

CHAPTER VIII

INTERNATIONAL LEGAL COOPERATION⁵³²

INTRODUCTION

As concern about corruption has increased, studies of the problem have clearly demonstrated a need for international cooperation. Cooperation and various forms of technical and development assistance are needed because corruption in one country can affect other countries in the region and any other country with which the problem State has significant economic, social, political, immigration or other links. Efforts by developing countries to enhance their economic, social and cultural development are impeded, as are the best efforts of other countries to assist them in these efforts. Corruption, organized crime and related problems also tend to spread from countries where they are endemic along economic or other links to countries where they are not. The globalization of trade, economic and social structures has also increased the prevalence of individual cases of corruption which have transnational elements.

Anti-corruption measures have been developed in an attempt to address the problem in all of these aspects. The United Nations Convention against Corruption, other major multilateral and regional treaties and other materials, including this Tool Kit contain measures to encourage countries to develop and adopt domestic anti-corruption programmes and to suggest individual elements of such programmes which have been proven effective in other countries. The overall effort is intended to ensure that each country has adequate anti-corruption measures in place, and to some degree, taking into account national differences, that all of these programmes are, if not parallel, then at least coherent enough to support international cooperation. These efforts deal with the prevention and control of corruption at the domestic level and cooperation in areas such as development and technical assistance can accomplish the same thing at the international level.

The remaining element is the establishment of measures which will encourage and facilitate cooperation in dealing with specific transnational or multinational cases of corruption. In this area international cooperation is more complex because other fundamental interests come into play. From the perspective of

⁵³² International judicial cooperation includes the following measures:

- Extradition
- Mutual Legal Assistance (model MLA)
- Transfer of Proceedings
- Transfer of Judgments
- Transfer of Judgments, especially Transfer of Sentenced Persons
- Recovery of illegal funds (tracing, freezing and confiscation)

States, the application of the criminal justice powers which involve the use of force, arrest, detention, prosecution, adjudication, punishment and other measures, represent the most coercive applications of the law, and as such are carefully reserved for sovereign national governments and their institutions. Other important interests also often arise in transnational corruption cases: the recovery of illicitly-transferred assets on so-called “grand corruption” cases has recently emerged as one such issue. From the perspective of individuals, human rights interests also arise.⁵³³ Given the consequences of a criminal conviction, a country’s human rights protections are usually the strongest for those in criminal jeopardy, and ensuring that they are adequately protected in all relevant jurisdictions is usually a major concern in transnational cases.

International cooperation in specific cases, usually referred to as legal or judicial cooperation, is usually governed either by some form of treaty or international legal instrument among a group of countries, or some form of specific agreement or arrangement between individual countries. Agreements and arrangements differ in their degree of formality, and may be of a general nature, focused on specific offences or categories of offences, such as corruption or narcotics-related offences, or agreed between countries with respect to a specific request or investigation. In some cases, cooperation may be possible without any formal treaty, agreement or arrangement at all, on the discretion of the competent authorities of the States involved. All of these questions vary depending on the laws of the States concerned, and in some cases depending on the subject-matter involved. The general areas of cooperation recognized in the more formal and structured arrangements include the following.

- **Mutual legal assistance.**⁵³⁴ The most extensive category, this includes most of the major forms of assistance needed to mount a successful investigation and prosecution. Generally, it includes requests to gather physical evidence, identify witnesses and obtain testimony, produce documents, conduct forensic tests and similar assistance. It frequently involves requests to foreign law-enforcement agencies, *via* diplomatic and executive central authorities, and may involve foreign judicial elements, especially if the assistance requested entails coercive measures such as search and seizure or electronic surveillance that raise human rights issues. In some frameworks it also includes assistance in the tracing, freezing, seizure, forfeiture and disposal or return of proceeds of crime, while in others these are provided for separately (below).
- **Tracing, freezing, seizure, confiscation and return of assets.**⁵³⁵ Since the advent of measures to prevent and combat money-laundering and to

⁵³³ The protection of individual rights is also, of course, regarded as a fundamental (and in many countries, constitutionally-entrenched) State interest, is the *raison d’être* for a number of international organizations, and a founding principle of the United Nations.

⁵³⁴ United Nations Convention against Corruption, Article 44.

⁵³⁵ United Nations Convention against Corruption, Articles 14 (prevention of money-laundering), 31 (freezing, seizure and confiscation of proceeds and other property), 40 (bank secrecy not an obstacle in domestic investigation), 46 (general mutual legal assistance), and Chapter V (Asset recovery), Articles 51-57. Article 60, subparagraphs 1(e)-(h) also deal with technical assistance

use the forfeiture of proceeds of crime as an added sanction and deterrent, the pursuit of proceeds across international boundaries has spawned another form of cooperation. Many of the actual measures taken are similar to those in mutual legal assistance, and this is sometimes considered as a type of mutual legal assistance. Assets targeted are usually either the proceeds of crime, which includes other property generated or derived from such proceeds, or other property used to commit crimes or in some way connected with crimes or offenders. Forms of assistance include surveillance of transactions and the searching of financial records to trace assets which have usually been transferred many times to frustrate such tracing, the use of legal powers to “freeze” suspect assets to prevent them from being further transferred until their origins and true owners can be identified, use of legal powers to actually seize assets and various forms of property, and to confiscate them by having legal title transferred to the competent authorities.

The final, and in some cases most problematic, stage is to have the confiscated assets transferred back to where they originated. This can be problematic, especially in corruption cases. It may be difficult to establish exactly where the proceeds did originate, and if specific victims are identified, whether they or the requesting State have the better claim. Corruption cases often involve very large numbers of unidentified victims, or the offenders may be former public officials leading to the argument that it is the requesting State and not its individual citizens, which should be paid. The State which has the assets may also not be convinced that the requesting State is now free from corruption, especially in cases where a new government has taken over after a period of institutionalized “grand corruption”. States on both sides of this situation face a dilemma. The requesting State is often impoverished by years or even decades of corruption and bad governance, leaving it with courts and other authorities unable to meet the high evidentiary standards of the countries where the assets have been concealed, and with few resources to hire the necessary experts. The requested State is faced with costly and complex investigations and legal proceedings to identify and confiscate the requested assets, evidence from the requesting State that may not meet established judicial standards, and if the entire process is successful, it runs the risk that it may be returning the assets to the corrupt officials of a new regime – whose credibility is usually not yet established – only to face similar requests from its future successors to pursue the same assets all over again.

