficking. Ideally, every investigation into trafficking should be accompanied by a financial investigation. Traffickers are motivated by greed, so going after criminal profits will hopefully hit them where it hurts. A financial investigation *should* be used as a means to investigate the trafficking offence (follow the money trail to see where it leads) and to identify assets that may be seized.
2. Freeze or seize criminal assets as soon as possible: ideally, every investigation into trafficking for labour exploitation should look for assets to freeze at the start, to ensure they can be seized eventually as they cannot be moved or disappear once frozen.
3. Check the assets of family and associates of the suspects: to prevent them from being traced, criminals will often put their assets in the name of a family member or associate. Investigators therefore need to look beyond the criminal's own assets when trying to locate criminal proceeds. In some member states, it is currently not possible to seize criminal assets when they are in someone else's name.
4. Seize cash: investigators could seize all amounts of cash for which no reasonable explanation can be provided, if they come across it.
5. Build up expertise on cross-border money flows and underground banking: in many cases, criminal proceeds are moved to other countries. They may also be removed from standard banking and other financial markets, as a criminal's money may use other financial networks such as bitcoins, which can make it difficult to trace assets. Financial investigators will therefore need expertise on how criminals obtain and move money, including through underground banking, to be able to follow the money.
6. Use the expertise of national and international partners: when the police are carrying out a financial investigation, they may need the powers and expertise of, for example, labour inspectorates, the tax authorities or accountants to collect and interpret all relevant information and possibly impose taxes or fines. They may also need their counterparts in the country of origin or destination to provide financial information or seize assets.
7. Cooperate with Financial Intelligence Units (FIUs): FIUs serve as national centres for the receipt of financial intelligence (suspicious transaction/activity reports) and related information to fight financial criminal activities, money laundering and terrorism. FIUs can provide useful and timely international cooperation on cases of trafficking for labour exploitation with their counterparts in other Member States, both directly and through the FIU.net Information Exchange System.

Adapted from: Government of the Netherlands, *Manual for Experts on Multidisciplinary Cooperation against Trafficking in Human Beings for Labour Exploitation* (2016)

Most AMS already have the basic legal infrastructure in place to enable them to trace, seize, freeze and confiscate proceeds of crime at the national level. Most AMS are also party to one or more treaties that require them to assist other States Parties, on request, by 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 the recovery of proceeds operates at a national level, before concluding with a detailed consideration of the legal and practical aspects of mutual legal assistance to recover proceeds of crime.

4.1.1 What are 'proceeds' of trafficking-related crimes?

'Proceeds of crime' encompasses any property that is derived from criminal activity. The term 'instrumentalities of crime' is slightly narrower – typically, referring 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 crimes, 'proceeds' of crime could potentially include:

- Profits derived from the exploitation of the victim;
- Costs paid by victims – for example, fees paid for obtaining employment, passports, visas, transportation and accommodation;
- Vehicles used to transport victims;
- Premises (such as factories, brothels, farms, fishing boats, mines, hospital clinics);
- Other infrastructure items, such as vessels, machinery, communication tools;
- Profits from the 'sale' of a person from one trafficker to another;
- Value of unpaid salaries; and
- Corrupt payments (typically to government officials) to facilitate trafficking and/or protect traffickers.

States differ as to what constitutes 'proceeds of crime'. It should be noted that:

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

4.1.2 What is a 'parallel financial investigation'?

A 'parallel financial investigation' refers to a financial investigation by investigators and/or prosecutors that is initiated alongside a criminal investigation. The concept of a 'parallel financial investigation' is a universally accepted investigative principle, applied to all forms of serious economic criminality. It has been widely recommended in respect of major crimes, including money laundering, associated predicate offences and terrorist financing.[128] For the reasons set out above, parallel financial investigations should be considered as part of the standard response in cases of trafficking in persons.

The *simultaneous* application of financial and criminal investigative techniques is crucial. Past practice has generally been to delay any financial investigation until after substantial probative evidence of the TIP allegation has been secured by the criminal investigation. This approach limits the potential of the parallel and simultaneous use of financial investigation techniques to fully contribute to the twin investigative goals of successfully prosecuting the traffickers and confiscating proceeds of their criminality.

4.1.3 Why are parallel financial investigations important in TIP cases?

Financial investigation in trafficking cases serves two key purposes: it contributes to stronger prosecutions; and it enables the confiscation of proceeds.

- **Contributes to stronger prosecutions:**

Addressing the financial aspects of trafficking crimes will help the prosecution case, thereby contributing to more and better prosecutions. This is because the nature of the trafficking crime means that offenders are especially vulnerable to the use of effective financial investigation techniques as a source of persuasive and probative independent evidence with which to strengthen the prosecution case against them. While victim testimony remains the most effective source of evidence in most trafficking cases, it is now well understood that successful prosecutions depend heavily on the availability of corroborative evidence – such as that which could be made available through financial investigation.

The evidentiary value of parallel financial investigations has been widely acknowledged. A study undertaken by EUROJUST helpfully explains why this aspect is so critical:[129]

> Financial investigation [in trafficking cases] is a very important tool to obtain evidence and to ensure recovery of proceeds of crime… Financial investigations examine monetary flows, which allow locating and identifying the individuals involved in the criminal network, the roles in the organisation, the countries involved, etc. Knowledge of the money flow from the source country to the destination country, via the transit countries, facilitates the investigation of the entire chain of trafficking, and could provide a strong indication of where the main suspects are to be found.

[128] See, for example, Recommendation 30 of the Financial Action Task Force, *Recommendations*, Financial Action Taskforce on Money Laundering (2003).
[129] EUROJUST, *Strategic Project on Eurojust's action against Trafficking in Human Beings* (Eurojust, 2012).

Text Box 36: Practice Note: Vulnerability of Traffickers to Financial Investigation

Several features of the trafficking crime render it especially vulnerable to financial investigation:

- High profits/cash flow/substantial 'proceeds of crime'
- Multiple/diverse 'instrumentalities' including premises, vehicles, vessels, machinery, communications tools, raw materials, etc.
- Multiple, conspiring offenders and other features conducive to a heavy evidentiary footprint in relation to financial aspects of the crime that can be exploited through financial investigation techniques

- **Enables confiscation of proceeds**

Parallel financial investigations enable the identification, seizure and confiscation of proceeds of criminal activities related to trafficking. This brings many benefits, including:

- Increased risks attached to the trafficking enterprise: effective financial investigation will make prosecution more likely and will present a threat to the profit basis of the crime; and
- Disrupting the capacity of traffickers to continue offending and/or to re-offend upon release from imprisonment.

In some jurisdictions, confiscated proceeds can be used to: (i) satisfy orders for compensation or other restitution made in favour of victims of trafficking and/or (ii) finance activities or programs aimed at supporting victims and preventing future trafficking. Particularly in the first instance, a parallel financial investigation can encourage victims to cooperate in the prosecution of their exploiters. Of course, as a matter of ethical practice, it is important to ensure that the prosecution process is not tainted by incentives that could be seen to influence any participant. Care should also be taken to ensure that victims are not induced to participate in the criminal justice process by unrealistic assessments of the possibility of obtaining compensation.

4.1.4 Why are parallel financial investigations underutilized in TIP cases?

Despite the clear advantages of parallel financial investigation in trafficking cases, this tool is infrequently used. In certain parts of the world, including in the ASEAN region, it is not yet a core part of the investigative strategy in a TIP-related case. Experience suggests that law enforcement is still operating at a distinct disadvantage: while criminals are often able to transfer proceeds of crime to another country quickly and easily, it is usually much more difficult for States to trace these proceeds and cooperate with each other to organise their seizure and confiscation. The repatriation of proceeds of trafficking crimes is even rarer.

Text Box 37: Practice Note: Widespread Failure to use Corroborative Evidence to Support Victim Testimony

A study conducted by EUROJUST into the reasons behind poor prosecution and conviction rates in trafficking cases throughout Europe noted that victim testimony can be insufficient to prove criminal intent or expose the entire chain of trafficking activities. It nevertheless identified a widespread failure on the part of criminal justice authorities to use corroborative evidence in support of victim testimony. Further, while practitioners affirmed the critical importance of financial investigations for obtaining evidence and ensuring the recovery of illicit assets, structural problems and deficiencies are preventing this tool from being used well.

Source: EUROJUST, *Strategic Project on Eurojust's Action against Trafficking in Human Beings* (Eurojust, 2012)

The underutilization of financial investigation techniques in cases of trafficking is not necessarily due to legal or procedural obstacles. Many States have in place the basic legal and regulatory infrastructure that allows them to trace, seize, freeze and confiscate proceeds of crime at the national level. Most States are also party to one or more treaties that require them to assist other States Parties, on request, with tracing, seizing, freezing and confiscating proceeds of crime. Problems often result from a lack of familiarity with established procedures, lack of resources and a general reluctance to cooperate across borders, as flagged throughout this Handbook.

The following extract from the EUROJUST study referred to above confirms this assessment and provides important insights into the multiple factors that contribute to poor utilization of parallel financial investigations in trafficking cases, as perceived by investigators and prosecutors:

> [Practitioners mentioned] the lack of capacity in terms of time, resources and expertise to properly run asset recovery or financial investigations. National competent authorities rather often have limited resources and, because asset recovery entails a considerable workload, manpower and time are often allocated only to the most immediate needs of the non-financial part of the investigation. At the same time, a lack of specialised training results in decreased effectiveness in [trafficking]-related financial investigations, and in significantly less use of the asset recovery tool.

An additional obstacle that is highly relevant to the ASEAN context is presented when a State's financial investigation capacity is located in a separate department, or another agency altogether. This separation inevitably leads to lack of ready access to financial investigation expertise.

The same EUROJUST study points out that additional obstacles, common to any type of organised crime investigation, have also been observed as relevant to financial investigations in trafficking cases, including:

> … the lack of centralised bank registers in some countries and strict bank secrecy regulation in some jurisdictions limit the possibilities to efficiently and accurately trace all financial assets of suspects. Second, suspects use third persons, especially family members, to conceal ownership of assets. Third, [trafficking] is a cash-intensive business; therefore, criminals rarely use bank services and asset tracing becomes very difficult. All these problems are closely related to the high standards of evidence required in some of the Member States, which call for unambiguous proof that the assets in question are generated from a specific criminal act. Without such proof, asset confiscation cannot be ordered.
>
> In addition, proceeds of crime are to a large extent used to sustain a high standard of living and the remaining benefit is often not invested in movable or immovable assets in the destination country, where the investigation and prosecution often take place. Rather, crime proceeds are very often routed to the branches of the criminal groups located in the source countries, again avoiding the use of financial institutions and hence increasing the difficulty to follow the money trial. Europol confirms that

> THB revenues are channelled through regular money remittance systems (e.g. Western Union, MoneyGram), alternative remittance systems (e.g. Hawala) and cash couriers.

While a similar study has not yet been undertaken in the ASEAN region, criminal justice practitioners of AMS have cited similar concerns as reasons why financial investigations are rarely pursed and why, even if commenced, they are often not successful.

Section **4.4** considers additional challenges as they relate to the international cooperation aspects of financial investigations.

4.2 Recovering proceeds of crime at the national level

A core 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, freeze and confiscate those proceeds, with a view to their eventual repatriation. However, any form of international cooperation 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.

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

- First, 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 lengthy legal process, through which the assets are confiscated; and
- Where these steps are taken as part of an international cooperation process, a further step may be taken to repatriate the assets to the Requesting State.[130]

The first three of these steps is considered separately below.

It is important to note, at the outset, the links between *national action* to recover proceeds of crime, and *international cooperation* to the same end. In short, the successful tracing, seizure and confiscation of assets within a single jurisdiction will often require international cooperation, whether informal or formal. The following diagram explains this:

Adapted from: World Bank, *Handbook for Practitioners on Asset Recovery under StAR Initiative* (2010)

[130] 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* (ADB/OECD) 81.

4.2.1 Tracing and identifying proceeds of crime

As noted above, the first step in recovering proceeds of crime is to locate proceeds in question. In most cases, the task of tracing proceeds of crime will 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 an FIU that is responsible for the collection and analysis of financial intelligence and its dissemination to domestic law enforcement agencies, that use the information in 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 an 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.

Table 5: Financial Intelligence Units of AMS

ASEAN Member State	Financial Intelligence Unit and Contact Details
Brunei Darussalam	**Financial Intelligence Unit** Authoriti Monetari Brunei Darussalam Level 7, Ministry of Finance Building Commonwealth Drive Bandar Seri Begawan BB3910 Brunei Darussalam Tel: +673 2381367 Fax: +673 2382256 Email: fiu@ambd.gov.bn
Cambodia	**Cambodia Financial Intelligence Unit** National Bank of Cambodia 22-24 Norodom Blvd, Phnom Penh, Cambodia Tel: (+855-23) 722 563, 722 221 Fax: (+855-23) 426 117 Email: info@nbc.org.kh
Indonesia	**Indonesian Financial Transaction Reports and Analysis Centre** Jl.lr. H. Juanda No. 35, Jakarta 10120 Indonesia Tel: (+62-21) 3850 455, 3853 922 Fax: (+62-21) 3856 809, 3856 826 Email: contact-us@ppatk.go.id
Lao PDR	**Anti-Money laundering Intelligence Unit** Bank of Lao PDR, PO Box 19 Yonnet Road, Ban Xieng Gneun, Chanthaboury District, Vientiane Lao PDR Tel/Fax: (+856-21) 264 624, 213 109 Email: bol@bol.gov.la

ASEAN Member State	Financial Intelligence Unit and Contact Details
Malaysia	**Financial Intelligence and Enforcement Department (Jabatan Perisikan Kewangan dan Penguatkuasaan) (UPWBNM)** 4th Floor, Block C Bank Negara Malaysia Jalan Dato' Onn, 50480 Kuala Lumpur, Malaysia Tel: (+60-03) 2698 8044 ext 8745 Fax: (+60-03 2691 6108 Email: fiu@bnm.gov.my
Myanmar	**Financial Investigation Unit** Myanmar Police Force Ministry of Home Affairs Nay Pyi Taw, Myanmar Tel: (+95) 067 412 493 Fax: (+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 **AMLC Units** Office of the Executive Director Direct line: +63-2-708-7066 Local: +63-2-708-7701 local 3083, 3084 Fax: +63-2-708-7909 Email: secretariat@amlc.gov.ph Legal Services Group Direct line: +63-2-708-7069 Local: +63-2-708-7701 local 3153, 3154 E-mail: legal@amlc.gov.ph Compliance and Investigation Group Direct line: +63-2-708-7071 Local: +63-2-708-7701 local 2372 E-mail: compliance@amlc.gov.ph
Singapore	**Suspicious Transaction Reporting Office (STRO)** Commercial Affairs Department 391 New Bridge Road #06-701 Police Cantonment Complex Block D Singapore 088762 Tel: (+65) 6325 0000 Fax: (+65) 6223 3171 Email: SPF_CADWebmaster@spf.gov.sg
Thailand	**Anti Money Laundering Office** 422 Phyathai Road, Wangmai District, Pathumwan, Bangkok 10330 Thailand Tel: (+66-2) 219 3600

ASEAN Member State	Financial Intelligence Unit and Contact Details
	Fax: (+66-2) 219 3700 Email: mail@amlo.go.th
Viet Nam	**The Anti-Money Laundering Information Centre** 3rd floor, Block E, Vuong Dao, Phu Thuong, Ha Noi Viet Nam Tel: (+84-2) 2239 446 (Director), (+84-2) 2239 451 (Research Department), (+84-2) 2239 447 (Intelligence Analysis Department) Fax: (+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,[131] 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), once 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 examination 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 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:

[131] 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* (ADB/OECD) 81.

- 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; and
- prevent criminals from simply recovering their assets by, for example, prohibiting them and their nominees from taking part in auctions of confiscated property.[132]

While national laws vary, there are typically two major forms of orders relevant to the 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, to prevent its disposal by the criminal or the reduction of its value by other means.
- **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) 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 has been 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. While national laws vary, there are several key types of orders that may be relevant to the 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 is not proceeds of crime.
- **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 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 from the commission of a crime.

[132] 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*].

- **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 conviction) or **non-conviction-based** (the assets can be confiscated prior to a conviction being recorded). 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'.[133]

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.[134]

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.[135]

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.

[133] Welsch, *International Cooperation for the Purposes of Confiscation.*
[134] Welsch, *International Cooperation for the Purposes of Confiscation.*
[135] Welsch, *International Cooperation for the Purposes of Confiscation*.

Text Box 38: Practice Note: Recovery of Proceeds

Cooperation between the Philippines and the Netherlands to recover proceeds of TIP offences

A foreign national and his Filipino spouse had been sending Filipinos to the Netherlands to work at a massage parlour. Proceeds of the human trafficking and swindling operations were regularly sent through banks in the Philippines, which resulted in the accumulation of bank deposits and properties in the Philippines, including hotel and residential lots.

The Philippines anti-money laundering authority then initiated civil forfeiture proceedings against the suspects. It was able to secure an *ex-parte* provisional asset preservation order and an asset preservation order until the final disposition of the case.

The MLA request from the Netherlands triggered a separate investigation by the anti-money laundering authority. That investigation found that the acts committed by the couple in the Netherlands constituted an offense in the Philippines that is similarly defined and punishable under the penal laws of the Netherlands (i.e. swindling).

