Sri Lanka

The Legal Framework for Extradition, MLA and Recovery of Proceeds of Corruption

Extradition in Sri Lanka is governed by the Extradition Law (No. 8 of 1977, as amended by Act 48 of 1999) and the Mutual Assistance in Criminal Matters Act (No. 25 of 2002) (MACMA). Extradition and MLA may be provided without a treaty to Commonwealth countries that have been designated by order in the Gazette. A treaty is required for all other countries (unless the request relates to an offense of money laundering).

In addition to the UNCAC, Sri Lanka is party to four bilateral extradition treaties, one with a member of the ADB/OECD Initiative (Hong Kong, China) and two with Parties to the OECD Convention (Italy and United States). Sri Lanka also has extradition relations under the London Scheme with eight members of the Initiative (Bangladesh; Fiji; India; Malaysia; Papua New Guinea; Samoa; Singapore; and Vanuatu). Sri Lanka has a bilateral MLA treaty in force with Hong Kong, China and Pakistan (members of the Initiative). An additional treaty with Thailand has been signed but is not in force.

The Extradition Law describes the procedure for extradition from Sri Lanka and several grounds of refusal. The MACMA offers a range of assistance, including production orders and MLA relating to proceeds of crime. Both laws lack some features commonly found in corresponding legislation in other jurisdictions, such as consent extradition and taking evidence by video conference. Extradition requests should be sent through the diplomatic channel to the Minister of Defence, Public Security, Law and Order (who at present is the President of Sri Lanka). MLA requests may be made through the diplomatic channel to the Secretary to the Minister of Justice. MLA requests must be made in English using the forms prescribed in the Schedule to the MACMA.

Legal Preconditions for Extradition and MLA (Including in Relation to Proceeds of Corruption)

Dual criminality is required for extradition and MLA from Sri Lanka. The conduct underlying an extradition or MLA request must be an offense in Sri Lanka if it took place there. For more intrusive forms of MLA (e.g., search and seizure), the offense must also be punishable in the requesting state by death or one year’s imprisonment. Sri Lanka may waive the dual criminality requirement for MLA if the conduct underlying the request is “of a serious nature and is a criminal matter.” For extradition to Commonwealth countries without a treaty, the offense must also be described in a list in the Extradition Law. The list includes bribery, theft, criminal breach of trust, dishonest misappropriation of property, any offense in respect of property involving fraud, and money laundering. The Law does not contain a fall-back provision for unlisted offenses, such as discretion to extradite for conduct that is not on the list but which constitutes a crime in the requesting and requested states.

Sri Lanka has not created offenses of illicit enrichment and bribery of foreign public officials, and it is unclear whether dual criminality would impact extradition and MLA requests involving these offenses. Sri Lanka does not impose criminal liability against legal persons for corruption offenses. It is therefore also unclear whether dual criminality prevents MLA in cases in which a legal person is the target of a corruption investigation or prosecution. For MLA requests made under the UNCAC, Sri Lanka is obliged to provide non-coercive MLA even in the absence of dual criminality.

Evidentiary tests may have to be met before Sri Lanka cooperates. For search and seizure, there must be reasonable grounds to believe relevant evidence will be found in Sri Lanka. The prima facie case evidence test applies to extradition, i.e., there must be evidence that would be sufficient to warrant the trial of the person sought for the subject offense if it had been committed in Sri Lanka. The Extradition Law specifically requires an extradition court to hear evidence not only in support of extradition but also on behalf of the person sought.
Specialty applies to extradition. For incoming requests, the Extradition Law requires specialty protection to be provided in a law (if the requesting state is a Commonwealth country) or an applicable treaty. The Act also provides specialty protection to persons extradited to Sri Lanka. The MACMA does not limit the use of information obtained through MLA to the investigation or prosecution referred to in the request. However, the UNCAC imposes use limitation on all MLA requests made under the Convention.

