Sharing Evidence across Borders: the Human Rights Challenge

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I. Introduction

Since the pivotal European Court of Human Rights decision in *Soering*,[1] a state cannot ignore the human rights consequences that might befall an individual whom it extradites. There has been a growing recognition of the obligations under international human rights law that an extraditing state owes to an extraditee. However, extradition is only one aspect of the web of international legal cooperation that states use to investigate, prosecute and punish criminals whose activities extend beyond national borders.

Before a state requests an individual's extradition, it may have already worked closely with a number of states to gather evidence about the alleged offence through mutual legal assistance and direct cooperation between law enforcement agencies. This sharing of information across international borders can have a significant impact on individuals' rights and freedoms; without their knowledge, their property could be searched, witnesses summoned to give evidence and email account details exchanged in order to build briefs of evidence against them. In many cases, this is a legitimate way of ensuring that offenders are not able to avoid prosecution by crossing international borders. However, in some cases, this evidence can be used to expose an individual to a range of human rights abuses, including an unfair trial, the imposition of the death penalty or torture.

Traditionally, the sharing of evidence through either mutual legal assistance (MLA) or law enforcement cooperation has not been seen as governed by specific international human rights law obligations. However, the intrusive nature of this area and its increasing prevalence suggest that there may be attempts to expand the application of international human rights law obligations to cover mutual legal assistance and law enforcement cooperation. As one commentator has stated:

> It takes no great prescience to predict that at some point in the future there could be a Soering-type case where an adjudicative body will be asked to pronounce on whether the provision of mutual legal assistance for an investigation in some State will violate the requested State's human rights obligations.[2]

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1 *Soering v United Kingdom* (1989) 161 Eur Court HR (ser A) (*'Soering'*).

2 Robert J Currie, 'Human Rights and International Mutual Legal Assistance: Resolving the Tension' (2000) 11 *Criminal Law Forum* 143, 149.

Indeed, the United Nations (UN) Human Rights Committee has shown an interest in mutual legal assistance by including recommendations about MLA in their concluding observations on Australia.[3]

The use of MLA and law enforcement cooperation has become increasingly important for states as criminal activities become increasingly global. The growing enthusiasm for these investigative and prosecutorial techniques can be seen in the fact that modern treaties on transnational and international crime include provisions on MLA and law enforcement cooperation.[4] However, this increased enthusiasm for MLA and law enforcement cooperation has not necessarily been matched by an increased vigilance in the regulation of the way in which these tools can have an impact on human rights. For this reason, it may seem logical to argue that there are human rights obligations in the international human rights treaty framework that should apply to MLA and law enforcement cooperation.

However, before adopting such an interpretation of international human rights law, it is important to consider whether there really is a lacuna in the current human rights protections and, if so, whether international human rights law is the appropriate vehicle for improving the protections. This paper outlines the legal framework of bilateral and multilateral instruments on criminal law in which MLA and law enforcement cooperation are conducted and the human rights protections that are already incorporated in the framework.[5] It then analyses the legal arguments that could be made in favour of applying certain international human rights law obligations to MLA and law enforcement cooperation to assess whether this is a legally sound and desirable course to pursue. The paper focuses on treaty-derived international human rights law obligations on civil and political rights, particularly the International Covenant on Civil and Political Rights[6] and the UN Convention against Torture.[7] The discussion will centre on fundamental human rights that have been recognised as attracting states' obligations not to extradite an individual: the right to life; the prohibition on torture; and the prohibition on cruel, inhuman or degrading treatment or punishment.[8]

II. What Are Mutual Legal Assistance and Law Enforcement Cooperation?

(a) Mutual legal assistance

Mutual legal assistance is the formal government-to-government process of sharing evidence about criminal investigations or prosecutions between states. The types of

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3 Human Rights Committee, *Concluding Observations of the Human Rights Committee: Australia,* 95th sess, UN Doc CCPR/C/AUS/CO/5 (7 May 2009) [20].

4 For detailed discussion, see the sections below on human rights protections under the MLA and law enforcement criminal law framework.

5 This framework shall be referred to as the 'international criminal law' framework.

6 International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR').

7 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) ('Convention against Torture').

8 This is discussed further below.

assistance that can be provided through MLA include: service of documents; search and seizure; restraint and confiscation of proceeds of crime; provision of telephone intercept material; and the facilitation of taking of evidence from witnesses.[9] Depending on the nature of the assistance sought and the domestic laws of the relevant states, some MLA requests may require judicial authorisation and others may be able to be executed through administrative and law enforcement channels.

Mutual legal assistance developed as an adjunct to extradition, with the first MLA provisions being found within treaties on extradition.[10] Mutual legal assistance as a standalone concept is a comparatively recent development in international criminal law, and the European Convention on Mutual Assistance in Criminal Matters of 1959[11] is the first multilateral treaty on the subject.[12] Some states require the existence of a treaty before they are able to make or receive MLA requests, whereas others (such as Australia) do not require a treaty and can rely solely on provisions in domestic law.[13] In any event, many states have negotiated bilateral MLA treaties and numerous multilateral treaties on transnational crime include provisions on MLA.[14] The MLA process is therefore governed by a combination of domestic law and bilateral and multilateral treaties on international crime.

As a legal process, MLA is not well understood beyond the comparatively small number of practitioners who work in the area, almost all of whom work for government. As McClean explains, mutual legal assistance 'lies rather forlornly in a no man's land between private international law on the one hand and criminal procedure on the other.[15] As MLA is often conducted during the course of an investigation and can contain sensitive information, the existence of requests is frequently kept confidential.[16] It is therefore not surprising that MLA has not received a great deal of attention in the international human rights law area.

(b) Law enforcement cooperation

Law enforcement cooperation refers to the sharing of information directly between law enforcement agencies, such as police, customs authorities or financial intelligence units. Unlike MLA, it does not necessarily involve a formal government-to-government request and is generally not governed by international treaties. Instead, law enforcement cooperation occurs through a variety of

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9 Model Treaty on Mutual Assistance in Criminal Matters, GA Res 45/117, UN GAOR, 45th sess, 68th plen mtg, UN Doc A/RES/45/117 (14 December 1990) annex ('Model Treaty on Mutual Assistance in Criminal Matters') art 1(2).

10 David McClean, *International Co-operation in Civil and Criminal Matters* (Oxford University Press, 2002) 161.

11 European Convention on Mutual Assistance in Criminal Matters, opened for signature 20 April 1959, 472 UNTS 185 (entered into force 12 June 1962) ('European Convention on Mutual Assistance').

12 McClean, above n 10, 161.

13 See, eg, Mutual Assistance in Criminal Matters Act 1987 (Cth) s 7.

14 See detailed discussion below on multilateral arrangements on MLA.

15 McClean, above n 10, 153.

16 See, eg, Model Treaty on Mutual Assistance in Criminal Matters, UN Doc A/RES/45/117 annex art 9.

mechanisms. Some law enforcement agencies have memoranda of understanding with their counterparts in other states and others may have less formal relationships based on personal or historic ties with foreign agencies.[17] In these circumstances, the limits on the type of information that can be shared and the manner in which it should be provided are largely governed by domestic laws of the relevant states as well as the non-binding terms of relevant memoranda of understanding.

Law enforcement cooperation can also be facilitated through intergovernmental organisations such as the International Criminal Police Organisation (Interpol) and the European Police Agency (Europol). These organisations facilitate the sharing of information through a network of liaison officers and shared databases. Similarly, national customs authorities are able to share information through the World Customs Organization, which dates back to 1953.[18]

III. What Human Rights Protections Exist under the International Criminal Law Framework for MLA?

Since MLA originally developed as an ancillary process to extradition, much of the MLA legal framework is adapted from the extradition framework, including the way in which MLA approaches human rights protections.[19] This means that, while MLA is a comparatively recent development in international legal cooperation, its approach to human rights has been drawn from the older practices of extradition law. Extradition law predates the post Second World War development of international human rights treaty law as we know it.[20] It is therefore unsurprising that its approach to human rights protection does not always neatly align with modern understandings of international human rights.

The main way in which human rights are protected in the context of MLA is in the provision of grounds for refusing requests,[21] as well as in the threshold question that a State makes about whether or not to enter into an MLA relationship with another State (be that through treaty or less formal means). This section will first consider the protections provided in bilateral treaties and then those that are provided in multilateral and regional treaties.

(a) Bilateral framework

The way in which each State chooses to negotiate treaties on mutual legal assistance varies. However, the UN Model MLA Treaty gives a good indication of MLA treaty-making practice since many bilateral treaties draw on its provisions. It was developed as a tool for states to use in the negotiation of bilateral MLA treaties and

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17 Ilias Bantekas and Susan Nash, *International Criminal Law* (Cavendish Publishing, 2nd ed, 2003) 262.

18 McClean, above n 10, 162.

19 McClean, above n 10, 160.

20 William Gilmore, 'The Provisions Designed to Protect Fundamental Rights in Extradition and Mutual Assistance in Criminal Matters Treaties' in *International Co-operation in Criminal Matters: Balancing the Protection of Human Rights with the Needs of Law Enforcement: Papers from the 1998 Oxford Conference* (Commonwealth Secretariat, 2001) 67, 67.

21 Ibid 69.

was first adopted by the General Assembly on 14 December 1990[22] with an updated text being adopted in 1998.[23] The commentary on the Model MLA Treaty provides useful explanation, but does not have any official status nor has it been formally endorsed by states.[24] This section will consider the provisions of the Model MLA Treaty and provide illustrations of where the model treaty is reflected in bilateral treaties between various countries.

Article 4 of the Model MLA Treaty provides a number of discretionary grounds for refusal. These include where the requested State 'is of the opinion that the request, if granted, would prejudice its sovereignty, security, public order (*ordre public*) or other essential public interest'.[25] This ground has been included in many bilateral treaties.[26] The public order and essential interest ground for refusal could potentially cover human rights issues.[27] The commentary to the Model MLA Treaty notes that this may be 'considered a sufficient and flexible protection for essential and fundamental interests which may include some of the specific grounds outlined below it. The parties could consider adopting that approach as opposed to reflecting a series of specific grounds'.[28] Negotiations on the MLA provisions of the United Nations Convention against Transnational Organized Crime[29] seem to indicate that fulfilment of at least some international human rights law obligations may fall

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22 Model Treaty on Mutual Assistance in Criminal Matters, GA Res 45/117, UN GAOR, 45th sess, 68th plen mtg, UN Doc A/RES/45/117 (14 December 1990).

23 Mutual assistance and international cooperation in criminal matters, GA Res 53/112, UN GAOR, 53rd sess, 85th plen mtg, Agenda Item 101, UN Doc A/RES/53/112 (20 January 1999, adopted 9 December 1998).

24 United Nations Office on Drugs and Crime, *Revised Manuals on the Model Treaty on Extradition and on the Model Treaty on Mutual Assistance in Criminal Matters* (2002). <http://www.unodc.org/pdf/model_treaty_extradition_revised_manual.pdf>. This manual was developed by the United Nations Office on Drugs and Crime and an Intergovernmental Expert Group Meeting.

25 Model Treaty on Mutual Assistance in Criminal Matters, UN Doc A/RES/45/117 annex art 4(1)(a).

26 See, eg, Treaty between the Republic of Indonesia and the People's Republic of China on Mutual Legal Assistance in Criminal Matters, Indonesia-China, signed 24 July 2000, <http://www.oecd.org/dataoecd/27/55/39882994.pdf> art 4(1)(c) ('Treaty between Indonesia and China'); Treaty between Japan and the United States of America on Mutual Legal Assistance in Criminal Matters, signed 5 August 2003, <http://www.mofa.go.jp/region/n-america/us/treaty0308.pdf> (entered into force 21 July 2006) art 3(1)(2) ('Treaty between Japan and the US'); Treaty between the Government of the United Kingdom Of Great Britain And Northern Ireland and the Government of the Federative Republic Of Brazil On Mutual Legal Assistance In Criminal Matters, signed 7 April 2005, <http://www.official-documents.gov.uk/document/cm80/8087/8087.pdf > (entered into force 13 April 2011) art 4(1)(a) ('Treaty between the UK and Brazil'); Treaty on Mutual Assistance in Criminal Matters between Australia and the Kingdom of Spain, signed 3 July 1989, [1991] ATS 6 (entered into force 31 January 1991) art 2(b) ('Treaty between Australia and Spain').