4.3 Informal international cooperation to strengthen the prosecution of TIP-related offences and facilitate eventual confiscation and forfeiture

This section considers how practitioners can utilise informal transactional cooperation methods in a financial investigation context. It supplements the broader information on informal cooperation in trafficking cases, set out in **Chapter 3**.

Text Box 39: Practice Note: Assessing Capacity to Cooperate

The first question

"In order to determine whether a joint international [financial] investigation is feasible, any country considering such an approach should assure itself that the other country has the political and institutional will to undertake such a difficult [task]."

Multiple resources are available to support an assessment into another country's capacity to cooperate in a financial investigation in a trafficking case. These include evaluation reports from the Financial Action Task Force, the World Bank and the IMF. These are similar reports critically examining national resources allocation to different branches of the criminal justice system, the States Central Authority and its financial intelligence unit. That information should allow the other State to make a reasonable assessment of the capacity of their potential as a partner in a joint investigation. Note that these reports are also a useful source of information about the potential partner country's laws with respect to confiscation.

Source: UNODC, *Manual on International Cooperation for the Purposes of Confiscation of Proceeds of Crime* (2012) at 29

Informal cooperation will only arise as a possibility when a criminal investigation into a suspected case of trafficking in persons indicates that some part of the crime has a transnational character and/or that financial aspects of the crime potentially implicate another country (e.g. that proceeds of the crime are in foreign jurisdictions).

This type of informal cooperation will have one or more of the following objectives:

1. To identify and secure additional financial evidence located in another State(s) to strengthen the prosecution case.
2. To initially trace TIP-related proceeds to facilitate subsequent mutual legal assistance requests to freeze them, pending subsequent application for confiscation.
3. To establish and secure probative evidence of additional offences related to money laundering in respect of proceeds of TIP-related crimes that may have been moved to another State(s).

Text Box 40: Practice Note: The Importance of Timing

The transnational aspects of a parallel financial investigation should be initiated as soon as it is apparent that the case under investigation has (or may have) a transnational dimension. Ideally, the transnationally focused financial investigation will take place simultaneously with the criminal investigation and not be delayed until any domestic enquiries have been advanced.

Taking steps to ensure that intelligence and or evidence located in another jurisdiction is identified as quickly as possible is important because such evidence will: (i) help guide and strengthen the ongoing criminal investigation; and (ii) lay the groundwork for a mutual legal assistance request, thereby reducing the risk of delays. In relation to laundered proceeds, early action in relation to transnational financial investigation enables prosecutors to seek the necessary orders leading to their confiscation.

It is important to be aware that cooperating States may have different priorities and agendas. For example, one State may be investigating substantive criminal offences, while the other may be following criminal assets. A confiscation-focused investigation by one party may conflict with an investigation by another party focused on establishing predicate offences. Both sides must be able to appreciate the other's interests and be committed to resolving any differences.[136]

4.3.1 Channels of informal cooperation: financial intelligence units

There are two main channels for the conduct of informal cooperation in transnational financial investigations: Financial Intelligence Units and direct police-to-police cooperation. A decision as to which avenue to use will depend on the circumstances of the case and the situation in the two countries concerned. This is explored further below. It should be noted that, in the majority of cases, it will be appropriate to employ both options (either simultaneously or consecutively).
An FIU is a central national agency responsible for receiving, analysing, and transmitting financial information to the competent authorities in support of efforts to combat money laundering and serious crimes such as terrorism. Increasingly, FIUs are being charged with identifying and disclosing suspicious transactions related to the financial aspects of other forms of serious organised criminality, including trafficking in persons.

Although every FIU operates under different guidelines, most can exchange information with foreign counterpart FIUs. In addition, many FIUs can provide other government administrative data and public record information to their counterparts, which can also be very helpful to investigators.[137] The following are key operational points for the investigator seeking informal cooperation from another country's FIU:

- **Range and type of information**

The FIU will typically have the regulatory capability to access core financial information in respect of a wide range of entities that are likely to be relevant in any financial investigation in TIP crimes, including financial institutions such as banks and money transfer service providers. The FIU may also be able to access information from other institutions such as real estate agents, casinos, dealers in precious metals and stones, accountants, lawyers and company formation agents.

- **Capacity to share:**

As noted, most FIUs have the legal capacity to share information with foreign counterparts in certain circumstances. For example, membership of the *Egmont Group*, an informal network of financial investigation units,[138] enables national FIUs to securely (using encrypted email connectivity) and expeditiously request and exchange financial information. Members of the Egmont Group include Brunei, Cambodia, Indonesia, Malaysia, the Philippines, Singapore and Thailand.

- **Privacy and security:**

It is vitally important for practitioners to recognise the acute sensitivity of FIU-derived intelligence and the care required to ensure that its management and dissemination is handled correctly. Characteristically, information provided by an FIU is for *confidential intelligence purposes only* and the use of such material as evidence in criminal proceedings will require some form of **prior** judicial

[136] UNODC, *Manual on International Cooperation for the Purpose of Confiscation of Proceeds of Crime* (2012) 27.
[137] International Monetary Fund and World Bank, *Financial Intelligence Units: An Overview* (2004), p. 18
[138] See further Egmont Group: https://egmontgroup.org/en

authorisation to ensure its admissibility and protect the confidentiality of the role of the FIU. In most cases, the exchange of FIU material with law enforcement agencies will be managed under the terms of some form of memorandum of agreement. In such a case, it is critical that practitioners adhere strictly to its requirements.

Text Box 41: Principles for Information Exchange between Financial Intelligence Units

The Egmont Group is a united body of **155 Financial Intelligence Units (FIUs)**. It provides a platform for the secure exchange of expertise and financial intelligence to combat transnational crimes including money laundering and terrorist financing (ML/TF). The Egmont group has produced a set of Principles governing information exchange between its member FIUs. The following is an extract.

B. General framework

7. International co-operation between FIUs should be encouraged and based upon a foundation of mutual trust.
8. Information-sharing arrangements must recognize and allow room for case-by-case solutions to specific problems.

C. International Co-operation

9. FIUs should exchange information with foreign FIUs, regardless of their status; be it administrative, law enforcement, judicial or other.
10. To this end, FIUs should have an adequate legal basis for providing co-operation on money laundering, associated predicate offences and the financing of terrorism.
11. FIUs should exchange information freely, spontaneously and upon request, on the basis of reciprocity. FIUs should ensure that they can rapidly, constructively and effectively provide the widest range of international co-operation to counter money laundering, associated predicate offences and the financing of terrorism. FIUs should do so both spontaneously and upon request, and there should be a lawful basis for providing co-operation.
12. In addition to the information that entities report to the FIU (under the receipt function), the FIU should be able to obtain and use additional information from reporting entities as needed to perform its analysis properly.
13. In order to conduct proper analysis, FIUs should have access to the widest possible range of financial, administrative and law enforcement information. This should include information from open or public sources, as well as relevant information collected and/or maintained by, or on behalf of, other authorities and, where appropriate, commercially held data.
14. FIUs should be able to disseminate, spontaneously and upon request, information and the results of their analysis to relevant competent authorities.
15. FIUs should use the most efficient means to co-operate. If bilateral or multilateral agreements or arrangements, such as a Memorandum of Understanding (MOU), are needed, these should be negotiated and signed in a timely way with the widest range of foreign FIUs in the context of international co-operation to counter money laundering, associated predicate offences and terrorist financing.
16. FIUs should be able to conduct queries on behalf of foreign FIUs, and exchange with these foreign FIUs all information that they would be able to obtain if such queries were carried out domestically.

Additional principles deal with: (i) obligations for the FIU making the request; (ii) obligations for the FIU receiving the request; (iii) unreasonable or unduly restrictive conditions and refusal of requests; and (iv) data protection and confidentiality.

See further Egmont Group: https://egmontgroup.org/en

Informal financial cooperation at the transnational level must generally commence with the investigator in a TIP case contacting his or her own FIU. The FIU is well placed to advise the investigator on technical matters related to the information to be requested and may also be able to provide insight into the laws, procedures and capacities of the country from whom assistance is to be sought.

Assuming both Units are members of the Egmont Group, the domestic FIU should be able to contact its counterpart Unit to request specific information provided to it by the investigator. The type of information requested will, of course, depend on the circumstances of the trafficking case. It may include:

- Bank account details and statements;
- Wire transfers;
- Supplementary information, such as manager's notes;
- Identity documents submitted under Customer Due Diligence regimes;
- Safety deposit boxes;
- Credit and charge card accounts;
- Pension, insurance and mortgage-related payments;
- Linked beneficiary or debit accounts;
- ATM transactions – showing patterns, movements and geographical locations at precise times;
- Money service transfers;
- Company formation fees;
- Credit referencing agencies; and
- Casino transactions.

The domestic FIU will usually be required to develop and transmit a formal request for information/assistance to its foreign FIU counterpart. To assist their own FIU, practitioners should make themselves aware of the relevant laws and procedures and support the FIU in ensuring the request is as detailed and specific as possible. For example, while FIU analysts will usually automatically search their databases to establish whether any of the resulting data is linked to any Suspicious Transaction Reports (STR) or Covered Transaction Reports (CTR), it is nevertheless prudent to ensure that the request to the FIU makes specific reference to this procedure.

4.3.2 Channels of informal cooperation: police-to-police cooperation

The various aspects of transnational police-to-police cooperation have been examined in **Chapter 2** of this Handbook. As noted in that Chapter, the optimum way to progress informal police cooperation in respect of TIP investigations is usually through engagement between the respective countries' specialist Anti-Trafficking Unit. This holds true for financial investigations, particularly in the earliest stages, where specialist investigators are able to advise on options and contacts.

Where no such specialist unit exists in the country from whom cooperation is sought, it will be necessary to identify an alternative contact point. Typically, in relation to financial matters, this will be the anti-money laundering unit or the FIU of the Requested State. These alternative types of unit will be experienced in financial investigative techniques and are likely to have developed sound working relationships with their counterparts in the Financial Investigation Unit of the State. If neither of these two alternative options is available, contact should initially be established with whichever unit holds operational responsibility for investigating transnational organised crime in all its forms because in the absence of any of the above, the investigation of TIP crime will usually form part of the responsibilities of such a unit.

Police-to-police cooperation will generally operate in areas that fall outside the mandate of the FIU, or in circumstances where the information required can be obtained through this channel more quickly or effectively. The list of possible sources and types of information is necessarily open-ended,

reflecting the diverse and evolving nature of trafficking-related crimes. The following categories are likely to be relevant in many financial investigations of transnational trafficking cases:

- Company registration authorities
- Land registries – title, holdings
- Stock market regulators – holdings
- Passport offices – fee payment methods
- Consulates – visa fee payment methods
- Accommodation agencies – rental of private and commercial premises
- Utility providers – water, gas and electricity – payment history
- Communications service providers – payment history
- Travel agencies – ticket history, payment methods
- Airlines – ticket history, executive club membership
- Vehicle hire companies – rentals and leasing
- Health authorities – registration of practitioners and medical facilities
- National and local tax authorities
- Vehicle registration departments

As highlighted at various points in previous chapters, practitioners should be prepared to provide accurate and detailed information to their foreign counterparts, to enable them to fulfil the request as quickly and effectively as possible.

4.3.3 Informal cooperation in investigations where suspects are not yet in custody

When planning to use informal financial cooperation in ongoing investigations *in which the suspected traffickers are not yet in custody*, early and close coordination between practitioners in both countries is essential for the purposes of security and risk assessment, and to ensure that future arrests are synchronised with restraint of proceeds.

Security and risk assessment: as with all investigations of this kind, there is a risk that police enquiries into the financial aspects of a suspected trafficking crime may alert the suspects to police interest in their activities. This can result in flight, disposal of relevant evidence, and the dispersal of proceeds. This risk is minimised in situations where FIUs are cooperating with each other in respect of financial institutions and other 'covered persons', because national law generally criminalises the disclosing of information about such inquiries. However, when informal police-to-police cooperation is used, the risk is real and must be managed. For example, police enquiries to establish the financial history of infrastructure transactions in respect of communications, the advertising or leasing of premises, vehicles, etc., can be highly vulnerable to compromise in ways that may jeopardise an ongoing investigation.

In trafficking cases, the security risks are particularly acute because of the possibility that vulnerable victims will be caught up in any action taken by the exploiter as a result of being alerted to an investigation. Active management of these risks requires that the practitioner considering making a request for assistance undertakes a risk assessment *in advance* and in relation to *each inquiry.* If the assessment reveals an unacceptable level of risk – or one that is disproportionate to the expected benefit – then the inquiry or requested action should be postponed until the suspects are in custody and/or proceeds are subject to restraint.

Synchronised restraint: in situations where identified proceeds have been laundered to another State, police-to-police cooperation should seek to synchronise the arrest of the suspects with the restraint

of those proceeds. Where an investigation is ongoing and informal cooperation has identified potential proceeds of the TIP crime in the Requested State, prompt and close coordination can help to synchronise the arrest of any suspected traffickers with an application to freeze or otherwise restrain the identified proceeds in the Requested State, to prevent their dispersal.

In cases where the informal cooperation has led to the commencement of an investigation in the Requested State, it may then be possible to use the fact of that investigation as the legal basis for seeking freezing or restraint orders in respect of the suspected proceeds. This will make synchronisation much easier to achieve. If this is not a possibility, a mutual legal assistance request for restraint will need to be processed as rapidly as possible to increase the chances of being able to restrain proceeds at the same time as effecting the arrest of the suspects.

4.4 International cooperation to recover proceeds of crime

The 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.

4.4.1 The Legal Framework

Many States have agreed, through a network of bilateral, regional and international treaties, to cooperate in relation to the financial aspects of serious crimes. In relation to mutual legal assistance, the primary focus is on the recovery of proceeds of crime.

Text Box 42: Practice Note: Understanding Differences between Legal Systems

The tracing and seizing of assets is an area in which differences in legal traditions (considered in **Chapter 2**) will come to the fore. Property (both real estate and personal property), banking systems and their protections, the management and disposal of seized assets and a plethora of other considerations are part and parcel of the regime of asset seizure and forfeiture. Communication will be key in ensuring that all phases of the seizure and forfeiture of assets run smoothly and that a successful result is obtained.

Cooperation through the AMLAT

Within the ASEAN region, the most significant agreement with respect to cooperation on financial aspects of trafficking in persons cases 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 (Article 1(4));
- restrain dealings in property or freeze property derived from the commission of an offence that may be recovered, forfeited, or confiscated; and
- recover, forfeit, or confiscate property derived from the commission of an offence (Article 1).

The ASEAN MLAT applies to 'criminal matters', which potentially extends to a wide range of criminal offences, including trafficking in persons and related offences (Article 1(1)).

Article 22 contains the key obligation in the ASEAN MLAT regarding 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 AMS 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 AMS 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 judgments that are made after the coming into force of the treaty.

Cooperation through the UNTOC[139]

States Parties to UNTOC have agreed to extensive obligations of cooperation regarding the recovery of proceeds of crime. As noted in the previous chapter, the mutual legal assistance provisions of UNTOC apply to all offences established in accordance with that Convention and its Protocols, where these offences involve an organized criminal group and there are reasonable grounds to suspect that victims, witnesses, proceeds, instrumentalities or evidence is located in the Requested State Party. [140] The relevant provisions of UNTOC are set out in the following text box.

Text Box 43: Types of Assistance Available under UNTOC

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 financial aspects/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 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.

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 UNCAC offences established in accordance with the Convention;
- Confiscate property, equipment or other instrumentalities used in or destined to be used in UNCAC offences;
- Identify, trace, freeze or seize proceeds of crime or instrumentalities for the purposes of eventual confiscation; and
- Empower their courts or other competent authorities to order that bank, financial or commercial records be made available or seized.

[139] Note that the UNCAC is also a possible legal basis for cooperation between AMS in relation to corruption offences such as bribery of officials, embezzlement of public funds and trading in influence; and Laundering 'proceeds of crime' This includes proceeds from *any* crime, which potentially includes the crime of trafficking in persons, or related crimes (UNCAC, Article 15-23).

[140] *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.

Article 13(1) of UNTOC specifically concerns international cooperation regarding the 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).

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. These requests can only be refused on the same grounds as apply to a mutual legal assistance request.

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.** 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 a description of the actions requested.

Cooperation through bilateral treaties

As noted in **Chapter 3**, by negotiating bilaterally, States can shape an agreement that meets the requirements of their legal system, whilst also promoting a high degree of certainty and predictability. Bilateral treaties are also able to work around those matters that tend to complicate mutual legal assistance between States with different legal traditions. Many countries have entered into bilateral agreements which either specifically deal with financial aspects of legal cooperation or which broadly address mutual assistance, including the recovery of proceeds of crime.

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, Viet Nam has entered into a bilateral treaty with Korea on mutual legal assistance in criminal matters.[141] Under this Treaty, the Parties have agreed to provide one another with assistance including tracing, restraining, forfeiting and confiscating proceeds and instrumentalities of crime.[142] The Parties are obliged, upon request, to endeavour to ascertain whether any proceeds of crime are located

[141] *Treaty between the Republic of Korea and the Socialist Republic of Viet Nam on Mutual Legal Assistance in Criminal Matters*, S. Korea- Viet Nam, Sept. 15, 2003, entered into force April 19, 2005 [hereinafter *Korea-Viet Nam MLA Treaty*].
[142] *Korea-Viet Nam MLA Treaty*, art. 1(3)(g).

within its jurisdiction and to notify the 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.[143]

However, the network of coverage provided by bilateral treaties in the ASEAN region is far from complete, underscoring the continued importance of multilateral alternatives, such as the AMLAT and UNTOC.

