

Informal Expert Group Meeting on International Cooperation in Criminal Matters

(Vienna, 9-11 April 2019)

Summary of the Chair

The United Nations Office on Drugs and Crime (UNODC), with the financial support of the Government of the People's Republic of China, organized and conducted, from 9 to 11 April 2019, an informal expert meeting on international cooperation in criminal matters.

The meeting brought together 36 experts and practitioners from 19 countries, representing both civil and common law legal systems, coming from institutions and agencies directly dealing with practical problems and challenges encountered in the field of international cooperation in criminal matters, and with 50/50 gender balance in their attendance.

Participating countries included: Algeria, Argentina, Austria, Canada, Chile, China, Egypt, Italy, Japan, Kenya, Mexico, Morocco, Peru, Romania, Russian Federation, Singapore, Thailand, United Kingdom, United States of America. With regard to regional networks, the following three networks were represented by Vienna-based UNODC staff: WACAP, CASC and Great Lakes Judicial Cooperation Network (GLJCN).

The participants engaged in dialogue and exchange of views and expertise/experience on practical aspects of international cooperation, as reflected in the agenda of the meeting. The agenda was divided into 5 sessions, but some of the issues under discussion were interconnected and therefore did overlap from one session to another.

At the closing session of the meeting, Mr. Zhang Xiaoming, in his capacity as Chair, summarized the salient points of discussion as follows:

Session 1. The use of the United Nations Convention against Transnational Organized Crime (UNTOC) as legal basis for international cooperation –challenges and potential

- 1) The development of international cooperation is not only a technical issue. It is also a matter of mutual efforts to bridge differences arising from different legal cultures and

systems and to implement common commitments on the basis of shared values. The Chair stated that an “approach of 5 Ms” – all of them complementary to each other – should be pursued: mutual interest, mutual respect, mutual trust, mutual assistance and mutual benefits.

- 2) Bilateral agreements or arrangements, regional treaties, other multilateral agreements or arrangements, including multilateral conventions such as the UNTOC and the use of the principle of reciprocity could have a complementary relationship in enhancing and facilitating international cooperation. Countries that have concluded bilateral or regional treaties on extradition or mutual assistance in criminal matters primarily use these treaties as a legal basis for international cooperation, and may also supplement their requests by referring to existing multilateral instruments. In the absence of a bilateral treaty, countries may rely on reciprocity as the basis to provide assistance, or use, where applicable, the provisions of multilateral instruments such as the UNTOC. In practice, there is an increasing trend of using the UNTOC as legal basis for international cooperation in criminal matters, as demonstrated by the presentation of pertinent cases during the meeting, but still the ratio of using it is much lower than that of using bilateral agreements. This was attributed to the prevalence of bilateral treaties or agreements with other countries and the effectiveness of such bilateral treaties or agreements, although it was also mentioned that in some cases such treaties did not include such types of cooperation as that for the purposes of seizure, confiscation and disposal of proceeds of crime or property.
- 3) The UNTOC provides a framework for international cooperation in criminal matters through its relevant provisions on both formal cooperation (articles 16, 18 and 13 on extradition, mutual legal assistance and international cooperation for purposes of confiscation, respectively) and informal cooperation among law enforcement authorities (article 27), witness protection authorities and financial intelligence units). Other provisions of the Convention such as article 19 on joint investigations and article 20 on special investigative techniques, including controlled delivery, are also useful, have been tested in practice and should be further used.
- 4) The UNTOC, including its supplementary Protocols establishing such offences as trafficking in persons, smuggling of migrants and firearms—related offences, has the potential to foster international cooperation in criminal matters especially through: the broad scope of application of its provisions on international cooperation; the expansion of the scope of extraditable offences by making use of the definition of “serious crime”,

as contained in article 2(b) of the Convention; and filling potential “criminalization gaps” in the domestic legislation of States parties (in cases of dualist legal systems), thus allowing for the fulfilment of the double criminality requirement, where this is needed, to allow the widest measure of assistance to be afforded in the broadest possible range of cases.