- **Law enforcement cooperation.**⁵³⁶ Countries with fairly high demands for cooperation frequently find it necessary to establish direct links at the law enforcement level. The degree of formality and legal structuring varies

in the form of training and other measures in relation to measures to prevent illicit asset transfers and to obtain the return of assets if they are illicitly transferred.

⁵³⁶ United Nations Convention against Corruption, Articles 48 and 49. Article 50, which deals with special investigative techniques is also included in this segment because special authority is often needed to use techniques such as electronic surveillance on the request of a foreign State.

depending on the countries involved and the extent of the cooperation covered. Specific measures may include such things as arrangements for the establishment of liaison bodies, the posting of liaison officers, or the establishment of joint teams of officers to conduct specific investigations once it becomes apparent that transnational elements are present. Countries where law-enforcement is equipped with modern information and communications technologies are increasingly relying on these to support secure Internet web-sites, electronic mail networks and similar arrangements to identify possible offenders and transnational elements of cases quickly, avoid or link parallel investigations and support ongoing investigations.

- **Extradition.**⁵³⁷ Extradition is the process whereby a country wishing to prosecute an alleged offender who is in another country formally requests the country in which the offender is found to turn him or her over for trial. Traditionally this has involved the extradition of fugitive offenders from countries to which they had fled after committing a crime, but more recently, globalization, new information and communications technologies and other factors have led to increasing numbers of cases where offences occur in several countries at once and offenders are extradited to jurisdictions where they have never been before. The process of extradition normally involves a number of stages. The requesting State contacts the requested State, identifying the offender and providing sufficient evidence to convince the requested State that there is a criminal (usually *prima facie*) case to meet. If satisfied, the requested State arrests and detains the offender, conducts judicial proceedings in which the offender may challenge the requesting State's case or motives, and if still satisfied, extradites the offender to the requesting State. These proceedings are generally much longer and more elaborate than those for other forms of cooperation because the basic human rights of the accused offender are in issue at every stage. The requesting State need not make out a full criminal case – this would entail prosecuting the offender twice – but it must at each stage produce sufficient evidence to persuade the courts and political authorities of the requested State that the infringements on the accused offender's rights are justified, and that there is no improper motive for the extradition. The cost and complexity of this process means that it is not usually used for minor cases.
- **Other forms of cooperation.** These are limited only by the needs and creativity of the states which set up the arrangements. Common arrangements include the transfer of criminal proceedings,⁵³⁸ in which an offender charged in one State can be prosecuted in another, possibly because most of the witnesses or other evidence is there, or because a group of countries all affected by an offence decide among them which is the most convenient forum for trial. Offenders who have been convicted

⁵³⁷ United Nations Convention against Corruption, Article 44.

⁵³⁸ United Nations Convention against Corruption, Article 47.

and sentenced may also be transferred at some later time, allowing them to serve sentences in their own country.⁵³⁹

⁵³⁹ United Nations Convention against Corruption, Article 45.

TOOL #42

EXTRADITION

Extradition is the surrender by one State, at the request of another, of a person who is accused or has been convicted of a crime committed within the jurisdiction of the requesting State. Generally extradition is subject to careful judicial proceedings, especially in the requested State, because matters of national sovereignty and the human rights of the person whose extradition is sought require protection. Proceedings are generally conducted within frameworks established by international law in the form of treaties or other agreements or arrangements between the States concerned, and national law, which establishes rules for the making and consideration of requests, review of the validity of the basis for prosecution if the person is extradited, and the application of safeguards to ensure that fundamental substantive and procedural standards can and will be met by the requesting State. In many countries, an element of political discretion is also involved. These frameworks commonly establish a number of limits. Not all of these necessarily apply in every case, and in some areas, the recent trend has been to reduce or remove obstacles as transnational crime, pressure to extradite offenders and case volumes have increased.

- **Offences must be extraditable.** Generally, both international instruments and national law does not provide for extradition for every possible offence. In some cases, lists of specific offences are prescribed and on others categories of offences are prescribed, dealing with corruption, narcotics trafficking, organized crime or other specific subject areas.⁵⁴⁰
- **Offences must be sufficiently serious to warrant extradition.** Extradition is complex and costly for both governments, and most countries apply *de minimus* rules, in which offences which fall below a certain standard of seriousness, measured by the type of conduct or the maximum possible punishment, are not extraditable.⁵⁴¹
- **Offences must correspond in both countries (dual criminality).** This principle is no longer applied as strictly as it had been by some countries, and it is not always necessary to establish that the actual offences correspond in both countries. In most cases, however, countries will not extradite unless the underlying conduct cited by the requesting State is also an extraditable offence in the requested State.⁵⁴²

⁵⁴⁰ The United Nations Convention against Corruption establishes a category of extraditable offences which includes any offence established by the Convention which has been implemented by, or is punishable in, the States Parties concerned. See Article 44, paragraph 1. Paragraph 2 makes it clear that States still may extradite for offences not included in the category if they wish.

⁵⁴¹ See United Nations Convention against Corruption, Article 44, paragraph 8.