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 domestic law in Thailand has divided the approach to proceeds of crime in MLA into two stages. The first stage is the seizure or freezing of property by the order of the authorized authority under the domestic laws of Thailand. The authority can either be executive authority or judicial authority in accordance with domestic law concerning the offence and the situation. The second stage of confiscation of property must be made by order of court. In handling the case with a request for confiscation in Thailand, the competent authority can apply to the relevant court for an order or writ requiring such confiscation.[144] 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".[145]

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; providing the necessary information to 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'. RA No. 9160, otherwise known as the "Anti-Money Laundering Act of 2001," was amended by RA No. 10365 in 2013, to include Trafficking in Persons (TIP) as a predicate offence, among others. 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.[146] Under

[143] *Korea-Viet Nam MLA Treaty*, art. 16.
[144] *Act on Mutual Assistance in Criminal Matters BE 2535 (1992) Sections 23, 24, 25, 32, 33, 34, 35, 35/1 and 35/2, amended by the Act on Mutual Assistance in Criminal Matters (2 version) BE 2559* (2016) Section 7 and 10 (Thail.).
[145] *Law Concerning Mutual Legal Assistance in Criminal Matters*, art. 3(2), (Law No. 1 of 2006) (Indon.).
[146] *Law number 8 of 2010 on Countermeasure and Eradication of Money Laundering,* Article 91, (Indon.) [hereinafter *Law on Countermeasure and Eradication of 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.

the Act, mutual legal assistance can be undertaken with other States where there is a treaty or on the basis of reciprocity.[147]

In the case of Singapore, the Attorney General's Chambers has published a *Practitioners' Guide to Asset Recovery in Singapore.*[148] The publication acts as a step-by-step guide for requesting countries when drafting mutual legal assistance requests to Singapore in recovering assets that are proceeds of crimes. It includes the following information:

- an explanation of the asset recovery regime in Singapore;
- the types of assistance that may be rendered;
- guidance on the technical requirements and procedural aspects of making mutual legal assistance requests;
- the contact information of the various departments involved in the asset recovery process; and
- various template forms which requesting countries can adopt.

Table 6: 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	*Mutual Assistance in Criminal Matters Order* (2005) *Criminal Asset Recovery Order 2012*
Cambodia	National mutual legal assistance law is currently being drafted. Some mutual legal assistance provisions are contained in the following legislation: 1. *Law on Anti-Corruption 2010* 2. *Law on the Control of Drugs 2013* 3. *Law on Terrorism 2007*
Indonesia	*Law number 8 of 2010 on Countermeasure and Eradication of Money Laundering* (Law No. 8 of 2010) *Law Concerning Mutual Legal Assistance in Criminal Matters* (Law No. 1 of 2006)
Lao PDR	*Decree on Anti-Money Laundering 2006*; *Law on Criminal Procedure (as amended 2012)*, Part XIV: International Cooperation in Criminal Proceeding *Law on Anti-Money Laundering and Counter-Financing Terrorism 2015*, Part III: International Cooperation in AML/CFT
Malaysia	*Mutual Assistance in Criminal Matters Act* (Act. 621) *Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act* 2001 (Act 613)
Myanmar	*Mutual Assistance in Criminal Matters Law* (Law No. 4/2004)
Philippines	*Anti-Money Laundering Act* (Republic Act 9160 as amended by Republic Act No. 10365)
Singapore	*Mutual Assistance in Criminal Matters Act* (Cap 190A, 2001 Rev Ed)
Thailand	*Act on Mutual Assistance in Criminal Matters BE 2535 (1992), amended by the Act on Mutual Assistance in Criminal Matters (2 version) BE 2559* (2016)

[147] *Law on Countermeasure and Eradication of Money Laundering* (Indon.), Article 91.
[148] Attorney-General's Chambers of Singapore (2016). *The Practitioner's Guide for Asset Recovery in Singapore*. Retrieved from: Attorney-General's Chambers of Singapore (2016). *The Practitioner's Guide for Asset Recovery in Singapore*. Retrieved from: : https://www.agc.gov.sg/docs/default-source/our-roles-documents/international-law-adviser/practitioner%27s-guide-for-asset-recovery-in-singapore---13-september-2016.pdf?sfvrsn=2

ASEAN Member State	National Law on Mutual Legal Assistance for Proceeds of Crime
Viet Nam	*Law on Mutual Legal Assistance* (Law No. 08/2007/QH12) *Criminal Procedure Code* (Code No. 101/2015/QH13)

4.4.2 The practice of international cooperation to recover proceeds of crime

Many of the issues that arise in relying upon international cooperation to recover proceeds of crime mirror those faced by any mutual 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 that must be followed to secure the return of proceeds of crime across international borders reflect those taken at the domestic level:

- First, 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 an extended legal process, in which the Requested State will confiscate the assets; and
- Finally, the assets may be repatriated to the Requesting State.[149]

The points raised at **4.2,** above, in relation to each of these steps at the domestic level, are relevant to cases of international cooperation concerning the recovery of proceeds of crime. Additional issues that arise in the context of international cooperation are identified below.

The following text box provides an example of how cooperation to recover proceeds (in this case relating to corruption offences) can work effectively when the appropriate tools are in place *and* there is a willingness on the part of both States to cooperate.

Text Box 44: Practice Note: Asset Recovery in Brunei

The Attorney General's Chambers of Brunei Darussalam successfully recovered over $600,000 BND [approximately $USD450,000] from proceeds of corruption placed in the bank accounts of a convicted criminal in a foreign jurisdiction.

The Malaysian national, a key Brunei Shell Petroleum (BSP) contractor was convicted and sentenced in November 2014 of multiple counts of bribing Shell employees in what was described by the High Court as a case involving "syndicated corruption on a large scale". The case was investigated by the Anti-Corruption Bureau.

In addition to imposing a custodial sentence, the presiding judge also made a Benefit Recovery Order under the Criminal Asset Recovery Order (CARO) on funds held in the suspect's bank accounts in Singapore. The order required those funds to be paid into the Criminal Assets Confiscation Fund, established under CARO which is managed by the Permanent Secretary of the Ministry of Finance.

[149] 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.

Following extensive work between the Attorney General's Chambers of Brunei Darussalam and the Attorney General's Chambers of Singapore, both of which also function as the Mutual Legal Assistance Secretariats of their respective nations, the Benefit Recovery Order was fully satisfied.

The success of this case marks the first time the Government of Brunei Darussalam has successfully enforced an asset recovery order through the use of Mutual Legal Assistance. The case highlights the importance of mutual legal assistance and serves as a reminder that criminals who hide their money and assets overseas are not untouchable. The successful enforcement of the Benefit Recovery Order is also testament to the strong and robust international cooperation framework that Brunei Darussalam possesses through laws such as the Mutual Assistance in Criminal Matters Order (MACMO) and the Criminal Asset Recovery Order as well as the strong and long-standing working relationship between the Attorney General's Chambers of Brunei Darussalam and Singapore.

Adapted from Press Release issued by the Government of the Kingdom of Brunei (2017)

Identification and seizure of proceeds of crime

The major international and regional legal instruments, including the AMLAT and UNTOC, 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, are taken by the Requested State in accordance with its domestic laws or any relevant treaty arrangements.[150]

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 proceeds. In other states, a formal request will be required to even identify the assets.

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 proceeds of crime are repatriated to the Requesting State. Repatriation of confiscated proceeds of crime is not always assured and 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 (Article 22(4)). Requested State 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 (Article 22(5)).

According to the 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 of property to their legitimate owners (Article 14(2)). This issue is considered further below.

[150] *UNTOC*, art. 13(4); *UNCAC*, art. 55(4); *ASEAN MLAT*, art. 22(1).

4.4.3 Use of proceeds to support or compensate victims of trafficking [151]

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 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.[152]

The linking of confiscated assets to victim compensation does find 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, 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" (Article 14(2)).

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.[153] This provision does not amount to an obligation to provide remedies as States only need offer the legal possibility of compensation.[154] According to the Legislative Guide, the Protocol's requirement 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.[155]

The UN Trafficking Principles and Guidelines requests that States consider ensuring, to the extent possible, that confiscated assets are used to support and compensate victims of trafficking (Principle 16). 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" (Guideline 4.4).

[151] This section is drawn from Gallagher, *The International Law of Human Trafficking*, Chapter 7.
[152] Gallagher and Holmes*, Developing an Effective Criminal Justice Response to Human Trafficking*, p. 330.
[153] *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.
[154] UNODC, *Legislative Guides to the Organized Crime Convention and its Protocols*, Part 1, para. 368.
[155] UNODC, *Legislative Guides to the Organized Crime Convention and its Protocols*, Part 1, para. 294.

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.[156]

The use of confiscated assets to compensate victims of trafficking in persons is becoming more common in some parts of the world. The following example, from Europe, demonstrates how transnational financial investigations can support this very important legal remedy.

Text Box 45: Practice Note: Use of Transnational Financial Investigation to Strengthen a TIP Prosecution and Secure Compensation for Victims

Dutch and Hungarian authorities established a joint investigation team in relation to a case of suspected trafficking in persons and money laundering. Investigations revealed that monies derived from the suspected trafficking operation had been sent to Hungary and, after being laundered, was used to purchase property and luxury goods. The two countries allocated themselves specific tasks: the Netherlands was to determine the illegal benefits of the suspect and confiscate them; Hungary was to detect and confiscate assets of the suspects. During the investigation multiple telephone conversations were recorded and overheard, also observations were used. There was use of a comprehensive financial research aimed at identification and seizure/confiscation of property and goods financed with criminal gains. As a result, it became possible to determine the losses incurred by the victims. This information was used by the Court in making an order for compensation of several hundred thousand euros from the suspects to several of the victims.

Source: UNODC – Netherlands and Hungary (2018)

These practices are less well established in the ASEAN region. It is nevertheless important to point out that the requisite legal and policy framework is in place with various ASEAN policy instruments affirming the right of victims of trafficking to access remedies. For example, the ASEAN Practitioner Guidelines state that:

> To the extent possible, the legal framework should enable victims to seek and receive remedies including compensation from appropriate sources, including those found guilty of trafficking and related offences.

The Practitioner Guidelines make a further, important link between compensation for victims and confiscation of the assets of their exploiters, stating 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.

It should be noted, however, that the ACTIP does not link confiscation of assets (Article 17) to victim compensation.

[156] 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."

Chapter 5: Extradition in Trafficking in Persons Cases

Contents of this Chapter:

Overview of this Chapter:

The purpose of this Chapter is to provide practitioners working on TIP cases with practical information that will assist them in determining whether to utilise extradition and to provide recommendations for effective engagement in the extradition process. While it is recognised that extradition is not yet common in TIP cases, its importance as a criminal justice tool has increased and that trend can be expected to continue. This Chapter is, therefore, oriented towards demystifying extradition and encouraging practitioners to consider this option in appropriate cases. It includes information about:

- the nature of extradition;
- the various legal bases that can be relied upon to support a request for extradition in a TIP case;
- the pre-conditions and safeguards that typically apply in extradition cases with specific reference to trafficking;
- the procedures that are typically followed in extradition cases; and
- how to make and respond to extradition requests.

As with the previous two chapters, this chapter is intended to provide detailed, background material for use in the *ASEAN Training Program on International Legal Cooperation in Trafficking in Persons cases.*

Key International and Regional Principles

Trafficking and related crimes are to be made extraditable offences.

States are obliged to ensure that the applicable legal framework enables extradition for trafficking-related offences (*ASEAN Trafficking Convention*, Article 19; UNTOC, Article 15; Trafficking Protocol, Article 5)).

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 (*ASEAN Trafficking Convention*, Article 19; UNTOC, Article 15).

States should extradite or, where appropriate, prosecute (*aut dedere aut judicare*)

States that do not extradite their nationals for trafficking-related offences or that refuse extradition on other grounds should prosecute alleged offenders (*ASEAN Trafficking Convention*, Articles 10, 19(4); *UNTOC*, arts. 15(3), 16(10)).

Human rights must be respected in the extradition process.

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 (*UNTOC*, Art. 16(13)).

Trafficking-related extradition requests should be expedited.

States should accord high priority to, and expedite, extradition requests that relate to trafficking (*UNTOC*, Art. 16(8)).

Key Questions for Practitioners

When considering whether to seek extradition in a trafficking case, practitioners should consider the following:

- Has the fugitive/defendant been located in another country?
- Does that country have the legal ability to extradite fugitives to your country?
- What is the likelihood that the Requested country will be willing and able to cooperate in the extradition of the suspect/offender?
- Is significant delay likely to occur in seeking extradition? If yes, what impact would this have on the prosecution's case with respect to witnesses and victims?

5.1 Introduction: Extradition in TIP cases

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. Due to the nature of the crime, suspects wanted for prosecution in one State will often be in another State. This may be because they are nationals of that State, or because they have deliberately taken steps to avoid prosecution or sentencing by fleeing to another State. Extradition will, therefore, sometimes be essential to the successful prosecution of trafficking cases.[157]

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.[158] It is normally based on a treaty obligation to surrender a fugitive, assuming that the Requesting state fulfils the treaty requirements with regard to presentation of certain specified documents, which can include a copy of the warrant of arrest, charging document, etc. The rules around extradition also seek to impose safeguards 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.[159] 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.

There is widespread agreement about the *value* of extradition in trafficking in persons cases. This is reflected in the provisions on extradition contained in the major international and regional anti-trafficking legal instruments, including the *ASEAN Trafficking Convention* (see further **5.2,** below). International policy documents, such as the UN *Recommended Principles and Guidelines on Human Rights and Human Trafficking* have also affirmed the importance of extradition as part of a comprehensive and effective criminal justice response to trafficking, providing that:

[157] OHCHR, *Commentary to the Trafficking Principles and Guidelines*, Principle 14 and related Guidelines, 222.
[158] See generally, Nicholls et. al, *The Law of Extradition and Mutual Assistance*.
[159] *Knowles v Government of the United States of America* [2006] UKPC 38, para. 12 cited in Nicholls, Clive QC and Montgomery, Claire QC and Knowles, Julian, *The Law of Extradition and Mutual Assistance* (Oxford University press, Second Edition 2007) 3.

> States shall ensure that trafficking, its component acts and related offences constitute extraditable offences under national law and extradition treaties. States shall cooperate to ensure that the appropriate extradition procedures are followed in accordance with international law.

Similar affirmations of the importance of extradition in trafficking cases have been made at the regional level.[160] The annual US *Trafficking in Persons Report* includes, within its assessment criteria:[161]

> Whether the government of the country extradites persons charged with acts of severe forms of trafficking in persons on substantially the same terms and to substantially the same extent as persons charged with other serious crimes (or, to the extent such extradition would be inconsistent with the laws of such country or with international agreements to which the country is a party, whether the government is taking all appropriate measures to modify or replace such laws and treaties so as to permit such extradition).

It is, however, important to acknowledge that the nature of the crime of trafficking in persons is such that different, or additional, considerations arise in extradition. Those considerations are highlighted in the text box below.

Text Box 46: Practice Note: Special Considerations Related to Victims of Trafficking in Extradition Proceedings

Extradition proceedings will generally elevate the public profile of a trafficking in persons case. This may impact on the safety and security of persons involved, including victims/victim-witnesses. Formal witness protection measures may need to be contemplated for victim-witnesses and others (such as family members) whose safety could be compromised. Irrespective of whether formal protection measures are in place, victims in cases involving extradition requests should be kept informed of all relevant proceedings.

While extradition has been relatively rare in trafficking cases, the use of this tool of international cooperation is slowly increasing. The following text box summarises a selection of recently reported cases.

Text Box 47: Practice Note: Extradition Cases reported in 2016 – 2017

In 2017 and 2018, the US State Department's *Trafficking in Persons Report* reported a number of instances in which extradition had been requested or granted in trafficking cases the previous year. These included the following:

- Eight Albanians were arrested in the **Netherlands, Germany, Greece, and Italy** for suspected involvement in trafficking; three of these suspects were extradited to **Albania**. **Albania** extradited eight suspected foreign traffickers to **Italy, Macedonia, and Moldova**
- **Azerbaijan** extradited to **Georgia** an Azerbaijani citizen wanted to stand trial in a trafficking in persons case
- **Belgium** granted three **Cambodian** extradition requests, one of which led to the conviction of a Belgian citizen for offenses related to child sex tourism in Cambodia.
- **Cabo Verde** began working with a foreign government to facilitate the extradition of a suspected trafficker, subject of an ongoing investigation in Cabo Verde.
- **Romania** extradited four traffickers to stand trial for trafficking in **Cyprus**.

[160] See, for example, *ASEAN Practitioner Guidelines*, at Part 1.A.4 ("[i]n order to ensure that there are no safe havens for traffickers, States are encouraged to either extradite or prosecute alleged offenders"); OSCE Action Plan, at Recommendation III (1.6) ("trafficking, its constitutive acts and related offences constitute extraditable offences under national law and extradition treaties").
[161] United States, Department of State, *Trafficking in Persons Report* (2018), p. 53.