- 5) During the meeting, the participants discussed the benefits of utilizing the broad scope of application of the UNTOC, and particularly its international cooperation provisions, often in combination with other bilateral or regional treaties. Concrete examples were given where the Convention was used as legal basis for such modalities of cooperation as the spontaneous transmission of information; the deployment of liaison prosecutors; witness protection; and the conduct of investigations involving economic crimes. On the latter, an emerging trend was noted in relation to the use of the Convention in the context of large -scale anti-corruption and money-laundering investigations involving tax havens; financial crimes committed through conspiracy; seizure and confiscation of proceeds of crime; and, where permitted, the execution of non-conviction -based confiscation (see below).
- 6) UNODC should continue working with practitioners from States parties to the UNTOC with a view to compiling updated information and statistical data on actual cases in which the UNTOC was used as a legal basis for international cooperation in criminal matters (whether on its own or in combination with other bilateral or regional treaties), for further inclusion in tailor-made tools and/or posting on SHERLOC, according to relevant mandates of the Conference of the Parties to the UNTOC (resolution 9/3, annex III, recommendation 1(j)).

Session 2. Advantages, current challenges, lessons learnt and possible responses to international cooperation through mutual legal assistance

- 1) Experts stressed the importance of capacity-building to enhance the effectiveness of central and other competent authorities involved in international cooperation. Training in the area of financial crime and asset recovery was underlined. The rotation of personnel within central authorities necessitates inclusive and regular training. At the same time, the need for continuity in international cooperation practice, namely having

in place a core group of practitioners with extensive experience and already established communication channels, was also highlighted as a useful policy.

- 2) It was further noted that the direct communication between central and/or competent authorities of cooperating States, in addition to, or, where appropriate, in lieu of the use of diplomatic channels, could offer solutions to expedite international cooperation.
- 3) In view of the multiple domestic authorities in many jurisdictions involved in the execution of MLA requests, central authorities should play an active role in ensuring better coordination with such executing authorities. In this regard, the expanded version of the UNODC Directory of Competent Authorities (CNA Directory) was mentioned.
- 4) Language barriers were reported as a significant challenge in MLA (but also extradition) proceedings. The issue of translation is crucial for the expeditious and effective execution of requests. A good practice reported was the communication with foreign embassies of the requesting countries for the recommendation/identification of translators, where necessary, taking into account the need to ensure the confidentiality of the relevant information, as appropriate. Resorting to regional networks to seek guidance and feedback can also offer solutions. The use of paralegal officers with linguistic skills within central authorities was further mentioned.
- 5) Case management systems are essential for the efficiency and effectiveness of central authorities. The existence of dedicated structures or units within the central authorities to deal with the increasing volume and complexity of work relating to new and sophisticated forms of crime could be a step towards addressing the growing backlog of cases. Further, the use of statistics can facilitate more efficient case management monitoring and the realignment of resources accordingly.
- 6) The availability of information on the legal requirements of the requested State for the execution of MLA requests is of paramount importance for ensuring timeliness, accuracy and clarity of such requests. Although there are different methods of making available such information, the use of online platforms (such as the UNODC on-line Directory of Competent National Authorities) and the facilities offered by regional networks were mentioned as possible options. The dissemination of on-line procedural guidelines (*guías de procedimiento*) or templates for making MLA requests was suggested as a good practice.
- 7) The establishment of inter-institutional working groups and joint investigation teams comprising officials from each of the concerned States was seen as a positive practice

that has been tested and could further be pursued. Technical assistance may be explored to this end.

