Mutual Legal Assistance, a mechanism enabling the prosecution of Transnational Organised Crime: barriers and solutions

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Résumé

L'essor du crime organisé transnational constitue une menace internationale fondamentale et nécessite des mécanismes efficaces de poursuite, sans lesquels ces entités illégales éroderont les capacités de l'État. Cet article explore l'idée que la coopération entre les États est la seule façon de prévenir l'émergence de refuges sûrs pour les criminels. En retraçant l'évolution des Traités d'Assistance Juridique Mutuelle qui codifient les conditions dans lesquelles les forces de police échangent des renseignements et des preuves, cet essai met en lumière à la fois leur importance cruciale et leur application décevante. Les obstacles persistants à cette approche multilatérale ont poussé les nations à forger des traités bilatéraux d'assistance juridique mutuelle et à explorer des canaux alternatifs d'échange d'informations, y compris des mécanismes extraterritoriaux et parfois illégaux, au détriment de la souveraineté et de la confiance mutuelle.

Malgré des progrès normatifs alimentés par une approche dirigée par Washington, les refus discrétionnaires soulignent la nécessité de réduire davantage les possibilités de rejet. Alors que l'absence de politiques de renforcement des capacités stables et soutenues sur une base bilatérale a été partiellement compensée par l'influence croissante de l'Office des Nations Unies contre la Drogue et le Crime (ONUDC), un problème plus profond persiste : la méfiance entre les nations. L'examen de régions telles que l'Amérique latine et l'Union européenne révèle des développements prometteurs sous la forme d'institutions plus intégrées, offrant une clé potentielle pour réduire l'influence omniprésente de la méfiance dans les procédures transnationales. En pratique, cependant, les approches unilatérales et extraterritoriales sont devenues prédominantes, éloignant encore davantage la perspective de développer une confiance mutuelle entre les États. Cet article identifie non seulement les défis existants dans le domaine de l'assistance juridique mutuelle, mais plaide également pour des efforts continus visant à renforcer la coopération internationale face à la menace redoutable posée par le crime organisé, en identifiant et en évaluant des solutions potentielles.

Abstract

The rise of transnational organised crime poses a fundamental international threat and necessitates effective mechanisms for prosecution, without which these illegal entities will erode the capacities of the State. This paper explores the view that cooperation between States is the only way to prevent the emergence of safe havens for criminals. Tracing the evolution of Mutual Legal Assistance Treaties (MLATs) which codify the conditions in which police forces exchange intelligence and evidence, this essay both highlights their crucial importance and their disappointing application. Persistent barriers to this multilateral approach have led nations to forge bilateral MLA treaties and explore alternative channels for information exchange, including extraterritorial and sometimes illegal mechanisms, at the expense of sovereignty and mutual trust.

Despite normative progress fuelled by a Washington driven approach to the issue, discretionary refusals underscore the need to further diminish the scope for rejection. While the absence of stable and sustained capacity-building policies on a bilateral basis has been partially compensated by the growing influence of the United Nations Office on Drugs and Crime (UNODC), a deeper issue persists—distrust among nations. Examining regions such as Latin America and the European Union reveals promising developments in the form of more integrated institutions, offering a potential key to reducing the pervasive influence of distrust on transnational proceedings. In practice, however, unilateral and extraterritorial approaches have come to the forefront, further driving away the prospect of developing mutual trust between States. This paper not only identifies existing challenges in the realm of Mutual Legal Assistance but also advocates for continued efforts to fortify international cooperation in the face of the formidable threat posed by organised crime, identifying and evaluating potential solutions.

Introduction

‘The threat to our security is not in an enemy silo, but in the briefcase or the car bomb of a terrorist. Our enemies are also international criminals and drug traffickers who threaten the stability of new democracies and the future of our children.’

Bill Clinton’s 1995 address at the United Nations (UN) Fiftieth Anniversary Charter Ceremony highlights his era’s growing concern for a previously neglected issue. It came at a time when organised crime was gradually becoming an international priority, and represents growing awareness that in a globalised world, criminals had become a common enemy (Annan, 2003). The UN Office on Drugs and Crime (UNODC) has estimated the revenue generated by organised crime to represent 2 to 5% of world GDP (Cryer, 2010). Interpersonal, gang and organised crime-related violence kills more people than political violence globally (Albanese, 2018). States have collectively identified the issue and have since attempted to develop legal formulas to remedy the situation.

André Bossard, former Interpol director, defines transnational crime as acts ‘necessitating the cooperation of two or more countries to solve, either because the crime itself is transnational insofar as it implies crossing at least one border before during, or after the fact, or by the consequences or the transnational character of the crime’ (Madsen, 2016, p.1) International cooperation is rendered crucial by the inherently cross border nature of transnational organised crime (TOC), and the failure of authorities to work hand-in-hand invariably leads to the establishment of safe havens, as criminals profit from enhanced mobility of a globalised world to escape prosecution (Harfield, 2003). To remedy the situation, States can call on their partners to share information with them and execute part of an investigative procedure. These acts of cooperation are known as mutual legal assistance (MLA), defined in the UN Convention Against TOC (UNTOC) as “widest measure” of cooperation “in investigations, prosecutions, and judicial proceedings’ (art. 18). Significant barriers impede the effective application of MLA. Analysed in Section 1, they are multifaceted and cover several legal obstacles. The international community has attempted to overcome such limitations, and these attempts will be the focus of Section 2. Issues of legislation have been overcome through criminalisation, yet extra-legal barriers are far harder to tackle, as some States lack the capacity to implement the ambitious provisions of UNTOC and other treaties, whilst garnering trust between nations has proven to be an almost insurmountable challenge. International cooperation in criminal matters is fundamentally heterogeneous. Its application therefore cannot be grasped simply through the analysis of treaties but calls for a study of how it has been implemented. Section 3 will therefore discuss effective application of MLA in practice, demonstrating that lasting barriers lead countries to develop bilateral MLA treaties (MLAT) and when possible, obtain information through alternative channels. The United States’ and China’s approach to gathering evidence highlight the gaps of MLATs, as they make use of its extraterritorial reach and dominance in strategic sectors to obtain information for prosecution, acts which undermine sovereignty. Nonetheless, further integrated models of MLA have developed, providing evidence that seemingly insurmountable obstacles can in fact be overcome. If the European Union, through its high-level of homogenisation is a fertile ground for such cooperation,

