MUTUAL LEGAL ASSISTANCE AND ASSET RECOVERY

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I. INTRODUCTION

The international community has seen cross-border movement of persons, goods and capital intensify greatly throughout the second half of the 20th century. While this global integration has brought greater wealth, it has also brought with it the growth of, and new trends in, cross-border crime. As a consequence, a new paradigm in criminal law has been emerging in this period, challenging the age-old international legal standards that have defined the modern sovereign State since the 17th century.

The rising international visibility of certain local events alongside the intensification of cross-border movements has allowed this rise of transnational crime[1], in particular of corruption, of money laundering and of transnational organised crime. The traditional interconnection between criminal law and sovereignty has, as a result, rendered the control of transnational crime at a purely local level obsolete. This is due to the fact that sovereignty becomes the main defence mechanism for transnational crime, as the latter normally structures itself through the use of different, and often conflicting, legal systems and traditions.

The response from the international community, in order to bridge this perceived impunity gap, has sought to enhance its cross-border co-ordination with regards to certain criminal offences. This co-ordination is done through hard and soft law instruments at the bilateral, regional and international levels. These instruments allow for a better co-ordination of disparate legal systems in order to avoid the superimposition of jurisdictions and efforts, where possible and applicable.

The focus of these international instruments, when combating corruption and money laundering, is to choke their incentives through the asset recovery process. It is understood that, if the financial incentives — be they the undue advantage offered or accepted, or the profits generated from it — are removed, the occurrence of corruption will be less likely.

The asset recovery process can be understood as a four-phased process[2], made up of the:

1. *Pre-investigative or intelligence gathering phase*, during which the analyst or the investigator verifies the source of the information which may initiate an investigation and determines its authenticity;

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[1] Maíra Rocha Machado (2004). Internacionalização do Direito Penal: A Gestão de Problemas Internacionais por meio do Crime e da Pena. p. 18.

[2] International Centre for Asset Recovery (ICAR) (2009). Tracing Stolen Assets: A Practitioner's Handbook. p. 19.

2. *Investigative phase*, where the proceeds and instrumentalities of crime are identified and located, as well as evidence of the true nature and ownership is collected. This stage covers several areas of investigative work in more formal processes, e.g., through the use of requests for MLA, and financial investigations to obtain and analyse bank records. This phase involves substantiating the veracity of the intelligence and information collected in the previous stage and converting it into admissible evidence. The result of this investigation can therefore be only a temporary measure – e.g., seizure – in order to later secure a confiscation order through the court;

3. *Judicial phase*, where a judgement against the perpetrator is obtained and, where applicable, a decision on the confiscation of the proceeds and instrumentalities of crime is determined;

4. *Realisation phase*, where the property is actually confiscated and realised by the State in accordance with the law, while taking into account international asset sharing obligations, as well as compensation for victims and determination on what to do with the confiscated assets.

One of the tools which is to be used within the asset recovery process – in particular if there are elements of cross-border movements – is known as mutual legal assistance (MLA). Its purpose is to articulate States in order to repress the cross-border criminal activity[3]. Therefore, MLA can be defined as the manner through which a State renders assistance to another so that the requesting State may comply with its jurisdictional obligations. The need for MLA is mainly due to the fact that the requesting State cannot exercise its jurisdiction in the requested State. As a result, the latter may furnish evidence or take coercive measures on behalf of the former in a way that both complies with its legal requirements and which may be valid in the courts of the requesting State.

MLA is based on the premise that a State will request another, through channels decided upon between them either bilaterally or through the international community, which will then rule on the contents of the request. It is not just a form of communication between States: it transcends to assistance provided by one State to another in order to co-ordinate legal systems with a view to satisfying evidentiary requirements relating to the investigations in the requesting State, or to safeguarding assets which may be at risk of loss or that are the fruits derived from criminal activity, and which are found in the requested State. When viewed this way, it is possible to expand the scope of application of MLA while respecting traditional perceptions of the sovereignty of States.[4]

This paper seeks to briefly put MLA into context in the asset recovery process, on the one hand, while focusing on the international and cross-border efforts to prevent and combat corruption, on the other. This paper will therefore seek to introduce the practitioner to the bases of MLA, its main principles, limits to international co-operation, and also the contents of requests for such assistance. Special focus will be given to the channels of communication, which must remain open and be used regularly and proactively by both the requesting and the requested States. Finally, this paper will also seek to address the issue of validity of the evidence in courts in both the requesting and requested State.