- 8) Liaison officers or liaison magistrates play a significant role in conducting effective cross-border investigations, inter alia, by facilitating the preparation of mutual legal assistance requests to the requested States in which they are based in and providing information on what is required in extradition requests and proceedings. The effectiveness of posting liaison officers or liaison magistrates could be enhanced by specialized training on the UNTOC and other applicable international instruments, as well as the legal system and national laws of the host country.
- 9) The importance of spontaneous transmission of information is emphasized in UNTOC (article 18, paras. 4 and 5). The main goal of spontaneous exchange of information is to assist foreign counterparts in obtaining information that could be helpful in conducting the preliminary stage of criminal proceedings
- 10) Informal consultations could play an important role in ensuring adequacy and clarity of international cooperation requests for their timely execution and should be explored first before sending a formal mutual legal assistance request. This minimizes the risk of such a request being refused or returned and delayed. In some cases, information needed for criminal investigations and proceedings could be obtained through informal assistance without the need for a mutual legal assistance request as such information may be provided by contacts in the law enforcement agencies or are publicly available on open source platforms. Therefore, States should build their mutual legal assistance (and extradition) relations on mutual confidence and strengthen, for that purpose, communication and coordination, including by enhancing the practice of formal and informal consultations at various stages of investigations and related proceedings, in particular with regard to the exchange of information on legal requirements and the exchange of draft requests in advance for clarification purposes. This is particularly important in terms of fulfilling the double criminality requirement, where this is needed (extradition and MLA involving coercive measures), and ensuring that the requirements of the domestic legislation of the requested State are met.
- 11) The use of electronic means to transmit requests for mutual legal assistance was highlighted as a good practice reported by a number of participants, as an established process for communication on the understanding that the hardcopy submission of the request and supportive documentation will follow. Nevertheless, the discussion also focused on potential challenges posed by the use of certain communication technologies

due to sensitive information dealt with in international cooperation requests. Reference was made to existing practices aimed at enhancing the security of the information exchanged, such as encrypted documents and the use of digital signatures.

- 12) Criminal activities carried out in the digital environment (for example, criminal misuse of cryptocurrencies) are posing significant difficulties to criminal justice practitioners. The number of requests for mutual legal assistance to obtain or preserve electronic evidence is growing drastically and current methods for dealing with such requests are not sufficiently efficient, both in terms of substance and timeliness, owing to the temporary and volatile nature of electronic data. Cooperation with the private sector, especially Communication Service Providers (CSPs) is vital to secure the preservation of and access to data.
- 13) In cases of international cooperation to carry out special investigative techniques, some participants discussed the importance of the “proportionality principle”. The relevant assessment could be made in light of the seriousness of the offence in question; whether a less restrictive alternative measure was available; whether there has been some measure of procedural fairness in the decision-making process; and whether affected persons have adequate possibilities for legal redress.
- 14) There is a need for prompt submission and execution of MLA requests for servicing documents such as judicial decisions to avoid complications in cases involving a short statute of limitations period.
- 15) Discussion also revolved around challenges arising from conflicts on territorial jurisdiction, especially in transnational cybercrime cases where, for example, the perpetrator is located in one jurisdiction, the server in another, while the effects of the crime are materialized in a third country or more countries. In this regard, conflicting jurisdictions may also result in concurrent requests for assistance and therefore consideration should be given to criteria for determining which request is to be granted (whether the requests have been made pursuant to a treaty or other legal basis; the interests of the requesting States; the relative seriousness of the offences; the nationality of the person and of the victims; or the chronological order in which the requests were received). Each criterion serves as a reminder of interests that may be present in a particular case and needs to be considered by the requested State, often in consultation with the requesting State. Reliance on such consultations may also be useful for the purpose of explaining the reasons for the final decision of the requested State.

Session 3. Service of documents, taking of evidence, confiscation and disposal of confiscated proceeds of crime or property (as defined in the UNTOC and on the basis of applicable bilateral treaties or agreements)