- **Denmark** commenced extradition proceedings against three individuals whose extradition had been request on human trafficking charges in **Romania**.
- **Greece** extradited three suspected traffickers to **Switzerland** and prepared extradition requests for additional suspects to **Mexico** and **Albania**
- **Hungary** extradited 52 foreign nationals accused of trafficking to several European countries.
- In **Ireland**, the High Court ordered the extradition of one suspected trafficker.
- **Egypt** requested extradition of one individual from the **Libyan** Government and cooperated with the **Sudanese** government to extradite several individuals.
- **Montenegro** extradited to Serbia two **Serbians** suspected of trafficking.
- **Slovakia** extradited three individuals to face trafficking charges to the **Czech Republic**, **Germany**, and **United Kingdom**.
- **United States – Mexico:** Law enforcement authorities from the United States and Mexico conduct coordinated, bilateral law enforcement actions under the U.S.-Mexico Bilateral Human Trafficking Enforcement Initiative to dismantle human trafficking networks operating across their shared border. In 2015, the two governments simultaneously apprehended eight defendants in both countries and charged them with operating a sex trafficking enterprise. In 2016, the governments collaborated to secure the extradition to the U.S. of the five defendants apprehended in Mexico.

Source: United States, Department of State, *Trafficking in Persons Report* (2017 and 2018)

Within the ASEAN region, extradition is still a rarely used tool of international legal cooperation in relation to all forms of criminal behaviour – and trafficking in persons is no exception. There are, however, several instances of extradition being sought and granted in cases involving trafficking in persons, as illustrated in the following text box.

Text Box 48: Practice Note: Extradition Cases in the ASEAN Region

In 2016, **Malaysia** requested that **Bangladesh** extradite one suspect for trafficking crimes that took place in the context of the 2015 discovery of mass graves of presumed victims of trafficking in border areas in Malaysia and Bangladesh.

The infrequency with which extradition takes place in trafficking cases is not difficult to understand. The complexity of trafficking investigations, the difficulty of securing intelligence from other jurisdictions through informal cooperation, and similar difficulties in obtaining evidence from other countries through mutual legal assistance have all been cited by AMS as relevant factors.[162] Lack of resources and the absence of a habit of cooperation can also hamper the development of an organizational culture that supports both the issuing and the effective handling of extradition requests.

[162] Report of the ASEAN Workshop on International Legal Cooperation in Trafficking in Persons Cases, Bangkok, Thailand, May 2017.

5.2 Legal bases for extradition in TIP cases

Historically, the practice of extradition was based on pacts, courtesy or goodwill between Heads of States.[163] The 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 and some states are *precluded* from engaging in extradition in the absence of a treaty.[164]

Today, the legal basis for extradition will usually be a bilateral or multilateral treaty or, in the absence of such 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 and are either open to all States or to Members of a particular group 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 States that are recognized under international law. Further, 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.[165]

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 may also be 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.[166] As a practical matter, a bilateral treaty may not always be available with the particular States from which a Requesting State is seeking extradition of a suspect or fugitive.

[163] 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*].
[164] McClean, *Transnational Organized Crime*: *A Commentary*, p. 179.
[165] ADB / OECD, *MLA, Extradition and Recovery of Proceeds of Corruption in Asia and the Pacific,* p. 28.
[166] ADB / OECD, *MLA, Extradition and Recovery of Proceeds of Corruption in Asia and the Pacific,* p. 28.

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*.[167] 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.[168]

Text Box 49: ASEAN Cooperation on Extradition: Recent Developments

The ASLOM has been developing a model treaty on extradition for use by AMS, which is expected to be adopted in late 2018. The Chairman's Statement of the 32nd ASEAN Summit, held in April 2018, noted that: "work could commence on an ASEAN Extradition Treaty as a next step, to strengthen ASEAN's resilience and capacity to combat transnational crime, and to enhance cooperation within ASEAN to ensure respect for the rule of law" (para. 9).

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.[169] 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, such as: 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 and the UN Trafficking Protocol. 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'.

The most important development in closing gaps around extradition – at least between AMS themselves – is the adoption and entry into force of the *ASEAN Trafficking Convention*. As explained further below, Article 19 of this instrument does three important things to expand the obligation of extradition in trafficking cases:

- It requires that trafficking offences be deemed to be included as an extraditable offence in any extradition treaty existing between Parties;
- Parties to the Treaty undertake to include trafficking offences as extraditable offences in every future extradition treaty concluded between them; and
- It allows the Convention to be used as the legal basis for extradition in situations where a Party receives a request from another party with whom it does not have an extradition treaty.

Table 7: AMS: Matrix of Bilateral Extradition Arrangements

[167] *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*].
[168] UNODC, *Revised Manuals on the Model Treaty on Extradition and the Model Treaty on Mutual Assistance*.
[169] *Extradition Treaty between the Republic of the Philippines and the Republic of Indonesia*, Philippines-Indonesia, Feb. 10, 1976.

ASEAN MEMBER STATE	Brunei Darussalam	Cambodia	Indonesia	Lao PDR	Malaysia	Myanmar	Philippines	Singapore	Thailand	Viet Nam
Brunei Darussalam	-	×	×	×	×	×	×	×	×	×
Cambodia	×	-	×	✓	×	×	×	×	✓	✓
Indonesia	×	×	-	×	✓	×	✓	×	✓	✓
Lao PDR	×	✓	×	-	×	×	×	×	✓	×
Malaysia	×	×	✓	×	-	×	×	×	✓	×
Myanmar	×	×	×	×	×	-	×	×	×	×
Philippines	×	×	✓	×	×	×	-	×	✓	×
Singapore	✓	×	×	×	✓	×	×	-	×	×
Thailand	×	✓	✓	✓	✓	×	✓	×	-	×
Viet Nam	×	✓	✓	×	×	×	×	×	×	-

UN Organized Crime Convention (UNTOC)

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 of extradition under UNTOC. Note that the UNCAC contains a similar set of provisions and this instrument could provide a solid basis for extradition in cases involving trafficking-related corruption.

Scope of application

The extradition obligations under UNTOC apply to offences established in accordance with that Convention. That includes:

- participation in an organized criminal group;
- laundering proceeds of crime;
- corruption;
- obstruction of justice;
- any other 'serious crime' (Article 2(b)) (a catch-all provision that covers conduct constituting an offence punishable by a maximum deprivation of liberty of four years or more serious penalty in both requesting and Requested States); and
- offences established by the Protocols, including trafficking in persons, attempts, participating as an accomplice, and ordering or directing TIP offences (Article 1(3)).

The extradition obligations in UNTOC will be activated where any of the above offences involve an organized criminal group and where the person who is the subject of the request for extradition is located in the territory of the Requested State Party (Article 16(1)).

Nature of the obligation

UNTOC provides the legal basis for extradition in three ways. Firstly, all offences to which the Convention applies are *deemed* to be extraditable offences in any extradition treaty already existing between States Parties (Article 16(3)). States Parties are also obliged to include such offences as extraditable offences in every future extradition treaty (Article 16(3)). 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 subsection. Secondly, if a State Party requires a treaty as a precondition to extradition, it may consider UNTOC as the requisite treaty (Article 16(4)). Thirdly, if a State Party does *not* require a treaty as a precondition to extradition, it shall consider the offences in UNTOC as extraditable offences (Article 16(6)).

Regional treaties and extradition arrangements

Extradition is addressed in the specialist regional trafficking treaties as well as in regional extradition agreements. For example, in Europe, the *European Trafficking Convention* requires trafficking and other offenses established under that instrument to be punishable by "effective, proportionate and dissuasive sanctions," including custodial penalties that can give rise to extradition (Article 23(1)). Trafficking in persons falls within the categories of extraditable offenses covered by the *European Convention on Extradition*.[170]

The *European Arrest Warrant* (EAW) has now replaced extradition between all European Union Member States. Such a warrant, which is valid throughout the 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 South East Asia, there is no regional extradition treaty. However, the *ASEAN Trafficking Convention* contains detailed provisions on extradition, as set out in table 8..

Table 8: The ASEAN Convention against Trafficking in Persons: Key Provisions/Obligations relating to Extradition

Principle of extradite or prosecute	
[In relation to obstruction of justice] Each 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. [In relation to TIP offences] Each 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.	Article 10

[170] *Note the Council of Europe Convention Relating to the Simplified Extradition Procedure between Member States of the European Union*, adopted March 10, 1995, to supplement the European Convention on Extradition, OJ C 78/1, Mar. 30, 1995. Note also the introduction of a European Arrest Warrant through the Council Framework Decision of 13 June 2002 on a *European Arrest Warrant and the Surrender Procedures between Member States* (2002/284/JHA), OJ L 190, July 18, 2002, at Art. 2(2). Human trafficking is one of the crimes for which surrender procedures are possible pursuant to the European arrest warrant.

Principle of extradite or prosecute	
A Party in whose territory an alleged offender is found, if it does not extradite such person in respect of an offence established in accordance with Article 5 of this Convention solely on the ground that he or she is one of its nationals, shall, at the request of the Party seeking extradition, be obliged to submit the case without undue delay to its competent authorities for the purpose of prosecution.	Article 19 (4)
ACTIP offences deemed to be included in all future and existing extradition treaties	
Offences established [under the] Convention shall be deemed to be included as an extraditable offence in any extradition treaty existing between Parties. The Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.	Article 19(1)
ACTIP may be used as the legal basis for extradition between parties	
If a Party that makes extradition conditional on the existence of a treaty receives a request for extradition from another Party with which it has no extradition treaty, it may consider this Convention the legal basis for extradition in respect of any [ACTIP] offence.	Article 19(2)
Obligations of cooperation in extradition	
[Subject to domestic laws and relevant agreements], the requested Party may, upon being satisfied that the circumstances so warrant and are urgent and at the request of the requesting 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.	Article 19(3)
[In relation to a prosecution following refusal of extradition on the basis of nationality] The Parties concerned shall cooperate with each other, in particular on procedural and evidentiary aspects, to ensure the efficiency of such prosecution	Article 19(4)
Obligations to designate a Central Authority	
For the purpose [the extradition provisions of the Convention] each Party shall designate a Central Authority to be notified to the depositary of this Convention	Article 19(5)

5.2.2 Domestic law

International law leaves every State free to make provision for extradition in its domestic law, even where there is no treaty with the Requesting State.[171] Extradition based on domestic law is increasingly common. Some States exclusively rely upon domestic law as a basis for extradition, with the consequence that extradition can proceed in the absence of a treaty relationship between the Requesting and Requested State. 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. A further group of States do not have general authority to extradite in the absence of an extradition treaty.

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 Requesting State 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.

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.

[171] McClean, *Transnational Organized Crime*: *A Commentary*, p. 179.

5.3 Extradition principles and preconditions

Having established the legal basis for a request for extradition, it is important to consider if there are any principles that must be addressed, or preconditions that must be met, for the application to succeed. Such principles or preconditions will generally be specified in either the relevant treaty or domestic legislation. The following discussion deals with some of the most common principles and preconditions.

5.3.1 Extraditable offences

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 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 for which the subject person can be extradited, according to the law of the Requested State.[172]

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 to decide which offences are extraditable. It has been noted that many modern international treaties define extraditable offences in terms of severity of punishment.[173] 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.[174]

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 (Article 16(2)). 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.[175]

Trafficking is an extraditable offence under the national laws of all AMS.

[172] Caruso, *Legal Challenges in Extradition and Suggested Solutions*, p. 58.
[173] 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*.
[174] Joutsen, *International Cooperation against Transnational Organised Crime*, p. 366.
[175] McClean, *Transnational Organized Crime*: *A Commentary*, p. 178.

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 in respect of requests made in bad faith. Accordingly, after concluding that there is a legal basis for extradition, it will be necessary for both the Requesting and Requested State to consider what evidence is required to support the request.

The evidentiary requirements 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.[176]

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 as to admissibility.[177] 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 law of the Requesting State concerning extradition.

Reflecting these practical difficulties, UNTOC requires States Parties to simplify evidentiary requirements in relation to offences that are covered by the extradition obligations (Article 16(8)). 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

[176] Prost, *Breaking Down the Barriers*: *International Cooperation in Combating Transnational Organised Crime* (1998), Information Network for Mutual Assistance in Criminal Matters and Extradition, Organization of American States, 9.
[177] ADB / OECD, *MLA, Extradition and Recovery of Proceeds of Corruption in Asia and the Pacific*, p. 46.

of a valid warrant, and materials concerning the identity of the person sought) together with some information about the conduct constituting the offence.[178]

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.[179] As there are likely to be many differences between national laws and practice, it is important for practitioners to try to understand the particular requirements of the Requested State.

5.3.3 Dual criminality

Extradition laws and regimes require that the conduct constituting the extraditable offence is 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 by 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 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.[180]

Modern extradition treaties and practice have confirmed this trend by adopting the 'conduct-based test' for dual criminality. The UN *Model Treaty on Extradition* proposes 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.[181]

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 punishable by imprisonment with a minimum period of at least [x] years or more severe penalty under the law of the Requested State.

[178] 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.
[179] ADB / OECD, *MLA, Extradition and Recovery of Proceeds of Corruption in Asia and the Pacific*, pp. 47, 97.
[180] 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).
[181] See *UN Model Treaty on Extradition* as referred to in Prost, *Breaking Down the Barriers*, p. 9.

Text Box 50: Practice Note: Dual Criminality in TIP-related Extradition Proceedings

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 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; and
- purely jurisdictional elements of statutes need not be replicated under both systems for the conduct to be an extraditable offence.[182]

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 which has subsequently been criminalized. This could be particularly relevant in TIP 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 refuse to cooperate with an extradition request if the person sought to be extradited has already been tried and acquitted or has already been punished in respect of the conduct underlying the request. This is known as the principle of double jeopardy (*ne bis in idem*). 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.

Debates on the application of the principle of double jeopardy 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 substantial new evidence has come to light. As noted in **3.4.3**, these difficulties can often be avoided through careful drafting of relevant legal instruments. The UN *Model Treaty on Extradition* 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.

[182] Caruso, *Legal Challenges in Extradition and Suggested Solutions*, p. 58.

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. In some rarer instances, some States may refuse extradition on the basis that they considered whether to prosecute the person in question and decided not to.[183]

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: [184]

> 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*.

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.[185]

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 one offence and then prosecute him or her for another. Nonetheless, there may be some flexibility in the application of the rule of speciality.

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.[186] The rule also 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.[187] The rule of speciality 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 Government of the Requesting State or the Central Authority when enough documents have been provided to consider the request.[188]

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[183] ADB / OECD, *MLA, Extradition and Recovery of Proceeds of Corruption in Asia and the Pacific*, p. 53.
[184] UNODC*, Revised Manuals on the Model Treaty on Extradition and the Model Treaty on Mutual Assistance,* p. 19.
[185] Caruso, *Legal Challenges in Extradition and Suggested Solutions*, p. 59.
[186] Joutsen, *International Cooperation against Transnational Organised Crime*, p. 368.
[187] Jousted, *International Cooperation against Transnational Organised Crime*, p. 369.
[188] ADB / OECD, *MLA, Extradition and Recovery of Proceeds of Corruption in Asia and the Pacific*, p. 48 and Thailand's *Extradition Act B.E. 2551 (2008), Sec. 11'*.

5.3.6 Non-extradition of nationals

Many States will not extradite their nationals. Refusal on this ground 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.

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.[189]

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 in ensuring offenders can be brought to justice.[190] 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).[191]

Under some laws and treaties, if a State refuses to extradite an individual because of nationality, 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 also enshrined in 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 invoked, 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, closer 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.[192] 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;[193] or
- if a Requested State refuses extradition of a national to serve a sentence, it may be obliged to consider requests by a Requesting State to enforce that sentence.[194]

If these options are used, the obligation to extradite or prosecute will be considered as being satisfied.[195] If the nationality issue proves to be an obstacle, the prosecuting authorities in the Requesting State will have to decide whether to press for prosecution in the foreign State or await an opportunity for the person to travel to a State from where extradition may be possible.[196]

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[189] Isidoro Zanotti, *Extradition in Multilateral Treaties and Conventions* (Martinus Nijhoff, 2006), p. ix.
[190] UNODC, *Revised Manuals on the Model Treaty on Extradition and the Model Treaty on Mutual Assistance*, p. 24.
[191] 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.
[192] Caruso, *Legal Challenges in Extradition and Suggested Solutions*, p. 61.
[193] See, for example, *UNTOC*, art. 16(11); *UNCAC*, art. 44(12).
[194] See, for example, *UNTOC*, art. 16(12); *UNCAC*, art. 44(13).
[195] Caruso, *Legal Challenges in Extradition and Suggested Solutions*, p. 62.
[196] Prost, *Breaking Down the Barriers*, p. 12.

5.3.7 Political/military offence exceptions

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: [197]

- recognition of the legitimacy of political dissent;
- acknowledgement of the need to ensure protection for the rights of the accused; and
- protection of the Requesting and the Requested States.

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: [198]

> 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.

However, the Manual goes on to note that: [199]

> 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.