[3] GONZÁLES, S. A. ; REMACHA Y TEJADO, J. R, org. (2001). Cooperación Jurídica Internacional. p. 141.
[4] GONZÁLES, S. A. ; REMACHA Y TEJADO, J. R, org. (2001). Cooperación Jurídica Internacional. p. 70.

II. ASSET RECOVERY AND CORRUPTION

The traditional perception of preventing and combating criminal activity is that there is a need to collect the evidence, identify the perpetrator of the criminal offence under investigation, prosecute him or her and convict or acquit him or her to a punishment that has been pre-determined in law. The identification, seizure and confiscation of the proceeds and the instrumentalities of crime, in this scenario, is secondary: the focus of this action is in order to ensure that there are funds to satisfy the civil obligations which derive from the criminal process, e.g., compensation to victims.

While this approach remains applicable in those cases in which the focus of the criminal action is the unlawful financial gain deriving from the criminal activity, the object is ensuring firstly that these assets are secured, as they are the gains of criminal activity. This is because corruption-related offences[5], money laundering, fraud and other financial crimes focus on the illicit financial advantage gained by the perpetrator when committing such offences. In these cases, while it is important to seek the conviction and incarceration of the perpetrator, the prime focus is to ensure that they do not enjoy the profits of their crime. Thus, it is fundamental that these criminal assets are identified, seized and confiscated. They are the object of the investigation and prosecution, not its by-product.

The identification of corruption-related proceeds and instrumentalities of crime is done through, and is part of, the asset recovery process, as explained above. This is because, the unlawful assets are laundered[6] by the perpetrator of the crime. Money laundering is the tool used by the perpetrators of corruption and financial crimes to hide the true nature, origin and ownership of the profits derived from crime[7]. On the other hand, asset recovery is the process through which law enforcement identify and trace those assets, linking them to the perpetrators and their criminal activities, in order to obtain the necessary seizure and confiscation of these unlawful assets.[8]

The identification of the proceeds and instrumentalities of crime, however, is oftentimes complex and time-consuming. As a consequence, the asset recovery process may be constricted by the difficulties in identifying these proceeds and instrumentalities.[9] An added complexity is the fact that, during the money laundering process, it is common to transit the proceeds and instrumentalities of crime through numerous jurisdictions, in an attempt to mask the true nature, origin and ownership of those unlawful assets.

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[5] The United Nations Convention Against Corruption (UNCAC), the global standard for preventing and fighting corruption, defines the following offences and corruption-related offences: active and passive corruption of national public officials, of foreign public officials and of officials of public international organisations; embezzlement; trading in influence; abuse of functions; illicit enrichment; bribery in the private sector; embezzlement of property in the private sector and money laundering of corruption-related offences.
It should be underscored that not all of these offences are mandatory under the UNCAC, as the corruption-related offences are graded as mandatory and non-mandatory by the Convention.

[6] While the exact definition of money laundering depends of how this criminal offence is defined in the national legislation of each country, it can be generally understood, for the context of this paper — and based on the international standards — as the process of concealing, disguising or hiding the true origin, nature and ownership of property derived from, or involved in criminal activity, such as the corruption-related offences.

[7] International Centre for Asset Recovery (ICAR) (2011). Development Assistance, Asset Recovery and Money Laundering: Making the Connection. p. 9.

[8] Ibid. p. 6.

[9] Ibid. p. 13.

As a result, States will normally require, during the investigation and prosecution of a corruption-related case, to make use of MLA, in order to collect the evidence – to substantiate the criminal activity – and to take coercive measures – such as the preservation of the proceeds and instrumentalities through seizure orders – in another jurisdiction. One of challenges to MLA, however, is its response time, which may be inadequate for seizing and confiscating assets, given the time needed for its execution between the involved countries versus the speed in which international financial transactions occur.[10]

III. MUTUAL LEGAL ASSISTANCE AND ASSET RECOVERY

There are several ways through which a State may pursue MLA with another, through: (i) bilateral or multilateral international treaties, (ii) reciprocity undertaking, or (iii) use of the legislation of the requested State.

