# PRIMERS FOR INTERNATIONAL ACCOUNTABILITY IN ASIA: MUTUAL LEGAL ASSISTANCE, EXTRADITION, & THE PRINCIPLE OF DOUBLE CRIMINALITY

## What Are 'Mutual Legal Assistance' And 'Extradition' In Criminal Cases?

'Mutual legal assistance' (MLA) refers to the 'process by which States seek and provide assistance in gathering evidence for use in criminal cases'. 'Extradition' refers to the 'formal process whereby a State requests the enforced return of a person accused or convicted of a crime to stand trial or serve a sentence in the [R]equesting State'. Both are important tools in the prosecution of core international crimes including war crimes, crimes against humanity, and genocide. This is because such crimes frequently have transnational dimensions: they may be committed across borders, evidence and witnesses may be located in multiple jurisdictions, and perpetrators and victims may move between States.

The process and circumstances for seeking such cooperation between States is governed by treaties. These can either be 'bilateral' (meaning between 2 States), or 'multilateral' (meaning between more than 2 States, such as the Association of Southeast Asian Nations (ASEAN) Treaty on Mutual Legal Assistance in Criminal Matters).

In general, each State's domestic laws will govern whether the State's authorities will be able to comply with MLA or extradition requests. Therefore, in most cases, both international and domestic law must be interpreted, and work, together for a request to be successful.

## What Is The 'Principle Of Double Criminality'?

The 'principle of double criminality', also referred to as 'dual criminality', requires that the conduct for which one State is seeking MLA or extradition must also be a criminal offence in the State providing that assistance. This requirement is often reflected in treaties and domestic law related to MLA and extradition. For example, consider a situation in which State A requests State B to extradite an individual accused of 'torture' as defined under State A's domestic law. If State B does not have the crime of torture in its criminal code, its courts may find State B's authorities are unable to comply with State A's request because the double criminality requirement is not satisfied.

'Double criminality' is closely related to the criminal law principle of *nullum crimen sine lege* ('no crime without law'). This principle holds that a person may only be held criminally responsible for conduct that was recognised as a 'crime' at the time it was committed. Upholding the principle of *nullum crimen sine lege* is central to the rule of law, ensuring that individuals can know in advance what conduct may give rise to criminal liability.

In theory, it is possible for domestic courts to interpret the principle of double criminality narrowly, requiring that the conduct carry the same name, definition, and penalty in both States. In general, however, courts adopt a broader approach by focusing on whether the underlying harm would be criminal in both jurisdictions, even if it is labelled or categorised differently.

## Does It Matter If A State Lacks International Crimes In Domestic Law But Criminalises Acts Like 'Murder' Or 'Grievous Bodily Harm'?

It depends. The core international crimes of genocide, crimes against humanity, and war crimes are considered 'international' or 'atrocity' crimes because they contain defining elements that make the conduct particularly grave. For example, the crime of genocide under the Genocide Convention involves not only the commission of certain physical acts (such as killing or causing serious bodily harm) but also special intent: 'the intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such'. Crimes against humanity similarly require more than the commission of violence. They must be committed as a part of a 'widespread' or 'systematic' attack. 'Widespread' generally refers to the large-scale nature of the violence, affecting many victims and/or occurring across a broad large geographic area. 'Systematic' refers to conduct that is methodical or pursuant to a policy or plan by organisations or governments. Finally, war crimes are distinguished by their nexus to an armed conflict:

the acts must take place in the context of, and be associated with, either an international or non-international armed conflict, triggering the application of international humanitarian law.

There can be legitimate discussion about whether, for example, labelling an act as genocide (as killing members of a protected group) serves the same purpose as labelling the same act as multiple counts of murder. However, differences in legal definitions may not matter for double criminality if the same core harm (killing other human beings) underlies the conduct.

Nonetheless, satisfying double criminality may be more difficult in cases where the alleged conduct, although clearly harmful, does not fit neatly within ordinary domestic crimes. This may be particularly true for certain offences that involve forms of coercion other than physical force or collective harm not easily captured in standard categories. For example, the crime against humanity of 'deportation or forcible transfer'[1] and the non-international armed conflict war crime of 'ordering displacement' centre on the unlawful movement of populations. While many States criminalise the involuntary nature of movement of people as 'human trafficking', this is not necessarily equivalent. This is because 'human trafficking' involves movement for 'the purpose of exploitation', whereas 'deportation or forcible transfer' or 'displacing civilians' do not. Similarly, domestic offences such as 'theft' may partially reflect the loss of property associated with these crimes but may not reflect instances where victims hold no formal legal title to land or property.