⁵⁴² See United Nations Convention against Corruption, Article 43, paragraph 2 and Article 44, paragraphs 2 and 8. In Article 44, paragraph 2 makes it clear that dual criminality requirements can be waived if desired, and paragraph 8 preserves extradition conditions set out in domestic law, which in some countries may include dual criminality requirements. Article 43, paragraph 2 states that where dual criminality is a requirement, it is deemed to be satisfied where the conduct

- **There must be a treaty, agreement or arrangement.** Extradition is allowed by some countries without this requirement, but in most cases, domestic laws require some form of international basis, both to ensure reciprocity and establish a basic procedural framework to ensure that basic safeguards are met. Where required at all, the international law basis for extradition may be a general, multilateral treaty such as the United Nations Conventions dealing with narcotic drugs, transnational organized crime or corruption, a bilateral treaty between the States involved, sometimes dealing only with a narrow range of offences, or a specific arrangement negotiated to cover a single case or series of related cases.⁵⁴³
- **Extradition must not be sought for an improper reason.** As an additional safeguard both treaties and political discretion may be used to block extradition where, in the view of the requested State, the real purpose is discriminatory or would amount to prosecution for reasons other than criminal behaviour, such as race, religion, ethnicity etc.⁵⁴⁴
- **Offenders can only be prosecuted for the reason they were extradited.** To prevent abuses in which offenders are extradited for an extraditable offence in order to prosecute them for something else which in itself would not have been extraditable, many countries insist on what is known as “specialty”, in which the requesting State must undertake not to prosecute for other offences. This restriction is still applied, but has been relaxed to some degree to allow for prosecution for other related offences. Where it becomes apparent after extradition that the accused offender may have committed further offences, a waiver of specialty can also be sought from the State which previously extradited to allow the additional prosecutions to take place.⁵⁴⁵
- **In some countries, offenders cannot be extradited for “political” or “fiscal” offences.** Historically, countries were not willing to extradite offenders where there was a likelihood that the requesting State was pursuing political opponents of the government or attempting to enforce its tax laws extraterritorially. In recent treaties, the trend has been to limit these restrictions, either by suspending them entirely, or more commonly,

underlying the offence is a crime in both States, even if the actual offences do not correspond exactly.

⁵⁴³ The United Nations Convention against Corruption and similar treaties cover both possibilities. Article 44 paragraphs 6 and 7 provide that, if a treaty is required, the Convention must either be sufficient in itself or States Parties in this situation must conclude additional treaties to cover extradition for Convention offences. If no treaty is required, States Parties must ensure that all of the offences established in accordance with the Convention are extraditable.

⁵⁴⁴ See United Nations Convention against Corruption, Article 44, paragraph 15.

⁵⁴⁵ United Nations Convention against Corruption, Article 44, paragraph 3 does not suspend speciality, but allows extradition for a group of offences if any one of those offences is extraditable under the Convention.

by providing that the offences made extraditable under the treaty could not be treated as political or fiscal offences.⁵⁴⁶

- **In some countries, citizens have the right not to be extradited.** In some countries, the right of nationals to enter into and remain in their own country supersedes the powers of the State to extradite them, and is constitutionally entrenched, making it impossible to change when ratifying and implementing an international treaty. To deal with this scenario, modern treaty requirements commonly include requirements that any offender not extradited for this reason must be prosecuted at home, usually with the assistance of the requesting State.⁵⁴⁷
- **In some countries, offenders may not be extradited to face the possibility of unacceptable treatment of punishment.** Increasingly, countries which ban capital punishment at home are also unwilling to, and in some cases constitutionally prohibited from, extraditing an accused offender to another country where the offender may be subject to the death penalty if convicted. In other cases, extradition to places where torture or other cruel or unusual treatment may be inflicted may also be refused. Refusal may be made judicially or through executive discretion, and in some cases extradition to death penalty countries may still be possible if the requesting State provides binding assurances that the death penalty will not be sought by prosecutors or carried out if the accused offender is convicted.

ESTABLISHMENT OF A NATIONAL EXTRADITION CAPABILITY

- Other technical assistance materials cover the establishment of national authorities in detail, and these will not generally be different for corruption-related cases than other cases, so the necessary measures will not be dealt with in detail here.⁵⁴⁸ The major elements and requirements of a national system include the following.
- **Reciprocal capability.** Extradition obligations are reciprocal, which means that domestic authorities must be capable of both seeking extradition from other countries and of responding to requests to extradite offenders to other countries.
- **Making extradition requests.** The competent authorities must determine what the requirements of the requested State are, and be able to meet

⁵⁴⁶ See United Nations Convention against Corruption, Article 44, paragraph 4, which requires that corruption offences not be treated as political offences, and paragraph 16, which states that State Parties may not refuse to extradite at all on the basis that the offence is seen as a fiscal offence.

⁵⁴⁷ See United Nations Convention against Corruption, Article 44, paragraph 11. See also Article 42, paragraph 3, which requires State Parties to establish the necessary extraterritorial jurisdiction so that they can prosecute a citizen accused of committing a Convention offence in another country. These requirements are commonly referred to as “extradite or prosecute” (*aut dedere aut judicare*) requirements and are also found in the United Nations Convention against transnational Organized Crime and some of the anti-terrorism treaties.

⁵⁴⁸ [xxx insert references to Commonwealth and other materials here or list in the text at this pointxxx]

- those requirements. Generally this will involve liaison between the national extradition authority and the local prosecutors and law-enforcement officials seeking the extradition. Evidence to establish the necessary basis must be assembled and formulated (including language translation where necessary) for the requested State.
- **Responding to extradition requests.** Competent authorities must be able to arrest and detain accused offenders, conduct necessary proceedings and extradite the offenders when required to do so. This also usually involves cooperation between a central or national authority and the local law enforcement agency in the place where the accused offender is found.
 - **Centralization.** Most treaties speak of “central authorities”, the establishment of which simplifies matters by providing a basic point-of-contact for requesting States, and by concentrating expertise on extradition and related matters. Essentially, the requesting State can contact the central authority of the requested State, which will then examine the request, establish that it meets basic legal and treaty requirements, and refer it on to the appropriate national and/or local authorities, who locate and arrest the offender and conduct the necessary judicial proceedings

RELATED TOOLS

International legal instruments covering extradition for general offence categories

- United Nations Convention against Corruption (not in force, corruption and related offences, including money-laundering)
- United Nations Convention against Transnational Organized Crime
- Commonwealth Scheme (Scheme Relating to the Rendition of Fugitive Offenders within the Commonwealth, 1966),
- European Convention on Extradition (1957); First Additional Protocol, Second Additional Protocol,
- EU Extradition Convention of 1995 and 1996, 1990 Schengen Agreement
- Benelux Convention on Extradition and Judicial Assistance in Penal Matters of 27 June 1962,
- Nordic States Scheme of 1962,
- Inter-American Conventions,
- The Arab League Extradition Agreement of 14 September 1952,
- Convention on judicial cooperation of the Union Africaine et Malagache of 1961,
- Convention on extradition of the Economic Community of West African States of 6 August 1994

TOOL #43

MUTUAL LEGAL ASSISTANCE (MLA)

Mutual legal assistance is an international cooperation process by which States seek and provide assistance in gathering evidence for use in the investigation and prosecution of criminal cases, and, in tracing, freezing, seizing and ultimately confiscating criminally derived wealth. It covers a wide and ever-expanding range of assistance. They include: search and seizure; production of documents; taking of witness statements by video conference; and temporary transfer of prisoners or other witnesses to give evidence

It differs from traditional cooperation between law enforcement agencies. Law enforcement cooperation enables a wide range of intelligence and information sharing, including from witnesses providing they agree to give information, documents or other evidentiary materials voluntarily. If the witness is unwilling, coercive measures will be needed, usually in the form of a court order from a judicial officer.

