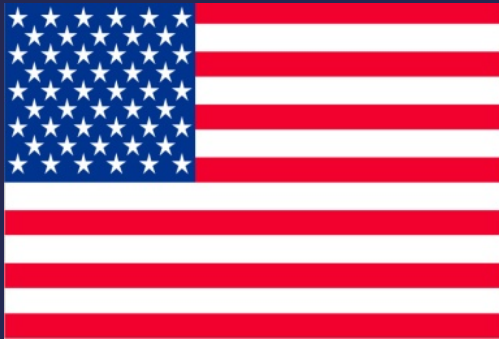


Collecting Foreign Evidence



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Lawyers Without Borders

March 2016



**LAWYERS
WITHOUT
BORDERS**
KENYA 



Outline

- I. Collecting Evidence from Foreign Entities
- II. Types of Assistance
- III. What is Mutual Legal Assistance (MLA)?
- IV. Alternative Forms of MLA
- V. How to Make an MLA Request
- VI. Grounds for Rejecting MLA Requests
- VII. Examples of MLA's Successes
- VIII. MLA's Place in Kenya/Africa

I. Collecting Evidence from Foreign Entities

Why Collect Foreign Evidence?

- Modern states have developed mechanisms for requesting and obtaining evidence for criminal investigations and prosecutions
- Some evidence may lie outside the scope of a state's jurisdiction
- Only with the cooperation of other states can an investigation be fully undertaken

Methods of Collecting Foreign Evidence

- Mutual Legal Assistance
- INTERPOL
- UN Mechanisms
- Peace and Security Protocol
- Letters Rogatory
- Informal (Agency-Agency) Agreements

II. Types of Assistance That Can be Requested

Foreign Evidence Requests

- How many of you have submitted a request for foreign evidence before?
- Which of the following types of assistance have you requested?
 - A) Forensic Evidence
 - B) Witness Testimony
 - C) Seizure of Assets
 - D) All of the above
- What form of evidence request have you made?
 - Mutual Legal Assistance
 - Letters Rogatory
 - INTERPOL
 - Other

Assistance Types

- Obtaining evidence or statements from persons
- Effecting service of judicial documents
- Executing searches, seizures, and asset freezing
- Providing information, evidence, items, and expert evaluations
- Providing originals certified copies of relevant documents and records, including government, bank, financial, corporate, or business records

Assistance Types (continued)

- Identifying or tracing proceeds of crime, property instrumentalities, or other things for evidentiary purposes
- Facilitating the voluntary appearance of persons in the requesting State party
- Any other type of assistance that is not contrary to the domestic law of the requested State party

III. What is Mutual Legal Assistance?

What is MLA?



Mutual Legal Assistance (MLA) is one of the most important legal tools for national authorities working to counter transnational crime

https://www.unodc.org/images/southeastasiaandpacific/2013/07/mla-workshop/mla_1.jpg

What is MLA?

- An agreement between two or more countries for the purpose of gathering and exchanging information to enforce public or criminal laws
- Formal MLA arrangements can be effected by a bi-lateral or multi-lateral treaty (the so-called MLA Treaties)
- For example, many countries, including Kenya, are party to the United Nations Convention against Transnational Organized Crime

What is MLA?

- Informal MLA agreements can also be brought about in this way
 - For example, the CITES (Convention on International Trade in Endangered Species of Wild Fauna and Flora) has no express MLA procedures
 - However, an MOU between CITES and INTERPOL encourages Mutual Assistance to take place between parties to CITES and members of INTERPOL

Is MLA Necessary?

- A formal mutual legal assistance request is required when the target state is asked to:
 - exercise a coercive power, or
 - obtain an order of a court
- “Coercive powers” include extradition, forced witness testimony, mandatory reporting by experts, etc.

Is MLA Necessary?