the Latin American region, due to its high exposure to TOC and its consequences, has conceived innovative responses which could serve as inspiration to overcome barriers on a global scale.

The essay picks up on, an albeit limited, literature evoking solutions to strengthen the existing MLA system or seek alternative ways to reach its objectives. Ranging from suggestions to create a supranational arbitration system to deal with MLA request denials to the development and generalisation of crime-based sanctions as a way of denying safe havens, these potential innovations all have their strengths and drawbacks. When they are ambitious, they will most likely never garner international support, and when they are feasible, they may risk infringing upon individual rights. When dealing with MLA, it is worth remembering that when discussing a potential change in the system: "if it is good, it will not be signed by all relevant parties, and if it is signed by all relevant parties, it will not be good" (Woods, 2017, p.670).

Section 1: Analysing conceptual barriers to Mutual Legal Assistance

1.1 The persistence of discretionary refusals and their embeddedness within the international system

International transfers and collection of evidence as a way of guaranteeing prosecution despite the presence of a foreign element in the procedure pose a considerable set of challenges to overcome. Denying safe havens relies on reducing the efficacy of fleeing the jurisdiction in which a crime was committed as a strategy to escape prosecution. This requires authorities to be able to cooperate on primary and secondary forms of MLA (Vries, Anderson, 2022); the former refers to proactive operations which include a transfer of procedural responsibility such as seizing assets or collecting evidence on behalf of the requestee, whilst the latter simply involves sharing existing evidence or intelligence. Although in principle all States share organised criminals as common antagonists, they also share the desire to maintain control over sensitive information and sovereignty over their jurisdictions. This tension between cooperation and sovereignty has allowed for contradictory tendencies associated with the development of MLA frameworks to overlap and prosper.

If transnational organised crime became an international priority during the 1990s (Fijaut, Paoli, 2008), difficulties persist to this day in creating a harmonised system for States to request both primary and secondary forms of MLA. If political and mutual trust between States remains the central barrier (Section 2.2), legal motives for refusing cooperation are embedded in the treaties themselves, whether they be multilateral, i.e. UNTOC, or bilateral MLATs. These motives appear as safeguards, all crucial, yet some are instrumentalised to enable discretionary rejections of cooperation. Those that protect individual human rights are particularly important to uphold without exception. For instance, in *R (El Gizouli) v Secretary of State for the Home Department [2020] UKSC 10*, the prosecution of Maha El Gizouli for terrorism after his arrest in Syria in 2018 by the United States depended "critically" on evidence collected by UK law enforcement. The UK Supreme Court found that "it is unlawful at common law for the state to facilitate the execution of the death penalty against its citizens or others within its jurisdiction anywhere in the world" ([143]), asserting sovereignty over the collected evidence and promoting its human rights regime. Political exceptions to MLA requests must also be continuously upheld to prevent attempts to

instrumentalise the system to repress political opponents and dissidents, as is the case with regard to FATF standards or Interpol Red Notices (Reimer, 2024).
If human rights rejections are necessary to avoid weaponizing the international system, certain exceptions can be instrumentalised for the opposite purpose: refusing to share requested information, to execute an investigative procedure or to freeze assets without having to explain the decision. The Djibouti v France ICJ decision demonstrates such arbitrary tendencies, a case in which France refused to comply with a request made based on a provision included in a bilateral treaty by citing its national security interests and the ICJ ruled that Djibouti could not contest the unilateral decision [135]. The ruling contends that that the "requested State enjoys wide discretion in deciding to refuse mutual assistance" if it "considers that execution of the request is likely to prejudice its sovereignty, its security, its *ordre public* or other of its essential interests". The ruling considers this to be "self-judging clause", as long as the requested State acts in good faith. Yvon Dandurand and Jessica Jahn highlight the issues behind the "self-judging clause": States can refuse or ignore cooperation requests without there ever being any kind of recourse made to them. They contend that only "radical" reforms, such as the establishment of a "binding arbitration mechanism to resolve bilateral disputes" could help save a failing system (Dandurand & Jahn, 2021, p.14). Such a mechanism could involve a possibility to appeal to a supranational authority to appeal to when a request for MLA is denied or simply ignored. Inspiration could be taken from international investment law, more specifically clauses included in bilateral investment treaties that provide arbitration conditions upon signature.

