


UNITED NATIONS  
*Office on Drugs and Crime*




Identifying, Restraining and Recovering  
Stolen Assets in the OSCE Region

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“Mutual legal assistance requests: good  
practices, pitfalls and pre-MLA  
cooperation”

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### Mutual legal assistance under the UNCAC

- Article 46: “States parties shall afford one another the widest measure of assistance in investigations, prosecutions and judicial proceedings in relation to offences covered by the Convention”.
- Assistance also in relation to offences for which a legal person may be held liable.
- Article 43 (1): possibility for States parties to extend cooperation in civil and administrative matters relating to corruption.



## Use of the UNCAC as legal basis for MLA

Mutual legal assistance: Article 46, paras. 9-29

- Applicable if States parties are not bound by other MLA treaty;
- If other treaty exists, its provisions shall apply unless States parties agree to apply paras. 9-29;
- UNCAC strongly encourages States parties to apply paras. 9-29 if they facilitate cooperation.



## Spontaneous transmission of information (art. 46 (4)(5) UNCAC)

Transmission of information relating to criminal matters to the competent authority of a foreign State without prior request:

- Where such information could assist in undertaking or concluding successfully inquiries and criminal proceedings.
- Where such information could result in a formal MLA request at a later stage.
- Assurances for confidentiality unless the information transmitted is exculpatory to an accused person.



### Forms of MLA under the UNCAC

#### MLA (Art. 46 UNCAC)

- I. Taking evidence or statements from persons;  
Facilitating the voluntary appearance of persons in the requesting State;
- II. Effecting service of judicial documents;  
Providing information, evidentiary items and expert evaluation;  
Providing originals or certified copies of relevant documents and records  
(including government, bank, financial, corporate or business records);
- III. Examining objects and sites;  
Executing searches and seizures, and freezing;  
Identifying or tracing proceeds of crime, property, instrumentalities or other things  
for evidentiary purposes;



### Forms of MLA under the UNCAC

#### MLA (Art. 46 UNCAC)

- IV. Other types of assistance, not contrary to the domestic law of the requested State
- V. Identifying, freezing and tracing proceeds of crime in accordance with chapter  
V of the Convention  
The recovery of assets in accordance with chapter V of the Convention



## Forms of MLA under the UNCAC

### I. Witnesses and Experts

#### A. Taking evidence or statements from persons;

##### Special remarks in relation to UNCAC:

- Protection of witnesses (art. 32)
- Agreements or arrangements for relocation of witnesses (art. 32(3))
- Protection of reporting persons (art. 33)
- Protection of persons cooperating with law enforcement authorities

##### Use of Video Conferences - UNCAC art. 46 (18)

- wherever possible and consistent with fundamental principles of domestic law
- at the request of the requesting State and with the permission of the requested State
- if it is not possible or desirable for the individual to appear in person in the territory of the requesting State
- eventually conducted by a judicial authority of the requesting State Party and attended by a judicial authority of the requested State Party



## Forms of MLA under the UNCAC

### I. Witnesses and Experts

#### Safe Conduct for (non-detained) witnesses, experts or other persons giving evidence in the Requesting State - art. 46 (27)

Such a person shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in the requesting State for acts, omissions or convictions prior to the transfer

- unless person remains voluntarily in the Requesting State Party after being officially informed that his/her presence is not longer required (period of 15 consecutive days or period agreed upon to leave that country)
- or**
- returns of his or her own free will to the Requesting State Party after having left it



Forms of MLA under the UNCAC

I. Witnesses and Experts

B. Facilitating the voluntary appearance of persons in the requesting Country;  
art. 46 (10-12)

Transfer of persons being detained or serving a sentence in requested State for purposes of identification, testimony or providing evidence

- **Conditions:**
  - (a) the person freely gives his or her informed consent
  - (b) the competent authorities of both State Parties agree, subject to such conditions as those State Parties may deem appropriate
- the **Requesting State Party**
  - shall keep the person transferred in custody (unless otherwise requested or authorized by the transferring State)
  - shall without delay return the persons to the custody of the transferring State
  - shall not require the transferring State to initiate extradition proceedings for the return of the person
- the **person transferred**
  - shall receive credit for the time spent in the custody of the requesting State
  - shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in the requesting State for acts, omissions or convictions prior to the transfer (unless transferring State agrees)



Forms of MLA under the UNCAC

II. Effecting service of judicial and other documents

- Providing originals or certified copies of bank and financial records: bank secrecy is not a ground for refusal of MLA requests (art. 46 (8))
- Obligation for requested State party to provide to the requesting State party copies of government records, documents or information in its possession that under its domestic law are available to the general public (art. 46 (29))
- Discretion for requested State party to provide to the requesting State party in whole, in part or subject to certain conditions copies of government records, documents or information in its possession that under its domestic law are **not** available to the general public (art. 46 (29))



