Extradition and Prosecutorial Difficulties Using Extra-Territoriality

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Extradition and Prosecutorial Difficulties Using Extra-Territoriality

By Arvinder Sambei

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This is a paper from the Nautilus Institute workshop "Cooperation to Control Non-State Nuclear Proliferation: Extra-Territorial Jurisdiction and UN Resolutions 1540 and 1373" held on April 4th and 5th in Washington DC with the Stanley Foundation and the Carnegie Endowment for International Peace. This workshop explored the theoretical options and practical pathways to extend states' control over non-state actor nuclear proliferation through the use of extra-territorial jurisdiction and international legal cooperation.

Other papers and presentations from the workshop are available here.

Nautilus invites your contributions to this forum, including any responses to this report.

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I. Introduction

Arvinder Sambei, Director, Sambei Bridger & Polaine Legal and Law Enforcement Specialists, draws on collective experiences to highlight the difficulties in apprehending, extraditing, and prosecuting individuals who have engaged in proliferation related behaviour salient to both counter-terrorism and to controlling WMD proliferation. Her report also highlights cases where extra-territorial jurisdiction and international legal cooperation has worked, where it has failed, and the conditions under which these outcomes were achieved.

The views expressed in this article are those of the author and do not necessarily reflect the official policy or position of the Nautilus Institute. Readers should note that Nautilus seeks a diversity of views and opinions on significant topics in order to identify common ground.

II. Article by Arvinder Sambei

-"Extradition and Prosecutorial Difficulties Using Extra-Territoriality"
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SUMMARY

This paper starts by examining the inter-relationship between extradition and jurisdiction. The practice of extradition, of course, has its roots in the idea of territorial jurisdiction; that is, a state could not prosecute or imprison a person who had committed a crime in the territory of another state, as the courts of the state where the person was found did not have criminal jurisdiction over his conduct. Extradition and jurisdiction are, therefore, inextricably linked. It highlights the different bases of asserting criminal jurisdiction by a state and the mechanisms of extradition.

This paper then goes on to examine the 'failures' of the formal extradition process, namely, the inherent delay in such proceedings. It then examines the practice of removing individuals from the territory of another state and whether such practice can withstand judicial scrutiny and that of the international community. It takes the approach that such practices are counter-productive, violate human rights law, and are meet by international censure rather than consent.

The second part of the paper examines the second measure of international co-operation, namely mutual legal assistance (MLA), which relates to the gathering of evidence located in another state. Counter- terrorism operations, by their very nature, are usually transnational in character and scope; and, as such, require investigators and prosecutors to gather evidence across borders.

The framework created by the now 18 UN CT instruments must be read in conjunction with text of UNSCR 1373, and the topic of mutual legal assistance (and, indeed, extradition) understood in the light of its provisions.

The adoption of UNSCR 1373 on 28 September 2001 gave an impetus never before seen to counter-terrorism measures generally, and to international co-operation in particular. Adopted under Chapter VII of the UN Charter, UNSCR 1373 imposes a number of obligations on member states. Importantly for the purposes of the present paper, although it was adopted in response to the 11 September 2001 terrorist attacks in the United States, the measures UNSCR 1373 sets forth are expressed in a much broader way and, arguably, seek to set new international norms in relation to counter-terrorism co-operation between states.

The critical importance of international co-operation, both MLA & extradition, cannot be underestimated. This was emphasised in the recent statement of the Head of UNODC when he underlined the need to strengthen regional and inter-regional law enforcement. It provides a framework for states to work together regionally and globally when addressing transnational crime, including terrorism and proliferation.

This paper then provides a detailed treatment of the MLA mechanisms and the challenges that, as with those in extradition, may arise within the context of counter terrorism.

In the concluding part, the paper examines the challenges of conducting a proliferation prosecution which include not only the sort of international co-operation obstacles encountered in many counter-terrorism cases, but also those particular problems that arise when attempting to build a case against what is, essentially, the smuggling of nuclear technology set, usually, within the context of a proliferation network. This examination is conducted through a case study and concludes with some lessons learnt, including that export control offences have major limitations and that effective MLA co-operation is vital, but investigations of this sort will inevitably give rise to difficult issues between requesting and requested states.

EXTRADITION & JURISDICTION

Let us begin by considering one of the aspects of international co-operation, namely extradition, the other measures being mutual legal assistance and the seizure & forfeiture of terrorist property.
It may assist to say, at the outset, that when one is speaking of extradition, it refers to the formal process by which states seek the return of individuals, accused or convicted of crimes, to the state where those crimes were allegedly committed. This is in contradistinction to renditions or extraordinary renditions, which have come into sharp focus within the context of terrorism. Rendition refers to the removal of individual(s) in the absence of a formal arrangement between states, whilst extraordinary renditions carry with them the even more draconian consequence namely, the informal removal of individuals with the attendant risk of being subject to torture or cruel and inhumane treatment by the officials of a state (it is, of course, recognised that the state officials referred to may involve officials from a number of states and include those responsible for handing over, removing, detaining and interrogating the individual). It is this process of removal that has been shrouded with controversy and criticism, rightly so. Extraordinary renditions can never be justified in law and are a flagrant abuse of international law and comity.
Let us then turn to consider each of these mechanisms (extradition, renditions, and extraordinary renditions) in more detail and highlight the challenges faced by states when seeking to apprehend those accused of acts of terrorism, within the territory or jurisdiction of the requesting state.
The practice of extradition has its roots in the idea of territorial jurisdiction; that is, a state could not prosecute or imprison a person who had committed a crime in the territory of another state, as the courts of the state where the person was found did not have criminal jurisdiction over his conduct. Extradition and jurisdiction are, therefore, inextricably linked.
Before we turn to look at the principles that govern jurisdiction, it is worth noting that extradition is

essentially a domestic process that seeks to give effect to a bilateral or multilateral treaty (regional or international). It must be emphasised however that there is no obligation in international law for a state to extradite a person found in its territory. It is, and always remains a matter for the requested state to decide if a person is to be surrendered to the requesting state. Extradition is therefore an act of state and does, in most jurisdictions, engage both the executive and judicial processes, leaving particularly in common law countries, for the executive to make the final decision on surrender, albeit with judicial oversight. The involvement of the executive is largely dependant on domestic law and arrangements. Some countries, in particular civil law jurisdictions have no executive involvement in the extradition process as it is regarded entirely as a judicial request.

A request for extradition is usually only acted upon where a treaty or arrangement exists between the requesting and requested state. Even where countries have attempted to move away from the need of a treaty and placing reliance on their own domestic law, it is often the case that treaties will still be seen as the preferred way forward. For example, the UK Extradition Act 2003 does not necessarily place reliance on the existence of a treaty in order to comply with a request for extradition; however a treaty or arrangement, whether general, ad hoc or MOU [1], is still, in practice, required.

Historically, states entered into bilateral treaties in order to secure the surrender of persons. This, of course, had a limited effect, as only parties to the treaty were bound by its terms. As crime became more international in nature and travel became easier, the international community (acting either through the United Nations General Assembly or regionally [2]) adopted a number of multilateral treaties, the 16 (now 18) counter terrorism conventions are such an example.

The United Nations-led arrangements have at their core the idea of extending jurisdiction so that states may assert jurisdiction over crimes which were neither committed on, nor necessarily had any direct effect upon' their territory. These arrangements apply particularly to crimes which affect the international community, for example, hostage-taking, torture, drug trafficking and hijacking aircraft. These United Nations (UN) instruments also invariably contain "*prosecute or extradite*" clauses, i.e. the state is obliged either to extradite the offender or to prosecute him itself. The basic idea is that criminals should not escape trial and punishment simply by absconding to another country.

Before we continue to examine the issues surrounding the surrender of individuals, it may assist to first examine the notion of criminal jurisdiction, that is, a state's competence to legislate and try offenders in its national courts.

