

Challenges in Implementing the Legal Framework for Mutual Legal Assistance in Criminal Matters

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Introduction

Papua New Guinea's (PNG) practice in International Crime Cooperation is as young as the *Mutual Legal Assistance In Criminal Matters Act 2005* (MACMA) and *Extradition Act 2005*. However, its jurisprudence and practice has significantly developed from a failed Julian Moti case to PNG's first successfully concluded extradition case in 25th October 2013. From zero cases of mutual legal assistance requests to the successful prosecution both in the criminal trial and the proceeds of crime proceedings in the Eremas Wartoto case.¹

Extradition is the transfer of an accused person from one State or country to another State or country that seeks to place the accused person on trial. This transfer is initiated by a Mutual Legal Assistance Request which is a request for evidence by one State to another to use in investigations, prosecution or court proceedings. The *Extradition Act 2005* is PNG's enabling law that regulates all extradition requests, and the MACMA regulates all mutual legal assistance requests. There are grounds for refusal of requests, and 'Political Offence' is one of those grounds under the MACMA and the *Extradition Act 2005*.

This paper outlines the key elements in international crime cooperation law on political offences in mutual legal assistance requests in PNG. It also sheds light on the challenges of identifying offences as 'political offences' in mutual legal assistance requests. This paper focuses on a case involving a country in Europe. The experience in dealing with this case has given PNG a better understanding of the key elements in international crime cooperation law on 'political offence' in mutual legal assistance requests (and its challenges).

The European Case

On the 30th of August 2019, PNG received its first mutual assistance request from a country in the European continent through the Department of Foreign Affairs through the PNG High Commission in Canberra.

It was reported that on the 22nd of February 2018, four citizens of this European country were kidnapped by abductors. The abductors set the others free except for one who was tortured and murdered in a province of this European country. His body was recovered by the police on the 20th of March 2018. While investigations were ongoing, the deceased's father and sister received phone calls from registered and active numbers from four other European countries and a registered and active Papua New Guinean number. Investigators believed that a connection error or other non-identified reasons prevented the caller to speak to the deceased's father and sister.

The investigators believed that the caller who called using the PNG registered phone number, must have had some information relating to the kidnapping and torture of the deceased, and was going to relay the information to the deceased's immediate family members since the calls were made between the date of the kidnapping and investigation.

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¹ *Wartoto v State* (2019) SC1834.

Type of Assistance Required

The office of the Prosecutor General of this European country, which is the Central Authority sent a mutual assistance request to PNG to assist in:

1. Producing information from the relevant telecommunication company in PNG on the subscriber/s of the mobile number including incoming and outgoing call logs, text messages and where the caller was when those calls were made; and
2. Obtaining information by interrogation through the questions provided; and
3. Obtaining information regarding the whereabouts of the person who made the calls and provide border crossing records.

Before PNG could consider whether or not to provide assistance to the European country, it needed to assess the political and socio-economic settings of the country. A key finding of this desktop review was that the European country was embroiled in internal disputes and also had a brief war with one of its neighbours. It was a landlocked country bordering one of two countries which were politically unstable.

Whether or not PNG can provide mutual legal assistance to this foreign country?

Papua New Guinea does not require mutual assistance requests to be made under a treaty, but can use the United Nation Convention Against Corruption (UNCA) as a basis for mutual assistance requests. The European country is a member of UNCAC, however, it did not use UNCAC to send this request. Instead, it made its request to PNG under the principle of 'comity' and 'reciprocity'.² PNG's view was that this approach was taken by this country because the issue was not a corruption matter.

In order to establish whether or not PNG can provide mutual legal assistance to this European country and make a decision, we had to ensure that the country's mutual assistance request to PNG complied with the MACMA Act, or met our legal basis or principles in order for PNG to provide mutual legal assistance.

The following are the legal basis or requirements that must be established in a mutual assistance request to PNG in order for PNG to provide mutual legal assistance:

1. *Whether or not the request has complied with Section 7 of the MACMA?*

Section 7 of the MACMA states that the request must be in writing, in English and sent from a Central Authority to the Minister for Justice. The request was from the European country's Central Authority to our Minister for Justice and was in English setting out the offence and the nature of the assistance required thereby complying with Section 7 of MACMA.

2. *Whether or not the offence is an indictable offence?*

The criminal offences in this case were kidnapping and torture. Kidnapping is a criminal offence that carries a penalty of imprisonment for a term of four to seven years according to the European country's Criminal Code. Torture is also a criminal offence and carries a penalty of imprisonment for a term of seven to ten years.

² Comity was defined in the case *Hilton v Guyot* (1895) 159 US 113. "Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws. Reciprocity in its simplest term means mutual action – give and take. Thus, if PNG provide assistance to a requesting country, then the requesting country will provide the same assistance to PNG if the need arises in the future.

Both offences are indictable offences in PNG. Kidnapping carries a penalty of 50 years without remission and parole pursuant to Section 353 of the *Criminal Code Act* of PNG, while the offence of torture is provided for under Section 19 of the *Criminal Code Act* (on grievous bodily harm) with a penalty of imprisonment not exceeding seven years.

