# Bilateral Cooperation in Criminal Matters in European and African Union Member States - A Case Study: Zimbabwe

Nigel Madzima*

**ABSTRACT**

The paper will explore the fundamental differences between the European Union as a supranational institution and vice versa, an intergovernmental institution, the African Union. Within these differences, one explores bilateral cooperation in criminal matters in the EU and the AU. The paper will define the kinds of collaboration found in investigating criminal matters within Europe and how the success of these collaborations is greatly owed to the union identity, the idea of integrating members' states to form one union identity. Due to this one identity, collaboration within the union is seamless. In contrast, in the African Union Context, the African Union is a collaborative effort to have different governments/member states cooperate, and this cooperation is marred with difficulty as member states hold firmly to their sovereignty. As a result, most of the cooperation in criminal matters is left to the governments of the member states to dictate instead of having the African Union as the centre of the collaborative effort. Therefore, this paper will make a synopsis of bilateral cooperation in criminal matters within the EU and AU member states.

**Keywords:** *African Union, European Union, bilateral cooperation, mutual cooperation, Zimbabwe.*

* Research assistant, Faculty of Law, Bahçeşehir Cyprus University, nigel.madzima@baucyprus.edu.tr

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## I. INTRODUCTION

This paper will compare member states' cooperation within the European Union (EU) and the African Union (AU) regarding criminal matters. Bilateral cooperation is the relationship and cooperation between national authorities of two member states in the AU and the EU (horizontal cooperation). On the part of the EU, one will shed more insights on the bilateral cooperation between the Commission and an individual state (vertical cooperation). The field of criminal cooperation in both the EU and the AU is actively legislated, comprising international treaties from either side that foster cooperation in criminal matters, namely, the European Arrest Warrant, the framework on Mutual Legal Assistance, and the AU Convention on Preventing and Combating Corruption. However, unlike the EU, the AU has not enacted legislation that explicitly focuses on bilateral cooperation among its member states. Instead, the AU has focused on broader frameworks and initiatives that deal with issues pertinent to Africa, peace, justice, and security.

Moreover, within these larger frameworks, the AU encourages cooperation from its member states in criminal matters pursuant to attaining justice. Nevertheless, member states of the AU are within their rights to have bilateral agreements amongst themselves and other nations; for example, Zimbabwe has an act that fosters mutual assistance in criminal matters between Zimbabwe and the Commonwealth countries and other foreign countries, the Criminal Matters (Mutual Assistance) Act Chapter 9:06 (Criminal Matters (Mutual Assistance) Act, 2018). Therefore, this paper will detail the nature of bilateral agreements and cooperation within the European Union in criminal matters and, vice versa, the bilateral agreements or lack thereof in the African Union.

## II. MODELS OF COOPERATION (THE REQUEST MODEL)

The starting point of this paper would be a further elaboration on the different cooperation models, namely, the request model, the mutual recognition model, and the availability model. The request model is discretionary in that it allows member states to handle interstate relations in a manner that both member states acknowledge. However, this discretion is not absolute; States can voluntarily limit their sovereignty by accepting restrictions. However, one should clearly distinguish between treaty-based requests and requests for assistance that are not treaty-based. Beginning with the latter, in the absence of a treaty, the requested state has complete discretion to assist or not if it deems so. International cooperation without a treaty is considered an act of comity between sovereign states.

On the other hand, when there is a treaty, the treaty will determine the conditions under which mutual assistance may occur. The treaty will oblige the contracting states to help/assist one another. Therefore, ratifying such a treaty implies that a state has accepted limitations on its sovereign rights and is bound upon request to help a member state. However, such treaties are not absolute and have pathways/exceptions for refusal. Thus, states can refuse the request without violating their obligations under international law.