It also differs from extradition, although many of the legal principles underlying mutual legal assistance are derived from extradition law and practice. Extradition involves the surrender of a person from one sovereign jurisdiction to another and fundamentally effects the liberty and possibly life of that person. Accordingly, extradition law, practice and procedure typically enable less flexibility and room for discretion in granting a request than mutual legal assistance.

DESCRIPTION

An United Nations expert working group (EWG) brought together in Vienna in December 2001 recommended that States take the following actions in order to facilitate the providing of effective mutual legal assistance:

Action 1. Enhancing the Effectiveness of MLA Treaties and Legislation

An effective legal basis to provide mutual legal assistance is critical to ensuring effective action. States should develop broad mutual legal assistance laws and treaties in order to create such a legal basis. Since mutual legal assistance treaties (MLATs) create a binding obligation to cooperate with respect to a range of mechanisms, States should, wherever possible, expand the number of States with which they have such treaty relationships. States or regions that would have difficulty negotiating an extensive network of bilateral MLATs should consider developing regional MLATs to create a modern legal framework for cooperation or, if that is not possible, ensure that they have an up-to-date domestic legal basis for providing legal assistance. In that context States may wish to consider relevant United Nations or regional model treaties⁵⁴⁹ or model legislation⁵⁵⁰ and their associated guidelines or commentaries.

⁵⁴⁹Eg, the United Nations Model Treaty on Mutual Assistance in Criminal Matters (Annex to Resolution 45/117 of 14 December 1990, and complementary provisions (Annex I to Resolution 53/112 of 9 December 1998; Model Treaty on Extradition (Annex to Resolution 45/116 of 14 December 1990, and complementary provisions (Annex I to Resolution 52/88 of 12 December 1997.

In developing or reviewing treaties and legislation States should ensure that there is the greatest possible flexibility in the domestic law and practice to enable broad and speedy assistance. It is particularly important to have the capacity to render the assistance in the manner sought by the requesting State.

States should regularly review such treaties and laws and, as needed, supplement them to ensure that they keep pace with useful developments in international mutual legal assistance practice.

Action 2. Strengthening effectiveness of central authorities

Establishment of effective central authorities

The United Nations Conventions on drugs and crime contain extensive and broadly similar provisions relating to mutual legal assistance. Included in their provisions are requirements for each Party to notify the Secretary-General of the United Nations of the central authority designated by it to receive, transmit or execute requests for mutual legal assistance. This is critical information for Requesting States in planning and drawing up requests. It must be accurate, up-to-date and widely available to those who frame or transmit mutual legal assistance requests.

States that have not already done so should establish a central authority that facilitates the making of requests under article 7 of the 1988 Convention for mutual legal assistance to other States Parties, and for speedy execution of requests received from other States Parties. Central authorities should be staffed with practitioners who are legally trained, have developed institutional expertise and continuity in the area of mutual legal assistance.

Designation of authorities with important national drug control capability in other fields (e.g., health ministries), but little if any in international mutual legal assistance should be avoided.

Ensuring the dissemination of up-to-date contact information

Parties to the 1988 Convention should ensure that contact information contained in the United Nations Directory of competent authorities under article 7 of the Convention is kept up to date, and, to the extent possible, provides information for contacting its central authority via phone, fax and Internet.

Ensuring round-the-clock availability

Both with respect to the 1988 Convention and generally, the central authority of a State should, to greatest extent possible, provide for a means of contacting an official of the central authority if necessary for the purposes of executing an emergency request for mutual legal assistance after working hours. If no other reliable means is available, States may consider ensuring that their Interpol

⁵⁵⁰ Eg, UNDCP's model laws: (a) for States of common law legal tradition Model Mutual Assistance in Criminal Matters Bill 2002, Model Foreign Evidence Bill 2002, Model Extradition (Amendment) Bill 2002, Model Witness Protection Bill 2002; (b) for States of the civil or continental legal tradition Model Law on Mutual Legal Assistance 2002.

National Central Bureau or other existing channel is able to reach such an official after working hours, with due consideration given to time zones.

Consistency of central authorities for the purpose

The EWG noted the wide and growing range of international conventions, each requiring parties to afford one another the widest measure mutual legal assistance in relation to the offences covered by the particular convention, and each requiring for that purpose the designation of a central authority.

The EWG noted the potential for fragmentation of effort and inconsistency of approach if different central authorities are designated for different groups of offences. States are therefore urged to ensure that their central authorities under the 1988 Convention and the UN Convention on Transnational Organized Crime of 2000 are a single entity of the kind described in this section, in order to make it easier for other States to contact the appropriate component for all kinds of mutual legal assistance in criminal matters, and to facilitate greater consistency of mutual legal assistance practice for different kinds of criminal offences.

Reducing delay

The EWG noted that significant delay in the execution of request is in part caused by delays in consideration of the request by the receiving central authority and transmission of the request to the appropriate executing authority. States should take appropriate action to ensure that requests are examined and prioritized by central authorities promptly upon receipt and transmitted to executing authorities without delay. States should consider placing time limits upon processing of requests by central authorities. States are encouraged to afford foreign requests the same priority as similar domestic investigations or proceedings. States should also ensure that executing agencies do not unreasonably delay processing of requests. Appropriate coordination arrangements should be in place in federal jurisdictions where constituent States have execution responsibilities to minimize the risk of delayed responses.

