TOPIC 3

THE SCOPE OF ASSISTANCE TO BE RENDERED TO THE REQUESTING STATE WITHIN THE FRAMEWORK OF MUTUAL LEGAL ASSISTANCE

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I. INTRODUCTION

In recent times, the rapid development of technology particularly in the fields of communication and transportation has successfully reduced the world to a "global village". These technological advances were intended to benefit the entire world by bringing different cultures together, and fostering a better understanding between the diverse religious, ethnic and cultural groupings the world over. Unfortunately, they have also been exploited by a criminally minded few, who have dedicated themselves to the usage of this equipment for the purpose of individual gain, and in the process circumventing and trampling upon all laws, ethics and regulations that stand in their way.

This unfortunate development is no better reflected than in the internationalisation of crimes, which by virtue of their cross-border characterisation have led to the coining of the term "trans-national crime". These crimes which are perpetrated by organized criminal gangs include, but are not limited to drug trafficking, illicit arms dealing, human trafficking, international fraud and terrorism to mention a few. In the process, these criminal fraternities accumulate stupendous wealth, which is used to further their nefarious ends and is intermingled with legitimate monies through the process of laundering and investments in legal enterprises.

The fight against organized trans-national crime has thus become the concern of law enforcement agencies in every part of the world. In consideration of the sovereignty of nations, it has become necessary to evolve new approaches to combat these crimes. As was said by the Attorney General of the United States of America, Janet Reno, "....we cannot continue to use 19th century methods to fight 21st century crimes". This statement is not limited to the technology required to successfully combat organized crime, but also, if not moreso refers to the ever-increasing need for co-operation between nations to successfully achieve this end. This 114th Crime Prevention Seminar examines two forums of co-operation between nations viz. Extradition and Mutual Legal Assistance Treaties (MLATs). It is with respect to these two types of treaties as a means of combating organized trans-national crime that problems were

highlighted, discussed and in some cases recommendations proffered. The subject matters and discussions under topic 3 are as reflected below in the following order:

- The structure and function of the Central Authority for the purpose of Mutual Legal Assistance.
- The confiscation of the proceeds of crime and the modalities for sharing.
- The feasibility of granting mutual legal assistance through new investigative methods and technologies.

II. STRUCTURE AND FUNCTION OF THE CENTRAL AUTHORITY FOR THE PURPOSE OF MUTUAL LEGAL ASSISTANCE AND EXTRADITION

A. Problem

Participants agreed that most central authorities presently appeared to cause delay in the response to, and execution of requests. It was with this in mind therefore, that discussion centred on the expectations of a central authority in terms of its function rather than its structure. Additionally, the question as to whether a different central authority was necessary to address requests on mutual legal assistance as opposed to extradition was raised as mutual legal assistance and extradition represented different intentions and to a certain extent different procedures.

B. Response

1. The seminar observed that most countries present the Department of Justice or the Office of the Attorney General as the central authority. It noted however, that a few countries have more than one central authority, which varied dependant on the content of the request. The purpose and function of the central authority was reduced to three essential duties:

   i. It is to be accessible and visible as a contact point. This means it should have a clear unambiguous reference (name), which should also include an address(es), telephone and facsimile numbers, e-mail address(es) and any other information that will enable easy access by communication to the authority in normal or urgent times.
   ii. It is to oversee the administrative and executive processing of all requests referred to it. It is thus not to exist merely as a mail box, but is expected to actively follow up on all requests giving directives and information as is necessary.
   iii. It should thus be staffed with competent hands versed and experienced in this field, and with the requisite logistics to accomplish its duties with the minimum of inconvenience.

2. The seminar also sought to make a clear distinction between the “central authority” on the one hand, and the “competent authority” on the other. While the former refers to the individual or institution through which requests are made and received and directives given with respect to their execution, the latter refers to the agencies or departments assigned the legal authority to carryout, enforce and implement the execution.