1.2 Coexistence of opposed legal philosophies: Mutual Legal Assistance between Common and Civil Law jurisdictions

Barriers to MLA can arise when discrepancies in legal systems and philosophies complicate the exchange of information process to such a point that assistance requests are delayed, denied, or lead to evidence being declared inadmissible in court when the *modus operandi* fails to conform to domestic legislation. The interaction between Common and Civil law jurisdictions illustrates this conflict of systems. Historically, given the geographic specificities of Common law jurisdictions, their utilisers were slow to build MLA relationships, both because it appeared pragmatic to them that the State in which prosecution took place would be best suited to gather evidence, and due to a general reticence to enforce another State's norms, thus viewing assistance through a sovereignty lens (Boister, 2018). Civil law systems in continental Europe, on the other hand, found MLA to be of use given population mobility. The differences in legal cultures, widely present in most areas of law, extend to MLA (Boister, 2018).
One prominent aspect of the Common and Civil law divide concerns the way in which evidence is gathered, and although the US has developed a doctrine of "double illegality" (see Section 3.1), issues of admissibility of evidence can arise due to different processes of evidence collection. An illustration of this and how it affects prosecution of TOCs can be found in the prosecutions resulting from *Operation Venetic,* where the UK was given access by a French and

Dutch Joint Investigation Team to millions of compromising messages exchanged between criminals on encrypted phones (Europol, 2020). Across Europe, questions were raised over rights of the defence, as the methodology used by French authorities was kept secret due to national security concerns, thus limiting the possibility for defendants to question its legality. In France, the Constitutional Court was called to statute on the question of which balance to strike between the principle of equality of arms between defence and prosecution and the necessity to protect national secrets (Ascione Le Dréau, 2022). In the UK, litigation mostly concerned the nature of the evidence, and more specifically whether the communications were intercepted whilst being stored or being transmitted (Griffiths, Jackson, 2022). Contrary to continental Civil Law jurisdictions, intercept material in the UK was historically used for intelligence purposes but would not be admissible in court. The 2016 Investigatory Powers Act alleviated this restriction, enabling prosecution to use intercept material when it is "stored in or by a telecommunication system" (Section 6(1)(c)(i)). In the case of *Operation Venetic,* courts held that the information was obtained whilst "being stored", rather than "being transmitted", and such a ruling could pave the way for further use of such material in cases concerning TOC (Section 6(1)(c)(i)). These legal developments suggest that the gap is being bridged and inconsistencies are thinning, allowing for MLA to transcend systemic discrepancies. Nonetheless, procedural differences remain. The "golden evidence rule" is an example of this, as Common law jurisdictions require authorities to be able to justify that the evidence has been sealed and protected from the moment of collection until trial. This can lead to it being declared inadmissible in courts, as foreign officers lack the training or the knowledge to fulfil the requirements (Madsen, 2016).

The relationship is not however systematically one of opposition, as jurisdictions can also take inspiration from one another as they develop their response to TOC (Balsamo, 2016). For instance, European scholars have called for their jurisdictions to integrate non-conviction-based confiscations, present in Common law jurisdictions in the form of civil forfeiture, which allows governments to seize any property allegedly involved in a crime or illegal activity. As such, non-conviction-based confiscations could be part of a strategy to make the law more flexible.

1.3 Regulating TOC within the confines of the rule of law

An effective rationale to justify an obligation to provide MLA can be derived from an International Human Rights Law requirement to investigate, prosecute, and adjudicate conduct harming citizens (Vervaele, 2014), thus constituting a responsibility to protect citizens from transnational criminals. However, such an argument necessarily raises the issue of conflicting rights, as a balance must be struck between protecting citizens and guaranteeing a fair trial to the defendant (Brems, 2014). States have found it difficult to strike such a balance, as MLA tends to predominantly favour the interests of the State, this is the case in jurisdictions that actively promote rights of defendants, and even more so in jurisdictions that do not possess such safeguards.

In the context of transnational proceedings, the equality of arms principle, which requires each party to be given a reasonable opportunity to present their case under conditions that do not place

them at a substantial disadvantage (Gless, Vervale, 2013), is often disregarded, as the possibilities offered by MLATs are only available to States. Scholars highlight the fact that defendants in transnational proceedings operate within a judicial "black hole" (Gless, Vervale, 2013, p.6), as the rules of the game, particularly concerning admissibility of evidence are often modified. Such modifications are particularly prominent in US and EU jurisdictions. In the US, *The Ver*dugo case created a "double illegality" requirement (Bentley, 1994) in which Fourth Amendment rights could be bypassed by obtaining evidence abroad (see Section 3.1). In the EU, German, French and crucially, European courts have opened the door to similar admissibility criteria. For instance, the *Bundesgerichtshof* accepted the use of a witness statement obtained in Turkey without the presence of a lawyer for the defence, even though such evidence would be excluded had the interview taken place in Germany [4 StR 126/92]. In *Stojkovic v France and Beligum,* French authorities had made an MLA request for an interrogation concerning a detainee in Belgium who was subsequently questioned without the presence of a lawyer, which, according to his status as a *témoin assisté* (intermediate status between a witness and a defendant under French criminal law) which would have given him the right to such assistance in France. The breach was crucial to the outcome of the case as the defendant gave incriminating evidence in that specific interrogation. Despite ruling that French and Belgian authorities had breached article 6 of the European Convention on Human Rights (ECHR) pertaining to the right to a fair trial, France was only ordered to pay non-pecuniary damages to the applicant, and the EctHR (European Court of Human Rights) failed to weigh in on whether such evidence was admissible. These cases highlight an uneasy coexistence of guarantees available to defendants and transnational proceedings in which rules are modified in the interest of pragmatism. This is particularly relevant in the EU, where mutual recognition of evidence is stipulated in Article 82 of the Treaty on the Functioning of the EU (TFEU). Combined with the existence of policing and judicial networks such as Europol and Eurojust, the integration model allows for forum shopping (Gless, 2013), a practice in which States prosecute in the jurisdiction most likely to award them a favourable outcome. In the US, these inherently unfair consequences are embedded in MLATs themselves, as they were designed for law enforcement. An intention to extend their access to defence lawyers never materialised. In this regard, disallowing an accused person to search for exculpatory evidence abroad was part of a "tough on crime" stance (Richardson, 2008), in which the balance struck concerning conflicting human rights heavily swayed towards potential victims. According to Richardson, the imbalance is the product of majoritarian bias, in which the majority protects its interest by applying a policy that "harms the minority group far more than any corresponding benefit to the majority" (Richardson, p.93).