Action 3. Ensuring awareness of national legal requirements and best practices

Increasing availability and use of practical guides regarding national mutual legal assistance legal framework and practices (domestic manuals; guides for foreign authorities)

It is important that domestic authorities be aware of the availability of mutual legal assistance and know the procedures to follow to obtain that assistance in relation to an investigation or prosecution. It is also very useful, particularly in larger jurisdictions, where there may be several authorities involved in the making or execution of such requests, to provide for the sharing of information between those authorities.

States should adopt mechanisms to allow for the dissemination of information, regarding the law, practice and procedures for mutual legal assistance and on making requests to other States, to domestic authorities. One possible approach is to develop a procedural manual or guide for distribution to relevant law enforcement, prosecutorial and judicial authorities. Other useful mechanisms can

include the distribution of a regular newsletter and the convening of domestic practitioners meetings to provide updates on cases, legislation and general developments.

The provision of information to foreign authorities was also highlighted as an important measure to facilitate effective cooperation. States should develop guidelines on domestic law and procedures relating to mutual legal assistance to inform foreign authorities on the requirements that must be met to obtain assistance. Any such guidelines should be made available to foreign authorities through a variety of methods, such as, for example, publication on a website, direct transmission to law enforcement partners in other States or distribution through the ODCCP or other international organizations.

Increasing training of personnel involved in the mutual legal assistance process

Effective implementation of mutual legal assistance instruments and legislation is not possible without personnel who are well trained with respect to the applicable laws, principles and practices. States should use a broad range of methods to provide such training, in a manner that will allow for the expertise to be sustained, for example:

- Lectures and presentations by central authorities as part of regular training courses or workshops for law enforcement, prosecutors, magistrates or other judicial authorities;
- Special workshops or seminars on a domestic, regional or multi-jurisdictional basis;
- Introducing programmes on mutual legal assistance as part of the curriculum for law schools or continuing legal education programmes; and
- Exchanges of personnel between central authorities of various jurisdictions.

Action 4. Expediting cooperation through use of alternatives, when appropriate

Value of police channels where formal coercive measures are not required...

The EWG wanted to emphasize that, except for coercive measures normally requiring judicial authority, formal mutual legal assistance will not always be necessary to obtain assistance from other States.

Whenever possible, information or intelligence should initially be sought through police-to-police contact, which is faster, cheaper and more flexible than the more formal route of mutual legal assistance. Such contact can be carried out through ICPO/Interpol, Europol, through local crime liaison officers, under any applicable memoranda of understanding, or through any regional arrangements, formal and informal, that are available.

Particularly where evidence is voluntarily given, or publicly available...

While generally police-to-police contact can never be used to obtain coercive measures for the sole use of the requesting State, it may be used to obtain voluntarily given evidence, evidence from public records or other publicly available sources. Again, the method has the advantage of being faster and

more reactive than formal requests. Certain categories of evidence or information may also be obtained directly from abroad without the need for police channels, for example publicly available information stored on the Internet or in other repositories of public records.

Or to help accelerate an effective response to very urgent formal requests...

Many States will also permit very urgent requests to be made orally or by fax between law enforcement officers so that advance preparations can be made or urgent non-coercive assistance given, at the same time as a formal request is routed between central authorities.

But always inform the Central Authority of the prior informal channel contacts...

The formal request should state that a copy has been sent by the informal route to prevent duplication of work. Similarly, where there has been prior police to police contact, the Letter of Request should state this and give brief details.

Use of Joint Investigation Teams

States should use joint investigation teams between officers of two or more States where there is a transnational aspect to the offence, for example in facilitating controlled deliveries of drugs or in cross border surveillance operations.

States should make full use of the benefits of the exchange of financial intelligence (in accordance with appropriate safeguards) between agencies responsible for the collating of financial transaction data and, where necessary, develop or enact the appropriate enabling legislation.

Action 5. Maximizing effectiveness through direct personal contact between central authorities of requesting and requested States

Maintaining direct contact throughout all stages of the request

The 1993 Report⁵⁵¹ had stressed the importance of personal contacts to open communication channels and to develop the familiarity and trust necessary to achieve best results in mutual legal assistance casework.

The EWG reaffirmed that personal contact between members of central authorities, prosecutors and investigators from the requesting and requested States remains critically important at every stage in the mutual assistance process. To facilitate that, contact details, including phone, fax and where available, email addresses, of the responsible officials, should be clearly stated within the request. Sometimes it may be desirable to establish contact with the official in the requested State before sending the request in order to clarify legal requirements or simplify procedures. Such contact can be initiated through the police-to-police means listed above, including through existing police attaché networks, or between prosecutors or staff of central authorities through the UNDCP list of competent authorities, through networks such as the European

⁵⁵¹UNDCP Expert Working Group on Mutual Legal Assistance and Related Cooperation (E/CN.7/1993/CRP.13). The EWG found that the recommendations in the 1993 Report had stood the test of time and still represented best practice. Some of them were now formally reflected in later instruments, such as Article 18 of the United Nations Against Transnational Organized Crime, 2000.

Justice Network of the European Union, or through less formal structures such as the International Association of Prosecutors or simply personal contacts.

Benefits of Liaison Magistrates, Prosecutors and Police Officers

The EWG also encouraged States to take initiatives such as the exchange of liaison police officers, magistrates or prosecutors with States with which there is significant mutual legal assistance traffic, either by posting a permanent member of staff to the central authority of that country, or by arranging short-term exchanges of staff. Experience shows that such "on-site" initiatives produce faster and more useful mutual legal assistance than usually possible through "distance" dealings.

Action 6. Preparing effective requests for mutual legal assistance

Preparation of a request for assistance involves consideration of a number of requirements, for instance, treaty provisions (where applicable), domestic law, the requirements of the requested State.

