Funded
by the European Union

EUROPEAN UNION

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Implemented
by the Council of Europe

Technical Paper

Mutual Legal Assistance in the Region of South East Europe: Challenges and Possible Solutions (with particular reference to asset recovery)

Prepared by Mr Rod Macauley, Council of Europe expert
December 2011

CMU-CAR-13/2011

Table of Contents

DEFINITIONS & SOME FIRST PRINCIPLES 3

BUILDING NETWORKS 4

LEGAL BASES FOR MAKING A FORMAL (MLA) REQUEST 4

ENSURING THAT NATIONAL LAW ALLOWS FOR EXECUTION OF RESTRAINT/FREEZING & CONFISCATION REQUESTS 4

OBSTACLES TO BE OVERCOME WHEN SEEKING INTERNATIONAL FORFEITURE/CONFISCATION CO-OPERATION 7

A TREATY-BASED FRAMEWORK FOR MLA IN ASSET RECOVERY CASES 7

CIVIL FORFEITURE & MLA 16

PARTICULAR PROBLEMS EXPERIENCED WHEN MUTUAL LEGAL ASSISTANCE IS SOUGHT IN ECONOMIC CRIME, CORRUPTION AND ORGANISED CRIME CASES 17

PRACTICAL CHALLENGES & STEPS TO TAKE BEFORE ISSUING AN MLA REQUEST 18

CHALLENGING A REFUSAL BY THE REQUESTED STATE TO EXECUTE THE LETTER OF REQUEST 20

For any additional information please contact:

Information Society and Action against Crime Directorate
Directorate General I - Human Rights and Rule of Law
Council of Europe, F-67075 Strasbourg Cedex
Tel: + 33 (0)3 88 41 29 76
Fax: +33 (0) 390 21 56 50
Email: lado.lalicic@coe.int

Web: www.coe.int/economiccrime

This document has been produced with the financial assistance of the European Union. The views expressed herein can in no way be taken to reflect the official opinion of the European Union or the Council of Europe.

Definitions & Some First Principles

Mutual legal assistance (MLA), sometimes known as 'judicial assistance' is the formal way in which states request and provide assistance in obtaining evidence located in one state to assist in criminal investigations or proceedings in another state. The state making the request is usually referred to as the 'requesting state', whilst the state to whom the request is made is the 'requested state'. Mutual legal assistance is designed for the gathering of evidence, not intelligence or other information.

Administrative assistance is sometimes referred to as 'informal assistance', as it does not involve the issuing of the formal letter of request that forms the basis of a mutual legal assistance request. Administrative assistance typically takes the form of police to police or prosecutor to prosecutor enquiries. It should be noted that a request for intelligence or information should be made through administrative assistance, not through MLA. In addition, aministrative assistance can, and should, also be used when making evidence-gathering requests to a state where no coercive power (e.g. a warrant or court order) is required to be exercised in order to obtain the evidence. Such an approach reduces the risk of delay and will be welcomed by most states. In this context, it is important to remember that, although administrative assistance is sometimes referred to as 'informal assistance', it does not mean that the form of the evidence obtained is informal or non-evidential; on the contrary, an evidence request complied with administratively/informally should present the evidence in the same form as if it was gathered in answer to a formal letter of request.

One further use of administrative assistance should also be noted at this stage: An administrative or informal approach should be the first step in any evidential request of complexity in any event, even where it is always the intention to issue a formal letter of request. By beginning on a police to police, or prosecutor to prosecutor basis, the requesting state will have the opportunity of discussing the form and the requirements of the letter with the requested state before the letter is finalised; that will better ensure that it addresses all matters that the requested state needs and that avenues of enquiry are narrowed down as much as possible in advance of the formal request. It will also help the authorities in both states to build networks and contacts.

Prosecutors and investigators sometimes have recourse to mutual legal assistance without exploring whether administrative, that is to say, investigator to investigator/prosecutor to prosecutor mutual assistance would, in fact, meet their needs. It is often forgotten that the state receiving the request might welcome an informal approach that can be dealt with efficiently and expeditiously.

Challenges:

- *Unnecessary/inappropriate use of MLA*
- *Insufficient recourse to administrative assistance*

Possible Solutions

- *Build specialised knowledge of those public prosecutors who will make/execute MLA requests*
- *Carry out practical training for wider judiciary/competent authorities*
- *Prosecutors, in particular, must ask themselves whether they really need a formal letter of request to obtain a particular piece of evidence*
- *Avoid inappropriate formal/informal requests as this will irritate the authorities of the requested states.*

Building Networks

Obtaining material via the route of administrative (informal) assistance, and ensuring is likely to be more easily achieved if positive and collaborative relationships have been built with key individuals in other states. Such relationships can be developed by investigators and prosecutors by arranging with other states, joint training courses, mutual exchanges of personnel, seminars and regional information exchange sessions. A more formal approach is the agreeing of a memorandum of Understanding (MOU) between investigative agencies from two or more states. Law enforcement in the region has already entered into such arrangements with counterpart agencies in other regional and Eastern European states.

Further progress can be made by appointing law enforcement liaison officers in other states. Such liaison officers would have to have access, in accordance with the laws of the host state, to all agencies within the state with relevant responsibilities.

Challenge

- *Need to build more effective networks of practitioners (across the region; in a number of different regions; across regions)*

Possible Solution

- *Create an enhanced Western Balkan network of prosecutors and investigators*

Legal Bases for Making a Formal (MLA) Request

Before a formal request can be made and MLA provided, there must be a legal basis.
The legal bases include:

(i) Multilateral instruments, including general MLA conventions (e.g. the Council of Europe Convention) or penal instruments (e.g., the UN Convention against Corruption)
(ii) Bilateral treaties
(iii) Schemes or voluntary arrangements, such as the Harare Scheme for Commonwealth states
(iv) National law, with or without a requirement for reciprocity
(v) Reciprocity/Comity

Challenge

- *Does national law allow co-operation when, for instance, there is no treaty and the basis is reciprocity/comity?*

Possible Solution

- *Amendment of national law to allow for as permissive a framework for co-operation as possible.*

Ensuring that National Law Allows for Execution of Restraint/Freezing & Confiscation Requests

A fundamental challenge that needs to be addressed by all states, including those within the region, is to have in place a framework for restraint/freezing and confiscation under national law. Without such a domestic regime in place, it is simply not possible for a state to be able to execute an MLA request for the tracing and recovery of assets.

