

CONFIDENTIAL

To: The Prosecutor's Office
The International Tribunal for the Prosecution for Serious Violations of
International Humanitarian Law Committed in the Former Yugoslavia
Since 1991
The Hague
The United Nations

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MEANS TO COMPEL WITNESSES
TO TESTIFY BEFORE THE TRIBUNAL

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I. Introduction and Summary of Conclusions

The General Framework Agreement for Peace in Bosnia and Herzegovina, also known as the Dayton Peace Accords in November of 1996, requires all parties to "cooperate fully in the investigation and prosecution of war crimes," but this has not enabled the International Criminal Tribunal for the Former Yugoslavia (hereinafter Tribunal) to use the substantive investigative powers needed to locate evidence and compel testimony.¹ Although signed by the Republic of Bosnia and Herzegovina, the Republic of Croatia, and the Federal Republic of Yugoslavia, cooperation could be greatly improved. The legal and logistical implications of prosecuting war crimes for the Tribunal seem to have fallen to the Prosecutor of the Tribunal.

Concurrently, of international concern, is the current situation facing the internationalization of crimes. Legal cooperation between foreign states and their differing legal systems has evolved from extradition to such complex areas as drug trafficking, terrorist activities, and genocide. As a United Nations (hereinafter UN) report noted in 1993: "The international community is faced with an increasing occurrence of well-organized criminal activity that transcends national borders, that replicates methods and techniques used with success in the financial and business communities, and that generates enormous wealth."² Issues of sovereignty between one

¹ General Framework Agreement for Peace in Bosnia and Herzegovina, Nov. 21, 1995 [hereinafter Dayton Peace Accord].

² *Control of Proceeds of Crime: Report of the Secretary-General*, U.N. Doc.

country and another complicate the gathering and delivery of evidence from one jurisdiction to another, including the identification, capture and delivery of a suspect.

This challenging development has been addressed through international cooperation with bilateral and multilateral civil conventions. In 1896, the Convention on Civil Procedure was produced at the Hague Conference to deal with service of process and the taking of evidence abroad. However, the situation is more difficult in criminal matters and is largely an area of non-cooperation between States. Police forces work together through such agencies as Interpol, and extradition treaties have been established, but international procedure is largely unestablished.

A useful tool in dealing with these legal difficulties are Mutual Legal Assistance Treaties (hereinafter MLATs). An MLAT, whether unilateral (a guide for use within a country) or multilateral (an agreement negotiated and executed by more than two parties), can effectively deal with investigative problems such as locating witnesses by providing equal access to all witnesses, whether located in the former Yugoslavia or other areas of the world. This cooperation has evolved into an era whereby mutual legal assistance is process in which one country will provide cooperation with another country in the investigation and prosecution of criminal offenses. Instead of reliance upon other countries and organizations (such as Non Governmental Organizations or international police organizations) for assistance, an MLAT could provide an outlet for the Tribunal to seize evidentiary material, compel witnesses to give testimony, expedite service of process and broaden investigations.

E/CN.15/1993/4; 25 January 1993, p.1.

The Prosecutor must use any advantage or means available to secure favorable evidence. This includes relocation of victims and witnesses to ensure personal and economic safety both prior to and after testimony. Undoubtedly, these and other suggestions are self-evident to the Tribunal and have been utilized. Encouraging witness testimony is an important avenue to explore. One prospect is the grant of immunity from prosecution for any witness coming forward.³ Though this is specifically disallowed by the Tribunal Rule 125, future consideration might be given to prospective benefits. Further issues of identifying witnesses and then locating them can arise. Another avenue is issuing a subpoena or bench warrant to compel attendance at the Tribunal, but the repercussions of a forcibly compelled witness can include little or no cooperation.

The difficulty to compel witnesses before the Tribunal is exacerbated because other territories want control, a respect of sovereignty, and a system in which to administer justice. When the Tribunal needs information within those territories, border complications set in. In this case, substantive law and policy differ within the former Yugoslavia and the UN so as to make the complications more acute. Some of the

³ Of interesting note is *Widmer v. Stokes*, 464 F.2d 592 (5th Cir. 1972), in which a former serviceman's testimony regarding the My Lai incident was compelled after an offer of immunity in the court martial of another serviceman. Widmer was ordered to testify but refused successfully asserting foreign jeopardy and application of the immunity statute (18 U.S.C.A. §6001) in military court martial proceedings.

territories disagree with the substantive claims and have personal agendas to limit any information from reaching the Tribunal.

It is clear that the first crucial step is the investigative process in which assistance from national authorities is required. The obligation of these authorities to cooperate in investigations depends upon provisions in the Tribunal's Statutes or mutual assistance in criminal matters.⁴ It is not surprising that some of these territories are unwilling to cooperate with the Tribunal.

In order to effectuate this process, the States and Tribunal should enact Mutual Legal Assistance Treaties under which the individuals (perspective witnesses), through their respective countries, would be obligated to honor a summons or subpoena, perhaps under threat of punishments, process and orders issued by the Trial Chamber or judge under Rule 39 (iv) of the Tribunal Rules of Procedure. Because the Prosecutor must investigate the crimes leading to indictments, significant resources are exhausted. Concurrent to the Prosecutor's investigation, other countries and organizations, may also be investigating the same subject matter. These other investigative bodies might be able to garner information that is more difficult for the Prosecutor to obtain, perhaps because of reticence on behalf of witnesses. Embodied within a possible MLAT, whether unilateral and setting guidelines or multilateral with actual procedural rules, could be an agreement

⁴ See Treaty Binder for United Nations Model Treaty on Mutual Assistance in Criminal Matters. An important provision is that the investigation by national authorities is conducted and evidence obtained with procedures to protect the victim and accused.

for information sharing so as to maximize limited resources. For instance, many human rights organizations were on the scene, so to speak, long before the Tribunal was formed. These organizations are likely to have information that could aid the Tribunal. Although it is difficult to foresee an unwillingness of human rights organizations to cooperate, their added investigative efforts could compel some of the less helpful countries, such as the Republic of Croatia, to cooperate. The UN (or Security Council members) could act as a facilitator for its member countries to expand investigative and legal roles.