- Today, the main international and regional anti-crime instruments require state parties to establish effective MLA regimes
- However, there are alternatives to formal MLA mechanisms

IV. Alternative Forms of MLA

Alternatives to Formal MLA

- Intermediary Requests
 - International Criminal Police Organisation (INTERPOL)
- Informal requests
 - Agency-to-Agency

Intermediary Requests - INTERPOL

- Worldwide, INTERPOL has 184 member countries, including all sub-Saharan African states



Intermediary Requests - INTERPOL

- Each INTERPOL member country maintains a national central bureau staffed by national law enforcement officers
- This is the designated contact point for other member countries requiring assistance with overseas investigations and the location and apprehension of fugitives

Peace and Security Protocol

- An agreement between Tanzania, Uganda, Burundi, Rwanda, and Kenya to combat transnational crime
- Includes provisions for exchanging criminal intelligence (rather than only evidence)

Letters Rogatory

- Customary means of obtaining judicial assistance in absence of treaty
- Letter between court of one country and another requesting assistance
- Generally less streamlined process than other MLA mechanisms

Letters Rogatory

- Should include:
 - Statement that request is being made in the interest of justice
 - Brief synopsis of the case, including type
 - Nature of assistance required (e.g., service of process, compelling testimony)
 - Identifying details of involved persons
 - List of documents sought or questions to be asked

Informal Requests - Agency-to-Agency

- In practice, informal requests for assistance are regularly made on an agency-to-agency basis where the use of coercive powers in the requested country is not required



V. How to Make an MLA Request

Steps in an MLA Request

- Sample Request Methods
- Foundational Requirements
- Minimum Information
- Effective Drafting
- Sufficient Evidence
- Principles of Law

Steps in an MLA Request

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Example MLA Paper Request

Overview of investigation

Background of the case

Details of the accused

GUIDE TO MLA SAMPLE REQUEST

SAMPLE MLA REQUEST

Note: This Sample Request is included for illustration purposes only. When drafting a request for assistance to a particular country, the requesting state must refer to the detailed Step-by-Step Guide of that country to ensure the requirements for seeking assistance in a given case are being met.

** On letterhead and translated into the language of requested state

URGENT*/CONFIDENTIAL
(*delete the above if not urgent)

**REQUEST FOR MUTUAL LEGAL ASSISTANCE
BY THE REQUESTING STATE TO THE REQUESTED STATE MADE
PURSUANT TO THE BILATERAL MUTUAL LEGAL ASSISTANCE
TREATY
BETWEEN THE REQUESTING AND THE REQUESTED STATE**

I. OVERVIEW OF THE INVESTIGATION AND PENDING PROSECUTION

The National Police Force and the National Prosecuting Service of the requesting state are investigating an alleged Fraud on its government (namely 'Influence Peddling'), contrary to section 555 of the *Penal Code* of the requesting state. This offence is alleged against:

Minister X
Date of Birth: January 1, 1951
Resident of 555 Tulipe Lane, City of Oak, Requesting State

Minister X has been charged with the above-stated offence and is currently on bail pending the commencement of his trial on December 1, 2011. Apart from the criminal proceedings against Minister X, he is also the subject of a parliamentary investigation under the *Conflict of Interest Code of the Requesting State* and at risk of removal from office if he is found to have breached his official duties under the *Code*.

In relation to the criminal investigation/prosecution, the National Police Force and the National Prosecuting Service of the requesting state require the following assistance:

- To obtain certified bank records from the Foreign Bank of the requested G20 state located at 222 Lane Road in the City of Pine in the requested G20 state.
- To obtain the compelled statement of Ms. S, residing at 333 Road Way, in the City of Pine, in the requested state. Ms. S is the daughter of Minister X and is believed by the investigators to have received the proceeds of Minister X's alleged criminal activity.
- To be permitted to attend in the requested state to conduct the court-ordered and sworn witness examination of Ms. S.