27 Gilmore, above n 20, 69.

28 United Nations Office on Drugs and Crime, above n 24, [83].

29 United Nations Convention against Transnational Organized Crime, opened for signature 15 December 2000, 2225 UNTS 209 (entered into force 29 September 2003) ('UNTOC').

within a State's 'essential interests'.[30] Of course, this begs the question of what obligations (if any) a requested State owes under international human rights law in such situations.

Another relevant ground for refusal is where:

> There are substantial grounds for believing that the request for assistance has been made for the purpose of prosecuting a person on account of that person's race, sex, religion, nationality, ethnic origin or political opinions or that that person's position may be prejudiced for any of those reasons;[31]

This ground for refusal is included in numerous bilateral treaties[32] and overlaps with some of the rights in the ICCPR, such as the principle of non-discrimination in article 2 and the guarantee of equality before the law without discrimination in article 26. Other relevant grounds for refusal include where the request relates to an offence the prosecution of which would amount to double jeopardy[33] or the act is an offence under military law, but not also under ordinary criminal law.[34] These grounds give some effect to the human rights protections of the right to a fair trial and the prohibition on double jeopardy in article 14.

A footnote to the Model MLA Treaty notes that states may wish to include further grounds for refusal, such as those related to the nature of the punishment (eg capital punishment).[35] Clauses on capital punishment have become increasingly common in the extradition context.[36] Such clauses typically provide that the requested State may refuse to grant extradition where an individual would be subject to the death penalty unless the requesting State provides an undertaking that the death penalty will not be imposed or, if imposed, will not be carried out.[37] As discussed below, this reflects the view of many states that there are obligations

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30 Proposed clauses on grounds for refusal relating to the prosecution or punishment of a person, as well as the political offence exception were deleted on the basis that they were covered as part of 'essential interests' in paragraph 21(b). See United Nations Office on Drugs and Crime, *Travaux préparatoires of the negotiations for the elaboration of the United Nations Convention on Transnational Organized Crime and the Protocols thereto* (United Nations Publication, 2006) 199.

31 Model Treaty on Mutual Assistance in Criminal Matters, UN Doc A/RES/45/117 annex art 4(1)(c).

32 See, eg, Treaty between Indonesia and China art 4(1)(b).

33 Model Treaty on Mutual Assistance in Criminal Matters, UN Doc A/RES/45/117 annex art 4(1)(d), which has been adopted in Treaty between the UK and Brazil art 4(1)(b).

34 Model Treaty on Mutual Assistance in Criminal Matters, UN Doc A/RES/45/117 annex art 4(1)(f), which has been adopted in Treaty between Indonesia and China art 4(1)(a) and Treaty between the UK and Brazil art 4(1)(c).

35 Model Treaty on Mutual Assistance in Criminal Matters, UN Doc A/RES/45/117 annex footnote to art 4(1).

36 John Dugard and Christine Van den Wyngaert, 'Reconciling Extradition with Human Rights' (1998) 92 *American Journal of International Law* 187, 192.

37 See, eg, European Convention on Extradition, opened for signature 13 December 1957, 359 UNTS 273 (entered into force 18 April 1960) art 11.

arising from the Second Optional Protocol to the ICCPR[38] and article 6 of the ICCPR to not return a person to a place where they may be subjected to the death penalty or arbitrary deprivation of life.

All of the grounds for refusal in the Model MLA Treaty are discretionary. This contrasts with the position in the UN Model Treaty on Extradition,[39] which makes refusal for many of these grounds mandatory. The Model Extradition Treaty also includes among its mandatory grounds for refusal:

> (f) If the person whose extradition is requested has been or would be subjected in the requesting State to torture or cruel, inhuman or degrading treatment or punishment or if that person has not received or would not receive the minimum guarantees in criminal proceedings, as contained in the International Covenant on Civil and Political Rights, article 14;
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> (g) If the judgment of the requesting State has been rendered *in absentia*, the convicted person has not had sufficient notice of the trial or the opportunity to arrange for his or her defence and he has not had or will not have the opportunity to have the case retried in his or her presence;[40]

The reasoning for the different treatment of MLA compared with extradition is explained in the manual on the Model MLA Treaty, which states that '[a]s mutual assistance does not directly affect a person's liberty, it may be felt unnecessary to insist on the inclusion of mandatory grounds for refusal, unless there are domestic legislation provisions to the contrary'.[41] Thus, MLA treaties unapologetically take a more flexible approach to human rights issues than extradition treaties.

Discretionary provisions could assist in resolving the problem of competing international legal obligations where a requested State has an obligation to provide MLA under a bilateral treaty and an obligation not to provide assistance under an international human rights treaty. Without such provisions, it would be unclear how to approach the conflict. If the international human rights obligation is a rule of *jus cogens*, it would prevail over the MLA obligation.[42] However, of the obligations that are relevant to MLA and law enforcement cooperation, only the prohibition on torture would be likely to be considered a rule of *jus cogens*.[43] Most MLA treaties are later in time than the ICCPR or the Convention against Torture, and it could be argued that under article 30 of the Vienna Convention on the Law of Treaties the MLA obligation would prevail over the obligation under the human rights treaty.[44] However, it is questionable whether the human rights treaties and the MLA treaties relate to 'the same subject matter' as required for article 30 to apply. The issue is

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38 Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty, opened for signature 15 December 1989, 1642 UNTS 414 (entered into force 11 July 1991) ('Second Optional Protocol').

39 Model Treaty on Extradition, GA Res 45/116, UN GAOR, 45th sess, 68th plen mtg, UN Doc A/RES/45/116 (14 December 1990) annex ('Model Treaty on Extradition').

40 Model Treaty on Extradition, UN Doc A/RES/45/116 annex arts 3(f)-(g).

41 United Nations Office on Drugs and Crime, above n 24, [90].

42 Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) arts 53, 64 ('Vienna Convention').

43 Currie, above n 2, 164.

44 Vienna Convention art 30.

further complicated by the fact that MLA obligations are owed to states whereas obligations under international human rights law are owed to individuals. Given the complexity of this issue, in order to be certain that human rights are given priority in any MLA application, protections in the international criminal law framework would need to be mandatory, not discretionary.

(b) Multilateral framework

There has been a growing tendency for multilateral treaties on international and transnational crime to include obligations to provide MLA to states parties. Multilateral treaties that create obligations to provide MLA include:

- United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances;[45]
- United Nations Convention against Transnational Organized Crime;
- United Nations Convention against Corruption;[46]
- International Convention for the Suppression of the Financing of Terrorism;[47] and
- International Convention for the Suppression of Terrorist Bombings.[48]

The inclusion of MLA provisions in multilateral conventions reflects the realisation that interstate cooperation is a vital part of combating international, transnational and even national crimes. The provisions on MLA have been criticised as 'limited to one or a few provisions, are referred to in broad or general terms, and are ill-defined and lack specificity'.[49] The most recent conventions, the UNTOC and UNCAC, include greater level of detail on the mechanics of the MLA process than earlier conventions such as the Drugs Convention, Financing of Terrorism Convention and Terrorist Bombings Convention. However, none of these conventions has a comprehensive approach to grounds for refusal or other human rights protections. Moreover, the more recent conventions have taken a more minimalist approach to human rights protections than the older conventions.

The older conventions include a general provision about protection of human rights:

> Any person who is taken into custody or regarding whom any other measures are taken or proceedings are carried out pursuant to this Convention shall be guaranteed fair treatment, including enjoyment of all rights and guarantees in conformity with

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45 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, opened for signature 20 December 1988, 1582 UNTS 95 (entered into force 11 November 1990) ('Drugs Convention').

46 United Nations Convention Against Corruption, opened for signature 9 December 2003, 2349 UNTS 41 (entered into force 14 December 2005) ('UNCAC').

47 International Convention for the Suppression of the Financing of Terrorism, opened for signature 10 January 2000, 2178 UNTS 197 (entered into force 10 April 2002) ('Financing of Terrorism Convention').

48 International Convention for the Suppression of Terrorist Bombings, opened for signature 12 January 1998), 2149 UNTS 256 (entered into force 23 May 2001) ('Terrorist Bombings Convention').

49 Cherif Bassiouni, 'Policy Considerations on Inter-State Cooperation in Criminal Matters' (1992) 4 *Pace Yearbook of International Law* 123, 127.

> the law of the State in the territory of which that person is present and applicable provisions of international law, including international human rights law.[50]

The UNTOC and UNCAC do not include a comparable provision. Perhaps this general human rights provision is of little practical use because it does not provide any level of specificity and relies on each state to determine what constitutes the relevant principles of 'fair treatment' and international human rights law. Given the high level of ratification of the ICCPR, in most circumstances, the states would already be bound to uphold these principles.[51] States may also be bound by human rights obligations under customary law. However, it could be argued that there is still value in the human rights provisions in the older conventions because they at least provide some overt minimum standard for states who are not party to relevant human rights treaties, but are party to treaties with MLA provisions.

The older conventions also provide a discretionary ground for refusal where a request has been made for the purpose of 'prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin or political opinion or that compliance with the request would cause prejudice to that person's position for any of these reasons'.[52] UNTOC and UNCAC provide this ground for refusal for extradition,[53] but not for MLA. Instead, UNTOC and UNCAC provide that a request for assistance can be refused if providing assistance would be prejudicial to the essential interests of the requested State, such as public order, sovereignty or security.[54] As noted above, it could be argued that causing a requested State to breach its international human rights obligations would be prejudicial to that State's essential interests or inconsistent with its *ordre public* and it would therefore be permissible to refuse assistance.

Any additional human rights protections for MLA under the multilateral conventions rely on each State's practice with respect to bilateral treaties and domestic law. UNTOC and UNCAC provide a ground for refusal where provision of assistance would be contrary to the legal system of the requested State.[55] The other conventions do not include this as an express ground for refusal, but instead state that assistance should be provided in conformity with existing bilateral MLA treaties or with the requested State's domestic law.[56] This means that if a State has human rights protections under its domestic law or includes particular protections in

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50 Drugs Convention art 17; Terrorism Financing Convention art 17; Terrorist Bombings Convention art 14.

51 As at 4 February 2012, there are 167 parties to the ICCPR. See United Nations Treaty Collection, International Covenant on Civil and Political Rights <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en>.

52 Drugs Convention art 15; Terrorism Financing Convention art 15; Terrorist Bombings Convention art 12.

53 UNTOC art 16(4); UNCAC art 44(15).

54 UNTOC art 18(21)(b); UNCAC art 46(21)(b). There are no equivalent provisions in the Drugs Convention, Terrorist Financing Convention or Terrorist Bombings Convention.

55 UNTOC Art 18(21)(d); UNCAC art 46(21)(d).

56 Drugs Convention art 12(5); Terrorism Financing Convention art 12(5); Terrorist Bombing Convention art 10(2).

its bilateral treaties, the multilateral conventions will not override these protections. For example, in Australia, subsection 8(1A) of the Mutual Assistance in Criminal Matters Act 1987 limits the ability to provide assistance where an individual has been charged or convicted with an offence that attracts the death penalty to 'special circumstances'.[57] However, if a State does not have protections under domestic law, the multilateral conventions will be of limited assistance.

The absence of comprehensive human rights protections in multilateral international criminal law conventions has potentially broader ramifications than any deficiencies in bilateral treaties. This is because, while a state makes a conscious (and hopefully considered) decision about which states to enter into bilateral treaties with, states parties to multilateral conventions cannot determine which other states will subsequently become parties. This makes a state's domestic laws all the more important; unless a state has domestic legislation prohibiting the provision of assistance in circumstances where an individual's human rights may be affected, that state could be obliged to provide assistance under the multilateral convention.