3. *Whether or not there are any possible grounds of refusal of assistance by the Minister for Justice pursuant to Section 9 and Section 10 of MACMA?*

There are no grounds under Section 10 of MACMA for refusal, but there are three possible grounds for refusal of assistance to this foreign country under Section 9 of the MACMA. These grounds are:

- a) A request by a foreign country for assistance must be refused if in the opinion of the Minister the request relates to an investigation of, or a proceeding for, a political offence (Section 9(1)(a)); or
- b) There are substantial grounds for believing that the request has been made with a view to prosecuting or punishing a person for a political offence (Section 9(1)(b)); or
- c) That providing the assistance would prejudice the sovereignty, security or national interest of PNG (Section 9(1)(c)).

The Definition of “Political Offence”

If the mutual legal assistance request by the European country was to fail the test on the ground of ‘political offence’, what then is the definition of ‘political offence’? The problem of defining a political crime is well summarized by Oppenheim when he states “where as many writers consider a crime, Political, if committed from a political motive, others call ‘Political’, any crime committed for a political purpose; again others recognize such a crime only as political as was committed both from a political motive and at the same time for political purpose, and thirdly some writers confine the term ‘Political Crime’ to certain offences against state only such as high treason etc...up to present day all attempts to formulate a satisfactory conception of the term have to decide according to their own municipal laws and practice whether, an offence to which extradition has to be requested is Political Crime or not.”³

Alam observes that ‘*pure political offence*’ is one that is exclusively aimed at the state or against political interest, without injuring private persons property or interest and not accompanied by the commission of crime. Such offences are directly aimed at the government and have none of the elements of ordinary crimes. This includes Sedition and Treason.⁴ Hyjek also points out that ‘*relative political offence*’ can be an extension of the purely political offence, when in conjunction with the latter, a common crime is also committed or when without committing a purely political offence, the offender commits a common crime prompted by ideological motives. Whether or not a relative offence has political consequences, will often depend on the proximity of the offence to the political objective sought. There is no fixed rule as to what degree of proximity is required.⁵

For instance, if the accused robbed a bank to obtain funds to support a political party, the object would clearly be too remote to constitute a political offence. But if the accused has killed a dictator in hopes of changing the government of the country, his objective would sufficiently immediate to justify the epithet ‘Political’.

In PNG, political offence or crime is provided under Section 9(2) of MACMA. This provision adopts the definition of ‘political offence’ provided in the *Extradition Act 2005*. Section 2 of the *Extradition Act* stipulates that:

³ Kalinga Kumar Panda, *A Text Book of International Law* (New Delhi: Anmol Publications, 1998) 188.

⁴ Aftab Alam, “Extradition and Human Rights” (2008) 48 *Indian Journal of International Law* 87 at p90.

⁵ Steven M Hyjek “Political Offences in the Law of Extradition” available at: www.refugee.org.nz/Reference/Chapter Two.htm (Visited on February 12, 2012).

“Political Offence” for a country, means an offence against the law of the country that is of a political character (whether because of the circumstances in which it is committed or otherwise and whether or not there are competing political parties in the country), but does not include:

- (a) an offence:
 - (i) that is constituted by conduct of a kind mentioned in a multilateral to which Papua New Guinea is a party; and
 - (ii) for which parties have an obligation to extradite or prosecute; or
- (b) the offence of genocide; or
- (c) an offence of:
 - (i) murder, kidnapping or other attack on the person or liberty; or
 - (ii) threatening or attempting to commit, or participating as an accomplice in, murder, kidnapping or other attack on the person or liberty;of the head of a State, head of Government or Minister of the Government of the country or a member of his or her immediate family; or
- (d) a terrorism offence; or
- (e) any other offence that Papua New Guinea and the other country have agreed will not be treated as a political offence for the purposes of extradition.

Is Kidnapping and Torture in this case “a political offence”?

Deducing from the definition of ‘political offence’ provided by Section 2 of the *Extradition Act*, kidnapping and torture are not a political offence if murder, kidnapping or other attack was made on the Head of a State, Head of Government or Minister of the Government of the country or a member of their immediate family. In this case, the deceased who was kidnapped and murdered was not a Head of State, nor a Head of Government or Minister of the Government of the country, therefore it *did not fit* as an *exception to political offence*.

The facts of the case showed that the alleged kidnapping and torture was in relation to a military conflict between the requesting country and its neighbour which resulted in a war. The conflict centered on two particular regions of the requesting country. Although they are officially part of the requesting country, they both have separate governments unrecognized by most other countries. This showed that there are competing political parties in the requesting country which met one of the requirements of Section 9 of MACMA.⁶

In the case of *Re-Menuier*⁷, Menuier was an anarchist who escaped to England from France, where he had perpetrated two bomb outages, one in a crowded cafe, and another at an army barracks. A divisional court on habeas corpus rejected the submission that the facts disclosed an offence of a political nature. Cave J, stated “It appears to me that, in order to constitute an offence of a political character, there must be two or more political parties in the State, each seeking to impose the government of their own choice on the other and that, if the offence is committed by one side, or on the other in pursuance of that object, it is a “political offence”, otherwise not”. This means that there should be some kind of organized party contending for power with the established Government.⁸ The courts in Britain have tried to lay down the tests. In *Re Castioni Case*⁹ the applicant Castioni with large numbers of Swiss citizens had for some time been dissatisfied with its government. The pentup frustration finally erupted into a largescale armed attack on a government building and Castioni shot a member of government. Evidence showed that Castioni and the deceased never met before and there were no grudges between them. The case had been regarded by later courts as connecting the concept of political

⁶ When Section 9 of MACMA and Section 2 of the *Extradition Act* are read together, the law is that there must be competing political parties in a country, as a circumstance to which an offence was committed, in order to classify it as, a political offence.