The traditional approach of states was that 'all crime is local', more particularly in common law systems, and therefore the courts could only try those matters that occurred within the territory of the state. The primary reason that states did not assert extra-territorial criminal jurisdiction, as stated above was founded in the concept of state sovereignty. It was for each state to try offenders within its own geographical territory(ies) or its own nationals. It was, to put it bluntly, no business of another state to impose or exercise its criminal laws or extend its criminal jurisdiction in another state. It was the narrow approach of states to jurisdiction based on the notion of state sovereignty that led to the birth and development of extradition between states.

The jurisdictional provisions, therefore, of domestic law or universal instruments have a central importance both to criminalisation and to the wider issues of international cooperation, in particular, extradition. It is those provisions which contain, inter alia:

i. Clarity on whether a particular offence should be justiciable before the courts of a state, although, of course, domestic law will provide the answer on whether they actually are;

ii. The 'extradite or prosecute' principle. In other words, aut dedere aut judicare, an area of law where states often face real difficulties.

Principles of Criminal Jurisdiction

A state may assert criminal jurisdiction in one or more of the following ways:

i. Territorial
ii. Active personality (nationality of offender)
iii. Passive personality (nationality of victim)
iv. Protective personality (National security)
v. Universal jurisdiction

The first two bases of asserting jurisdiction have been the bedrock of common law systems, save for piracy which has long been an exception to the territorial rule for criminal jurisdiction under English law.

However, the idea of territorial jurisdiction has been subject to revision over the centuries and in 1927, the Permanent Court of Justice in 'The Lotus case' [3] observed that
"Though it is true that in all systems of law the principle of the territorial character of criminal law is fundamental, it is equally true that all or nearly all these systems of law extend their action to offences committed outside the territory of the State which adopts them, and they do so in ways which vary from State to State. The territoriality of criminal law, therefore, is not an absolute principle of international law and by no means coincides with territorial sovereignty..."
The position under common law, though, remained largely territorial unless jurisdiction was expressly extended by statute. This is in contrast to civil law jurisdictions where the concept of jurisdiction is not seen as a concept separate to, and, from the aspect of statehood or indeed international law. The manner in which common law jurisdictions have sought to extend criminal jurisdiction such that their courts are competent to try matters which otherwise would not be justiciable has been through a number of inroads developed through both common law and statute. This extension allows courts to consider acts or omissions not committed within the territory, hence extending the scope of criminal jurisdiction ('extra–territorial jurisdiction'). However, it must be borne in mind that the extension of criminal jurisdiction by a state is not without its limits and states are not free to legislate over criminal conduct that may have no nexus with a state (save, of course, for crimes under international law, but that too has its limits).

The reader will be aware of the nature of the jurisdictional bases set out above, and the same will not, therefore, be rehearsed herein.

'Extradite or Prosecute' [aut dedere aut judicare]

A key rationale for the jurisdictional provisions contained within the various counter terrorism instruments, is also to give practical effect to the extradite or prosecute obligation, a state must ensure that, where it refuses to extradite, its domestic courts are competent to exercise jurisdiction over an act which took place elsewhere and has no connection with its own citizens or interests other than the fact of alleged offender's presence on its territory. As an example, each of the UN's counter-terrorism instruments that create criminal offences imposes the obligation on a State Party to refer a suspect to its prosecuting authorities in circumstances where it has refused to extradite that suspect to a requesting state. This is further reinforced by UNSCR 1373 which obliges all member states to deny safe haven to those 'who finance, plan, support, or commit terrorist acts, or provide safe havens' [4].
It should be noted, though, that the obligation is not to prosecute come what may; rather, the requirement is that the suspect should be considered for prosecution in the same manner as any other criminal suspect. If there is insufficient evidence to prosecute, then, of course, a prosecution will not be expected to ensue. Thus, the domestic law of the requested state will dictate whether or not there is sufficient evidence to mount a prosecution, and this includes whether or not the matter

is justiciable in the courts of the requested state.
By the same token, though, in a state where there is a prosecutorial discretion whether to prosecute, that discretion may not be used in such a way as to deliberately frustrate the underlying principle.

THE CHALLENGES OF EXTRADITION IN CT CASES

Having considered the general principles of jurisdiction and the rationale for the wider assertion of such jurisdiction, particularly in the context of acts of terrorism, let us now examine whether such an extension allows for effective international co-operation and further whether it permits states to take extra-territorial measures to ensure the presence of those accused of acts before its courts, that is to say, the removal (forcible or otherwise) of the individual outside the extradition regime.
The first question must be as follows: does a state, acting through its agents, have the power to carry out arrests, detention and removal of individuals from the territory of another state? The short answer must be, no.
It has long been recognised that agents of state A do not have a power to arrest in state B, as the procedures for arrest and detention are dictated by the national laws of the country in which the individual resides, permanently or temporarily; therefore, any arrest, detention and removal must be conducted by the agents of that state.
Therefore, if a person is present in the territory of state B, but state A intends to interview or prosecute the individual, the only legitimate routes available to state A are through mutual legal assistance and extradition, respectively. Extradition, as mentioned above is the formal process by which states seek the return of individuals, accused or convicted of crimes, to the state where those crimes were allegedly committed. Co-operation between states is set out in the relevant treaty which apart from creating the legal basis for surrender, dictates the formalities and essential safeguards, such as double criminality, specialty and grounds for refusal, quite apart from those that may be contained within domestic law. Quite often, these may be well beyond those contained in the treaty, and as it is the domestic law of the requested state that applies, it follows that any additional safeguards, grounds for refusal or remedies would apply.
That having been said, practical experience has shown that extradition proceedings, particularly in common law systems, can be protracted, expensive and often lead to lengthy delays in returning suspects. In some instances, it can lead to potential witnesses withdrawing their evidence through intimidation or fear. For example, following the US Embassy bombings in East Africa in August 1998, the US lodged an extradition request to the UK in respect of three individuals, Al-Fawwaz, Abdel Bary & Eidarous for their alleged part in the conspiracy. All 3 suspects were arrested on 27 September 1998. Since their arrest in 1998, there have been a number of hearings in the UK and the matter is now before the European Court on Human Rights. Some 13 years since their first arrest, one of the suspects (Eidarous) has died; the other two are waiting for the matter to be heard at Strasbourg. Similarly, other requests [Abu Hamza (27 May 2004), Babar Ahmad(5 August 2004) , Haroon Rashid Aswat (7 August 2005), Syed Talha Ahsan (19 July 2006)] from the US relating to terrorist related matters are currently before the European Court on Human Rights and are not likely to be heard in the immediate future.
A further example of how the delay in extradition proceedings can frustrate any prosecution in the requesting state is demonstrated by the US extradition request to the UK in respect of Abu Doha (request made in August 2001). The evidence against Abu Doha was primarily from a co-defendant; however, due to the length of time taken by the extradition proceedings, the witness withdrew his statement, leaving the prosecuting little choice but to withdraw the request in August 2005.
These are just some instances where delay in extradition proceedings, mainly in the UK, can lead to frustrating the subsequent prosecution in the requesting state. It is, for example, inconceivable that should Al-Fawwaz and Abdel Bary ever be returned to the US, the length of time of the extradition proceedings will no doubt contribute to the ‘degrading’ of evidence in the US. It is not just the US extradition requests that have met with severe delays; UK’s European partners faced the same