3. On the question of the number of central authorities appropriate in a given state, the seminar felt it best to leave this to the discretion of the state as this was an issue of domestic policy upon which international consensus would be difficult to achieve. It was

rather advocated that treaties should concentrate on ensuring the availability as quickly as practicable of all information on the chosen central authority to facilitate expeditious communication. The seminar also stressed that in as much as the structure of a central authority could not be dictated that each state should nonetheless endeavour to ensure its functionality by staffing it with adequate personnel and equipment and ensuring the same for all competent authorities. The seminar thus concerned itself more with the functionality of the central authority, than with its number or structure.

III. CONFISCATION OF THE PROCEEDS OF CRIME AND MODALITIES FOR SHARING

A. Problem

The illegitimate proceeds of criminal activity in many states are subject to confiscation on the orders of a competent court after due process. However, many of these legal provisions are silent on the disposal of these confiscated assets, and thus do not consider the possibility of sharing the assets with another state. This unfortunate situation exists, despite the fact that in many cases involving transnational criminal activity, the confiscated assets in question were illegally acquired through criminal activity in one state, but necessitated the involvement through legal assistance of law enforcement agencies within another state. The issue becomes further complicated when these assets are invested in legitimate enterprises, as the tracing of these assets requires expert knowledge and experience. In addition, if an agreement on sharing is arrived at what yardstick, criteria or modality is to be adopted in respect thereto.

B. Response

1. The seminar unanimously agreed that criminal proceeds should be subject to confiscation by order of court, and that in states where this legal provision did not exist (if any), the state or states concerned should be encouraged to so legislate.

2. The seminar also sought to make a clear distinction between confiscation and disposal, as confiscation referred to the legal process of permanently depriving a person of his assets in favour of the government; disposal refers to a decision on its subsequent use.

3. Participants were of the opinion that the sharing of assets between participatory states to an investigation particularly of organized transnational crime, recognised and acknowledged the co-operation necessary to fight-organized crime, and the efforts of other states and their respective law enforcement agencies. In this respect therefore, the seminar recommended that the most appropriate avenue for asset sharing are bilateral treaties, since this problem is insufficiently addressed in the domestic legislation of most states. These bilateral treaties would thus provide the legal basis for sharing the proceeds of crime between the participating states.

4. As opposed to bilateral treaties, the multilateral conventions are not well suited to regulate all the substantive and procedural problems associated with asset sharing. The most negotiators of these conventions are able to agree on is a clause that encourages the state parties to conclude bilateral agreements and arrangements to this effect.

5. Before the issue of the modalities for sharing was broached, the seminar cautioned that the legitimate third party interests in confiscated assets should be acknowledged, and that part of the confiscated assets excluded from sharing.

6. The actual modalities or criteria for the sharing would have to be agreed upon by the states on a case by case basis as the variables involved make the issue too complicated for the presentation of a single formula. Where illegitimately acquired assets have been inter mingled with legitimate investments, the proportion that can be traced and identified to the satisfaction of the courts should be subject to confiscation and disposal.

7. Finally, not all confiscated assets should be subjected to disposal without careful evaluation of the other states' interests as some may have a cultural, national or even a spiritual significance and cannot be subjected to evaluation. In these instances, it would be appropriate to return the asset in question in the greater interest of mutual co-operation and understanding.

IV. FEASIBILITY OF GRANTING MUTUAL LEGAL ASSISTANCE THROUGH NEW INVESTIGATIVE METHODS AND TECHNOLOGIES

A. Problem

The seminar recognised and acknowledged that with the passage of time, new methods, techniques and technology were being applied to the investigation and prosecution of cases. However, that though these techniques and methods had their advantages, in an era when it is necessary to obtain evidence in one state, and use it for prosecution in another certain problems become apparent. This is all the more so when the legal systems and procedures of the countries involved are different. The two principle problems were discussed under the headings of "legal" and "practical".