Too meticulous attention to detail, however, could result in a request that was unduly lengthy or was so prescriptive that it inhibited the requested State from resorting to alternative methods of securing the desired end result. Those preparing requests should apply these basic principles:

- Be very specific in presentation;
- Link the existing investigation or proceedings to the assistance required;
- Specify the precise assistance sought, and
- Where possible, focus on the end-result and not on the method of securing that end-result (for example, it may be possible for the Requested State to obtain the evidence by means of a production or other court order, rather than by means of a search warrant)
- Assist in the application of the above principles, the EWG developed checklists and tools for use in preparing requests. The checklists set out both the requirements generally expected of requests and additional specific requirements for certain areas of assistance.

Action 7. Eliminating or Reducing impediments to execution of requests in the Requested State

Interpreting legal requirements flexibly.

In general, States should strive to provide extensive cooperation to each other to ensure that national law enforcement authorities are not impeded in pursuing criminals who may seek to shield their actions by scattering evidence and the proceeds of crimes in different States. As described below, States should examine whether their current framework for providing assistance creates unnecessary impediments to cooperation and, where possible, reduce or eliminate them.

In addition, those prerequisites to cooperation that are retained should be interpreted liberally in favour of cooperation; the terms of applicable laws and treaties should not be applied in an unduly rigid way that impedes rather than facilitates the granting of assistance.

Minimizing grounds for refusal and exercising them sparingly

If assistance is to be rendered as extensively as possible between States, the grounds upon which a request may be refused should be minimal, limited to protections that are fundamental to the requested State.

Many of the existing grounds of refusal in mutual legal assistance are a "carry over" from extradition law and practice, where the life or liberty of the target may be more directly and immediately at stake. States should carefully examine such existing grounds of refusal to determine if it is necessary to retain them for mutual legal assistance. An area of particular concern was dual criminality. It was noted that positions were divided, with some States requiring it for all requests, some for compulsory measures only, some having discretion to refuse on that basis and some with neither a requirement nor a discretion to refuse. Because of the problems that can arise from the application of this concept to mutual assistance, the EWG recommended that States consider restricting or eliminating the application of the principle, in particular where it is a mandatory precondition.

Problems can also arise from the application of the *ne bis in idem* principle as a grounds for refusal of assistance. To the greatest extent possible, those States applying this grounds for refusal should use a flexible and creative approach to try to minimize the circumstances where assistance must be refused on this basis. For example, when necessary, they should obtain an undertaking that the requesting State will not prosecute a person who already has been prosecuted in respect of the same conduct in the requested State, to enable information to be provided to assist in investigations in the requesting State. Some States do not apply this grounds for refusal at all and States may wish to consider if it is possible to adopt such an approach.

Any grounds for refusal should be invoked rarely, only when absolutely necessary.

Reducing use limitations

Traditionally, evidence transmitted in response to a request for mutual legal assistance could not be used for purposes not described in the request unless

the requesting State contacted the requested State and asked for express consent to other uses. In order to avoid cumbersome requirements that are often not necessary, however, many States have provided for a more streamlined approach in their mutual legal assistance practice. For example, many modern mutual legal assistance treaties require the requested State to advise that it wishes to impose a specific use limitation; if the advisory is not deemed necessary, there will be no limitation of use .

Such methods provide adequate control to the requested State in important cases while facilitating the efficiency of mutual legal assistance in the many cases that are not sensitive. States should consider adopting such modern approaches to use limitations.

Ensuring confidentiality in appropriate cases

Some States are not in a position to maintain confidentiality of requests and the contents of requests have been disclosed to the subjects of the foreign investigation/proceedings, thereby potentially prejudicing the investigation/proceedings. It was noted that confidentiality of requests was often a critical factor in the execution of requests. It was recommended that where it is specifically requested, requested States should take appropriate measures to ensure that the confidentiality of requests is maintained. In circumstances where it is not possible to maintain confidentiality under the law of the requested State, the requested State should notify the requesting State at the earliest possible opportunity and, in any case, prior to the execution of the request to allow it to decide if it wishes to continue with the request in the absence of confidentiality.

Execution of requests in accordance with procedures specified by the requesting State

It is important to comply with formal evidentiary/admissibility requirements stipulated by the requesting State to ensure the request achieve its purpose. It was noted that failure to comply with such requirements would often make it impossible to use the evidence in the proceedings in the requesting State, or at the least, causes delay, (for example where the requested material has to be returned to the requested State for certification/authentication in accordance with the request). The requested State should make every effort to achieve compliance with specified procedures and formalities to the extent that such procedures/formalities are not contrary to the domestic law of the requested State. States are also encouraged to consider if domestic laws relating to the reception of evidence can be made more flexible to overcome problems with the use of evidence gathered in a foreign State.

Coordination in multijurisdictional cases

Increasingly, there are cases in which more than one State has jurisdiction over some or all of the participants in a crime. In some cases, it will be most effective for the States concerned to choose a single venue for prosecution; in others, it may be best for one State to prosecute some participants while one or more other States pursue the remainder. In general, coordination in such multi-jurisdictional cases will, inter alia, avoid a multiplicity of requests for mutual legal assistance from each State with jurisdiction. Where there are multiple requests for assistance in the same case, States are encouraged to closely consult in order to avoid needless confusion and duplication of effort.

Reducing complexity of mutual legal assistance through reform of extradition processes

Traditionally, some States have not extradited their nationals to the State in which a crime took place. At times, such States would instead seek to prosecute their national themselves in lieu of extradition, resulting in lengthy and complex requests for mutual legal assistance to obtain the necessary evidence from the country in which the crime took place.

Recent increases in the number of States that either will extradite their nationals or will temporarily extradite them provided that any sentence can be served in the State of nationality, reduce the need for mutual legal assistance that would otherwise be required.

States that do not extradite nationals should consider whether their approach can be reduced or eliminated. If that is not possible, the States concerned should seek to coordinate efficiently with a view to an effective domestic prosecution in lieu of extradition.

Cooperation with respect to confiscation (enforcement of civil forfeiture, asset sharing)

There are particular impediments to assistance with respect to the freezing/seizure and confiscation of proceeds of crime. As noted in the report of the EWG on asset forfeiture⁵⁵² in relation to freezing/seizure, it can be difficult to obtain this assistance on the urgent basis required because of some of the inherent delays in the mutual assistance process.

Problems also arise because of the different approaches to the execution of mutual assistance requests and the varying systems for confiscation.

