

Background paper (Wednesday 5 September 15:45-17:00)

Formal and informal paths to international legal assistance

Combining formal and informal mechanisms: ways for speeding up MLA

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International cooperation infringes upon national sovereignty, in the sense that coercive measures implying the use of public force, a national monopoly, are ordered and carried out by the judiciary of the requested State on its national territory, on demand and on behalf of a foreign State.

The logic of national sovereignty limits a State's jurisdiction for legal action to its national territory, possibly to its nationals having acted on foreign territory.

Now, modern criminality ignores borders and criminals of any kind tend to go global rather than limit their activities to the territory of one State.

Modern tools of communication, symbolized by the internet, have made it all but impossible to implement a containment policy towards crime.

If crime can proudly claim near universal jurisdiction, the judicial authorities whose duty is to fight it are limited to tight jurisdiction rules.

Unable to act on foreign territory, a State must require its foreign counterparts to act whenever a judicial enquiry spreads geographically under their jurisdiction.

Structurally, this materializes into a number of legal challenges and time consuming operations for the requested State, including:

- coordinating two or more legal systems, which implies, besides basic logistics, accommodating different legal principles, definitions of crime, procedural laws and provisions for international cooperation;
- limiting or denying cooperation when susceptible to affect its national interests;
- controlling the conformity of the foreign State's procedure to international standards and treaties, besides its own national law.

The judiciary of any State, when required to grant legal assistance, is thus compelled, before it can take any action, to analyse the usual mandatory grounds for denying cooperation, including that the request:

- does not jeopardize internal security, defence secrets, public order and other so called "essential national interests";
- does not aim at prosecuting political opinion or discriminating with regard to race, nationality, sex or religion;

- could not be labelled as a "fishing expedition" or a simple tax evasion inquiry;
- meets the legal conditions relating to reciprocity, double incrimination, double jeopardy, proportionality and similar principles or reservations.

Some of the decisions it takes on those matters might further require the approval of a superior authority and eventually be challenged in court.

Practically, legal assistance operations are time consuming and resources demanding:

- the usual vehicle for international cooperation is the diplomatic channel, not known to be particularly fast, and sensitive to political intervention;
- carrying out an MLA procedure means that some of the national judiciary's resources are mobilized to the benefit of another State; politically, it has at times proven difficult to justify it in times of budget restrictions and street insecurity, citizens being allegedly more worried about their tax money and street crime in front of their doors than by international cooperation to unclear direct benefit;
- doing another country's job is seldom a priority, especially in recurrent situations of work overload.

These classical difficulties arise in any mutual legal assistance operations, from extraditing persons to collecting and handing out elements of proof or freezing and repatriating assets.

Informal and alternative practices have been tested to answer some of the legal challenges of international judicial cooperation and improve its speed; they have yielded some positive results, with very few if any drawbacks.

1. The Judiciary

International legal cooperation is unavoidable in a globalized economy, and should be taken by the judiciary as a normal and necessary way of conducting a criminal inquiry.

It implies accepting to devote specific resources to legal assistance, from training judges and staff to streamlining the procedures and setting up smooth channels to conduct them; the best laws and treaties will not be of much use without the proper structures, persons and coaching to implement their provisions.

It also requires that the judiciary acts on an international request for cooperation just like it would on a national inquiry, considering among other points that whatever operations or practice that treaties, conventions or its internal law do not forbid are allowed.

Also a personal contact with the colleagues requesting cooperation helps build confidence and expertise in the foreign law's requisites; meetings, even over a phone or by videoconference, can help understanding an investigation and orientate it, as well as solving the many practical problems resulting in painful delays or other hindrances; it is invaluable to avoid the possible legal errors that could invalidate, in the requesting country's courts, the measures taken by the requested State.

2. National Procedure

Whenever possible, the inquiry being conducted for the requesting State should be doubled up with a national procedure.