The international community has established a trend since the adoption of the United Nations Convention against Illicit Traffic in Drugs and Psychotropic Substances, adopted in 1988[11] (1988 Vienna Convention), by including specific provisions pertaining to MLA. Since then, these provisions have been enhanced and detailed more thoroughly, as can be seen in the United Nations (UN) Conventions against Transnational Organized Crime (UNTOC), adopted in 2000, and against Corruption (UNCAC), adopted in 2003.

There are also regional MLA conventions within regional bodies, such as the African Union (AU), the Southern Africa Development Community (SADC), the Organisation of American States (OAS) and the Council of Europe (CoE). Furthermore, according to current trends in the field of tackling corruption, there is, at the international legal level, the Organisation for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Transactions (OECD Anti-Bribery Convention)[12] and on the regional level, the corruption conventions of the OAS, the AU, the SADC and of the CoE.

An international multilateral or bilateral convention may be invoked for the purpose of MLA if both the requesting and requested States have ratified it. In the absence of such ratification by both States, a State may seek to request assistance with the provision of reciprocal treatment in future cases of a similar nature emanating from the requested State. It should be noted, however, that not all legal traditions allow for such a reciprocity undertaking without a legal basis between both countries. Finally, assistance may also be requested on the basis of the internal legislation of the requested State. This is because several jurisdictions already have within their legal framework provisions for MLA, e.g., Switzerland and the United Kingdom.

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[10] International Centre for Asset Recovery (ICAR) (2011). Development Assistance, Asset Recovery and Money Laundering: Making the Connection. p. 13.

[11] The 1988 Vienna Convention establishes a turning point for the international community as a whole. Prior to this, however, there were some successful experiences seen on the bilateral and regional levels, as is the case of the European Convention on Mutual Assistance in Criminal Matters (adopted by the CoE in 20 April 1959) and its additional Protocol, adopted in 17 March 1978. On the bilateral level, Switzerland and the US signed a bilateral treaty on mutual legal assistance in 1977.

[12] It should be noted that the OECD Anti-Bribery Convention does not contain mechanisms enabling MLA. It has nevertheless been mentioned in this paper as it is an important instrument for the prevention and the combating of corruption.

There are, however, subtle differences between multilateral and bilateral treaties that provide for MLA. Due to the fact that multilateral conventions encompass numerous jurisdictions (e.g., the UNCAC has been ratified by over 150 jurisdictions), the co-ordination between all these States limits itself to establishing important principles and standards concerning specific criminal conduct which the international community wishes to address and combat. The main element of multilateral conventions is not the co-ordination of MLA instruments, but rather the co-ordination of specific offences deemed relevant by the international community. In these cases, more attention is given to the internationalisation of local paradigms,[13] rather than the procedural provisions enabling the prevention and the combating of such offences.

On the other hand, bilateral treaties on MLA, due to the limited number of parties involved, are able to establish exact procedures and the limits to co-operation that the involved States are willing to provide through such assistance. Bilateral treaties, therefore, do not generally address criminal conduct of the substantive criminal law, but rather leave its application open to any criminal activity (although limited by the principle of speciality, as will be seen below), specifying the rules of procedure to be followed in requests for MLA. Co-ordination between two jurisdictions that have a bilateral MLA treaty in place is more easily attainable, as they seek the co-ordination of jurisdictions and their mechanisms to counter cross-border criminal activity, rather than focusing on the internationalisation of the local paradigms.

It should be noted that the use of the bases for MLA listed above are not mutually exclusive. A request for MLA can be based on one or more conventions, or on a convention and the national legislation of the requested State. This is because the request may address multiple criminal activities of a person or persons, which can easily span numerous multilateral conventions. On the other hand, it may be possible to use a multilateral convention, which addresses specific transnational crimes, and a bilateral treaty, which will specify the appropriate procedures to be followed.