Sri Lanka will not provide extradition or MLA if a request relates to the prosecution or punishment of an offense of a political character. The MACMA (but not the Extradition Law) excludes from this exception offenses that fall within the scope of an international convention to which Sri Lanka and the requesting state are parties, and which obliges Sri Lanka to extradite or prosecute the person sought. Money laundering is also deemed not to be a political offense under the Extradition Law. For extradition requests made under the UNCAC, the Convention requires that corruption offenses not be considered political offenses.

Double jeopardy is also a basis for refusing cooperation. Extradition is refused if the person sought would be discharged under a law relating to previous acquittal or conviction had he/she been charged with that offense in Sri Lanka. MLA is refused if the accused in a foreign prosecution has been acquitted or convicted in Sri Lanka for the same conduct.

There are additional grounds for refusing MLA. Sri Lanka will refuse a request that prejudices national security, international relations or public policy. The UNCAC also allows requests made under the Convention to be refused if assistance is likely to prejudice the sovereignty, security, ordre public or other essential interests of the requested state. The MACMA does not address whether MLA may be refused on grounds of bank secrecy. Other Sri Lankan legislation (e.g., section 16 of the Prevention of Money Laundering Act) expressly overrides secrecy obligations to compel disclosure of information. For requests made under the UNCAC, Sri Lanka is prohibited from refusing MLA on this ground.

As for other grounds for denying extradition, Sri Lanka does not prohibit the extradition of its nationals per se. Extradition is denied if the offense is punishable by death in the requesting state but not in Sri Lanka. It is also refused if extradition is unjust or oppressive, or if a person sought is facing charges in Sri Lanka (for the same or a different offense).

Procedures and Measures to Improve the Efficiency of Extradition and MLA

Sri Lanka’s central authority for extradition is the Minister of Defence, Public Security, Law and Order, while the central authority for MLA is the Secretary to the Minister of Justice. Both bodies are required to use the diplomatic channel for sending and receiving requests.

The Secretary to the Minister of Justice examines all incoming requests to ensure compliance with the MACMA and any relevant treaties. If the request meets these requirements, the Secretary forwards the request to an appropriate body (e.g., the police) for execution. The Secretary also has sole authority to make outgoing MLA requests under the MACMA.

As the central authority for extradition, the Minister of Defence, Public Security, Law and Order may issue an authority to proceed upon receiving a request. The High Court may then issue a warrant to arrest the person sought. If the person is arrested, the Court conducts a hearing to determine whether there is a prima facie case, and whether there are certain grounds for refusing extradition (e.g., political offense). If the requisite conditions are met, the Court commits the person into custody to await extradition. The person then has 15 days to appeal the Court’s decision. The appellate court may hear additional evidence relating to the grounds for denying extradition. If the appeal is dismissed, the case reverts to the Minister to determine whether the person should be surrendered. In making his/her decision, the Minister will also consider the grounds for denying extradition listed in the Extradition Law (e.g., political offense). The person may be discharged if he/she is not removed from Sri Lanka within 2.5 months after the Court orders committal and 1 month after the Minister orders surrender.

There are measures for handling urgent requests for extradition but not MLA. The Extradition Law allows foreign states to request provisional arrest. However, the request must be made through the diplomatic channel. The MACMA does not contain any provisions for urgent MLA requests. Both the Secretary to the Minister of Justice and the Minister of Defence, Public Security, Law and Order have Web sites. However, the sites do not contain information on extradition or MLA.
The Sri Lanka Police Service may provide assistance at the law-enforcement level outside of the MACMA. In 2005, the Service’s Interpol Unit received and responded to 209 and 207 requests for information respectively. It sent 138 requests abroad in the same year.

Recovery of Proceeds of Corruption in Criminal Proceedings

MLA concerning proceeds of corruption is provided through the Mutual Assistance in Criminal Matters Act. A broad range of assistance is available, including, tracing, restraining and forfeiting property.

Sri Lanka may assist a foreign state in identifying, locating or valuating proceeds of crime. Proceeds is defined in this context as property reasonably believed to have been derived or obtained, directly or indirectly, from the commission of an offense that is punishable by death or one year’s imprisonment. The MACMA does not specify the measures available for executing a request (e.g., search warrants, production or monitoring orders). It merely states that the Secretary to the Minister of Justice may, in his/her discretion, give the assistance wherever it is practicable to do so.