The above assistance is required as evidence in the anticipated prosecution of Minister X and to trace the proceeds of the alleged criminal activity with a view to future seizure and confiscation. In this regard, seizure and confiscation orders will be sought in the requesting state on the basis of the evidence gathered in the requested G20 state. At a future date, the

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MLA Request Tool



Mutual Legal Assistance Request Writer Tool



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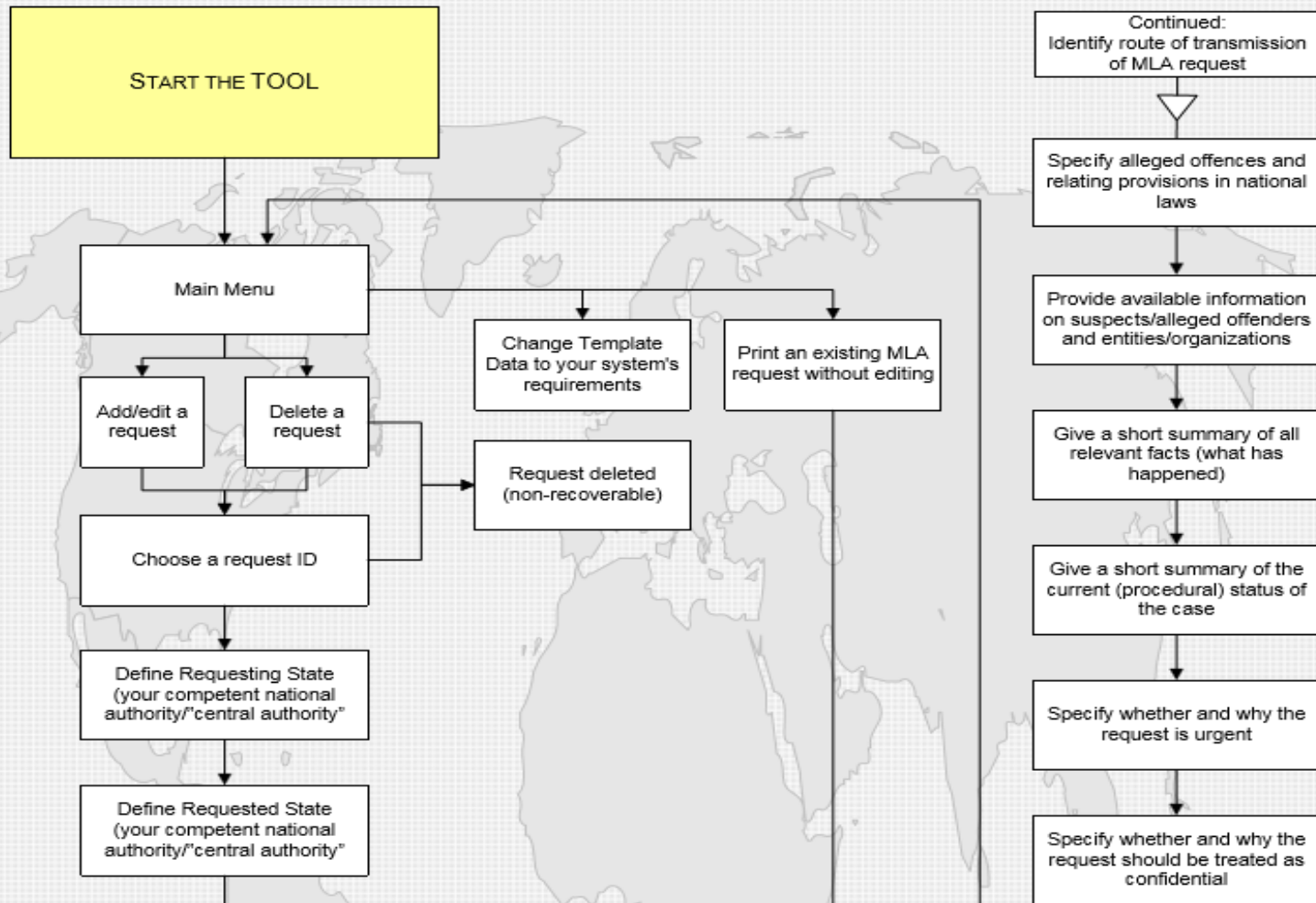
A-1400 Vienna