The practitioner should therefore, at an initial stage, analyse the criminal activity found within his or her jurisdiction but which carries effects outside of it, superimposing the said activity with all the international conventions that its country has ratified. Following this step, it should observe whether these conventions have also been ratified by the State in which assistance is to be requested.

1. Mutual Legal Assistance and the Pre-Investigative and Investigative Stages

When an investigation reaches the stage at which an action must be executed within another jurisdiction, the investigator or prosecutor must focus on three initial questions: whom should be contacted in order to request effective assistance, what mechanism should be used, and when should this request be submitted to the requested State? In order to answer these questions, several factors must be taken into account and they have to be considered and analysed on a case-by-case basis.

The investigator should first determine whether the information sought in another jurisdiction could be produced formally or informally. Should the latter scenario be the case, that is, if no evidence is to be presented to a court or coercive measures sought but rather the collection of information to support furthering the investigation, the investigator may wish to

[13] Boaventura de Sousa Santos (2005). A Crítica da Razão Indolente: Contra o Desperdício da Experiência. p. 18.

make use of his or her contacts in order to obtain said information. If no contacts are known, the practitioner should make use of his or her contacts to pursue other contacts within their network. Another avenue to be considered is the use of legal attachés or police liaisons with the Embassy of the requested State. Another mechanism that should be sought in the informal assistance is making use of the numerous groups available for such purposes, such as the Egmont Group of Financial Intelligence Units (FIU) or the Interpol channels.

Should the procedure sought be produced formally, not only must the practitioner make use of the contacts mentioned in the preceding paragraph prior to issuing a request for MLA, but he or she must also contact the central authority of his or her State. The central authority is a body comprised of experts in the field of MLA. Ideally, the central authority is responsible for assisting the law enforcement community and prosecutors in devising their international strategies for an investigation and prosecution, if MLA is required. In order to do so, the central authority must heavily rely on its networking capabilities with central authorities and officials of other jurisdictions, but also have a general understanding of the requirements for MLA and the legal requirements necessary in the requested State in rendering assistance, in order to ensure effectiveness and diligence in the execution of the request. The staff at the central authority should, for this reason, have an adequate understanding not only of the legal and judicial requirements of their country, but also that of the main requested States.

Preliminary contact prior to taking any actions pertaining to MLA is essential in raising the chances of a successful request: in international co-operation, communication is key. Such contact will ensure that the requesting authority attains an understanding of what information must be contained in the request and how the information should be best conveyed within the request to the requested State. Also, such preliminary contact will anticipate the forthcoming request, and allow the requested State to analyse and agree on the terms of the draft request, ensuring its future effectiveness. All these factors become particularly important when the request is either deadline driven which is often the case, or its execution is urgently required.

The timing for issuance of the request is also very important. This is because while the investigation may be confidential in the requested State, procedures in the requesting State may determine that the request must be disclosed to the defence prior to sending the evidence to the requesting State. Communication, once again, is paramount so that both the requested and the requesting States fully understand the outcomes, results and consequences of the assistance rendered. It is only through appropriate communication that the practitioner will learn and understand the legal implications of the request in the requested State. Moreover, understanding these implications will also anticipate legal challenges in the proceeding in the requesting State.

2. Principles Governing Mutual Legal Assistance

There is an array of principles that govern MLA, derived from both international and national law. From a day-to-day practical experience, however, two principles stand out for practitioners who are faced with drafting requests: the principles of dual criminality and speciality.

The principle of speciality prohibits or prevents the requesting State from utilising the results arising from the assistance rendered by the requested State in proceedings other than those specified in the request for MLA. This does not mean, however, that the results from

such a request cannot be utilised in proceedings other than those specified in the request for MLA. Rather, it means that the requesting State must ask in writing for permission from the requested State to utilise the results in other proceedings, and obtain such authorisation prior to disclosing the evidence in other proceedings.

This written request must refer to the new proceedings in which the requesting State wishes to use the evidence, explaining the offences under investigation, the context of the investigation and how the evidence provided would benefit the other proceedings. Should the requested State agree, the evidence may then be lodged in the new proceedings, respecting any conditions that the requested State may wish to impose.