II. Factual Background

The UN Security Council, exercising its authority under Chapter VII of the UN Charter, established the Tribunal by passing Resolution 808.⁵ The goal of the Tribunal is threefold: (1) to do justice; (2) to deter further crimes; and (3) to contribute to the restoration and maintenance of peace.⁶

In order for the Tribunal to effectively function, witnesses must appear before it to testify. If the Tribunal has the means to effectively compel the attendance of witnesses, then the witnesses are available to the Tribunal for evidentiary purposes. Means exist to bring a witness to court, some of which the Tribunal has publicly implemented with the Victims and Witness Protection Unit, the shielding identities of witnesses, and taking depositions in place of live testimony.⁷ However, because of the infrastructure of the Tribunal, live testimony is the preferred method of evidence. Although this is difficult to accomplish at times, the credibility of the witness may be enhanced and expand the probative worth of the testimony for purely subjective, personal reasons.

⁵ U.N. SCOR 808 S/Res/808(1993).

⁶ U.N. SCOR 827/S/Res/827(1993).

⁷ Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, *The Prosecutor v. Dusko Tadic a/k/a "Dule"*, Case No. IT-94-I-T, Tribunal (Aug. 10, 1995).

Each party to the Tribunal has an interest to present favorable testimony. However, the defense has an added advantage to exclude damaging testimony from the prosecution. The exclusion is not difficult to accomplish with the current state of political and economic affairs in the former Yugoslavia and the varying degrees in which those countries respond to requests. Even if not planned, the environment in the former Yugoslavia is conducive and favorable to the defense.

III. Legal Discussion

Tribunal Rules of Procedure

The Prosecutor's Office is enabled by Article 18 of the Statute allowing the Prosecutor to initiate investigations from any source, question witnesses, and seek the assistance of the concerned State authorities.⁸ Furthermore, Rule 39 provides that the Prosecutor may summon and question suspects, victims, and witness, and seek the assistance of any relevant international body including Interpol.⁹ A source of importance for the

⁸ Article 18 of the Statute:

"1. The Prosecutor shall initiate investigations ex-officio or on the basis of information obtained from any source, particularly from Governments, United Nations organs, intergovernmental and non-governmental organizations. The prosecutor shall access the information received or obtained and decide whether there is sufficient basis to proceed.

2. The Prosecutor shall have the power to question suspects, victims, and witnesses, to collect evidence and to conduct on-site investigations. In carrying out these tasks, the Prosecutor may, as appropriate, seek the assistance of the State authorities concerned."

⁹ I.T.R. Proc. & Evid., R. 39. Rule 39 elaborates on the prosecutor's powers. It provides that in the conduct of investigations, the Prosecutor may:

"(i) summon and question suspects, victims and witnesses and record their statements, collect evidence and conduct on-site investigations;

Prosecutor is that information has already been collected by the Non Governmental Organization's (hereinafter NGO's) involved in the conflict prior to the formation of the Tribunal. It is also likely that the Prosecutor has structured the evidence gathering process to ensure admissibility of this type of evidence. Although the Prosecutor has the capability to summon witnesses and record their statements under Rule 39 (i), the rules do not address instances in which witnesses refuse to make statements or cooperate with the Tribunal. Information from witnesses is usually given on a cooperative basis. Compelling witnesses to attend and testify at Tribunal proceedings are of a different nature. Under Rule 39 (iii), the Prosecutor may seek the assistance of State authorities concerned. The concerned State may summons or subpoena the witness to the Tribunal. The rules do address guidelines for taking depositions but again give a definite preference for live testimony from witnesses.¹⁰

(ii) undertake such other matters as may appear necessary for completing the investigation and the preparation and conduct of the prosecution of the trial, including the taking of special measures to provide for the safety of potential witnesses and informants.;

(iii) seek, to that end, the assistance of any State authority concerned, as well as of any relevant international body including the International Criminal Police Organization (INTERPOL); and

(iv) request such orders as may be necessary from a Trial Chamber or a Judge.

¹⁰ I.T.R. Proc. & Evid., R. 71 and 90(A).

The Tribunal should seek to minimize the effects of testifying before the Tribunal in order to compel attendance. The witness is invariably open to an adversarial cross-examination, media publicity, and hostile repercussions. Although some witnesses might view the process as a catharsis to aid in healing or redemption and freely speak, others are more likely to be withdrawn and hesitant.

Under Rule 40, the Prosecutor is authorized to request any state to prevent injury or intimidation of witnesses or the destruction of evidence.¹¹ This is an enabling provision to ensure cooperation from the concerned states with the Tribunal. Under the rules, witnesses are entitled to refuse to answer any questions that tend to incriminate them but the Tribunal may override a refusal and compel the testimony.¹² Additionally, the rules

¹¹ I.T.R. Proc. & Evid., R. 40. Rule 40 states: "In case of urgency, the Prosecutor may request any State: (i) to arrest a suspect provisionally; (ii) to seize physical evidence, (iii) to take all necessary measures to prevent the escape of a suspect or an accused, injury to or intimidation of a victim or witness, or the destruction of evidence. The State concerned shall comply forthwith, in accordance with Article 29 of the Statute."