The 1988 Convention permits a State to comply with a request for freezing/seizure or confiscation by directly enforcing the foreign order or by initiating proceedings in order to obtain a domestic order. As a result the approach taken differs between States.

Further, the States that obtain domestic orders do so on the basis of varying domestic asset confiscation regimes. In some States there is a requirement to provide evidence of a connection between the property sought to be confiscated and an offence. Other States employ a value or benefit system where there need only be evidence that the property is linked to a person who has been accused or convicted of a crime.

Experience in this area clearly demonstrates that the direct enforcement approach is much less resource intensive, avoids duplication and is significantly more effective in affording the assistance sought on a timely basis. Consistent with the conclusions of the EWG on asset forfeiture, the EWG strongly recommended that States that have not done so adopt legislation to permit the direct enforcement of foreign orders for freezing/seizure and confiscation.

In the interim, where a State is seeking assistance by way of freezing/seizing or confiscation of assets, prior consultation will be required to determine which

⁵⁵² UNDCP Expert Working Group on Effective Asset Forfeiture Casework, Vienna, 3-7 September 2001

system is employed in the requested State in order that the request can be properly formulated.

The EWG also noted that several jurisdictions have adopted or are in the process of adopting regimes for civil forfeiture (i.e. without the need to obtain a criminal conviction as a prerequisite for final confiscation). The EWG supported the use of civil forfeiture as an effective tool for restraint and confiscation. It was, however, recognized that this created new challenges because most current mutual legal assistance regimes are not yet applicable to civil forfeiture. The EWG recommended that States ensure that their mutual assistance regimes will apply to requests for evidentiary assistance or confiscation order enforcement in civil forfeiture cases.

Problems also arise in requests relating to freezing/seizure and confiscation because of insufficient communication about applications for discharge of an order or other legal challenges brought in the requested State. It is critically important that the requesting State be informed of any such application in advance so that it can provide additional evidence or information that may be of relevance to the proceedings. Once again, the importance of communication was emphasized.

The EWG noted the importance of equitable sharing of confiscated assets between the Requesting and Requested State as a means of encouraging cooperation, particularly with States that have very limited resources to execute requests effectively.

Reducing impediments to mutual legal assistance brought about by third parties
Accused or other persons may seek to thwart criminal investigations or proceedings by legal action aimed at delaying or disrupting the mutual legal assistance process. While it may well be fundamental to provide the opportunity for third party participation in certain proceedings arising from the execution of a request for mutual legal assistance, States should ensure that, wherever possible, their legal frameworks do not provide fortuitous opportunities for third parties to unduly delay the providing of assistance or to completely block execution on technical grounds.

In addition, a modern trend in taking witness evidence in the requested State is to defer objections based on the law of the requesting State until after the testimony is transmitted to the requesting State, so that it may decide on the validity of the objection. That avoids the possibility of an erroneous ruling in the requested State and allows the requesting State to decide matters pertaining to its own law.

Consulting before refusing/postponing/conditioning cooperation to determine, if necessary

Where the requested State considers that it is unable to execute the request, formal refusal should not be made before consulting with the requesting State to see if the problems can be overcome, or the request modified to enable assistance to be given. For example, where assistance cannot be given because of an ongoing investigation or prosecution in the requested State, it may be possible to agree to the postponement of the execution of the request until after the domestic proceedings are concluded. In another example, consultation may

lead to the modification of a request for search and seizure that could not be fulfilled under the law of a requested State to a request for a production order, that could. Where, however, it is not possible to resolve the issue, reasons should be given for refusal.

Action 8. Making use of modern technology to expedite transmission of requests

States should make use of modern means of communications to transmit and respond to urgent requests for mutual legal assistance to the greatest extent possible. Where there is a particular need for speed, traditional and much slower methods of transmission of requests (such as the transmission of written, sealed documents through diplomatic pouches or mail delivery systems) can result in cooperation not being provided in time. Where there is a concern that evidence may be lost or that significant harm to persons or property may result if cooperation is not expedited, means such as phone, fax, or Internet should be utilized. The requesting and requested States should determine among themselves how to ensure the authenticity and security of such communications, and whether such communications should be followed up by a written request transmitted through the traditional channel.

Action 9. Making use of most modern mechanisms for providing MLA

The EWG noted the opportunities presented by modern technology to expedite the provision of assistance in criminal matters and to maximize the effectiveness of mutual assistance processes. The EWG also noted developments in international forums such as the European Union (Convention on Mutual Assistance in criminal matters between the member States of the European Union of 22 May 2000) and the Council of Europe (Convention on Cyber Crime) in relation to the taking of evidence via video-link and the interception of electronic communications.

It was recommended that States give consideration to acceding to such Conventions where possible and appropriate, and to developing the ability through their domestic legislation or otherwise to facilitate transnational cooperation in the following areas:

- The taking of evidence via video-link;
- The exchange of financial intelligence between agencies responsible for collating financial transactions data;
- The exchange of DNA material to assist in criminal investigation; and
- Interception of communications;
- The provision of assistance in computer crime investigations, including:
 - Expeditious preservation of electronic data;
 - Expeditious disclosure of preserved traffic data;
- Allowing interception where telecommunications' gateways are located on the territory of the requested State, but are accessible from the territory of the requesting State; and
- Monitoring electronic communications on a "real-time" basis

Action 10. Maximizing availability and use of resources

Providing central authorities with adequate resources

An effective mutual assistance programme needs to be properly resourced in terms of both central and competent authorities and necessary infrastructure. As an optimum position, States should ensure that appropriate resources are allocated to mutual legal assistance. For developing States with many urgent competing resource priorities, ideal resource levels may not always be attainable.

Obtaining assistance from a requesting State

There may be other creative approaches that can be adopted to deal with resource issues. Importantly, a requested State may wish to "seek assistance from the requesting State in order to provide assistance". Some examples of the types of assistance that can be sought from the requesting State include providing personnel or equipment to be used in execution of the request, paying for the use of private counsel or covering general costs in whole or in part. A number of States have found it useful to lend a staff member to a requesting State to facilitate the preparation and drafting of an effective request.