(c) Regional framework

The most well-developed regional system of mutual legal assistance is in Europe. All Member States of the European Union (EU) are party to the Council of Europe Convention on Mutual Assistance in Criminal Matters of 1959.[58] The only grounds for refusal in this convention are where the request relates to a political offence and where execution of the request is likely to prejudice the sovereignty, security, *ordre public* or other essential interests of its country.[59]

The EU has built on this base with numerous initiatives. The most comprehensive instrument is the 2000 Convention on Mutual Assistance in Criminal Matters.[60] Article 1(1)(a) of the 2000 Convention specifies that one of the convention's purposes is to facilitate application between members of the 1959 Council of Europe Convention. This convention, together with a growing collection of other EU initiatives, has broken down some of the distinctions between MLA and law enforcement cooperation. Many types of requests are now able to be made directly between judicial or law enforcement authorities, without the need for the request to go through a central authority. The European Evidence Warrant allows for the designated judicial authority in one state to issue a warrant, which must be

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57 Where a person has not yet been charged, it is at the discretion of the Attorney-General whether or not to provide assistance. See Mutual Assistance in Criminal Matters Act 1987 (Cth) s 8(1B). See discussion below about the different treatment of persons who have already been *charged* or *convicted* and those who are merely under investigation.

58 Bantekas and Nash, above n 17, 234.

59 European Convention on Mutual Assistance art 2.

60 Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, opened for signature 29 May 2000, [2000] OJ C 197/3 (entered into force 23 August 2005) ('2000 EU Convention').

given effect in another Member State by providing the specified evidence.[61] These warrants are only available for existing objects, documents or data.

The EU and Council of Europe instruments make reference to the European Convention on Human Rights[62] and the Charter of Fundamental Rights of the European Union.[63] All members of the Council of Europe are parties to the European Convention on Human Rights[64] and all members of the European Union are also members of the Council of Europe. In addition, when implementing EU law, including the laws on MLA, EU states are also obliged to act consistently with the EU Charter. This does not necessarily provide any clarity about the potential conflict of obligations that a State may have if it has an obligation to provide assistance under an EU or Council of Europe instrument, but there is a real risk that the requesting State may use that information in a manner that breaches an individual's human rights under the ECHR or the EU Charter. However, in the European context, this question is less pressing because the ECHR and the EU Charter provide the requested State with some basis for expecting that the requesting State will uphold the human rights of persons within its jurisdiction and, if it does not, that individual has avenues for redress.

A cooperation mechanism that has been developed by a more disparate collection of states is the Harare Scheme.[65] The Harare Scheme is a non-binding agreement of less-than-treaty status that establishes a framework for Commonwealth countries to provide mutual legal assistance to one another.[66] All of the grounds for refusal in the Harare Scheme are discretionary and include where assistance would:

- 'be contrary to the Constitution of that country, or would prejudice the security, international relations or other essential public interests of that country'[67]; or
- 'facilitate the prosecution or punishment of any person on account of his race, religion, nationality or political opinions or would cause prejudice for any of these reasons to any person affected by the request'.[68]

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61 *Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters* [2008] OJ L 350/72.

62 Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953) ('ECHR').

63 Charter of Fundamental Rights of the European Union [2000] OJ C 364/1 ('EU Charter'). See, eg, 2000 EU Convention preamble, which exhorts States to act in a manner consistent with the ECHR.

64 Henry Steiner and Philip Alston, *International Human Rights in Context* (Oxford University Press, 3rd ed, 2008) 938.

65 Commonwealth Secretariat, *Scheme Relating to Mutual Assistance in Criminal Matters within the Commonwealth (April 1990)* < http://www.thecommonwealth .org/shared_asp_files/uploadedfiles/2C167ECF-0FDE-481B-B552-E9BA23857CE3_ HARARESCHEMERELATINGTOMUTUAL ASSISTANCE2005.pdf >.

66 McClean, above n 10, 197.

67 Commonwealth Secretariat, above n 65, art 8(2)(a).

68 Ibid art 8(2)(b).

The Harare Scheme has an accompanying model bill to assist Commonwealth countries to implement the Scheme in domestic law.[69] However, the non-binding nature of both the scheme and the model bill mean that each country is free to participate to the extent and in a manner of its choosing. Accordingly, the Harare Scheme has a very 'light touch' to the regulation of protecting human rights in MLA.

Other regional groupings have developed a range of instruments on MLA such as the Association of South-east Asian Nations' Treaty on Mutual Legal Assistance in Criminal Matters[70] and the Inter-American Convention on Mutual Assistance in Criminal Matters.[71] Each of these schemes handles the issue of human rights differently and interrelates differently with the relevant regional human rights instruments.

IV. What Human Rights Protections Exist under the International Criminal Law Framework for Law Enforcement Cooperation?

If extradition is the most visible form of international legal cooperation, law enforcement cooperation is possibly the least visible, although one of the most important. The work done by police and other law enforcement agencies in sharing information and assisting one another with investigations is crucial to combating national as well as transnational crimes. However, much of this is done through informal arrangements and arrangements of less-than-treaty status. The regulation of these activities is therefore largely left to domestic legal systems. As Bassiouni has pointed out in this context, there are dangers in legally uncontrolled police activity, including the potential for human rights abuses.[72]

(a) Bilateral framework

Much of the sharing of information between law enforcement agencies is done through bilateral memoranda of understanding. While some of these memoranda may contain human rights provisions, they are not legally-binding and are generally not publicly available due to the sensitive nature of the subject matter.[73] Instead, an individual who has been affected by the provision of information under a bilateral arrangement is likely to have to resort to any provisions in the domestic law that limit the circumstances in which information can be provided.

For example, the applicant in *Rush* sought to argue that provision of information by the Australian Federal Police (AFP) to the Indonesian National Police (INP) that

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69 McClean, above n 10, 211.

70 Treaty on Mutual Legal Assistance in Criminal Matters among Like-Minded ASEAN Member Countries, signed and entered into force 29 November 2004, <http://www.asean.org/17363.pdf>.

71 Inter-American Convention on Mutual Assistance in Criminal Matters, signed 23 May 1992, OAS 75 (entered into force 14 April 1996).

72 Bassiouni, above n 49, 130.

73 See, eg, *Rush and others v Commissioner of Police* (2006) 229 ALR 383, 395 ('*Rush*'), where the Commissioner of the Australian Federal Police indicated that the *Memorandum of Understanding Between the Government of the Republic of Indonesia and the Government of Australia on Combating Transnational Crime and Developing Police Cooperation* would not be produced because of public interest privilege.

related to an investigation for an offence involving the death penalty was beyond the powers of the AFP under the Australian Federal Police Act 1979 (Cth). The MOU between Australia and Indonesia on law enforcement cooperation was of no assistance to Rush as it is not enforceable by an affected individual and is not publicly available. In this way, bilateral arrangements on law enforcement cooperation are aimed at managing expectations and relations between states on a political and operational level, rather than providing any legally-enforceable human rights protections.

(b) Multilateral framework

Interpol facilitates the dissemination of crime-related information to Member States, with a particular focus on drugs and criminal organisations, financial and high-tech crimes, public safety and terrorism, trafficking in human beings, corruption and tracing fugitives.[74] Information is shared through centrally-maintained databases and also through liaison officers. Although the Interpol constitution does not create any legally-binding human rights protections, the relevance and importance of human rights in Interpol's work has been recognised since the organisation's inception. Article 2 of Interpol's constitution provides that Interpol's role is:

> (1) To ensure and promote the widest possible mutual assistance between all criminal police authorities within the limits of the laws existing in different countries and in the spirit of the Universal Declaration of Human Rights...[75]

Article 3 specifies that 'It is strictly forbidden for the Organization to undertake any intervention or activities of a political, military, religious or racial character'. This was originally interpreted very restrictively, but in the past 20 years, this has been interpreted as applying to crimes of an objectively political nature, not necessarily to all crimes where the suspect's motivation was political.[76] While Interpol has recognised that the organisation's work has the potential to impact on human rights and encourages Member States to uphold human rights, there are no legally-enforceable obligations.

Multilateral conventions on transnational crime have also encouraged the use of law enforcement cooperation between states. However, the provisions in these conventions have tended to be rather cursory in their treatment of the subject and have not addressed the issue of human rights. The Conventions on the Prevention of Terrorist Bombings and the Financing of Terrorism oblige parties to 'afford one another the greatest measure of assistance in connection with criminal investigations or criminal or extradition proceedings' in relation to offences under the conventions, but do not elaborate any further.[77] The Drugs Convention gives more direction, by specifying some of the ways in which states parties are obliged to cooperate, including:

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74 Interpol, *About Interpol* (16 February 2010) Interpol <http://www.interpol.int/public/icpo/default.asp >.

75 Interpol, ICPO-INTERPOL Constitution and General Regulations (13 November 2008) Interpol <http://www.interpol.int/Public/ICPO/LegalMaterials/constitution/constitutionGenReg/constitution.asp#art5>.

76 Bantekas and Nash, above n 17, 266.

77 Financing of Terrorism Convention art 12; Terrorist Bombing Convention art 10.

- sharing information between agencies;
- cooperating in the conduct of inquiries; and
- conducting joint operations as appropriate.[78]

The Drugs Convention also obliges parties to develop and implement appropriate training[79] and facilitates the use of international controlled operations.[80] The UNTOC and UNCAC take a similar approach by obliging parties to cooperate through a range of suggested measures[81] and encouraging parties to enter bilateral and multilateral agreements to further law enforcement cooperation.[82]

All of these conventions are silent on the issue of human rights protections or guidance on circumstances in which requests for assistance should be refused. The brevity of the provisions means that states' legal obligations with respect to human rights protections are governed by each individual State's domestic laws.

(c) Regional framework

In Europe, the 2000 Convention on Mutual Assistance in Criminal Matters, provides for a range of law enforcement cooperation, including 'spontaneous exchange of information',[83] controlled deliveries,[84] and establishment of joint investigation teams.[85] As discussed above, this system does not provide its own system of human rights protections, but instead relies on the underpinnings of the European Convention on Human Rights and the EU Charter.

Established by the Europol Convention,[86] Europol began operations in The Hague on 1 July 1999. On 1 January 2010, the Europol Convention was replaced by Council Decision of 6 April 2009 establishing the European Police Office. While operations were initially limited to EU-specific offences such as illegal immigration, drug trafficking, money laundering and people smuggling, from 2002, Europol's responsibilities have expanded to facilitate the exchange of information on a wide range of crimes.[87] Article 5(1) lists as one of Europol's principal tasks 'to collect, store, process, analyse and exchange information and intelligence'. Non-EU countries including Australia, Canada, Switzerland and the United States participate in Europol and exchange information on the basis of cooperation agreements.[88]

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78 Drugs Convention art 9(1).
79 Drugs Convention art 10.
80 Drugs Convention art 11.
81 UNTOC art 27(1); UNCAC art 48(1).
82 UNTOC art 27(2); UNCAC art 48(2).
83 2000 EU Convention art 7.
84 2000 EU Convention art 12..
85 2000 EU Convention art 13.
86 Convention based on Article K.3 of the Treaty on European Union, on the establishment of a European Police Office, OJ C 316/2 (entered into force 1 October 1998).
87 Alun Jones and Anand Doobay *Jones and Doobay on Extradition and Mutual Assistance* (Sweet & Maxwell, 3rd ed, 2005) 375.
88 Europol, International Relations: Cooperation Agreements <http://www.europol.europa.eu/index.asp?page=agreements>.

As this brief survey shows, the way in which human rights are addressed in the international arrangements on MLA and law enforcement cooperation is ad hoc and inconsistent. There is a range of different instruments covering these issues. The only system with a consistent approach to fundamental human rights is the European system, but only because it is able to draw on the provisions of the European Convention on Human Rights and the EU Charter to enforce human rights in the requesting State without the need to extend obligations to the requested State. For requests that go beyond the European borders, the situation is much less clear.

International human rights law clearly places limits on the manner in which the requesting state can use information that it has obtained from other states to conduct investigations and prosecutions. When two states that are parties to the relevant human rights treaties share information or evidence, there is some level of comfort that both states are under international human rights law obligations not to use the information to inflict torture or arbitrarily to deprive an individual of his or her life. However, the situation is more difficult when a state that is a party to the relevant human rights treaties provides information to a State that is not. Some of the key obligations in international human rights treaties may also be reflected as norms of customary law. The obligation may be well established under customary international law not to subject an individual to torture, but it is less clear in the context of the imposition of the death penalty. Moreover, obligations under customary law are less visible and arguably offer less political leverage than treaty-derived obligations. For these reasons, this discussion will focus on treaty-derived obligations.