¹² I.T.R. Proc. & Evid., R. 90(E). Rule 90(E) states: "A witness may object to making any statement which may tend to incriminate him. The Chamber may, however, compel the witness to answer the question. Testimony compelled in this way shall not be used as evidence in a subsequent prosecution against the witness for any offence other than perjury."

do provide a penalty of imprisonment or a fine for any witness who knowingly gives false testimony.¹³

International Evidence Gathering

Letters Rogatory

Letters rogatory have been the principle means of requesting evidence from foreign authorities. It is a written request from a court in one country to one in a foreign state requesting evidence or judicial assistance.¹⁴ In 1854, the United States Department of State received a request from a French Court requesting witness testimony in connection with a preliminary criminal proceeding in France.¹⁵ Because the court lacked statutory authority to execute the request, Congress passed The Act of March 2, 1855 which granted broad powers to the United States (hereinafter U.S.) circuit courts to respond to letters rogatory.¹⁶ Specifically the 1855 Act authorized the execution of letters rogatory

¹³ I.T.R. Proc. & Evid. R. 91(E).

¹⁴ Harry L. Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 Yale L.J. 515, 519 (1953) (defining letters rogatory as a "request by a domestic court to a foreign court to take evidence from a certain witness"). See e.g., 28 U.S.C. §1782 (1992) (authorizing U.S. courts to use letters rogatory).

¹⁵ *Id.* at 540.

¹⁶ Act of Mar. 2, 1855 ch. 140, § 2, 10 Stat. 630. This statute granted broad powers to U.S. courts to compel testimony of witnesses in order to assist foreign courts.

"from any court of a foreign country to any circuit court of the United States ... to make the examination of witnesses [located within the United States].¹⁷

Congress enacted The Walsh Act in 1926, in an attempt to provide federal courts with the authority to issue letters rogatory to foreign courts requesting them to compel U.S. citizens and domiciliaries to "appear and testify" before them, and to issue subpoenas to compel U.S. citizens or domiciliaries in foreign countries to appear in the U.S. as witnesses in federal criminal trials.¹⁸ However, the Act was ineffective because foreign countries were not obligated to comply with any requests.¹⁹

Law enforcement officials typically use letters rogatory when Interpol²⁰ and other police channels are unable to produce the requested evidence.²¹ While some

¹⁷ *Id.*

¹⁸ Act of July 3, 1926, Ch. 762, Sec.1, 44 Stat. 835 (1926).

¹⁹ Jones, *supra* note 14, at 540 (primarily because of misindexing, the Act passed into obscurity and later was crippled by a subsequent statute).

²⁰ Interpol is an international law enforcement information exchange headquartered in France with offices around the world. Over 100 countries are members of Interpol and provide personnel on a rotation basis. It serves a repository for basic information on transnational crimes. See generally Ethan A. Nadelmann, *The Role of the U.S. in International Enforcement of Criminal Law*, 31 Harv. Int'l. L.J. 37, 46 (1990).

governments are willing to help locate witnesses, undertake joint investigations, and gather evidence in a response to a request from Interpol or a police liaison, other governments require the request be transmitted by a letters rogatory.²² In the absence of a treaty or executive agreement, "[l]etters rogatory are an important device by which governments and their officials may enlist the assistance of foreign courts in requiring the production of evidence"²³ and are issued on the basis of comity or courtesy.²⁴ The reviewing court has substantial discretion in processing a request. The court must balance the interests of the person from whom the evidence is requested with "the strong

²¹ Nadelmann, *supra* note 20, at 318.

²² Nadelmann, *supra* note 20, at 319. "[S]ome request that a foreign court compel a suspect or witness to provide testimony; others seek permission for a U.S. law enforcement official or defense attorney to interview a suspect or witness, accompany a local official on such a requested interview, or attend and participate in a foreign judicial proceeding."

²³ *In re Request for Int'l Judicial Assistance (Letter Rogatory) for the Rep. of Braz.*, 936 F.2d 702, 704 (2d Cir. 1991).

²⁴ P.F. Sutherland, *The Use of the Letter of Request (or Letters Rogatory) For the Purpose of Obtaining Evidence For Proceedings in England and Abroad*, 31 *Int'l Comp. L.Q.* 784, 785 (Oct. 1982).

federal interests in harmonious foreign relations...."²⁵ The courts have held that a letter rogatory issued from a German court, pursuant to the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters²⁶, to obtain a blood sample from a U.S. citizen in a paternity suit is a valid request.²⁷

Unfortunately, letters rogatory have developed into a time consuming process involving diplomatic personnel, courts of respective countries, and private counsel to sometimes facilitate the requests.²⁸ Letters rogatory are now an outdated form of evidence gathering in the complex arena of international law.²⁹ Obtaining foreign

²⁵ In re: Request for Judicial Assistance from the Seoul District Criminal Court, Seoul, Korea, 428 F. Supp. 109, 114 (N.D. Cal. 1977), *aff'd*, 555 F.2d 720 (9th Cir. 1977).

²⁶ 23 U.S.T. 2555, T.I.A.S. 7444 (a multi-national treaty signed at the Hague on March 18, 1970, ratified by Congress and signed by the Federal Republic of Germany and the U.S. (entered in force October 7, 1972)).

²⁷ In re: Letter Rogatory from the Local Court of Ludwigsburg, Federal Republic of Germany, In the Matter of Anton e Smith, 154 F.R.D. 196 (Ill. Dist. Ct. 1994).

²⁸ See generally Mutual Legal Assistance With the Republic of Colombia, S. Rep. No. 35, 97th Cong., 1st Sess., p.8 (1981).

²⁹ Jones, *supra* note 14, at 554.

evidence or testimony material and the difficulties each present has led to the development of new ideas, specifically the proliferation of MLATs.

Gathering Evidence in the United States for Use in International Disputes

The evolution of the 1855 Act and letters rogatory are now the scope of two United States statutes useful for gathering evidence in international disputes. Letters rogatory are the most frequently used method for obtaining testimonial evidence by means of compulsory process in the US. A request may either be transmitted through diplomatic channels or directly to the appropriate channel. The first is 28 United States Code § 1782, used to gather evidence in the U.S. for use abroad, and the second is 28 U.S.C. § 1783, used to subpoena witnesses located abroad to testify in the U.S.