The design of MLATs sways heavily in favour of States on the global stage and even more so in jurisdictions with less concern for individual human rights. This stems from the fact that UNTOC's article 18, the "mini treaty" on MLA", does not create specific due process or fair trial rights; instrad, it includes a passing reference to "due regards to the rights of the defence", rather such rights will vary depending on the adherence or lack of to specific international agreements. China has for instance signed an MLAT and a "Boundary Management System" with Nepal, designed to "expedite" both extraditions and increase surveillance of Tibetan refugees (Freedom House). The

agreement contributes to the denial of jurisdictional safe havens, with political and individual rights bearing the brunt.

Section 2: Evaluating attempts at creating a harmonised international framework for Mutual Legal Assistance

2.1 Promoting convergence of domestic legislation through criminalisation

Despite the absence of a strict dual criminality requirement in most bilateral and multilateral treaties, discretionary refusals and exceptions to the rule highlight the need to harmonise domestic regulations to reduce the scope of such occurrences to promote cooperation. The process of criminalisation responds to a two-fold requirement to incorporate the transnational nature of organised crime and to monitor the evolution of compliance. The 1990s was a decisive decade in this regard, as previously disregarded acts such as money-laundering and bribery of foreign officials were recognised as key enablers of TOC and became international priorities. The 1988 Vienna Drug Prohibition Convention signalled a turning point as it integrated the proceeds of crime into international policy (Nadelman, Andreas, 2008), seeking to "establish as criminal offences under its domestic law, when committed intentionally" (art.3). The voluntarist nature of International Law and the overwhelming adhesion to codifying treaties, of which UNTOC and UNCAC are prime examples (signed by 191 and 189 parties respectively), obscures the reality that criminalisation emerged not as a natural worldwide response to the issue of TOC, rather a result of the actions of "transnational moral entrepreneurs" (Nadelman, Andreas, 2008) which decisively shaped the process as they imposed a specific body of norms internationally. These treaties were heavily influenced by norms already present within certain legal systems. Samuel Witten, legal advisor to the State department, argued for US ratification of UNTOC by positing that "the value of these Convention provisions to the United States is that they oblige other countries that have been slower to adapt to the threat of transnational organised crime to adopt new laws in harmony with ours" (Boister, 2018). Criminalisation thus provides the benefit of constraining parties to legislate in a way that is consistent with US norms. However, these treaties left transposition to the goodwill of domestic authorities, and a review mechanism to survey its implementation was only launched in October 2020. Concerning UNCAC, a group including Russia, China, Iran, Pakistan, Venezuela, and Ecuador argued in favour of national discretion for implementation and the refusal of a review mechanism (Heimann, 2018). Faced with this resistance, non-State "transnational moral entrepreneurs" (Nadelman, Andreas, 2008) affiliated to a Western conception of TOC paved the way for the "Washington consensus" (Krastev, 2000). The World Bank and the International Monetary Fund led similar policies, as they began to include anti-money laundering evaluations in country evaluations, as well as including bribery and corruption as part of their selection mechanism for loans and contracts. These highly effective harmonisation mechanisms led to the criminalisation of drug trafficking facilitation practices such as bank secrecy, formerly considered to be an acceptable practice of customer confidentiality (Levi, 2002). Harmonisation through criminalisation has been the main success of the 1990s and the 2000s, creating the conditions for evidence to be shared without the obstacle of the dual criminality requirement. Legal uniformity in