The political offence exception is not absolute and can be expected to further narrow as States develop more rigorous responses to crimes, such as terrorism, that often have a strong political dimension. For example, at the international level, the political offence exception has been removed in relation to prosecutions for corruption.[200]

International law also recognises that extradition is not available for military crimes that are not otherwise subject to criminal sanction.[201] This ground of refusal is found in various laws and treaties. 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 and an extraditable offence under the non-military, civilian laws, extradition should not be refused.[202] Under such an approach, military personnel could be extradited in respect of trafficking in persons offences and related crimes if those offences are extraditable.

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[197] Caruso, *Legal Challenges in Extradition and Suggested Solutions*, p. 60.
[198] UNODC, *Revised Manuals on the Model Treaty on Extradition and the Model Treaty on Mutual Assistance*, p. 22.
[199] UNODC, *Revised Manuals on the Model Treaty on Extradition and the Model Treaty on Mutual Assistance*, p. 16.
[200] 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).
[201] UNODC, *Revised Manuals on the Model Treaty on Extradition and the Model Treaty on Mutual Assistance*, p. 18.
[202] 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.

5.3.8 Human rights considerations

International law and international criminal justice standards require the human rights of suspects and offenders be respected and protected. This requirement extends to the extradition process which, by its nature, creates risks to human rights. The UNTOC explicitly provides in Article 16(13) that:

> Any person regarding whom proceedings are being carried out in connection with any 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.

Right to a fair trial

The right to a fair trial is clearly set out in international law and international human rights law. UNTOC confirms that this right applies at all times (Article 16(14)). The following principles and rights, enshrined in international law, must be upheld throughout the extradition process:

- all persons are considered equal before courts and tribunals;
- everyone is entitled to receive 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.

More specifically, in the determination of any criminal charges, all accused persons have and enjoy the right to be:[203]

- informed promptly, and in detail, of the nature and cause of the charge against him/her;
- given adequate time and facilities for the preparation of their defence and to communicate in private with counsel of their choosing;
- tried without undue delay;
- present when the matter is being determined;
- provided legal assistance where required by interests of justice;
- 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;
- provided the services of an interpreter, if required; and
- not compelled to testify against him or herself or to confess guilt.

A request for extradition could be refused on the basis that the individual concerned may not receive the minimum guarantees set out above. This is certainly the case in Europe, where the European Court of Human Rights has held that an extraditing party will be in violation of fair trial rights protected in the *European Convention on Human Rights* if 'the fugitive suffered or risks suffering *a flagrant denial of a fair trial* in the requesting country'.[204]

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.[205] The doctrine of non-enquiry, considered in detail in **Chapter 2**, is directly relevant to this issue.

[203] See further, *ICCPR*, art. 14(3). See also, Nowak, *U.N. Covenant on Civil and Political Rights*, pp. 302-357.
[204] European Court of Human Rights, *Soering v The United Kingdom*, appl. no. 14038/88, para. 113
[205] UNGA, *Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, p. 6, para. 8.

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: [206]

- 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?

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.[207]

Persecution and *non-refoulment*

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. It should be noted here that, while the UN Trafficking Protocol refers 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. In some States, victim return has been prevented by the Courts because of the risk of re-trafficking.

Death penalty cases

In some countries, trafficking in persons is a capital offence. 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 arise in situations where both the Requesting and Requested State have and use the death penalty.[208]

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:[209.]

- seek an appropriate assurance from the Requesting State that it will not impose or carry out the death penalty;

[206] UNODC, *Revised Manuals on the Model Treaty on Extradition and the Model Treaty on Mutual Assistance*, p. 17.
[207] UNODC, *Revised Manuals on the Model Treaty on Extradition and the Model Treaty on Mutual Assistance,* p. 19.
[208] Caruso, *Legal Challenges in Extradition and Suggested Solutions*, p. 62.
[209] See further, UNODC, *Revised Manuals on the Model Treaty on Extradition and the Model Treaty on Mutual Assistance*, pp. 24-27.

- in cases where domestic jurisdiction exists, prosecute the case in its own jurisdiction in lieu of extradition; or
- if satisfied that the suspect will be given a fair trial in accordance with internationally recognized standards, allow the extradition on the condition that the suspect, if convicted, will be returned to the Requested State for enforcement of an appropriate sentence.

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.[210] States accepting death penalty assurances will have different requirements or processes regarding what type of assurances are sufficient or available. For some countries, an assurance in the form of a sworn statement by the highest judicial authority in the Requesting State is required. In others, legal authority to make the necessary assurances is vested in the executive branch of government.

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.[211]

Torture and inhumane treatment or punishment

International law clearly provides 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* (Article 5) and affirmed in the ICCPR (Article 7) and the Convention against Torture (Articles 3 and 16).

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.[212] 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" (Article 3(2)).

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 (Article 16(1)). Many States, the Committee against Torture and the UN Human Rights Committee, have interpreted this to include an obligation not to extradite a person from their territory in these

[210] UNODC, *Revised Manuals on the Model Treaty on Extradition and the Model Treaty on Mutual Assistance*, p. 26.
[211] UNODC, *Revised Manuals on the Model Treaty on Extradition and the Model Treaty on Mutual Assistance*, p. 27.
[212] 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.

circumstances.[213] 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'"[214]) or where the penalty includes corporal punishment.

International legal obligations, including those related to human rights, should not be put aside to serve short-term criminal justice objectives. 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. Where such issues arise, Requested States should take the opportunity 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;
- if pre-return assurances are provided, consider and plan for post-return monitoring;
- in cases where domestic jurisdiction exists, prosecute the case in its own jurisdiction in lieu of extradition; or
- 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, allow the extradition on the condition that the suspect, if convicted, will be returned to the Requested State for enforcement of an appropriate sentence. [215]

Text Box 51: Practice Note: Assurances in Relation to Torture

Some States may extradite individuals if they receive assurances from the Requesting State that it will not use torture against those individuals. However, in a report of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment to the General Assembly (A/60/316), it was concluded that States could not resort to diplomatic assurances as a safeguard against torture and ill-treatment where there were substantial grounds for believing that a person would be in danger of being subjected to torture or ill-treatment upon return. It was the view of the Special Rapporteur that diplomatic assurances were ***unreliable and ineffective in the protection against torture and ill-treatment as they were usually sought from States where the practice of torture was systematic***. Moreover, post-return monitoring mechanisms had proved to be no guarantee against torture. Diplomatic assurances were not legally binding, therefore they carried no legal effect and no accountability if breached; and the person whom the assurances were aimed at protecting had no recourse if the assurances were violated

Source: Conference of Parties to the United Nations Convention on Transnational Organized Crime, Working Group on International Cooperation, *Discussion of Challenges faced in the course of Extradition Proceedings*, UN Doc. CTOC/COP/WG.3/2018/2 (2018)

[213] 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.

[214] 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.

[215] UNODC, *Revised Manuals on the Model Treaty on Extradition and the Model Treaty on Mutual Assistance*, pp. 26-27.

5.3.9 National and public interest

Some countries may refuse to cooperate in extradition on the basis that such cooperation would prejudice their 'essential interests'.[216] While 'essential interests' are 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.[217] 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.

5.3.10 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.[218] 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.[219] This approach is reflected in the UN *Model Treaty on Extradition* (Article 2(3)). Both UNTOC (Article 16(15)) and UNCAC (Article 44(16)) provide that extradition may not be refused on the ground that an offence is fiscal or involves fiscal matters.

[216] ADB / OECD, *MLA, Extradition and Recovery of Proceeds of Corruption in Asia and the Pacific*, pp. 49-51.
[217] ADB / OECD, *MLA, Extradition and Recovery of Proceeds of Corruption in Asia and the Pacific*, p. 50.
[218] UNODC, *Revised Manuals on the Model Treaty on Extradition and the Model Treaty on Mutual Assistance*, p. 11.
[219] UNODC, *Revised Manuals on the Model Treaty on Extradition and the Model Treaty on Mutual Assistance*, p. 11.

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. This possibility is particularly acute in trafficking in persons offences, where criminal conduct connected to the same offence can easily involve multiple jurisdictions.

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: [220]

- 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; and
- the chronological order in which the requests were received.

Some States may also refuse extradition if the conduct constitutes an offence committed wholly or partly in their territory. Once again, this can be a common scenario in cross-border trafficking cases. Under some existing arrangements, the Requested State must undertake to prosecute the person if it refuses to extradite on this basis.[221]

Text Box 52: Practice Note: Multiple Jurisdictions and Competing Requests

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; and
- Lack of interest by prosecutors if crime committed elsewhere.

[220] UNODC, *Revised Manuals on the Model Treaty on Extradition and the Model Treaty on Mutual Assistance*, p. 61.
[221] ADB/OECD, *MLA, Extradition and Recovery of Proceeds of Corruption in Asia and the Pacific*, pp. 55-56.

5.5 Alternatives to extradition

The complications of extradition can encourage States to seek other means by which to secure the general goals of an extradition process – which is to ensure that a person accused or convicted of a crime cannot use jurisdictional barriers to evade justice. Alternatives to extradition can be formal, such as the example provided in the following text box.

Text Box 53: Practice Note: Alternatives to Extradition/Formal Cooperation Recognizing a Foreign Judgment

An individual convicted of trafficking in persons in the Netherlands escaped custody and returned to Turkey, his country of origin. The Netherlands was not able to request extradition due to the fact that Turkey does not extradite its nationals, the Dutch authorities requested Turkey to take over responsibility for execution of the judgement delivered by the judicial authorities of the Netherlands. Turkey complied with this request. This resulted in a short procedure in Istanbul at the Court of First Instance and in 2016 this case was brought before the Court of Appeal in Ankara. This Court of Appeal confirmed the judgement given by the Court of First Instance. The convicted trafficker is now serving his original sentence in a Turkish prison.

Source: UNODC - Netherlands (2018)

International practice has also 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, 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, particularly 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.[222] In this regard, States should very carefully consider their obligations under international human rights law regarding the right of all persons to liberty and security, the prohibition on torture and the obligation of *non-refoulement*.[223] The possibility that inappropriate or unlawful use, or overuse, of informal means could undermine the effectiveness of extradition regimes, and 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 involving harsh interrogation techniques (torture), prohibited under the sending State's laws, being 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.[224]

[222] See further, UNGA, *Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*.

[223] 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."

[224] 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

5.6 Preparing extradition requests

The preparation of extradition requests can be difficult and time-consuming. However, careful preparation will ensure that delays and obstacles are minimized. This 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.

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".[225] INTERPOL can issue a 'Red Notice', effectively allowing information about the wanted person to be circulated worldwide, with a request to its national officers 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.[226] To avoid the risk 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 the individual concerned and notify the Requesting State or to locate and arrest and then notify the Requesting State.[227]

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 and Article 19(3) of ACTIP provide 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.

As UNODC has noted, this provision is useful for States parties that may need a treaty basis to be able to order the provisional arrest of a person with a view to eventual extradition, even prior to the presentation of a formal extradition request. The provision covers situations in which it is urgent to arrest the person sought, but there is not enough time to compile all the documents required for a formal extradition request. One such example is when the Requesting State has reason to believe that the person is about to flee the Requested State. The application may be made by any means prescribed in the domestic laws or relevant treaties, including means capable of producing a written record.

Justice, *Torture by Proxy: International Law Applicable to Extraordinary Renditions* (New York University School of Law, 2005).

[225] INTERPOL Constitution, Article 2, cited in, UNODC, *Report: Informal Expert Working Group on Effective Extradition Casework Practice*, p. 16.

[226] See further, http://www.interpol.int/Public/Wanted/Default.asp.

[227] UNODC, *Report: Informal Expert Working Group on Effective Extradition Casework Practice*, p. 16.

Text Box 54: Practice Note: Consultation for Provisional Arrest

Provisional arrest requests are, by their very nature, urgent, and avoiding delays at that stage can be crucial to the success of an extradition case. It is therefore important to process provisional arrest requests in the most speedy and efficient manner possible; States should establish procedures for communicating and carrying out such requests expeditiously. States with a Central Authority for extradition should devise a system to ensure that it is immediately aware of any such request transmitted. Establishing efficient communications is essential, both nationally and internationally, to reduce the delay in the transmission to the Requested State of sufficient evidence to secure arrest.

Once the provisional arrest has been made, the clock starts ticking and the Requesting State needs to provide all the information needed for a formal extradition request, usually within 40 to 60 days, although periods up to 90 days are not uncommon. Failure to submit the extradition request within the prescribed period of time entails the release of the provisionally arrested person.

Against this background, early and continuous contacts and consultations between the Central Authorities of the requested and Requesting States are important, in order to ensure the best possible coordination to deal with tight deadlines and procedural restraints. With a bit of planning and foresight, a number of issues can be dealt with beforehand, including possible alternative measures (e.g., bail, surrendering of passports or regular reporting), the preparation of supporting documentation, filing deadlines and a description of the entire process in the Requested State and what is expected of the Requesting State.

Source: Conference of Parties to the United Nations Convention on Transnational Organized Crime, Working Group on International Cooperation, *Discussion of Challenges faced in the course of Extradition Proceedings*, UN Doc. CTOC/COP/WG.3/2018/2 (2018)

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.[228] A provisional arrest request is an urgent measure that enables a person 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 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.[229]

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, it may be necessary 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, it is usually preferable to prepare all of the documentation and make a full extradition request at the outset.[230]

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. A further group of States will act on an INTERPOL 'Red Notice' if the conditions under their national extradition law are met, and on the understanding that a formal extradition request will follow.

[228] Bernard Rabatel, *FAQs on the extradition process*, *in* Denying Safe Haven to the Corrupt and 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*].
[229] UNODC, *Report: Informal Expert Working Group on Effective Extradition Casework Practice*, p. 16.
[230] UNODC, *Report: Informal Expert Working Group on Effective Extradition Casework Practice*, pp. 16-17.

Table 9: AMS: INTERPOL Red Notice a Legal Basis for Provisional Arrest

ASEAN Member State	INTERPOL Red Notice as a legal basis for provisional arrest
Brunei Darussalam	✓
Cambodia	x
Indonesia	✓
Lao PDR	x
Malaysia	✓ (Malaysia requires that the provisional warrant of arrest be sent as provided under the Extradition Act 1992 [Act 479])
Myanmar	x
Philippines	✓
Singapore	✓
Thailand	x
Viet Nam	✓

It should be noted that those AMS which *do not* accept INTERPOL Red Notices as a legal basis for provisional arrest may be under a similar obligation under Article 19(3) of the ACTIP.

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 provisional arrest of the person in question. These issues are considered further 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 met. In that regard, it is important to understand that the *procedure* for extradition may be very different in the Requested State, particularly if it is operating under another legal system.

It is important to ensure that sufficient information has been gathered to enable the completion of an appropriately detailed and complete extradition request. This requires consideration of the relevant standard of proof.

Text Box 55: Practice Note: Differences between Legal Systems: Procedural Considerations

The UNODC *Handbook on Mutual Legal Assistance and Extradition* (2012) notes the particular evidentiary challenges that arise in the context of extradition proceedings between States operating under different legal systems:

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

Prior to making the request, it is also advisable for the Requesting States to identify the dates by which 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 ongoing personal contact between the Central Authority, prosecutors and investigators in the Requesting and the Requested State.[231] Misunderstandings can often be avoided by officials from each State liaising at the earliest opportunity, preferably even before a formal extradition request is made.[232] 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 is available on the UNODC Competent National Authorities Directory (CNA Directory).[233]

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; and
- diplomatic officials who can advise on political matters.

[231] Secretariat of the ADB / OECD, *Overcoming practical* challenges, p. 74.
[232] UNODC, *Report: Informal Expert Working Group on Effective Extradition Casework Practice*, p. 17.
[233] UNODC, 'The Competent National Authorities (CNAs) on-line Directory', available from < http://www.unodc.org/compauth/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.

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 preconditions to extradition have been met.

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. It should be noted 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.[234]

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 the 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 offence(s) and information about the 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: [235]

- 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; and
- a copy of the charging document or record of conviction if seeking enforcement of a sentence.

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 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 examining the warrants and related documentation. Other States require evidence to meet certain standards of proof, either to a *prima facie* or probable cause test. It is important to ascertain what is required at an early stage, so that an appropriate level of information is included in the extradition request.

As a practical matter, it can be difficult to know exactly what level of detail 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 materials filed in court – as security allows.[236]

[234] UNODC, *Report: Informal Expert Working Group on Effective Extradition Casework Practice*, p. 4.
[235] Caruso, *Working Together and Intensifying Actions to Strengthen the Extradition Process*, pp. 89-90.
[236] Caruso, *Working Together and Intensifying Actions to Strengthen the Extradition Process*, p. 90.

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.

Establish legal basis for request

Extradition requests should clearly state the legal basis upon which the Requesting State is seeking to rely. If the Requested State is under a legal obligation to either extradite or prosecute, 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 that any specific provisions relied upon are identified.

Provide information on status of proceedings

Any extradition request should include information about the status of any proceedings for which the person is sought. 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).[237] Furthermore, some States may require information to confirm that a convicted person sought for sentencing is 'unlawfully at large' before they will cooperate.[238]

Provide information relevant to bail/conditional release

In some States, bail (or other forms of conditional release) may be granted pending the outcome of 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; and
- 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.

[237] Rabatel, *FAQs on the extradition process*, p. 83.
[238] Rabatel, *FAQs on the extradition process*, p. 82.