⁷ (1891) Q.B 149.

⁸ See generally I.A Shearer, *Extradition in International Law* 320’ (Manchester, UK: Oceana Publications, 1971).

⁹ (1891) Q.B 149.

offence with overt acts in the course of some kind of political disturbance or conflict between different parties contending for power in a State.

However, in *Rex v Kolozynski case* of 1955¹⁰, the British Court did not follow the restrictive definitions given in the two previous judgments, but extended the definition of 'political offences' by saying "The words offence of political character must always be considered according to the circumstances existing at the time when they have to be considered. The present time is very different from 1890 when *Castioni's case* was decided." The judgment has been favorably accepted by many scholars and accordingly now not only offences committed to over-throw a government but also attempt to suppress or prosecute persons holding different political opinions is considered a political offence.¹¹

In the present case, two regions of the European country both declared independence respectively resulting in civil unrest in the country. As a result, a neighbouring country intervened by sending its armed forces as peace keeping forces into the two regions. The requesting country accused its neighbour of shooting down its drone which the neighbour denied. The requesting country then attacked one of the capitals of the two breakaway regions which was seen as initiating the armed conflict. During the war, one of the breakaway regions lost many of its service men including civilians and they alleged that the requesting country was responsible for genocide during the war, and this was the reason (per the facts of the case) the deceased in this case was kidnapped and tortured by the so-called law-enforcement officers of the neighbouring country.

The deceased usually entered a town in one of the breakaway regions to sell his fruits and vegetables. On the fateful day, he went with his friends when he was arrested by the so-called law-enforcement officers of the neighbouring country. They questioned his friends on whether he participated in the war and his friends said he did not, but that he was in the Iraqi War. He was accused of participating in the war and of taking part in the genocide. It was for this reason; he was kidnapped and brutally tortured and died.

The events in this case established the circumstances of political character as explained by the case law and the legal framework of PNG. The deceased who is from the requesting country came from one of the two breakaway regions of the country, aligning with a different political view or opinion. The circumstances in which the deceased was kidnapped and murdered are political and met the requirement of a political offence under Section 9(2) of the MACMA.

In this case, the deceased died from the torture he endured and was not released to the requesting country and his family until after 22 days causing a huge international political conflict. According to the media the breakaway region kept his body for 22 days after his death, and certain organs were missing when they returned the body. The missing organs made it difficult for the autopsy to investigate the cause of his death.

The reason for the torture, kidnapping, death and the delay in returning the body of the deceased was that he was accused of taking part in the genocide. This reason is a political reason. The fact that his body was held by the breakaway region for 22 days, and the allegations that some of his organs were missing from his body to make it difficult for the requesting country to investigate the cause of his death, are all political in nature, and fall under the ambit of international principles of 'political offence' (as explained in the previous paragraphs on *Pure/Relative Offence* and the summary of *Oppenheim*.)

¹⁰ (1955) 1 Q.B 540.

¹¹ Kalinga K Panda, n3, supra.

Section 9(a), (b) and (e) of the MACMA state that a mutual assistance request should not be provided if the request relates to an investigation or proceedings of a '*political offence*'. Political offence for a country *means an offence against the law of the country that is of a political character (whether because of the circumstances in which it is committed or otherwise and whether or not there are competing political parties in the country), but does not include certain offences (as stated in the previous paragraphs)*. In this case, the offence of kidnapping and torture were committed for a political reason or, the circumstances of the case are political in nature, therefore these offences are political offences and PNG could not provide mutual assistance to the foreign European country.

To provide the assistance to the requesting country would also prejudice the sovereignty, security or national interest of PNG. From the international media and international community, it was clear that this case was political in nature in which if PNG provided the assistance, it would very likely prejudice its sovereignty, security and national interest.

Conclusion

The request for mutual legal assistance to the European country was rejected by PNG because it did not fall under the UNCOC. In PNG's view this request related to an investigation of a political offence. There were substantial grounds for believing that the request had been made with a view to prosecute or punish a person for a political offence, and that providing the assistance would prejudice the sovereignty, security or national interest of PNG.

This was PNG's first mutual assistance request that had been refused. In this case one can appreciate the challenges of ensuring that an offence is not a political offence or is a political offence to make a decision on a mutual assistance request. It must also be appreciated that in some mutual assistance request cases, it is not always a straight forward matter, meaning a country may need to look farther than the law; that can be research on historical background of a country, their geographical and political back ground or their relationship to PNG.