fact contributed to the requirement being dropped in many MLATs. The process was heavily influenced by US policy, and not only explains the content of the treaties, but also helps fathom its subsequent application. Harmonised definitions facilitated requesting MLA yet failed to address issues of capacity (Section 2.3), creating a discrepancy between the ambition of the treaty and its effective application. Ironically, the US, which was the main advocate for criminalisation, has itself been a victim of such an uneven process, overwhelming signatories of MLATs with demands and having to employ extraterritorial methods to obtain them (Section 3.1).
The Financial Action Task Force (FATF) has since emerged as the key regulator in the realm of finance and security. Created in 1989, it published 40 recommendations to combat money laundering and corruption. Despite the FATF comprising of only 39 member-states, it developed a "naming and shaming" policy to expose those who failed to comply with the recommendations, to such a point that countries would do anything to make sure we are not on that list, fearing economic consequences. If the FATF has emerged as a strong normative actor with regards to, for instance, implementing norms in relation to banking intelligence, it has not yet adopted a proactive role in enforcing MLA. Although lacking standards in terms of MLA are part of the mutual evaluation process, by which countries can be listed as jurisdictions under increased monitoring. South Africa was placed on the list in the latest update provided by the Paris based institutions in June 2024, with a mention made of its deficiency regarding "outbound mutual legal assistance" (FATF, 2024). Other countries have had similar remarks made to them, including the United Arab Emirates (UAE), notoriously a haven for transnational criminals, as recently demonstrated by the Dubai Unlocked journalistic investigation. To obtain its removal from the so-called "grey list", amongst other measures, the UAE signed 44 bilateral MLATs and sent out 327 requests for information, achieving its objective in February 2024 (Francis & Odeyaji, 2023). The UAE example demonstrates that the FATF functions as a simple compliance mechanism, ticking numerical boxes rather than assessing MLA standards qualitatively. Indeed, as extradition requests for criminals arrested in Dubai have been ignored (Ljubas, 2024), it is difficult to imagine Dubai suddenly becoming a reliable partner for MLA. Yet, the UAE's major efforts to free itself from the FATF's high scrutiny jurisdictions signals the institutions high normative and de facto enforcement capabilities. If it were to heighten its qualitative standards with regard to MLA, it could spearhead meaningful change.

2.2 The impossible task of nurturing mutual trust

Information exchanged via MLA is inherently sensitive, as it contains intimate data concerning individuals and ongoing investigations. States executing requests are therefore trusting their counterpart to maintain the confidentiality of such information and that it be used appropriately, thus respecting the principle of speciality that dictates that evidence received must be used exclusively within the boundaries of the reasons for which it was requested. Two forms of trust therefore emerge, the first regards the capacity of States to maintain confidentiality, the second relates to the diplomatic relations entertained with the requestee and the belief that it will respect the principle of speciality. A Senior Official in the UK's Serious Organised Crime Agency illustrates

this fact by admitting that "the sad truth is I am not going to share my best, most delicate information with the Russian or Mexican police departments" (Naim, 2012, p109). Russia launching a full-scale invasion of Ukraine has completely undermined any prospect of international cooperation and illustrates a trend of wavering multilateralism in the context heightened geopolitical tensions, compromising international cooperation. This provides an explanation to difficult China-US cooperation in the context of the fentanyl crisis, as a US congressional report points to "Many outstanding requests by both the United States and China remain unfulfilled" (Greenwood & Fashola, 2021, p. 8). Mass corruption in Mexico's government, illustrated by the recent conviction of García Luna, formerly responsible for Mexico's response to cartels, highlights the fear of confidentiality concerning "sensitive operational information" (*Travaux Préparatoires,* UNODC, p.269). The nexus between capacity and trust explains why cooperation is mainly reserved to "prosperous and peace-loving nations that have an effective public administration" (Fijnaut, 2000, p.125). As the *Djibouti v. France* caselaw suggests, even the existence of treaty obligations cannot compensate for trust when dealing with sensitive information. Proactive forms of MLA implicate delegation of a procedural responsibility, meaning that the requesting State must be confident in the executing State's capacity to seek out evidence whilst respecting a process that may differ from their own jurisdiction.

The consequence of international distrust is not only that MLA is often an exclusive and bilateral club, but also that it mainly operates thanks to informal connections between law enforcement officials (Boister, 2003). Due to the difficulty, if not the impossibility, of obtaining evidence through MLA requests, such information is often obtained outside the framework of MLATs, and an official request will only be made when evidence is needed for trial (Perras, 2017). Under this model, liaison officers are vital, fulfilling the role of information gathering diplomats. Informal connections create a relationship of dependence between the human qualities of the liaison officer and information gathering. As such, a need to resort to affinities between individuals testifies to the weakness of current MLATs and information sharing mechanisms. Only in the EU are such relationships automatised, through the development of "detailed cooperation frameworks" (Hufnagel, 2017, p.32) such as the Schengen Information System which operates as a collaborative database, as a threshold of trust has been established (Section 3.3).

2.3 Enabling the transition from theory to practice through capacity building

To enable effective cooperation legally possible thanks to the convergence of domestic legislation, treaties established that signatories would "designate a central authority that shall have the responsibility and power to receive requests for MLA and either to execute them or to transmit them to the competent authority" (art 18(13)). It was agreed that countries were unequal in their ability to comply to such measures, given that some nations possessed pre-existing infrastructure or had more means to build them. Therefore, capacity-building clauses were integrated into suppression treaties as part of the negotiations, as a condition imposed by nations of the Global South to change their practices and laws. The UNTOC therefore provided "to enhance financial and material assistance to