MLA to restrain or forfeit property under the MACMA consists essentially of the enforcement of foreign court orders. Foreign restraining, forfeiture and pecuniary penalty orders may be enforced if there are reasonable grounds to believe that there is property in Sri Lanka which is subject to the order or could satisfy the order. The foreign order must also be final. If these conditions are met, the foreign order may be registered with a Sri Lankan court, after which the order may be enforced like a domestic order. The MACMA does not allow Sri Lankan courts to issue restraining orders pursuant to a foreign request. There are also no provisions for urgent requests.

Concerning the repatriation of proceeds, the MACMA authorizes the Secretary to deal with property recovered under the Act for the purpose of giving effect to a foreign request. The Prevention of Money Laundering Act also allows property forfeited under that Act to be returned to a requesting state. Neither Act provides guidance on what factors will be considered in the exercise of discretion.

Conclusion

Ratification of the UNCAC has significantly enhanced Sri Lanka’s ability to seek and provide extradition and MLA in corruption cases. Sri Lanka has enacted legislation on extradition and MLA. A range of assistance is available, including MLA relating to proceeds of crime. Dual criminality may be waived if the conduct underlying an MLA request is “of a serious nature”. Foreign restraining, forfeiture and pecuniary penalty orders may be enforced by direct registration, thereby avoiding delays associated with applying for a second order.

Recommendations for a Way Forward

The Legal Framework for Extradition and MLA

To facilitate cooperation with countries that are not States Parties to the UNCAC, Sri Lanka could consider allowing extradition and MLA in the absence of a treaty. Cooperation could also be enhanced by adding features commonly found in other jurisdictions, such as extradition by consent and taking evidence via video conference.

Legal Preconditions for Extradition and MLA

MLA could be enhanced by eliminating the dual criminality requirement or reducing it to a discretionary requirement. Alternatively, Sri Lanka could consider requiring dual criminality only for more coercive measures (extradition, search and seizure etc.) and not for less intrusive ones, such as requests for production orders and service of documents. Sri Lanka should also ensure that it can execute non-coercive requests made under the UNCAC even in the absence of dual criminality (as required by Article 46(7) of the UNCAC). Abandoning the list approach to defining extradition offenses in the Extradition Law could help
ensure that all corruption and related offenses are covered. Sri Lanka could also take steps to ensure that dual criminality does not prevent cooperation in cases involving illicit enrichment, bribery of foreign public officials, or where the target of an investigation or proceeding is a legal person.

Reviewing the evidentiary aspects of the extradition process could further enhance cooperation. In particular, Sri Lanka applies the prima facie case test in extraditions. Civil law jurisdictions seeking extradition from common law jurisdictions have had difficulties in complying with this test. Consideration could therefore be given to following the example of some common law countries (e.g., Australia and the United Kingdom for extradition to certain non-Commonwealth countries) and requiring lesser or even no evidence for extraditions. In addition, the Extradition Law requires the extradition judge to receive evidence on behalf of the person sought. Sri Lanka may wish to consider whether this would allow the person to tender evidence regarding whether he/she committed the offense underlying the extradition. If so, the extradition hearing could potentially be turned into a trial, thereby delaying the process.

The Extradition Law requires an assurance of specialty either in an applicable treaty or a law in the requesting state. Consideration could be given to accepting specialty assurances from the judicial or diplomatic authorities of a requesting state, which is the practice in many countries.

Extradition and MLA is refused for offenses of a political character. Consideration could be given to expressly excluding corruption offenses from the definition of a political offense under both the Extradition Law and the MACMA. Extradition is also denied if the offense is punishable by death in the requesting state but not in Sri Lanka. To ensure that justice is served, Sri Lanka could consider allowing extradition if the requesting state provides an assurance that the death penalty would not be sought or carried out. Alternatively, Sri Lanka could take steps to allow the prosecution of the person sought whenever extradition is denied on this basis.