Provide 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 or be at risk of torture or inhumane treatment or punishment). 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. In addition, as noted at **5.3.8**, assurances may not be relied upon in all cases.

Specify relevant time limits

If any time limitations apply to the offence (for example, statutory bars on prosecution after a period of time), 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.

Accommodate 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).[239] 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.[240]

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.[241]

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 in 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 request. 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. This can avoid unnecessary delays once extradition proceedings have begun and prevent the possible refusal of the extradition request.[242]

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[239] UNODC, 'The Competent National Authorities (CNAs) on-line Directory', available from <http://www.unodc.org/compauth/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.
[240] Rabatel, *FAQs on the extradition process*, p. 84.
[241] ADB / OECD, *MLA, Extradition and Recovery of Proceeds of Corruption in Asia and the Pacific*, pp. 20, 62-63.
[242] UNODC, *Report: Informal Expert Working Group on Effective Extradition Casework Practice*, p. 17.

Provide supplementary requests when required

If the Requested State considers that the information provided in the extradition request is deficient, 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 (Article 16(16)) and UNCAC (Article 44(17)), 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.

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 on 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.

- **'Full order' requests:**

The diplomatic channel is the traditional conduit for extradition requests in many States and regions. Generally, the actual request will be prepared by prosecutors or the Central Authority in the Requesting State, who will send the request to the diplomatic authorities of their State. The Requesting State's 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 commonly used in mutual legal assistance than it is in extradition.[243] There is, however, a clear trend, particularly in treaties, towards utilizing Central Authorities as a conduit for extradition requests, as this 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.

[243] ADB / OECD, *MLA, Extradition and Recovery of Proceeds of Corruption in Asia and the Pacific,* p. 64.

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 to be extradited is determined. These are matters for ultimate determination by the courts of the Requesting State, if the person is extradited. Accordingly, only matters that relate to the proper determination of the extradition request and the safeguards provided for in extradition arrangements should be considered. Issues that might be considered at extradition hearings would likely include: [244]

- 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; and
- sufficiency of the supporting evidence (where required).

The extradition process generally consists of 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, the person sought is released. If the conditions are met, 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, 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 against the decision of the Requested State judge to deny extradition; and
- appeal by the person sought against an executive government decision to order surrender.

Appeals provide important safeguards. However, they can also delay and lengthen the extradition process. It is important for Requesting and Requested States to understand each other's systems and coordinate throughout any appeal process.

[244] UNODC, *Report: Informal Expert Working Group on Effective Extradition Casework Practice*, p. 20.

5.7.2 Simplified extradition

Endorsement of warrants

Under some simplified extradition schemes, extradition is based on the endorsement of warrants. This process involves the Requesting State sending the warrant for the arrest of the person sought to the Requested State. The judge in the Requested State 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 or 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.

As discussed above, the domestic laws of Singapore, Malaysia and Brunei allow for the endorsement of warrants in some circumstances. For example, under Singapore's *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.[245] Malaysia's extradition makes similar provision in respect of both Singapore and Brunei.[246] Brunei's extradition law allows for judges in Singapore to endorse warrants issued by Malaysia and Singapore.[247]

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.[248] 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.[249] 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.[250]

[245] See further, *Extradition Act* (Sing.), section 33.
[246] *Extradition Act* (Malay.), Part V.
[247] *Extradition Act* (Malay.), Part V; and *Extradition (Malaysia and Singapore) Act* (Brunei)
[248] *Extradition Act* (Sing.), section 36.
[249] *Extradition Act* (Sing.), section 37.
[250] *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 speciality).

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 decides (usually at the executive or ministerial level) 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.[251]

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 to Requested State officials, but in respect of 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.[252]

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. Limits generally 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; and
- time to effect surrender.

[251] 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.
[252] UNODC, *Report: Informal Expert Working Group on Effective Extradition Casework Practice*, p. 20.

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.[253] 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 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.[254] It is equally 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.[255]

[253] UNODC, *Report: Informal Expert Working Group on Effective Extradition Casework Practice*, p. 20.
[254] UNODC, *Revised Manuals on the Model Treaty on Extradition and the Model Treaty on Mutual Assistance*, p. 58.
[255] UNODC, *Revised Manuals on the Model Treaty on Extradition and the Model Treaty on Mutual Assistance*, p. 57.

Chapter 5: Attachments

Attachment 1: Checklist for Outgoing Extradition Casework Planning, from the UNODC Informal Expert Working Group on Effective Extradition Casework Practice[256]

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 Practice[257]

[256] 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

[257] 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.

Attachment 1: Checklist for Outgoing Extradition Case Work Planning, from the UNODC Informal Expert Working Group on Effective Extradition Casework Practice

Checklist for Outgoing Extradition Case Work Planning[1]

❑	*Earliest contact with Requested State*	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.
❑	*Concurrent requests*	Check for them at earliest stage. If there are any, ensure the case for priority is prepared, communicated and negotiated soonest.
❑	*Legal basis*	Check whether an extradition request can be made to the proposed Requested State.
❑	*Arrest, search and seizure*	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.
❑	*Time Limits*	Check the time limits for receipt of the request in the Requested State following arrest and ensure the time limits will be met.
❑	*Format of documents and any evidentiary requirements*	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.

[1] 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.

❑	*Potential grounds for refusal*	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.
❑	*In absentia proceedings*	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.
❑	*Rule of Specialty*	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.
❑	*Language of request*	The request and accompanying documents should be made in or accompanied by a certified translation into a language as specified by the Requested State.
❑	*Submit a draft request for feedback*	Consider doing this, particularly if you are not familiar with the requirements of the Requested State, or the case is complex.
❑	*Hearings – Presence of Representatives*	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.
❑	*Transit arrangements*	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.
❑	*Surrender arrangements*	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.

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 Practice

Checklist for the Content of Extradition Requests, Required Supporting Documents and Information[1]

Mandatory content/document requirements for all requests:

❑	*Identity of the person sought*	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).
❑	*Facts and procedural history of the case*	An overview of the facts and procedural history of the case, including the applicable law of the Requesting State and the criminal charges against the person sought.
❑	*Legal provisions*	A description of the offence and applicable penalty, with an excerpt or copy of the relevant parts of the law of the Requesting State.
❑	*Statute of Limitation*	Any relevant limitation period beyond which prosecution of a person cannot lawfully be brought or pursued.
❑	*Legal basis*	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.

[1] 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.

If the person sought is accused of an offence (but not yet convicted)[2]	
❑ *Warrant of Arrest*	The original or certified copy of a warrant issued by a competent judicial authority for the arrest of that person, or other documents having the same effect.
❑ *Statement of the offence(s)*	A statement of the offence(s) for which extradition is requested[3] 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.
❑ *Evidence*	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 <u>every</u> 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 *prima facie* 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 *in absentia*)	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.

[2] Some States also require an affidavit establishing probable cause that the person sought committed the crime in question.
[3] 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:

❑ *Arrest warrants and Conviction/detention orders*	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.
❑ *Assembly of request*	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.
❑ *Transmission of the request*	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:

❑ *Identity of Authority*	Identification of the office/authority requesting the provisional arrest/extradition.
❑ *Prior communication*	Details of any prior contact between officers in the Requesting and Requested States.
❑ *Presence of officials*	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.
❑ *Indication of urgency and/or time limit*	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.
❑ *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.
❑ *Language*	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).
❑ *Supplementary documents*	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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United Nations Convention against Transnational Organized Crime, Dec. 12, 2000, UN Doc. A/RES/55/25 (Annex I), entered into force Sept. 25, 2003.

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

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.

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

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.

United Nations 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.

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.

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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 organised 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

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 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 matters 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:** Assistance may be provided even in the absence of any formal agreement or treaty. However, in such circumstances, there must be an assurance given by the requesting country that it will entertain a similar request by Brunei Darussalam for assistance in criminal matters – **Sec 22(1)(c)(i)**.

- **Speciality:** 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:** A request shall be refused if it relates to the investigation, prosecution or punishment of a person in respect of an omission that, if it had occurred in Brunei Darussalam, would have constituted an offence under the military law in Brunei Darussalam but not also under the ordinary criminal law of Brunei Darussalam – **Sec. 24(1)(b)**.
- **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)(f)**.
- **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://agc.gov.bn/AGC%20Site%20Pages/MLA%20Secretariat.aspx [the various forms are available under Form of Requests].
- **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, UNTOC and UNCAC: The designated Central Authority under the ASEAN MLAT and UNCAC is the Attorney General. Contact details are as follows:

Mutual Legal Assistance and Extradition Secretariat
Attorney General's Chambers
The Law Building
KM 1, Jalan Tutong
Bandar Seri Begawan BA1910
BRUNEI DARUSSALAM

Email address: mla@agc.gov.bn
Telephone No: +673 2244872
Fax No: +673 2223100

ii) *Under* UNTOC: see (i) above.

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 Asset Recovery Order*, 2012 (CARO). The provision of mutual legal assistance in the recovery of proceeds of crime is covered in Part IV 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. 2** of the CARO, "proceeds of crime" means (a) any property or benefit derived or realised directly or indirectly from a serious offence; (b) any property or benefit derived or realised from a disposal or other dealing with proceeds of a serious offence; and includes, on a proportional basis, property into which any property derived or realised directly from the offence was later successively converted, transformed or intermingled, as well as income, capital or other economic gains derived or realised from such property at any time since the offence; and any property used or intended to be used in the commission of any serious offence.

  Sec. 2 of CARO also defines "tainted property" which is referenced in other Brunei Darussalam's asset recovery orders. It defines "tainted property" as: (a) property used in or in connection with the commission of the offence, if it was in the person's possession at the time of, or immediately after, the commission of the offence; (b) property derived, obtained or realised as a result of or in connection with the commission of an offence if it was acquired by the person before, during or within a reasonable time after the period of the commission of the offence of which the person is about to be charged, charged or convicted; (c) proceeds of crimes; (d) that the income of that person from sources unrelated to criminal activity of that person cannot reasonably account for the acquisition of that property; and (e) tainted property includes property of a corresponding value to property defined in paragraphs (a), (b), (c) and (d); or (f) property which, due to any circumstance such as, but not limited to, its nature, value, location or place of discovery, or the time, manner or place of its acquisition, or the person from whom it was acquired, or its proximity to other property referred to in the

foregoing paragraphs, can be reasonably believed to be property falling within the scope of paragraph (a), (b), (c) or (d).

- **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:** Chapter II of Part V, in particular **Sections 93-97** of CARO which deals with foreign countries' requests for recovery of proceeds. The relevant provisions are as below:
- **Confiscation:** Under **Sec. 94**, 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: Sec. 98** provides for the sharing of confiscated property with foreign countries.

D. EXTRADITION

a) Extradition Treaties

- *Multilateral:* Brunei Darussalam is a party to UNTOC and UNCAC.
- *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* (2006). 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* (2006) is an "extradition offence" under **Sec. 3(1)** Extradition Order (2006), as it is an offence which has a maximum penalty of more than one-year imprisonment.

- *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 (**Sec 23**) may be applied and a "record of the case" (**Sec 24**) may be required.
  - **Dual Criminality:** Dual criminality is required under **Sec. 3(1)**.
  - **Speciality:** The Attorney General may refuse to surrender the person under **Sec. 17(3)(a)** if the requesting country has not given a specialty undertaking.
- *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 the requesting country or in Brunei Darussalam. Surrender may also

be refused under **Sec. 17(e)** if final judgment has been given against him for the offence in Brunei Darussalam or in a third country.

- **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 [**Sec 4(b) and (c)**]. 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.

- *Procedure*
  - **Provisional Arrest:** A provisional arrest warrant is provided for 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:** All requests should be in the English language in order for the transmission of the request to be processed expeditiously. Brunei Darussalam does not accept requests which are not in the English language.
  - **Transmission:** An extradition request should be made to the Attorney General by a diplomatic officer, consular officer, or Minister of the Requesting State (**Sec 9**). The request should be addressed to:

    Mutual Legal Assistance and Extradition Secretariat
    Attorney General's Chambers
    The Law Building
    KM 1, Jalan Tutong
    Bandar Seri Begawan BA1910
    BRUNEI DARUSSALAM

    Email address: mla@agc.gov.bn
    Telephone No: +673 2244872
    Fax No: +673 2223100

  - **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 signed a bilateral treaty regarding mutual legal assistance with Viet Nam but has not yet ratified that instrument.

b) National Law on Mutual Legal Assistance: Cambodia has drafted a national law on *Mutual Legal Assistance in Criminal Matters*. The draft is currently being finalised for presentation to the Parliament.

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 Prosecution and Criminal Affairs, Department of Mutual Legal Assistance in Criminal Matter and Extradition, Ministry of Justice
No. 14, St Samdach Sothearos
Sangkat Chey Chumneas
Khan Daun Penh
Phnom Penh
KINGDOM OF CAMBODIA

Telephone No: +855 23 210 760
Facsimile No: +855 23 210 760

ii) Under UNCAC: There is a draft *National Law on Mutual Legal Assistance in Criminal Matters*. Under this current draft, Cambodia requires all requests to be sent to the Central Authority, which is the Minister of Justice.

iii) Under UNTOC: There is a draft *National Law on Mutual Legal Assistance in Criminal Matters*. Under this current draft, Cambodia requires all requests to be sent to the Central Authority, which is the Minister of Justice.

iv) Under National Law: All requests are to be transmitted through diplomatic channels to the Ministry of Foreign Affairs. However, under the current draft *National Law on Mutual Legal Assistance in Criminal Matters*, Cambodia requires all requests to be sent to the Central Authority, which is the Minister of Justice.

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 a party to a bilateral treaty with Viet Nam covering MLA to recover proceeds of crime (**Art. 16**).

b) National Law

There is a draft *National Law on Mutual Legal Assistance in Criminal Matters* and there are also some provisions under other laws that deal with proceeds of crime, and which may be applicable to cases in which mutual legal assistance is sought.

- **Definition of Proceeds of Crime: Article 3(b)** of the *Law on Anti-Money Laundering and Combating the Financing of Terrorism* stipulates that it "Shall mean any property derived from or obtained, directly or indirectly, through the commission of any felony or misdemeanour."
- **Identification and Tracing:** Mutual legal assistance in the identification and tracing of proceeds of crime may be undertaken through **Art. 91, 92, 159, 160** of the *Criminal Procedure Code.*
- **Freezing and Seizure: Art. 30 New 1** of the *Amendment to the Law on Anti-Money Laundering and Combating Financing of Terrorism* provides that "[u]pon becoming aware of the existence of any property related or suspected to be involved with the offences or proceeds of a predicate offence, the law enforcement authorities must seize that property without delay and as soon as practicable and sue to the court to freeze such property." Trafficking offences such as trafficking in human beings and sexual exploitation, including sexual exploitation of children, are predicate offences under the amendment.
- **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 on of "proceeds or the properties earned by or which resulted from the offence." **Art. 30 New 2** of the Amendment of **Art. 3, Art. 29, and Art. 30** of the *Law on Anti Money Laundering and Combating the Financing of Terrorism* provides for confiscation of property in the event of a conviction for a predicate offence, which includes trafficking in human beings and sexual exploitation.
- **Repatriation of Funds: Art. 36** of the *Draft Cambodia National Law on Mutual Legal Assistance in Criminal Matters* will address repatriation of funds. The Treaty on *Mutual Legal Assistance in Criminal Matters* with Viet Nam and with Russia also provide for repatriation of funds.

D. EXTRADITION

a) Extradition Treaties

i) Multilateral: Cambodia is a party to UNTOC and UNCAC.

ii) Bilateral: Cambodia has concluded bilateral extradition treaties with PR China, Korea, Lao PDR, Thailand, Viet Nam, Russia and France.

b) National Law on Extradition

Book 9, Title 1, 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. **Art. 33** of the Cambodian Constitution states that a Khmer citizen shall not be deprived of his/her nationality, exiled, or arrested to be extradited to a foreign country, except in case of mutual agreement.
- **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. **Art. 32** of the Cambodian Constitution states that "everyone has the right to life, liberty and security of person."
- **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** of the Criminal Procedure Code states that an extradition order may not be issued where the prosecuted acts were committed in the territory of the Kingdom of Cambodia and a trial has been concluded by final judgment.

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**. However, under the current draft *National Law on Mutual Legal Assistance*, Cambodia requires all requests to be sent to the Central Authority, which is the Minister of Justice.
- **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 the Republic of 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.
- **Speciality:** 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
JI. 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 the 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 Countermeasure and Eradication of Money Laundering* (Law No.8 year 2010).

- **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."

- **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 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 SAR, Republic of Korea, Malaysia, Philippines, Thailand, Papua New Guinea, Singapore, Republic of Iran and Republic of India.

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: Art. 4** of *Law No.1 year 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 for 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 **articles 18-21** of *Law No.1 year 1979 on Extradition*.
- **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 Ministry of Law and Human Rights 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 and Optional Protocol for CRC.

b) Domestic Legislation: Trafficking in persons is criminalised in **Art. 134** of the Penal Law and *Law on Anti-Trafficking in Persons* (**Art. 2**), **Art. 24** of the *Law on Development and the Protection of Women* and **Art. 90** of the *Protection of the Rights and Interests of Children*.

