2000

Human Rights and International Mutual Legal Assistance: Resolving the Tension

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If indeed, as has been said, "it is fashionable nowadays to discuss the problems that arise from the application of general human rights to extradition", 1 then it is also true that human rights concerns are increasingly being raised with regard to other forms of international criminal co-operation as well. As compliance with international human rights norms has become the subject of greater scrutiny by both States and international adjudicative bodies, concerns have been raised regarding their application to the various processes by which States aid each other in combating transnational crime. Prosecuting authorities are presented with problems of how the standards for the protection of the individual to which their national system subscribes can be given effect in a situation where the norms, views and obligations of another sovereign State are directly engaged.2 A disparity in human rights protection between two jurisdictions may leave States in the difficult position of being unable or unwilling to co-operate in an international criminal investigation, and possibly in violation of an obligation to do so.

This troubled logarithm has been the focus of a great deal of discussion and debate on the extradition front. However, despite the importance of extradition as a tool for securing the assistance of foreign States in the prosecution of criminal offenders, it is acknowledged that the discussion must of necessity be taken to other forms of co-operation, particularly the provision of mutual legal assistance (MLA). WhileMLA "does not involve such a direct and far-reaching intrusion into the personal liberty of the individual" as extradition,3 the exchange of evidence and access to foreign courts that is embodied in the various MLA treaty regimes raises similar issues, and has important human rights implications. As the International Law Association recently stated, "[m]utual [legal] assistance treaties [hereafter MLATs] have not received the attention they deserve despite the key role they play in international co-operation in the suppression of crime".4

This article explores the interaction of human rights and MLA, in an effort to identify current trends and offer suggestions for future practice. Focus will be placed in particular upon the tension existing between the internationalization of human rights and the need for effective and efficient techniques with which to combat transnational crime. The first section will explore the factors and dilemmas faced by the requested State (i.e., the State receiving a request for criminal assistance) in deciding whether to co-operate in the provision of MLA. In concluding the first section, possible resolutions for predicaments

[1] Associate, McInnes Cooper, Halifax. M.A. (1994, Norman Paterson School of International Affairs, Carleton University); LL.B. (1998, Dalhousie); LL.M. (1999, Edinburgh). The author is grateful to ProfessorWilliam Gilmore, University of Edinburgh, for goodwill and assistance in preparing an earlier draft.

faced by the requested State will be evaluated. Particular attention will be paid to proposals by the Committee on Extradition and Human Rights of the International Law Association (ILA), which comprise scholarly examination of a recent vintage.5

The provision ofMLA, however, may be distinguished from extradition in that the requesting State (i.e., the State making the request for cooperative assistance) must also decide whether there is a conflict with its human rights obligations in accepting and using evidence from a foreign jurisdiction. The second section will canvass this and related issues, and offer possible solutions in conclusion. Again, particular emphasis will be placed on the submissions of the ILA on these matters.

The general theme throughout will be similar to that which has pervaded the extradition literature: examining international criminal cooperation from a human rights stable presents the challenge of balancing the protection of the individual with the larger, international societal interest in combating crime.6 It will be emphasized that, as the need to combat international crime grows and what might be called an "international criminal procedure" comes into being, this process will require an embedded substantive protection for human rights. However, both the need for flexibility and comparative differences in domestic criminal law regimes will entail a system of protection framed differently than analogous domestic norms.

Considering that aspects of MLA practice stem from extradition law, as well as the fact that human rights implications in that area have been explored by both commentators and courts, extradition will be drawn upon by way of analogy as far as is useful and relevant. Also, the United Nations Model Treaty on Mutual Legal Assistance 19907 will be utilized as a functional model in evaluating various MLA provisions, as will several other multilateral and bilateral instruments and arrangements.8

A. DEFINING MUTUAL LEGAL ASSISTANCE

Mutual legal assistance has been recognized as one of the most innovative techniques for inter-jurisdictional law enforcement to emerge this century, and "the fastest growing business in the criminal justice field".9 Its growth in popularity has largely been a response to the increasing amount and sophistication of transnational crime,10 as the need was perceived by criminal justice authorities to co-operate in the transmission of evidence between jurisdictions.11 This was conceived both as a reaction to the traditional jurisdictional difficulties associated with prosecuting transnational crime, and as a proactive and realistic means of attacking crime in an age of instantaneous communication and open borders.

Traditionally carried out through the diplomatic system of letters rogatory,12 MLA is now largely a creature of treaty and the subject of arrangements on both the bilateral and multilateral levels.13 For present purposes, it is suitable to adopt Gilmore's definition of MLA in criminal matters: "the process whereby one State provides assistance to another in the investigation and prosecution of criminal offences".14 This definition includes what Gilmore describes as "such unglamourous but highly practical matters" as the provision of

evidence, documentary or viva voce, for use abroad; the search and seizure of evidence for use in foreign proceedings; the transfer of witnesses for interview; and the serving of documents originating in another jurisdiction.15

B. THE REQUESTED STATE: WHITHER INCOMPATIBLE OBLIGATIONS?

One of the most vexing problems with regard to the interaction of international criminal assistance and human rights standards has been the question of how to reconcile potential, and occasionally realized, conflicts of international obligations, as well as conflict on a more general policy level. It is entirely possible that a State could have an obligation to provide mutual legal assistance to a treaty partner, yet be fully cognizant that the evidence will be used in a criminal prosecution wherein human rights standards to which the State is bound will not be upheld. This State has a two-pronged dilemma: first, is the provision of assistance on such facts a violation of its human rights commitments? If so, then how is the State to resolve the fact that it must breach either its human rights obligation or its cooperation obligation to the treaty partner? What is a State's duty in the face of conflicting international obligations, and which obligation prevails? The answers remain far from clear.

I. Conflicting Obligations: Extradition and the Soering Principle

The existence of this type of conflict has been played out in the extradition context, and the first question answered in the affirmative. A traditional analysis might determine that, where the requested State was not involved in the actual violation of the right involved, then responsibility could not be incurred through extradition.16 The cases of Soering,17 Ng18 and Short,19 however, each found international human rights tribunals or domestic courts deciding that a State that extradited persons to a State where certain fundamental rights were threatened would violate its conventional human rights obligations. The Soering case in particular has been hailed by many as heralding a fundamental change in the interaction of international criminal co-operation and human rights, with only slight exaggeration accorded to the assigning of the "pre-Soering and post-Soering" era labels.20

In a general sense, this development vindicates the idea that the individual, rather than being simply the object of international law,21 has a certain amount of international legal personality and the capacity to enjoy rights autonomously as a subject of international law.22 Moreover, these cases have adduced a link between human rights and international criminal co-operation that did not exist previously. They represent a clear expression of international and domestic judicial opinion that States engage their human rights obligations when they reach a certain degree of involvement in criminal proceedings against an individual, though the threshold of this engagement is far from being determined.23 As such, under certain human rights regimes States may become responsible for violations through simply partaking of the process, and can be subject to supra-national scrutiny based on a system of individual petition in so doing.24

However, even before attempting to extend what might reasonably be referred to as the "Soering principle" to MLA, it should be questioned whether the jubilation surrounding this

development has been carried slightly too far. Recently, two distinguished commentators have explained the effect of the Soering principle in the following manner:

. . . when an international court or other institution finds a State to be in breach of its obligations under a human rights treaty for having extradited a fugitive, primacy is in effect accorded to a human rights norm over the extradition treaty.25

However, these "international courts or other institutions" have as their mandates the determination of State compliance with their founding instruments. To determine that extraditing a fugitive will breach an obligation under those instruments does not vitiate the fact that not extraditing said fugitive will entail a breach of the extradition treaty.26 In short, the State is left bound by a set of conflicting international obligations, a situation on which international human rights adjudicative bodies are silent.

II. MLA and the Soering principle

This tension between obligations raises a more complex dilemma in the MLA context, ironically because there is a forceful argument to be made that from a technical point of view a similar problem of conflicting obligations does not exist. To be sure, as human rights norms take on more force within the international community, it is inevitable that States will be called upon to examine their MLA practice from a human rights standpoint,27 since from a conceptual point of view the same potential for conflict exists here as with extradition. 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 MLA for an investigation in some State will violate the requested State's human rights obligations.

The question posed to such an adjudicative body could be the following: will a State engage its human rights obligations by providing another State with evidence/assistance for use in a criminal investigation or prosecution? Can the Soering principle be extended to MLA practice? This is a more complex question even than it appears, as it raises both a very technical question of jurisdiction and a more general issue of determining the scope of international human rights. Requests for assistance under an MLA arrangement do not necessarily presuppose that the subject of the investigation28 is within the jurisdiction of the requesting State, but it is a matter of course that the requesting State will carry out any prosecution as an exercise of its criminal jurisdiction. Since this is the case, does the requested State owe a human rights obligation to a person who is not physically within its jurisdiction? This question will be most important in a Soering-type situation where the requested State is party to such an instrument but the requesting State is not.29

Soering found that, in the context of extradition, providing criminal assistance to a State which was not a party to the European Convention on Human Rights could engage international responsibility. In so doing, as commentators have noted, Soering gives the appearance of extraterritorial application of the Convention insofar as it applied Convention standards to acts to be carried out in a non-Convention State.30 The Court in fact made an effort to avoid such an extraterritorial application, specifically stating that

"the Convention does not . . . purport to be a means of requiring the Contracting States to impose Convention standards on other States".31 Despite the fact that Soering would have suffered denial of his rights in the United States, the Court found that the United Kingdom owed him the protection of Convention rights as he himself was "within their jurisdiction", and thus within the ambit of article 1.32 As such, the Court recognized "an inherent obligation" of Convention States not to extradite where the fugitive "would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment proscribed by [article 3]".33 Responsibility for breach of the treaty would result from the State having "taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment".34

In the MLA context, however, the accused will most often not be within the jurisdiction of the requested State, and will probably be in the jurisdiction of the requesting State at the time of a rights violation that appertains to him/her. Does the requested State owe a duty of protection to an accused who is physically outside its jurisdiction? The general approach to jurisdiction under article 1 of the European Convention has been that "a contracting party cannot be held responsible for acts committed by . . . other States in another country".35 It may thus be argued that, if the requested State owes no obligation towards individuals outside its jurisdiction, then the human rights instrument is not engaged with the sending of MLA, and the potential for conflict between that instrument and the MLA treaty remains unrealized. The MLA treaty is thus the only instrument that governs relations between the parties.

Other cases before the European Court of Human Rights, however, have provided a somewhat expanded notion of jurisdiction. In Drozd and Janousek v. France and Spain,36 the petitioners had been convicted of criminal offences in Andorra (which was not a State party at that time) and imprisoned through a prisoner transfer arrangement in France. They complained of a breach of the right to a fair trial. While finding no violation, the Court did conclude that France's obligation to safeguard the right was engaged through its role in the criminal process, and thus responsibility was possible in a retroactive, extraterritorial fashion. The Court also stated that "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".37 It is arguable that the provision of MLA by the requested State is an act of authority producing effects extraterritorially. The authorities are certainly exercising jurisdiction over the essential legal interests of the person regardless of their physical location, particularly in cases of search and seizure.38

It is submitted, moreover, that human rights issues cannot be disposed of on a purely technical level. It seems somewhat facile to declare that protection under a human rights instrument extends only to a corporeal human being. Even where a person is physically on the territory of the State party, it is the legal interests of this person that are being protected, rather than just physical well-being.39 The ambit of international human rights law is the protection of the legal interests of all persons, by all States. Assigning responsibility for this protection on the basis of physical location, while perhaps explicable from a functional point of view, seems unduly arbitrary. This is not to advocate the

extension of every substantive or procedural human rights obligation to every State with regard to every individual, but rather to note that MLA relates to special circumstances. The requested State is called upon to act in a compulsory manner that directly affects the individual's legal interests, and to assist one of the most invasive forms of interaction between State and individual. Accordingly, the requested State is directly engaging the legal interest of the individual, and should act in accordance with its own adopted policies on human rights protection.