The key question is whether a state can provide information or evidence to another state without having to accept some liability for the foreseeable consequences that may befall individuals because of this information exchange. In order to answer this question, it is necessary to consider whether there are any obligations that can be found in international human rights law treaties that apply to a requested state when it provides information or evidence to another state.

V. How Does the International Human Rights Law Jurisprudence consider Extradition?

While there is very little judicial or academic consideration of the potential application of international human rights law to MLA and law enforcement cooperation, the same cannot be said of extradition. Since the pivotal decision of the European Court of Human Rights in *Soering*, numerous international, regional and domestic courts and commentators have considered and refined the international human rights obligations relevant to extradition. Because the legal framework and practice of extradition have similarities with MLA and law enforcement cooperation, it may be tempting to draw on the extradition jurisprudence and apply the same approach to MLA and law enforcement cooperation. As later discussion will explain, there are important differences between extradition and MLA and law enforcement cooperation that make direct transposition impossible. However, it is still useful to discuss the international human rights law jurisprudence on extradition because: (1) it provides a meaningful

way of distinguishing several core rights from the panoply of international human rights; and (2) it highlights why applying international human rights law to MLA and law enforcement cooperation is even more complicated than applying it to extradition.

In the case of *Soering*, the European Court of Human Rights recognised that a State party to the European Convention on Human Rights owes obligations to an individual that it is surrendering to another State. These obligations include human rights violations that are 'foreseeable consequences of extradition suffered outside their jurisdiction'.[89]

In *Soering*, the US requested Soering's extradition from the United Kingdom for the offence of murder. Soering argued that there was a serious likelihood that he would be sentenced to death and would suffer from the 'death row phenomenon'. He argued that this amounted to inhuman and degrading treatment and punishment contrary to article 3 of the European Convention on Human Rights. The Court agreed.

The Court held that a requested State may owe obligations to ensure that an individual who is surrendered for extradition is not subjected to human rights violations in the requesting State:

> ... in so far as a measure of extradition has consequences adversely affecting the enjoyment of a Convention right, it may, assuming that the consequences are not too remote, attract the obligations of a Contracting State under the relevant Convention guarantee...[90]

The Court discussed the extent of the article 1 obligation on states to secure rights to 'everyone within their jurisdiction' and explained that it cannot be interpreted as requiring a requested State only to surrender an individual for extradition if the conditions in the requesting State fully accord with all of the Convention's provisions.[91] Instead, there are certain rights that attract this obligation not to return an individual.

The Court highlighted that the prohibition on torture or cruel, inhuman or degrading treatment or punishment appears in a range of international conventions and is considered to be a fundamental right from which no derogation is permissible.[92] For these reasons, it was held that an 'inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment'.[93]

An express obligation not to extradite an individual in circumstances involving torture or cruel, inhuman and degrading treatment or punishment is included in article 3 of the Convention against Torture. Adopting a similar approach to the Soering Court, the Human Rights Committee has also confirmed that there is an

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89 *Soering* (1989) 161 Eur Court HR (ser A) [86].
90 Ibid [85].
91 Ibid [86].
92 Ibid [88].
93 Ibid [88].

implied obligation not to extradite an individual under article 7 of the ICCPR for torture or cruel, inhuman and degrading treatment or punishment. In the Human Rights Committee communication of *Ng v Canada*,[94] the Committee found that California's practice of executing by gas asphyxiation, which might take over ten minutes to cause death, resulted in prolonged suffering constituting cruel, inhuman or degrading treatment within article 7 of ICCPR. The Committee stated:

> ... if a State party takes a decision relating to a person within its jurisdiction, and the necessary and foreseeable consequence is that this person's rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant.[95]

Accordingly, there is a reasonably well-settled rule for parties to the European Convention on Human Rights, the Convention against Torture and the ICCPR. The scope of cruel, inhuman or degrading treatment or punishment is potentially quite broad. It can include circumstances where a person would face corporal punishment[96] or prolonged solitary confinement.[97]

There is no general prohibition under international law on the use of the death penalty. However, the ICCPR does place limits on the circumstances and manner in which the death penalty can be imposed.[98] The way in which the Human Rights Committee has interpreted this article has evolved over the past decade. In the cases of *Kindler v Canada*[99] and *Ng v Canada*, the majority of the Human Rights Committee held that the right to life in article 6 of the ICCPR did not create a general prohibition on extraditing an individual to another State where he or she may be subject to the death penalty, even if the requested State is abolitionist. However, this reasoning was effectively overturned in *Judge v Canada*.[100] In *Judge v Canada*, the Committee stated:

> For countries that have abolished the death penalty, there is an obligation not to expose a person to the real risk of its application. Thus, they may not remove, either by deportation or extradition, individuals from their jurisdiction if it may be reasonably anticipated that they will be sentenced to death, without ensuring that the death sentence would not be carried out.[101]

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94 Human Rights Committee, *Views: Communication No 469/1991*, 49th sess, UN Doc CCPR/C/49/D/469/1991 (7 January 1994) ('*Ng v Canada*').

95 Ibid [6.2].

96 Human Rights Committee, *General Comment No 20: article 7 (Prohibition of Torture or other Cruel, Inhuman or Degrading Treatment or Punishment*, 44th sess, UN Doc HRI/GEN/1/Rev.1 at 30 (10 March 1992) [5]; Human Rights Committee, *Views: Communication No 792/1998*, 74th sess, UN Doc CCPR/C/74/D/792/1998 (18 March 2002) ('*Higginson v Jamaica*').

97 Human Rights Committee, *General Comment No 20: article 7 (Prohibition of Torture or other Cruel, Inhuman or Degrading Treatment or Punishment*, 44th sess, UN Doc HRI/GEN/1/Rev.1 at 30 (10 March 1992) [6].

98 *ICCPR* art 6.

99 Human Rights Committee, *Views: Communication No 470/1991*, 48th sess, UN Doc CCPR/C/48/D/470/1991 (18 November 1993) *('Kindler v Canada')*.

100 Human Rights Committee, *Views: Communication No 829/1998*, 78th sess, UN Doc CCPR/C/78/D/829/1998 (13 August 2003) ('*Judge v Canada*').

101 Ibid [10.4].

For parties to the Second Optional Protocol, the position is even clearer. Since the overall purpose of the second optional protocol is to abolish the death penalty, states parties are not only under an obligation to abolish capital punishment in their own jurisdiction, but also not to contribute to the implementation of capital punishment by other states.[102] In any event, regardless of whether or not a state has ratified the Second Optional Protocol, if a state is abolitionist, since the case of *Judge v Canada*, it has been accepted that there is an obligation not to extradite an individual to another state where it may be 'reasonably anticipated' that he or she will be subject to the death penalty or arbitrary deprivation of life.

If a state retains the death penalty, it will not be obliged to refrain from extraditing an individual to another retentionist state. However, it may be under an obligation not to extradite an individual to a state that does not comply with the conditions placed on the circumstances in which the death penalty can be imposed under the ICCPR.

There is uncertainty as to the existence of other obligations not to extradite. For example, authors have attempted to raise arguments that they should not be returned to a State where they may be subject to an unfair trial in violation of the right in article 14 of the ICCPR.[103] The European Court of Human Rights has recognised that there may be an obligation not to return a person where he or she would be subject to a 'flagrant denial of justice'.[104] However, as yet there is no decision of the Human Rights Committee confirming the existence of a right not to be extradited on this basis.

It is important to note that under article 6 of the ICCPR, there are requirements for certain trial standards in matters relating to the imposition of the death penalty. However, this is not necessarily connected to a general right to a fair trial under article 14 of the ICCPR. Different understandings of 'fair' criminal procedure in civil and common law countries and the difficulties in predicting the fairness of a trial and appeal process to which a particular individual will be subjected mean that states will normally afford one another a wide margin of appreciation to the requesting state when concerns about the criminal justice system are raised.[105] It is therefore difficult to argue that there is an obligation not to extradite under the ICCPR relating to fair trial standards, except where the standards relate to a trial on the imposition of the death penalty.

As noted above, the *Soering* court rejected any notion of a general obligation not to extradite for violation of any human rights. Indeed, a broad obligation not to extradite for violation of any human rights could risk unduly prioritising the rights of fugitives over the rights of their victims. Extending the obligation not to extradite

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102 Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (NP Engel, 2nd ed 2005) 153.

103 See, eg, Human Rights Committee, *Views: Communication No 956/2000*, 78th sess, UN Doc CCPR/C/78/D/956/2000, (7 August 2003) (*'Piscioneri v Spain'*); Human Rights Committee, *Views: Communication No 1086/2002*, 77th sess, UN Doc CCPR/C/77/D/1086/2002 (*'Weiss v Austria'*).

104 *Othman (Abu Qatada) v the United Kingdom* (European Court of Human Rights, Application No 8139/09, 17 January 2012) (*'Abu Qatada'*).

105 Dugard and Van den Wyngaert, above n 36, 204.

beyond the scope of *jus cogens* human rights obligations would also increase uncertainty about whether the treaty-derived human right obligation should prevail over the treaty-derived obligation to extradite. For the purposes of considering the existence of human rights obligations in the MLA and law enforcement context, this paper will draw on the extradition jurisprudence and focus on the comparatively well-settled obligations not to extradite related to the right to life, the death penalty, arbitrary deprivation of life and the prohibition on torture and cruel, inhuman or degrading treatment or punishment.

Although there may appear to be direct parallels between extradition and MLA or law enforcement cooperation, closer consideration reveals some important differences. Extradition cases such as *Soering* have sometimes been interpreted as recognising the extraterritorial application of human rights.[106] However, this is not accurate. In the context of extradition, the person to whom the obligation is owed is within the State's territory. The significance of the *Soering* line of decisions is not that human rights obligations are owed to persons beyond a State's territory, instead they establish that obligations can extend to foreseeable acts that occur beyond a State's territory. In the case of extradition, the affected person is within that State's territory. In the context of MLA and law enforcement cooperation, potential victims may be affected by actions occurring beyond the State's territory while that person is outside of the State's territory. Thus, it is necessary to look beyond the extradition jurisprudence in order to answer the question of whether international human rights law obligations are owed to persons affected by MLA or law enforcement cooperation.

VI. Does the International Human Rights Law Framework Create Obligations with Respect to MLA and Law Enforcement Cooperation?

(a) How should the question be characterised?

There are many and varied circumstances in which a request for MLA or law enforcement cooperation may be executed. The suspect about whom information is sought may be present in the requesting state, in a third state or even in the requested state. In the interests of simplicity, this discussion will consider the most straightforward case in which a state is requested to provide evidence to assist in the investigation or prosecution of a person who is present in the requesting state. For the purposes of the general discussion, no distinction will be made between a request for assistance made through the MLA channels or through the law enforcement cooperation channels.

Whenever information is provided about a suspect, there may be a risk that the requesting state will use this information to facilitate a breach of the suspect's rights, such as exposure to torture or imposition of the death penalty. In these circumstances, clearly the requesting state has breached the individual's rights

106 For example, in *Loizidou v Turkey (Preliminary Objections)* (1995) 310 Eur Court HR (Ser A) [62] the Court cites *Soering* in support of the notion that 'jurisdiction' extends beyond a State's territory.

under international human rights law. The more difficult question is whether the requested state has also breached its international human rights obligations. In order to answer this question there are three key issues:

1. Where did the potential breach occur? In the place where the decision to provide assistance was made, or in the place where the effect of the decision was felt by the victim?
2. Is the victim within the 'jurisdiction' of the requested state, even though he or she may never have been in that state's 'territory'?
3. Was there a close enough connection between the provision of the information by the requested state and the violation of the individual's rights by the requesting state to be able to hold the requested state liable?