frustrations when seeking to secure the return of those suspected of terrorist acts. A case in point is the French request for Rachid Ramda which took over 10 years to conclude.
Therefore, in an attempt to simplify and expedite a usually complex and lengthy process, the Council of the European Union adopted the European Arrest Warrant (EAW), and was adopted through the Council Framework Decision of 13 June 2002. It has had the effect of replacing extradition proceedings between Member states and is based on the principle of mutual recognition of criminal decisions between Member states, being designed to have a uniform effect throughout the European Union. The main aim of the EAW is to ensure a swift surrender and avoid the delay usually associated with extradition requests.
The adoption of the EAW has hastened the extradition process, but it is not without its own shortcomings. Grave concern and disquiet has been raised by various human rights bodies in the UK such as Justice, Liberty etc, and more recently by Fair Trial International that the adoption of the EAW had led to the removal of a number of bars to extradition, in particular, the safeguards contained in the Human Rights Act 1998. Furthermore, the removal of an essential safeguard in extradition law namely, double criminality [5], in respect of some 32 offences (of which terrorism is such an offence) has been the subject of much debate until it was addressed by the then House of Lords in *Dabas* [6], a request from Spain for offences of 'terrorism' and the earlier case of *Office of King's Prosecutor, Brussels v Cando Armas and another* [7].
The EAW has also been criticised for permitting warrants to be circulated for what may appear to be trivial offences. Prior to the adoption of the EAW in the UK, triviality of the offence provided a ground for challenge, which has now been removed. Recent media reports and public perception that the EAW is being used in circumstances where the offence is so trivial that it would, under any other extradition regime, not warrant an application for extradition on the basis the request would be seen to be a disproportionate measure and to that extent it is a violation of Article 8 of ECHR [8].
Extradition, as a measure of international co-operation in terrorism related requests, is not without its own shortcomings and is often perceived as an ineffective tool. The delays inherent in such proceedings speak for themselves. It must, however, be emphasised that irrespective of the nature of such proceedings and the attendant delays, it must not act as a driver for a state (through its law enforcement agencies) to initiate the removal of individuals outside this framework as it has the effect of denying individuals due process and will, almost inevitably, amount to a violation of human rights.
It is naïve to pretend that removal of individuals from the territory of another state does not have a long history; it does. Given that states have and will engage in such activity when there is a perception of threat, it is hardly surprising to see the deployment of such tactics within the context of terrorism, either with or without the consent of the state in which the individual is present. Of course, some of these removals have been with the consent of the state where the person is present. It is recognised that a state may choose, in the absence of any formal arrangement between itself and the requesting state, to enter into an *ad hoc* arrangement or simply surrender a person on the basis of comity.
The reliance on comity as a legal basis has come into sharp focus in the context of terrorism. Comity (literally, courteousness of nations) is the recognition by one state of the legal procedures and jurisprudence of another. Following the bombing of the US embassies in Kenya and Tanzania, and in particular, after the events of 11 September 2001 states, notably the US, have come under stern criticism for relying on comity [9] rather than a formal extradition request to a requested state. The key concern lies in the fact that a request for surrender based on comity alone has the effect of denying the fugitive any legal protection to challenge the 'request' or to ensure that there are adequate safeguards in place particularly where the offence may attract the death penalty. The only protection available in such circumstances will be whatever happens to be afforded by the national law of the requested state. Such surrenders generally fall foul of human rights considerations and have been the subject of adverse judicial comment in various jurisdictions, irrespective of the consent of the state.

To put it another way, the fact that a state may consent to the removal of person on the basis of comity, and without engaging the extradition process, is not of itself conclusive that the surrender was lawful; equally important is the manner and circumstances in which the removal takes place. Let us, therefore, consider the different guises of rendition/surrender:

- Abduction or kidnapping (Eichmann, Ocalan etc)
- Informal surrender (the recent handover by Kenyan authorities to Uganda of suspects in the Kampala bombing; handover by Bosnia and Herzegovina to the US of six Algerian suspects [10])
- 'Disguised' extradition/luring a person into the jurisdiction [for example, Bennett (UK), Lakhani (US), Vanunu (Israel)].

In each of the instances set out above, the human rights obligations (arbitrary detention, risk of torture, *refoulment* etc) are engaged of either both states or, at the very least, the 'host' state (i.e. the state from which the individual is removed) and actions outside any lawful surrender undoubtedly violate the rights of the individual. The questions we, therefore, need to examine is what remedies, if any, are available to the individual in such instances. The stark reality is that the remedies for such violations are limited indeed, and depend largely on the approach of the national courts. In addition, one must consider the approach of the regional and international human rights bodies as custodians of the various human rights instruments.

1. Did the state from which the individual was removed, consent to such an action? If so, was the individual able to challenge, in a meaningful way, his detention for the purposes of removal or did the surrender take place outside any legal regime or judicial oversight?
2. What remedies does the person have before the national courts of the state where he has been brought for trial (this part does not concern itself with the situation where a person is brought into a state for the purposes of interview/interrogation; that is the remit of MLA).

Let us examine each of these in turn:

Responsibility of the 'host' state

The Constitutional Court of South Africa in the recent case of *Khalfan Khamis Mohamed, Abdrurahman Dalvie and President of the Republic of South Africa and six others [2001]* [11] condemned the handing over by deportation of Khalfan Khamis Mohammed to the US Authorities. Given the significance of this judgment, it is worth considering the facts of this case. Following the US Embassy bombing in Dar-es-salaam, Tanzania on 7 August 1998, Khalfan Khamis Mohammed, a Tanzanian national left Tanzania on 8 August 1998 having obtained a visa from the South African High Commission on 6 August 1998. He entered South Africa by road on 16 August 1998. Upon entry into South Africa he settled in Cape Town and in due course applied for asylum under an assumed name. He was granted temporary residence status.

In the interim, he was indicted in New York for the embassy bombing and a warrant was issued for his arrest on 17 December 1998 by the Federal District Court for the Southern District of New York. The information was then transmitted to Interpol to secure his arrest.

The South African Police Service and the Department of Home Affairs were aware of the US investigation. In August 1999, an FBI agent identified Khalfan Khamis Mohammed (hereinafter referred to as Mohammed) whilst trawling through the South African records for asylum seekers and brought it to the attention of Chief Immigration Officer.

Mohammed was arrested in Cape Town on 5 October 1999 by immigration officers. He was detained and interrogated by South African immigration officers and thereafter handed over to FBI agents for interrogation. He was subsequently removed to New York on 6 October 1999 to stand trial in relation to the Tanzania US Embassy bombing and indicted. If convicted, he faced the death penalty.

During this time he was held at the detention facility near the airport and denied access to a lawyer. Moreover, when his lodgings were searched his flatmate/landlord was informed that Mohammed was being deported to Tanzania and that it would not assist him to be legally represented. Following his removal, his legal representatives sought declaratory and mandatory relief against the government.
The Constitutional Court observed:

The Bill of Rights which we find to have been infringed, is binding on all organs of State and it is our constitutional duty to ensure that appropriate relief is afforded to those who have suffered infringement of their constitutional rights……Republic of South Africa had no authority in law to deport or purportedly to deport or otherwise to remove or cause the removal of Mohammed from the Republic to the US..'
The Khalfan case is an example of instances where, under the veil of co-operation, the actions of the law enforcement agencies, in this case of both South Africa and the US, can and do circumvent due process. Any remedy that may be available to Khalfan in the US is limited (see discussion below). However, it does raise the question of what obligations, if any, contained in the various international human rights law (IHRL) instruments can extend to measures taken by a state's agents in the territory of another state.
Put another way, where agents of state A enter state B and remove individual(s) for the purposes of prosecution, are their actions capable of being scrutinised under IHRL law, and if so, how?
The 'how' aspect has been a vexed question and the subject of much legal debate and judicial opinion from the European Court on Human Rights, the Inter-American Court of Human Rights, and national courts. The key question to be addressed under 'how' is to ask whether it is ever possible for human rights obligations assumed by a state under its domestic law or regional/international treaties capable of being applied to the actions of its agents abroad?
There is, of course, no difficulty where the individual whose rights have been violated is within the territory of a state, he would have a cause of action as the obligation on the part of the state (acting through its agents) is triggered; but is the obligation carried through when the agents conduct themselves abroad, that is to say, does the individual fall 'within the jurisdiction' of a state such that the obligation is triggered? Is 'within the jurisdiction', a wider concept than territory (see discussion above), capable of engaging such rights. It is to this we must now turn in order to determine if the actions of a state are capable of being held to account.