Austria

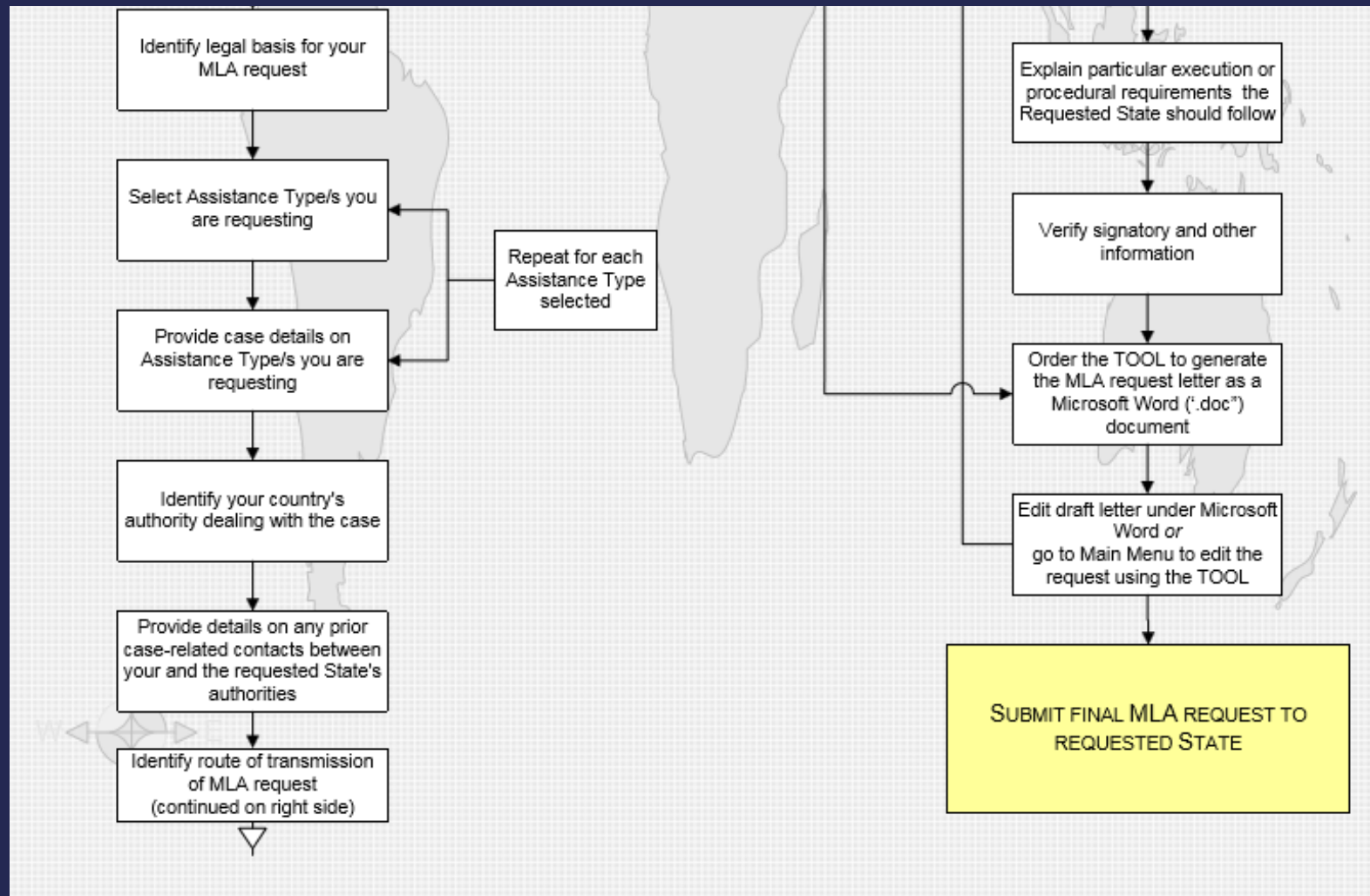
Email: mla@unodc.org

MLA Request Tool Process (Part 1)

WORKFLOW PROCESS OF THE MUTUAL LEGAL ASSISTANCE REQUEST WRITER TOOL ("TOOL")



MLA Request Tool Process (Part 2)



Steps in an MLA Request

- ~~Sample Request Methods~~
- Foundational Requirements
- Minimum Information
- Effective Drafting
- Sufficient Evidence
- Principles of Law

Foundational Requirements

- In order to make MLA requests, there must be a foundation in place
- Keep formal and informal legal assistance arrangements up to date
- Develop effective arrangements for receiving and executing requests

Steps in an MLA Request

- ~~Sample Request Methods~~
- ~~Foundational Requirements~~
- Minimum Information
- Effective Drafting
- Sufficient Evidence
- Principles of Law

Minimum Information

- Name of authority making the request
 - Kenya Wildlife Service
- Subject matter and nature of the investigation
 - Ivory Trafficking – uncovering hidden assets
- Summary of relevant facts
 - The plaintiff was found with XYZ, after a witness placed the plaintiff...