Under treaty-based requests, treaties determine the conditions under which they will apply; for example, Art 2 European Convention on Extradition, *"extradition shall be granted in respect of offenses punishable under the laws of the requesting Party and of the requested Party ...."* (ETS No. 024). Therefore, creating the double criminality requirement, states can only render assistance in cases where the offense is a crime under both the laws of the requesting party and the requested state. The requested party under the EU will have to inquire on its own to determine whether the crime/offense is such that it is criminal in its state. Contrary to the EU, the AU does not have a comprehensive treaty

on extradition as the EU does. Domestic laws and bilateral agreements define the landscape of extradition in cases of extradition within the AU. Art 15(2) of the African Union Convention on Prevention and Combating Corruption*: "State parties shall include offenses falling within the jurisdiction of this Convention in their internal laws as crimes requiring extradition…"* Therefore, member states in the AU define the conditions for extradition and mutual assistance through national legislation and other bilateral agreements outside the AU. In Zimbabwe, the principle of double criminality is required for extradition purposes when dealing with treaty-based requests. S.6(2)a) of [Chapter 9:06] states that, in instances of a request for assistance by a foreign nation, the government of Zimbabwe has grounds for a refusal to grant such assistance in cases where the offense to which the person is to be prosecuted would not suffice as a crime in Zimbabwe.

The principle of double criminality is complex in that the question becomes, where should it be applied? Should all criminal matters be subjected to the double criminality principle? What is the scope to which it covers? Should all forms of mutual assistance rely on the double criminality principle? The EU denotes that only in cases where international cooperation will inevitably infringe upon the rights of individuals should the principle of double criminality be applied. The EU has taken a stance that relies less on the fulfilment of the conditions of the double criminality principle, and this is because the EU believes that the principle of double criminality is a hindrance to practical cooperation, and this is reflected in the limited instances where the principle of double criminality can be relied upon; Framework Decision, 2002/584 on the European Arrest Warrant has several listed offenses where the principle of double criminality should not apply. Therefore, it is undeniable that a shift has taken shape against applying the double criminality principle within the EU; however, the focus should be preserved. This

principle serves the purpose of limiting severe cooperation forms that undermine the individual rights of the accused persons. However, the same cannot be said regarding the AU since it gives de facto power to the member states to set the tone for bilateral cooperation in criminal matters. Therefore, member states are most likely to rely more on the double criminality principle, unlike limiting its use, as is the case in the EU. Member states are most likely to hold on to the idea of the sovereignty of their criminal procedure, which would only permit recognition of one's jurisdiction/criminal procedure if it aligns with theirs. The difference between the EU and the AU stems from the principal nature of the organizations in question. The EU is supranational, which translates to one jurisdiction, one Union territory, and one Union identity, and as such, allows for free movement because member states recognize legislation from other member states to be no different from their own. If not, how can one achieve free movement if the fear of prosecution by another member state for the same crime looms in the background (ne bis in idem)? Thus, the nature of the organization explains why the EU has shifted away from the double criminality principle, as the EU aims to harmonize Union law. In contrast, the double criminality principle gives supremacy to one state's laws. On the other hand, the AU is an intergovernmental organization that recognizes each state's sovereignty and competence, thus explaining the deafening silence by the AU on the issue of double criminality as it leaves this for the states to decide, unlike in the EU, where member states serve the interests of the Union.

Besides the double criminality principle, there are other grounds in the EU upon which the requested state can rely for refusal to provide mutual assistance. For example, an offense that is political gives room for the requested state to refuse to extradite the accused (Art 3 European Convention on Extradition); adding on, offenses under military law that are not offenses under ordinary criminal law give room for refusal on the requested state

(Art 4 European Convention on Extradition) and extradition is also refused when the crime is committed in the territory of the requested member state (Art 7 European Convention on Extradition). In the African Union, under the Convention on Preventing and Combating Corruption, Art 15(6) of the Convention states that;

> *"in cases where the requested state refuses to extradite on the basis that it has jurisdiction over the offense, without delay the state should submit the cases before its authorities for prosecution*." (African Union Convention on Preventing and Combating Corruption | African Union. n.d.)

In this regard, the AU and the EU share a commonality. Both organizations grant the requested states leeway to refuse extradition in cases where the requested state has jurisdiction. 'Jurisdiction on the matter' manifests as a crime committed in the member state's territory. Under Art 6(1(a) of Chapter 9:06, Zimbabwe also grants refusal of assistance because the offense the accused is alleged to have committed is political. Therefore, both in the EU and the AU exists a vast array of grounds upon which assistance from the requested state may be refused.

