**Mutual Legal Assistance (MLA) and Mutual Assistance (MA)**

Due to the transnational nature of crime, investigators and prosecutors need to be able to gather evidence from foreign jurisdictions. There are procedures for both formal (MLA) and administrative (MA) assistance, however the efficacy of these is dependent on those to whom requests are made for them. Other difficulties facing MLA include a lack of understanding as far as requests are concerned and the absence of contact points. It is, therefore, prudent to consider using mutual assistance, if appropriate, which can be more efficient and expeditious. The willingness of states to cooperate may also be a problem, and so it is advisable to build and maintain transnational working relationships.

The question of whether MLA or MA should be sought depends on the nature of the enquiry. MA should be sought, for instance, if through the enquiry, the requested state does not have to seek coercive powers to carry out the request, or details and public records that do not require a court order to be obtained, or if a potential witness needs to be contacted to see if he/she would assist voluntarily. MLA should be sought, for example, when the enquiry needs to obtain a testimony from a non-voluntary witness, interview a person as a suspect, obtain information from financial institutions, request for search and seizure or transfer a consenting person into custody in order for testimony to be given.

Ultimately MLA is intended for obtaining evidence alone, and other investigative activities such as obtaining intelligence and locating suspects ought to be achieved through administrative means. Indeed even much in the way of evidence can be obtained informally. There are key considerations a prosecutor must take into account when deciding whether to seek evidence informally or not: any evidence must be gathered lawfully according to the laws of the requested state; all activity should be consented to by the requested state, and the evidence in question must be usable at trial in the requesting state. Note that inappropriate actions by informal request may irritate the foreign state and make them less inclined to assist, and that failing to act according to the above considerations may lead to evidence being excluded.

In addition, it is often appropriate for an enquiry by formal request to be based on information previously gathered via administrative assistance methods, and as much preparation as possible by informal means is an advisable course of action for prosecutors and investigators.

**Formal Requests (MLA)**

**UNCAC aims to facilitate MLA and to encourage further agreements between States Parties and make MLA more efficient globally**. The Convention requires States Parties to provide MLA to each other, and may require States Parties with an insufficient MLA framework to amend legislation. However, States Parties may determine the extent to which they provide assistance for judicial proceedings. Forms of assistance are specified in UNCAC, Article 46 (3) (a)-(k).

- Denying MLA on the grounds of bank secrecy is prohibited and contrary legislation should be amended.
- It is recommended for States Parties to consider ways in which they can assist even in the absence of dual criminality.
- States Parties are required to assist in non-coercive actions.
Proactive and voluntary exchange of information between States Parties that is important to combat offences at an early stage, perhaps even before the receiving state party has any knowledge of such information, is encouraged.

The Form of the Letter of Request

There is no set format for letters of request, and the resulting variance in quality of such documents can lead to a delay in the provision of assistance. Letters therefore must give all necessary information such that the requested state can decide whether to give assistance or not. Indeed some guidance on what a letter of request must include is outlined in UNCAC, Article 46 Paragraph 15.

This paper suggests the following checklist as to what should be included in a letter of request:

- A assertion of authority by the author
- Citation of relevant treaties and conventions
- Assurances
- Identification of suspect Present position in respect of the criminal investigation
- Charges under investigation
- Summary of facts and their relation to the request
- Enquiries to be made and assistance required
- Signature of the author of the letter

The requester must ensure their domestic law allows the request. Prosecutors are also recommended to make early contact with their counterpart in the requested state. Finally, conditions that need to be satisfied in the letter are as follows:

- An undertaking of reciprocity if required by the requested state
- The assistance must relate to criminal proceedings
- A guarantee of a fair trial and respect for fundamental rights
- The matter of dual criminality should be addressed
- The request does not relate to fiscal, political or military misdemeanours
- A description of the facts that form a basis for the investigation
- Reference to any relevant bilateral or multilateral agreements

Particular problems experienced in Mutual Legal Assistance sought in corruption cases

Dual Criminality

The concept of dual criminality is unnecessarily restrictive with respect to MLA, making giving or receiving assistance difficult. As such the UNCAC has suggested that states do not apply this principle to MLA proceedings, and indeed the convention allows for MLA to take place without dual criminality being present. States Parties must also render MLA if non-coercive measures are involved, even in the absence of dual criminality.

Influential Target

If an investigation involves an influential political or business figure, in the requested or requesting state, or if the target in question is protected from scrutiny by their position, then assistance may not be provided. This can be tackled by ascertaining who in the requested state can be trusted, getting to know the requested state and its political and legal systems as much as possible, seeking assurances from the requested state and by reminding the requested state that it may find itself as the requesting state in the future.