Asset Sharing

The sharing of confiscated assets between the requesting and requested States is an important way that cooperation can be encouraged and additional resources provided. The EWG noted that asset sharing arrangements between States now find support in multilateral instruments such as the UNTOC Convention (Article 14 par. 3, subparagraph b). The Group encourages States able to do so, to make greater use of asset sharing possibilities for such purposes.

Optimizing language capability

One special resource issue identified was the need for capacity for languages within the central authority. The optimum is the presence of bilingual or multilingual personnel working in the authority which enhances capacity for informal communication as well as with respect to review and presentation of requests. Access to reliable translation services is also of critical importance to ensure that translations of outgoing requests are accurate and properly reflect the original document and to review incoming requests where the accompanying translation is of a poor quality.

At the same time, some States may be unable to employ bilingual or multilingual personnel or have easy access to translation services for geographic or cultural reasons or because of a lack of resources. In such cases, creative solutions need to be found to deal with language problems. Some examples would be seeking assistance from other Government departments and missions abroad or perhaps from the requesting or requested State as the case may be.

Action 11. Role of the United Nations in facilitating effective MLA

UNDCP and CICP have recognized and established roles in assisting requesting States to implement particular international conventions, UNDCP, relating to drug control and CICP relating to transnational organized crime. The work includes legislative drafting assistance, model legislation on, for example, mutual

legal assistance, asset forfeiture, witness protection, and the domestic use of foreign evidence, training of prosecutors and judicial officers, and regional and interregional casework problem-solving workshops for practitioners.

Coordination of Technical Assistance

The EWG also recognized the essential role of UNDCP/CICP in working with its partners, first to help establish effective central authorities and, secondly, to coordinate cooperation and training efforts on a national, subregional and regional basis. In doing so, the EWG stressed the importance of drawing on the expertise of practitioners dealing with mutual legal assistance issues and casework on a daily basis, linking them to States in need of training and by networking their efforts under the scheme of wider partnerships.

Updating of United Nations Directory of Competent Authorities for Mutual Legal Assistance

In calling on States to notify accurate, appropriate and timely information particulars of their central authorities to transmit or execute mutual legal assistance requests for the purposes of Article 7 of the 1988 Convention, the EWG urged UNDCP to work with the States concerned to help ensure that the UNDCP Directory of Central Authorities is as useful as possible for day-to-day international casework cooperation.

Consistency between the 1988 Convention and the United Nations Convention against Transnational Organized Crime (UNTOC)

In noting similar basic mutual assistance requirements of the 1998 Convention and the 2000 UNTOC Convention, and the legal assistance work done by UNDCP and CICP, the EWG urged CICP and UNDCP to work closely together in assisting States to implement their mutual legal assistance obligations under the Conventions.

Development of Training Materials

The EWG noted the compilation, indexing and publication of all drug control legislation, including anti-money laundering legislation by UNDCP. The legislation is also available on the ODCCP website. The EWG recommended that UNDCP collect and compile from States any existing guidelines for foreign requesting authorities and training materials produced in this field of expertise (for example, the Commonwealth University Curriculum on International Cooperation to Combat Crime, coordinated training activities for magistrates from Spain, Portugal and France, etc.). The materials could then be posted on the ODCCP and partner websites with appropriate cross-links, subject to the agreement of the material providers.

The EWG encouraged the organization by UNDCP/CICP, Commonwealth Secretariat, EU, regional organizations and other interested partners, of regular meetings of mutual assistance practitioners to discuss developments in mutual assistance law, policy and practice.

PRECONDITIONS AND RISKS

Preconditions and risks were also discussed during the EWG and are reflected in the Report of the Informal Expert Working Group on Mutual Legal Assistance

Casework Best Practice, Vienna 3-7 December 2001 as well as the Report of the preceding EWG of 15-19 February, 1993.

Main Preconditions

Both countries should be party to the 1988 Convention if article 7 is to be used as the legal basis for the request;

Similarly, with respect to the United Nations Convention against Transnational Organized Crime;

There should be adequate domestic enabling mutual legal assistance legislation and procedures or, if treaties are self-executing in the countries concerned (i.e. the treaty itself becomes the domestic law of the country), the relevant treaty, bilateral or multilateral, enables the request or execution action concerned.

Main Risks

Absence of adequate enabling domestic legislation; lack of political will to implement the treaty or enabling legislation with adequate infrastructure and human/financial resources;

Absence of an effective central authority to request, execute or transmit to others for execution international mutual legal assistance requests;

Delay in executing the request and transmitting the results for use by the requesting State, usually due to lack of central authorities between which regular communication can identify and resolve outstanding request execution problems;

Introspective national focus in the Requested State on sovereignty, the paramount nature of domestic mutual legal assistance law, practice and procedure, particularly procedural law and practice;

Costs of the execution of requests can lead to serious delay and even refusal of requests, unless central offices can communicate to limit excessive requests and solve cost problems for example through cost-sharing arrangements.

RELATED TOOLS

For related tools please be hereby referred to the Report of the Informal Expert Working Group on Mutual Legal Assistance Casework Best Practice, Vienna 3-7 December 2001.

- The EWG-developed General and supplemental Checklists intended to provide general guidance in the preparation of requests for international mutual legal assistance in criminal matters.
- The General Checklist deals with the basic content of all mutual legal assistance requests. The Supplemental Checklists deal with additional content needed for the effective execution of requests for search and seizure, production of documents, taking witness statements/evidence, temporary transfer of prisoners to give evidence, pre-judgment seizure/freezing, or post-judgement confiscation.

The EWG also reproduced two Forms with permission, including a Cover Note (Request/Acknowledgment) for mutual legal assistance requests and an Authentication Certificate for Foreign Public Documents. Further, the Legal Advisory Programme of UNDCP developed comprehensive drug-related model legislation available for all major legal systems. In the field of mutual legal

assistance, the UNDCP Model Mutual Assistance in Criminal Matters Bill 2000, the Model Foreign Evidence Bill 2000 and the UNDCP Money Laundering and Proceeds of Crime Bill 2000 are available for States with a common law tradition and for States with a civil law system, the UNDCP Model Law on International Cooperation (Extradition and Mutual Legal Assistance) and the UNDCP model Law on Drug Trafficking and Related Offences.