Regarding other grounds for denying cooperation, the MACMA does not deal with the issue of bank secrecy. Recent international instruments expressly prohibit the use of bank secrecy as a ground for denying MLA (e.g., Article 9(3) of the OECD Convention, Article 46(8) of the UNCAC, and Article 3(5) of the Southeast Asian MLAT). Other Sri Lankan legislation (e.g., the Prevention of Money Laundering Act) also explicitly states that secrecy obligations should not prevent the disclosure of information. Consideration could be given to codifying a similar provision in the MACMA for MLA requests that are made outside the UNCAC.

**Procedures and Measures to Improve the Efficiency of Extradition and MLA**

There are separate central authorities for extradition and MLA in Sri Lanka. Designating a single body as the central authority for all extradition and MLA requests could concentrate expertise and help avoid problems with duplication and coordination. Allowing the central authority to send and receive requests directly could help avoid delays associated with the diplomatic channel. Creating a Web site for the central authority could greatly assist foreign requesting states. The site could contain information on the extradition and MLA process, contact information, copies of relevant legislation and treaties, and sample documents (particularly the required forms for requesting MLA). To properly evaluate the performance of the central authority, Sri Lanka could keep detailed statistics including the number of requests received, sent, executed and refused, the nature of the assistance sought, the offenses involved, and the time it took to execute the requests.

The extradition process could be made more efficient by streamlining the process. For example, certain grounds for denying extradition (e.g., political offense) are considered by both the Court at the extradition hearing and the Minister of Defence. Avoiding duplication could improve efficiency. As well, an order of committal may be appealed before the Minister decides to surrender the person. Allowing the appeal to be heard after the Minister’s decision could be more efficient, since the Minister may decide against surrender and thus render the appeal moot. It may also be more efficient for an appellate court to review the committal and surrender orders simultaneously.

The procedures for urgent requests could also be improved. The Extradition Law requires foreign states to send requests for provisional arrest through the diplomatic channels, which could introduce significant delay. Allowing requests to be sent via facsimile or Interpol could alleviate these concerns. Urgent MLA requests could also be accepted through these channels as well as orally with subsequent written confirmation (e.g., see Article 46(14) of the UNCAC).
Recovery of Proceeds of Corruption in Criminal Proceedings

Allowing MLA in relation to instrumentalities of crime could be helpful. As well, the MACMA does not provide specific measures to trace proceeds of crime. It merely states that the Secretary to the Minister of Justice may assist whenever it is practicable to do so. Consideration could be given to adding to the MACMA specific tools for tracing, e.g., search warrants, and production and monitoring orders.

Under the MACMA, foreign restraining and forfeiture orders may be enforced only by direct registration of the foreign order. It could be useful to also allow Sri Lankan courts to issue restraining or forfeiture orders pursuant to a foreign request. To deal with urgent cases, Sri Lanka could consider allowing registration (for a limited duration) of a faxed copy of a sealed or authenticated foreign order.

As for repatriating the proceeds of corruption, the Secretary to the Minister of Justice could consider entering into arrangements for sharing assets with foreign states. Sri Lanka could also clarify the criteria for repatriating assets, including whether and how it would take into account the factors referred to in Article 57 of the UNCAC.

Information for Seeking Assistance

Central Authority

For MLA - Through the diplomatic channel to:
The Secretary to the Minister of Justice
Superior Courts Complex
Colombo 12, Sri Lanka
Tel: +94 1 2449 959 / 2323 979
Fax: +94 1 2445 447
Justices@sri.lanka.net
www.justiceministry.gov.lk

For Extradition - Through the diplomatic channel to
The President of Sri Lanka and Minister of Defence, Public Security, Law and Order
Tel: +94 1 2324 801 / 2430 860
Fax: +94 1 2430 590
modmedia@sltnet.lk

Additional Contact

Sri Lanka Police Service
Interpol Unit
Criminal Investigation Department
Tel: +94 1 2320 570

Relevant Laws and Documentation

Extradition Law (No. 8 of 1977, as amended by Act 48 of 1999)
Mutual Assistance in Criminal Matters Act (No. 25 of 2002)
Prevention of Money Laundering Act (No. 5 of 2006)
www.apgml.org/documents/docs/17/Sri%20Lanka%20MER%20-%20Final%2010August06.pdf