This proposal represents no manifest injury to the interests of the requested State. If States internationalize the processes of crime control, then surely individual protections must be similarly internationalized, at least to the extent that the requested State has control over the process. Such an admittedly novel extension of jurisdiction will not bind the requesting State to the human rights instrument, but is meant to provide the requested State with a solid legal basis on which to refuse co-operation in a situation where the individual faces human rights violations. To provide evidence for use in a foreign criminal procedure that amounts to a "flagrant denial" of fair trial rights,40 simply on the basis that "our human rights obligations don't cover the accused", may render the requested State complicit in conduct which it has agreed to prohibit, necessarily leaving a bad taste from a legal and moral standpoint.

This basis for refusal is not unknown to MLA practice, but simply unarticulated at the level of international obligation. As explored below, standard MLA instruments contain enumerated bases for refusal of cooperation specifically geared towards protecting the individual. Moreover, the power to provide MLA even under a treaty arrangement is maintained in many States as an inherently discretionary decision on the part of the central authorities. In the United Kingdom, for example, the Home Office will generally refuse a request where it appears that the accused will be subject to human rights violations; this decision is justified on the grounds of "public policy", but it is acknowledged that so refusing may constitute a breach of the applicable MLAT.41 Both of these aspects suggest a duty on the part of the requested State to respect its own human rights obligations in its MLA practice, even where the potential or actual violation is extraterritorial.

Jurisdictional questions aside, however, a State's customary human rights obligations may also be engaged through its MLA activities. An inquiry into this issue will best proceed through an examination of the specific rights involved.

III. Which Human Rights?

The foregoing has suggested a duty of States that are party to an international human rights treaty to apply these protective provisions to their MLA practice. It would be hardly accurate to suggest an unqualified duty, however, involving every provision of all such treaties. Crime suppression is also an important goal, and will necessarily involve a strict delimiting of the relationship between the practice of criminal co-operation and the rights involved. Accordingly, the question may not be, as Gane has phrased it, "are mutual assistance obligations subject to implied human rights restrictions?"42 but rather "which rights will restrict co-operation, and to what extent?"

Conceptually, all human rights norms are potentially applicable to international criminal co-operation. However, the development of human rights law has taken into account the pressing need for crime control as a necessary component of promoting individual freedom. Thus, while certain rights are non-derogable, others must give way to such reasonable limitations as are necessary and justified in a free and democratic society.43 Article 9(1) of the International Covenant on Civil and Political Rights lays out a prohibition of arbitrary arrest or detention, and several other rights are similarly limited.44

The Soering judgement acknowledges that the inter-State balance between law enforcement and human rights is a different one than at the national level. The Court stated that not all protections in the European Convention on Human Rights were necessarily relevant to the extradition process, though it declined to enumerate those which were.45 Dugard and Van den Wyngaert, based on a survey of State practice and international instruments, have observed that it seems "impossible to argue seriously that there is a general exception to extradition whenever any human right is seriously threatened, which would be opposable by any requested State to any requesting State on the basis of obligations assumed under regional and universal international human rights treaties".46

Given the lower level of intrusiveness involved, the same must be true of MLA. Soering involved a request for extradition of an accused to face a possible death sentence, thus engaging fundamental issues of individual liberty and dignity. MLA, on the other hand, involves providing documents, witness statements and the like, which are more remote to the actual deprivation of liberty. Yet, central authorities in many countries would hopefully stand aghast at the notion of providing evidence which helped to secure the conviction, and subsequent execution, of a person for the crime of adultery under a religious state regime. This is an essential quandary in both theory and practice.

The Commonwealth, which has recently devoted itself to the issue of balancing human rights with crime control,47 has noted the following rights as customary and non-derogable: the right to life;48 the prohibition of torture and other forms of cruel, inhuman and degrading treatment and punishment;49 the prohibition of slavery; and freedom from retroactive criminal laws.50 Notably, none of these rights appear as bases for refusal in the United Nations Model Treaty, though such "lesser rights" as nondiscrimination and double jeopardy do.51 However, there is widespread international agreement on the non-derogability of these rights, as well as a strong argument for their being customary international law on the level of jus cogens.52 Bearing in mind that the jurisdictional argument raised above renders this controversial, the following is submitted: providing MLA to a State where an accused is likely to face violation of these rights could violate States' human rights obligations under customary law, and possibly under treaty law. Such a proposition accords with the general spirit behind Soering, where the Court found that liability would be incurred if the United Kingdom took action that consequently exposed the petitioner to ill-treatment.53

This argument is fairly convincing with regard to these jus cogens principles. Admittedly, it is "predicated on the possible occurrence of acts that will take place, if at all, in the future, outside the jurisdiction of the State party, and by another State over which the [requested]

State has little or no control".54 However, States have a basic duty to give effect to their obligations at international law, including human rights obligations.55 This duty is owed, not to the particular individual concerned, but to the entire international community, both as a matter of the authority of customary law and the status of at least these human rights as obligations erga omnes.56 For a State to eschew the torture of accused persons during the criminal process, and yet facilitate such process in another State, reeks of hypocrisy, and more importantly frustrates the ambit of the prohibition. Dicta from the Ng case indicate that extraditing to a State which practices torture will be a violation of obligations,57 and the same logically follows for the purposes of MLA. The illegitimacy of such proscribed practices must tip the balance away from the interests of crime control, particularly in that they are more likely to spawn further social disorder and defeat ipso facto the notion of effective law enforcement.

Two problems arise. First, the accused will usually have no means through which to apply for a decision to refuse assistance by the requested State, as this is an area at the discretion of the government with no judicial scrutiny.58 Second, the situation may be subject to threshold problems, particularly in terms of differences regarding what constitutes torture or degrading/inhuman treatment.59 The conditions under which MLA is provided may vary with the State from which evidence is requested, highlighting the difficulty in determining any international standard. States with limited resources may also have difficulty monitoring conditions in other States so as to determine the danger of rights violations, or may turn a political "blind eye" to such danger. All of this militates in favour of establishing an international standard, and at least clarifying obligations between treaty partners.

With regard to other rights, the picture becomes increasingly cloudy. The right against discrimination is well known to MLA arrangements, and is also a widely-held human right.60 However, courts have been reluctant to apply it, due to the difficulties in establishing that discrimination is taking place (except in familiar cases, such as South Africa).61 Cases of individual discrimination, furthermore, would be almost impossible for MLA central authorities to determine with the small amount of information generally accompanying an MLA request. Basing a refusal on discrimination, therefore, is inherently difficult, as the requested State "does not have an [sic] view of the whole trial".62

The right to a fair trial is similarly well-established, appearing in many major human rights instruments.63 Article 14 of the International Covenant on Civil and Political Rights sets out the fullest panoply of "due process" rights for the accused, and Gane has suggested that all of these are relevant to international co-operation.64 The European Court of Human Rights has shown itself willing to consider this issue,65 and has suggested that extradition will be denied where the accused faces "a flagrant denial of a fair trial in the requesting country".66 In the MLA context, however, there are several other factors. The United Nations Model Treaty contains no mention of fair trial rights, which by contrast appear in article 3(f) of the Model Treaty on Extradition. This is at least an indication that less importance is attached to these rights by the international community in this context. Similar to most extradition cases it also suffers from a temporal problem, in that the accused has not yet faced trial, disclosing the difficulty of predicting a future event. Finally,

fundamental differences in the interpretation of "fair trial rights" remain between States with common law and civil law traditions.67 Requiring the requested State's process standards to be met in the requesting State before providing MLA could hold up co-operation altogether.68

In the final analysis, a violation of human rights obligations may be incurred, in certain situations, by sending evidence pursuant to an MLA request to a requesting State known to endanger such rights. This is a complex matter, made all the more so by the fact that the task of addressing it in the first instance falls not to courts, which are fairly well-equipped for such matters, but to governments. Also, even if this sort of rights violation is alleged, by whom will the requested State be called to task? Unlike extradition, where an accused may have some avenues of appeal as part of the process, there is usually no one present in the requested State to raise these issues. Moreover, how is a central authority to track the violations which may occur within the criminal jurisdictions of treaty partners? Such a task may be beyond the resources of the typically already overworked Ministry of Justice officials who make and fulfill such requests. The relevance of human rights concerns being applied at all in this context has been questioned by one practitioner, who writes:

Where [MLA] is concerned the requested country is providing information or assistance to the criminal justice process of another country. It has so much less influence over what finally happens to the person who is the subject of the request.69

Nonetheless, logic and the Soering principle suggest that to deny that a co-operating State is complicit, and thereby responsible, in a human rights violation resulting from the conduct of a criminal prosecution is to deny legal effect to the rights themselves. Yet the tension surrounding the need for efficient and unobstructed criminal co-operation makes the drawing of lines based on human rights considerations rather complex. Imposing strict legal standards on this practice could defeat the very flexibility that MLA is designed to facilitate. Torture and slavery will be fairly easily determinable, but other rights less so. The European Court's dictum that co-operation might be denied where the accused "has suffered or risks suffering a flagrant denial"70 of some rights might inform the discretionary decision of the requested State. Without a legal basis for making such a refusal, however, the requested State will incur responsibility for violating its MLA treaty with the requesting State.

IV. Addressing the Conflict: Traditional "Treaty-based" Responses

As noted above, there has been implicit recognition by States that the requested State owes a certain protective duty to the individual when engaged in criminal co-operation, and that a means was required to assuage potential conflict. This has manifested itself in the fact that MLA practice embodies a number of protective principles, generally taking the form of treaty provisions allowing the signatory States to decline a request without violating the central obligation to co-operate.71

Whether these provisions protect the individual by specific design is a matter of debate, due to their roots being found in the traditional law of extradition, which largely predates

the development of international human rights.72 Recent commentary has suggested that such provisions are an uncomfortable fit with the modern, rights-oriented idiom due to their being dedicated to "political and inter-State considerations which may differ from State to State".73 Another commentator has written, however, that while the link between these protective provisions and human rights is "by no means self-evident and . . . often indirect", they nonetheless promote protection of the individual in a manner that some times exceeds the scope of human rights treaties.74 Moreover, grounds of refusal have developed in the post-war era that are more specifically tailored to human rights concerns, such as the discrimination clause,75 and these are clear evidence of the growing significance of international human rights norms for State practice in international criminal co-operation.