It is no coincidence that the principal international instruments addressing cross-border and transnational crime each contain such a requirement. Thus, for corruption cases (including,

of course, public and private sector embezzlement etc), UNCAC (at Article 31) requires States Parties to adopt measures (to the greatest extent possible within their legal system) to enable the confiscation of (i) proceeds, (ii) equivalent value of proceeds and (iii) instrumentalities of offences covered by the Convention, and also to regulate the administration of such property. Article 31 also obligates States Parties (i) to enable the identification, tracing, freezing and seizing of items for the purposes of confiscation and recovery, and (ii) to empower courts or other competent authorities to order the production of bank records and other evidence for purposes of facilitating such identification, freezing, confiscation and recovery.

Similar provisions are found in the Organised Crime Convention (Articles 12-14) , The Vienna (Drugs) Convention (Article 5), the Convention for the Suppression of the Financing of Terrorism, Security Council resolution 1373 (2001) and the Council of Europe's Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime.

In relation to freezing/restraint, some states in the region, such as Serbia, have the capability to obtain a 'temporary seizure' order pursuant to an incoming MLA request. Temporary seizure, as the term suggests, means that the state actually takes possession of the property subject to the order. That is a wider power than the freezing/restraint provisions that most states have and is, therefore, compliant with the standard created by the instruments mentioned above.

Each state should ask itself whether, in the event of (i) reciprocity/comity requests for restraint/temporary seizure, and (ii) treaty requests for restraint/temporary seizure, national law requires that criminal proceedings have been instituted. If it does, and if 'criminal proceedings' are understood by national courts to include circumstances where a criminal investigation has begun (even though, in common law States, there will be no formal legal/court decision to that effect), then no difficulty arises. However, if there is a narrow construction, and a charge has to have been laid or summons issued, then a state would not be able to afford assistance to common law states by way of restraint/temporary seizure where a complex investigation has taken place and the suspect has become aware, but has not been charged or indicted and no formal legal decision on opening an investigation file has been required in the requesting state (on the basis that the decision to begin the investigation, in a common law state, would be one for law enforcement and would not require the legal process of opening a file formally).

Similarly, it should be remembered that post-conviction confiscation or forfeiture may, depending on the state involved, be achieved by:

- A property-based system; or,
- A value-based, or benefit, system.

(It should be noted, however, that some states, such as Australia, combine the two.)
The first method was traditionally the civil law approach, whilst the second was that of the common law. However, that delineation has, to some extent, very much broken down.

A property-based system allows confiscation of property found to be proceeds or instrumentalities of crime. Instrumentalities means any property used for the commission of crime. The property-based is that traditionally found in civil law states and is, therefore, in operation in most European jurisdictions.

The focus of this model is 'tainted property'. It is the system in use in, for instance, Italy and Spain. To give an example, in Canada (another jurisdiction with the system in place), the sentencing judge may order confiscation of property that constitutes proceeds of crime where the offence for which the conviction was obtained was committed in relation to those proceeds. In addition, even if not satisfied that the property relates to the specific offence, the court may also order forfeiture of property if satisfied beyond reasonable doubt that the property is the proceeds of crime. The property basis for recovery is, by its very nature,

specific to property; therefore, if the property cannot be located, has been transferred to a third party, is outside the state, has been substantially diminished in value or has been mixed with other property, the court may usually order a financial penalty (as a fine) instead.

In contrast, the value-based or benefit system allows the determination of the value of proceeds and instrumentalities of crime and the confiscation of an equivalent value.
This approach is the one that has usually been favoured by common law states; although, it should be noted that both The Netherlands and Austria, although civil law states, have also adopted value-based confiscation.

Value- based confiscation has its origins in the United Kingdom. Under this system, the court calculates the 'benefit' to the convicted offender of a particular crime. Having determined the accrued benefit, the court will then assess the defendant's ability to pay (i.e. the value of the amount that might be realisable from the defendant's assets). On the basis of those calculations, the court then goes on to make a 'confiscation order', in the amount of the benefit or the realisable assets, whichever is the lower. An additional period of imprisonment will, typically, also be determined, but will only be served by the defendant if he fails to pay the amount of the order.

In addition to the above approaches, many states now have a split system in place. Such an approach allows both for the confiscation of specific items of property which are found to be the proceeds or instrumentalities of a crime, and for the making of an order based on the value of the proceeds of crime received. In some of those states, the principal method of confiscation remains property-based, but the law allows for a value order to be made if a piece of property is not available for confiscation for certain, defined, reasons; for instance, where the defendant has removed the property from the territory and it cannot be located. In other jurisdictions, systems are in place that rely equally on property and value confiscation.

Although all of the above methods require a criminal conviction as a prerequisite, the proceedings following conviction are generally, but not always, of a civil nature; the effect of that is that in a common law jurisdiction, the procedure will explicitly employ the so-called civil standard of proof (proof on the balance of probabilities). It should be noted, though, that in some states (such as Hong Kong SAR), the burden of proof is reversed, and falls on the defence, at the post-conviction confiscation hearing stage

In the context of MLA, the greatest challenge is remembering that international co-operation takes into account the fact that different states have different ways of complying with requests. Thus, routinely, states with a value-based system will request a state with a property-based system to obtain (or enforce) a confiscation order and, in such a circumstance, if one is obtained in a court of the requested state it will be on a property-based approach. The same principle will, of course, be applied if the roles are reversed and it is a state with a property-based system making the request to a value-based state. In either case, providing that the requesting state's authorities liaise with their counterparts, ascertain what evidence and material needs to be produced, and understand the basis and effect of the order sought, there should be no practical difficulty.