support the efforts of developing countries", which was to be done to the best "extent possible" (Article 30(2)(b)). The process of capacity building is fundamental to developing MLA, not only because scarcely resourced systems and poorly trained personnel are unable to deal with the flow of requests, but also due to the sensitivity of such information, as States feared that the confidentiality of such information would be compromised. This exact concern was formulated during the *travaux préparatoires,* as the issue of sensitive operational information was raised, particularly concerning ongoing investigations, illustrating the link between capacity and trust. Capacity-building initiatives seemed mutually beneficial, allowing for countries lacking centralised headquarters to develop the necessary infrastructure, and for countries desiring to make use of the newly established framework to share and request information without fearing for its confidentiality. Nonetheless, efforts for development have failed to materialise, as the African group at the 2015 UN Commission on Crime Prevention and Criminal Justice called for more technical assistance, and in the same year, at the Conference of State Parties to the UNCAC, 59 of such Parties identified over 2,200 technical assistance needs. Such limitations highlight a huge gap between the ambitions of the suppression treaties and their effective implementation (Fijnaut, 2000). Section 2.1 identified that faced with the issue of criminalisation, transnational moral entrepreneurs led by the US adopted an aggressive strategy, which is only partially possible in relation to capacity building. In this instance, States with greater resources are tasked with a development responsibility yet cannot be constrained into acting as the UNTOC only provides for best efforts obligations. Thus, efforts were mainly bilateral and purely self-interested, as part of a "first-line of defence" strategy. For instance, a US initiative assisted Haiti in re-creating its civilian police force, yet new stations were primarily located on the West Coast due to it being an area used by Columbian cartels for trafficking (Boister, 2018). As funding capacity-building is voluntary, countries operate under the threat of resources being stripped and distributed elsewhere. In part because of the highly targeted nature of bilateral assistance, the UNODC has attempted to fill the void by providing a multilateral conduit focused on developing competencies and training, by familiarising relevant personnel with the legislation and framework (Boister, 2018). The UNODC's contribution was recognised by the General Assembly (Resolution 73/186), identifying the progress made in the delivery of advisory services and technical assistance. A crucial factor towards enabling cooperation, capacity-building is limited by the discrepancy between the ambition of treaties and the funding effectively attributed to their implementation.

Section 3: The regional and heterogenous reality of Mutual Legal Assistance: from bilateralism to integration

3.1 The temptation of circumventing MLA through extraterritorial collection of evidence

The US's approach to MLA showcases limitations within the multilateral system as it makes use of its extraterritorial reach to circumvent procedural barriers and even breach its obligations under international law. In spite of international suppression treaties and a multitude of bilateral agreements, the US faces difficulties obtaining all the evidence it needs to pursue prosecutions of a

transnational dimension. Its MLATs with Central and Southern American countries, which have overloaded domestic courts with requests, demonstrate the discrepancy between the US's ambitions and the limited capacities of some of its partners (Harfield, 2003). This serves as a justification for US authorities to conduct its own evidence gathering operations abroad, rather than remaining within the boundaries of MLATs which provide for a transfer of procedural responsibility, as a corollary condition to State sovereignty. The leading case discussing the rationale behind the method can be found in *United States v Verdugo Urdiquez* [494 U.S. 259 (1990)]. It purports to a joint operation led by the DEA and Mexican Officials in which premises belonging to the Mexican defendant were searched without a warrant and the evidence was subsequently used for a conviction in the US. The Supreme Court found that rights awarded by the Fourth Amendment of the US constitution regulating unreasonable searches and seizures did not apply to "a non-resident alien located in a foreign country" [23], and that applying such a right would disable "political branches to respond to situations involving our national interest."[22] "National security" refers to a vague and permissive standard and the Court's jurisprudence *de facto* liberalised the use of such evidence. The Court's decision creates a "double illegality" requirement, requiring that the procedure violate the search standards of both the US and the concerned country (Bentley, 1994). The pragmatic rationale of such a decision is to restrict situations in which evidence could be disregarded by courts on the basis of a procedural discrepancy. An adverse corollary effect of such a doctrine is that it encourages an extraterritorial approach, precisely in order to escape constitutional obligations. The *Verdugo* case further demonstrates an extraterritorial tendency as the search violated Article (1)2 of the drafted US-Mexico MLAT which expressly forbade the exercise of sovereign powers within the other party's territory, although the treaty was in fact only signed and ratified after the dispute arose. Nonetheless, the US acted incompatibly with treaty obligations, further highlighting the irreplaceable role that trust in the corresponding administration plays when choosing a *modus operandi.*

Undoubtedly, the US is able to act in such a manner due to its status and hegemony in so many domains, a key one being digital platforms. Due to most major social media platforms being based in the US, it is likely that user information is stored on its territory, including incriminating data necessary for prosecution. US municipal law prohibits firms from disclosing most customer content except in response to a warrant issued by a domestic judge (Nojeim, 2015). As an exception to these blocking statutes, US law allows for firms to hand over metadata, yet the standard practice has been for these corporations to reject such demands, hiding behind aforementioned blocking statutes and customer privacy. The consequence of this dominance is that foreign jurisdictions are dependent on the US's goodwill to share information exchanged between their own nationals, and also that US authorities have direct access to foreign conversations without even having to submit an MLA request. The line between extraterritorial reach and the benefit of possessing a dominant position seems an unclear one, yet both point towards the US's ability to obtain evidence through multiple channels, thus bypassing requirements stated in MLATs.

In terms of long-arm and extraterritorial reach, the People's Republic of China (China) has taken matters even further by setting up covert police stations abroad that fully encroach upon

sovereignty, the most publicised example being in Manhattan (US Department of Justice, 2023). These covert facilities and agents have been utilised to coerce into forced returns and intimidate dissidents, but also to with build cases on corrupt officials and petty criminals, fully embedding the practice within a strategy of circumventing traditional MLA.