Within the extradition context, these grounds for refusal are predominantly expressed in a mandatory fashion. In MLA practice, by contrast, States "tend to adopt a discretionary formula",76 making refusal on these grounds optional. This suggests, as Gane has written, that "the protection of the rights of the individual is of greater importance in the context of extradition than in the context of other forms of cooperation in criminal matters".77 Practically, this functions as a corollary to the reduced concern with individual liberty in MLA and allows States flexibility in their co-operation efforts.

Traditional extradition-based protective principles appearing inMLATs differ in their human rights applications. The ground of double criminality78 is not widely employed in bilateral treaties,79 but it does allow States to refuse co-operation for conduct which they have not criminalized due to human rights concerns.80 The double jeopardy provision (based on the principle ne bis in idem81) is found in the United Nations Model Treaty,82 the Inter-American Convention,83 and the Commonwealth Scheme.84 This provision upholds the similar principle expressed in article 14(7) of the International Covenant on Civil and Political Rights, and is a fairly welldefined protection for that specific right. The political offence exception is widely employed in treaties, but has lately been suffering some criticism as being increasingly irrelevant to the modern context of international criminal co-operation.85

One unique feature of MLATs which has the potential to allow States an outlet for avoiding implication in human rights violations is the ordre public clause.86 This type of provision allows States to refuse assistance based on loosely-defined essential interests, including sovereignty, security and public order. The provision has its origins in States' reluctance to bind themselves to provide certain kinds of evidence, some of which might betray national security or industrial secrets. However, it has been acknowledged that the ambit of this exception could be sufficiently wide to cover human rights matters:

Mutual assistance might therefore legitimately be refused where the requested State has reason to believe that the assistance it provides may be used to violate the accused's human rights on the grounds that this would prejudice that State's essential interests by placing it in violation of its treaty obligations or its obligations under general international law.87

As Swart points out, however, ordre public "is a rather vague criterion, compelling the requested State to examine the question in each single case".88 Moreover, practitioners have expressed scepticism regarding ordre public, noting that its use may impede the effective provision of MLA and hinder reciprocity89 - without specifically protecting human rights.

In the extradition context, the States of the European Union have moved to further restrict even the operation of these protections in favour of more efficient co-operation.90 However, this development is due not to decreasing interest in human rights protection among these States, but rather the converse: protection of the individual can be relaxed among these States which are all party to the European Convention on Human Rights and share a common history and vision, with a commensurate level of trust that, for example, fair trial rights will be ensured.91 Such an arrangement is ideally suited to co-operation among States subject to a supra-national human rights adjudicative body whose rulings can have direct effect domestically. Even States parties to the International Covenant on Civil and Political Rights, however, are not subject to the same level of supervision. Accordingly, the assumption of human rights goodwill cannot be a widely-used instrument of policy in this way.

While these protective provisions are directed towards protecting the individual during transnational criminal process, this motivation does not translate to a specific targeting of the relevant human rights norms. It is not merely organizational semantics to wish for a specific engaging of human rights protections in this manner, for agreement on such would allow States to protect their human rights interests, make co-operation more predictable and thereby more efficient, and shield them from responsibility for refusal to co-operate. Current MLA practice does not provide for the assessment by States of whether and to what extent their co-operation engages their human rights obligations, which could lead to the situation of conflicting obligations raised above.

V. Addressing the Conflict: The Substantive Law of Treaties

If a conflict between a State's human rights treaty obligation and its MLA obligation can be made out, then it is essential to determine whether a priority can be found. It has been suggested in prestigious quarters that, crudely put, human rights obligations simply trump conflicting treaties on the basis of their status as a "higher" form of international law.92 Yet this formulation of priority for human rights appears to be aspirational, and does not solve the problem of the requested State's responsibility under the criminal co-operation treaty.

The substantive law of treaties is helpful in illuminating the problem, if not in resolving it. Article 30 of the Vienna Convention on the Law of Treaties,93 on "Application of successive treaties relating to the same subject-matter",94 governs conflicting treating obligations. Paragraph (3) provides that, where two States are party to two treaties, "the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty". Where one State is party to both treaties, and the other only to one, paragraph (4)(b) declares that "the treaty to which both States are parties governs their mutual rights and obligations".95 Article 31(3)(c) establishes a general rule that treaties must be interpreted

in light of "any relevant rules of international law applicable in the relations between the parties".

It has been suggested that, presupposing an extradition treaty, where both requesting and requested State are also parties to a human rights instrument, that instrument will have priority over the application of the extradition treaty.96 As article 30 indicates, however, traditional treaty law manages this matter by way of temporality: "it is to be presumed that a later treaty prevails over an earlier treaty concerning the same subject-matter",97 due to this being the latest expression of intent between the parties.98 Where a human rights treaty is predated by arrangements concluded early in the century or before,99 then the assumption of human rights primacy would be safe. However, virtually all MLA arrangements are later in time than the major human rights regimes and would, according to article 30, take precedence over human rights treaties as the latest expression of the will of the parties. It seems an unlikely reading of intent on behalf of States that have concluded MLATs that "human rights norms will govern our conduct - except during international criminal co-operation".

Moreover, in a Soering-type situation where the requesting State is not a party to the relevant human rights instrument, the criminal co-operation treaty governs and the requested State may breach its co-operative obligation by fulfilling its human rights duty. The fact that a State decides or is instructed by a court to be bound by its human rights obligation is no defence to its responsibility to the treaty partner.100

Other aspects of the law of treaties provide scant comfort for the abrasion caused by treaty conflicts.101 One argument is that such human rights as are considered to be jus cogens principles will take priority over extradition treaties102 through the operation of articles 53 and 64 of the Vienna Convention.103 Thus it could be asserted convincingly that freedom from slavery is a "trumping" principle, as is freedom from torture, particularly in light of the Torture Convention's explicit limitation of extradition.104 The controversy which rages over the remaining body of human rights, however, precludes for it any realistic qualification as jus cogens.105

It is by no means clear, for the most part, that human rights norms must take precedence over international criminal co-operation treaties.106 As a matter of law, it is difficult to justify the proposition that a requesting State bound neither by the human rights treaty nor by the jurisdiction of the adjudicative body, such as the United States in Soering, must simply relinquish its treaty rights without protest. A court, whether domestic or international, can decide this question with regard to the domestic legal effect within the requested State, but this will not extinguish the State's responsibility pursuant to its treaty obligations.107

It might be argued that the solution to this dilemma is to acknowledge the conflict between transnational criminal process and human rights norms as a limitation of international law, and allow such conflicts to be governed politically. From the criminal co-operation point of view, however, policy action is required because the existing situation creates political and legal conflict between States. Ultimately, many States may be left in breach of their treaty

obligations or their human rights policies, creating political tensions and undermining the general anti-crime regime. The notion of a continuing series of cases like Soering, where States are left to negotiate some kind of ad hoc conditional co-operation in an attempt to pick up the pieces of a breach of obligation, must give us pause. So, too, must the notion of prosecutorial authorities resorting to "unofficial" methods of evidence collection, based on perceived human rights "obstacles" to effective criminal co-operation. Moreover, from a human rights point of view, States should suffer neither formal nor unofficial sanction for upholding their human rights commitments, attacks upon which strike at the very foundation of civil order that the criminal law, ironically enough, is designed to protect.

A scheme for resolving this conflict is necessary, as well, for the continued development of MLA schemes. With less concern for the actual bodily integrity of the accused, a looser approach to safeguarding rights has been adopted with regard to the kinds of evidence-taking, proceeds-seizing activities inherent in MLA arrangements. As explored above, human rights considerations have, in practice, been applied differently in this context despite their common origins in extradition law. However, if the previous submissions are correct, then the same morass of conflicting obligations is likely to haunt MLA practice as well. For all of these reasons, the balance between protection of the individual and the suppression of crime requires a coherent set of international norms to serve as its underpinning. It is desirable that this be accomplished by way of internationally negotiated treaty provisions and in a manner that removes the potential for conflict, given that treaty law in its orthodox form provides no adequate solutions.

VI. Human Rights and the Requested State: An International Rule of Refusal?

As has been shown, refusal to provide mutual legal assistance based on concern for the protection of the individual is a well-founded aspect of State practice, though such refusal has generally been framed in discretionary terms. This discretion reflects a desire on the part of authorities to maintain a free flow of evidence between jurisdictions, the implicit notion being that the courts of the requesting State are the bodies with the jurisdiction to adjudicate with regard to human rights concerns. This in turn is based on the fact that the freedom of the accused is not at issue in the requested State, and that it is possible to argue that no human rights duty is owed towards this person with regard to MLA.

However, this perspective limits human rights obligations of the requested State to protecting the corporeal person within its jurisdiction, when the very nature of human rights norms suggest that the individual's legal interests are the proper focus. If a State is willing to refuse cooperation because of potential discrimination in a criminal proceeding, then such willingness must be based implicitly on an acknowledgement that being complicit in discrimination is contrary to international law duties. It seems only fitting that, a priori, the same should apply to even more compelling prohibitions such as torture.

The discretion, however, remains, especially given that only a limited role for the requested State's courts is contemplated by MLA practice. As such, a reasonable aspiration at this point in the development of the law of international criminal co-operation is that requested States adopt a human rights-oriented policy, but one with legal effect vis-a-vis relations

with treaty partners. The International Law Association has proposed the insertion of the following clause into MLA agreements:

Assistance shall be refused if it appears to the requested State that there are substantial grounds for believing that the rendering of such assistance would result in a serious violation of the human rights of any person under any treaty for the protection of human rights to which the requested State is a party, under customary international law, or under the domestic law of the requested State.108

This clause utilizes mandatory terminology, reflecting the increasing importance of human rights concerns in this context, and allows the requested State to frame its refusal on the basis of its own human rights obligations. It also allows States to exert political pressure on treaty partners to bring their human rights practices into line with fundamental standards.

The requirement of "substantial grounds" for suspicion that a "serious" violation "would" happen seems to imply an application of quasi-judicial decision-making. However, MLA central authorities are arguably capable of determining such a standard, and it allows sufficient flexibility for the differences between, for example, common law and civil law jurisdictions to be managed reasonably well.109 Such a determination will be fairly easily made with regard to customary prohibitions such as torture, arbitrary death, slavery, and other more "serious" violations.110

C. THE REQUESTING STATE: DETERMINING ADMISSIBILITY OF EVIDENCE

Human rights obligations are no less relevant for the requesting State's MLA practice, in that it is this State wherein the accused is likely to face trial. The requesting State is thereby subject to the tension between crime control and the protection of the individual in a very practical manner it must determine the extent to which evidence provided can be utilized in criminal proceedings. However, this tension manifests itself, not in a conflict between human rights and MLA obligations, but rather between the State's human rights obligations and its crime control objectives. It may be that a requesting State wishing to uphold its human rights obligations must give some consideration to the manner in which MLA-based evidence has been collected.