- 1) As reported, the process of international cooperation for purposes of confiscation may involve a combination of both informal requests for assistance and mutual legal assistance requests. Typically, mutual legal assistance is required in cases where the requested measures involve the use of coercive powers by the requested State, such as the power to compel the production of bank account transaction details or search and seizure orders.
- 2) The more intrusive the measure, the higher the evidentiary standard of proof required to specify that an offence has been committed; to demonstrate that the assets sought are linked to the offence or offender (nexus between the offence and the assets/property); and to show where exactly the assets sought to be restrained or recovered are located.
- 3) International cooperation in confiscation poses difficulties of its own due to such factors as diversity of national legal systems and the need to ensure the cooperation of the banking and financial sector. Such problems can only be addressed by working closer together at the international level to align national law and practice, using as far as possible such international points of reference such as the respective provisions of the UNTOC. At the national level, legislation and practice should be developed to allow greater flexibility in providing international cooperation in restraint and confiscation, with due regard to the legitimate interests of third parties. Many of the current challenges can be dealt with by ensuring that the authorities are aware of the legal tools available for cooperation and are motivated to use them.
- 4) Cases of non-conviction-based confiscation have been reported as a good practice. However, due to constitutional limitations or other restrictions of domestic laws, this practice is not followed in all jurisdictions. Reference was made to the fact that the UNTOC is silent on this issue, whereas the UNCAC requires - in article 54, paragraph 1 (c) - States parties to consider taking such measures as may be necessary to allow confiscation 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. In this connection, the applicability of article 34 para. 3 of the UNTOC (States parties can

adopt stricter or more severe measures than those provided for in the Convention) was highlighted.

- 5) The issue of the effective management of seized and confiscated assets as a prerequisite for preserving their value pending their disposal was addressed. The UNTOC lacks an explicit provision on the administration of frozen, seized and confiscated property. However, several participants noted that the policy and operational aspects of such administration are commonly addressed as significant issues in both organized crime and corruption cases in view of the need to maximize the benefit that can be gained from the confiscated proceeds or property.
- 6) The management of assets creates a multitude of practical challenges requiring specialized professional skills to maintain their value, manage them cost-effectively and ensure their sale at market value. Countries have been tackling those challenges using diverse approaches. Several countries have created specialized asset management offices, either within existing public sector structures or as independent entities. There is a need for the exchange of good practices and lessons learned, which would provide fertile ground for the development of global knowledge and guidance on effective ways to manage and dispose of assets seized and confiscated domestically, and on the administration, return and disposition of assets where more than one jurisdiction is involved.
- 7) In discussing the disposal of confiscated proceeds of crime under the UNTOC, attention was devoted to article 14, paragraph 2, of the Convention (“States Parties shall, to the extent permitted by domestic law and if so requested, give priority consideration to returning the confiscated proceeds of crime or property to the requesting State party so that it can give compensation to the victims of the crime or return such proceeds of crime or property to their legitimate owners”). It was acknowledged that further exchange of national experiences should be encouraged to accumulate knowledge on criteria used for the return of assets or on potential percentages stipulated in models of distribution of confiscated assets. Such experiences may include case-by-case arrangements, but preferably stand-alone provisions either in legislation or in applicable treaties need to be pursued.
- 8) There is a need to continue efforts for using more effectively the UNTOC as a legal basis for international cooperation for purposes of confiscation and disposal of confiscated proceeds of crime or property, taking into account the full scope of cooperation available under its relevant provisions; to promote awareness about the use

of the Convention in dealing with related matters; and to facilitate training activities for central authorities, judges, prosecutors, as well as law enforcement officers and personnel of financial intelligence units, who are engaged in international cooperation to target proceeds of crime.

Session 4. Practical aspects, challenges encountered and good practices in the field of extradition

- 1) Where the double criminality requirement is needed, it seems to be fulfilled in most cases regardless of the terminology used to denominate the offence in question or the category of offences to which it is considered to belong. Thus, requested States need only to establish that an equivalent conduct to the one for which extradition is sought is criminalized in their domestic law. This “conduct-based” concept is considered as a good practice, although provided only in the UNCAC (article 43, paragraph 2) and not in the UNTOC. Subsequent changes of the criminal charges in an extradition process is a challenge that can be addressed through consistent application of the rule of speciality.
- 2) The extradition process in a requested State is, in general, a two-tier process involving decision-making steps by both judicial and executive authorities, as prescribed in relevant legislations. In all stages of extradition proceedings, the principle of legality, in terms of compliance with the substantive conditions of extradition and the institutional framework in place, is important to avoid constitutional challenges.
- 3) Trends and developments in extradition law and practices in some States over the last years have focused on “fast-track” extradition procedures through the consistent practice of simplified extradition as an available option, subject to certain requirements and on the understanding that the person sought consent to such a simplified process. Article 16, paragraph 8, of the UNTOC provides that States parties shall endeavour to expedite extradition procedures, subject to their domestic law. Implementing legislation is necessary to enable the use of simplified extradition procedures. Such legislation could provide that if a person consents to extradition, there is no need to go through all stages of a typical extradition process. In addition, arrangements on simplified consent-based extradition proceedings are increasingly and consistently incorporated in bilateral treaties or agreements on extradition. Simplified proceedings are also prescribed under