## Forms of MLA under the UNCAC

### III. Examination, Tracing, Search, Seizure, Freezing

Examining objects and sites;  
Executing searches and seizures,

Encouragement to conclude bilateral or multilateral agreements or arrangements for using special investigative techniques - art.50 (2)  
Undercover Operations/ Electronic Surveillance (Audio - Video - Data)/ Controlled Deliveries

Encouragement to make, in the absence of an agreement or arrangement, decisions to use such special investigative techniques on a case-by-case basis - art. 50 (3)



## Forms of MLA under the UNCAC

### III. Examination, Tracing, Search, Seizure, Freezing

Identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes;  
Freezing of proceeds of crime; Seizure of property, instrumentalities etc arts. 55 and 46

Protection of the rights of *bona fide* third parties art. 55 (9)



## Forms of MLA under the UNCAC

CONFISCATION:  
Two ways:



or



Order of Confiscation made by Requested State with a view to giving practical effect to the request of Requesting State

Execution of the Order of Confiscation of Requesting State by Requested State (Direct enforcement)

### Object of Confiscation:

Transformed or converted property

Mixture with property acquired from legitimate sources: Confiscation up to the assessed value of the intermingled proceeds

Production of Income or other benefits: Confiscation of that income or other benefits derived from proceeds of crime, or property of "transformation" or "mixture"

Possibility of **non-conviction-based confiscation** where the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases



## Grounds for Refusal

### Grounds for Refusal

UNCAC - Special Provisions:

Optional grounds for refusal (art. 46 (21):

- Request is not made in conformity with the Convention
- Execution of the request is likely to prejudice the sovereignty, security, *ordre public* or other essential interests of the Requested State
- Prohibition by the domestic law of the Requested State to carry out the action requested with regard to any similar offence, had it been subject to investigation, prosecution or judicial proceedings under the own jurisdiction
- Contradiction to the legal system of the Requested State relating to MLA for the request to be granted
- Absence of dual criminality [discretion to provide assistance even if it is not fulfilled "where deemed appropriate" – Obligation to provide assistance if it is requested for non-coercive measures]



### Grounds for Refusal

#### Grounds for Refusal

#### UNCAC - Special Provisions:

- Assistance may not be refused on the sole ground that the offence is also considered to involve fiscal matters (art. 46 (22))
- States parties shall not decline to render assistance on the ground of bank secrecy (art. 46 (8))



### MLA Procedure

#### Classical Procedure

Requesting Authority Requesting State  
(Investigator, Prosecutor, Judge)

Ministry of Justice Requesting State

Ministry of Justice Requesting State

Diplomatic Channel

Diplomatic Channel

Ministry of Justice Requested State

Ministry of Justice Requested State

Executing Authority Requested State  
(Investigator, Prosecutor, Judge)







MLA Procedure

Improving the procedure

Problems	UNCAC
Complex and cumbersome Procedure	<p>-Creation of a <b>central authority (authorities)</b> to ensure the speedy and proper execution or transmission of the requests received without prejudice to the right to require the requests to be addressed through diplomatic channels and (in urgent circumstances) through Interpol</p> <p>-Where possible: submission of requests by electronic media, in urgent circumstances <b>oral</b> communication, subject to written confirmation</p> <p>-Conclusion of bilateral or multilateral agreements or arrangements to serve the purposes of or to give practical effect to the provisions of the Convention.</p>
Language Problem	Request made in a language acceptable to the requested State Party



MLA Procedure

Improving the procedure

Problems	UNCAC
Refusal of MLA	<ul style="list-style-type: none"> <li>• Requested Party may request additional information               <ul style="list-style-type: none"> <li>• in accordance with its domestic law</li> <li>• when this can facilitate the execution</li> </ul> </li> <li>• Requested Party shall consult Requesting State to consider whether assistance may be granted subject to such terms and conditions as it deems necessary</li> <li>• Reasons shall be given for any refusal</li> </ul>
Interference with an ongoing investigation, prosecution of proceeding in Requested State	MLA may be postponed after consultation with Requesting State to determine if the MLA can still be given subject to such terms and conditions as it deems necessary



MLA Procedure

Improving the procedure

Problems	UNCAC
Delays	<p>Requested State</p> <ul style="list-style-type: none"> <li>- shall execute request as soon as possible</li> <li>- and shall take as full account as possible of any deadlines suggested in the request</li> <li>- and shall respond to reasonable requests on progress of its handling of the request</li> </ul> <p>Requesting State</p> <ul style="list-style-type: none"> <li>shall promptly inform requested State when MLA sought is not longer required</li> </ul>
Costs	<ul style="list-style-type: none"> <li>- Ordinary costs shall be born by requested State (unless otherwise agreed)</li> <li>- For expenses of a substantial or extraordinary nature, State Parties shall consult each other</li> </ul>



THANK YOU FOR YOUR ATTENTION

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