Minimum Information

- Description of the assistance sought
 - Extradition, Asset Freezing, etc.
- Identity, location, and nationality of any person concerned
 - John Mwiti, Switzerland, Kenyan National
- Purpose for which the evidence, information, or action is sought
 - To corroborate existing witness testimony that places plaintiff at crime

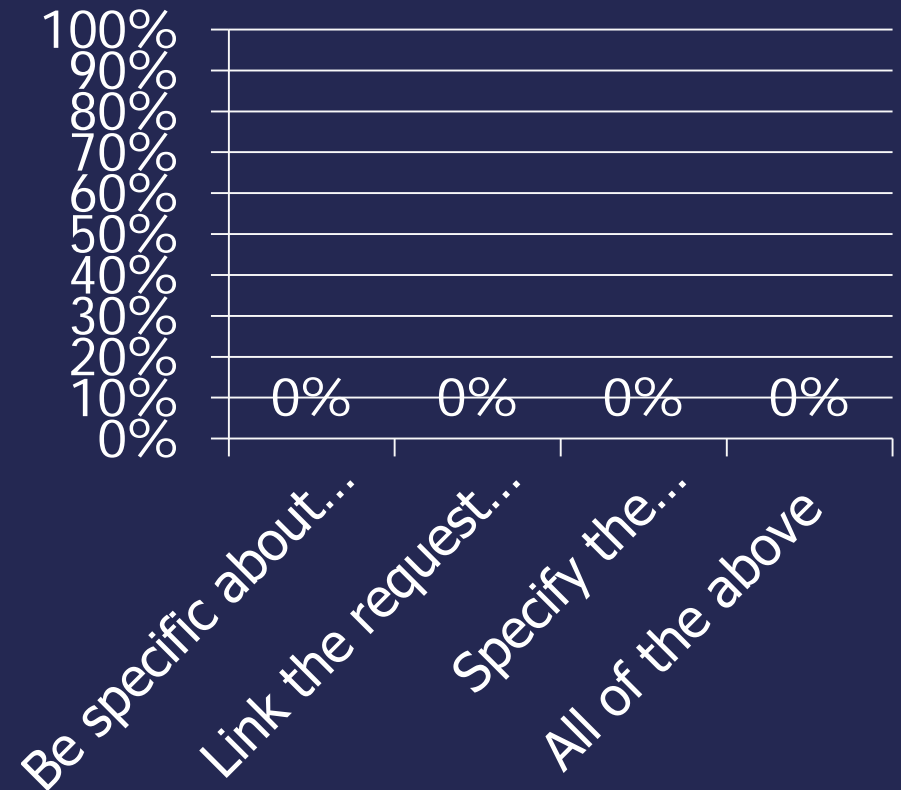
Steps in an MLA Request

- ~~Sample Request Methods~~
- ~~Foundational Requirements~~
- ~~Minimum Information~~
- Effective Drafting
- Sufficient Evidence
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Effective Drafting

Q: Which of the following drafting principles are **most** important in MLA requests?

1. Be specific about **what** you require, rather than **how** to acquire it
2. Link the request to an existing investigation or proceeding
3. Specify the precise assistance sought
4. All of the above



Effective Drafting

- Correct Answer: D) All of the above.
 - Be specific about what you require, rather than the method of acquiring it
 - Link the request to an existing investigation or proceeding
 - Specify the precise assistance sought

Steps in an MLA Request

- ~~Sample Request Methods~~
- ~~Fundamental Requirements~~
- ~~Minimum Information~~
- ~~Effective Drafting~~
- Sufficient Evidence
- Principles of Law