Challenge

- *Is there a comprehensive framework for restrain/freezing and confiscation in national law?*

Possible Solution

- *Put requisite legal framework in place without delay*
- *Close liaison between the requesting and requested state at the stage when a formal request is being drafted.*

Obstacles to be Overcome When Seeking International Forfeiture/Confiscation Co-operation

Among the procedural, evidentiary and political obstacles to recovery efforts are:

- Anonymity of transactions impeding the tracing of funds and the prevention of further transfer
- Lack of technical expertise and resources
- Lack of harmonisation and co-operation
- Problems in the prosecution and conviction of offenders as a preliminary step to recovery
- Absence of institutional/legal avenues through which to pursue claims successfully, certain types of conduct not criminalised, immunities, third party rights
- Questions of evidence admissibility, type and strength of evidence required, differences regarding *in rem* forfeiture, time-consuming, cumbersome and ineffective mutual legal assistance treaties when the identification and freezing of assets must be done fast and efficiently
- Limited expertise to prepare and take timely action, lack of resources, training or other capacity constraints
- Lack of political will to take action or co-operate effectively; lack of interest on the part of victim states in building institutional and legal frameworks against corruption
- Offenders are often well connected, skilled and bright. They can afford powerful protections and can seek shelter in several jurisdictions. They have been able to move their assets and criminal proceeds discretely and to invest them in ways that render discovery and recovery difficult.

A Treaty-Based Framework for MLA in Asset Recovery Cases

A question that states in the region will wish to ask themselves is whether they should enter into bilateral agreements with each other for the purposes of effective MLA, or whether they should rely on those multilateral instruments to which they, and their neighbours are parties.

The Council of Europe's 1959 MLA Convention, UNTOC and UNCAC are each an example of a multilateral treaty. The term "convention" is generally used for formal multilateral treaties where there are a broad number of parties and where participation is open to the international community.

The international trend is very much towards reliance on multilateral agreements in MLA. Such an approach does, of course, help to ensure that a broad international standard is created, that a global co-operation framework that is as permissive as possible is put in place, and that there is less opportunity for the confusion that can be created by an abundance of international instruments, some multilateral, some bilateral, with differences in approach and threshold from one to another.

We should, therefore, look at the MLA framework to created by the principal international instruments that are relevant to our present discussion and ask whether they are 'fit for purpose' within the region.

<u>EUROPEAN CONVENTION ON MUTUAL ASSISTANCE IN CRIMINAL MATTERS 1959 (as amended by the Second Additional Protocol [2001])</u>

This was the first significant instrument for MLA. It was developed by the Council of Europe, and entered into force on 12 June1962. It provided recognition of the necessity for specific instruments for co-operation in evidence gathering. However, it has limitations; in particular, it

was designed to operate amongst states of similar legal tradition, that of the civil law. It does not address the significant challenge to effective MLA, bridging the differences between legal systems. However, that is where the EU Convention (see below) now steps in.

The Convention was intended to encourage a broad permissive approach to MLA. Thus, Article. 1 specifically provides that the States Parties undertake to afford each other the widest measure of assistance in criminal proceedings. At the same time, its provisions do not apply to arrests, the enforcement of verdicts or to offences under military law which are not offences under ordinary criminal law.

In addition to stressing the widest measure of mutual assistance, Article 1 (at para 1) makes it clear that the Convention applies only to judicial, as opposed to administrative, proceedings. The effect of paragraph 1 is, inter alia, to make it clear that the Convention's provision's apply not just to those forms of mutual legal assistance specifically mentioned within the text, but also other forms of mutual legal assistance, including requests for assistance made in connection with:
(i) proceedings in respect of an offence which, while not classified as a criminal offence, is punishable by a fine imposed by an administrative authority (as is the case with, for instance, liability of the legal person in Germany and Italy). To make it quite clear that assistance can only be sought in the judicial stage of such proceedings, the phrase "at the time of the request for assistance" was inserted into paragraph 1;
(ii) an injured party's claim for damages in criminal proceedings;
(iii) an application for pardon or review of sentence;
(iv) proceedings for the compensation of a person acquitted.
This is reinforced by amended Article 1(3), which brings within the scope of the Convention proceedings brought by administrative authorities where the matter may give rise to proceedings before a court with jurisdiction in criminal matters.

<u>Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters</u>
The Second Additional Protocol to the Convention was adopted at Strasbourg on 8 November 2001 by the member States of the Council of Europe. Its purpose was to improve upon and supplement certain aspects of the Convention. The changes made are set out, above, in the discussion of the Convention's Articles.

In addition to amending the existing provisions of the Convention, the Second Additional Protocol explicitly provides for requests to be made in respect of:

- Cross-border observations (Article 17);
- Controlled delivery (Article 18);
- Covert Investigations (Article 19);
- Joint investigation teams (Article 20).

It must be emphasised that, in relation to the deployment of covert or special investigative means, such activity (if agreed to by the requested State) must take place in accordance with the laws of the requested State.

<u>EUROPEAN UNION MLA CONVENTION 2000</u>
On 29 May 2000, the EU Council of Ministers adopted the Convention on Mutual Assistance in Criminal Matters. The Convention aims to encourage and modernise co-operation between judicial, police and customs authorities within the EU (along with Norway and Iceland) by supplementing provisions in existing legal instruments, including the 1959 Convention, and facilitating their application.

The state receiving a request must in principle comply with the formalities and procedures

indicated by the requesting state. But when an offence falls within the competence of the receiving authority, a spontaneous exchange of information (i.e. without prior request) may take place between member states regarding criminal offences and administrative infringements.

The effect of the EU Convention is to supplement not just the 1959 Convention and its 1978 Protocol on Mutual Assistance in Criminal Matters, but also the Benelux Treaty of 1962 and the 1990 Schengen Implementation Convention.