Section 1782 authorizes:

[T]he district court ... in which a person resides or is found ... [to] order h[er] to give [h]er testimony ... or to produce a document for use in a proceeding in a foreign or international tribunal. The order may be made pursuant to letter[s] rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person³⁰

The history of § 1782 reveals Congress' intent to strengthen the power of district courts to respond to requests for international judicial assistance.³¹ Section 1783, entitled "Subpoena of Person in Foreign Country," states:

³⁰ 28 U.S.C. § 1782.

³¹ In re Letters Rogatory from the Tokyo District Tokyo, Japan, 539 F.2d 1216, 1218

A court of the United States may order the issuance of a subpoena requiring the appearance as a witness before it, or before a person or body designated by it, of a national or resident of the United States who is in a foreign country, or requiring the production of a specified document or other thing by him, if ... necessary in the interest of justice and ... if the court finds, in addition, that it is not possible to obtain his testimony in admissible form without his personal appearance or to obtain the production of the document or other thing in any other matter.

Judicial assistance may be sought to compel testimony and statements, and require the production of documents or other tangible evidence. The U.S. Department of State is permitted to receive and transmit letters rogatory and does not distinguish between civil and criminal matters.³² Unfortunately, the wording of the statutes has been upheld to indicate that assistance is provided at the court's discretion.³³ Additionally, any person subpoenaed may assert any legal privilege under the laws of the U.S. or the requesting country.

(9th Cir. 1976).

³² 28 U.S.C. 1781 (1976).

³³ *In re Request for Judicial Assistance from Seoul District Criminal Court, Seoul, Korea*, 555 F.2d 720 (C.A. Cal. 1977); *In re Letters Rogatory From Tokyo District, Tokyo, Japan*, 539 F.2d 1216 (9th Cir. 1976).

Contrary to civil law countries, the U.S. does not prohibit the taking of voluntary testimony or voluntary production of documents within the U.S. to aid a foreign judicial proceeding so long as the notification and clearance requirements of 18 U.S.C. § 951 are complied with. Additionally, any interested person is permitted to request judicial assistance under § 1782.

Subpoena Duces Tecum

Most requests pursuant to § 1782 are for document production rather than testimonial evidence. A subpoena duces tecum is issued and commands the custodian of the documents, or other tangible evidence sought, to appear and bring the items specified. Individuals may be able to assert U.S. constitutional privilege against self-incrimination in relation to production of their own personal documents or the privileges under the laws of the requesting country. The request may also be challenged in U.S. courts.

Materials sought pursuant to § 1782 must be discovered "for use in a foreign or international tribunal."³⁴ However, it is clear that judicial assistance extends to proceedings before foreign administrative, quasi-judicial tribunals, and investigating magistrates.³⁵ The legislative history of § 1782 provides that a court should "take into

³⁴ *In re Letters of Request to Examine Witness From the Court of Queen's Bench for Manitoba, Canada*, 59 FRD 625 (N.D. Cal.), *aff'd per curiam*, 488 F.2d 511 (9th Cir. 1973) (discovery for an investigation unrelated to a judicial or quasi-judicial controversy not permitted under Section 1782 (a)).

³⁵ H.R. Rep. No. 1052, 88th Cong., 1st Sess. (1963).

account the nature and attitudes of the Government of the country from which the request emanates ..." in exercising its discretionary power under § 1782.³⁶ A subpoena duces tecum may be modified if it is found overbroad.³⁷ The U.S. courts have held that requests pursuant to § 1782 apply to evidence sought for use in a foreign criminal proceeding.³⁸ Furthermore, a defendant's right to confrontation is upheld when represented at a deposition pursuant to a subpoena duces tecum.³⁹

³⁶ 1964 U.S. Code & Ad. News at 3788.

³⁷ In re Letter of request for Judicial Assistance from the Tribunal Civil De Port-Au Prince, Republic of Haiti, 669 F. Supp. 403 (1987). The successor government to Jean-Claude Duvalier, pursuant to an investigation regarding corruption within the Duvalier government, sought bank records from the Bank of Boston International South and Merceron, the former Minister of Finance for Haiti. Two of the records sought under the subpoena were transactions predating the Minister's involvement in the Duvalier government. The subpoena was modified to reflect this fact and granted.

³⁸ In re Letter Rogatory From the Justice Court, 523 F.2d 562 (6th Cir. 1975).

³⁹ *Id.*

MLATs

An option that has emerged to offset the limitations of letters rogatory is MLATs, which enable law enforcement officials to obtain evidence abroad.⁴⁰ Expeditious in nature and often a direct channel between different countries, MLATs are greatly expanding in scope and number. These bypass the normal channels of a letter rogatory thereby ensuring quicker results and can be set-up with procedural framework to ensure that the resulting evidence is admissible. MLATs are often connected to drug treaties, the banking and securities market, and international criminal acts.

Provisions generally found in MLATs include locating people, taking the testimony of people, production of documents, and service of documents. The explosion in growth of MLATs may also be due to their popular use in addressing legal problems inherent in the international drug trade and the fact that locating and transferring people for testimonial purposes may not generally be available under letters rogatory.

MLATs may be bilateral or multilateral in nature. Generally, there are two articles common to all MLATs: articles defining the scope of assistance and articles limiting the circumstances in which assistance between the parties is required.⁴¹ The effect of an MLAT request is that layers of diplomatic channels are bypassed and the foreign

⁴⁰ Letters rogatory, or letters of requests, are the traditional means by which a court in one state seeks judicial assistance from a court in a foreign state.

⁴¹ Marian Nash, *Contemporary Practice of the United States Relating to International Law*, 86 A.J.I.L. 548, 551 (1992).

assistance is secured in a shorter time.⁴² MLATs generally provide service of documents, provision of records, locating persons, taking the testimony of persons, production of documents, execution of requests for search and seizure, and the transfer of persons in custody for testimonial purposes.