Right of Appeal

Some states allow the subject of a request for MLA to appeal against the sharing of evidence with the requesting country, which can cause delay.

Search and/or Seizure

In this instance the requesting authority should be as specific as possible when giving information concerning the location of the person or premises in question. Indeed the requested state will only execute such a request if there are reasonable grounds to suspect an offence was committed and that the process will yield relevant evidence and this must be set out in the letter of request, as outlined in this paper. Within Europe it is also advisable to acknowledge the core principles of the European Convention of Human Rights. Ultimately, even if all this is carried out, there is still the chance that search and seizure will have less chance of success in some jurisdictions.

Requests for Freezing, Repatriation of Assets and Confiscation

Requests for freezing, repatriation of assets and confiscation are unlikely to be successful, although UNTOC and UNCAC have addressed these issues to a certain extent. However there is still no binding legal instrument with respect to repatriation of assets.

Sensitive Aspects to an Investigation

It may be that certain information in the letter of request is sensitive in nature, and due to the inherently insecure nature of requesting MLA, this could be exploited by criminals or corrupt persons. As such those requesting MLA should weigh this risk in the balance, and it is advisable that a letter contain only enough information to ensure the request is executed. Alternatively a conditional request can be issued. Similar risks are also inherent in sending sensitive information electronically.
European Evidence Warrant

The EU's European Evidence Warrant aims to expedite regional co-operation through mutual recognition of judicial decisions, and the judicial decisions of one member state are enforced in the others. As such MLA requests are replaced by the EEW, which is treated as a judicial order. However the EEW is only concerned with judicial cooperation. Furthermore the execution of the EEW can be refused in the circumstances outlined in Article 13. Indeed the lack of dual criminality is not an adequate reason for refusal according to Paragraph 16 of the EEW.

Under the EEW, certain offences have been approximated, such that offences and procedures are aligned between member states; there are 32 such offences, of which corruption is one. In addition to the EEW there are regulations in place that require member states to set up Asset Recovery Offices to facilitate a more rapid exchange of information. This is supported by Eurojust, which is responsible for co-ordinating investigations and prosecutions between member states.

However the EEW also has difficulties. The framework is not yet sufficiently in use, and so gathering evidence in a member state expediently is challenging; most requests still rely on the EU MLA Convention. However, this does not enable the gathering of evidence outside the EU.

For proactive investigations the deployment of undercover officers is necessary, but deployment and practices vary, state authorisation is required and there is a risk that the officers in question might be exposed during trial proceedings. Also there are currently no conventions in place for the management and deployment of undercover officers, and member states would have to enter into bilateral or multilateral agreements, which would take time. Uncertainty about the mechanism and a general lack of awareness also present difficulties, as does the cost.

Using MLA and Administrative Assistance to trace and recover assets

A key part of any anti-corruption efforts is the need to trace and recover assets. UNCAC provides for domestic freezing and confiscation and the recovery of property and assets in Articles 31 and 51-59 respectively. Article 52 addresses preventative measures through financial institutions, such as knowing your customer, while Article 53 provides for direct recovery, by which an individual or state has access to courts to institute civil proceedings of property. Article 54 provides the mechanisms for the recovery of property through international cooperation in confiscation, which requires the establishment of a basic regime for domestic freezing, seizure and confiscation as specified in the Convention. Article 55 addresses international cooperation for purposes of confiscation.

Article 57 is on the return and disposal of assets, and focuses on the embezzlement of state assets and subsequent removal of those assets from the state. This as it removes the fruits of crime from the perpetrators. Article 58 requires the establishment of a Financial Intelligence Unit, which is responsible for receiving, analysing and disseminating suspicious financial transactions.

Requesting assistance from other countries to identify and trace assets is vital in combating the transnational asset movement that is linked with international crime. Indeed the EU's Asset Recovery Offices (ARO) facilitates the tracing and identification of proceeds of crime. Such tracing also creates a more complete picture of the extent of criminality.

MLA requests for restraint of assets: Guiding Principles

Requests for confiscation of assets will require a formal request. Principles that govern MLA requests also apply when seeking cooperation specifically to freeze or confiscate assets. In such letters wording must be precise, and requests to trace funds must address beneficial owners as well as those with a power of attorney. The beneficial owner must also be identified, and specific and concise requests should be made concerning what is being sought. Consideration as to the implications of the request should be made clear, and negative impacts minimised, if possible. The question of who would receive repatriated assets should also be addressed. Finally requests for financial transaction information ought to be focussed, and provision must be made for the circumstances in which states will execute a request without delay.
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