The EU Convention stipulates that such mutual assistance shall respect the basic principles of each Member State and the ECHR. It covers criminal offences and administrative infringements.

On 16 October 2001 a Protocol concerning mutual cooperation on banking information was also adopted, aiming at fighting against money laundering and financial crime. This Protocol forms an integral part of the 2000 Convention.

The EU Convention provides that the requesting state can ask the receiving state to comply with some formalities or procedural requirements which are essential under its national legislation. It also seeks to avoid delay by providing that requests for MLA and communications about MLA are to be made directly to the judicial authorities with territorial competence. (However, in some cases documents may be sent or returned via a central authority, and urgent requests may be made via Interpol or any other competent body.)

It also makes provision for mechanisms involving modern communication methods such as video conferencing and teleconferencing.

What kind of MLA may be requested under the EU Convention?
Mutual assistance may be requested in the following cases:

- to hand over to the competent authorities of a requesting State objects that have been stolen or obtained by other criminal means and that are found in another member state;
- to temporarily transfer to the territory of a member state where an investigation is being carried out a person held on the territory of another member state;
- hearing by videoconference;
- hearing by telephone conference;
- to permit controlled deliveries on the territory of a member state in the framework of criminal investigations into offences that may give rise to extradition. They are to be directed and monitored by the authorities of the requested member state.
- two or more EU Member States may set up a joint investigation team for a specific purpose and for a limited period of time.
- covert investigations may also be carried out by officers of another member state (as well as by officers of the home Member State) acting under covert or false identity, provided that the national law and procedures of the member states where the investigations take place are complied with.
- for the competent authority of a member state to request another member state to intercept telecommunications. These may either be intercepted and transmitted directly to the requesting state or recorded for subsequent transmission. Such requests must be in accordance with the national laws and procedures of the involved member states.

THE UN CONVENTION AGAINST TRANSNATIONAL ORGANISED CRIME 2000 (UNTOC)
The UN Convention Against Transnational Organised Crime (UNTOC or 'The Palermo

Convention') was opened for signature on 12 December 2000 and came into force on 29 September 2003. It is also supplemented by three Protocols.

Ambit

Although an international instrument to counter transnational organised crime, in reality, UNTOC has a broader application. It:

- Defines and standardises certain terms (such as 'confiscation', 'organised criminal group', 'proceeds of crime', 'property', and 'serious crime') that are used with different meanings in various States or circles;
- Requires States to establish specific offences as crimes;
- Requires the introduction of specific control measures, such as the protection of victims and witnesses;
- Provides for the confiscation/forfeiture of the proceeds of crime;
- Promotes international cooperation, through, in particular, extradition, legal assistance and joint investigations;
- Provides for training, research and information-sharing measures;
- Encourages States to put in place preventive policies and measures.

MLA Provisions

In Article 3, UNTOC calls for the widest measure of MLA in investigations, prosecutions and judicial proceedings, and expands the scope of application to all convention offences.

Article 18 is the principal MLA provision. It provides that assistance may be requested for taking evidence or statements, effecting service of judicial documents, executing searches and seizures, examining objects and sites, providing information, evidence and expert evaluations, documents and records, tracing proceeds of crime, facilitating the appearance of witnesses and any other kind of assistance not barred by domestic law. Article 18 applies also to international co-operation in the identification, tracing and seizure of proceeds of crime, property and instrumentalities for the purpose of confiscation.

UNTOC allows states to refuse an MLA request under certain conditions (Article 18(21). However, it makes clear that assistance cannot be refused on the ground of bank secrecy (18(8)) or for offences considered to involve fiscal matters (18(22)). States are required to provide reasons for any refusal to assist. States must execute requests expeditiously and take into account possible deadlines facing the requesting authorities (for example expiration of a statute of limitation).

Asset Recovery Provisions

Article 12 requires a State party to adopt measures, to the greatest extent possible within its legal system, to enable confiscation of proceeds/the equivalent value of proceeds and instrumentalities of offences covered by the Convention. The term "to the greatest extent possible within their domestic legal systems" is intended to reflect the variations in the way that different legal systems carry out the obligations imposed by this Article. Nevertheless, States are expected to have a broad ability to comply with the provisions of Article 12.

Article 12 also obligates each State party to adopt measures to enable the identification, tracing, freezing and seizing of items for the purpose of eventual confiscation. In addition, it obligates each State party to empower courts or other competent authorities to order production of bank records and other evidence for purposes of facilitating such identification, freezing and confiscation.

Article 13 then sets forth procedures for international co-operation in confiscation matters. These are important powers, as criminals frequently seek to hide proceeds and instrumentalities of crime abroad, as well as evidence relating thereto, in order to thwart law

enforcement efforts to locate and gain control over them. A State party that receives a request from another State party is required by Article 13 to take particular measures to identify, trace and freeze or seize proceeds of crime for purposes of eventual confiscation.

Article 13 also describes the manner in which such requests are to be drafted, submitted and executed. It is important to note that these are special procedures aimed at obtaining the proceeds of crime, as opposed to procedures that assist in the search for such proceeds as part of the evidence of crime (for example, warrants and *in rem* procedures).

Article 14 addresses the final stage of the confiscation process: the disposal of confiscated assets. While disposal is to be carried out in accordance with domestic law, States parties are called upon to give priority to requests from other States parties for the return of such assets for use as compensation to crime victims or restoration to legitimate owners. States parties are also encouraged to consider concluding an agreement or arrangement whereby proceeds may be contributed to the UN to fund technical assistance activities under UNTOC or shared with other States parties that have assisted in their confiscation.

Detailed provisions similar to those of UNTOC can be found in UNCAC, Article 5 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, the International Convention for the Suppression of the Financing of Terrorism, UN Security Council Resolution 1373 (2001) and the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime. States that have enacted legislation to implement their obligations as parties to those conventions may not need major amendments for meeting the requirements of UNTOC. In addition, the FATF Forty Recommendations provide guidance to countries on means of identifying, tracing, seizing and forfeiting the proceeds of crime.