Even this is controversial.111 From an inter-State perspective, authorities will take care to avoid any action or policy prescription that smacks of questioning another State's exercise of criminal jurisdiction. For the courts of one State to pronounce upon the evidence-gathering technique of another, through the lens of the requesting State's individual rights statute or rules of admissibility, is tantamount to extraterritorial application of the requesting State's law. Moreover, if both requesting and requested State are parties to the human rights treaty in question, then a finding by the former's court that evidence provided by the latter has transgressed a human rights standard may be a de facto declaration of breach by the requested State not a move designed to foster good treaty relations. On the other hand, if the requested State is not a party to the international human rights regime in question, such a decision could again give the impression of extraterritorial effect.112

These issues are less complex with regard to elements of human rights law that have entered the customary realm, and that embody jus cogens principles. For example, the Torture Convention contains a prohibition of admitting into proceedings any evidence obtained by torture,113 and this prohibition's status as customary law means that all States are bound by this standard.114 This is by no means a minor statement on the balance of human rights with crime control. As the International Law Association has stated, "[a] contrary view would amount to accepting that the end (crime suppression . . .) justifies the means (torture), which would run counter to the letter and spirit of international human rights instruments".115 A similar case can be made for the other jus cogens rights mentioned above. However, this is, as has been shown, a segment of a longer list of rights that are potentially relevant to the MLA context.

I. "Equality of Arms": MLA and the Accused

As explained above, MLA practice has typically exhibited less concern for the protection of the rights of the individual than extradition. This difference takes on a marked importance for the accused in the requesting State due to the fact that, unlike the extradition process where the judiciary will be involved in applying relevant individual rights protections, no such recourse exists underMLA procedure. As extradition involves the potential of actual physical transportation of an individual to face criminal proceedings abroad, it is the individual who is the subject of the determinative legal proceedings in the requested State, i.e., the extradition hearing. Therein, he or she is entitled (though the extent of entitlement varies from State to State) to raise both procedural and substantive matters in this regard.116 In MLA practice, by contrast, insofar as the taking of evidence will be carried out by foreign authorities working within their own jurisdictions, the individual is excluded from invoking domestic protection regimes.117 Faced with irregularities or illegalities in the requested State, the only recourse for the accused is to the domestic criminal court which is presented with the evidence.

Given MLA's relative youth in comparison to extradition, this can be safely characterized as a deliberate expression of policy on the part of co-operating States. An MLA treaty regime is an agreement between two States, specifically designed to facilitate co-operation at the intergovernmental level. The individual, as such, is the object of the treaty regime, and the subject only of criminal proceedings that utilize the evidence so collected; unless the treaty expressly awards rights to individuals within its terms, they have none. American practice in this area has in fact been to expressly exclude any standing for the individual under MLATs.118

This state of affairs interacts somewhat uneasily with the notion of universal human rights. MLA, despite being one of the more modern arrows in the quiver of criminal authorities, rests on a traditional international legal framework which, while facilitating action taken by the State against the individual, disallows any redress on the international level for transgressions against individual liberty. In effect, the pendulum is swung heavily towards the interests of the State in the investigation of crime. It can be convincingly argued that this is a necessary reality of efforts to combat transnational crime, and that the entire point of MLA is to ease procedural difficulties, not create them. Moreover, the individual can

access such rights in the form of domestic exclusionary rules. Aside from the problem of how such "exclusions" take place in practice, to be discussed below, this design allows only for ex post facto validation of the individual's rights. International human rights norms are designed to protect a vital sphere of the individual's core liberties, and to limit intrusions into other liberties to the extent necessary to maintain social order demonstrating a need for ex ante protection. The current writer does not submit that the entire MLA process should be subject to procedural safeguards at the expense of efficiency of international criminal co-operation, nor that it be exposed to judicial scrutiny at every step. However, it is desirable that an avenue for human rights protection be committed to by requesting States in the context of MLATs.

The International Law Association has also noted another area of defence weakness in MLA practice: "Many [MLATs] seriously violate human rights norms by extending the benefits of assistance to the prosecution only. Such a practice violates the principle of 'equality of arms' which is a fundamental feature of a fair trial."119 While it seems questionable whether a fundamental human rights norm is being violated,120 it is true that under typical MLA arrangements the authorities have complete discretion as to which evidence is to be gathered under the foreign system. The defence is thus barred from access to an inter-State channel for evidence collection and left to its own devices and resources to pursue evidence in the foreign jurisdiction. This will often preclude any evidence-gathering in the requested State by the defence, even though material which is potentially exculpatory may exist beyond the specific parameters of the investigation being undertaken by the requesting State authorities. Thus, it is not unrealistic to contemplate an unfair trial as a result of evidence beneficial to the defence being unretrievable, perhaps even unknown to the defence, on this basis.

There have been proposals at various levels to address these concerns. The International Law Association has proposed that States consider "the needs of the indigent individual unable to afford to collect evidence in his defence abroad",121 although even wealthy defendants would need access to mostly inaccessible governmental machinery in the foreign jurisdiction. The government of Australia has addressed this concern more fully in an amendment to its MLA implementing legislation that "formalizes the role of the Attorney-General in seeking foreign evidence at the request of the defence".122 The Commonwealth Law Ministers have recently adopted a recommendation stating that "court based [MLA] channels should be available equally to the defence and prosecution and that every country accepted that requests for assistance made by courts on the motion of the defence should, in the interests of justice, be responded to".123 While the collective frustration of prosecutors would be palpable if such a policy were instituted world-wide, it does offer a means of protecting the fairness of criminal proceedings, and perhaps provides a means of balancing the State's exclusive control over evidence-gathering.

II. MLA and Non-Inquiry

The distinctive delicacy of the criminal jurisdiction is reflected in current MLA practice. MLATs, in keeping with the traditional letters rogatory system, are not designed to be substantive law-making instruments in terms of their domestic applicability. Rather, they

are designed to provide a functional co-ordination of the domestic criminal law regimes, so that evidence may be transmitted from one to another. Domestic statutes, in such jurisdictions that have them, are generally designed to provide a "fit" between the international obligation and the domestic criminal procedure. The goal, as such, is not to change either State's criminal process, but to establish a system by which they can interact. This is reflected in the widely-employed treaty provision, which also appears in the United Nations Model Treaty, to the effect that requests with regard to taking of evidence, search and seizure, etc. are to be carried out in accordance with the law of the requested State.124

When a treaty relationship has been entered into, the States concerned have a vested interest in maintaining a working relationship that reflects a sense of obligation. As such, the courts of the requesting State will not scrutinize the collection of evidence by the authorities of the treaty partner State to the same extent as would be done domestically. There may be an analogy to the extradition context in this respect. The Canadian case of Argentina v. Mellino125 noted that, where a treaty exists, an assumption that the authorities of the treaty partner will not sufficiently consider the interests of fairness and human rights "is offensive to notions of comity and 'amounts to a serious adverse reflection . . . on foreign governments to whomCanada has a treaty obligation . . . '"126 It is tempting to deduce from this expression of policy that the executive arm of a government is likely to conclude treaties only with States which are like-minded in terms of protecting the individual during criminal process. Such a deduction would pale, however, in light of the fact that the goal of MLA instruments is access to evidence in other jurisdictions, the "unlocking" of one State's law on behalf of another.127 The prime criterion for the formation of arrangements with other States is the number of requests that are expected to be made, rather than congruence of human rights policy. The MLA system is designed for speed and flexibility in the fight against international crime, and this is likely to dominate over any notions of political concurrence.128 Thus, for the courts of the requesting State to base a refusal to examine the human rights standard of evidence collection in the requested State on an assumption of good will seems disingenuous at best. A more accurate interpretation of the application of comity in this regard is simply that it does not make for good relations to allow even the appearance of questioning the criminal process of a treaty partner State. Given the importance of reciprocity in theMLA relationship, States are also likely to be unenthusiastic about any questioning of their own criminal process in a requesting State, a further motivator in keeping judicial exclusions of evidence to a minimum.

The case law of several States active in MLA indicates that courts will generally not inquire into the propriety of the taking of evidence, including searches and seizures, that occurs in requested jurisdictions. This approach is consistent with the "rule of non-inquiry" in extradition matters.129 The prime justification applied by courts is an unwillingness to adjudicate either the laws of other States or the actions taken by their law enforcement authorities, due to sovereignty concerns, the interests of comity, and perhaps most centrally lack of jurisdiction. The effect from a human rights standpoint, however, is the same in that the accused can be deprived of the protection of admissibility standards of both the requesting and requested States. This also raises the potential of admitting evidence taken by methods that contravene the provisions of international human rights

treaties to which the requesting State is a party, and that this in turn will violate the requesting State's human rights obligations. Despite this having been raised as a possibility by European Commission on Human Rights dicta,130 there appears to be no sense of opinio juris among States that admission of such evidence would incur a violation of human rights instruments. Courts, when faced with the question, have generally fallen back on a general approach, if not a "rule", of non-inquiry.

Cases have dealt with two instances: where the evidence-gathering was performed in accordance with the laws of the requested State, but would be inadmissible under the requesting State's rules of evidence; and where the evidence-gathering was illegal under the laws of the requested State. The approach of the courts, however, has been broadly the same in both to refuse to scrutinize the conduct of foreign authorities acting in their own jurisdictions. Evidence taken abroad will generally be admitted unless the Court regards it as "shocking," or if admitting it would threaten the fairness of the trial. A classic example is the series of Belgian "telephone-tapping" cases reviewed by Gane and Mackarel.131 In each of these, telephone interception evidence, which was inadmissible under Belgian law at the time, was nonetheless allowed into criminal proceedings by the Cour de Cassation. In one the interception was carried out in the Netherlands under a request from the Belgian authorities,132 while in another the Belgian authorities had requested access to pre-existing interceptions in France.133 In all cases, the Court ruled that, although such evidence would have been inadmissible had it been obtained in Belgium, the fact that the interceptions were consistent with requested States' laws which had been upheld as valid by the European Court of Human Rights extinguished any objections to reliance upon them.

The Canadian courts have taken a more expansive view of non-inquiry. In two non-MLAT cases, R. v. Harrer134 and R. v. Terry,135 the Supreme Court of Canada confirmed136 that evidence taken by American officials which met American procedural requirements but did not meet the standards of the Canadian Charter of Rights and Freedoms would be admissible nonetheless, as the Charter was only intended to regulate the behaviour of Canadian police and could not apply extraterritorially.137 In both cases the Court stated that exclusion of evidence would be possible if the manner in which the evidence was taken rendered the trial unfair, or if admitting it would "bring the administration of justice into disrepute", and noted that this was geared towards achieving "a just accommodation between the interests of the individual and those of the State in providing a fair and workable system of justice".138

An interesting recent Canadian case regarding MLA is Schreiber v. Canada (Attorney General).139 Schreiber is a complex case, and has been variously mischaracterized as having to do with "collecting evidence by invading the suspect's privacy",140 and "the classic example" of "case law upon the propriety of obtaining evidence from a foreign jurisdiction by means that would not be available in one's own jurisdiction".141 The case was in fact not about admissibility, but rather whether the right to privacy, embodied in section 8 of the Canadian Charter, was engaged by the sending of a letter of request for MLA. Canadian authorities had made a letters rogatory request of Switzerland for seizure of Schreiber's bank records. Search and seizure under the Charter in Canada requires judicial pre-authorization in the form of a warrant, but MLA practice required none. In

response to Schreiber's argument that the request engaged his section 8 right to privacy, the Court found that the letter of request itself did not endanger the privacy right. Any search and seizure affecting Schreiber's privacy would take place within Swiss jurisdiction, and thus was not within the ambit of the Charter.