B. Response

1. The seminar identified the following technologies that have been employed to some degree or other in modern law enforcement and criminal justice processes:

   i. Audio Tape Recordings
   ii. Video Tape Recordings
   iii. Telephone Conferencing
   iv. Still and Movie Photography
   v. Video Conferencing (Satellite Link)
   vi. Close Circuit Television
   vii. Electronic Surveillance
   viii. Satellite Surveillance
   ix. Electronic Bugging
   x. Fingerprint Analysis
   xi. DNA Analysis
   xii. Controlled Delivery

The list was considered not exhaustive however, each of these methods or techniques of investigation had at one time or other, particularly in developed countries, been applied in granting or obtaining mutual legal assistance in:

   i. Recording of evidence - oral and physical
   ii. Searches, seizures and confiscations
   iii. Examination of objects and sites
   iv. Provision of information
   v. Locating and identifying persons and objects, and
   vi. Other types of assistance.

2. Having acknowledged the problems, the advantages of these modern investigative techniques are as many

as the techniques are varied. Firstly, these techniques can (under certain conditions), and have been, successfully employed in investigations and court proceedings. Secondly, being purely scientific methods they are verifiable through other scientific methods of analysis and therefore the authenticity of the evidence is ascertainable. This means thirdly, that their utility is both effective and pro-active. In the case of court proceedings, and in certain instances investigations, some of these techniques have the capability to reduce the risk, time and expense associated with travel, and consequently limit the time and cost of the entire judicial process. They also and particularly where organized crime is concerned, can where necessary afford protection to witnesses who may be in danger when testifying. Finally, modern scientific technology supports and protects the rights of the individual by ensuring through indisputable means that right person is committed to prison, where older more over bearing methods of investigation left a margin of doubt. In this respect science furthers the interests of democracy.

3. The legal problems associated with these new techniques were best illustrated in the use of controlled delivery and video link technology. Controlled Delivery it was noted was one of the major outcomes of the 1978 United Nations Convention on Drug Trafficking held in Vienna, Austria. It is the process of allowing prohibited narcotic substances to be transported through various territories, under the covert surveillance and "supervision" of law enforcement agents. The objective is to identify trafficking routes, volume of traffic, the means employed and the traffickers themselves, with the ultimate aim of devising strategies to prevent further trafficking of these substances. This technique has over the years proven an extremely effective way of combating the drug trade, and as a result the technique has been applied to other crimes with equal success. However, the technique has not been without its birth pangs. Because of the differences hitherto mentioned in legal systems, policies and approaches to crime resolution reflected by nations the world over; controlled delivery has met with some "opposition". This perhaps principally extends from a legal notion that "...he who comes for justice must come with clean hands". The point often made is that since the law enforcement agents knew of the trafficking of drugs, but did nothing about it, they have by their omission committed a crime. Therefore perhaps, the value of their testimony and indeed the evidence (drugs) is questionable.

4. A further example of the legal problems that have to be resolved with new investigative techniques was illustrated by the increasing use of video link (via satellite) technology in obtaining testimony and information. The question here is one of admissibility in the courts as in most countries there exist no legislation in this respect, and the courts have not adopted it as part of their "Judicial Practice". Furthermore, most courts for the preservation of justice demand the physical appearance of witnesses and not matrix imagery no matter how impressive it may seem. In addition to the above, some of these techniques constitute an infringement of the rights of the individual particularly where electronic surveillance is deployed in investigations. As opposed to the four fundamental human rights recognised as non-dirigible (the right to life; the

prohibition on torture and other forms of cruel, inhuman and degrading treatment and punishment; the prohibition on slavery; and freedom from *ex post facto* or retroactive criminal laws), governments may impose some restrictions as necessary in a democratic society on other rights; such as the right to privacy.

5. One of the practical issues raised by the new investigative techniques bordered on the technical and financial problems. Some of these techniques involve infrastructure and equipment the cost of which cannot reasonably be expected to be met by some law enforcement agencies or their governments as resources are limited, and their priorities different. This of course could be over come if governments are willing to dedicate a percentage of confiscated criminal proceeds to the fight against crime.