THE UN CONVENTION AGAINST CORRUPTION 2003 (UNCAC)

UNCAC was opened for signature on 9 December 2003 and came into force on 14 December 2005.

UNCAC has the most detailed MLA provisions to date of any penal instrument. The offences under the Convention are wide; it is therefore likely to prove an especially useful practical tool to those investigating and prosecuting not just corruption, but a broad range of economic and financial crimes (particularly where public officials are alleged to be involved).

MLA provisions

The Convention generally seeks ways to facilitate and enhance mutual legal assistance, encouraging States Parties to engage in the conclusion of further agreements or arrangements in order to improve the efficiency of mutual legal assistance. In any case, paragraph 1 of Article 46 requires States Parties to afford one another the widest measure of mutual legal assistance as listed in Article 46 (3) in investigations, prosecutions and judicial proceedings in relation to the offences covered by the Convention. If a State Party's current legal framework on mutual legal assistance is not broad enough to cover all the offences covered by the Convention, amending legislation may be necessary.

States Parties have discretion in determining the extent to which they will provide assistance for judicial proceedings, but assistance should at least be available with respect to portions of the criminal process that in some States Parties may not be part of the actual trial, such as pre-trial proceedings, sentencing proceedings and bail proceedings.

The UNODC Legislative Guide (at paragraphs 593-5) sets out the principal requirements of Article 46 as follows:

State Parties are required:

(a) To ensure the widest measure of mutual legal assistance for the purposes listed in Article 46, paragraph 3, in investigations, prosecutions, judicial proceedings and asset confiscation and recovery in relation to corruption offences (art. 46, para. 1);
(b) To provide for mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to offences for which a legal entity may be held liable under Article 26 (art. 46, para. 2);
(c) To ensure that mutual legal assistance is not refused by it on the ground of bank secrecy (art. 46, para. 8). In this respect, legislation may be necessary if existing laws or treaties governing mutual legal assistance are in conflict;
(d) To offer assistance in the absence of dual criminality through non-coercive measures, subject to the basic concepts of its legal system (art. 46, para. 9, *(b);*
(e) To apply paragraphs 9 to 29 of Article 46 to govern the modalities of mutual legal assistance in the absence of a mutual legal assistance treaty with another State party (art. 46, paras. 7 and 9-29). In this respect, legislation may be necessary if existing domestic law governing mutual legal assistance is inconsistent with any of the terms of these paragraphs and if domestic law prevails over treaties;
(f) To notify the Secretary-General of the United Nations of their central authority designated for the purpose of Article 46, as well as of the language(s) acceptable to them in this regard (art. 46, paras. 13 and 14);
(g) To consider entering into bilateral or multilateral agreements or arrangements to give effect to or enhance the provisions of Article 46 (art. 46, para. 30).

In addition, States parties may provide information on criminal matters to other State parties without prior request, where they believe that this can assist in inquiries, criminal proceedings or the formulation of a formal request from that State party (art. 46, paras. 4 and 5). States parties are also invited to consider the provision of a wider scope of legal assistance in the absence of dual criminality (art. 46, para. 9 *(c)*).

Article 46, paragraph 3, sets forth the following list of specific types of mutual legal assistance that a State party must enable:
(a) Taking evidence or statements from persons;
(b) Effecting service of judicial documents;
(c) Executing searches and seizures, and freezing;
(d) Examining objects and sites;
(e) Providing information, evidentiary items and expert evaluations;
(f) Providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records;
(g) Identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes;
(h) Facilitating the voluntary appearance of persons in the requesting State party;
(i) Any other type of assistance that is not contrary to the domestic law of the requested State party.
(j) Identifying, freezing and tracing proceeds of crime in accordance with the provisions of chapter V of this Convention.
(k) The recovery of assets in accordance with the provisions of chapter V of this Convention.

It should be noted that there is a prohibition on the denial of mutual legal assistance on the ground of bank secrecy by virtue of Article 46, paragraph 8. Thus, where a State party's laws currently permit such ground for refusal, amending legislation will be required.

Article 46 (2) mandates States Parties to provide MLA with respect to investigations, prosecutions and judicial proceedings in which a legal person is involved.

Article 46(9) requires States Parties to take into account the purposes and spirit of the Convention (Article 1) as they respond to requests for legal assistance in the absence of dual criminality. Although States Parties may decline to render assistance in the absence of dual criminality (para. 9 (b)), they are further encouraged to exercise their discretion and consider the adoption of measures that would broaden the scope of assistance even in the absence of this requirement (para. 9 (c)).

However, to the extent consistent with the basic concepts of their legal system, States Parties are required to render assistance involving non-coercive action on the understanding that the assistance is not related to matters of a *de minimis* nature or cannot be provided under other provisions of the Convention (para. 9 (b)).

Paragraphs 4 and 5 of Article 46 provide a legal basis for the spontaneous transmission of information whereby a State Party forwards to another State Party information or evidence it believes is important to combat offences covered by the Convention at an early stage where the other State Party has not made a request for assistance and may be completely unaware of the existence of such information or evidence. The aim of these provisions is to encourage States Parties to exchange information on criminal matters voluntarily and proactively. The receiving State Party may subsequently use the information provided in
order to submit a formal request for assistance. The only general obligation imposed for the receiving State Party, which is similar to the restriction applied in cases where a request for assistance has been transmitted, is to keep the information transmitted confidential and to comply with any restrictions on its use, unless the information received is exculpatory to the accused person. In this case the receiving State Party can freely disclose this information in its domestic proceedings.

Article 46 (18) proposes the use of videoconference as a means of providing evidence in cases where it is not possible or desirable for the witness to appear in person in the territory of the requesting State Party to testify.

Asset Recovery Provisions
In addition to Article 31 (Freezing, seizing etc,), which provides for a domestic freezing and confiscation regime in each State Party, UNCAC makes detailed provision for the recovery of property/repatriation of assets.