Furthermore, the case of Abdullah Öcalan and Turkey shows the nature of international cooperation in real-time in light of the request model, not treaty based. Abdullah Öcalan founded the Kurdistan Workers' Party (PKK), which had been involved in an armed conflict with Türkiye (Trilsch & Ruth, 2006). However, in 1999, the Turkish intelligence agents managed to capture Ocalan in Kenya and brought him to Türkiye to stand trial for the crimes he was accused of (crimes of terrorism). At the time, Türkiye and Kenya had no treaty for cooperation in criminal matters. Therefore, Türkiye, as the requesting state (not treaty-based) seeking international cooperation in criminal proceedings against Ocalan, relied on Kenya's cordiality and goodwill. Turkey made a non-treaty request to Kenya, seeking the extradition of Ocalan to Turkey to face trial;

Türkiye submitted a formal request for extradition to Kenya, detailing the charges levelled against Öcalan and the evidence supporting those charges. Note that at this point, Kenya could have refused to extradite the accused because they did not want to; there was no treaty establishing obligations from either state; thus, the general assumption is that countries are within their discretion to either aid or not. However, in the spirit of congeniality and harmony within international law, states tend to assist one another, and this case was no exception. As the requested country, Kenya complied with Türkiye's request (having consulted with its domestic laws) and extradited Öcalan to Turkey. Öcalan was tried and convicted in Türkiye. Therefore, this case mirrors how a request model on the cooperation of states in criminal matters looks in real-time.

## III. THE MUTUAL RECOGNITION MODEL

The principle of mutual recognition demands that a decision or order by the competent authorities of one member state be recognized and executed in another. Mutual recognition is inspired by internal market principles, where goods legally obtained are placed in the market of another member state, and a second check of whether they follow the conditions of another state is not permissible. Therefore, the ideal situation in the EU should be a free flow of arrest warrants, investigation orders, and judicial decisions from one member state to the other. This system is much more fluid, faster, and efficient than the request model. It eliminates the bureaucracy that muddles the no-treaty-based request model. The Schengen Agreement in Art 54 CISA denotes that *"a person whose case has been fully disposed of in one contracting party should not be prosecuted in another country on the same facts."* Therefore, mutual recognition, besides being swift and more efficient than the request model, is also built upon the foundation of trust among EU member states. It is a part of the internal fabric of the EU's internal market principles.

Moreover, since the EU is a supranational organization, the presumption is that decisions by a member state are in line with their (EU) shared values and principles. Several legal instruments, like the European Arrest Warrant, have implemented the mutual recognition model in the EU. On the other hand, the AU has yet to have unified statutory instruments like the EU for mutual recognition. The recognition or lack thereof of foreign judgments within the AU/Africa lies within the fabric of the AU as an intergovernmental organization; thus, domestic laws, regional agreements, and bilateral agreements of the member states outside the AU establish mutual recognition. Thus, each member state determines the procedure and criteria for recognizing foreign decisions. For example, Zimbabwe currently has no bilateral agreement upon which it recognizes foreign decisions as binding on itself in criminal matters. However, in certain instances, a special plea of autre fois acquit or autre fois convict is put forward when the accused was convicted or tried for the same material facts elsewhere (foreign court). If the court accepts that plea, all criminal proceedings against the defendant are dropped, and this gives effect to the rule in section 70(1)m) of the Zimbabwean constitution (*Nemo debet bis vexari pro una et eadem causa)* no one should be tried twice for the same crime. (17. PLEAS Zimbabwe Legal Information Institute, n.d).

## IV. THE AVAILABILITY MODEL

This cooperation model entails that information held by national enforcement agencies is directly accessible in an automated manner to the law enforcement authorities of another member state. Decision 2008/615 on Stepping up Cross Border Cooperation defines the principle of availability;

> "*law enforcement agent from another member state of the EU who needs information to carry out his duties can obtain that information from another member state, and the*

> *member state that holds this information shall make it available for the declared purpose."* (Decision 2008/615)

Unlike the request model, this allows a quicker and more efficient way of initiating investigations, where one must wait for a response or refusal. The African Union, however, does not have explicit conventions like the EU that transpose the concept of availability. However, inferences can be made on the statutory instrument of AFRIPOL, Art 4(d) of the statute of the African Union Mechanism for Police Cooperation, which states that *"the functions of AFRIPOL is to facilitate the exchange of information and intelligence in the prevention of transnational organized crime, terrorism, and cybercrime."* (AFRIPOL, 2017) Therefore, cooperation in the form of information sharing from one member state to another is encouraged; thus, the principle of availability arguably exists within the AU.