These examples suggest an inexorably worsening landscape, yet this is not the only way forward. In R (KBR, Inc) v Director of the Serious Fraud Office, the UK Supreme Court found that law enforcement acted wrongfully by using channels outside of the MLA framework (Cochrane, 2022, p. 528). The rationale put forward that it was "inherently improbable that Parliament should have refined this machinery as it did, while intending to leave in place a parallel system for obtaining evidence from abroad" (KBR (SC), [45]). The paradox picked up on by Lord Lloyd-Jones is not only applicable to the UK, it also illustrates incoherences at the international level, that a system dedicated to investigative cooperation should exist, all the while States continue to develop backchannels to circumvent it. In countries with independent judiciaries, judges should follow this lead. Indeed, only when countries will have refused extraterritorial and illegal collection of evidence will there be a true incentive to develop a functioning collaborative system.

3.2 At the intersection of multilateralism and unilateralism: crime-based sanctions

Originally reserved to foreign policy, sanctions have progressively entered the realm of transnational organised crime repression and have become a "criminal justice tool" in their own right (Moiseienko, 2024, p.18). Resorting to such practices is symptomatic of the barriers to cooperation and the failure to promote mutual trust and capacity for MLA (Herbert & Bird, 2023, p4). Crime-based sanctions are explicitly seen as an alternative or at least a compliment to MLA, as they pursue similar objectives to primary MLA given that they can result in the freezing and confiscation of assets. The CJUE has pointed to this complementarity when justifying the use of "misappropriation sanctions" against former public officials, claiming that traditional channels would lack effectiveness as they would award "enough time to transfer their assets to States having no form of cooperation with the Egyptian authorities" (Ezz et al v. Council, Case T-256/11 (Feb. 27, 2014) [66]). This EU policy can also be termed as "legal assistance sanctions" (Moiseienko and Hufnagel, 2015, p. 355). Indeed, according to Moiseienko and Hufnagel, two-types of sanctions apply directly to organised crime: the aforementioned assistance sanctions as well as crime-based sanctions which are "imposed in response to a criminal offence allegedly committed by the person targeted". Three entities are known to actively impose sanctions on criminals: the US, the EU and the UN, the latter being the only multilateral framework in the sense that they emanate from a collective decision taken by the UN Security Council (UNSC) under article 41 of the UN Charter, and that it relies on member states for implementation. In practice, however, the UN is only a minor issuer of such sanctions. Article 24 of the UN Charter explains that the role of the UNSC is the "maintenance of international peace and security", meaning a high threshold of violence needs to be reached to gain its attention.

Applying sanctions is thus reserved to a small club of entities which have the capacity to do so either through international treaties or by *de facto* capacity awarded by a powerful position in the international economy. As such, these sanctions help to deny safe havens to criminals as their high mobility is no longer a decisive advantage. For instance, with the advent of correspondent banking, a criminal placed on the SDN list will have issues handling the proceeds wherever they are. The US's Department of the Treasury's Office of Foreign Assets Control (OFAC) has for instance made use of these prerogatives awarded by Executive Order (E.O.) 14059, which "targets persons involved in the Global Illicit Drug Trade", when targeting members of the Cartel Jalisco Nueve Generación (CJNG) involved in the trade of fentanyl.

Whereas the previous section (Section 3.1) refers to extraterritorial evidence collecting necessitating some form of encroachment of another State's sovereignty, crime-based sanctions offer the advantage of preserving, to some degree, bilateral relations. This is not to say that elevating sanctions to a systematically used tool is desirable. There would be two significant drawbacks to such a practice. Firstly, being a non-conviction-based punishment, the threshold for application is lower and a generalised application of these measures could lead to individuals having sanctions imposed onto them simply because of a lack of evidence needed for a conviction. The second issue is that despite being a criminal justice tool in practice, sanctions remain in the hands of non-judicial bodies, such as the OFAC in the US, for which national security is the main concern, rather than due process. As such, although crime-based sanctions are a useful tool which can compensate certain of the deficiencies of MLA, further *ex-ante* judicial oversight should be seen as a precondition to any further roll-out of the policy.

3.3 The Latin American model: an innovative approach with ambitions hindered by corruption, capacity and mutual trust

Latin America is characterised both by its high exposure to organised crime and by its unstable political regimes. This combination means that the region has often been at the forefront of developing legal instruments to combat the issue, yet high levels of corruption and the scarcity of binding provisions has hindered implementation. The Organisation of American States (OAS) and its creation of the Inter-American Convention Against Corruption (IACAC) was the first regional agreement of its kind, signalling a leadership role for Latin American states in the fight against corruption in the public sphere (Nagle, 2007). The manifestation of political will to combat TOC on a regional level materialised through protocols such as the Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms (CIFTA). The novelty of such the project was that, rather than being a simple transposition of the UNTOC's additional protocol on regulation of arms trafficking, it catered to Latin American particularities by providing for cost-effective MLA mechanisms, limiting the impact of the lack of capacity in the region. Furthermore, the convention addressed issues of confidentiality as it attempted to garner trust between members (article 12). Despite highlighting the innovative nature of Latin American regulation, its limitations also underline the weak implementation of such measures as the text failed to provide a compliance

mechanism. Scholars identify the political instability and the mass corruption as hinderances to implementation, that rises to such a high-level in certain States that political and civil society elites are reticent to implement norms that could be used against them (Nagle, 2007). High-level prosecutions linked to TOC are often conducted by the US, making use of its extraterritorial reach. It is in light of this potential for political pressure that the proposal for a Latin American and Caribbean Criminal Court Against Transnational Organised Crime (COPLA) must be read (Currie, Leon, 2018). The proposal aims to create an institution that will "investigate and prosecute the leaders and heads of criminal organisations responsible" for offences committed within its jurisdiction, which consists of Caribbean and Latin American signatories of the UNTOC. COPLA would therefore remove hinderances to MLA by creating a centralised platform that investigates and receives evidence. Such a project would provide progress in the reduction of safe havens in the region, by limiting the scope for State weakness to prevent arrest and prosecution. However, even if the project were to materialise, doubts can be raised over the political nature of such an organisation, as States such as Mexico could see high-ranking officials prosecuted (Eskauriatza, 2021). Conventions such IACAC, CIFTA and COPLA highlight the innovative stance of Latin America, all the while revealing the difficulty of such projects materialising due to issues of capacity, corruption and trust.