The starting point must be at the international level. The primary source of IHRL is the UN Charter, which specifically recognises human rights in the Preamble; however, the Charter itself remains silent on what rights are recognised and how they are to be enforced. This was not addressed until the adoption of the Universal Declaration of Human Rights 1948 (UDHR), often referred to as the Bill of Rights. The UDHR provides for comprehensive protection for all rights – civil, political, social, cultural, and economic. It was further split into two Covenants, namely, International Covenant on Civil & Political Rights 1966 (ICCPR), and the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR).
The Covenants set out the internationally recognised rights, but provided no mechanism to oversee their enforcement. In respect of civil and political rights this was remedied by the establishment of the HRC under the Optional Protocol to the ICCPR. The HRC was set up to monitor the implementation of the ICCPR by member states, but its competence has been extended to consider, inter alia, individual petitions. The Committee also provides useful guidance on the interpretation and application of the ICCPR through General Comments. In the context of the present discussion, General Comment 31 (revised 2004) is most helpful.
The relevant part of Paragraph 10 of the General Comment provides as follows:
...This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the

territory of the State Party. ..This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory...
So, the test set out for 'within the jurisdiction' is essentially 'effective control' by any organ of the state, including, armed forces. Taking that as the starting point, the International Court of Justice (ICJ) has also considered the question of the extra-territorial application of human rights [12], as have the regional courts, such as ECtHR.
Within the European context, the seminal case is *Bankovi?* and *Others v. Belgium and 16 other Contracting States* [13], a case concerning bombing by NATO of the Radio-Television Serbia (RTS) headquarters in Belgrade in April 1999 during the Kosovo conflict. The relatives of the deceased, and one injured, alleged, *inter alia*, violation of Article 2 (right to life). The Court examined the phrase 'jurisdiction' contained within Article 1 of the Convention and in rejected any jurisdictional link between the applicants and the respondent Member states, and concluded that the Convention must 'be considered to reflect this ordinary and essentially territorial notion of jurisdiction'.
The Court also observed that it had recognised only exceptionally extra-territorial acts as constituting an exercise of jurisdiction, when the respondent state, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercised all or some of the public powers normally to be exercised by that Government.
However, there has been some confusion on this issue as in 2005, the European Court in *Issa & Others v Turkey* [14] delivered its judgment and seems to have shifted its position on the necessary jurisdictional link between a complainant and the state to considering whether the actions of a state could render it liable, and made some interesting observations on the circumstances in which a state could be held liable for actions taken outside its own borders, however temporary those may be provided, 'effective control' was exercised by the state or its agents [15].
The Inter-American Commission on Human Rights in 1999 considered the extra-territorial application of the American Declaration in *Coard et al v the United States* and concluded that where an individual is 'subject to the authority and control' of agents of a state, 'each American state is obliged to uphold the protected rights of any person subject to its jurisdiction'.
The common thread running through all the above decisions, and interpretation of Article 2 of the ICCPR, it is clear that at the international and regional level, the words 'within the jurisdiction' have been given a meaning wider than 'territory' where it can be shown that the state is exercising 'effective control and authority' over the individual.
The House of Lords in the UK was confronted by a similar complaint following UK military operations in Basra, Iraq in *Al-Skeini & Others v Secretary of State for Defence* [16]. The proceedings were brought by the relatives of six Iraqi nationals who had been killed by UK soldiers. In respect of 5 of them, the victims had been killed as a direct result of military operations, however, in the case of the sixth victim, he had been arrested and detained by British soldiers at the UK detention facility in Southern Iraq where it was alleged he was the subject of maltreatment and eventually died as a result of that treatment. The Court considered whether the complainants, residing in Iraq, fell within the ambit of the ECHR and the Human Rights Act 1998 for the purposes of an independent enquiry into the death of their relatives.
Their Lordships found that in the case of the Iraqi national, Baha Mousa, who was held at the detention facility at the time of his death, warranted an independent enquiry into the circumstances of his death and remitted the matter to the Divisional Court. In respect of the remaining 5 Iraqi nationals, the House of Lords concluded that the Convention did not have extra-territorial application in this instance based on the reasoning of the ECtHR in *Bankovi?*. Their Lordships also considered the extra-territorial application of the Human Rights Act 1998 and the majority concluded that the Act had extra-territorial reach, although the reasoning differed to some extent.
The extra-territorial application of human rights was discussed again in *Al –Sadoon & Mufdhi v UK* [17], both in the UK and by the European Court of Human Rights [18]. Both have emphasised that it is only in 'exceptional cases that the acts of the state party performed or producing effects, outside

their territories can constitute and exercise of jurisdiction by them'. At present a number of cases from Iraq are before the ECtHR and it remains to be seen whether the court extends the 'exceptional' circumstances in which the Convention is engaged where conduct takes place outside the territory of the state party.

The position, therefore, at present can be summarised as follows: where a state acting through its agents conducts enforcement activities (arrest, detention, transfer etc) outside its own territory, it will be obliged under human rights law, to afford the same protection to those that come within its jurisdiction as a result of the agents exercising effective control and authority over such individuals. In practice, of course, any remedy that may be available to the individual who has been removed from a country may well be limited.

In such circumstances, the only remedy available to the individual is to challenge, in any subsequent proceedings in the requested state, the basis on which he appears before the national court. Here too, one sees a difference of approach by national courts: at one end of the legal spectrum, the national court may stay the proceedings on the grounds of abuse of process as is the case in the UK and South Africa; at the other, certain states, the US being a notable example, do not look behind the mechanisms used to bring a person before their courts [19], save for two narrow exceptions.

Remedies before the national courts of the 'requested state'

Generally speaking, a national court is competent to exercise its jurisdiction over individuals that appear before it. Until recently, the mechanism by which an individual appeared before the courts was seldom considered and any application for a stay of proceedings usually rejected on the basis that it was no concern of the court to consider the mechanisms by which the person is brought before it. This thinking was largely influenced by the notion that once before the court, the defendant would be afforded the usual protections attaching to the right to a fair trial. Over the years, however, this approach has been rejected in a number of jurisdictions, such as the UK, Canada, South Africa [20]; whilst others, such as the US, adhere to the principle that a court is not precluded from exercising jurisdiction simply on the basis of any irregularity in bringing the person before the court. At present, this divergence in approach is problematic as any remedies available to an individual who has been abducted or lured are limited [21] indeed.

Under the *Ker-Frisbie* doctrine established in the US, once an individual is brought before a court, it can properly exercise jurisdiction over the individual without the need to scrutinise the mechanisms by which the he is brought before it. The rationale being that the individual is then afforded all the protections of a fair trial. However, the courts recognise two narrow circumstances in which a challenge may be brought. First, where the removal of an individual violates an explicit term of an extradition treaty; Secondly, where the removal is accompanied by the use of torture or other 'extreme conduct'. To date, there has been no case in the US where the court has stayed proceedings on the basis of abduction/luring.

By contrast, the UK takes a different approach and in *The Queen v the Bow Street Magistrates ex p Sir Rupert Henry Mackeson* [22], the applicant was accused of offences of fraud committed in May 1979 in the UK. He was at the time residing in Zimbabwe (then Rhodesia), and was deported to the UK in April 1980. Upon his arrival to the UK, he was arrested and charged with offences under the Theft Act 1968. The matter was set down for a committal hearing for 15 January 1981. The applicant lodge judicial review proceedings and sought an order prohibiting any committal from taking place on the basis that the deportation ('veiled extradition') was unlawful. The authorities in Rhodesia, following a request by the Metropolitan Police, for his return in circumstances when there was no extradition arrangement between the two countries had surrendered the applicant. Furthermore, the UK authorities could have applied for his extradition after December 1979 as 'legality had returned to Rhodesia', but the UK authorities chose not to submit an extradition request.