B. MUTUAL LEGAL ASSISTANCE

a) Mutual Legal Assistance Treaties

i) Multilateral: Lao PDR is a party to UNTOC, UNCAC and to the ASEAN MLAT.

ii) Bilateral: Lao PDR has concluded a bilateral mutual legal assistance treaty with Viet Nam and Thailand. Lao uses the same procedure in its bilateral mutual legal assistance treaties with PR China, Thailand and Viet Nam. In criminal cases, Lao PDR refers to the *Treaty on Mutual Legal Assistance in Criminal Matters*.

b) National Law on Mutual Legal Assistance

There is no dedicated mutual legal assistance legislation in Lao PDR. However, Part XIV: *International Cooperation in Criminal Proceeding of the Law on Criminal Procedure* (2012) and **Art. 44 and 45** of the *Anti-Money Laundering and Counter Financing of Terrorism Law* 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 combatting and deterring money laundering.

i) Requirements (under the *Law on Criminal Procedure*)

- **Evidentiary Test:** There is an evidentiary test (**Articles 44 – 44** of *Law on Criminal Procedure*)
- **Dual Criminality:** There is no dual criminality provision but see Chapter 2 of Penal Code.
- **Reciprocity:** There is no reciprocity requirement; however, assistance is to be provided on the basis of 'mutual cooperation' where there is no treaty. See also **Art. 9** of the *International Cooperation of Criminal Procedure Law*.
- **Specialty:** There is a speciality provision in **Articles 72, 73, 133 and 179** of the *Law on Criminal Procedure*.

ii) Restrictions and Exceptions

- **Double Jeopardy/Ongoing Proceedings:** There are no double jeopardy/ongoing proceedings provisions.
- **Human Rights:** There are no human rights provisions but see the National Constitution.
- **Death Penalty:** There are death penalty provisions in Chapter 5, **Articles 255 – 256** of the *Law on Criminal Procedure*.
- **Political/Military Offence:** There are no political or military offence provisions but see **Art. 145** of the *Law on Criminal Procedure*.

- **National/Public Interest:** Under **Art. 273** of the Law on Criminal Procedure and **Art. 34** of the *Decree on Anti-Money Laundering* and **Art. 49** of the *Anti-Money Laundering and Counter Financing of Terrorism Law*, 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:** See **Articles 22 and 58** on Bank Secrecy and **Art. 32** of the *Anti-Money Laundering and Counter Financing of Terrorism Law*.

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 that is required, and **Art. 43** specifies the content that must be contained within a request for assistance concerning a money laundering offence.
- **Language:** see **Art. 74** of the *Law on Criminal Procedure*.
- **Urgent Procedures:** see **Art. 140** of the *Law on Criminal Procedure*.
- **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 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: Information not available

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 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 legal assistance treaty with Viet Nam, 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 combatting and deterring money laundering, which is likely to include at least the identification and tracing of proceeds of crime.

- **Definition of Proceeds of Crime:** contained in **Article 8** of the *Decree on Anti-Money Laundering*.

- **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: Art. 40** of the *Decree on Anti-Money Laundering* contains specific provisions regarding freezing and seizure. See also **Art. 45** of that law.
- **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 Lao PDR and other States Parties in respect of any offences under that treaty.

ii) Bilateral: Lao PDR has concluded bilateral extradition treaties with Cambodia, PR China and Thailand. The mutual legal assistance treaty with Viet Nam 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. 272** of the *Law on Criminal Procedure* (amended 2012), 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. 273** of the *Law on Criminal Procedure* if it would affect the sovereignty, security or stability of the nation, or any important interest of Lao PDR.

iii) Procedure

- **Form and Contents:** 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:** See **Art. 74** of the Law on Criminal Procedure.
- **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 to 2 months for preventative 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 and Anti-Smuggling of Migrants 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, the United States of America, United Kingdom of Great Britain and Northern Ireland, Republic of Korea, Republic of India, PR China and Ukraine.

b) National Law on Mutual Legal Assistance

Malaysia's national law on mutual legal assistance is the *Mutual Assistance in Criminal Matters Act* 2002 [Act 621] (MACMA 2002). Under this Act, Malaysia does not require the existence of a treaty as a condition for mutual legal assistance. Under **Section 18** of MACMA 2002, Malaysia may provide mutual assistance in criminal matters to a non-treaty partner provided that a Special Direction is issued by the Minister charged with the responsibility for legal affairs, if the Minister, on the recommendation of the Attorney General, agrees to accede to the request.

Assistance may be provided under MACMA 2002 in relation to an offence of trafficking in persons, as this is a "serious offence" with a maximum punishment of a term not exceeding fifteen years under Act 670.

i) Requirements

- **Evidentiary test:** There is no general evidentiary test. However, a search warrant under **Sec. 36** of MACMA 2002 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)** of MACMA 2002 if the relevant act or omission, if committed in Malaysia, would not have been an offence against the laws of Malaysia.
- **Reciprocity:** There are no provisions requiring reciprocity. However, under **Sec. 20 (3)(d)** of MACMA 2002 a request may be refused if a foreign State is not a prescribed foreign State and the appropriate authority of that foreign State fails to give an undertaking to the Attorney General that the foreign State will, subject to its laws, comply with a future request by Malaysia to that foreign State for assistance in a criminal matter.
- **Speciality:** A request shall be refused under **Sec. 20(1)(j)** of MACMA 2002 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 of Malaysia consents under Section 20(2) of MACMA 2002.

ii) Restrictions and Exceptions

- **Double Jeopardy/Ongoing Proceedings:** A request shall be refused under **Sec. 20(1)(e)** of MACMA 2002 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)** of MACMA 2002 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)** of MACMA 2002 if it relates to an offence of a political nature, and under **Sec. 20(1)(c)** of MACMA 2002 if it relates to a military offence. **Sec. 21** of MACMA 2002 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)** of MACMA 2002 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)** of MACMA 2002.
- **Language:** There is no provision which prescribes the language of the request.
- **Urgent Procedures:** There are no urgent procedure provisions, but an advance copy of the request can be directly sent to the Attorney General's Chambers (AGC) for preliminary consideration.
- **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
Prosecution Division, Attorney General's Chambers Malaysia,
No 45 Pesiaran Perdana,
Precinct 4, 62100, Putrajaya
MALAYSIA

Telephone No: +60 38 872 2591
Facsimile No: +60 38 890 1607

ii) *Under UNCAC:* The AGC is the Central Authority for Mutual Legal Assistance in Criminal Matters while the Ministry of Home Affairs is the Central Authority for extradition matters.

iii) *Under UNTOC:* The AGC is the central authority for Mutual Legal Assistance in Criminal Matters while the Ministry of Home Affairs is the Central Authority for extradition matters.

iv) *Under National Law:* Under **Sec. 19** of MACMA 2002, 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 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, 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

MACMA 2002 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** of MACMA 2002 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)** of MACMA 2002 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.
- **Freezing and Seizure:** Under **Sec. 31(1)(b)** of MACMA 2002, a foreign State may request assistance in the restraining of property which may become the subject of a foreign forfeiture order. Under **Sec. 35** of MACMA 2002, 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)** of MACMA 2002. A foreign forfeiture order must be registered by application to the High Court in accordance with **Sec. 32** of MACMA 2002.
- **Repatriation of Funds:** There are no provisions regarding the repatriation of funds to the Requesting State.

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, Republic of Indonesia, Kingdom of Thailand, United States of America, Republic of India, Republic of Korea and Ukraine.

b) National Law on Extradition

The law governing extradition to and from Malaysia is contained within the *Extradition Act* 1992 [Act 479]. Part V of Act 479 also specifically provides for the enforcement of warrants issued in Brunei Darussalam and the Republic of 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 Republic of Singapore.

Under Act 479, extradition offence is an offence which is punishable, with imprisonment for not less than one year or with death. Under Act 670, the offence of trafficking in persons would be considered an extraditable offence as the punishment is for a term not exceeding fifteen years which is more than one-year imprisonment.

i) Requirements

- **Evidentiary test:** Under **Sec. 19(4)** of Act 479 a *prima facie* case must be established, unless dispensed with in an agreement between Malaysia and the Requesting State (see **Sec. 4** of Act 479).
- **Dual criminality:** Under **Sec. 6(2)** of Act 479 an extradition offence must be punishable in both the Requesting State and in Malaysia.
- **Speciality:** Under **Sec. 8(e)** of Act 479 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** of Act 479, consent must be sought from the Minister of 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.

ii) Restrictions and Exceptions

- **Double jeopardy/ongoing proceedings:** There are no double jeopardy or ongoing proceedings provisions.
- **National:** Under **Sec. 49(1)(a)** of Act 479 the Minister of 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. **Sec. 9** of Act 479 lists offences which are not to be regarded as political offences.
- **Human rights:** Under **Sec. 8(b) and (c)** of Act 479 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)** of Act 479 the Minister of 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)** of Act 479 if the Magistrate considers that it is warranted.
- **Form and Contents:** The documentary requirements for an extradition request are contained in **Sec. 12(2)** of Act 479.
- **Language:** There is no provision prescribing the language of the request.
- **Transmission:** Under **Sec. 12(1)** of Act 479 a request for extradition is to be made to the Minister of Home Affairs by a diplomatic representative of the Requesting State.
- **Consent:** A person may consent to a waiver of extradition on proceedings under **Sec. 22** of Act 479.
- **Time limits:** No time limit is specified; however, under **Sec. 16(1)** of Act 479, the Magistrate must fix a "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 Myanmar ratified UNCAC on 20 December 2012.

ii) Bilateral: Myanmar concluded the treaty on Mutual Assistance in Criminal Matters with India in 2010. Myanmar is planning to enter the Bay of Bengal Initiative for Multi-Sectoral Technical and Economic Cooperation (BIMSTEC) *Convention on Mutual Legal Assistance in Criminal Matters* and to conclude bilateral treaties on MLA with the Russian Federation and Viet Nam.

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 an evidentiary test provision (Under **Sec. 12** of MLA)
- **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.
- **Speciality:** There is a provision requiring specialty (Under **Sec. 24** of MLA). According to **Sec. 24**, the President may decide to grant, refuse or suspend extradition.

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:

Union Attorney General
Union Attorney General's Office
The Republic of the Union of Myanmar
Building 25, Naypyitaw

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
Building No 8, Administrative Zone, Naypyitaw
THE REPUBLIC OF THE 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 **Art. 16** concerning extradition. Myanmar ratified UNCAC on 20th December 2012.

ii) Bilateral: Myanmar has not entered into any bilateral extradition treaties.

b) National Law on Extradition

Myanmar enacted the *Extradition Law* on July 21, 2017. Under the *Extradition Law* 2017, Extraditable offences means an offence that is punishable with imprisonment for a period of two years and above; under any existing laws of the State or any existing laws of the Requesting State when the extradition request is made (**Sec. 3 (d)**).

Under **Sec. 6**, the State may refuse the request for extradition in any of the following circumstances:

- the person sought is a national under the existing law of the State;
- the offence for which extradition is requested is an offence to be taken action under any military law;
- any court of either State has rendered a final judgment against the person sought for an offence for which extradition is requested, and enforced the sentence upon him or he has been granted a pardon for such offence;
- there are substantial grounds to believe that the request for extradition has been made for the purpose of prosecuting or punishing the person sought on account of his race, religion, nationality, or political opinions;
- there are substantial grounds to believe that the person sought would be liable to be sentenced in the Requesting State by unfair hearing;
- the offences have a political nature; provided that the offences under schedule (a) shall not be deemed offences of political nature;
- the offence for which the request is made has been committed in whole or in part within the territory of the State;
- there are substantial grounds to believe that the request is made for the purpose of transferring the person sough to the third state in respect of committing offences before the offence for which extradition is requested;

- there are substantial grounds to believe that the person sought would be subjected in the Requesting State to torture or cruel, inhuman or degrading treatment.

Under **Sec. 7**, the Requesting State shall make a request for extradition to the Ministry of Foreign Affairs through diplomatic channel. The following information shall be stated in writing in Myanmar or English in a request for extradition:

- the biography of the person sought, including the name, figure, nationality, address, photo, deoxyribonucleic acid (DNA) and fingerprints, etc.;
- the number of the First Information Report or case number of the court and the summary of the case;
- the necessary documentary evidence, an original or a certified copy of a warrant for investigation and prosecution;
- the provision of the relevant legislation for the jurisdiction of the Requesting State with regard to the offence;
- substantial grounds and evidence for the Requesting State to believe that the person sought has been in the State;
- The contact department, name and address of the contact person in the Requesting State; and
- The information prescribed in Form 1 and Form 2 annexed to this Law.

Philippines

A. LEGAL RESPONSE TO TRAFFICKING IN PERSONS

a) UN Protocols: The Philippines is a party to 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 (RA) No. 9208), as amended by RA No. 10364, also known as the *Expanded Anti-Trafficking Act of 2012*.

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, Republic of Korea (South Korea), Spain, Switzerland, United States of America, and the United Kingdom.

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 mutual legal assistance in detecting and combating money laundering contained within the RA No. 9160, otherwise known as the *Anti-Money Laundering Act of 2001* as Amended by RA No. 10365. Trafficking in Persons is now among the predicate offences of money laundering under this Act. With the amendment, bank inquiry, freeze order, and civil forfeiture of assets belonging to human traffickers is now a remedy available to the State.

c) Transmission of Requests

i) Under ASEAN MLAT: The Central Authority is the Secretary of Justice. Contact details are as follows:

C/O Department of Justice (DOJ)
ATTN: Office of the Chief State Counsel
Padre Faura St., Ermita 1000 Manila
REPUBLIC OF THE PHILIPPINES

Telephone No: +63 2 523 8481 (Local no: 300/214)
Facsimile No: +63 2 521 1904
Email: osec.doj@gov.ph

ii) Under UNCAC: The declared Central Authority under UNCAC is the DOJ (contact details above).

iii) Under UNTOC: The Competent National Authority under UNTOC is the Office of the Chief State Counsel in the DOJ (contact details above).

iv) Under National Law: Requests for assistance under the *Anti-Money Laundering Act* of 2001, as amended by R.A. No. 10365, are made to the:

Office of the Executive Director
AMLC Secretariat
5th Floor, EDPC Building
Bangko Sentral ng Pilipinas (BSP) Complex
Mabini corner Vito Cruz Street, Malate, Manila

REPUBLIC OF THE PHILIPPINES

Direct line: +63 2 708 7066
Local: +63 2 708 7701 (local no. 3083, 3084)
Fax: +63 2 708 7909
E-mail: secretariat@amlc.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, Republic of Korea (South Korea), Spain, Switzerland, United States of America and the United Kingdom.

b) National Law

The Philippines has no specific law on mutual legal assistance. In 2013, the *Anti-Money Laundering Act* was amended to include trafficking in persons as one of the predicate offenses of money laundering.

While the Philippines has no specific law on mutual legal assistance, the A*nti-Money Laundering Act* (2001) has a provision – **Sec. 13** (Mutual Assistance among States) – that relates to mutual legal assistance. This section provides for the making of mutual assistance requests both by the Philippines and to the Philippines, in the investigation or prosecution of money laundering offenses. 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 Council (AMLC) may execute a request for assistance by tracking down, freezing, restraining and seizing assets alleged to be proceeds of any unlawful activity.
- **Confiscation:** Under Sec. **13(b)(3)**, the AMLC may execute a request for assistance by applying for an order of forfeiture of any monetary instrument or property in the court. The court, however, shall not issue such an order unless the application is accompanied by an authenticated copy of the order of a court in the Requesting State ordering the forfeiture of said monetary instrument or properly of a person who has been convicted of a money laundering offense in the Requesting State, and a certification of an affidavit of a competent officer of the Requesting State stating that the conviction and the order of forfeiture are final and that no further appeal lies in respect or either.
- **Repatriation of Funds:** There are no provisions regarding the repatriation of funds to the Requesting State. However, the Requesting Party may specify in the MLA the request for repatriation of funds.

D. EXTRADITION

a) Extradition Treaties

i) Multilateral: The Philippines is a party to UNTOC and UNCAC; however, it 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 extradition treaties with the following countries: Indonesia (1976); Thailand (1981); Australia (1988); Canada (1989); Switzerland (1989); Micronesia (1990); Korea (1993); USA (1994); Hong Kong Special Administrative Region (1995); China (2001); Spain (2004); India (2004); and the UK (2009).

b) National Law on Extradition

The national law on extradition is the *Philippine Extradition Law* (Presidential Decree (PD) No. 1069). This law provides for extradition only where there is an applicable treaty or convention. Under this law, trafficking in persons (TIP) 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.
- **Speciality:** There is no provision requiring specialty. However, the rule of specialty can be found in the Philippine's bilateral treaties. Under this principle, the person being extradited will only be tried or punished by the Requesting State for offenses in respect of which extradition has been granted unless the Requested State consents thereto.
- **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.

ii) 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)**. **Sec. 20(e)** however provides that release from provisional arrest shall not prejudice re-arrest and extradition of the accused if a request for extradition is received subsequently in accordance with the relevant treaty of convention.