The principle of dual criminality, on the other hand, is capable of easy understanding but often difficult to fully comprehend. Requesting States often see it as the main reason for restricting or denying assistance by requested States. This principle, which can also be found in other forms of international assistance, such as extradition proceedings, conveys the fact that the offence under investigation in the requesting State must correlate to an offence in the requested State. The offence in both the requesting and requested States do not have to be identical – if this were to be required, it would, in fact, greatly diminish the possibility of rendering assistance. Rather, it means that the core elements of the offence in both States must be similar in nature.

While drafting the request for MLA, the practitioner must be aware of the dual criminality principle, and explain how its jurisdiction perceives the offence. The practitioner cannot simply lay down the legal definition of the offence and hope that the requested State will be able to understand it and find a similar offence within its legal system – the practitioner drafting the request must seek to explain how the offence operates within its jurisdiction, and to intertwine it with the subject-matter of the request with the criminal offences found in the requested State. The practitioner must heavily rely on communication with the requested State in order to achieve this, as the understanding of the criminal offences in the requested State will only be forthcoming through this channel.

It should be highlighted that mutual legal assistance is not a transfer of the responsibility to investigate to another country (commonly known as a "fishing expedition"). While the requested State may have the jurisdiction to conduct an investigation, it is the requesting State which has the jurisdiction to investigate and prosecute. It is merely requesting the former to collect evidence or to conduct and act on behalf of the latter, as it does not have jurisdiction to act in the requested State. Thus, the requesting State must conduct its own investigation, especially if it is the only one which has jurisdiction over the matter, and the requests for MLA must be sufficiently clear, detailed and based on preliminary findings from its own investigation. The requesting State's preliminary investigations must sufficiently provide details about the background for the action which is being requested in the request for MLA.

3. Kinds of Assistance

Treaties on MLA generally provide a list of measures under which assistance may be sought. This list, however, is not exhaustive and States will render assistance insofar as the request does not contradict its own internal constitutional and legal framework. Furthermore, assistance may be rendered at any stage of the criminal proceedings — both pre-trial and trial — and includes acts ranging from the service of process to more complex coercive measures such as obtaining bank statements and seizing proceeds of crime. Other coercive measures

such as seeking to enforce arrest warrants or the extradition of persons are not encompassed by MLA and are done through extradition.

It should be noted that MLA is entrenched within the criminal jurisdiction of a State, which, in turn, is the most visible aspect of its sovereignty, and no other State may seek to apply criminal proceedings directly or enforce criminal orders within another State's jurisdiction without its prior approval. What this means in practical terms is that requests for MLA must contain sufficient information in order for the requested State to understand what is being sought and its connection with the underlying facts, so as to be able to act on behalf of the requesting State within the former's jurisdiction. Failure to provide the minimal amount of information to satisfy the requested State's jurisdiction will more likely than not result in the rejection of the request, as it will be deemed insufficient. Furthermore, the requesting State must also inform the requested State upon application for MLA the reasons for which such coercive measures or production of evidence are necessary for its criminal proceedings.

MLA is not a means to have the requested State carry on an investigation for the requesting Sate, and thereafter to retransmit the results to the requesting State, so that it may initiate its own investigation or prosecution. This is also known as a fishing expedition, or when the requesting State shifts the burden of the investigation to the requested State. One of the keywords in MLA is co-ordination, and, as such, the requesting State must provide sufficient information, which can only be obtained through investigation, to enable the requested State to render the assistance sought.

When requesting assistance, the practitioner must also be aware of the legal requirements to be met in both the requesting and requested States for the assistance sought, e.g., transmission of affidavits or court orders alongside the request for MLA. While the practitioner of the requesting State is knowledgeable of the standards needed for the production of evidence, one must assume that this is not the case regarding the legal standards of the requested State.

There are many variables to this equation. The type of assistance to be pursued in the requesting State is the first point that the practitioner should analyse. Requests seeking the service of documents or court orders from the requesting State will have simpler standards, whilst taking evidence from a witness or expert may be more complex, as some States deem the production of evidence by witnesses a coercive measure, should the witness not wish to produce it voluntarily and must, therefore, be compelled to produce evidence.