A national criminal inquiry allows the requested State, in sole accordance with its own legislation, to incriminate people or companies placed under its jurisdiction, without depending on dual criminality and other MLA restrictions.

This is particularly noteworthy in cases related to corruption, since for some years now many countries can try, even if they acted abroad, their nationals and residents, whether individuals or companies, for active corruption of foreign public officials.

Similarly, money laundering offences could provide sufficient ground for admitting jurisdiction over people concealing proceeds of foreign bribery on local bank accounts.

If anything, an autonomous national procedure might significantly facilitate the freezing and confiscating of assets related to corrupt practices, considering that it can be conducted to its legal end independently of the international cooperation procedure.

3. Spontaneous Information

Some national laws and recent international conventions (UNCAC art. 46 / 4 and 5; CoE Convention 141 [2005] on money laundering, art. 20; Swiss IMAC, art 67a) regulate the spontaneous forwarding of information to a foreign State, without prior request, usually on the condition that it could facilitate an ongoing criminal investigation, or enable the foreign State to present a formal demand for mutual assistance if it seeks elements of proof.

4. MLA Requests as a source of information

MLA requests are by themselves a valuable source of information, since they must, by law, state at minimum a summary of the relevant facts from the requesting State's own investigations.

They will most likely include names, dates, places, operating mode, possibly bank connections or similar and documentary evidence.

Such factual elements can justify the opening of a national procedure if jurisdiction appears to be given over, notably, acts of corruption or money laundering (*cf. nr 2 above*).

It might also be of interest to note that sending out a formal MLA request amounts, for the requesting State, to transmit, purposely or not, information and elements of proof to the requested State, which may use them for its own investigations without some of the legal limitations it would face if it had itself formulated a request for cooperation.

The same can be said about delegating a prosecution to a foreign State, which implies for the country requesting the delegation to hand over the evidence it has itself gathered.

These ways to proceed have sometimes been labelled "wild legal assistance", and could arguably be successfully challenged in court if they appear to be nothing but a blatant procedural misuse.

5. Regular MLA Requests

Specific provisions in national laws or conventions, often overlooked, can prove helpful to accelerate a cooperation process:

- urgency clauses allow to bypass the diplomatic channels (cf. UNCAC art. 13 and 14);
- provisional measures can be taken rapidly, on a *prima facie* or *reasonable* basis, notably to temporarily freeze assets (cf. UNCAC art. 54 / 2; 55 / 7 and 8);
- allowing foreign investigators to participate, on the requested State's territory, to the execution of their cooperation request, notably to a house or office search in order to help sort out the documents to be seized, or attend auditions of witnesses and suggest questions (cf. UNCAC's *joint investigation*, art. 49; Swiss IMAC, art. 65a).

6. Voluntary cooperation of a party

Parties concerned by an inquiry might find it opportune to cooperate with the investigation.

A witness might thus accept that a statement he has signed, his bank records or documents that have been seized during a search be handed over to the requesting State, possibly at certain conditions to be discussed, like limiting the scope of the cooperation provided or granting him some degree of immunity.

This might be worth considering, since it can help dispensing with some irritating formalities and saving valuable time.

7. Financial Intelligence Units

Administrative cooperation is often quicker and much less formal than regular MLA procedures, particularly to gather information and documentary references relevant to criminal investigations.

Many countries have set up so called FIUs or similar (cf. UNCAC art. 58).

The data that these units have been collecting over the years is increasingly reliable and far reaching.

Even if the information is often handed out to prosecuting authorities with a "*for intelligence purposes only*" restriction, it can prove quite helpful to initiate or focus an inquiry.

8. Financial intermediaries

In recent years, legislation has been implemented in many countries to impose to banks and other financial intermediaries, under various conditions, the obligation to report suspicious clients or transactions to judicial authorities.

They have themselves taken a number of measures to curb their "*ethical risk*" of being caught into a criminal procedure for laundering proceeds of large scale corruption or embezzlement of public funds.