Article 54 (Mechanisms for recovery of property through internationals co-operation in confiscation) provides that:

- Each State Party, in order to provide MLA pursuant to Article 55 of the Convention, with respect to property acquired through on involved in a commission of an offence established in accordance with the Convention shall, in accordance with its domestic law:
  - Take such measures as may be necessary to permit is competent authorities to give effect to an order of confiscation issued by a court of another State Party;
  - Take such measures as may be necessary to permit its competent authorities, where they have jurisdiction, to order the confiscation of such property of foreign original by adjudication of an offence of money laundering or such other offence as may be within its jurisdiction, or by other procedures authorised under its domestic law;

- Consider taking such measures as may be necessary to allow confiscation of such property without a criminal conviction in cases in which the offender cannot be prosecuted by reason of death, flight or absence, or in other appropriate cases.

- Each State Party, in order to provide MLA upon a request made pursuant to Article 55 shall, in accordance with its domestic law:
  - Take such measures as may be necessary to permit its competent authorities to freeze or seize property upon a freezing or seizure order issued by a court or competent authority or requesting State Party that provides a reasonable basis for the requested State Party to believe that there are sufficient grounds for taking such actions and that the property would eventually be subject to a confiscation order (i.e. to permit its competent authorities to give effect to a confiscation order issued by a court of another State Party);
  - Take such measures as may be necessary to permit its competent authorities to freeze or seize property upon a request that provides a reasonable basis for the requested Party to believe that there are sufficient grounds for taking such action and that the property would eventually be subject to an order of confiscation for the purposes of giving effect to an order for confiscation order by a court of another State Party;
  - Consider taking additional measures to permit its competent authorities to preserve property for confiscation, such as on the basis of a foreign arrest or criminal charge related to the acquisition of such property.

Article 55 (International co-operation for purposes of confiscation) provides that:

- A State Party that has received a request from another State Party having jurisdiction over an offence established in accordance with the Convention for confiscation of proceeds of crime, property etc situated in its territory shall, to the greatest extent possible within its domestic legal system:
  - Submit the request to its competent authorities for the purpose of obtaining a confiscation order and, if such an order is granted, give effect to it; or
  - Submit to its competent authorities, with a view to giving effect to it to the extent requested, a confiscation order issued by a court in the territory in the requesting State Party in accordance with Articles 31 and 54, insofar as it relates to proceeds of crime, property etc situated in the territory of the requested State Party.

- Following a request made by another State Party, having jurisdiction over an offence established in accordance with the Convention, the requested State Party shall take measures to identify, trace and freeze or seize proceeds of crime, property etc for the purpose of eventual confiscation to be ordered either by the requesting State Party or, pursuant to a request made under Article 55, by the requested State Party.

- A description of property to be confiscated, a statement of facts, and a legal admissible copy of the confiscation order shall be provided, as appropriate, by the requesting Party.

- Co-operation under Article 55 maybe refused or provisional measures lifted if the requested State Party does not receive sufficient and timely evidence, or if the property is of a *de minimis* value.

- Before lifting any provisional measure taken pursuant to Article 55, the requested State Party shall, wherever possible, give the requesting State Party an opportunity to present its reasons in favour of continuing the measure.

- Article 55 shall not be construed as prejudicing rights of bone fide third parties.

Article 57 is one of the most crucial and innovative parts of the Convention. There can be no prevention, confidence in the rule of law and criminal justice processes, proper and efficient governance, official integrity or widespread sense of justice and faith that corrupt practices never pay, unless the fruits of the crime are taken away from the perpetrators and returned to the rightful parties.

For this reason there is little discretion left to States parties about this article: States are required to implement these provisions and introduce legislation or amend their law as necessary.

Article 57 requires State Parties to:

- dispose of property confiscated under articles 33 or 55 as provided in paragraph 3 below, including by return to prior legitimate owners (para. 1);
- enable their authorities to return confiscated property upon the request of another State party, in accordance with their fundamental legal principles and taking into account bona fide third party rights (para. 2);
- in accordance with the above and articles 46 and 55 of the Convention,

    - return confiscated property to a requesting State party, in cases of public fund embezzlement or laundering of embezzled funds (see art. 17 and 23), when confiscation was properly executed (see art. 55) on the basis of final judgement in the requesting State (this judgment may be waived by the requested State) (para. 3, subpara. a)
    - return confiscated property to a requesting State party, in cases of other corruption offences covered by the Convention, when confiscation was properly executed (see art. 55), on the basis of final judgement in the requesting State (which may be waived by the requested State) and upon reasonable establishment of prior ownership by the requesting State or recognition of damage by the requested State (para. 3, subpara. b);
    - in all other cases, give priority consideration to the
        - return of confiscated property
        - return such property to its prior legitimate owners
        - compensation of victims (para. 3, subpara. c).

States parties may also consider the conclusion of agreements or arrangements for the final disposition of assets on a case-by-case basis (art. 57, para. 5).

Challenges

- *Do the relevant multilaterals need supplementing by bilateral (if the substantive legal framework provided by the multilaterals needs supplementing) or MoUs (if the existing mechanics for co-operation need refining or clarifying) within the region?*
- *Should the comprehensive framework created in UNCAC and UNTOC for recovering the proceeds of crimes under those conventions be replicated, for other acquisitive crimes, by the concluding of bilateral agreements in the region?*

Possible Solutions

- *In order to arrive at a reasoned view, and to ensure 'buy in' and consensus from states, create a working group of experts from across the region (with external input to ensure the widest discussion of international best practice) to meet and prepare a detailed critique (to include recommendations)*
- *In the event that the expert group concludes there is merit in concluding bilateral, the group to prepare draft agreements to ensure as much commonality across the region (and, hence, effective co-operation) as possible.*

Civil Forfeiture & MLA

Some states have civil forfeiture (or 'confiscation *in rem*') available in their procedure law or code. Although a civil action, it may arise from a criminal investigation. Consequently, MLA practitioners will sometimes be asked to make or to execute an MLA request for such a case. Some states will provide MLA for civil forfeiture cases, others will not. It is therefore important to liaise if the issue arises.