European Convention on Mutual Assistance

MLATs may either be specialized or general in nature, such as the European Convention on Mutual Assistance in Criminal Matters, adopted in 1959 by the Council of Europe (hereinafter “European Convention”).⁴³ It contains provisions dealing with letters rogatory, service of writs and records of judicial verdicts, the appearance of witnesses to give evidence, experts and prosecuted persons from other contracting parties, and the supply of extracts from judicial records. The European Convention is the main instrument for gathering evidence abroad, is currently ratified by nineteen countries, and played a major role in assisting the U.S. to draft its first MLAT with Switzerland and other subsequent MLATs.⁴⁴

⁴² Nadelmann, *supra* note 20, at 319.

⁴³ European Convention on Mutual Assistance in Criminal Matters, adopted Apr. 20, 1959, Europ. T.S. See Treaty Binder.

⁴⁴ The European Convention has been ratified by Austria, Belgium, Denmark, Finland, Iceland, Italy, Liechtenstein, Luxembourg, the Netherlands, Norway, Spain,

The scope of MLATs is wide ranging but a single focus such as evidence gathering is possible.⁴⁵ The European Convention is limited to cooperation between judicial authorities but Article 15 of the European Convention does provide for the possibility of direct transmissions of requests through Interpol. The European Convention specifies that every country “shall make every effort to comply with the request.”⁴⁶

The European Convention addresses the fact that a country may wish to examine a witness within its own borders and applies three rules to such questioning:⁴⁷

- a) A witness or expert who has failed to answer a summons to appear shall not be subject to any punishment, unless subsequently [s]he voluntarily enters the territory of the requesting party and is there again duly summoned (Article 8, European Convention).

Sweden, Switzerland, Turkey, the U.K., and Israel. See European Treaty Series No. 30.

⁴⁵ See, e.g., Treaty on Mutual Assistance in Criminal Matters, May 25, 1973, U.S.-Switz., 27 U.S.T. 2019.

⁴⁶ Art. 3 & Section 3 of the European Convention. See Treaty Binder.

⁴⁷ Richard Atkins, ed. *Gathering Evidence in the Civil Law System in The Alleged Transnational Criminal* 281-282 (1995).

- b) The witness or expert resident in the territory of the requested state obtains the benefit of immunity from prosecution on account of facts or convictions prior to his/her departure from the territory of the requested state. The witness shall not be prosecuted or detained or subjected to any other restriction of his/her personal liberty in respect thereof. This immunity applies to persons prosecuted and persons in custody who are temporarily transferred for the purpose of cross-examination. This immunity is limited to a period of fifteen days from the date when their presence is no longer required. The witness must be given the opportunity to leave the requesting state (Article 12, European Convention).
- c) The request or summons shall indicate the approximate allowances payable and the traveling and subsistence expenses which are refundable (Article 10 § 2, European Convention).

The growth of international crime has been followed by international cooperation. The list of bilateral and multilateral agreements is long and growing. It includes the UN Model Treaty on Mutual Assistance in Criminal Matters (1990), the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (1990), and the Inter-American Convention on Mutual Assistance in Criminal Matters (1992).⁴⁸

⁴⁸ See Treaty Binder.

United States' MLATs

The U.S. Congress has ratified at least thirteen MLATs to provide assistance in foreign investigations.⁴⁹ The first MLAT entered into by the United States was with Switzerland (in force on January 23, 1977), where customary reluctance to cooperate in criminal matters was reinforced by Swiss law.⁵⁰ Assistance specified in the treaty included:

1. ascertaining the whereabouts and addresses of persons;
2. taking the testimony or statements of persons;
3. effecting the production or preservation of judicial and other documents, records, or articles of evidence;
4. service of judicial and administrative documents; and
5. authentication of documents.

The objective of the treaty was to provide a formal mechanism for the use of U.S. enforcement agencies to seek the assistance of foreign governments in obtaining information related to pending investigations or proceedings in the U.S.

⁴⁹ MLATs in force include Argentina, Bahamas, Canada, Italy, Mexico, Netherlands, Switzerland, Turkey, and the U.S. (on behalf of Anguilla, British Virgin Islands, Cayman Islands, Montserrat, and Turks and Caicos Islands). MLATs signed include Belgium, Colombia, Jamaica, Morocco, Nigeria, Panama, Spain, Uruguay, and Thailand.

⁵⁰ U.S.-Switzerland MLAT, May 25, 1973, T.I.A.S. No. 8302, 20 U.S.T. 2019 (entered into force January 23, 1977).

Once the request has met the substantive requirements, judicial assistance is usually granted and includes:

1. search and seizures;
2. interception of communications;
3. subpoena duces tecum;
4. the lifting of bank secrecy; and
5. the interrogation of witnesses.

The Treaty compromised between differences in the two countries by applying the procedure of the requested country to any questioning (Article 9 § 2).

Protection and rights are afforded to witnesses under the Treaty. A witness can claim a privilege to testify so long as [s]he has a privilege to do so under the law of either state (Article 10 § 1). The requested state relies upon a certificate of the central authority of the requesting state in order to determine the existence and scope of a privilege.

Although the Swiss treaty required double criminality, subsequent treaties dispense with that requirement.

The U.S. developed a model mutual assistance treaty providing for assistance at the investigative and prosecutorial stages. Authority is obtained under 28 U.S.C. § 1782 in the same manner as letters rogatory and requests for assistance would be made through or to designated authorities.⁵¹ The essential elements include:

1. executing requests relating to criminal matters;

⁵¹ See U.S. mutual assistance model treaty or Digest of US Practice in International Law 1978, pp. 859-865.

2. taking of testimony or statements of persons;
3. effecting the production, preservation, and authentication of documents, records, or articles of evidence;
4. serving judicial documents;
5. effecting the appearance of a witness before the court;
6. locating persons; and
7. providing judicial records, evidence, and information.