As such, the case did not specifically address the exclusion of evidence that invaded the privacy right, but the Court did make some comment on this topic. Chief Justice Lamer stated that, having chosen to bank in Switzerland, Schreiber was entitled only to whatever privacy protection regime operated under Swiss law.142 He also noted the Court's reluctance to measure foreign laws against Canadian constitutional guarantees, but declared that evidence could be excluded if it "affected the fairness of a trial held in Canada".143 Though the parties had led no evidence regarding Swiss law, the Chief Justice seemed to intimate that a search in violation of Swiss law might have been relevant to a determination of fairness.144

British and American case law and practice have demonstrated an even looser standard. In the United States "the courts have consistently reaffirmed the principle that the actions of foreign law enforcement officials, and evidence obtained outside the United States by those actions, are not subject to the usual constitutional protections afforded by the Bill of Rights".145 As such, in Brulay v. United States,146 questioning, searches and seizures by Mexican officials, which contravened the fourth and fourteenth amendments to the Constitution but did not violate Mexican law, were ruled admissible. The United States Constitution did not apply to foreign law enforcement officers. A series of cases following Brulay confirmed this rule, though adding the caveat "that the actions of foreign officials should not be such as to 'shock the conscience' of the Court".147 United States courts have maintained this perspective even towards evidence gathered illegally by their own agents outside the jurisdiction, transmitted by means which ignored an existing MLA arrangement.148

In the United Kingdom, the legislature has moved to submit evidence gathered under MLA requests to domestic admissibility rules.149 Even under these rules, however, the discretion awarded to judges has resulted in findings similar to those of United States courts, extending non-inquiry even to a case where wiretap evidence admitted in an English court was taken in France in breach of both French law and the European Convention on Human Rights by American agents.150 The recent Scottish case of Torres v. H.M. Advocate151 summarized the position of the Scots criminal jurisdiction prior to the incorporation of the European Convention on Human Rights into the domestic law: the courts have a "well-understood discretion to exclude evidence which has been obtained by means which . . . are 'offensive to our fundamental principles of justice and fair play' ".152

III. An International Exclusionary Rule?

The foregoing survey of case law illustrates the traditional response of States to evidence which may in its taking violate international human rights norms. This response is primarily based on the wide-ranging discretion possessed by the courts to admit or exclude such evidence from criminal proceedings. There is an apparent consensus among the

various courts that the general policy of non-inquiry will be tempered by exclusion in the interests of "fairness", "fundamental principles of justice", where the conduct "shocks the conscience of the court", or whether admission would "bring the administration of justice into disrepute".

From an international obligation point of view, this remains an extremely grey area. The language of "justice" and "fairness" employed by the courts is not specifically tailored to implementing human rights norms to which a State is party, with the possible exception of general fair trial rights. The courts have been disinclined to hold that, for example, grievous violations of the right to privacy which breach the accused's rights both under international law and domestic law will be excluded, preferring to rely on the general, discretionary approach. Obviously, as demonstrated by the Belgian cases, not all practices which would violate the requesting State's laws represent human rights violations; but quaere which ones will? The nexus between the laws of the requesting State and its international human rights obligations is left unaddressed. Also unanswered is the central question: is the requesting State under an obligation to exclude evidence that is the product of conduct that violates its human rights obligations? State practice, as embodied in the judgements of criminal courts, would seem to posit such an international exclusionary rule, but only in the most heinous or "shocking" of cases. Based on the dicta of the courts, it is likely that evidence-gathering which involved, for example, cruel and unusual treatment falling short of torture would be excluded as being contrary to the interests of fairness. On the whole, however, courts have proven difficult to "shock",153 and have declined to exclude evidence resulting from serious invasions of privacy and personal liberty. They are, moreover, generally reluctant to interfere with the processes of international criminal co-operation, which are seen to rest on vital interests of international comity and thus remain the preserve of the executive.

The problem appears to be articulating an international human rights standard at the domestic level, one which the courts can apply when determining admissibility. Admittedly, each State will have its own interpretation (and possibly domestic implementation) of the human rights norm in question, and these will obviously not accord uniformly on the international level. It seems logical, however, that requesting State parties to international human rights treaties are obliged to give effect to the enumerated rights vis-a-vis accused persons within their jurisdictions. For the human rights obligation to be made effective, in turn, the courts must have recourse to a standard that reflects the obligation itself in a specific manner, rather than simply how a transgression affects the fairness of proceedings.

Various formulations have been proffered for a rule of exclusion where the evidence "has been obtained in violation of international human rights standards" binding upon the requesting State.154 The Rules of Procedure and Evidence of the International Tribunal for the former Yugoslavia provide that "[e]vidence obtained directly or indirectly by means which constitute a serious violation of internationally protected human rights shall not be admissible".155 The Rome Statute of the International Criminal Court includes the following:

Evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if:

a) The violation casts substantial doubt on the reliability of the evidence; or

b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.156

The Rome Statute appears to enact an approach similar to that already taken by courts in determining admissibility. However, it first leaves the question open of which rights will be considered "internationally recognized". Does this refer to principles which have attained jus cogens status or entered customary law? Or to rights which are common to major human rights instruments? Then, having found a human rights violation, the Court will not automatically exclude but determine if the manner of taking "casts doubt" on its reliability, or would be antithetical to and damage the integrity of proceedings. This leaves the Court a great deal of discretion in refusing to exclude evidence, depending on how its future jurisprudence determines the parameters of the "integrity of proceedings". It is arguable that this level of flexibility and discretion is appropriate for this particular court, as the seriousness of the matters with which it is concerned may merit a more flexible approach towards evidence collection. To provide such a standard at the inter-State level, however, would seem overly broad and open to abuse.

The International Law Association's latest submissions attempt to set a standard more appropriate to the domestic court setting. In its Third Report, the ILA proposed that a treaty provision be included in MLA arrangements declaring "a requested State shall not violate international human rights norms in its collection of evidence. Evidence obtained in violation of such norms shall not be admissible in proceedings in the requesting State."157 It also "encouraged" States to develop domestic admissibility laws along the lines of the Yugoslavia Tribunal's Rule 95, noting sensibly that, "it is unlikely that municipal courts will apply a customary rule without the endorsement of municipal law".158 The formulation of the domestic rule did not appear in the Third Report's final recommendations, however.

Moreover, in its Final Report even these suggestions were critically softened. The Final Resolutions adopted by the Conference bade States to include the following clause in their mutual legal assistance agreements:

1. A requested State shall, in the rendering of assistance, observe the norms of human rights contained in any treaty for the protection of human rights to which it is a party, under customary international law, or under the domestic law of the requested State.

2. Where assistance has been rendered by the requested State contrary to paragraph 1 of this clause, the authorities of the requesting State shall consider to what extent, if at all, such assistance should be admissible in proceedings in the requesting State.159

While this proposal makes international human rights norms nominally more relevant to MLA practice and court proceedings, it defers to domestic admissibility standards in a

manner similar to current court practice. "Considering" the extent of admissibility in the face of human rights violations does nothing to give effect to the rights themselves under the requesting State's criminal regime. Moreover, while the ILA makes several recommendations for the amendment of domestic extradition laws to make similar proposals effective, the MLA recommendations are not accompanied by any such proposed amendments. This is particularly noteworthy in two respects. First, the courts of many States would require legislative authority to exclude evidence specifically on the basis of human rights violations. Second, and perhaps most important, no provision is made for the individual to be able to invoke such protections. Without these two additional steps, any recourse offered by such an "exclusion clause" in an MLA treaty would not provide real, substantive protection of the rights of the individual.

As such, and drawing upon the various proposals examined above, the following submissions are offered:

1. States should include inMLATs a clause to the following effect: (a) the requested State shall, in the rendering of assistance, observe the norms contained in any human rights treaty to which it is a party, under customary international law, or under the domestic law of the requested State; (b) evidence obtained through serious violations of international human rights norms shall not be admissible in the requesting State.

2. States should amend their domestic MLA statutes or other relevant laws to ensure: (a) that courts in criminal proceedings are required to exclude evidence which is the product of serious violations of human rights norms contained in any human rights treaty to which it is a party, under customary international law, or under the domestic law of the requested State; (b) that individuals are entitled to assert these rights.

This approach offers the advantage of focusing on specific human rights obligations rather than "fairness of proceedings". It provides a basically intelligible standard for courts evaluating admissibility, and gives direct effect to the actual human rights norms which bind the requesting State, whether customary or treaty-based. The inclusion of "seriousness" as a criterion in determining admissibility would allow the courts a standard of flexibility desirable from an enforcement point of view.160 Moreover, the negotiation of treaty provisions would place continuing "upward" pressure on MLA treaty partners to act in accordance with international human rights standards.

D. CONCLUSION

The proposals offered above are necessarily no more than suggestions for methods by which international criminal co-operation and human rights concerns can be balanced in a manner reflecting both coherence and delineated international legal obligation. That they will be controversial is taken as given; while there has been traditional agreement that the protection of the individual's physical being justifies exceptions to extradition obligations, the protection of personal legal interests attracts far less consensus. States may view this as an unwarranted intrusion into the exercise of criminal jurisdiction, while prosecutors and central authorities may perceive it as an ill-conceived handicap to the important mission of

facilitating the fight against transnational crime. However, it should be reiterated that it remains possible to exclude the most serious of violations without hopelessly encumbering the system of co-operation, provided the system is amended with care and vision. Moreover, the significance of international human rights protection is that it enumerates certain fundamental, universal values. There are some roads down which we must not go, lest we inadvertently offer the most pernicious of criminals the victories they seek.

1 C. van den Wyngaert, Applying the European Convention on Human Rights to Extradition: Opening Pandora's Box?, 39 I.C.L.Q. 757 (1990), at 757.

2 Which is complicated by the fact that "States have a tendency to think that anything connected with criminal law, even quite minor procedural matters, affects national sovereignty." R. DUSSAIX, Some Problems . . . , in COUNCIL OF EUROPE, PROBLEMS ARISING FROM THE PRACTICAL APPLICATION OF THE EUROPEAN CONVENTION ON MUTUAL ASSISTANCE IN CRIMINAL MATTERS (1971), cited in MUTUAL ASSISTANCE IN CRIMINAL AND BUSINESS REGULATORY MATTERS (W. Gilmore, ed., 1995), n. 27. See also remarks by Professor J. Crawford, 82 ASIL PROC. 301 (1995).

3 J. Sheedy, International legal obligations under human rights instruments, in INTERNATIONAL CO-OPERATION IN CRIMINAL MATTERS: BALANCING THE PROTECTION OF HUMAN RIGHTS WITH THE NEEDS OF LAW ENFORCEMENT 6 (Oxford Conference Papers, 1998), p. 11. See also A. Eser, Common Goals and Different Ways in International Criminal Law: Reflections from a European Perspective, 31 HARVARD INT'L. J. 117 (1990), at 123.

4 INTERNATIONAL LAW ASSOCIATION, COMMITTEE ON HUMAN RIGHTS AND EXTRADITION, HELSINKI CONFERENCE: SECOND REPORT (1996). See also C. Gane, Human rights and international cooperation in criminal matters, in CRIME SANS FRONTIERES: INTERNATIONAL AND EUROPEAN LEGAL APPROACHES (P. Cullen and W.C. Gilmore, eds., 1998); S. Trechsel, The role of international organs controlling human rights in the field of international co-operation, in PRINCIPLES AND PROCEDURES FOR A NEW TRANSNATIONAL CRIMINAL LAW 633 (A. Eser & O. Lagodny, eds., 1992), p. 635.