The first question is complicated, but does not necessarily affect the overall answer to the question. When information is provided through MLA or law enforcement cooperation, it may be done in a variety of ways. For example, if the US requests information from Australia, some of the options for transmission include:

- Australian authorities send the information via the postal system from Australia to the US;
- Australian authorities forward the information to the Australian Embassy in Washington for Australian diplomats to hand it over to US authorities;
- Australian law enforcement officers who are posted to the US hand over the information directly to US law enforcement officers;
- Australian authorities give the information to the US Embassy in Canberra; or
- US officials travel to Australia to collect the information.

Not all of these options would be available in all circumstances, depending on factors such as the type of authorisation required for the particular type of information. However, it can be seen that the decision to hand over information sometimes occurs in the US and sometimes in Australia. Similarly, the handing over of the information sometimes occurs in Australia and sometimes in the US.

Should it make a difference whether a visiting US official picks up the information from Australia or whether the information is handed over by an Australian official in the US? Instinctively the answer must be no, but a formalistic approach to the question could see that the act occurs in Australia in the first scenario and in the US in the second. In any of the hypothetical situations, the requested state is responsible for the handing over of information by its agents. It therefore seems appropriate to focus on whether the person affected by the handing over of the information is within that state's 'jurisdiction'.

The second and third issues (about jurisdiction and causation) are at the heart of the issue of whether international human rights law applies to MLA and law enforcement cooperation. The question of jurisdiction will be the focus of the following discussion and then the question of breach of obligations will be briefly addressed. As will become apparent from the discussion, these questions overlap and it is difficult to isolate the issues.

(b) Is a person who is the subject of an MLA or law enforcement cooperation request within a State's 'jurisdiction' for IHRL purposes?

Broadly speaking, a State only owes obligations to protect the human rights of those within its jurisdiction. It is at this point that the limits of the relevance of the extradition jurisprudence become apparent. In extradition cases, the potential victim is in the territory of the requested state and therefore clearly within that state's jurisdiction. By contrast, in the MLA or law enforcement context, the potential victim may be outside the territory of the requested state. Whether a person who is outside a state's territory can still be within that state's jurisdiction is therefore at the heart of the question of whether international human rights law creates obligations in the MLA or law enforcement cooperation context.

The starting point for establishing jurisdiction comes from the text of the treaties themselves. Article 2(1) of the ICCPR provides:

> 1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals **within its territory and subject to its jurisdiction** the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. (Emphasis added)

Other international human rights instruments handle this issue slightly differently. Article 2 of the Convention against Torture provides that states will take measures to prevent 'acts of torture in any territory under its jurisdiction', with article 22 allowing for petitions from 'individuals subject to its jurisdiction'. Article 1 of the European Convention on Human Rights obliges states to 'secure to everyone within their jurisdiction' the rights under the Convention. Article 1 of the American Convention[107] refers to the rights of 'all persons subject to their jurisdiction', while there is no jurisdictional clause in the African Charter on Human and Peoples' Rights.[108]

On the face of it, the jurisdictional clause in the ICCPR is the most restrictive, referring to both 'territory' and 'jurisdiction'. The *travaux préparatoires* reveal that this was a subject of ongoing discussion and amendment throughout negotiations, with France seeking to refer only to 'jurisdiction' and the US leading a movement to include the reference to 'territory'.[109] The awkwardness of the final wording could lead to uncertainty as to whether 'territory' and 'jurisdiction' are to be read conjunctively or disjunctively. The Human Rights Committee has interpreted the provision disjunctively and stated '... 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'.[110] As

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107 American Convention on Human Rights, opened for signature 1969, 1144 UNTS 123 (entered into force 18 July 1978).

108 African Charter on Human and Peoples' Rights, opened for signature 27 June 1981, 1520 UNTS 217 (entered into force 21 October 1986).

109 Nowak, above n 102, 43.

110 Human Rights Committee, *General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 80th sess, UN Doc CCPR/C/21/Rev.1/Add. 13 (26 May 2004).

Nowak points out in his commentary to the ICCPR, a literal, conjunctive interpretation of the phrase could lead to 'absurd' results. For example, an individual who is denied entry to his or her country of citizenship would be unable to claim his or her right to enter under article 12(4) because they would technically be outside the territory of that state.[111] Nowak therefore suggests that one needs to take 'a reasonable systematic and teleological interpretation including the historical background to determine the personal scope of application'.[112] Thus, obligations owed under international human rights law are clearly not limited to persons within a state's territory. However, the difficult question is then how and when a person is within a state's jurisdiction for the purposes of international human rights law.

(i) Are the general law principles of 'jurisdiction' relevant?

It has been suggested that the term 'jurisdiction' needs to be used with 'extreme caution' as it is a word that has a large number of different meanings.[113] Although certainly not without controversy, general principles of public international law envisage a wide range of circumstances in which a State may seek to exercise enforcement jurisdiction: territoriality; nationality; passive personality; the 'effects' doctrine; and universal jurisdiction.[114] The question then arises as to whether this jurisprudence is helpful in determining the scope of a state's 'jurisdiction' for the purposes of international human rights law. The European Court of Human Rights referred to these general principles in the case of *Bankovic*:

> As to the "ordinary meaning" of the relevant term in Art.1 of the Convention, the Court is satisfied that, from the standpoint of public international law, the jurisdictional competence of a state is primarily territorial. While international law does not exclude a state's exercise of jurisdiction extra-territorially, the suggested bases of such jurisdiction (including nationality, flag, diplomatic and consular relations, effect, protection, passive personality and universality) are, as a general rule, defined and limited by the sovereign territorial rights of the other relevant states ... The Court is of the view, therefore, that Art.1 of the Convention must be considered to reflect this ordinary and essentially territorial notion of jurisdiction, other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances of each case.[115]

However, it is not necessarily settled law that general international legal principles of jurisdiction can be directly applied in the international human rights law context.

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111 Nowak, above n 102, 43.

112 Ibid.

113 Peter Malanczuk, *Akhurst's Modern Introduction to International Law* (Harper Collins, 7th ed, 1997) 109.

114 Martin Dixon and Robert McCorquodale, *Cases and Materials on International Law* (Oxford University Press, 4th ed, 2003) 273.

115 *Bankovic and Others v Belgium and 16 Other Contracting States* (European Court of Human Rights, Grand Chamber, Application No 52207/99, 12 December 2001) [59].

As one commentator stated:

> Is every person in respect of whom the state can prescribe, enforce or adjudicate rules of law in relation to, necessarily 'within its jurisdiction'? The answer must be no.[116]

Indeed, when one considers the wide range of circumstances in which a state may have jurisdiction in the broader sense of the word, it becomes apparent that international human rights law cannot just pick up the general jurisprudence on jurisdiction. Conversely, if a state takes an action outside its territory and there is no jurisdictional basis for these actions under general international law, that should not necessarily mean that any persons who are affected by the action are not within that state's jurisdiction for the purposes of international human rights law. Scheinin summarises this issue by stating:

> The question posed by the complainants in Bankovic to the European Court of Human Rights was not whether NATO countries were entitled, under public international law, to destroy a television station in Belgrade. The question was whether they had any human rights obligations if they decided to do so.[117]

Perhaps the relevance of the general principles of jurisdiction is in establishing the starting position that a state only has jurisdiction over acts outside its territory in exceptional circumstances. It may also help to set the limits on when an individual can be said to be within a state's jurisdiction. Thus, a state cannot be expected to protect an individual's rights in another state where to do so would require the state to act without a jurisdictional basis.

Given the uncertainties in the relationship between the more general principles of jurisdiction in international law and the specific concepts of jurisdiction in the human rights context, this following discussion will focus on the jurisprudence on 'jurisdiction' in the specific human rights context.

(ii) Is there a valid way in which to extend the concept of 'jurisdiction'?

When considering extraterritorial jurisdiction in the context of international human rights law, the individual opinion of Tomuschat in the Human Rights Committee decision of *Lopez Burgos* about the correct interpretation of article 2(1) of the ICCPR is often cited:

> To construe the words 'within its territory' pursuant to their strict literal meaning as excluding any responsibility for conduct occurring beyond the national boundaries would, however, lead to utterly absurd results. The formula was intended to take care of objective difficulties which might impede the implementation of the Covenant in specific situations. Thus, a State party is normally unable to ensure the effective enjoyment of the rights under the covenant to its citizens abroad, having at its disposal only the tools of diplomatic protection with their limited potential... It may be concluded, therefore, that it was the intention of the drafters, whose sovereign

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116 Dominic McGoldrick 'Extraterritorial Application of the International Covenant on Civil and Political Rights' in Fons Coomans and Menno T Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia, 2004) 42, 45.

117 Martin Scheinin, 'Extraterritorial Effect of the International Covenant on Civil and Political Rights' in Fons Coomans and Menno T Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia, 2004) 73, 79.

> decision cannot be challenged, to restrict the territorial scope of the Covenant in view of such situations where enforcing the Covenant would be likely to encounter exceptional obstacles. Never was it envisaged, however, to grant States parties unfettered discretionary power to carry out wilful and deliberate attacks against the freedom and personal integrity against their citizens living abroad.'[118]

However, while there is a general body of agreement that jurisdiction in the international human rights law context can extend beyond a state's territory, there is little consensus about precisely how far it extends, with different international institutions taking different positions.[119] Even where there is agreement about the outcome, there is often disagreement about the reasoning on which this outcome should be reached.

A common theme is that jurisdiction can be said to extend to circumstances in which a state has 'effective control'. However, there are differences of opinion as to exactly what the state needs to control; does a state need to control the territory, an individual, or just have control over an outcome? In the case of an MLA or law enforcement request, the requested state would not ordinarily have control over the territory where the person is or control over that person. It would therefore be necessary to find that the requested state can be said to have jurisdiction on the basis of control over something more intangible such as the person's legal rights or the outcome for the person. This section will consider the different ways in which 'effective control' can be interpreted and the logic or desirability of taking a more expansive approach to jurisdiction.

1 Control over territory

A series of cases has recognised that where a state is controlling the territory of another state, the occupying state owes obligations under international human rights law to the occupants. The European Court of Human Rights explained 'effective control' over territory as a basis for jurisdiction in *Loizidou v Turkey* when it stated:

> Bearing in mind the object and purpose of the Convention, the responsibility of a Contracting Party may also arise when as a consequence of military action—whether lawful or unlawful—it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.[120]

In this case, the Court found that the claims of the applicant against Turkey were admissible because the control of territory exercised by Turkish forces in Northern Cyprus was such that the occupants could be said to fall within the jurisdiction of

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118 Human Rights Committee, *Views: Communication No 52/1979*, 13th sess, UN Doc CCPR/C/13/D/52/1979 (29 July 1981) ('*Lopez Burgos v Uruguay*').

119 Sigrun Skogly, 'Extraterritoriality: Universal Human Rights Without Universal Obligations?' in Sarah Joseph and Adam McBeth (eds), *Research Handbook on International Human Rights Law* (Edward Elgar, 2009) 71, 75.

120 *Loizidou v Turkey (Preliminary Objections)* (1995) 310 Eur Court HR (Ser A) [62].

Turkey. This position has been approved in cases such as *Cyprus v Turkey*,[121] *Bankovic*[122] and *Al-Saadoon v United Kingdom*.[123]

The Committee against Torture and the Human Rights Committee have also endorsed an approach to jurisdiction that recognises the existence of certain obligations where a state controls territory. For example, in their examination of the United States of America, the Committee against Torture considered that the US was responsible for ensuring human rights of detainees in Guantanamo Bay, Cuba.[124] It should be noted that the United States has consistently advocated an interpretation of the treaties that limits obligations to its geographic territory.[125]

2 Control over the person

Courts have long recognised that the control that a state exerts over a particular individual can bring them within the scope of that state's jurisdiction for the purposes of international human rights law. For example, in the 1989 case of *Stocké v Germany*,[126] a German citizen who fled Germany to avoid tax fraud accusations was lured back from France by a German government agent under false pretences. The ECHR found that Stock was within Germany's jurisdiction because of the control that the state exercised over him.