The leading authority on the practice of 'handing over' now is the House of Lords case of *ex p Bennett* [23]. The court was asked to consider the consequences for a prosecution where a person has been removed from a country to the UK in the absence of an extradition arrangement. The question for Their Lordships was whether in the exercise of its supervisory jurisdiction the court has

the power to inquire into the circumstances by which a person has been brought within the jurisdiction and if so what remedy, if any, is available to prevent his trial where that person has been lawfully arrested within the jurisdiction for a crime committed within it.
Bennett was a New Zealand national wanted by the UK authorities for an offence of fraud. He was traced in South Africa but as there was no extradition arrangement between UK and South Africa, a request could not be made. Officers received legal advice to that effect, but decided to liaise with their counterparts in South Africa and Bennett was subsequently sent to the UK by the South African police, apparently in defiance of a South African court order.
By a majority, Their Lordships answered the certified question in the affirmative and in so doing extended the ambit of abuse of process to include the circumstance where there has been a misuse of executive power even where such misuse cannot be shown to have resulted in prejudice to the accused.
The position in South Africa is similar to that in the UK. The Supreme Court in *S v Ebrahim* [24], in allowing the appeal, came to the conclusion that where a person has been abducted by agents of the state, the court lacks jurisdiction to hear the matter on the grounds that the acts of the state agents amount to an abuse of process. The Court further held that the 'the individual had to be protected against unlawful detention and against abduction, the limits of territorial jurisdiction and the sovereignty of states had to be respected, the fairness of the legal process guaranteed and the abuse thereof prevented so as to protect and promote the dignity and integrity of the judicial system. The state was bound by these rules and had to come to Court with clean hands, as it were, when it was itself a party to proceedings and this requirement was clearly not satisfied when the state was involved in the abduction of persons across the country's borders.'

THE INTERNATIONAL FRAMEWORK FOR MUTUAL LEGAL ASSISTANCE (MLA) IN CT CASES

The adoption of UNSCR 1373 on 28 September 2001 gave an impetus never before seen to counter-terrorism measures generally, and to international co-operation in particular. Adopted under Chapter VII of the UN Charter, UNSCR 1373 imposes a number of obligations on member states. Importantly for the purposes of the present paper, although it was adopted in response to the 11 September 2001 terrorist attacks in the United States, the measures UNSCR 1373 sets forth are expressed in a much broader way and, arguably, seek to set new international norms in relation to counter-terrorism co-operation between states. The framework created by the now 18 UN CT instruments must be read in conjunction with text of UNSCR 1373, and the topic of mutual legal assistance (and, indeed, extradition) understood in the light of its provisions.
The framework and procedures within which both formal assistance from state to state via a letter of request (referred to as 'mutual legal assistance') and informal cooperation, typically from investigator to investigator or prosecutor to prosecutor (referred to as 'administrative assistance' or, sometimes, 'mutual assistance') are obtained are sometimes bewildering and very often depend on the attitude and opinions of those 'on the ground' to whom the request is made. That, indeed, is a central and constant difficulty. However, whether formal or informal, the importance of such co-operation cannot be overstated.
Counter- terrorism operations, by their very nature, are usually transnational in character and scope; and, as such, require investigators and prosecutors to gather evidence across borders. However, if for the purposes of criminalisation, and even extradition, ratification and implementation of the UN CT instruments can be said to be '*the foundation of a successful global counter-terrorism strategy…*'[25], the instruments themselves have been slow to provide a detailed framework for investigative and evidentiary co-operation between states. Largely reactive they might be, but the instruments are, nevertheless, the only truly global foundation for international co-operation in terrorism cases. Any discussion of mutual legal assistance must, therefore, pay due regard to them, whilst at the same time recognising that it is the UN CT instruments, regional agreements, bilateral treaties and states' domestic laws which, taken together, have provided the

precondition for building a comprehensive network for co-operation.

Meeting some of the challenges by informal approach

Prosecutors and investigators sometimes have recourse to mutual legal assistance without exploring whether administrative, that is to say, investigator to investigator/prosecutor to prosecutor mutual assistance would, in fact, meet their needs. It is often forgotten that the state receiving the request might welcome an informal approach that can be dealt with efficiently and expeditiously.

Prosecutors must thus ask themselves whether they really need a formal letter of request to obtain a particular piece of evidence.

The general principle is that a formal request should be made for obtaining evidence, and an informal or administrative approach made if seeking intelligence or information. To that may be added the rule of thumb that if the evidence sought is non-contentious or does not require the exercise of a coercive power (such as a court order or search warrant) in the requested state, then most states will usually be in a position to assist on an administrative basis. Typically, that administrative avenue will prove to be much less prone to delay.

The extent to which states are willing to assist even with a formal request does, of course, vary greatly. In many cases, it will depend on a particular state's own domestic laws, on the nature of the relationship between it and the requesting state and, it has to be said, on the attitude and helpfulness of those officials to whom the request is made. The importance of excellent working relationships being built up and maintained trans-nationally cannot be too greatly stressed.

Any consideration of administrative assistance should not overlook the use to which such assistance can be put in order to pave the way for a later, formal, request. It might, for instance, be possible to narrow down an enquiry in a formal letter of request by first seeking informal assistance.

Building Networks

Obtaining material via the route of informal assistance is likely to be more easily achieved if positive and collaborative relationships have been built with key individuals in other states. Such relationships can be developed by investigators and prosecutors by arranging with other states, joint training courses, mutual exchanges of personnel, seminars and regional information exchange sessions.

Further progress can be made by appointing law enforcement liaison officers in other states. Such liaison officers would have to have access, in accordance with the laws of the host state, to all agencies within the state with relevant responsibilities.

If, however, a formal request is needed then it must, generally have a legal basis. Such a basis might be:

- A multilateral convention (such as one of the UN CT instruments or a regional convention);
- A bilateral treaty;
- A voluntary arrangement between states, such as the Scheme Relating to Mutual Assistance in Criminal Matters within the Commonwealth ('The Harare Scheme') for Commonwealth states;
- Domestic law, which may, or may not, impose a reciprocity requirement.

In respect of the above, it should be borne in mind that there is no all-encompassing or 'universal' MLA convention and that assistance may be requested and received in the absence of any treaty agreement and, indeed, in the case of some states, in the absence of any domestic MLA law.

Grounds for refusal: challenges & practicalities

The granting of mutual legal assistance by a state is an exercise of sovereignty. There is, therefore, a general discretion to refuse assistance; although, of course, where MLA is sought on the basis of a treaty, where bilateral or multilateral, that discretion is subject to the obligations contained therein.

The principal difficulties, however, are less outright refusal, but, rather, delay and the often cumbersome process involved in making and executing a formal request. The importance of building 'networks' and of consultation between requesting and requested state is, then, paramount. Indeed, the international imperative is to encourage states to address concerns they might have in executing a request by adopting measures short of outright refusal.

Such measures could include attaching conditions to execution of a request or postponing execution (where, for instance, the enquiries requested would be likely to prejudice an ongoing domestic criminal investigation in the requested state). Moreover, in circumstances where a state is minded to refuse a request, it should notify the requesting state and give reasons, and, where practicable, it should then consult with the requesting state before reaching a final decision (in the hope that the bar to assistance is capable of being resolved through discussion). Indeed this consultative approach is specifically provided for in the MLA provisions of recent instruments.

Different international instruments contain some common and some different grounds for refusal. Similarly, states vary as to the grounds for refusal set out in domestic law and, indeed, different states may take different approaches in relation to the same ground.

It is, for obvious reasons, a basic principle of MLA that a state is able to refuse a request if to execute would be contrary to domestic law. Accordingly, those instruments that address MLA often contain a specific provision to that effect. In addition, though, it is always important to ascertain what grounds for refusal are contained within the national MLA law(s) of the state to whom a request is to be made.

When they sign up to international arrangements to provide MLA (whether bilateral treaties or multilateral conventions), states undertake to give assistance in accordance with the terms of the arrangement. Most, if not all arrangements specify grounds for refusal.

Whether or not assistance is given in response to an individual request for assistance will be a matter for the competent authority of the state from which assistance is sought (usually, but not always, a court or investigating magistrate). If assistance is refused there is usually little, if any, scope for negotiation.

In practice, refusal, even in CT cases, is reasonably rare and is most likely to occur simply because the request cannot be executed at all, perhaps due to insufficient information to establish the whereabouts of the evidence or a witness. Occasionally assistance may be refused for legal reasons, perhaps because in the receiving state the conduct complained of would not be an offence, the assistance sought would not be lawful, or the subject of the request has already been acquitted or convicted of the same offence.