regional arrangements, such as the European arrest warrant, which arrangement other regions may wish to consider.

- 4) Certain rights and guarantees that are applicable under the domestic legal systems to ordinary criminal proceedings may apply to extradition proceedings. Article 16, paragraph 13, of the UNTOC refers to due process and fairness of the domestic extradition proceedings in the requested State party. At the same time, it is acknowledged that the objective is not to turn the extradition proceedings into a mini-trial prior to the surrender of the person sought to the authorities of the requesting State, but rather to decide whether or not the person sought should be sent to the requesting State to face, by way of trial or sentence, criminal charges in that State.
- 5) Consultations play a pivotal role in providing assurances and guarantees regarding the treatment of the person sought after his or her surrender to the requesting State. Consultations with counterparts in the requesting State may also occur at different stages of the extradition proceedings in order to facilitate the decision-making process and may include effective advocacy and ways to address questions from the courts in the requested State.
- 6) Consultations at an early stage may also be a good opportunity to exchange information on legal requirements, including the content of the request for provisional arrest or the submission of a future extradition request. Such an exchange is of particular importance if the States involved have different legal traditions or systems.
- 7) In certain circumstances, diplomatic assurances provided by the requesting State can resolve problems related to the process of examining human rights considerations in the extradition process. Several participants noted, however, that even when diplomatic assurances are sought or being negotiated, such assurances do not obviate treaty obligations, if the extradition request otherwise meets the requirements of the relevant treaty.
- 8) Extradition and asylum intersect in a number of ways if the person whose extradition is sought has refugee or asylum seeker status. While States retain the prerogative to decide whether to accede to an extradition request, extradition procedures and refugee and asylum processes should be coordinated in such a way as to enable States to rely on extradition as an effective tool in preventing impunity and fighting transnational crime, but also in a manner that is fully consistent with their international human rights protection obligations. States should ensure the confidentiality of information related to a person's refugee status in the context of proceedings which may result in the

extradition of that person. Nevertheless, this does not preclude the requested State from giving a viable response to the requesting State on the status of the extradition request and the reasons of refusal.

- 9) The issue of extraditing a country's own nationals was also discussed. Some participants noted that in this modern age where transnational crime, including in most cases cybercrime, cross borders and the victims are located, and offences occur, in another jurisdiction, extraditing a country's own nationals is important for pursuing justice. Other countries noted, however, that their domestic laws barred the extradition of their own nationals.

Session 5. UNODC tools on international cooperation in criminal matters, including the UNODC Mutual Legal Assistance Request Writer Tool, and regional judicial cooperation networks.

Networking

- 1) Regional judicial cooperation networks¹ are important tools to facilitate international cooperation in criminal matters, train criminal justice practitioners in this area and raise awareness of the tools developed to assist investigative and prosecutorial authorities.
- 2) UNODC, as a global facilitator for international cooperation in criminal matters, currently supports several regional judicial cooperation networks, including the West African Network of Central Authorities and Prosecutors (WACAP), the Network of Central Authorities and Prosecutors from Source, Transit and Destination Countries in response to Transnational Organized Crime in Central Asia and Southern Caucasus (CASC) and the Great Lakes Judicial Cooperation Network (GLJCN). In 2019, UNODC will convene meetings with countries of South East Asia to possibly establish a judicial cooperation network for the region.
- 3) It is important for UNODC to continue facilitating the exchange of practical expertise