The Human Rights Committee has also found that arrest or detention of a person by an agent of the state will bring that person within the state's jurisdiction, even where they are outside the state's territory. For example, in the 1979 case of *Lilian Celiberti de Casariego v Uruguay*,[127] a Uruguayan citizen was visiting Brazil when Uruguayan agents abducted her, took her across the border into Uruguay and tried her by a military court without providing her with access to legal representation of her choice. In their reasoning, the Committee stated that the fact that the abduction occurred on foreign soil did not bar the Committee from considering the communication because what was important was 'the relationship between the individual and the state in relation to a violation of any of the rights set forth in the ICCPR, wherever they occurred'.[128] Article 2(1) of the ICCPR 'does not imply that the state party concerned cannot be held accountable for violations of rights under the ICCPR which its agents commit upon the territory of another state, whether with

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121 *Cyprus v Turkey* (1997) 23 EHRR 244.

122 *Bankovic and Others v Belgium and 16 Other Contracting States* (European Court of Human Rights, Grand Chamber, Application No 52207/99, 12 December 2001) [59].

123 *Al-Saadoon and Mufdhi v United Kingdom* (2009) 49 EHRR SE11 ('*Al-Saadoon*').

124 Committee Against Torture, *Conclusions and Recommendations: United States of America*, 36th sess, UN Doc CAT/C/USA/CO/3/Rev 1 (18 December 2006).

125 Human Rights Committee, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant Third periodic reports of States parties due in 2003: United States of America*, UN Doc CCPR/C/USA/3 (28 November 2005) [130].

126 *Stocké v Germany* (1989) 199 Eur Court HR (ser A) 24 [166].

127 Human Rights Committee, *Views: Communication No. 56/1979*, 13th sess, UN Doc CCPR/C/OP/1 (29 July 1981) [92] (*'Celiberti de Casariego v Uruguay'*).

128 Ibid [10.2].

the acquiescence of the Government of that State or in opposition to it'.[129] The Committee adopted the same approach in the similar case of *Lopez v Uruguay*.[130]

It is therefore well established that in circumstances where agents of a state detain an individual outside the territory of the state, the individual is within that state's jurisdiction. [131] Clearly, these circumstances are not directly relevant to MLA or law enforcement cooperation because the requested state does not exercise direct control over the person that is comparable to arrest or detention. However, there may still be some relevant principles that can be drawn from these cases.

The notion of jurisdiction based on the control over a person opens up the idea that there is something important about the relationship between the state and the individual, not just the location of the individual. It seems that, where a state controls the territory, there is no need to prove a particular relationship with the state. However, where there is no control over the territory, it is necessary to prove a particular level of control over the individual.[132]

The abduction and arrest cases also show that jurisdiction is not necessarily mutually exclusive. At the time of her abduction, Ms Celiberti de Casariego would also have been within the jurisdiction of Brazil. If Brazilian authorities were complicit in the abduction or if they had committed an entirely unrelated breach of her rights at the same time, Ms Celiberti de Casariego would have been within the jurisdiction of both Brazil and Uruguay. As Hampson and Salama noted in their report to the Sub-Commission on the Promotion and Protection of Human Rights, 'An individual may be within the jurisdiction of one state for some purposes and of another for other purposes. Jurisdiction is not an all or nothing affair'.[133] This is relevant to the MLA context because it indicates that the fact that an accused person is in the territory (and therefore jurisdiction) of the requesting state does not necessarily preclude the possibility that the person could be within the jurisdiction of the requested state. The question then becomes whether control over a person that falls short of actual physical control could ever enliven a state's jurisdiction.

The recent Grand Chamber decision in *Al-Skeini*[134] seems to indicate that control over territory and control over the person can work cumulatively to establish the requisite overall level of control required for jurisdiction. Earlier, the House of Lords had decided that persons in Southern Iraq who were killed by

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129 Ibid [10.3].

130 *Lopez Burgos v Uruguay* UN Doc CCPR/C/13/D/52/1979 (1981).

131 With the notable exception of the US, as discussed above.

132 Rick Lawson, 'Life after Bankovic: On the Extraterritorial Application of the European Convention on Human Rights' in Fons Coomans and Menno T Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia, 2004) 83, 98.

133 Françoise Hampson and Ibrahim Salama, 'Administration of Justice, Rule of Law and Democracy' (Working paper on the relationship between human rights law and international humanitarian law, Commission on Human Rights Sub-Commission on the Promotion and Protection of Human Rights) 57th sess, UN Doc E/CN.4/Sub.2/2005/14 (21 June 2005).

134 *Al-Skeini and Others v the United Kingdom* (European Court of Human Rights, Grand Chamber, Application No 55721/07, 7 July 2011) ('*Al-Skeini*').

British troops on patrol were not within the UK's jurisdiction.[135] One of the reasons for the House of Lords' conclusion was that the insurgency was so intense that the UK did not have a sufficient level of control over the territory.[136] However, the Grand Chamber of the ECHR effectively overturned this finding and found that the individuals who were shot by the British troops were within the UK's jurisdiction.

The Grand Chamber reasoned that:

> following the removal from power of the Ba'ath regime and until the accession of the Interim Government, the United Kingdom (together with the United States) assumed in Iraq the exercise of some of the public powers normally to be exercised by a sovereign government. In particular, the United Kingdom assumed authority and responsibility for the maintenance of security in South East Iraq. In these exceptional circumstances, the Court considers that the United Kingdom, through its soldiers engaged in security operations in Basrah during the period in question, exercised authority and control over individuals killed in the course of such security operations, so as to establish a jurisdictional link between the deceased and the United Kingdom for the purposes of Article 1 of the Convention.[137]

In this way, the Grand Chamber seems to have drawn from both the ideas of control over territory and control over the individual. The Grand Chamber refers to a state's use of force as being able to 'bring the individual ... under the control of the State's authorities'.[138] However, it only looks to this element of personal control after establishing that the UK was exercising 'all or some of the public powers normally to be exercised by that Government'.[139] Accordingly, the bombing in *Bankovic* would not be sufficient to create jurisdiction because there was no accompanying exercise of public powers, even though the action itself seems to have a very similar effect on the individuals.

While this is an interesting development in the jurisprudence on establishing jurisdiction through control of the person, it is unlikely to assist in the effort to establish jurisdiction over persons who are affected by the provision of mutual assistance or law enforcement cooperation. This is because the requested state does not exercise any particular public power in the territory of the requesting State. If jurisdiction is to be established, it is necessary to take the principles of jurisdiction through control one step further by looking to control over outcomes.

3 Control over outcomes

There are a number of cases from regional and international institutions that do not seem to fit within the framework of jurisdiction based on control over territory or control over the person. Decision makers in cases about the issuing of passports, enforcement of a foreign judgment and trial in absentia have been willing to find

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135 *Regina (Al-Skeini and others) v Secretary of State for Defence* [2007] 3 WLR 33.

136 The primary reason was that Southern Iraq was held not to be part of the ECHR's *espace juridique* and the Convention therefore did not apply. This finding has been overturned by the Grand Chamber of the ECHR.

137 *Al-Skeini* (European Court of Human Rights, Grand Chamber, Application No 55721/07, 7 July 2011) [149].

138 Ibid [136].

139 Ibid [135].

breaches of international human rights law obligations without being troubled by the fact that the complainant was outside the territory of the respondent state. However, these cases do not provide full explanations of their findings about jurisdiction. Moreover, the judgments in cases such as *Bankovic* and *Al-Saadoon* do not explain the way in which these judgments interact with cases that have taken more expansive approaches to jurisdiction. This leaves one with the sense that there may be other ways in which to expand a state's jurisdiction, but little guidance on the way in which this should be done. This section will consider some of the ways in which these cases could be interpreted and whether this would justify an expanded notion of jurisdiction that would encompass MLA and law enforcement cooperation cases.

A case that one commentator has interpreted[140] as possibly indicating that mutual legal assistance could be seen as an act of authority producing effects extraterritorially which brings an affected individual within that state's jurisdiction is *Drozd and Janousek v France and Spain*.[141] In this case, a Spanish and a Polish citizen were convicted of bank robbery by an Andorran court. At the time, Andorra was not a party to the European Convention. Part of usual Andorran practice means that French and Spanish judges sit on the appeal courts, but in a personal capacity. Offenders are able to select whether to be imprisoned in France or Spain and the applicants in this matter chose France. The applicants then brought a complaint against France alleging that they had not received a fair trial in Andorra and that France was now breaching this right by enforcing the sentence. The Court did not find that there had been a breach of their right to a fair trial. However, the Court suggested that if there had been an unfair trial, France's role in imprisoning the applicants could amount to a breach of the right to a fair trial. The Court stated:

> The term "jurisdiction" is not limited to the national territory of the High Contracting Parties; their responsibility can be involved because of acts of their authorities producing effects outside their own territory.[142]

The Court later went on to state:

> The Contracting States are, however, obliged to refuse their co-operation if it emerges that the conviction is the result of a flagrant denial of justice (see, mutatis mutandis, the Soering v. the United Kingdom judgment...).[143]

It is difficult to decide the best way in which to interpret this case because of the confusing facts and scant explanation of the reasoning. The obiter statement about states being responsible for acts producing effects outside their territory could be hinting at a very broad interpretation of jurisdiction or it could be limited to circumstances in which the state also exercises some form of territorial or personal control. The statement about states being obliged to refuse cooperation where there is a flagrant denial of justice does not advance us any further because the Court was referring to a situation in which the victim is actually present in the territory of the state. It is therefore of little help in understanding the MLA or law enforcement

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140 Currie, above n 2, 152.
141 *Drozd and Janousek v France and Spain* (1992) 14 EHRR 745.
142 Ibid [91].
143 Ibid [110].

cooperation situation, where the person is not physically present in the requested state's territory.

Another interesting area of jurisprudence is the series of communications to the Human Rights Committee in the late 1970s and early 1980s, known as the 'passport cases'.[144] These cases dealt with Uruguay's refusal to issue passports to citizens who were residing outside of Uruguay. Article 12(4) of the ICCPR provides that 'No one shall be arbitrarily deprived of the right to enter his own country'. In the case of *Nunez v Uruguay*, the author was a Uruguayan journalist who had been living and working in Italy when, unbeknownst to him, his Uruguayan passport was revoked. Nunez submitted a communication to the Human Rights Committee arguing that this breached his right to enter his country under article 12(4). Uruguay argued that Nunez was not on Uruguayan territory and was therefore not within Uruguay's jurisdiction for the purposes of article 1 of the Optional Protocol to the Covenant. The Committee rejected this argument and stated:

> ... it followed from the very nature of that right that, in the case of a citizen resident abroad, article 12(2) imposed obligations both on the State of residence and on the State of nationality, and that therefore article 2(1) of the Covenant could not be interpreted as limiting the obligations of Uruguay under article 12(2) to citizens within its own territory.[145]

Similarly, in the case of *Montero v Uruguay* the Committee found that Uruguay breached the obligation under article 12(4) of the ICCPR when it did not renew Ms Montero's passport while she was living in Berlin.

The passport cases show that jurisdiction is not limited to circumstances where there is control over either the territory or the person. The reference in *Nunez v Uruguay* to the fact that issuing a passport is 'clearly a matter within the jurisdiction of the Uruguayan authorities' suggests that the Committee took comfort from the fact that Nunez was within Uruguay's jurisdiction for the purposes of general international law. However the extracts quoted above also indicate that the Committee seemed to find that there was something special about the right to enter one's country that meant that the obligations must extend to citizens who are outside the state's territory. It is this very scenario that Nowak uses to support his disjunctive reading of 'territory' and 'jurisdiction' in article 2(1) of the ICCPR because he reasons that it would be 'absurd' if one needed to be within the territory of a state in order to assert the right to enter the state. While this seems reasonable, it raises the question of whether there are any other rights that require an extraterritorial reading of the obligation.

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144 Human Rights Committee, *Views: Communication No 108/1981*, 19th sess, UN Doc CCPR/C/19/D/108/1981 (22 July 1983) ('*Nunez v Uruguay*'); Human Rights Committee, *Views: Communication No 106/1981*, 18th sess, UN Doc CCPR/C/18/D/106/1981 (31 March 1983) ('*Montero v Uruguay*'); Human Rights Committee, *Views: Communication No 57/1979*, 15th sess, UN Doc CCPR/C/OP/1 (23 March 1982) ('*Martins v Uruguay*'); Human Rights Committee, *Views: Communication No 77/1980*, 18th sess, UN Doc A/38/40 (31 March 1983) ('*Lichtensztejn v Uruguay*').