6. Another practical problem discussed bordered on the training and technical competence of personnel to handle the sort of equipment used in these investigations. It is obvious that training would have to be provided in the spirit of international co-operation by countries whose understanding of these new methods factored its implementation. Again, the issue of cost would have to be addressed, but could be overcome if nations co-operate in the interest of a crime free world. This desire has been expressed in the draft Convention against Transnational Crime (TOC), which provides that States Parties shall assist one another in planning and implementing research and training programmes designed to share expertise in various areas. These areas include the collection of evidence, modern law enforcement equipment and techniques, methods used in combating transnational organized crimes committed through the use of computers, telecommunications networks or other forms of modern technology, detecting and monitoring of the methods used for the safe transfer, concealment or disguise of proceeds derived from such offences.

7. The feasibility of their use must therefore depend on the respective laws of the states involved, which if not compatible may necessitate provisions governing the acquisition of evidence by these means in the respective mutual legal assistance treaties. As a recommendation, consideration could be given to the organising of a forum or seminar, where technologists, judicial officers, law enforcement personnel and others could meet and discuss the problems associated with new technologies in investigation and prosecution, with a view to increasing the "comfort level" of the more conservative minded professions. Ultimately, the fight against organized crime will require sacrifices - academic and physical.

V. ADVANTAGES AND DISADVANTAGES OF BILATERAL MUTUAL LEGAL ASSISTANCE TREATIES

A. Problem

Because of the possibility of the number of countries that could become signatories to a multilateral treaty (there are 186 in the United Nations), it was considered an exercise in futility to examine the advantages and disadvantages of a multilateral treaty. There are simply too many variables involved in the equation. It is however, a lot simpler to examine the merits and demerits of these treaties from

a bilateral perspective, which is the approach adopted.

B. Response

1. One of the advantages of Mutual Legal Assistance Treaties (MLATs) lies in the fact that it places international co-operation on a firm footing by providing predictable areas of co-operation between countries.

2. MLATs acts as a vehicle of co-operation between consenting countries regardless of their individual legal systems.

3. Mutual legal assistance treaties assist individual states cope more effectively with criminal cases that have trans-national criminal characteristics.

4. Such treaties facilitate the receiving and rendering of assistance by way of "compulsory orders". This would mean that by signing and ratifying a treaty, the parties to it undertake an express obligation to render each other an assistance as defined in the treaty, unless the requested state invokes a ground for refusal.

5. They also provide a mechanism for evaluating the application of these treaties in relation to crime resolution.

6. These treaties also allow for methods and procedures, which ordinarily may not have been acceptable to the judicial systems involved. In addition, many of these treaties allow for direct contact, thus avoiding the formal diplomatic and cumbersome channels of communication. This speeds the process of criminal justice and the ultimate effectiveness of crime management.

7. Finally, in an era when almost each law enforcement agency (police, customs, immigrations, drug law enforcement agency etc.) has some form of agreement or other with a counterpart agency in another country, MLATs reduce the legal basis for co-operation to one document, which inevitably simplifies the process, and opens the requesting agency to the benefits and co-operation of all the other agencies. It must be stated however, that MLATs are not the only basis for co-operation in mutual legal assistance as domestic laws of some states, reciprocity and the notion of comity have served similar, though slightly more constrained roles in this respect.

8. On the other hand, it is noticed that there are some defaults with mutual legal assistance treaties. The first of these is that ratification can take years after the actual treaty has been signed, and for as long as the ratification is held in abeyance, so long shall the treaty be ineffectual. It must be mentioned however, that usually there exists some form of co-operation between countries prior to their entering into formal agreements, which reflect to a large degree the pre-existing levels of co-operation. Such formal agreements are usually accompanied with "Executive Agreements" on co-operation, which forms the basis of continued interaction before the treaties are formally ratified.

9. They can lead to an inequality in terms of benefits and obligations. One of the states is more likely to make more requests than the other, which means the requested state seemingly does more work. However, the more bilateral treaties entered and signed the greater the probable general benefit from their usage.

10. The opening of borders through these treaties itself can lead to security implications, which themselves may ultimately be more problematic than those of the criminals which lead to the treaty in the first place.

The question of the utility of mutual legal assistance and extradition treaties in relation to the problems discussed above are in the final analysis to be dealt with by individual states. It perhaps may be useful to mention that with the growth of organized transnational crime it has become imperative that government focus their attention in these areas.