The U.S. MLATs are an increasingly important tool against crime, particularly transnational ones such as drug trafficking and terrorism. The crimes involve the cooperation of law enforcement authorities throughout the world. The result is that the respective countries are obligated to provide evidence and other forms of assistance as specified in the treaty.

The U.S. treaties with Argentina, Spain, and Uruguay provide the broadest application and requires assistance provided without regard to whether the criminal conduct in question would constitute an offense in the requested country.⁵² An objective common to all U.S. MLATs is that assistance between the parties be provided to maximum extent possible thus limiting any grounds for denial based on any reason.⁵³

⁵² Nash, *supra* note 41, at 551.

⁵³ *Id.*

The treaties address the need for publicly available documents to be released to the requesting State. In the U.S. this is determined under guidance from the Freedom of Information Act with the requested State exercising discretion as to whether information is released.⁵⁴ If the States do not have a process similar to a subpoena duces tecum, search and seizure may be used to obtain necessary business records.⁵⁵

Only under the Italian Treaty are appearance of witnesses is obligatory. The Treaty was developed in response to an increase in heroin traffic and a number of extradition cases. The Italian Treaty creates an international subpoena that “compel[s] that person to appear and testify in the Requesting State by means of the procedures for compelling appearances and testimony of witnesses in the Requested State.”⁵⁶ This provision is also different from Article 8 of the European Convention. This creation raises questions concerning the rights of witnesses and the mechanisms to address those problems but is a significant step toward an international criminal legal system.

The agreements further specify safe conduct either for persons transferred or summoned, limitations on use of evidence obtained pursuant to the treaty for outside use, the costs involved, the contents and execution of requests and any further limitations on

⁵⁴ 5 U.S.C. § 522 (1976).

⁵⁵ See e.g., Netherlands Treaty Article 5; Colombian Treaty Article 15(1); Turkish Treaty Article 27; Italian Treaty Article 13(1); Moroccan Treaty Article 13; Swiss Treaty Article 18.

⁵⁶ Italian Treaty Article 15(1).

use. MLATs eliminate the diplomatic channels of letters rogatory, make any requests mandatory (within the scope of the treaty), and require that any procedures specified in the request are followed (unless prohibited by U.S. law).

The case law applicable to MLATs is minimal because of their recent uprising. The costs of litigation combined with the complex nature of asserting your rights in a foreign country may add to the low numbers. Courts in the U.S. are enforcing the provisions of MLATs pursuant to litigation. In *United States v. Sindona*, the Second Circuit held that the case would be dismissed unless a request by a defendant under a Swiss MLAT was fulfilled.⁵⁷ However, an interesting unpublished case dealing with search and seizure carried out under the U.S.-Netherlands Treaty is *United States x. rel. Public Prosecutor of Rotterdam, Netherlands v. Richard Jean Van Aalst*.⁵⁸ The defendant's premises were searched pursuant to a search warrant issued by a U.S. magistrate in Orlando, Florida based upon an affidavit signed by a special agent of the U.S. Drug Enforcement Administration. The defendant alleged that the request for the search, in the form of a cablegram, was not a judicial statement under oath as required by the Treaty, that the search warrant did not meet the legal requirements under the U.S. Federal Rules of Criminal Procedure and federal case law, and that Section 4 of Article 6 of the Treaty is

⁵⁷ *United States v. Sindona*, 636 F.2d 792 (2d Cir. 1980), *cert. denied*, 451 U.S. 912 (1981).

⁵⁸ United States District Court, Middle District of Florida, Orlando Division, Case No. 84-67-MISC-018.

in violation of the separation of powers principle.⁵⁹ The request for a hearing was denied.⁶⁰

In another unpublished case, *U.S. v. Carver et. al.*⁶¹, the U.S. District Court Judge ordered that the defendants “shall not, either directly or indirectly, attempt to frustrate this Court’s order granting leave to take depositions or this Court’s requests for international judicial assistance to the jurisdictions of Bermuda, Liechtenstein, and Switzerland”⁶²

The U.S. enacted the Comprehensive Crime Control Act of 1984 to address some of the problems with taking evidence in foreign jurisdictions.⁶³ The Act creates an exception to the hearsay rule regarding authenticity for business records, extending the

⁵⁹ Alan Ellis & Robert L. Pisani, *The United States Treaties on Mutual Assistance in Criminal Matters: A Comparative Analysis*, 19 Int’l. Law. 189, 215-216 (1985).

⁶⁰ *Id.*

⁶¹ *United States v. Carver, et. al.*, Criminal No. 81-342 (D.D.C., Nov. 10, 1981).

⁶² Ellis & Pisani, *supra* note 59, at 217.

⁶³ H.R.J. Res. 648, 98th Cong., 2d Sess. (1984) (signed by President Reagan on October 12, 1984, and became law on November 10, 1984). Specifically Title II, Chapter XII, Part K.

statute of limitations for the time to obtain information from abroad, and allowing for delays resulting from efforts to obtain evidence from abroad.⁶⁴ Most of the disputes falling under the Act have to deal with banking, taxes, and foreign assets disputes.

Austrian MLATs

Austria enacted its first MLAT on December 4, 1979, Extradition and Mutual Assistance in Criminal Matters (hereinafter EMACM).⁶⁵ Although unilateral in nature, the EMACM was established as a framework for future events and in response to the increase and changing nature of international criminal law and increased importance of human rights. The EMACM was followed by the Swiss Judicial Assistance Law of 1981⁶⁶ and the Law on International Judicial Assistance in Criminal Matters enacted in the then Federal Republic of Germany around the same time.⁶⁷

⁶⁴ Foreign Evidence Rules Amendments: H.R. 5406 and S. 1762, 98th Cong., 1st Sess. (1984) (hearings before the Subcommittee on Criminal Justice, Committee on the Judiciary, House of Representatives, on April 25, 1984).

⁶⁵ See Treaty Binder.