For clarity, civil forfeiture is an action against the property (hence, '*in rem*') not the person and is the mechanism by which, in the absence of criminal proceedings, the proceeds of criminal activity can be confiscated so as to deprive a person of ill gotten gains. Many practitioners will be more familiar with the established mechanisms for asset forfeiture through criminal proceedings, as described above. Post-conviction confiscation is the usual course of events and should be the preferred option where the accused is found in the territory of a state and there is sufficient evidence to support a criminal prosecution.

However, there are instances when such a course of events may not be available to the prosecuting agencies of a state, as the suspect may have fled following the dissipation of his assets, may be able to rely upon a jurisdictional privilege (sometimes referred to as 'domestic immunity') or may have died. In such circumstances, civil forfeiture is able to be used to prevent the proceeds of the criminal activity to be enjoyed by the suspect (and his associates) abroad and to prevent 'inheritance' of such proceeds by successors.

There may be occasions, particularly in relation to corruption cases, where in a state where there is a prosecutorial discretion, a decision has to be made whether to proceed down a criminal post-conviction confiscation route or via the civil process. Practitioners in the region should be aware of this because it is possible that a regional state could receive an MLA request from a state where such a prosecutorial decision has been made. The following considerations should be borne in mind:

- The different mechanisms (of confiscation) each have advantages and disadvantages;
- Package of criminal and civil measures is often required to recover assets laundered internationally;
- Chosen mechanism often fact-dependant;
- Various issues will be weighed when deciding what is the most suitable mechanism:
    i. How efficient and speedy are civil and criminal mechanisms in the jurisdiction in which assets are located?
    ii. How easy and costly is it to freeze assets in the jurisdiction in which they are located using criminal or civil powers?
    iii. Can an enforceable confiscation order be obtained (e.g against dead or absconding defendants, or foreign companies/trusts)?
    iv. Can a confiscation order be enforced against the entity holding the assets?

v. What opportunity will a defendant have to challenge a foreign confiscation order?
vi. What is the standard of proof? "Beyond reasonable doubt" v "Balance of probabilities"
vii. What are the rules on admissibility of evidence?
viii. What are the rules on jurisdiction?
ix. What individuals and entities can be defendants?

Challenge

- *Putting in place civil forfeiture law domestically*
- *Ensuring that MLA requests in civil forfeiture cases can be made/executed*

Possible Solutions

- *Demonstrating nationally that civil forfeiture is constitutional and does not breach international human rights law*
- *Including provisions in national law to enable MLA requests in civil forfeiture cases*

Particular Problems Experienced when Mutual Legal Assistance is Sought in Economic Crime, Corruption and Organised Crime Cases

Influential Target

If an investigation involves an influential politician or business figure in the requested State, or if a powerful suspect in the requesting state has allies in the state of whom the request is to be made, the assistance sought may never be provided. The requested authority may, for instance, cite “national interest” or immunities/jurisdictional privilege enjoyed by certain sections of the community (e.g. ministers of the government or judges).

This challenge is not an easy one to overcome. However, some practical steps can be taken. First, as much information and detail should be obtained as to who in the requested state may be trusted, and as to what are the most accurate sources of information. It might be that embassies in the requested state will be in a position to answer this, but the requesting state’s FIU might also be able to assist. Second, the requesting authority must get to know the requested state itself in the widest sense, particularly its political and legal systems, whilst putting aside any prejudice or preconceptions. The same applies to the officials themselves who will be liaised with during the process. Third, the requesting state can seek assurances from the requested state. Although assurances are sometimes broken, there is always pressure on a state to ensure that guarantees are respected. Fourth, there can be a reminder given to the requested state that there is always a next time. That the requested state today may well be tomorrow’s requester is always a powerful motivator; indeed, it is one of the unspoken driving forces in international co-operation.

Appeals

In some states, the person in respect of whom the request for mutual legal assistance is made is able to appeal against the sharing of evidence with the requesting authority. When such an appeal is available it may well cause lengthy delay. In those European states which have traditionally enjoyed favourable tax and banking conditions, for instance Liechtenstein and Switzerland, an appeal avenue is available in relation to the disclosure of information on financial position etc. In those countries, in addition, institutions such as banks may have similar rights of appeal.

Search & Seizure

Search and/or seizure generally can be problematic. Essentially, the authority making the request should be careful to provide as much information as possible about the location of

the premises etc. But it must be remembered that different jurisdictions set different thresholds. Search and seizure is a powerful weapon for investigators. It must be assumed that the requested state will only be able to execute a request and search/seizure if it has been demonstrated by the request that reasonable grounds exist to suspect that an offence has been committed and that there is evidence on the premises or person concerned which goes to that offence. These “reasonable grounds” should be specifically set out within the letter therefore.

Generally, it will not be enough simply to ask for search and seizure without explaining why it is believed the process might produce evidence. For a request within Europe, it is undeniably good practice to have written regard to the core principles of the ECHR, namely necessity, proportionality and legality. Interference with property and privacy in European states is now usually justifiable only if there are pressing social reasons such as the need to prosecute criminals for serious offences. Even if all these factors are addressed, it may well be that the searching of the person and taking of fingerprints, DNA other samples will have less chance of success in some jurisdictions. It is, therefore, to liaise with the requested state on this point specifically before a request is issued.

Investigations & Proceedings of Sensitivity
As financial crime and corruption becomes increasingly sophisticated and transnational, and as more and more cases involve a link with organised crime, it may well be that there are extremely sensitive aspects to an investigation. Nevertheless, it may be that that sensitive information will have to be included in a formal request for assistance in order to satisfy the requested authority. At the same time, the disclosure of prospective witnesses and other information that could be exploited by criminals, organised crime or those who are otherwise corrupt, needs to be weighed in the balance.