5 In this regard, the following documentation authored by the International Law Association, Committee on Extradition and Human Rights, will be drawn upon: BUENOS AIRES CONFERENCE: FIRST REPORT (1994); HELSINKI CONFERENCE: SECOND REPORT (1996); TAIPEI CONFERENCE: THIRD REPORT (1998); REPORT OF THE SIXTY-EIGHTH CONFERENCE HELD AT TAIPEI, TAIWAN, REPUBLIC OF CHINA (24-30) OF MAY 1998 (1998).

6 On the latter see E. Nadelmann, Global Prohibition Regimes: The Evolution of Norms in International Society, 44 INTERNATIONAL ORGANIZATION 479 (1990).

7 U.N. Doc. A/CONF.144/28 (hereinafter "UN Model Treaty"). As amended (to incorporate a previously optional protocol on confiscation of proceeds) in "Commission on Crime Prevention and Criminal Justice, Report on the Seventh Session (21-30 April 1998)", U.N.

Doc. E/CN/ 15/1998/11.

8 Primarily the European Convention on Mutual Assistance in Criminal Matters 1959, E.T.S. 30; SCHEME RELATING TO MUTUAL ASSISTANCE IN CRIMINAL MATTERS WITHIN THE COMMONWEALTH (1986) (see generally D. McClean, Mutual Assistance in Criminal Matters: The Commonwealth Initiative, 37 I.C.L.Q. 177 (1988)); and the InterAmerican Convention on Mutual Assistance in Criminal Matters 1992 (reprinted in W. Gilmore, supra note 2, at 161)

9 K. Prost, "Breaking Down Barriers: International Cooperation In Combatting Transnational Crime", a paper delivered to the International Association of Prosecutors Conference, September 2-6, 1997, Ottawa, Ontario (copy on file with author). Gilbert has remarked on the recent popularity of mutual legal assistance treaties, noting "the sudden realization by common law States of their usefulness" (G. GILBERT, TRANSNATIONAL FUGITIVE OFFENDERS IN INTERNATIONAL LAW 69 (1998)). See generally D. MCCLEAN, INTERNATIONAL JUDICIAL ASSISTANCE (1992), Chapters 5 and 6; R. Geiger, Legal assistance between States in criminal matters, 3 ENCYC. PUB. INT. L. 201 (1997).

10 Transnational crime being defined as domestic crimes which involve two or more jurisdictions. See generally L. Shelley, Transnational Organized Crime: An Imminent Threat to the Nation-State?, 48 J. INT'L AFFAIRS 45 (1995).

11 A. Ellis, R. Pisani, The United States Treaties on Mutual Assistance in Criminal Matters: A Comparative Analysis, 19 INTERNATIONAL LAWYER 189 (1985), at 189.

12 See R. Geiger, supra note 9, at 205. Mutual legal assistance continues on an ad hoc basis, however, resting on the discretionary power of the national authority to provide or refuse assistance where deemed appropriate.

13 This essay will also confine itself to the provision of mutual legal assistance through treaty-based arrangements, excluding questions of international evidence-gathering which involve more informal techniques such as policing co-operation; but see B. Babovic, Interpol and Human Rights, INT'L CRIMINAL POLICE REV. 2 (July-August 1990); M. Mackarel & C. Gane, Admitting Irregularly or Illegally Obtained Evidence from Abroad into Criminal Proceedings - A Common Law Approach, [1997] CRIM. L. REV. 720.

14 W. Gilmore, supra note 2, at xii.

15 Ibid.

16 For discussion of this point, see C. Van den Wyngaert, supra note 1, notes 11, 12 and accompanying text.

17 Soering v. United Kingdom, Series A, No. 161. Soering, a German national apprehended in the United Kingdom, appealed the United Kingdom's acquiescence to an extradition request from the United States on murder charges in Virginia subject to the death penalty.

The European Court of Human Rights found that, "the decision by a Contracting State to extradite a fugitive may give rise to an issue under Article 3 [of the European Convention on Human Rights], and hence engage the responsibility of that State under the Convention" (at para. 91). With regard to Soering, the Court found that the conditions faced on death row in Virginia (taking into account his personal circumstances) would constitute "inhuman or degrading treatment or punishment" within the meaning of article 3 of the Convention, and extradition would breach the United Kingdom's obligation to proscribe such conduct.

18 Ng v. Canada, UN Doc. CCPR/C/49/D/469/1991. Serial killer Charles Ng had been extradited by Canada to the United States, where he faced trial in California that could have resulted in his execution by gas asphyxiation, a form of punishment prohibited under article 7 of the International Covenant on Civil and Political Rights, (1976) 999 U.N.T.S. 171. The United Nations Human Rights Committee ruled that Canada had violated its obligations under the Covenant because Ng's punishment could reasonably have been foreseen.

19 The Netherlands v. Short, Decision of the Supreme Court of the Netherlands, reprinted in 29 I.L.M. 1375 (1990). Charles Donald Short, an American sergeant stationed in the Netherlands, had killed and dismembered his wife. His extradition was requested by the United States under the terms of the NATO Status of Forces Agreement. Short faced the death penalty upon his return, and the Supreme Court found that extraditing him would violate its obligation under Protocol No. 6 to the European Convention on Human Rights, which prohibits the death penalty. The Court held that Protocol No. 6 was the only one of the two instruments to grant direct individual rights under Netherlands law, and thus prevailed.

20 C. VAN DEN WYNGAERT, Rethinking the law of international criminal cooperation: the restrictive function of international human rights through individual-oriented bars, in PRINCIPLES AND PROCEDURES FOR A NEW TRANSNATIONAL CRIMINAL LAW 489 (A. Eser & O. Lagodny, eds., 1992), at 490.

21 M. AKEHURST, AMODERN INTRODUCTION TO INTERNATIONAL LAW 69 (4th ed., 1982); P. JESSUP, AMODERN LAW OF NATIONS 17-18 (1948). In the extradition context, see United States v. Vreeken, 803 F.2d 1085 (10th Circ., 1986).

22 S.Williams, Human Rights Safeguards and International Cooperation in Extradition: Striking the Balance, 3 CRIM. L. FORUM 191 (1992), at 222; S. WILLIAMS & A. DE MESTRAL, AN INTRODUCTION TO INTERNATIONAL LAW 43 (2nd ed., 1987).

23 See R. Lillich, The Soering Case, 85 AM. J. INT'L L. 128 (1991), at 141-142.

24 In Soering, the Court indicated that it was following the previous jurisprudence of the European Commission on Human Rights on this point, citing a series of cases (at para. 33 of the judgment).

25 J. Dugard & C. Van den Wyngaert, Reconciling Extradition with Human Rights, 92 AM. J.

INT'L L. 187 (1998), at 194.

26 Indeed, the authors acknowledge this conflict; ibid.

27 The United Nations has recently added an "Annex on Model Legislation to the Model Treaty", U.N. Doc. A/CONF.144/28, at 12. Under the heading "Procedure" it states: "The model legislation should include options for procedures dealing with both incoming and outgoing requests for assistance in criminal matters. Such procedures should be in conformity with, whenever applicable, international and regional human rights instruments".

28 Hereinafter, for the purposes of brevity and practicality only, "the accused".

29 Where both States are parties to an international human rights instrument, the matter is unlikely to come up in any meaningful way. The accused is entitled to petition the external human rights body from the requesting State, disposing of any need to consider the potential responsibility of the requested State. The very recent European Court of Human Rights case of Selmouni v. France, however, emphasizes why this remains a matter of concern; see "Court finds France guilty of torture", THE GUARDIAN, July 29, 1999, at p. 15. Where the requested State is not party to the human rights instrument, no questions of duties owed to the individuals are raised, and all human rights matters will be resolved (or not) by the requesting State.

30 J. Quigley & A. Shank, Death Row as a Violation of Human Rights: Is It Illegal to Extradite to Virginia?, 30 VIRGINIA J. INT'L L. 241 (1989), at 250-251; R. Lillich, supra note 23, at 142.

31 Supra note 17, at para. 86.

32 "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."

33 Supra note 17, at para. 88. Article 3 of the Convention prohibits "torture or inhuman or degrading treatment or punishment."

34 Ibid., at para. 91.

35 D. Harris, M. O'Boyle & C. Warbrick, LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 644 (1995), at 644. Article 2(1) of the International Covenant on Civil and Political Rights is similar.

36 Series A, No. 240.

37 Ibid. (emphasis added).Moreover, as Harris et al. note, supra note 35, at 642, in X and Y v. Switzerland, 9 DR 57 (1977), the European Commission "found that the exercise by Switzerland of special treaty responsibilities on behalf of Liechtenstein brought all those to

whom they applied under Swiss jurisdiction for the purpose of Article 1".

38 States are responsible for violations of the rights of persons outside their territory: F. JACOBS, THE EUROPEAN CONVENTION ON HUMAN RIGHTS 14-15 (1974).

39 It is conceivable that in the European context, these legal interests could fall under domestic jurisdiction, as "the jurisdiction of a contracting State is, for this purpose, the area or objects of its jurisdiction, as defined by its domestic law within the limits prescribed by international law": J. FAWCETT, THE APPLICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 18-19 (1969) (emphasis added).

40 To use the language of the European Court of Human Rights in Soering, supra note 17, at para. 113.

41 Interview with Elizabeth C. Munro, Head of Fraud and Specialist Services Unit, Crown Office, Edinburgh, July 23, 1999.

42 C. Gane, supra note 4, at 169.

43 This is recognized in some national constitutional rights regimes, e.g., the Canadian Charter of Rights and Freedoms, s. 1.

44 For example, the right to privacy, in article 17 of the International Covenant on Civil and Political Rights and article 8(2) of the European Convention on Human Rights.

45 Supra note 17, at para. 86.

46 Supra note 25, at 205.

47 See REPORT OF THE OXFORD CONFERENCE ON INTERNATIONAL CO-OPERATION IN CRIMINAL MATTERS 3 (1999).

48 The Commonwealth States qualified this with reference to the United Nations Human Rights Committee's finding in Kindler v. Canada (No. 470/1991), U.N. Doc. A/48/40, Vol. II, p. 138, that lawful capital punishment does not violate the right to life per se; ibid., at note 2.

49 Accord, K. Carmichael & F. McKay, Law Reform: US and UK Remedies for Torture Committed Abroad, 2 INT'L BAR ASSOC. HUMAN RIGHTS INSTITUTE NEWS 14 (1997), at 15. Dugard and Van den Wyngaert, supra note 25, also generally agree, though noting that a great deal depends on the degree of cruelty/in humanity involved (at 198-202).

50 Accord, C. Gane, supra note 4, at 168.

51 Art. 4(c) and (d).

52 Infra, footnotes 103-106 and accompanying text.

53 Supra note 17, at para. 91.

54 R. Lillich, supra note 23, at 142.

55 This is embodied in the principle pacta sunt servanda, itself a jus cogens principle (J.L. BRIERLY, THE LAW OF NATIONS 49-56 (6th ed., 1963)), and encapsulated in article 26 of the Vienna Convention on the Law of Treaties (1979), 1155 U.N.T.S. 331.