Given that most MLA requests in CT cases will be made pursuant to a treaty, it is worthwhile, though, to have in mind that discretionary refusal powers are found in most MLA treaties, and treaties containing MLA provisions In addition, of course, some instruments and arrangements addressing MLA contain explicit provisions addressing those discretionary grounds for refusal long recognised (through customary law) as being legitimate reasons to refuse a request for assistance.

State/Public Interest

International instruments addressing MLA, whether multilateral or bilateral, will typically contain an explicit provision allowing for assistance to be refused (in relation to a request made in relation on the instrument in question) where to provide assistance would prejudice, or be detrimental to, the requested state's interests.

This ground is not particularly common in practice, save perhaps for national security. It is, therefore, of some importance in the context of the present discussion. Practitioners will usually realise in advance the cases that may trigger this ground. When such a case arises, the requesting and requested states should consult each other to try to resolve the matter and to strike an appropriate balance between international co-operation and the protection of national interests of one state. As always with MLA, dialogue is usually the key.

Political Offence

Denial of assistance in both MLA and extradition cases on the basis of the political offence exception has traditionally posed great challenges; however, its importance in relation to terrorism offences has diminished considerably thanks to the removal of the political offence exception in the universal CT instruments.

Fiscal Offence Exception and Bank Secrecy

Both international treaties and the national law of some states allow refusal of an MLA request on the ground that the offence under investigation is a fiscal one. However, the Terrorism Financing Convention specifically provides at Article 13 that '*..none of the offences set forth in article 2 shall be regarded, for the purposes of extradition or mutual legal assistance, as a fiscal offence. Accordingly, States Parties may not refuse a request for extradition or for mutual legal assistance on the sole ground that it concerns a fiscal offence*.'

Capital Punishment/Human Rights

Many states will refuse MLA assistance if the death penalty could be imposed by the requesting state in the case in question. The determining factor is not that a state retains the death penalty, but rather whether the offence in question is punishable by death. The principle is harder to apply to a request for MLA than to one for extradition, because the request for MLA will usually occur at an early stage in a case, when it may be difficult to say with any certainty whether the death penalty may be imposed.

A requesting authority that is faced with the issue will wish to consider whether the death penalty is, in fact, applicable to the case. It may then wish to consider whether an assurance is able to be given that, in the event of conviction, that penalty will not be imposed in that case. It follows that where, for the requested state, the death penalty is a discretionary ground for denying assistance, then the requesting and requested states should consult each other as a matter of priority in order to try to resolve the issue.

On broader human rights issues, all the authorities involved in making and executing an MLA request are public authorities and, therefore, generally bound by the provisions of relevant international and regional human rights instruments. They must therefore act compatibly with those (e.g. the ECHR) when making a request, and in giving assistance. Even if the MLA treaty in question does not contain a specific ground of refusal on human rights grounds, a request should be refused if to execute it would be to bring about an unjustified breach of a qualified right or a breach of an absolute right.

Extraterritoriality

For some states, there may be special restrictions in executing MLA requests in cases where the underlying offence occurs outside the territory of the requesting state. Of course, this is as particular issue in CT cases, since the international response and the obligations of states are predicated on allowing 'no safe haven' and most states have extraterritorial jurisdiction provided for in national CT law to enable them to prosecute crimes that have taken place on the territory of another state. Although there is no escaping the potential difficulty that extraterritoriality can cause to some states in this regard, one has to say that if national laws properly reflect the obligations imposed by the international CT framework, international co-operation through MLA should not be unduly restricted.

PARTICULAR PROBLEMS EXPERIENCED IN MUTUAL LEGAL ASSISTANCE SOUGHT IN COUNTER-TERRORISM CASES

If a counter-terrorism investigation also involves an allegation of corruption implicating an influential or powerful figure in the requested state, the assistance sought may never be provided. The requested authority might even cite "national interest" or immunities enjoyed by certain sections of the community, for example, Ministers of the government or judges.

This challenge is not an easy one to overcome. However, some practical steps can be taken. First, as much information and detail should be obtained as to who in the requested state may be trusted, and

as to what are the most accurate sources of information. It might be that embassies in the requested state will be in a position to answer this, but, for instance, the requesting state's FIU might also be able to assist. Second, the requesting authority must get to know the requested state itself in the widest sense, particularly its political and legal systems, whilst putting aside any prejudice or preconceptions. The same applies to the officials themselves who will be liaised with during the process. Third, the requesting state can seek assurances from the requested state. Although assurances are sometimes broken, there is always pressure on a state to ensure that guarantees are respected. Fourth, there can be a reminder given to the requested state that there is always a next time. That the requested state today may well be tomorrow's requester is always a powerful motivator; indeed, it is one of the unspoken driving forces in international co-operation.

It should be noted in respect of terrorism financing investigations that in some states the person in respect of whom the request for mutual legal assistance is made is able to appeal against the sharing of evidence with the requesting state. When such an appeal is available it may well cause lengthy delay and, of course, alert the target. In those European jurisdictions which have traditionally enjoyed favourable tax and banking conditions, for instance Liechtenstein and Switzerland, an appeal avenue is available in relation to the disclosure of information about a person's financial position, although not, generally, at the interlocutory or investigative stage. In those states, in addition, institutions such as banks may have similar rights of appeal.

Search and/or seizure generally can be problematic. Essentially, the authority making the request should be careful to provide as much information as possible about the location of the premises. Although some states have introduced more far-reaching powers in this regard to assist in the investigation of terrorist offences and suspects, it must be remembered that different jurisdictions set different thresholds. Search and seizure is a powerful weapon for investigators. It must be assumed that the requested state will only be able to execute a request and search/seizure if it has been demonstrated by the request that reasonable grounds exist to suspect that an offence has been committed and that there is evidence on the premises or person concerned which goes to that offence. These "reasonable grounds" should be specifically set out within the letter therefore. Generally, it will not be enough simply to ask for search and seizure without explaining why it is believed the process might produce evidence. For requests within Europe, it is undeniably good practice to have written regard to the core principles of the ECHR, namely necessity, proportionality and legality. Interference with property and privacy in European countries is now frequently justified only if there are pressing social reasons, such as the need to prosecute criminals for serious offences. Even if all these factors are addressed it may well be that the searching of the person and taking fingerprints, DNA other samples will have less chance of success in some jurisdictions. Accordingly, any state making a request to any other state, whether in Europe or not, should address the issue of fundamental/human rights, the nature of any breaches which execution of the request might bring about, the legal basis for such a breach, and why, in the particular circumstances of the investigation which is in hand, the breach is justifiable.

Sensitive information contained within an MLA request

There are likely to be extremely sensitive aspects to many counter-terrorism investigations. It may also be that, in a given case, sensitive information needs to be included in a formal request for assistance in order to satisfy the requested authority. At the same time, the disclosure of prospective witnesses and other information that could be exploited by terrorist groups or their sympathisers needs to be weighed in the balance. In reality, the system for obtaining mutual legal assistance, globally, is inherently insecure. The risk of unwanted disclosure will be greater or lesser depending on the identity of the requested state. When considering the issue, those making the request must have regard to the duty of care issues which arise. Sometimes, difficulties can be avoided by the issuing of a generalised letter which leaves out the most sensitive information, but provides enough detail to allow the request to be executed. Exceptionally, consideration can be given to the issuing of a conditional request for mutual legal assistance; in other words, a request

that is only to be executed by the requested authority if it can be executed without requiring sensitive information to be disclosed.

Adducing evidence obtained from abroad

As set out above, it is always advisable for the requesting state to ask the requested state's authorities to allow the evidence sought to be gathered in the form usually expected by the requesting state's courts. However, this may not always be possible. Some, but not all states, have enacted provisions allowing the admission into evidence of material not in a form which would be regarded as the prescribed form if the evidence had been gathered domestically, subject to any other exclusion arguments which might be mounted.