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. Singapore acceded to the UN Trafficking Protocol on 28 September 2015.

b) ASEAN Protocols: Singapore ratified the ASEAN Convention against Trafficking in Persons, Especially Women and Children on 25 January 2016.

c) Domestic Legislation: Human trafficking is criminalised under the *Prevention of Human Trafficking Act 2014* which came into effect from 1 March 2015. Trafficking of women and girls is criminalised in the *Women's Charter* (Cap. 353). The use of slaves, forced labour, and other trafficking-related offences are criminalised in the *Penal Code* (Cap. 224), the *Prevention of Corruption Act* (Cap. 241) and the *Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act* (Cap. 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* (Cap. 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. Trafficking of persons under the *Prevention of Human Trafficking Act 2014*, 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 Second 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 "foreign offence", and that the material sought is likely to be of substantial value to the case.

  The evidentiary test for execution of a warrant for search and seizure is that "there are reasonable grounds for suspecting that a specified person has carried on or has benefited from a foreign offence".

- **Dual criminality:** No dual criminality requirement for a request which does not involve coercive forms of assistance: (a) Arrange the attendance of persons in the foreign state (Part III, Division 3); or (b) Facilitate the custody of persons in transit through Singapore (Part III, Division 4); or (c) Locate or to identify persons (Part III, Division 7); or (d) Assist in effecting the service of process (Part III, Division 8).

  Dual criminality requirement applies to coercive forms of assistance such as: (a) Assistance in obtaining evidence (Part III, Division 2); (b) Enforcement of foreign

confiscation orders (Part III, Division 5); and (c) Assistance in search and seizure (Part III, Division 6). For further information on recent amendments to the law please see: https://www.mlaw.gov.sg/content/minlaw/en/news/parliamentary-speeches-and-responses/2R-speech-by-SMS-on-macma-bill-2014.html#orders.

- **Reciprocity:** Under **Sec. 16(2)**, 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.
- **Speciality:** 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 provision for a 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 an offence under the military law applicable in Singapore but not also under the ordinary criminal law of Singapore.
- **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:** With regard for production orders under **Sec. 22**, under **Sec. 23(4)(b)** the production order shall have effect notwithstanding any obligations as to secrecy or other restrictions upon the disclosure of information imposed by statute or otherwise

iii) Procedure

- **Form:** The contents requirements for requests are contained in **Sec. 19(2)**. Sample forms are available at https://www.agc.gov.sg/our-roles/international-law-advisor/mutual-Legal-assistance. Countries that have signed and ratified the Treaty on Mutual Legal Assistance in Criminal Matters among Like-minded ASEAN Member Countries should make requests for mutual legal assistance to Singapore using the form provided on the website of the Secretariat for this Treaty at http://aseanmlatsec.agc.gov.my/index.php?r=portal/left&id=TlZJYjVDRktQUmxxeWJmSXpWbnlUUT09.
- **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 ASEAN MLAT: The Central Authority is the Attorney-General. Contact details are as follows:

Director-General
International Affairs Division
The Attorney General's Chambers
1 Upper Pickering Street
Singapore 058288
REPUBLIC OF SINGAPORE

In case of urgent request, a copy of the request can be sent by fax to: +65 6702 0513 or by email to AGC_CentralAuthority@agc.gov.sg.

For further information on mutual legal assistance in Singapore, please refer to the following website https://www.agc.gov.sg/our-roles/international-law-advisor/mutual-Legal-assistance

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 proceeds and instrumentalities of criminal activities.

b) National Law

The national law in Singapore regarding the recovery of proceeds of crime is the *Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act* (Cap. 65A) (CDSC Act). This Act applies to offences listed in the Second Schedule to the Act, including trafficking in persons and persons who receive payments in connection with exploitation of trafficked victims under the *Prevention of Human Trafficking Act 2014*, 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 of Sec. 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.

Singapore has launched a *Practitioner's Guide for Asset Recovery in Singapore*, accessible at https://www.agc.gov.sg/docs/default-source/our-roles-documents/international-law-adviser/practitioner%27s-guide-for-asset-recovery-in-singapore---13-september-2016.pdf?sfvrsn=2

- **Definition of Proceeds of Crime:** Under **Sec. 8** of the CDSC 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 any time, 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.

  MACMA also permits the recovery, forfeiture or confiscation of any payment or other reward received in connection with an offence against the law of that country, or the value of any such payment or reward; and any property derived or realised, directly or indirectly, from any payment or other reward, or the value of any such property.

- **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 **Sec. 33-34** of MACMA.

- **Freezing and Seizure:** Freezing and seizure of proceeds of crime may be carried out upon request under **Sec. 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, it has lodged a declaration under UNCAC to the effect that it does not consider UNCAC to be a legal basis for cooperation on extradition.

ii) Bilateral: Singapore has concluded extradition treaties with Hong Kong SAR, United States and Germany. It also has extradition arrangements with 40 declared Commonwealth countries, including Canada, under the London Scheme for extradition within the Commonwealth. Singapore has reciprocal arrangements with Malaysia and Brunei based on the endorsement of warrants issued in the respective countries. Singapore and Indonesia signed an Extradition Treaty in 2007 but have not yet ratified it. (See https://www.mlaw.gov.sg/content/minlaw/en/news/parliamentary-speeches-and-responses/oral-answer-by-senior-minister-of-state-for-law--indranee-rajah-0.html)

b) National Law on Extradition

The national law on extradition is the *Extradition Act* (Cap. 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 the First Schedule 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) and "The recruitment, transport, transfer, harbouring or receipt, for the purpose of exploitation – (a) of any individual below the age of 18 years; or (b) of any other individual, by means of the threat or use of force (or any other form of coercion), abduction, fraud, deception, the abuse of power, the abuse of the position of vulnerability of the individual, or the giving or receipt of money or other benefits to secure the consent of a person having control over that individual."

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. In the case of a person who is alleged to have been convicted of an extradition crime – sufficient evidence to satisfy the Magistrate that the person has been convicted of that crime.
- **Dual criminality:** Under **Sec. 2** an "extradition crime" must be an offence under the law of the foreign 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. In the case of a declared Commonwealth country, the additional requirement is that the offence under the law of the declared Commonwealth country must have a maximum penalty of death or imprisonment for not less than 12 months.
- **Speciality:** 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.
- **National:** 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** (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 provision for a 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, requests should be in English or a translation into English should be attached with the request.
- **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).

  Under **Sec. 13** (for foreign States) and **Sec. 28** (for declared Commonwealth countries), a person who is in custody in Singapore at the expiration of 2 months after the date of the committal or order; or if an application for an Order for Review of Detention has been made by the person – the date of the decision of the court to which the application was made or, where an appeal has been brought from that decision to another court, the date of the decision of the other court, whichever is the later, the High Court, upon application made to it by the person and upon proof that reasonable notice of the intention to make the application has been given to the Minister, shall, unless reasonable cause is shown for the delay, order that the person be released.

Thailand

A. LEGAL RESPONSE TO TRAFFICKING IN PERSONS

a) UN Protocols: Thailand has ratified the UN Trafficking Protocol and has signed but not yet ratified the Migrant Smuggling Protocol.

b) Domestic Legislation: Trafficking in persons is criminalised in the *Anti-Trafficking in Persons Act* B.E. 2551 (2008), amended by the *Anti-Trafficking Act (No. 2)* BE 2558 (2015) and the *Anti-Trafficking Act (No. 3)* BE 2560 (2017).

B. MUTUAL LEGAL ASSISTANCE

a) Mutual Legal Assistance Treaties

i) Multilateral: Thailand has 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 (1992), amended by the *Act on Mutual Assistance in Criminal Matters* BE 2559 (2016). 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 **Sections 23,32,33, and 34** 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.
- **Speciality:** 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:** If necessary, the Thai Government can provide assurance to the Requested State that the death penalty shall not be executed (**Sec. 36/1**).
- **Political/Military 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:** Under Thai domestic laws, bank secrecy cannot be raised in criminal case.

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 *Regulations 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 based on the principle of reciprocity.
- **Urgent Procedures:** There are no urgent procedure provisions.
- **Attendance of Officials:** There is no provision for the attendance of officials from the Requesting State, but in practice officials from the Requesting State may be allowed to attend in the procedure as observers where appropriate.

c) Transmission of Requests

i) Under ASEAN MLAT: Thailand has ratified the ASEAN MLAT and 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 is the Attorney General.

ii) Under UNCAC and UNTOC: Thailand has ratified UNCAC and UNTOC, and therefore has designated a Competent National Authority under these treaties.

iii) 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
Ratchaburidirecrith Building, Government Complex
Chaeng Watthana Rd.
Khet Laksi
Bangkok 10210
THAILAND

C. MUTUAL LEGAL ASSISTANCE TO RECOVER PROCEEDS OF CRIME

a) Treaties

i) *Multilateral:* Thailand has ratified UNTOC, UNCAC and the ASEAN MLAT, and is therefore bound by the provisions of those treaties regarding mutual legal assistance to identify and recover proceeds of crime.

ii) *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 5 and **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. However, under the *Anti-Trafficking in Persons Act BE 2551*, the offence of trafficking in persons is a predicated offence under the money laundering law. As a result, all the money and assets derived from the crime could be forfeited accordingly.
- **Identification and Tracing:** A request for search and seizure may be executed under **Sec. 23**, and in accordance with the *Act on Mutual Assistance in Criminal Matters BE 2559* (2016), the relevant authorities can petition the court for a warrant to search and seize any article that has been unlawfully obtained.
- **Identification and Tracing:** Orders for production of documents or other items may be sought under **Sec. 22** . Searches may be carried out upon request under Sec. **33-34** of MACMA.
- **Freezing and Seizure:** 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 a 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 properties can be returned to the Requesting State if there is a treaty specifying the repatriation of funds.

D. EXTRADITION

a) Extradition Treaties

i) Multilateral: Thailand has ratified UNTOC and UNCAC.

ii) Bilateral: Thailand has concluded bilateral extradition treaties with the following countries: Bangladesh, Belgium, Cambodia, PR China, Indonesia, Korea, Lao PDR, 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* BE 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.
- **Speciality:** 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.
- **National:** 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, the Thai Government can provide assurance that if the offender is convicted with the death penalty, the death penalty will not be executed, and 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 me period set by the court, but less than 90 days) the person shall be released under **Sec. 16**.

Viet Nam

A. LEGAL RESPONSE TO TRAFFICKING IN PERSONS

a) UN Protocols: Viet Nam 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).* In 2015, the new *Penal Code* was passed by the National Assembly in which trafficking in persons offence was provided under **Art. 150** and the offence of trafficking in persons aged under 16 was provided in **Art. 151**. It came into force on January 1st, 2018.

B. MUTUAL LEGAL ASSISTANCE

a) Mutual Legal Assistance Treaties

i) Multilateral: Viet Nam is a party to the UNCAC and ASEAN MLAT and has signed. Viet Nam ratified UNTOC and Palermo Protocol on 8 June 2012.

ii) Bilateral: Viet Nam has concluded bilateral treaties on mutual legal assistance with Czech Republic, Slovakia Republic (continued obligation from the precedent MLA treaty with Czechoslovakia signed on 14 Feb 1980), Cuba, Hungary, Bulgaria, Poland, Russia, Ukraine, Belarus, PR China, North Korea, South Korea, India, the United Kingdom, Algeria, Indonesia, Australia, Spain, 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 Viet Nam.
- **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 Viet Nam.
- **Reciprocity: Art. 4(2)** - Where there exist no treaties on legal assistance between Viet Nam and foreign countries, legal assistance activities follow the principle of reciprocity which, however, do not contravene Vietnamese law and conform to international law and customs.
- **Speciality: Art. 27(1)** requires information or evidence provided by agencies in Viet Nam 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 Viet Nam. 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 Viet Nam.

- **Human Rights:** There is no provision for a human rights exception under the national law. In the bilateral treaty on MLA on criminal matters between Viet Nam and Australia, **Art. 4(g)** says assistance shall be refused if the Requested Party considers that there are substantial grounds for believing that the request for assistance has been made for the purpose of investigating, prosecuting or punishing a person on account of that person's race, sex, sexual orientation, religion, nationality or political opinions or that that person's position may be prejudiced for any of these reasons.
- **Death Penalty:** There is no provision for a death penalty exception under the national law, however, the matter is regulated in some bilateral treaties, e.g. between Viet Nam and Australia, or Spain; assistance may be refused if the request relates to the investigation, prosecution or punishment of a person for an offence in respect of which the death penalty may be imposed or executed unless the Requesting Party undertakes that the death penalty will not be imposed or, if imposed, will not be carried out. Under the *Criminal Procedure Code* and the Report No. 1967/VKSTC-HTQT, once receiving a request for a death penalty exception, the Supreme People's Procuracy shall consider and propose to the President of Viet Nam to decide. In principle, Viet Nam undertakes that the death penalty will not be carried out.
- **Political/Military Offence:** No provision under the national law, but in bilateral treaties on MLA on criminal matters, e.g. between Viet Nam and the United Kingdom, Algeria, Australia, assistance shall be refused if the Requested Party considers that the request relates to the investigation, prosecution or punishment of a person for an offence of a political character or the confiscation or restraining of proceeds and/or an instrument of such an offense.
- **National/Public Interest:** Under **Art. 21(1)(b)** a request will be refused if it may jeopardize the sovereignty or national security of Viet Nam.
- **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. Viet Nam).
- **Urgent Procedures:** There are no urgent procedure provisions.
- **Attendance of Officials:** There are no provisions for the attendance of officials from the Requesting State. Thus, a request for attendance of officials shall be considered in the same procedure with other requests. The Supreme People's Procuracy of Viet Nam shall consult with the competent investigation agency to decide on the matter.

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
VIET NAM

Telephone No: +84 4694 0197
Facsimile No: +84 43942 4381

ii) Under UNCAC: Viet Nam 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's Procuracy
44 Ly Thuong Kiet Street
Hoan Kiem district
Hanoi,
VIET NAM

Telephone No: (+84) - 43825 5058
Facsimile No: (+84) - 43825 5400

C. MUTUAL LEGAL ASSISTANCE TO RECOVER PROCEEDS OF CRIME

a) Treaties

i) Multilateral: Viet Nam is a party to UNCAC and the ASEAN MLAT, which provide for mutual legal assistance to identify and recover proceeds of crime.

ii) Bilateral: Viet Nam has concluded bilateral treaties on mutual legal assistance with Czech Republic, Slovakia Republic (continued obligation from the precedent MLA treaty with Czechoslovakia signed on 14 Feb 1980), Cuba, Hungary, Bulgaria, Poland, Russia, Ukraine, Belarus, PR China, North Korea, South Korea, India, the United Kingdom, Algeria, Indonesia, Australia, Spain, Lao PDR and Mongolia.

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. 101/2015/QH13) and *Penal Code* concerning the restraining and confiscation of proceeds of crime, which may be applicable to a request for assistance.

- **Definition of Proceeds of Crime: Art. 41** of the 2015 *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, illicit earnings from the commission of crime".
- **Identification and tracing: Art. 507** of the 2015 *Criminal Procedure Code* provides that the identification and tracing, seizure, distrainment, freezing, confiscation of proceeds of crime shall be implemented in accordance with the *Criminal Procedure Code* and other relevant legal documents of Viet Nam. The handling of proceeds of crime shall be implemented in accordance with multilateral/bilateral treaties which Viet Nam is a member of.

- **Freezing and Seizure: Art. 129 and 438** of the 2015 *Criminal Procedure Code* provide the grounds and procedure for freezing proceeds of crime of individuals and organizations. Freezing shall be applied to the assets of the accused or other person if there are grounds to believe that proceeds are related to the offense. The seizure is provisioned under Chapter XII of the 2015 *Criminal Procedure Code*.
- **Confiscation:** Under **Arts. 45** of the 2015 *Penal Code*, property confiscation will apply to persons sentenced for offences with a 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: Viet Nam is a party to UNCAC but has declared that it does not consider UNCAC to be a legal basis for extradition. Instead, Viet Nam has declared that extradition shall be conducted in accordance with Vietnamese law, on the basis of treaties on extradition and the principle of reciprocity. Viet Nam ratified UNTOC on 8 June 2012.

ii) Bilateral: Viet Nam has concluded extradition treaties with PR China, Algeria, India, Australia, Indonesia, Hungary, South Africa, Cambodia, Sri Lanka, Spain, of which the treaties with Algeria, India, Australia, Cambodia and Indonesia have come into force. The mutual legal assistance treaties with Lao PDR, Czech, Slovakia, Cuba, Bulgaria, Poland, Russia, Ukraine, Belarus, North Korea, Mongolia, South Korea also contain 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 Viet Nam 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 Viet Nam and the Requesting State.
- **Speciality:** 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 Viet Nam for the offence for which extradition is requested.
- **National:** 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. The Supreme People's Procuracy shall consider and propose to the President of Viet Nam to decide on the death penalty exception. In principle, Viet Nam undertakes that the death penalty will not be carried out.
- **Jurisdiction:** There is no exception where Viet Nam has jurisdiction to prosecute the relevant offence.

iii) Procedure

- **Provisional arrest: Art. 41** of the law on MLA provides that "Upon receipt of official extradition requests of foreign countries, competent bodies of Viet Nam may apply precautionary measures under Vietnamese law and treaties to which Viet Nam is a contracting party in order to ensure consideration of extradition requests". The precautionary measures are regulated under Section I, Chapter VII of the 2015 *Criminal Procedure Code* including detention and 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. Viet Nam).
- **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.