Multinational companies have, similarly, developed extensive compliance structures to the same

purpose.

The data that they have been collecting, themselves or through specialized private agencies, in just about every country where they run their business, can prove quite helpful if one can legally gain access to it, for instance through a formal seizure of client's files, KYC notes, compliance records, etc.

Valuable information, privately collected in a foreign country, is thus passed onto the judiciary without much formalism and with none of the restrictions of legal assistance.

9. Civil procedures

Initiating a civil action in foreign courts may help freezing and confiscating assets (UNCAC art. 53, a).

The process will most certainly be costly, but might prove effective considering that the burden of proof of the illicit origin of assets to be forfeited is lighter in civil cases than in criminal ones.

An alternative worth considering is for the requesting State to participate as a civil party in criminal proceedings in the requested State, which could notably grant it full access to documentary evidence useful for its own investigations; such evidence might not be usable in court before a formal MLA procedure is brought to an end, but it will certainly facilitate its ongoing inquiries.

8. Politics

As a golden rule, politics should not interfere with the judiciary, although in mutual legal assistance, the ubiquitous references to "essential national interests" leave it open to consider a request for cooperation beyond strict legal criteria (UNCAC art. 21 (b); partially excluded by the OECD Convention's art. 5).

In turn, and usually with the same argument of defending "national interests", a country's executive can take autonomous measures to order a provisional freeze on assets suspected to proceed from large scale looting of foreign public funds; it has been done by the Swiss government, to the country's banks, in a number of sensitive cases, outside any request for assistance by the countries directly concerned.

9. The Media

Granting an interview to a reputable media can spread factual information internationally, and raise the interest of a foreign investigator who might orientate his inquiry accordingly and, if necessary, file a formal legal assistance request.

Internet has become a precious, if not devastating tool in that matter.

Besides law officers, compliance staff, notably in bank and multinational companies, do screen papers for information about their clients, the businesses they run and the origin of their wealth; according to what has become public through the media, they might find themselves in the obligation to report to the judiciary (*cf. nr 8 above*) or at least increase their level of internal

control on a particular client.

Also, the press does succeed, at times, in building up enough pressure to prevent the burying of a sensitive criminal case.

10. Pitfalls of Informal Cooperation

Where the rule of law prevails, there is little "risk" for the judiciary to do its job, e.g. to investigate criminal activities and try criminals.

Some obvious pitfalls can easily be avoided:

- plain illegality, disregard of the rule of law and the requirements of fair trial, and general violations of elementary legal principles eventually end up ruining not only individual cases but the reputation, the long term efficiency and the legitimacy of the whole judicial system, with devastating effects on international cooperation;
- lack of formalism may lead to imprecision, hence unreliable facts and elements of proof that will complicate rather than facilitate an investigation;
- flawed elements of proof will be unusable in court, with potentially costly consequences for the prosecution.

That being said, testing in good faith alternative ways to formal MLA procedures will, at worst, invalidate all or part of an investigation, which remains a rare event and will at least set precise standards through jurisprudence, allow an open legal debate on issues of interest for international cooperation, and possibly trigger adjustments to the corresponding legislation.

Conclusion

International legal assistance is certainly not the most popular task devoted to the judiciary, since it draws precious resources from fighting "local" crime.

It is also viewed, especially when it comes to fighting corruption of foreign officials, as potentially damaging to national companies, for the sole benefit of third parties that might besides be fierce competitors.

Serious tendencies exist towards curtailing the means allotted to the judiciary for legal assistance procedures.

Crime has logically become as globalized as the economy, whereas the judiciary lags behind, tied to a dusty formalism totally unfit to challenge modern legal issues.

This political debate notwithstanding, one professional answer the judiciary can give is to work as quickly and effectively as possible on international cooperation, to not fear such procedures and to be technically as imaginative and creative as it would be on its national cases.

The true future of mutual legal assistance is to become ordinary routine for all of us.