Providing bank records or seizing proceeds of crime, on the other hand, have higher standards. Banking information is, for the most part, legally protected, and a court order has to be obtained prior to its disclosure to both the authorities of the requesting and requested States. Seizing of assets in the requested State on behalf of the requesting State, is the most complex type of assistance to be sought, as is its maintenance for future confiscation and repatriation.

One important point to consider is that requests for MLA are not final. This is to say that requests may be issued at any stage of the criminal proceedings in the requesting State, and that more than one request may be issued for the same proceedings. The practitioner may wish to pursue initially the production of banking information pertaining to an account held by the investigated person. Upon disclosure of the banking information, the investigation

may conclude that other accounts were also used, at which point further requests for disclosure should be made to the requested State. When this investigation has firmly established the link between the investigated person, the facts and the bank accounts, and the monies have been located, a further request for MLA should then be made, seeking to seize the proceeds of crime.

As such, requests for MLA should remain simple, to the extent possible, and should seek precisely what the investigation in the requesting State has already uncovered. One overly long and detailed request, containing multiple requests for assistance are not only cumbersome to execute but also raise the level of complexity, which will invariably result in delay in its execution. Therefore, the practitioner should seek to issue requests with precise objectives: the issuance of a request does not preclude issuance of future requests seeking to amend the previous one or containing a different focus for the assistance sought. This approach, in fact, is generally better accepted and usually has a better chance of success.

Upon establishing the type of assistance to be pursued, the practitioner must then know and understand the standards to be met in the requesting State. This must be done with prior communication with the requested State. Where a more experienced practitioner in MLA may be able to make use of his networking contacts, a new practitioner in the field will have to rely on the central authority of his country.

However, it may not only be the central authority of the requesting State that will have the necessary information. Additionally, other very important sources of information for the practitioner are contacts within the Embassy of the requested State in its own State, such as legal attachés or police liaisons. Many countries nowadays have within their Embassy staff experts from their law enforcement community, and they should be contacted as they are aware of their own law enforcement community and the requirements necessary to obtain the assistance sought in the requested State. Embassy contacts seek to bridge the gap between law enforcement communities of States.

4. Contents of the Request

A request for MLA must be simple and objective, as the requested State must understand the correlation between the criminal activity in the requesting State and what is being requested. The assistance sought should be clearly established and linked to the facts and criminal conduct described in the request.

In order to have a successful request for MLA, it is common to have an investigation that has already been initiated in the requesting State. Its findings will lead the investigator to new leads or hypotheses, which must then be tested in order to confirm if the investigated person(s) is guilty. However, should the information needed to confirm some of these hypotheses be in another jurisdiction, a request for MLA will be necessary.

In order to initiate a request for MLA, the request in the requesting State must be prepared by the relevant authority. It is of little use to have all the information and proceedings done properly if the competent authority does not sign the request, as no court of law in the requesting State will accept the evidence that was, in the final analysis, requested by an incompetent authority. The proper authority will then seek to provide the necessary information emanating from the investigation in the requesting State to the requested State, and be sure that the requirements in both States are met.

The request for MLA must include personal information of the person or persons under investigation, i.e. the full name of the person, date of birth, name of his or her mother and passport number; a summary of the proceedings underway in the requesting State, including the docket number, a brief description of the proceedings, and the stage which the proceedings under the criminal procedures of the requesting State has reached.

A brief description of the facts is to follow the introductory information. Here, the requesting State must provide information of the facts, and how these facts correlate to the investigated person or persons. A correlation between the criminal offence or offences and the facts and persons must also be explained.

Thereafter, a copy of the criminal offences and their sanctions must be made available to the requested State. It is of the utmost importance, however, that these criminal offences are explained. This is necessary as some countries require that requests for MLA meet the dual criminality principle, in which the offence in the requesting State must find correlation with a criminal offence in the requested State.

5. Validity of the Evidence

Preparing a request for MLA is only part of the work which has to be done in MLA. Its preparation must be thorough and complete, as the main goal is to guarantee its effectiveness. Not only must the effectiveness of the request be considered but also the results arising therefrom.