In reality, the system for obtaining mutual legal assistance, globally, is inherently insecure. The risk of unwanted disclosure will be greater or lesser depending on the identity of the requested state. When considering the matter, those making the request must have regard to duty of care issues which arise for them. Sometimes, difficulties can be avoided by the issuing of a generalised letter which leaves out the most sensitive information but provides enough detail to allow the request to be executed. If the sensitive detail proves to be needed, the letter may be supplemented by a briefing given personally by, for instance, the requesting prosecutor to the receiving prosecutor. Exceptionally, consideration can be given to the issuing of a conditional request for mutual legal assistance; in other words, a request that is only to be executed by the requested authority if it can be executed without requiring sensitive information to be disclosed.

Practical Challenges & Steps to Take Before Issuing an MLA Request

Matters for the Prosecutor or Judicial Authority to Have in Mind Before Issuing the Letter
It must be emphasised that the prosecutor or other judicial authority who is to issue the letter of request must satisfy himself of the following <u>before</u> the letter is issued:

- Whether an offence has been committed or there are reasonable grounds for suspecting this to be so and which offences are under investigation;
- The subjects of the investigation;
- The assistance sought and its relevance to the investigation;
- The identity of any competent overseas authority that is, will, or may be able to give assistance (when dealing with EU states, the issuer of the letter should ideally identify the court with jurisdiction over the area where the evidence is sought and the person who is expected to give assistance);
- Is the proposed enquiry permitted by national law in the requesting and requested state?

- Is the proposed enquiry permitted under the relevant convention, treaty or other international instrument that is being cited within the letter?
- Has enough factual information about the case been given to provide a proper basis for the assistance to be sought?
- Does the assistance to be sought amount to little more than a "fishing expedition"? (In particular, if any coercive measures (such as a search warrant) are likely to be needed in the requested state, it is highly likely that a judicial authority will have to be satisfied that the enquiry is more than just speculative, that there are grounds for believing that the evidence exists or can be made available. The issuer of the letter should, therefore, state in the letter of request the basis for believing that this is so and show a legitimate and clear nexus between the facts and the assistance sought.)
- What value will the assistance sought have for the investigation or proceedings? MLA is a time-consuming process, not just for the requesting judicial authority, but, in particular, also for the executing judicial authority, for which it can also be both human and financial resource-intensive. The issuer should consider whether the assistance sought is likely to be proportionate to the case. and should explain in the letter of request what bearing the assistance sought will have upon the case.
- Can the assistance be obtained by other means? Judicial authorities should not use MLA for enquiries that could be made by other, less formal, means.
- Can the assistance that is sought be realistically given? Some enquiries that could not be undertaken easily in one state might be relatively straightforward in another. For example, France and Belgium keep centralised banking records, whereas the UK does not.
- Can the assistance be given in the time available?
- Is the assistance sought likely to produce admissible evidence?
- What are the consequences of issuing an LOR? Would making the request create unacceptable/unjustifiable security risks? Would seeking assistance risk revealing a sensitive investigation? Some jurisdictions are unable to carry out investigations without notifying those concerned/those being targeted, others are able to do so. Each jurisdiction will have different criteria governing whether or not secrecy can be maintained.

Common & avoidable problems: Matters to note

- One of the concerns most frequently expressed by representatives of the competent judicial authorities of states is of delays in execution, or refusal of requests for inconsistent reasons.
- There are a number of recurring causes for delay or refusal. These include: letters of request transmitted which lack precision, letters in which there is no nexus between the summary of the facts and the assistance being requested, poor quality of translation into the language of the requested state.
- Sometimes the evidence requested is unavailable or delayed because, for instance, it is in the possession of a third party. such as a bank, or is ‘historical’ and therefore archived or destroyed.
- Frequently letters of request fail to set out the contact details of those undertaking the investigation in the requesting state.
- The requesting state should always consider the likely effect in the requested state of executing a request where an ongoing investigation is taking place in the requested state.

- Many of the difficulties encountered are simply commonplace errors occurring through inexperience or poor practice. Building specialisation and creating a network of contacts amongst practitioners helps reduce the chances of mistakes being made.

Challenging a refusal by the requested state to execute the letter of request

International co-operation, whether by way of formal MLA or an informal request, depends in very large part on goodwill, a willingness to assist, and the recognition that today's requested state might be the requesting State tomorrow. What then can be done in the event of a refusal to execute a request?

If a letter of request is issued on the basis of comity, without the force of a treaty obligation, the requested State will be at liberty to refuse to execute if it is unwilling to cooperate.

However, if the request is made in reliance upon a treaty, whether bilateral or multilateral, an unjustified refusal will put the requested State in breach of its treaty obligation. Such a course may well risk embarrassment and might prompt executive or diplomatic pressure to accede to the request.

Nevertheless, if a state remains steadfast in its refusal there is, in practical terms, little that can be done. Depending on the instrument concerned, the matter may be put before the conference or assembly of the States Parties and might result in censure, or it might be referred to the organisation or body with 'ownership' of the instrument in question. Either way, rebuke and little more will be the outcome.

A further avenue that a requesting state might go down is to bring an action before the International Court of Justice (ICJ in The Hague. Indeed, the ICJ (the principal judicial organ of the United Nations) handed down a judgment on 4 June 2008 following an action brought by Djibouti against France in respect of a refusal to execute an MLA request. The judgment itself does not assist on any substantive principle relevant for present purposes, as the Court found that France, by not giving Djibouti the reasons for its refusal to execute the letter of request, transmitted on 3 November 2004, failed to comply with its international obligation under Article 17 of the 1986 treaty between the two states and that the finding of that violation constituted appropriate satisfaction, but rejected all other claims by Djibouti. Nevertheless, the case serves to highlight that the ICJ is capable of providing a forum for redress when one state wishes to challenge a refusal by another to execute a letter of request.

-----ooOOOoo-----