Sufficient Evidence

- In order for a successful mutual legal assistance request to be prepared, there must be “sufficient evidence” to make that request
- The standard is generally that which would demonstrate a legitimate case to be tried at court

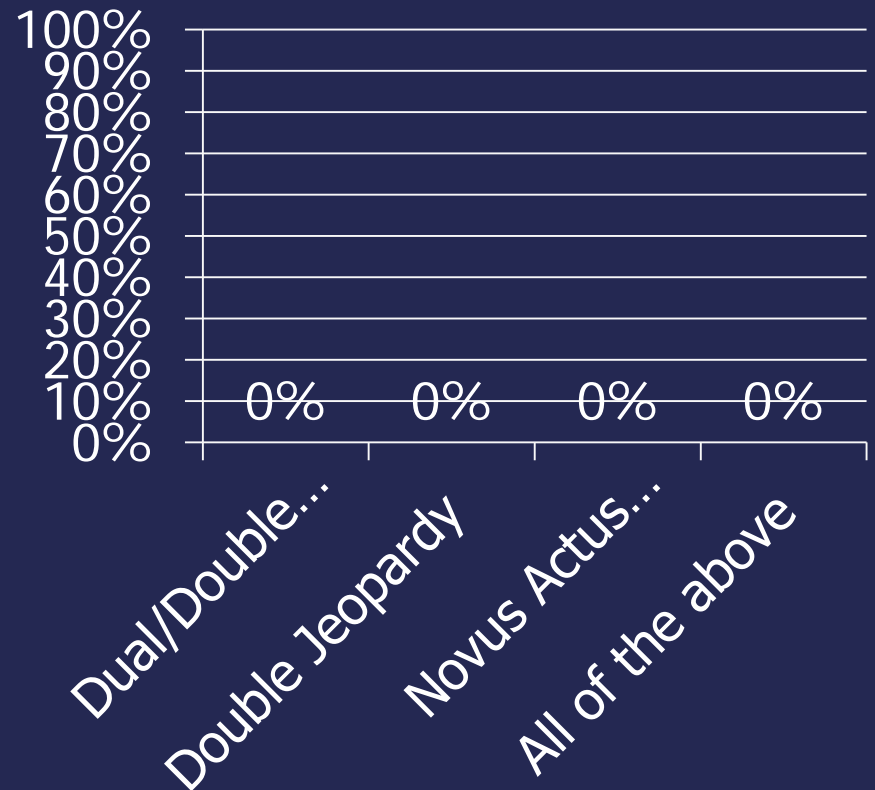
Steps in an MLA Request

- ~~Sample Request Methods~~
- ~~Foundational Requirements~~
- ~~Minimum Information~~
- ~~Effective Drafting~~
- ~~Sufficient Evidence~~
- Principles of Law

Principles of Law?

Q: What principles of law must be in operation when making an MLA request?

1. Dual/Double Criminality
2. Double Jeopardy
3. Novus Actus Interveniens
4. All of the above



Principles of Law?

- A) Dual or Double Criminality
 - A principle that requires the conduct of the person subject to an MLA request to be viewed as a criminal offence in both the requesting and the requested State

VI. Grounds for Rejecting MLA Requests

Grounds For Rejection of Request

- Request not made according to rules
- National/Public Interest - may involve national security
- Bank Secrecy
- Political Offences

Grounds For Rejection (continued)

- Human Rights Considerations
- Double Jeopardy
- Lack of sufficient information in the request is NOT grounds for refusal
 - Target state must request more information if necessary

VII. Examples of MLA Successes

Examples of Success - Lesotho

- Lesotho Highlands Water Project Case
 - Masupha Sole, CEO of the Lesotho Dam Project, was found to have over \$1M in multiple Swiss bank accounts



Examples of Success - Lesotho

- The prosecution only had evidence that monies were paid into Swiss accounts but nothing to prove that the transactions took place in Lesotho, thus lacking jurisdiction



Examples of Success - Lesotho

How did Lesotho officials pursue the criminal?