56 Per Barcelona Traction, Light and Power Co. (Second Phase), [1970] I.C.J. Reports 3, at para. 33.

57 Ng v. Canada, supra note 18, at para. 14.1. The European Court of Human Rights has found that the prohibition of torture is an absolute one, not subject to any balancing with other interests or proportionality tests; Chahal v. United Kingdom, 23 E.H.R.R. 413 (1997), esp. paras. 79-82.

58 And this is assuming that the accused knows of the investigation. The making of requests often precedes the beginning of criminal proceedings. In some States it may be possible to apply for judicial review of a decision to render assistance, as in the United Kingdom (E.C. Munro interview, supra note 41).

59 See J. Dugard & C. Van den Wyngaert, supra note 25, at 198.

60 International Covenant on Civil and Political Rights, arts. 2, 26; European Convention on Human Rights, art. 14.

61 J. Dugard & C. Van den Wyngaert, supra note 25, at 202.

62 A. Klip, Obtaining Evidence from Witnesses Abroad: Comparative Examples of Attitudes and Responses of States in Mutual Legal Assistance in Criminal Matters, in PROCEEDINGS OF THE FIRST WORLD CONFERENCE ON NEW TRENDS IN CRIMINAL INVESTIGATION AND EVIDENCE 453 (J.F. Nijboer & J.M. Reijntjes, eds., 1997), at 456.

63 International Covenant on Civil and Political Rights, art. 14; European Convention on Human Rights, art. 6; American Convention on Human Rights, art. 8; African Charter on Human and People's Rights, art. 7.

64 C. Gane, supra note 4, at 169.

65 See Barberea, Messeguee and Jabardo v. Spain, Series A, No. 146, and Kotovski v. The Netherlands, Series A, No. 166.

66 Soering v. United Kingdom, supra note 17, at para. 113. Generally, however, the Court has not accepted the argument that the denial of fair trial rights can impede international

criminal co-operation; see Drozd and Janousek v. France and Spain, supra note 36, at para. 110.

67 See C. Markees, The difference in concept between civil and common law countries as to judicial assistance and cooperation in criminal matters, in A TREATISE ON INTERNATIONAL CRIMINAL LAW, VOL. II: JURISDICTION AND COOPERATION 171 (M.C. Bassiouni & V. Nanda, eds., 1973). See also CRIMINAL PROCEDURE SYSTEMS IN THE EUROPEAN COMMUNITY (C. van den Wyngaert, ed., 1993).

68 J. Dugard & Van den Wyngaert, supra note 25, at 204.

69 D. Stafford, Fundamental Rights, in Oxford Conference Papers, supra note 3, 63 at 66.

70 Soering v. United Kingdom, supra note 17, at para. 113.

71 Generally, reasons for refusal must be provided: United Nations Model Treaty, art. 4(5); Inter-American Convention on Mutual Assistance in Criminal Matters 1992 (reprinted in Gilmore, supra note 2, at 161), art. 26.

72 See T. Stein, Extradition, 2 ENCYC. PUB. INT'L L. 327 (1995).

73 O. Lagodny, Human Rights and Extradition, 62 REVUE INT'LE DROIT P eENAL 45 (1991), at 51.

74 W.C. 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 67 (Oxford Conference Papers, 1998). See also G. Gilbert, supra note 9, at 6.

75 For example, the United Nations Model Treaty, art. 4(1)(c): "Assistance shall be refused if . . . 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 person's position may be prejudiced for any of those reasons."

76 W.C. Gilmore, supra note 74, at 69.

77 C. Gane, supra note 4, at 163.

78 That is, that the conduct on which the request is based must be criminalized in both States: G. Gilbert, supra note 9, at 104.

79 D. McClean, supra note 9, at 155, although it does appear in the Treaty between the Government of the United Kingdom and the Government of Canada on Mutual Assistance in Criminal Matters (Drug Trafficking), art. VIII(ii). Double criminality is expressly excluded as

a basis for refusal in the Inter-American Convention, art. 5.

80 Such as sodomy, abortion and adultery, criminalization of which are prohibited by arts. 17 and 19 of the International Covenant on Civil and Political Rights; HELSINKI CONFERENCE: SECOND REPORT (1996), at 7. For this reason, the Committee recommended that the double criminality ground be retained in the extradition field (ibid.). Accord G. Gilbert, supra note 9, at 105-106.

81 See G. Gilbert, supra note 9, at 182-183.

82 Art. 4(1)(d).

83 Art. 9(a).

84 Art. 7(1) (d).

85 See generally G. Gilbert, supra note 9, Chapter 6.

86 This clause allows assistance to be refused "if the requested Party considers that the execution of the request is likely to prejudice the sovereignty, security, ordre public, or other essential interests of its country" (1959 European Convention on Mutual Legal Assistance in Criminal Matters, art. 2(b)). See also art. 7(2)(a) of the Commonwealth Scheme; art. 4(1)(a) of the United Nations Model Treaty.

87 REPORT OF THE SIXTY-EIGHTH CONFERENCE HELD AT TAIPEI, TAIWAN, REPUBLIC OF CHINA (24-30) OF MAY 1998 (1998), at 8. Australia has proposed using the Commonwealth Scheme's ordre public clause as a ground for refusing to provide evidence in death penalty cases, but this has attracted no consensus among the members of that Scheme; see MEETING OF SENIOR OFFICIALS OF COMMONWEALTH LAW MINISTRIES, MALTA, 29 MAY-1 JUNE 1995 (1995), at 71-76.

88 A.H.J. Swart, Human rights and the abolition of traditional principles, in PRINCIPLES AND PROCEDURES FOR A NEW TRANSNATIONAL CRIMINAL LAW 505 (A. Eser & O. Lagodny, eds., 1992), at 524.

89 D. Stafford, supra note 69, at 66.

90 See generally M. Mackarel & S. Nash, Extradition and the European Union, 46 INT'L COMP. L. Q. (1997). Negotiations for a similar approach to MLA are underway; E.C. Munro interview, supra note 41.

91 H.J. Bartsch, TheWestern European Approach, 62 REVUE INT'LE DROIT P eENAL 499 (1991), at 501. Title VI of the Maastricht Treaty requires member States to act consistently with their human rights obligations during criminal co-operation; see generally A.Whelan, Fundamental Rights, Democracy and the Rule of Law in the Third Pillar, in JUSTICE COOPERATION IN THE EUROPEAN UNION (G. Barrett, ed., 1997).

92 See generally T. Meron, On a Hierarchy of International Human Rights, 80 AM. J. INT'L L. 1 (1986); J.P. HUMPHREY, NO DISTANT MILLENNIUM: THE INTERNATIONAL LAW OF HUMAN RIGHTS (1989); H. STEINER, P. ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT (1996). Accord, A.H.J. Swart, Refusal of Extradition and the United Nations Model Treaty on Extradition, 23 NETH. YB. INT'L L. 175 (1992), at 206; contra, J. Dugard & C. Van den Wyngaert, supra note 25, at 205-206.

93 1155 U.N.T.S. 331 (1969), in force 1980.

94 It appears highly questionable at first glance whether human rights instruments and international criminal co-operation treaties can even be considered as "relating to the same subject-matter". Sir Ian Sinclair's survey of the Convention's negotiation and the International Law Commission's explanatory reports has revealed that this phrase "must be construed strictly" (THE VIENNA CONVENTION ON THE LAW OF TREATIES 98 (2nd ed., 1984); see also P. REUTER, INTRODUCTION TO THE LAW OF TREATIES 102 (1989): "The rule of article 30 would therefore only apply to treaties with subject-matters of a comparable degree of 'generality'."). However, the International Law Commission, while formulating the provisions of the Vienna Convention, noted that the rules contained in article 30 "have particular importance" to "the priority of application of treaties having incompatible provisions" (see Yearbook . . . 1966, Vol. II, at 214). Thus, it would appear that treaties having the same subject-matter is not an essential criterion for these rules to apply.

95 With regard to paragraph (4), paragraph (5) states that this rule is "without prejudice to . . . any question of responsibility which may arise for a State from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty", in effect leaving the effects of breach to the law of State responsibility.

96 Swart takes this view (supra note 92, at 205), but cites contra O. LAGODNY, DIE RECHTSSTELLUNG DES AUSZULIEFERNDEN IN DER BUNDESREPUBLIK DEUTSCHLAND 100-104 (1987).

97 I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 625 (4th ed., 1990).

98 T. Elias, THE MODERN LAW OF TREATIES 57 (1974).

99 Which would include many extradition treaties still functioning today; see generally Stein, supra note 72.

100 This is notwithstanding the fact that the United Kingdom and the United States resolved their Soering difficulty amicably, when the American authorities amended the extradition request to include only non-death penalty charges; see R. Lillich, supra note 23, at 141. The actual terms of Soering's surrender can be found in Res. DH(90)8 of the Committee of Ministers, H.R.C.D. Vol. I, 52-54.

101 Article 30 is prefaced by the phrase "subject to Article 103 of the Charter of the United

Nations". Article 103 provides that outside treaties must give way to Charter obligations. However, the Charter's human rights heads do not provide a great deal of specificity in terms of obligation, rendering the "hierarchical principle" (I. Sinclair, supra note 94, at 96) a difficult case to make.

102 It has been submitted that all human rights, as jus cogens, prevail over extradition treaties; see Institute of International Law, New Problems of Extradition, 60 YB. INST. INT'L L. 211 (1983 II), esp. 223-234.

103 Article 53 provides that "a treaty is void, if at the time of its conclusion, it conflicts with a peremptory norm of general international law". Article 64 says that "if a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates". Article 31(3)(c), noted above, might also be relevant in this context.

104 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (1987) 1465 U.N.T.S. 85, art. 3(1): "No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." A similar argument could be made with regard to these principles' status as customary international law; see C. Van den Wyngaert, supra note 1, at 762.

105 I. Sinclair, supra note 94, at 217; J. Dugard & C. Van den Wyngaert, supra note 25, at 195-205.

106 Y. Dinstein, Human Rights and Extradition, 62 REVUE INT'LE DROIT P ENAL 31 (1991), at 37.

107 This was discussed in the "Opinion of the Advocaat-Generaal" in The Netherlands v. Short, supra note 19. The "Opinion" also contains a substantive discussion of conflicting treaty obligations.

108 Report of the Sixty-Eighth Conference Held At Taipei, Taiwan, Republic of China (24-30) of May 1998 (1998), at 14.

109 As the ILA points out, "the threshold of 'seriousness' is not easily quantifiable but is not a concept unknown to instruments in the field of international criminal law" (ibid., at 4-5). It goes on to cite relevant examples from the Geneva Conventions, the Draft Code of Crimes Against the Peace and Security of Mankind, the International Law Commission's Draft Statute for a Permanent International Criminal Court, and the International Covenant on Civil and Political Rights.

110 Formore "borderline" cases, it is possible that the practice of "conditional extradition" advocated by the ILA might be applied in a similar fashion, in that conditions could be placed on an agreement to provide assistance; see Report of the Sixty-Eighth Conference Held At Taipei, Taiwan, Republic of China (24-30) of May 1998 (1998), at 10-14, and Final

Report, at 156, per I. Shearer.