## V. COUNCIL OF EUROPE CONVENTIONS

### a. European Convention on Mutual Assistance on Criminal Matters (ETS N0. 30)

The Convention is an international treaty that provides the blueprint for cooperation and assistance between member states in the EU in criminal matters. The Convention facilitates the exchange of information/intelligence, extradition, and other forms of assistance. The Convention requires that requests for mutual assistance between member states be in writing, transmitted, and carried out by national judicial authorities. Significant provisions of the Convention include but are not limited to Art 1, which establishes the general principle/obligation to provide mutual assistance; Art 2 defines the scope of the Convention by establishing the limits of the principle of mutual assistance in the contracting document, for example, an offense of a political nature will give rise to when making requests and Art 11 sets limitations on when the requests can be executed

for a person in custody whose personal appearance as a witness is applied for by the requesting party for example, the request of a member state may be refused if the presence of the witness is necessary for proceedings pending in the territory of the requested party (ETS No. 30).

**b. European Convention on Extradition (ETS No. 24)**

The Convention on Extradition creates the framework for extraditing individuals accused or convicted of crimes within the EU member states. The Convention sets the blueprint for extradition, guaranteeing a uniform process that fosters cooperation and mutual assistance in criminal matters within the EU. The significant provisions of the Convention on Extradition are Art 1, which sets the tone by creating a general obligation to extradite. Art 2 defines extraditable offenses under the Convention as offenses punishable under the laws of both the requesting and requested parties. Art 3, 4, and 6 give grounds for a refusal to extradite in cases where the offense is political or a military offense that is not an offense under ordinary law; requested parties can also refuse to extradite their nationals (these do not exhaust grounds for a refusal to extradite). Art 22 provides the procedure for extradition, which is determined by the requested party's laws (ETS No. 24).

## VI. MUTUAL ASSISTANCE

Mutual assistance is a form of international cooperation within the EU to aid in criminal proceedings within the EU by way of exchanging information, collection of evidence, skills building, and facilitation of the proceedings.

**a. The Exchange of Information (Mutual assistance)**

Insights on how the exchange of information within EU member states will be drawn

from different Directives and statutory instruments of the EU; for instance, a general obligation has been imposed on the police authorities by Art 39 CISA. Paragraph 2 of Art 39 of CISA provides the rules on the use of information as evidence, which can only occur with the consent of the judicial authorities. The exchange of information may also take the form of preventative mechanisms. Like the Anti-Money Laundering Directive, which includes provisions for exchanging information among member states in the EU to combat money laundering (Directive 2018/843). In addition, Art 88 TFEU says that collaboration by sharing information within the European Commission makes implementing the EU laws and policies easier.

Similarly, the African Union Conventions also provide for mutual assistance in the form of sharing and exchanging of information. For example, Art 4(d) of AFRIPOL facilitates the exchange of information to prevent transnational organized crime. SADC, an African regional organization, has a protocol for Mutual Legal Assistance in criminal matters. Art 2(5)c) of the protocol provides that assistance should be in the form of providing and exchanging information, documents, and records within the member states (Protocol on Mutual Legal Assistance in Criminal Matters 2002; SADC, 2002b). Therefore, the EU and the AU provide mutual assistance mechanisms for sharing information amongst member states for a more effective, efficient application of criminal proceedings.

**b. Transfer of Proceedings**

Transferring proceedings allows the transfer of ongoing criminal proceedings from one member state to another. Several Directives within the EU govern this process. The Directive on the Transfer of Proceedings in Criminal Matters establishes the rules and procedures for transferring an ongoing criminal case from one member state to another.

The Directive enables the transfer of criminal proceedings in the interest of justice and a fair trial (Directive 2014/41UE). In addition to the principle for transferring proceedings from one member state to another, the European Arrest Warrant, which operates within the confinements of mutual recognition allows direct contact between judicial authorities of member states making the transfer of proceedings faster, Art 1 EAW establishes the provision of arresting and surrendering a person by another member state on behalf of the requesting state for the commencement of criminal prosecution(Framework Decision 2002/584). Contrary to the EU, the AU lacks a framework Equivalent to the European Arrest Warrant. However, other regional agreements provide for the transfer of proceedings. Art 2(5)g) of the SADC Protocol on Mutual Legal Assistance in Criminal Matters allows for the transferring of persons to the requested state for the commencement of criminal proceedings (Protocol on Mutual Legal Assistance in Criminal Matters, 2002). Therefore, the shortcomings of the AU of not having a framework that directly addresses cooperation in criminal matters, as is the case in the EU, is absolved by bilateral agreements between AU member states and other regional organizations like SADC and ECOWAS.