Challenging a Refusal to Execute a Letter of Request

International co-operation, whether by way of formal MLA or an informal request, depends in very large part on goodwill, a willingness to assist and the recognition that today's requested state might be the requesting state tomorrow. What then can be done in the event of a refusal to execute a request?

If a letter of request is issued on the basis of comity, without the force of a treaty obligation, the requested state will be at liberty to refuse to execute if it is unwilling to co-operate. However, if the request is made in reliance upon a treaty, whether bilateral or multilateral, an unjustified refusal will put the requested state in breach of its treaty obligation. Such a course may well risk embarrassment and might prompt executive or diplomatic pressure to accede to the request. However, if a state remains steadfast in its refusal there is, in practical terms, little that can be done. Depending on the instrument concerned, the matter may be put before the conference or assembly of the States Parties and might result in censure, or it might be referred to the organisation or body with 'ownership' of the instrument in question. Either way, rebuke and little more will be the outcome.

A further avenue that a requesting state might go down is to bring an action before the International Court of Justice (ICJ) [26] in The Hague. Indeed, just such an action was brought before the ICJ brought by Djibouti against France: *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)* [27].

On 9 January 2006 the Republic of Djibouti, Djibouti filed an application against France before the on the basis of '*the refusal by the French governmental and judicial authorities to execute an international letter of request regarding the transmission to the judicial authorities in Djibouti of the record relating to the investigation in the Case against X for the murder of Bernard Borrel*'.

This was the first time that a requesting state had commenced proceedings against the requested state for failure to provide assistance in response to an MLA request and is therefore of key significance.

In its application Djibouti claimed that the refusal constituted a violation of France's international obligations both under the Treaty of Friendship and Co-operation signed by the two states on 27 June 1977 and the Convention on Mutual Assistance in Criminal Matters between France and Djibouti dated 27 September 1986.

The second claim by Djibouti was that in summoning of certain internationally protected nationals of Djibouti, including the Head of State, as témoins assistés, legally represented witnesses, in connection with a criminal complaint for subornation of perjury against X in the Borrel case, France had violated its obligation to prevent attacks on the person, freedom or dignity of individuals enjoying such protection.

On 4 June 2008, the International Court of Justice (ICJ) rendered its judgement in the case. In its Judgment, the Court unanimously found that France failed to meet its international obligations by not giving the reasons for its refusal to execute a letter of request issued by Djibouti in 2004. The Court also determined that its finding of this violation constitutes appropriate satisfaction. The Court did not uphold any of the other final submissions presented by Djibouti.

Receiving Foreign Material into Evidence in the Requesting State

Since the procedural and evidence-gathering laws of states differ considerably, the requesting state may require special procedures (such as statements under oath, notarised affidavits, or audio/video recorded interviews of suspects) that are not recognised under the law of the requested state.

This has posed a difficulty for a requesting state, since the general principle has always been that the requested state will give primacy to its own procedural law.

That principle has led to practical problems, in particular when the requesting and the requested states represent different legal traditions. For instance, the evidence transmitted from the requested state may be in the form prescribed by its laws, but such evidence may be unacceptable under the procedural law of the requesting state.

The solution is really twofold: the requesting state should ask for its procedure to be applied in the evidence-gathering process, insofar as it is not inconsistent with the laws of the requested state, and, in any event, each state should seek to put into their national law a provision (with appropriate safeguards on admissibility etc) allowing evidence from abroad to be adduced in a form other than that usually required by its procedural law.

THE CHALLENGES OF INTERNATIONAL CO-OPERATION IN PROLIFERATION PROSECUTIONS

The challenges of conducting a proliferation prosecution include not only the sort of international co-operation obstacles encountered in many counter-terrorism cases, but also those particular problems that arise when attempting to build a case against what is, essentially, the smuggling of nuclear technology set, usually, within the context of a proliferation network.

A Case Study: The Khan Network [28]

It is the A.Q. Khan network that globally has provided prosecutors and law enforcement with much of their learning; therefore, for present purposes, it is on that network that we will focus.

The background is well-known and will not be rehearsed in detail here, save to say that Abdul Qadeer Khan is a Pakistani nuclear scientist who, it is alleged, built a network of contacts and engaged upon technology smuggling operations, following his return to Pakistan from The Netherlands in 1976. It was Khan who provided Pakistan with uranium technology (as an alternative to plutonium) when he brought with him the plans for uranium centrifuges used at an enrichment facility in The Netherlands, along with a list of suppliers of the required components.

More than thirty suspects have been investigated with law enforcement operations undertaken in a number of jurisdictions, including Germany, Switzerland, South Africa and the UK. However, such enquiries have resulted in limited, or rather, uneven, success: a defendant in Germany was convicted and received 7 years' imprisonment, whilst, in other jurisdictions, the sanctions imposed have been much more limited. Further, in some Asian and Middle-Eastern states, prosecution decisions appear to have been politicised, with pre-trial detention (including, house arrest in Pakistan for Khan himself, and detention under internal security provisions in Malaysia for B.S.A. Tahir, one of Khan's deputies).

Meanwhile, the network has provided assistance to nuclear weapons programmes not just in Pakistan, but in Iran, Libya and South Korea. In Pakistan, the capability to produce nuclear weapons has been based on the very technology brought from The Netherlands, whilst, since 1987, Pakistan has been able to produce highly enriched uranium for its weapons programmes.

What then of the attempts to prosecute members of the network and the lessons to be drawn therefrom?

The German case of the engineer Gotthard Lerch is instructive. Lerch was sentenced to five and a half years imprisonment in November 2008 for providing assistance to Khan's network. However, that conviction came after three previous attempts to prosecute him had failed.

The first investigation of Lerch took place in 1987. He had left his native Germany for Switzerland and had there set up a mechanical engineering company, which started producing vacuum systems for use in uranium enrichment centrifuges. It was whilst working for the German engineering contractor Leybold that Lerch had first come into contact with Khan. It was suspected by the

German authorities that, having maintained contact with Khan, Lerch had assisted him in procuring components for Pakistan's programme and had now become a European supplier to him at a time when Khan was assisting Iran and North Korea.
The German investigators believed that Lerch had smuggled plans and blueprints for the vacuum systems into Switzerland and sought to collect evidence that would result in a prosecution for breaching German export control laws and for misappropriating classified information. To that end, they sought judicial assistance from the Swiss; however, with the investigation stretching to 1990, Switzerland then refused to provide any further assistance as lapse of time had rendered the matter statute of limitations-barred. That, it should be said straightaway, is not an uncommon problem: most civil law states have a time period prescribed by law beyond which (i) an investigation (usually between 6 and 24 months) and (ii) a prosecution cannot extend. Even though, in some states, there is provision for the time period to be suspended pending the execution of an MLA request, the delay often consequent on seeking assistance is a very real practical difficulty.
In the absence of the Swiss evidence, the German prosecutor's case was substantially fettered. The case had to rely instead on business documents and financial records, coupled with evidence of the nature and capability of the vacuum systems produced. It is worth noting that, at this time, the German prosecutor had to use offences falling under export control laws, which were, of course, intended to criminalise exporters who had failed to disclose the actual nature of a consignment, rather than proliferation networks (hence, for instance, the short limitation of time). Unsurprisingly, therefore, the case never proceeded to a trial on the facts.
A second attempt at prosecution of Lerch took place between 1990 and 1992. Indeed, the German Parliament even took the step of amending the Federal Law Regulating Weapons of War in order to provide greater mechanisms for the investigators. Evidence was obtained as to the smuggling of plans by Lerch and as to his connections with Khan and Pakistan. Accordingly, charges of misappropriation of blueprints and carrying out illegal export to Pakistan were laid. However, again, Switzerland refused to provide physical evidence located within its territory. The result was that both the importing of weapons charge and that of misappropriation were dismissed.
The third investigation into Lerch ran for almost nine years, but was thwarted in 2006. It was alleged that Lerch had contributed to the proliferation of nuclear weapons by organising, supervising and supplying Khan's network in its construction of a uranium enrichment gas feed system (in South Africa), which was for onward shipment to Libya.
In 2004, having been furnished with evidence from the interdiction by the US of the German vessel BBC China and from the Libyan authorities, the German prosecutor sought the extradition of Lerch from Switzerland in November 2004. After an initial delay, Switzerland agreed to the request, but sought to impose conditions that would, in the event, prove fatal to the prosecution case. The first condition was that Germany should return the Swiss national Urs Tinner, then recently placed in custody on suspicion of assisting the Khan network. The German prosecutor had intended to adduce evidence from Tinner implicating Lerch.
The second condition was that the prosecutor drop an allegation of treason against Lerch that formed part of the extradition request. It has to be said that the inclusion of such a charge was designed to allow Lerch to be tried by the highest court of first instance; to that extent, it was being deployed as a 'tool'. Switzerland relied on its bilateral extradition treaty with Germany which, of course, provided for refusal of an extradition request when the extradition crime is political. This condition was acceded to and the practical effect was that a local prosecutor, rather than a specialist federal prosecutor, took conduct of the case, and that a court which, by the trial judge's own admission had neither the resources nor the experience for such a case, heard it.
A further setback to the prosecution also occurred when evidence from B.S.A. Tahir (a 'lieutenant' of the Khan network) was unable to attend court in Mannheim as he remained in detention in Malaysia, with the Malaysian authorities unwilling to provide for his attendance in person. An affidavit setting out Tahir's evidence was provided to the German prosecutor, but that alone (without the witness being present for cross-examination) was insufficient and the affidavit could not be adduced under