145 *Nunez v Uruguay*, UN Doc CCPR/C/19/D/108/1981, [6.1].

Another right that has been recognised as applying to an individual when he or she is outside that state's territory is the right under article 14(3) of the ICCPR for a person to be present during the determination of a criminal charge against him or her. In the Human Rights Committee communication of *Mbenge v Zaire*,[146] Mbenge was living as a refugee in Belgium at the time that a court in Zaire sentenced him to death without his knowledge. The Committee found that his rights under article 14(3) had been violated because the state had not provided any evidence that they had attempted to contact Mbenge. The Committee did not address the issue of jurisdiction. The Committee's views seem to be based on an assumption that Mbenge was within Zaire's jurisdiction without any explanation of the basis.

Clearly, Zaire did not have control over the territory where Mbenge was or exercise any public powers, nor did Zaire exert any actual control over his person. Accordingly, the reasoning of cases such as *Bankovic* and *Al-Skeini* does not help us to understand the *Mbenge* decision. Applying the logic in the passport cases, it could be argued that there is something inherent in the right not to be tried in absentia that means that it should be understood as applying even when an individual is outside the territory of the state. However, trial in absentia is not the same as failure to issue a passport. Whereas in order to give effect to the right to enter a country it is necessary to interpret it as applying when a person is outside that country, the right to be tried in one's presence could be equally important to a person who is in the territory of the state as to someone who is outside the territory. Unlike the right to enter one's country, the right to be tried in one's presence could be construed as only applying when the person is inside the state's territory without leading to 'absurd' results. This indicates that there is something more to the question of jurisdiction than just control over territory or the person. The Human Rights Committee has not provided any guidance on this issue, with General Comment 32 on article 14 not mentioning the issue of jurisdiction.[147] General Comment 31 on the nature of the obligations under the ICCPR is similarly unilluminating as it simply states 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'.[148] This leaves the area open to different theories and speculation.

The Inter-American Commission on Human Rights has referred to the notions of 'power' and 'authority' over persons in a case that is factually quite similar to *Bankovic; Armando Alejandre Jr and Others v Cuba* (the 'Brothers to the Rescue'

146 Human Rights Committee, *Views: Communication No 16/1977*, 18th sess, UN Doc A/38/40 (25 March 1983) ('*Mbenge v Zaire*').

147 Human Rights Committee, *General Comment No 32: Article 14: Right to equality before courts and tribunals and to a fair trial*, 19th sess, UN Doc CCPR/C/GC/32 (23 August 2007).

148 Human Rights Committee, *General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 80th sess, UN Doc CCPR/C/21/Rev.1/Add. 13 (26 May 2004) [10].

case).[149] In Brothers to the Rescue, the Cuban military shot down two civilian aircraft in international air space. The Commission found Cuba responsible for breaching the victims' right to life and right to a fair trial. The Commission stated:

> ... when agents of a state, whether military or civilian, exercise power and authority over persons outside national territory, the state's obligation to respect human rights continues. ... agents of the Cuban State, although outside their territory, placed the civilian pilots of the 'Brothers to the Rescue' organization under their authority.[150]

The Commission's use of the terms 'power and authority' indicates a more expansive approach than the term 'effective control'. The 'power and authority' is still phrased as being linked to the person, rather than the outcome. However, Brothers to the Rescue did not involve control over the person in the sense of forcing a person to be in a particular place through detention or abduction, so the control referred to must be control over the person's life in a wider sense. The Grand Chamber's reasoning in *Al-Skeini* can be interpreted in a similar manner; the Chamber refers to exercising 'power and control' over individuals who were killed.

In *Bankovic*, the applicants argued that jurisdiction for the purposes of the *European Convention on Human Rights* should be determined by how much control the state party has over the outcome. The Court summarised their arguments as follows:

> In particular, they suggest that the determination of "jurisdiction" can be done by adapting the "effective control" criteria developed in the above-cited Loizidou judgments (preliminary objections and merits) so that the extent of the positive obligation under Article 1 of the Convention to secure Convention rights would be proportionate to the level of control in fact exercised. They consider that this approach to jurisdiction in Art.1 would provide manageable criteria by which the Court could deal with future complaints arising out of comparable circumstances. Accordingly, when, as in the above-noted Loizidou judgments (preliminary objections and merits), the Turkish forces were found to have had effective control of Northern Cyprus, it was appropriate to consider Turkey obliged to vindicate the full range of Convention rights in that area. However, when the respondent States strike a target outside their territory, they are not obliged to do the impossible (secure the full range of Convention rights) but rather are held accountable for those Convention rights within their control in the situation in question.[151]

The *Bankovic* Court rejected this argument, as did the Grand Chamber in *Al-Skeini*.[152] However, this 'graduated approach' of scaling a state's obligations according to the control that the state has over the outcomes of their action has been picked up by a number of commentators. Scheinin proposes a theory of 'facticity and normativity'. Under this approach, the extent of a state's obligation is determined by the amount of control that it is able to exert in the particular factual

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149 Inter-American Commission of Human Rights, *Views: Case No 11.589,* Report No 86/99 (29 September 1999) (*'Armando Alejandre Jr and Others v Cuba'*).

150 Ibid [25].

151 *Bankovic and Others v Belgium and 16 Other Contracting States* (European Court of Human Rights, Grand Chamber, Application No 52207/99, 12 December 2001) [46]-[47].

152 *Al-Skeini* (European Court of Human Rights, Grand Chamber, Application No 55721/07, 7 July 2011) [124].

situation. He explains that '[e]ven if someone's human rights are violated in country A, country B cannot be said to be responsible for that violation unless it had some factually possible and meaningful way to prevent the violation'.[153] Scheinin believes that this approach can be seen in the Human Rights Committee's concluding observations on Iran in 1993, which provide:

> The Committee also condemns the fact that a death sentence has been pronounced, without trial, in respect of a foreign writer, Mr. Salman Rushdie, for having produced a literary work and that general appeals have been made or condoned for its execution, even outside the territory of the Islamic Republic of Iran. The fact that the sentence was the result of a fatwa issued by a religious authority does not exempt the State party from its obligation to ensure to all individuals the rights provided for under the Covenant, in particular articles 6, 9, 14 and 19.[154]

The fact that the Committee felt competent to comment on Iran's action of encouraging summary execution of an individual outside Iran's territory by persons who may be entirely unconnected to Iran certainly indicates a generous approach to jurisdiction. Scheinin emphasises that the Committee did not ask itself whether public international law principles recognised Iran's jurisdiction to assassinate an individual in Britain; the Committee presumed that performing such an assassination or inciting non-state actors to perform it would entail 'effective control' over the deprivation of an individual's life, even when the killing occurs outside the territory of Iran.[155]

Lawson agrees that the factual circumstances should dictate the obligations that a State owes. The higher the level of control that a state exercises over an individual, the higher the obligations that the state owes to that individual. He explains:

> ... to the extent that they assume de facto control over individuals and interfere with their lives, they should take 'measures within the scope of their powers which, judged reasonably, might have been expected' to avoid violations of these individuals' rights. Arguably, this standard is more demanding when fundamental rights – such as the right to life and the prohibition of torture – are at stake.[156]

Using this logic, when a state provides information or evidence to another state knowing that it will be used in the investigation or prosecution of an individual, it could be argued that the individual is within that state's jurisdiction because of the impact that the information from the requested state has on the ability to investigate or prosecute. The requested state could be said to have control over the outcome by determining whether or not to hand over a key piece of evidence. However, this then opens up the question of how much control is necessary. This issue will be discussed further below in the context of foreseeability and causation of the breach of human rights.

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153 Scheinin, above n 117, 75.

154 Human Rights Committee, *Concluding Observations of the Human Rights Committee: Iran*, UN Doc CCPR/C/79/Add.25 (3 August 1993) [256].

155 Scheinin, above n 117, 80.

156 Lawson, above n 132, 106.

The attraction in the approaches of Scheinin and Lawson is that they do not treat rights differently according to which side of the border an individual is standing or which particular weapon a state chooses to use. Hampson and Salama illustrate this by stating:

> If the test used is control of the victim, as opposed to control over the infliction of the alleged violation, ground forces may be found to be in control of the applicant, as in the Issa case, but it is difficult to see how airborne forces could be, even when that person is intentionally targeted.[157]

Defining jurisdiction according to control of outcomes gives a graduated approach that recognises the extent to which a state causes or is able to effect the enjoyment by an individual of his or her human rights.

The relevance of this argument can be seen when applied to the MLA or law enforcement cooperation context. While the more common MLA scenario involves a suspect who is present in the requesting state, it is also possible that a state may request MLA for a suspect who is in the territory of the requested state. The question then arises as to whether it is logical for a requested state to be expected to treat a request for mutual assistance differently depending on where the person is physically located, rather than according to the justice system of the requesting state and the likely consequences for that individual. It seems counter-intuitive to allow a state to provide assistance if the individual is located in another state but not to allow the provision of assistance if the individual happens to be on the requested state's territory at the time.

However, despite the attractiveness of some of these arguments and the support among some commentators, the ECHR squarely rejected such arguments in *Bankovic*. The Court considered that the applicant's idea was a 'cause and effect' notion of jurisdiction that would mean that a state could be held liable by any person anywhere in the world who is affected by a state's actions. The Court reasoned that this would deprive the phrase 'within their jurisdiction' of any real meaning. If the drafters had intended this meaning, they would have adopted the kind of language used in common article 1 of the Geneva Conventions, which requires the Contracting Parties to undertake 'to respect and to ensure respect for the present Convention in all circumstances'.[158]

The extended notions of jurisdiction discussed above can certainly be seen as putting a strain on traditional definitions of 'jurisdiction'. There are also conceptual challenges in this approach. Defining jurisdiction according to control over outcomes conflates the question of whether a person is within a state's jurisdiction with the question of whether the state has actually breached that right. The conventional way in which to consider a claim that a state has breached an

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157 Françoise Hampson and Ibrahim Salama, 'Administration of Justice, Rule of Law and Democracy' (Working paper on the relationship between human rights law and international humanitarian law, Commission on Human Rights Sub-Commission on the Promotion and Protection of Human Rights) 57th sess, UN Doc E/CN.4/Sub.2/2005/14 (21 June 2005) [91].

158 *Bankovic and Others v Belgium and 16 Other Contracting States* (European Court of Human Rights, Grand Chamber, Application No 52207/99, 12 December 2001) [25].

individual's human rights is first to look at whether the individual is within the State's jurisdiction and then to ask whether the state has breached its obligations. The relevant time at which to ask questions about foreseeability and due diligence in investigating risks is when considering if an actual breach has occurred. An approach to jurisdiction that conflates these two questions would represent a significant change in methodology and one that would, no doubt, meet with apprehension by states. International human rights law has already made inroads into traditional notions of sovereignty by recognising that states can owe obligations at international law to individuals, not just other states. It would be another significant leap to say that these obligations are owed to any individuals who are potentially affected by that state's actions. This is not to dismiss the approach out of hand, but rather to recognise the ramifications of the approach and the likelihood that it would be met with reluctance by states.

The 'outcomes' approach also challenges the relationship between the concepts of 'jurisdiction' and 'state responsibility'. Jurisdiction and state responsibility have traditionally been seen as separate questions. Jurisdiction is a question of whether or not a person is under the state's control (either through their location or their relationship to the state), whereas state responsibility is a question of whether or not a particular action is attributable to the state. This separates the general powers of the state over the person from the effect of a state's particular action on the person. The 'outcomes' approach merges these questions; if a person is affected by the acts of the state or the state's agents, then the person is within the state's jurisdiction. Advocates of the 'outcomes' approach see the convergence of principles of state responsibility and jurisdiction as a positive outcome.[159] However, it may risk oversimplifying the issue. For example, in the case of *Bankovic*, it is important first to consider whether the NATO states were responsible for the bombing. Whether or not the affected persons were within the states' 'jurisdiction' for the purposes of international human rights law is a separate question. Just because the affected persons were not within the states' jurisdiction for human rights law purposes does not mean that there is necessarily a vacuum in the law; other bodies of law such as international humanitarian law can be applied. Failure to treat jurisdiction and state responsibility as separate questions could have flow-on effects when there are bodies of law other than human rights law that may be relevant.