⁶⁶ Edith Palmer, *The Austrian Law on Extradition and Mutual Assistance in Criminal Matters* (1983) citing 20 Int'l. Legal Materials 1339 (1981). Translated version.

⁶⁷ Bundesgesetzblatt, (BGBl I), vol. 23, p. 2071 (December, 1982).

Prior to enactment of EMACM, Austria had limited bilateral treaties on mutual assistance in criminal matters. Aside from an extradition treaty between Austria and Monaco,⁶⁸ a judicial assistance treaty with Yugoslavia covering criminal and civil matters,⁶⁹ and recent mutual assistance bilateral agreements with Poland and Hungary,⁷⁰ the EMACM was a relatively new approach.

The format of the EMACM contains seven chapters. Chapter I outlines the general provisions. Chapter II is the most comprehensive in nature and also addresses the political and military exceptions. Chapters III, IV and V focus upon mutual assistance to foreign countries and novel requests. Rules for requests of cooperation are discussed in Chapter VI while Chapter VII specifies implementation issues.

The EMACM opens the door for implementation of future treaties while addressing assistance outside the scope of the treaty. The EMACM does not make assistance obligatory but addresses the fact that European countries are dependent upon mutual assistance in criminal matters as many criminal acts extend beyond boundaries. The

⁶⁸ Austria-Monaco Extradition Treaty, February 22, 1886, Reichsgesetzblatt (1887 RGBI 13) renewed by Treaty of March 31, 1922 (1922 BGBl 660).

⁶⁹ Palmer, *supra* note 66 citing *vertrag zwischen der Republik Osterreich und der Foderativen Volksrepublik Jugoslawien uber den wechselseitigen rechlichen Verkehr vom 16. 1955 BGBl 224.*

⁷⁰ Mutual Assistance Treaty with Poland, February, 1978, 1980 BGBl 145; Mutual Assistance Treaty with Hungary, February, 1975, 1976 BGBl 339.

EMACM is able to address evidentiary concerns that any gathered facts may not be admissible in a court. The EMACM does not address prospective acts falling within its jurisdiction. This may have simply been oversight that later proved useful in order to maintain an expansive scope of the law. Traditional forms of assistance usually included within the scope of EMACM were investigative acts, serving summons, releasing information and interrogating witnesses. The EMACM specifically provides for the transfer of a person to a requesting state for evidentiary purposes.⁷¹

Section 50 of the EMACM limits mutual assistance acts to criminal proceedings actually pending, enforcement matters, and compensation proceedings for wrongful detention among other things. The EMACM excluded assistance for foreign police investigations because the requests are normally processed through Interpol. In addition to the EMACM, Austria has supplemental bilateral agreements in force with other European Countries.⁷²

Unless the mutual assistance desired is service of process to a willing recipient, the EMACM requires that assistance is only granted for offenses that are punishable by the Austrian court and the requesting country court. Service of process under the EMACM

⁷¹ Palmer, *supra* note 66.

⁷² Supplemental Austrian Agreements to the European Extradition Convention; Switzerland, 1974 BGBl 717; with Italy, 1977 BGBl 559; with the Federal Republic of Germany, 1977 BGBl 35; and Supplemental Austrian Agreements to the European Mutual Assistance Convention: Switzerland (1974 BGBl 716), Italy (1977 BGBl 558), and the Federal Republic of Germany (1977 BGBl 36).

can only occur if the requesting country guarantees safe conduct on behalf of the witness. Of interesting note, is that Yugoslavia had similar provisions in two mutual assistance treaties, one with Austria and another with the then Federal Republic of Germany.⁷³

The Austrian criminal proceeding is inquisitorial rather than the common law adversary version.⁷⁴ The judge governs most of the evidence and interrogates the evidence. Both sides may interrogate the witness directly but inappropriate questions may be refused. Austria is a civil law country with strong issues of sovereignty thus Section 59 of the EMACM prohibits foreign investigations or procedural acts on Austrian soil. Any needed information by foreign officials would be gathered under the EMACM or another applicable mutual assistance treaty. However, in certain cases foreign officials are allowed to participate in acts falling under Section 59 of the EMACM.

Incentives of MLATs

Of the many examples of a mutual legal assistance treaty, the UN Model Treaty on Mutual Assistance in Criminal Matters is a good introduction for conceptualizing such a Tribunal document.⁷⁵ Since compliance or cooperation among the Republic of Bosnia & Herzegovina, Republic of Croatia, and the Federal Republic of Yugoslavia is not ensured,

⁷³ F.R.G.-Yugoslavia Treaty, October, 1971, 1974 BGBl II 1167 (F.R.G.).

⁷⁴ Palmer, *supra* note 66, at 99.

⁷⁵ U.N. Model Treaty on Criminal Matters, 1990. See Treaty Binder.

a unilateral model is an appropriate starting point. By first drafting necessary provisions to ensure needed assistance, the Tribunal or UN could then facilitate an agreement between the effected countries and the Tribunal. Besides allowing the Tribunal to gain cooperation and mechanisms to obtain evidence directly, the agreement would also allow the former Yugoslavian countries to maintain some control, input and sovereignty in the process.

The issue of sovereignty is an important one in consideration with MLATs. A state or country can claim extraterritorial effect for its criminal laws but these laws are unenforceable beyond its borders. This request for sovereignty necessitates that most agreements be bilateral in order to specify cooperation. However, the UN model provides a framework for which the Tribunal, through the Security Council, can draft preliminary MLATs (see attachments for other MLATs). Police agencies such as Interpol and Eurpol provide assistance for international crime gathering information outlets, however, with the increase of a "borderless" world, more legal agreements between countries must be entered into to provide effective enforcement. Therefore, the scope of a preliminary MLAT between member countries, the Tribunal and the former Yugoslavia has the potential for a world model.