The judge ruled that Lesotho could exercise jurisdiction, because it was the country feeling the effect of the bribers' crimes (*S v. Mharapara* [1986] Zimbabwe)

By using an MLA agreement between Switzerland and Lesotho, the prosecution were able to bring charges against major construction companies that were involved in bribing Sole

Examples of Success - UK

- A Chinese company was under investigation by UK officials for value-added tax fraud and money-laundering involving a large amount of funds



Examples of Success - UK

- UK authorities made a MLA request to their Chinese counterparts, on the basis of the Organized Crime Convention, with the hope of sending officials to China for evidence collection
- The request was reviewed for conformity with the main elements of the Organized Crime Convention format
- Authorities conducted several rounds of consultations

Examples of Success - UK

What would the UK and Chinese governments be consulting on?

- The timing and means of evidence collection;
- Ways for witnesses to present testimony and the associated costs; and
- The methodology and scope of the inquiry

Examples of Success - UK

- Witness testimony and related evidential documentation were provided to the United Kingdom authorities to secure a conviction
- The Chinese authorities concerned did a large amount of work throughout the process to ensure the successful collection of evidence for the case

VIII. MLA's Place in Kenya & Africa

Topics to Be Covered

- MLA in Treaties
- MLA Challenges for Kenya
- MLA in Kenya's Laws

MLA's Place in Kenya

- MLA in Treaties
- MLA Challenges for Kenya
- MLA in Evidence in Kenya

MLA in Kenya

- Which country have you most wanted assistance from?
 - Tanzania
 - South Africa
 - UK
 - US
 - Other

MLA in Conventions

- African Union Convention on Preventing and Combating Corruption (AUCPCC)
 - 48 Signatories
 - 54 Parties



**AFRICAN UNION CONVENTION ON PREVENTING
AND COMBATING CORRUPTION**

MLA in Conventions

- Eastern and Southern Africa 'Anti-Money' Laundering Group (ESAAMG)
 - 16 Members



Eastern and Southern Africa
'Anti-Money' Laundering Group

MLA's Place in Kenya

- ~~MLA in Treaties~~
- MLA Challenges for Kenya
- MLA Evidence in Kenya

MLA Challenges for Kenya

Three Challenges for Transnational
Crime Management in Africa

1) Crimes Emanating Beyond Jurisdiction

- **Challenge:** How to deal with crimes that emanate from outside the jurisdiction
 - The task is to ensure that criminals do not remain beyond the reach of the criminal law

Solution

- 1) MLAs ensure that criminals who escape the prosecuting jurisdiction can still be brought to justice, with the cooperation of the country in which they are located

2) Investigating Transnationally

- **Challenge:** Investigating crimes with a transnational element
 - Investigating and prosecuting a case with a transnational element will require the assistance of the authorities in that other country

Solution

- 2) Formal MLA Treaties ensure cooperation between countries in obtaining evidence, securing witnesses, and ultimately bringing a criminal to justice

3) Tracing and Recovering Proceeds

- **Challenge:** Tracing and recovering proceeds of crime that have been moved out-of-state
 - Developing effective mechanisms for recovering the proceeds of crime, wherever they may be in the world

Solutions

- MLAs
 - MLAs create avenues for managing criminal proceeds, especially those that fall outside the typical jurisdiction of the prosecuting country, such as:
 - Reporting Agreements, so as to find and freeze the proceeds of crime
 - Search and Seizure Requests, which allow for the confiscation and repatriation of the proceeds of crime

MLA's Place in Kenya

- ~~MLA in Treaties~~
- ~~MLA Challenges for Kenya~~
- MLA Evidence in Kenya

MLA in Kenya's Legal System



LAWS OF KENYA

MUTUAL LEGAL ASSISTANCE ACT

No. 36 of 2011

MLA in Kenya's Legal System

- *Mutual Legal Assistance Act, § 6(2)*
 - Legal assistance includes, among others, facilitating the voluntary attendance of witnesses or potential witnesses in a requesting state and providing information, evidentiary items and expert evaluations

MLA in Kenya's Legal System

- *Mutual Legal Assistance Act, § 33*
 - Evidence obtained abroad is not inadmissible by reason only that the statement contained therein is hearsay or a statement of opinion
 - To determine probative value, the court may receive evidence, examine the record, and draw any reasonable inference from the record

IX. Discussion