Whilst it is important to meet the requirements of a request for MLA established by the legal framework of the requesting State, in order for it to provide the assistance sought, the actions undertaken by the requested State must also be deemed applicable in the requesting State. Bilateral, regional and international treaties which contain rules for MLA determine that the rules of procedure for the execution of the request shall be those of the requested State.

What if, however, the way in which the evidence is produced by the requested State is considered inadmissible by the requesting State's jurisdiction? It should be highlighted that the general rule mentioned in the preceding paragraph does contain an important exception: the requesting State may ask the requested State, in the former's request for MLA, for it to observe specific procedures applicable in its jurisdiction whilst executing the request. The requested State shall then comply with these rules during the execution of the request, to the extent that they do not conflict with the requested State's internal legal framework or its constitutional requirements.

An important observation thus arises: as uncommon as the procedure may be in the requested State, it shall be observed. Therefore, communication between the requesting and the requested States is of the essence in order to guarantee the success of this procedure, and to understand the extent of application of the requesting State's procedures within the requested State's jurisdiction.

Therefore, if the evidence is produced in a valid manner in the requested State, or if the procedure adopted for the production of the evidence is considered valid by the requested State, it must be considered as valid in the requesting State's jurisdiction.

IV. CONCLUSION

The asset recovery process is a powerful tool for the combating of corruption-related offences. It is also, however, a complex process which requires the investigator and the prosecutor to think outside the box.

An important part of the asset recovery process is mutual legal assistance, as the proceeds and the instrumentalities of crime will normally transit between numerous jurisdictions in an attempt to have hidden – and sometimes even have it as a final destination – by the perpetrator, the true nature, origin and ownership of these proceeds and instrumentalities.

A request for MLA is however a delicate balance between what information is necessary and should be conveyed, and what, in fact, has to be disclosed. This is so because several factors come into play – whereas the requested State needs enough information and understanding of the case in the requesting State in order to render assistance in the assistance sought, an excessive amount of information may create confusion in the requested State, and misunderstanding as to what is the purpose of the request. Moreover, too much information may be made readily available to the defence at a moment when the investigation is still confidential, thus defusing the element of surprise necessary to any investigation. Of fundamental importance to the asset recovery process in general, and mutual legal assistance in particular, are that the channels of communication between the requested and requesting States remain open and are used at all times, even prior to the issuing of the request for MLA itself.

The key to successful MLA is, thus, communication. It is only through clear, concise and constant communication prior to, throughout and after the assistance has been rendered, that the requesting authority will be able to know the intricacies of MLA with the requested State. Moreover, communication brings another important element to MLA: trust. Through communication, one party is able to gradually build the necessary trust that any law enforcement activity requires in order to ensure effectiveness and success.

Although the variables of MLA – difference between legal systems and traditions, the type of assistance required and the subject matter of each investigation all interacting simultaneously – do not allow for one to establish a formula for sure success, it is possible to establish a checklist against which a request should be tested whilst it is in the process of being drafted.

The practitioner should establish what assistance will be sought through the request and what the legal basis will be. Once this is defined, dual criminality issues should be established, if any, and the drafting of the request should be done in a way that it can be comprehended by the requested State's jurisdiction. The request should be proofread in order to ensure that all the necessary information and linkages are contained and, if possible, sent to the requesting authority so that it too may determine that all the information is contained within. Finally, prior to sending the request, it should be checked whether all the appropriate supporting documentation, if any, or, if necessary, accompanies the request.

I. APPENDIX OF ABBREVIATIONS

1988 Vienna Convention	United Nations Convention against Illicit Traffic in Drugs and Psychotropic Substances
AU	African Union
CoE	Council of Europe
FIU	Financial Intelligence Unit
MLA	Mutual Legal Assistance
OAS	Organisation of American States
OECD	Organisation for Economic Co-operation and Development
OECD Anti-Bribery Convention	Convention on Combating Bribery of Foreign Public Officials in International Transactions
SADC	Southern Africa Development Community
UN	United Nations
UNCAC	United Nations Convention Against Corruption
UNTOC	United Nations Convention against Transnational Organized Crime