3.4 European Integration: closing in on the complete denial of safe havens for Transnational Organised Crime

The EU is in many ways an exception to the bilateral and informal reality of MLA as the highly integrated jurisdiction has in many aspects overcome the issue of incompatibility, trust, and capacity to develop a harmonised legal system that has considerably reduced havens within the communitarian territory. As discussed in Section 1.2, continental Europe has historically been open to MLA due to its highly mobile population, which has only grown through the process of European integration, further strengthening the case for robust judicial cooperation. Evidence of such cooperation can be traced back to 1959 and the European Convention on Mutual Assistance, but the core of the current framework for criminal matters appeared in 2000. Key instruments that constitute the innovative structure are the Schengen Information System, a database giving access to various details including identify, whereabouts and DNA (Hufnagel, 2017). Contrary to bilateral agreements, where trust is generated through diplomatic channels and is dependant on global trends, the EU court system enables judicial cooperation to continue to function by creating its own source of trust. The particularity of the EU is that harmonisation is not only the result of domestic criminalisation, but also of supranational directives transposed into municipal law. For instance, directive 2015/849 relative to anti-money laundering provisions applied to the financial institutions called for the creation of a register of effective beneficiaries of assets that would be open to the public. The CJEU ruled that this constituted a grave interference into the fundamental right of privacy (articles 7 and 8 of the EU charter). The court exerts a limitative function, favouring confidence by ensuring that citizens will not have their rights impaired in another European

jurisdiction. The ECtHR fulfils a similar role, enabling cooperation with non-member States. Strasbourg jurisprudence was used by Swiss courts to justify the carrying out of a seizure and confiscation of goods requested by Italian authorities. Despite preventive confiscation entailing an interference to the peaceful enjoyment of possessions, the Court found that the aim of authorities was both legitimate and proportional to the gravity of the case by preventing the unlawful use of possessions whose lawful origin had not been established. The ECtHR thus generates confidence between authorities by providing a common arbitration to conflicts between rights.

However, despite mechanisms created by EU conventions and trust developed by supranational courts, practical limitations persist and prevent their application. Lucas and Sánchez provide an illustration of dysfunctional procedures, as they narrate a "real story" of MLA in the EU. Common obstacles include requests simply never being completed and returned, linguistic mistakes leading to rejection and transborder interrogations failing due to technological flaws. Despite favouring direct contact through authorities, which can be done through electronic means (article 25(3) European Cybercime Convention), investigations often rely on liaison officers to verify that the request is in fact being treated, reintroducing a human element into the procedure. These remaining obstacles highlight a lack of cooperative culture between European authorities, a culture where authorities consider transnational investigations to be of prime importance.

Conclusion

A crucial mechanism to prosecute increasingly mobile organised criminals, the development of MLA has seen contrasting successes. The convergence of domestic legislation championed by multilateral institutions hides the uneven reality of MLA's extension, subject to unresolved issues of capacity and of trust. Problems concerning capacity and trust interlink to the extent that they create fear amongst developed States of confidential information leaking, whilst States necessitating investment grow frustrated by its difficulty to materialise and by intrusions into their sovereign prerogatives. Unfortunately, geopolitical trends seem to be moving towards increased distrust rather than multilateralism and cooperation. Faced with these difficulties, the US has made use of its dominant position to obtain evidence throughs its extraterritorial reach, whether this be through a long-arm approach to jurisdiction or a growing recourse to crime-based sanctions. These extraterritorial approaches, whether pursued by the US, China or others, undermine the development of an international regime.

Whereas a failure to implement stable and sustained capacity-building policies on a bilateral basis has been gradually compensated by the increasing influence of the UNODC, distrust between nations seems to be a far more deep-rooted issue. Garnering trust between States is the next crucial yet complex step to make in the promotion of further cooperation between States to reduce impunity for TOCs. If certain hinderances can only be overcome through infrastructural progress, adapting legal regimes to the transnational nature of organised crime can contribute to banishing safe havens. Both the Latin American region and the European Union seem to be paving the way for more integrated institutions, which could be the key to reducing the influence of distrust on

transnational proceedings. The EU's court system that protects individual rights, although adverse effects remain, generates the confidence necessary to accepting to share sensitive information. COPLA, which contrary to the EU is a proposal emanating from States with limited capacity and trust, is another initiative designed to limit impunity through the creation of the first international criminal court for transnational crime. TOC, a tentacular phenomenon which seeks to obtain advantages by weaving its way into institutions is intrinsically linked to governments and therefore politics. Transnational proceedings are therefore highly likely to generate diplomatic tension along the way, and perhaps the creation of an international court would be a solution for prosecutions to remain unbiased.