the German Criminal Procedural Code.
Requests for judicial assistance to obtain business documents relating to Lerch were also made by the court in Mannheim to both Switzerland and South Africa, but were refused. Further requests to US and UK intelligence to use evidentially material held by them were also refused on grounds of national security.
Accordingly, the court dismissed the case in July 2006, but imposed conditions on Lerch, which included an obligation to reside in Germany to avoid the need for a future extradition request should the investigative file be re-opened against him.
That case was re-opened in mid-2008 by the German prosecutor, following an assurance of assistance from the Swiss. A case was brought before the State Security Council of the High Court of Stuttgart. Lerch was convicted of providing technical assistance and input for the purpose of the construction of centrifuge equipment in South Africa. As before, the intended destination of the apparatus was Libya. Lerch received five and a half years' imprisonment.

It should be noted that in this fourth attempt at a prosecution:

- The High Court of Stuttgart had jurisdiction (following an amendment to the procedural law);
- Both Switzerland and Liechtenstein co-operated fully and executed the requests made of them, furnishing bank and business records, as well as (in the case of Switzerland) physical evidence;
- Libya provided evidence by way of financial records setting out the payments made to Lerch;
- A UK national, Peter Griffin, gave evidence against Lerch. Griffin himself had been the subject of investigation in the UK for his part in allegedly supplying Khan's network for the benefit of Libya.

Lessons Learnt

Wider lessons may be drawn from this, and other proliferation prosecution cases (including the South African cases of Gerhad Wisser and Daniel Geiges, the Swiss investigation into the brothers Urs and Marco Tinner, and the UK investigation into Peter Griffin):

- Export control offences have major limitations when applied to proliferation cases. Such offences are, in any event, complex. If to be utilised in proliferation cases, export control expertise must be present within the prosecuting team.
- Effective MLA co-operation is vital, but investigations of this sort will inevitably give rise to difficult issues between states (particularly where national security or other national interests are perceived to be at risk). Thus, consultation in advance of the issuing of a formal letter of request should be regarded as a prerequisite, along with ongoing consultation between requesting and requested state throughout the process.
- Extradition requests, and the choice of charges, need to be carefully framed.
- Globally, likely sanctions in the event of criminal conviction vary widely and sentences imposed may not always be effective and dissuasive.
- A state may have to make a difficult choice between maintaining ongoing intelligence gathering and mounting or supporting a criminal prosecution.
- Measures complementary to prosecution, such as the freezing of assets pursuant to UN Security

Council Resolutions, are equally important in order to create an effective deterrent.

III. References

[1] Recent UK-Rwanda MOU [14.12.2006 amended 22.12.2006]
[2] 1957 European Convention on Extradition (the "ECE"),
[3] The Lotus case concerned a criminal trial resulting from a collision between a French steamer (the SS Lotus) and a Turkish vessel, the SS Boz-Kourt which occurred in August 1926. As a result of the accident, 8 Turkish nationals drowned. The case was presented before the permanent Court of International Justice, the then judicial branch of the League of Nations. The central issue was whether Turkey had jurisdiction to try the French officer who had been on watch duty at the time of the collision. The incident had occurred on the high seas and France claimed that only the state whose flag the vessel flew had jurisdiction to conduct the trial. The court, however, rejected that argument and found that there was no rule in international law which prohibited the taking of an extended jurisdiction and that a sovereign state, in that regard, was able to take jurisdiction as it wished so long as, by so doing, it did not breach an express prohibition in, for instance, a formal instrument.
[4] Paragraph 2(c) of UNSCR 1373
[5] At the heart of any extradition request lays the notion of an ‘extradition crime’, which is predicated on the rule of double criminality, itself long been regarded as one of the key safeguards in extradition, in that, if conduct did not amount to an extradition crime then no extradition could lie.
[6] [2007] UKHL 6
[7] [2004] EWHC 2019 (Admin)
[8] Sandru v Romania [2009] EWHC 2879 (Admin) it was alleged that S had stolen and killed ten chickens from a neighbour for which he was sentenced in his absence, to three years’ imprisonment.
[9] Examples include the removal of the Embassy bombing suspects from Kenya (Odeh & Owalhi) by the US; Mohammed Khalfan from South Africa, a suspect of the Tanzania Embassy bombing; more recently Kenya simply handed over the suspects of the bombing in Kampala (2010) without due process and on the basis of comity
[10] the Human Rights Chamber (2002) in considering an application in relation to Lakhdar & others criticised the handing over of four Algerians to the US in the absence of a request for extradition and found that a diplomatic note, without more, cannot be the basis of a valid extradition request, and the absence of any indictment in the US did not ' fulfil the requirements for a formal extradition of persons who have been charged or convicted as provided for in Chapter XXXI of the Code of Criminal Procedure of the Federation of Bosnia and Herzegovina (see paragraphs 87 to 92 above)...'
[11] CCT 17/01
[12] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004 p136 (see paragraphs 109 – 111) 9 July 2004; Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation) Provisional Measures, 15 October 2008 (final judgment to be handed down on 1 April 2011).
[13] Application no. 52207/99; [11BHRC435]
[14] Application no. 31821/96
[15] Ocalan v Turkey [2003]ECHR125
[16] [2007]UKHL 26.
[17] [2009] EWCA Civ 7
[18] Application no. 61498/08
[19] U.S v Alvarez-Machain, (15 June 1992) 504 U.S 655 (1992)
[20] S v Ebrahim (1991) (2) SA 553

[21] US v Lakhani 480 F 3d 171
[22] Divisional Court, 25 June 1981 (unreported)
[23] R v Horseferry Road Magistrates' Court ex p Bennett [1994] 1 AC 42; R v Horseferry Road Magistrates' Court ex p Bennett (No 3) [1995] 1 Cr App R 147;
[24] 1991 (2) SA 553 (A)
[25] 'Preventing Terrorist Acts: A Criminal Justice Strategy', Terrorism Prevention Branch, UNODC, at p37
[26] Principal judicial organ of the United Nations.
[27] Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), Judgment, I.C.J. Reports 2008, p. 177.
[28] The factual details set out owe much to the articles carried in 'WMD Insights': Issues March 2006, December 2007 and January 2010

IV. Nautilus invites your responses

The Northeast Asia Peace and Security Network invites your responses to this essay. Please send responses to: bscott@nautilus.org. Responses will be considered for redistribution to the network only if they include the author's name, affiliation, and explicit consent.