111 Although it is not far-fetched. The ruling in Drozd and Janousek, supra note 36, regards a prisoner transfer arrangement, but discloses a situation where the individuals in question had rights under the Convention, cognisable by the courts of the requesting State, for violations of those rights in the requested State (Andorra). It would seem to accord with this finding that the requesting State must take into account violations of human rights by the authorities of the requested State.

112 Indeed, the European Court's ruling in Soering, supra note 17, has been characterized in this manner; see C. van den Wyngaert, supra note 1, at 761. Contra R. Lillich, supra note 23, at 142.

113 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, supra note 104, art. 15.

114 For a recent treatment of the torture prohibition's status at international law, see the House of Lords' judgement in R. v. Bow Street Stipendiary Magistrate and others, ex parte Pinochet Ugarte (Amnesty International and others intervening) (No. 3), [1999] 2 All E.R. 97, [1999] 2 W.L.R. 825, 38 I.L.M. 581 (H.L.).

115 Report of the Sixty-Eighth Conference Held At Taipei, Taiwan, Republic of China (24-30) of May 1998 (1998), at 7.

116 See generally G. Gilbert, supra note 9, at 78-141, and Chapter 4.

117 The Supreme Court of Canada stated this principle explicitly in Schreiber v. Canada (Attorney General), [1998] 1 S.C.R. 841; see infra, at note 139 and accompanying text.

118 Canada-U.S. Treaty, art. 2(4); U.S.-U.K. Treaty on the Cayman Islands, art. 1(3); U.S.-Mexico Treaty, art. 1(5); Netherlands-U.S. Treaty, art. 18(2). See also Inter-American Convention, art. 2. As Gane and Mackarel have pointed out, excluding the individual's protections at the moment when, temporally, only inter-State interaction is taking place, makes it difficult for the individual to secure redress for bad faith or questionable practice on the part of either State's authorities (C. Gane & M. Mackarel, The Admissibility of Evidence Obtained from Abroad into Criminal Proceedings - The Interpretation of Mutual Legal Assistance Treaties and Use of Evidence Irregularly Obtained, [1996] European Journal of Crime, Criminal Law and Criminal Justice 98, at 105-108, citing United States v. Sturman and others, 951 F.2d 1466 (6th Circ., 1991) and United States v. Davis, 767 F.2d 1025 (1985)).

119 Report of the Sixty-Eighth Conference Held At Taipei, Taiwan, Republic of China (24-30) of May 1998 (1998) (supra note 5), at 10.

120 Article 14 of the International Covenant on Civil and Political Rights provides to the accused only the right "to have adequate time and facilities for the preparation of his

defence . . . ,"which does not necessarily extend even to the right of disclosure of evidence, let alone accessing machinery for transnational evidence gathering.

121 Report of the Sixty-Eighth Conference Held At Taipei, Taiwan, Republic of China (24-30) of May 1998 (1998), at 10.

122 D. Stafford, "The Role of the International Association of Prosecutors in Encouraging International Cooperation", paper presented to the International Association of Prosecutors Annual Conference, Sept. 2-6, 1997, Ottawa (copy on file with author).

123 Commonwealth Secretariat, Report of the Oxford Conference on International Cooperation in Criminal Matters (1999), at 8. The United Kingdom's published International Mutual Legal Assistance in Criminal Matters Guidelines (1991) notes the following: "[R]equests may relate to any aspect of the investigation or prosecution of offences, although the majority of formal requests forwarded by the Central Authority are expected to relate to the obtaining of evidence for use in a prosecution" (at para. 46).

124 See United Nations Model Treaty, arts. 11 and 17.

125 [1987] 1 S.C.R. 536.

126 S. Williams, Human rights safeguards and international cooperation in extradition: striking the balance, in PRINCIPLES AND PROCEDURES FOR A NEW TRANSNATIONAL CRIMINAL LAW 535 (A. Eser & O. Lagodny, eds., 1992), at 561, quoting Argentina v. Mellino, ibid., at 555.

127 G. Kriz, International Co-operation to Combat Money-Laundering: the Nature and Role of Mutual Legal Assistance Treaties, 18 COMMONWEALTH L. BULL. 723 (1992), at 729.

128 For example, the first successful bilateral MLA treaty was struck between the United States and Switzerland, one a common law and the other a civil law jurisdiction (Treaty between the United States of America and the Swiss Confederation on Mutual Assistance in Criminal Matters, 25 May 1973, 27 U.S.T. 2019, TIAS 8302.). Canada recently announced plans to negotiate an MLA treaty with Russia - a relationship with wide legal differences (remarks delivered by Alan Kessell, United Nations Treaty Law and Criminal Division (JLA), Department of Foreign Affairs, to the Canadian Council on International Law Annual Conference, Ottawa, Oct. 16, 1997).

129 The rule that in extradition hearings, courts will not inquire into "such matters as the observance of the rule of law in the requesting country, and of the status of human rights norms in that country especially as they relate to fair trial [and] procedural safeguards . . . " I. Shearer, Extradition and Human Rights, 68 AUSTRALIAN L.J. 451 (1994), at 452. Such matters are deemed "best left to executive determination," J. Dugard and C. van den Wyngaert, supra note 25, at 189. See generally, G. Gilbert, supra note 9, at 79-84; R. Wilson, Toward the Enforcement of Universal Human Rights Through Abrogation of the Rule of Non-Inquiry in Extradition, 3 ILSA J. INT. COMP. L. 751 (1997); C. Nicholls, The Rule of Non-

Enquiry in Extradition Cases, in Oxford Papers, supra note 3, at 111; J. Quigley, The Rule of Non-Inquiry and the Impact of Human Rights on Extradition Law, 15 NORTH CAROLINA J. INT. LAW & COM. REG. 401 (1991); M.C. BASSIOUNI, INTERNATIONAL EXTRADITION 372, 633 (2nd ed., 1987).

130 In X. v. Germany (App. No. 11853/85), 10 E.H.R.R. 521 (1998), the applicant contended that evidence illegally taken in Turkey was used in a prosecution in Germany, and violated the right to a fair hearing in article 6(1) of the European Convention on Human Rights. While it ruled against the application, the Commission noted that "it is in principle conceivable that the used of the evidence . . . could be contrary to that provision" (at 524). Klip has cited this case as justification for his submission that "[a]lthough the requesting State is not responsible for disregarding the Convention by the requested authorities, it is responsible for the use of material as evidence. It violates the Convention itself, when it uses material obtained contrary to the Convention' (Klip, supra note 62, at 456).

131 C. Gane & M. Mackarel, supra note 118, at 114-116.

132 En Cause de Co. D., Cour de Cassation (2ieme ch., sect. neerl.) Jan. 26, 1993; [1993] Revue droit penal 768.

133 En Cause de Co. D., Cour de Cassation (2ieme ch., sect. neerl.) Oct. 12, 1993; [1994] Revue droit penal 792. The authors cite a third case (Cour de Cassation, 2ieme ch., sect. neerl., Feb. 19, 1985), which involved similar circumstances in Sweden.

134 [1995] 3 S.C.R. 562.

135 [1996] 2 S.C.R. 207.

136 From a lower court ruling in R. v. Filonov, (1993) 82 C.C.C. (3d) 516 (Ont. Ct. G.D.).

137 In Terry, supra note 135, (at 216-217) the Court specifically stated, albeit in obiter dicta, that if United States police were responding to a treaty request, they would not be subject to the Charter.

138 R. v. Harrer, supra note 134 (per La Forest J.). However, in R. v. Cook, [1998] 2 S.C.R. 597, a majority of the Court held that where an accused was questioned by Canadian police in the U.S. for potential prosecution in Canada, the Charter did apply to the conduct of the Canadian officers. This prima facie extraterritorial application of the Charter was permissible because doing so did not violate American sovereignty in any way.

139 [1998] 1 S.C.R. 841. See: R.J. Currie, Case Comment: Schreiber v. Canada (Attorney General), 8 DALHOUSIE J. LEGAL STUD. 207 (1999).

140 Report of the Sixty-Eighth Conference Held At Taipei, Taiwan, Republic of China (24-30) of May 1998 (1998), supra note 5, at 8.

141 C. Murray, "The protection of fundamental rights in mutual assistance cases: the defence view," in Oxford Papers, supra note 3, 137 at 141.

142 Supra note 139, at 857.

143 Ibid. The majority of the Court concurred with this statement; per L'Heureux-Dube J. at 863.

144 Ibid., at 857-858.

145 M. Mackarel & C. Gane, supra note 13, at 722.

146 383 F.2d 345 (9th Circ., 1967).

147 M. Mackarel & C. Gane, supra note 13, at 722, citing Stonehill v. United States, 405 F.2d 738 (9th Circ., 1968), United States v. Marzano, 537 F.2d 257 (7th Circ., 1975), United States v. Busic, 587 F.2d 577 (3rd Circ., 1978).

148 United States v. Verdugo-Urquidez, 100 S.Ct. 1056 (1990).

149 Criminal Justice (International Co-operation) Act 1990, ss. 3(8) and 3(9).

150 R. v. Governor of Pentonville Prison, ex parte Chinoy, [1992] 1 All E.R. 317. Chinoy in fact appealed this decision to the European Commission of Human Rights (Chinoy v. United Kingdom, App. no. 15199/89), pleading inter alia a violation of his right to liberty and security of person set out in article 5 of the Convention. Citing the European Court of Human Rights ruling in Wassink (Series A, no. 185-A), the Commission found that no procedural or substantive rules of United Kingdom law had been violated, and that moreover he had not been subject to "arbitrariness" which the provision was designed to protect. From the domestic side, the finding in Chinoy would seem to have been tempered somewhat by the subsequent House of Lords ruling in R. v. Horseferry Road Magistrates Court, ex parte Bennett, [1993] 3 All E.R. 138, which ruled that evidence gathering which involved significant illegality on the part of officials (in this case a de facto abduction) would amount to "an abuse of process" and be excluded.

151 [1997] S.C.C.R. 491. The case dealt with a technical irregularity committed by the Canadian R.C.M.P. during a search and seizure pursuant to a Scottish MLA request.

152 Ibid., at 499, citing H.M. Advocate v. McKay, [1961] J.C. 47.

153 See, e.g., United States v. Verdugo-Urquidez, supra note 148.

154 C. Gane, supra note 4, at 170.

155 33 I.L.M. 484 (1994), Rule 95. Such rights would include those in "the International Covenant on Civil and Political Rights, the Torture Convention, and the European

Convention", according to M.C. BASSIOUNI & P. MANIKAS, THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 952 (1996). See also: V. MORRIS& M. SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, VOL. I 260-261 (1995).

156 U.N. Doc. A/CONF.183/9, art. 69(7). Article 69(8) also sets out an international noninquiry approach: "When deciding on the relevance or admissibility of evidence collected by a State, the Court shall not rule on the application of the State's national law."

157 Report of the Sixty-Eighth Conference Held At Taipei, Taiwan, Republic of China (24-30) of May 1998 (1998), at 22.

158 Ibid., at 9-10.

159 International Law Association, Final Report, at 14.

160 See, in the context of Rule 95's "seriousness of damage" standard, D. Nsereko, Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia, 5 CRIM. L. FORUM 507 (1991).