An analysis of the cases and arguments that support an expanded notion of jurisdiction to cover control over outcomes shows that this is a particularly difficult area. There is no clear line of support for this approach, although there are certainly aspects of a range of cases that can be drawn together to support the argument. The implications that such an approach would have on the conceptualisation of human rights is significant. It could potentially extend the persons to whom a state owes obligations under international human rights law to cover a wide range of individuals. The extent of a state's obligations to these individuals would be limited

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159 Scheinin, above n 117, 76; Hampson and Salama, above n 133 [91]; James Ross, 'Jurisdictional Aspects of International Human Rights and Humanitarian Law in the War on Terror' in Fons Coomans and Menno T Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia, 2004) 9, 24.

according to the extent of their control. However, the very notion of extending a state's obligations would be likely to be met with significant reluctance by states.

(b) What degree of causation and foreseeability are necessary to create an obligation?

What level of control or foreseeability is required in order to find that a state breached its obligations to an individual who was affected by the information or evidence provided by the requested state? Even if one accepts an extended notion of jurisdiction such that a state's 'jurisdiction' extends to an individual affected by a request for MLA or law enforcement cooperation, can the requested state be seen as being implicated in the human rights abuse that the requesting state may commit? There must be some sufficient level of causation or foreseeability in order to be able to find the requested state responsible for the breach of human rights.

In tackling this issue, states have tended to differentiate between information provided on an MLA basis and information provided on a police-to-police basis. Thus, MLA is often governed by treaties, but law enforcement cooperation is usually facilitated by memoranda of understanding. In the Australian context, the Mutual Assistance Act 1987 defines the scope of MLA able to be provided, but the limits on law enforcement cooperation are set out in the AFP Practical Guide on International Police to Police Assistance in Death Penalty Situations.[160] This seems to reflect a general belief that MLA requires more stringent regulation than law enforcement cooperation, presumably because it can have more 'serious' consequences. States such as Australia also apply different laws or policies to assistance that is provided before an individual is charged compared with assistance provided after a person is charged.[161] This seems to indicate a presumption that once an individual is charged, there is a more direct link between providing the evidence and the effect on the person to whom the evidence relates. However, the value of this distinction seems questionable when different legal systems may 'charge' a person at different stages of the investigation and prosecution process.[162]

The limitations of the existing approaches can be seen in the example of the Bali 9 case. In this case, the AFP provided the Indonesian National Police with a tip-off about the names of suspects and the expected timing of a planned drug importation from Indonesia to Australia.[163] While this information was provided on an agency-to-agency basis rather than under MLA and was provided before any suspects had

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160 Australian Federal Police, *AFP Practical Guide on International Police to Police Assistance in Death Penalty Situations*, OG0001, 7 November 2007.

161 See, eg, Mutual Assistance in Criminal Matters Act 1987 (Cth) s 8(1A), which makes potential imposition of the death penalty a mandatory ground for refusal for requests after a person has been charged, but only a discretionary ground if the person has not yet been charged.

162 The Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Act 2011 (Cth) cl 11 proposes to amend the Mutual Assistance in Criminal Matters Act 1987 (Cth) s 8(1A) to ensure that the mandatory ground for refusal in death penalty matters also applies when a person has been arrested or detained on suspicion of committing an offence for which the death penalty may apply, regardless of whether formal charges have been laid.

163 *Rush and others v Commissioner of Police* (2006) 229 ALR 383.

been charged with an offence, it was a critical part of the series of events that led to these individuals being charged and prosecuted for offences that carry the death penalty.

It is relevant to consider the approach taken in the extradition context. In the extradition context, the requested state may have no direct role in the human rights breach but can still be found to be liable for its role in exposing an individual to the risk of breaches being committed by the requesting state. A requested state can be liable if objectively at the time of extradition, it should have known that there was a 'real risk' or it was 'foreseeable' that the breach would occur following extradition. The *Soering* court referred to consequences that were 'not too remote'[164] and circumstances where there was a 'real risk'.[165] The Human Rights Committee has variously referred to 'necessary and foreseeable' consequences,[166] where there is a 'real risk'[167] and consequences that 'may be reasonably anticipated'.[168] It is irrelevant whether the requesting state actually goes through with the anticipated act of torture or deprivation of life. The key question is the foreseeability of a potential human rights abuse.

Applying these tests to the MLA and law enforcement cooperation context, the question is whether there is a 'real risk' that the person the subject of the investigation or prosecution would be subject to a breach of one of their key human rights if the assistance is provided. The range of variables in the MLA or law enforcement cooperation context is greater than in extradition cases. Extradition can only be requested once an arrest warrant has been issued for a particular individual. By contrast, a request for assistance can occur at any stage of an investigation or prosecution. The assistance provided could be a crucial piece of evidence or it could be one small piece in a much larger body of evidence required to prove guilt. It is also possible that, at the time that a request for assistance is made, the suspect may not be within the territory of the requesting state and prosecution will only be possible if a third State extradites the individual to the requesting state.

While the MLA and law enforcement cooperation context is more complex than the extradition context, it is arguable that the test from extradition jurisprudence of 'real risk' and 'necessary and foreseeable' consequences is still relevant. If a state requests a piece of information in relation to the investigation or prosecution of a particular crime, it does not seem unreasonable to suggest that providing this information may foreseeably lead to a person being prosecuted and convicted of that crime. An argument that the information being provided is not critical to the prosecution would be second-guessing the investigative and prosecutorial processes of the requesting state.

However, there may still be an important difference between sharing evidence across borders and forcibly relocating a person from the safety of one state to another state where there is a real risk that he or she will be exposed to a human

164 *Soering* (1989) 161 Eur Court HR (ser A) [85].
165 Ibid [88].
166 *Kindler v Canada*, UN Doc CCPR/C/48/D/470/1991, [6.2].
167 *Ng v Canada*, UN Doc CCPR/C/49/D/469/1991, [14.2].
168 *Judge v Canada*, UN Doc CCPR/C/78/D/829/1998, [10.4].

rights breach. Instinctively, there seems to be something more direct in the chain of causation when the requested state's actions hand a person over to another jurisdiction. The challenge here is in formulating a test of causation or foreseeability that takes account of the complexities of the processes and variables involved in sharing evidence but is still workable in practice. This is clearly an area that would benefit from greater analysis by Governments and human rights treaty bodies.

VII. Conclusion

Just as extradition can have a significant impact on an individual's human rights, so too can the sharing of evidence through MLA or law enforcement cooperation. At first glance, it may seem logical to extend the approach taken to the obligation not to extradite individuals to the MLA and law enforcement cooperation context. However, there are some significant differences between the MLA or law enforcement cooperation processes and the extradition process that mean that international human rights law's approach to extradition cannot be directly imported into MLA and law enforcement cooperation.

Any application of the obligations under international human rights law to MLA and law enforcement cooperation would require an extended understanding of 'jurisdiction'. While such an understanding may be possible to construct by drawing on cases such as the passport cases and cases on trial in absentia, there are significant conceptual challenges that will need to be addressed. Further work is also needed to develop a test of causation or foreseeability that is sufficiently sophisticated for the complex factual situations in the MLA and law enforcement contexts. Even if these theoretical problems can be overcome, any move towards a more expansive approach is likely to encounter strong opposition from states.

One way in which to address the issue of human rights protections in MLA and law enforcement cooperation could be through the bilateral and multilateral treaty system on which many of these processes are based. To this end, the International Law Association has proposed inserting a clause into MLA treaties that would require states to refuse assistance where it is likely that the assistance would result in a person's human rights being violated in a way that contravenes international law.[169] However, such a formulation would require significant refinement before it could be workable in practice. As the discussion above has highlighted, issues such as how 'likely' the risk would need to be and whether the protection applies to all human rights arising from any treaty or rule of customary international law or whether it would be limited to specified key human rights would need to be clarified. Too broad an approach could be seen as being unjustifiably protective of alleged criminals' rights at the expense of the rights of the victims.

At the moment, MLA and law enforcement cooperation are covered in a number of bilateral, multilateral and regional instruments. However, there have been moves towards creating a comprehensive treaty on international legal cooperation that

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169 International Law Association, *Report of the Sixty-eighth Conference held at Taipei* (1998), cited in Ronli Sifris, 'Balancing Abolitionism and Cooperation on the World's Scale: The Case of the Bali Nine' (2007) 35 *Federal Law Review* 81.

would address extradition, MLA and law enforcement cooperation.[170] Creation of such an instrument would provide an unprecedented opportunity to address human rights in a thorough, considered manner. A comprehensive treaty could include clear, mandatory grounds for refusal where a sufficient risk existed that specified human rights would be breached. The requisite level of risk and the specified human rights could draw on the extradition jurisprudence as a starting point. However, it would be very difficult to develop a framework that was sufficiently nuanced to handle complex situations but also able to be applied by officers in their day-to-day activities.

For example, the handling of the death penalty would be likely to generate significant differences of opinions between states. Some commentators argue that abolitionist states should never provide information relating to a death penalty offence without an adequate undertaking that the death penalty will not be imposed or carried out.[171] However, other commentators argue that a blanket prohibition on providing information without an undertaking could constitute too great a constraint on the effectiveness of international cooperation.[172] Law enforcement agencies regularly share information both in response to requests and on a voluntary basis. Requiring a death penalty undertaking before sharing any piece of information could severely restrict the ability of foreign agencies to work together to fight transnational crime.

Even the seemingly non-controversial issue of prohibiting provision of assistance where there is a real risk of torture or cruel, inhuman or degrading treatment or punishment creates difficulties in practice. Unlike the death penalty, torture does not appear as a punishment on the requesting state's statute books and the requested state would have to undertake independent research to establish if any risk existed. A requested state would need to consider such diverse issues as the conditions in prison if a person were convicted and the adequacy of medical treatment in the prison system. While this sort of analysis is certainly possible and is often conducted before a state surrenders a person for extradition, it would be unworkable to expect this sort of analysis in every instance in which one police officer shares information with a foreign counterpart. In practice, it could mean that if there were any history of practices that could amount to torture or cruel, inhuman and degrading treatment or punishment in a state, other states would not cooperate with it on any basis. This situation would not be able to be remedied by seeking undertakings since undertakings relating to torture or cruel, inhuman or degrading

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170 For example, the issue was discussed but ultimately rejected at the 2010 UN Congress on Crime Prevention and Criminal Justice; Draft Salvador Declaration Comprehensive Strategies for Global Challenges: Crime Prevention and Criminal Justice Systems and Their Development in a Changing World, UN Doc A/CONF.213/L.5 (29 March 2010) [23].

171 Colin McDonald, 'Don't Bury Us Before We're Dead' (Paper presented at the Criminal Lawyers Association of the Northern Territory Eleventh Biennial Conference 'Remote Justice', Bali, 5 July 2007).

172 Lorraine Finlay, 'Exporting the Death Penalty? Reconciling International Police Cooperation and the Abolition of the Death Penalty in Australia' (2011) 33 *Sydney Law Review* 95.

treatment or punishment are considered inherently unreliable. [173] A blanket prohibition on any form of cooperation with a particular state could create a haven for criminal activity.

At the moment, each state handles these issues in a different way. An attempt to negotiate a comprehensive multilateral treaty would therefore face significant challenges. It is difficult to envisage an approach that could be adopted by consensus by states but would be clear and precise enough to constitute an improvement on the existing ad hoc arrangements. Further research and discussion is needed to develop a considered approach that takes into account law enforcement imperatives and government priorities, but is also strongly grounded in principles of international human rights law and criminal law. As the use of MLA and law enforcement cooperation continues to grow, it is increasingly important for this discourse to evolve and keep pace with casework developments.

173 *Baysakov v Ukraine* (European Court of Human Rights, Application No 54131/08, 18 February 2010); *Chahal v United Kingdom* [1996] Eur Court HR 54. But see also *Abu Qatada* (European Court of Human Rights, Application No 8139/09, 17 January 2012), in which the Court took into account assurances obtained from the Jordanian Government by the UK Government.