**c. Transfer of Sentenced Persons**

Transfer of sentenced persons is a legal process where individuals convicted and sentenced for a crime in one member state are transferred to their home country to serve their sentence. The reasons for such a process are many, reducing the prison population by sending foreigners to their home countries for rehabilitation and reintegration of the accused into his community (Mandela rules). The European Convention on the Transfer of Sentenced Persons defines the conditions of transfer, the procedure, and the requirement of consent of the sentenced person (CETS. 112). Similarly, Art 12 of the

Transfer of Offenders Act establishes the provision for transferring offenders to and from Zimbabwe and any other territory [Chapter 7: 14].

### d. Supervision of Probation Measures

Supervision of probation measures caters to the supervision and enforcement of probation measures in another member state. For example, the European Supervision Order allows for the transfer of supervision responsibilities from one state (sentencing state) to the other (executing state) (Framework Decision 2009/829). In addition to the EU's framework, countries can rely on their national legislation to supervise probation measures or enter into bilateral agreements with other countries that foster cooperation in criminal matters and supervise the accused persons subject to probation measures.

### e. European Protection Order for Victims of Crime

The European Protection Order ensures that protection measures granted in one member state are recognized and enforced in another member state. For example, a Protection Order in the UK is legally enforceable anywhere in the EU. Thereby creating blanket protection for victims of crime as there is consistent protection even when traveling across the EU (Directive 2011/99/EU).

## VII. POSITION OF DEFENSE IN MUTUAL COOPERATION IN CRIMINAL MATTERS

### a. Rights of Defense

The right to a defense is one of the core foundations of international criminal law; therefore, it is only logical that such a right exists when dealing with criminal matters that transcend national borders when dealing with cooperation between states. The ECHR affords an individual the right to a fair trial, and part of that right is to defend oneself in

person or through legal representation (Art 6(3)c) ECHR). In addition, the Directive on the Right to Access of a Lawyer guarantees individual access to a lawyer in criminal proceedings (Directive 2013/48/EU). Similarly, Art 7 of the African Union Charter allows individuals to have their cause heard, appealed, and defended (Banjul Charter). Despite the importance of having bilateral agreements and cooperation amongst member states, cooperation must be done in a manner that does not infringe upon the individual's rights. When that happens, we can always rely on these instruments that provide the right to defend ourselves.

**b. Legal Remedies**

One could pursue many legal remedies to defend oneself in cooperation in criminal matters, such as 1) the right to legal representation. 2) the right to information, to be informed promptly of the charges against them (Art 6 ECHR). 3) the right to a fair trial. 4) a right to challenge the validity of cooperative measures. The individual can challenge the validity of extradition under the European Convention on Extradition.

**c. Human Rights in Mutual Cooperation in Criminal Matters**

Human rights play a policing role in Europe and Africa when dealing with criminal matters that border on the cooperation of states. Human rights protection of individual rights and freedoms inevitably draws the periphery to which bilateral agreements cannot cross. This periphery is complex to detect, leading to rights violations enshrined in the ECHR, ICESPR, Banjul Charter, and the UDHR. Therefore, without going into detail on the rights granted by different Human Rights documents, one concludes that human rights afford individuals an audience with the court to defend against arbitrary cooperation in criminal matters.

## VIII. CONCLUSION

In conclusion, Bilateral cooperation in the European Union is saturated with Conventions and Directives that regulate how cooperation in criminal matters takes shape, and this owes significantly to the nature and type of organization that is the European Union. The European Union is a supranational organization, granting the organization powers that transcend national borders, which allows for the harmonization of laws as all member states identify on one identity, the EU identity. This structure of the EU allows member states within the EU to easily recognize judgments from other member states, a fit impossible in an intergovernmental organization like the African Union. The nature of the structure, which is an advantage to the EU, is a disadvantage in the AU in that member states in an intergovernmental organization have problems with ceding their sovereignty, and this can be traced back to a lack of comprehensive legislation by the AU that delved deeper in cooperation in criminal matters, instead, the AU has conventions that indirectly address the issue, leading to national legislation and bilateral agreements between member states outside of the AU defining the framework for cooperation in criminal matters.

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