¹ Regional judicial cooperation networks are primarily instruments/initiatives available to all criminal justice practitioners (UNODC or other organizations play the role of secretariat or technical partner). The networks' national contact points are resource persons in their respective jurisdictions; they share contacts and information (e.g. on legal requirements in their jurisdiction), facilitate cooperation in court cases, are involved in the organization of training and provide strategic advice. The regional judicial cooperation networks are also platforms that various initiatives can use for training, networking, exchange of good practices, interaction with civil society or deployment of liaison magistrates.

among practitioners in the field of international cooperation; and to support for this purpose its efforts to organize practical-oriented expert group meetings on a regular, preferably annual, basis, in accordance with relevant mandates of the Conference of the Parties to the UNTOC (resolution 8/1, para. 18; and resolution 9/3 COP-UNTOC, annex I, recommendation 1(h)).

- 4) UNODC should continue capacity building activities and training on the use of the UNTOC for international cooperation purposes through wider dissemination of existing tools or, if appropriate, the creation of new template with clear guidance on legal requirements, as foreseen in the Convention.

Tools

- 1) The following tools were presented and criminal justice practitioners were encouraged to use them and contact UNODC in case they experience any difficulties or need any additional information in this regard:
 - ✓ The SHERLOC knowledge management portal (sherloc.unodc.org), a global repository on resources and laws on crimes, covering almost all mandated areas of UNODC² through its fifteen crime-types, in particular: its Caselaw Database which allows for researching cases on international cooperation and its cross-cutting issues section where cases based on the use of UNTOC as legal basis for international cooperation are collected, the Database of Legislation providing an overview of key legal provisions on international cooperation can be searched and accessed and the Directory of Competent National Authorities (CNA Directory) which allows registered users to search for the contacts of central or competent authorities worldwide, designated to receive among others international cooperation requests;
 - ✓ The UNODC Directory of Competent National Authorities, a SHERLOC-powered database. Access to this database is restricted to government officials. It contains the contact details of more than 740 central and competent authorities (from 175 countries) designated to handle requests for, inter alia, extradition, mutual legal assistance and transfer of sentenced persons. To access the directory, government

² In the field of international cooperation in criminal matters exclusively, SHERLOC database on legislation contains 7,800 pieces of legislation from 198 countries, as well as 2,900 case law documents from 117 countries.

officials must request an account via the following link:
<https://sherloc.unodc.org/cld/en/v3/sherloc/cna/register/>;³

- ✓ The MLA hotline⁴ recently launched by the Global Programme for Strengthening the Capacities of Member States to Prevent and Combat Organized and Serious Crimes (GPTOC): unodc-mla.facilitators@un.org;
- ✓ The MLA Request Writer Tool that criminal justice practitioners can use to draft MLA Requests in English or French: <https://www.unodc.org/mla/index.html>;
- ✓ UNODC guides, best practices and model legislative provisions on various topics (e.g. on extradition, mutual legal assistance, asset confiscation, sharing of confiscated proceeds of crime or property, transfer of sentenced persons, etc.);
- ✓ The UNODC Practical Guide for Requesting Electronic Evidence Across Borders, which was recently launched under a joint initiative of UNODC, the United Nations Counter-Terrorism Committee Executive Directorate (CTED) and the International Association of Prosecutors (IAP).

2) During the meeting, the importance of making available guidelines or templates on requesting different forms of cooperation was underlined. In this regard, the Secretariat presented the case of some States that have developed similar guidelines and that are available through the on-line Directory, usually in different languages. The importance of fostering the development of this type of on-line guidelines or templates by a larger number of States was highlighted as a good practice.

³ The On-line Directory of Competent National Authorities also includes the direct link to the text of the applicable domestic legislation, as well as information on each country's specific requirements.

⁴ UNODC can facilitate ongoing case cooperation by serving as a liaison between countries and identifying the right contacts in other jurisdictions. All the UNODC needs to know is the nature of the case and what type of assistance is needed (assistance to find a witness, to take statements, to get a court record, etc.).