Accordingly, while ordinary domestic crimes may sometimes provide a sufficient basis for cooperation, the absence of core international crimes in domestic law could create issues for satisfying the principle of double criminality.

## Why Is This Relevant To International Accountability In Asia?

As a diverse region encompassing Central, South, Southeast, and East Asia, Asian States have varying levels of incorporation of core international crimes into their domestic legislation.

Some States have incorporated war crimes, crimes against humanity, and genocide into their domestic law after becoming signatories to the Rome Statute of the International Criminal Court (ICC) (see, for example, the Philippines and the Republic of Korea). However, the Rome Statute does not require States Parties adopt specific or new definitions of its crimes. Therefore, some Parties have chosen to rely on existing domestic offences rather than codifying particular international crimes (see, for example, Japan). This raises uncertainty as to whether the particular elements of core international crimes will allow courts in States relying on the equivalency of domestic offences to find that the principle of double criminality is met.

Beyond the Rome Statute, all Asian States are Parties to the four Geneva Conventions.[2] The Geneva Conventions (GCs) incorporate an obligation on Parties to investigate, and then extradite or prosecute within their national courts (known as *aut dedere aut judicare*)[3] individuals in their jurisdiction who are alleged to have committed specific violations of the Conventions known as 'grave breaches' (see Art 49 GC I; Art 50 GC II; Art 129 GC III; and Art 146 GC IV). To enable States to extradite or prosecute under domestic law, these Articles also oblige Parties to 'provide effective penal sanctions' for 'grave breaches' in their national legislation.

However, 'grave breaches' under the Conventions are defined in the context of international armed conflict, not non-international armed conflict.[4] This leaves open the question of whether requests for MLA and/or extradition relating to non-international armed conflicts would satisfy the requirement of double criminality in States that have criminalised 'grave breaches', but have not also criminalised similar conduct beyond international armed conflict.

## Is The Ljubljana-The Hague Convention Relevant To These Issues?

[1] It is important to note that 'forcible' is not restricted to specific physical acts and may include 'threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment.'
[2] Similar provisions are also provided in treaties such as the Genocide Convention (Art V) and Convention against Torture (Art 4).
[3] This obligation, to investigate and then extradite or prosecute under national laws, is central to preventing impunity because it ensures that perpetrators of core international crimes cannot evade accountability by exploiting jurisdictional gaps or crossing borders.
[4] However, see here.

The Ljubljana-The Hague Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes against Humanity, War Crimes and other International Crimes (LHC) is a multilateral MLA and extradition treaty that focuses on State-to-State cooperation addressing core international crimes. The LHC is separate from, but complementary to, the Rome Statute regime in addressing impunity; it prioritises cross-jurisdictional support for domestic investigation and prosecution. Because many States maintain traditional MLA or extradition treaties only with major trading partners or key diplomatic allies, the inter-regional nature of the LHC means that acceding as a Party could significantly expand a State's avenues for cooperation, including by supporting stronger collaboration across the so-called Global South.

Like the Geneva Conventions, the LHC obligates State Parties to incorporate the crimes to which the Convention applies into its domestic law (Art 7), provide jurisdiction over such crimes (Art 8), and to extradite or prosecute alleged offenders of such crimes that are within its jurisdiction (Art 14).[5] These crimes include genocide, crimes against humanity, and war crimes in both international and non-international armed conflict (Art 5). While this may require Parties to adopt new domestic legislation, it leaves to the discretion of the State how the legislation is framed while still harmonising the jurisdictional bases on which Parties can cooperate.

Notably, Asian States do not need to become Parties to any particular treaty in order to incorporate core international crimes into domestic law or to enable cooperation in their prosecution. However, in practice, the absence of shared treaty-based obligations could leave good faith cooperation vulnerable to obstacles such as double criminality.

[5] Importantly, this is also envisioned in the Draft Articles on Prevention and Punishment of Crimes against Humanity (Draft Articles) (see e.g. Arts 7, 8, 9, and 10). For more on the Draft Articles and Asia, see the Asia Justice Coalition's work here.