Negotiation of MLATs is often complex and protracted.⁷⁶ However, some sort of agreement between the Tribunal and the respective countries could be tied to funding

⁷⁶ Ethan A. Nadelmann, *Negotiations in Criminal Law Assistance Treaties*, 33 Am. J. Comp. L. 465 (1985).

whether from humanitarian aid, loans from member countries, International Monetary Fund loans, etc. The effect of economic stabilization might offset non-cooperation due to political concerns. All parties must have a sufficient interest in the effectuation of an agreement to guarantee success. Therefore, some additional incentive should be given for the cooperation of the former Yugoslavia. Again, this includes economic relief, enhanced public image and some sort of cooperation agreement limiting the scope of compliance. A suggestion would include a grant of immunity to increase witness cooperation although, arguably, Rule 90 (E) already grants this in a limited format.⁷⁷

The framework of a MLAT should include that all evidence obtained is admissible in the Tribunal, requests be kept confidential, and penetrate any withholding of evidence frustrating the Prosecutor's office. Although formal agreements between countries can be time consuming, they are often expeditious in nature. The Prosecutor has limited resources, which cannot be spent chasing unlikely indictments due to evidentiary concerns. In a prospective MLAT, the Tribunal could ensure that compliance with all rules of procedure occur, what enforcement avenues are available, and what will happen in a non-compliance situation.

A debate exists within the U.S. that MLATs do not provide equal discovery powers to all parties, thus violating the Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution.⁷⁸ Currently, Congress and the Justice Department oppose granting

⁷⁷ I.T.R. Proc. & Evid., R. 90(E).

⁷⁸ Strasser, *Crime Has No Borders, So Countries Close Ranks*, Nat'l L.J., Oct. 30, 1989 at 40. col. 1.

defendants access to the MLAT process because foreign governments are reluctant to enter into MLATs under such circumstances.⁷⁹ The evidence gathering powers under an MLAT can and should extend to both parties. This is a potential selling point to the countries of the former Yugoslavia. Since time and money also hamper the defense team, significant resources specified in a prospective mutual agreement could assist their task.

The formation of an MLAT between the Tribunal and the former Yugoslavia would effectively open resources to both sides of the Tribunal. As public outcry has broadened against the crimes committed in the former Yugoslavia, the pressures to allow greater latitude in evidentiary matters has risen. Most differences in resulting MLATs are the result of negotiation between the treaty members. MLATs supplement rather than supplant existing international arrangements. They are an exchange of information in much the same way as letters rogatory and Interpol.

Authority to Establish a MLAT

Under Article 16 of the Statute, the Prosecutor shall act independently as a separate organ of the Tribunal and not seek or receive any instructions from any government or any other source. Facially, this limits the Prosecutor from attempting any type of mutual assistance request or treaty. However, Article 18 grants the Prosecutor broad powers in conducting an investigation and, as the Prosecutor may deem appropriate, seek the assistance of State authorities. Within these provisions lies a clear understanding of what

⁷⁹ *Id.* at 40, col. 4.

the Tribunal intended to allow the Prosecutor in conducting an investigation and securing evidence.

A more likely route to facilitate a mutual assistance request or treaty is to approach the trial chambers and some sort of agreement negotiated between all the parties. As a side note, some MLATs negate any need for compliance with the treaty if the security of any country is at stake. This could be a significant deterrent to the Prosecutor's Office if incorporated in any type of agreement. On a larger scale, the UN Security Council could consider an addendum to the Dayton Peace Accords to provide mutual assistance between the states and parties.

An Alternative:

A "Commonwealth Scheme"

An alternative to a formal treaty, such as a MLAT, is to develop a devise that embodies certain types of multilateral agreements but does not create binding international obligations and is not registered under Article 102 of the UN Charter. The agreed upon details would be a sort of recommendation in which each party would abide. The Commonwealth Scheme was developed in 1986 when representatives from 29 countries devoted four days to the negotiations to review existing cooperation in commercial crime and improve judicial assistance in criminal matters.⁸⁰ The Scheme was endorsed the following year.

⁸⁰ David McClean, *Mutual Assistance in Legal Matters: The Commonwealth Initiative*, 37 Intl. & Comp. L.Q. 177, 180 (1988).

The provisions of the Scheme are wide ranging. Assistance in criminal matters under this Scheme includes assistance in:

1. identifying and locating persons;
2. serving documents;
3. examining witnesses;
4. search and seizure;
5. obtaining evidence;
6. facilitating the personal appearance of witnesses;
7. effecting a temporary transfer of persons in custody to appear as a witness; and
8. obtaining production of judicial or official records.

The request for assistance is transmitted from one country to another. In emergencies, oral requests may be processed if followed by a written request. An option is to process information through central authorities or proceed through local authorities.

In particular, the Scheme provides for elaborate provisions to enable evidence to be taken in the courts of the requesting country, either by facilitating the travel of witness or by arranging for the transfer of custody for a prisoner willing to give evidence. The European Convention on Mutual Assistance in Criminal Matters and bilateral treaties negotiated by the U.S. provide similar provisions.⁸¹ However, the provisions apply only

⁸¹ See Treaty Binder for Scheme, paragraphs 23-25; European Convention, Articles 10-12; US-Swiss Treaty, Articles 23 and 26.

when the potential witness is willing to appear, no question of compulsion arises, and immunity is granted while the witness is in the requesting country.

Limits on Testimony

According to the European Court of Human Rights

Because of the world's view on the nature and drama unfolding at The Hague, there should be procedural safeguards to rights all parties involved. The Fifth Amendment of the U.S. Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself."⁸² The Supreme Court has construed the Fifth Amendment privilege against self incrimination to prohibit compulsion of a person's testimony if there is a real danger that the government will use the testimony, or the evidence derived from it, against the witness in a criminal prosecution.⁸³

The European Court of Human Rights (hereinafter ECHR) has held that the use of anonymous witness testimony without an opportunity for the defendant to examine or challenge violates Article 6 (1) of the convention⁸⁴ even if the identity of the witness was

⁸² U.S. Const. amend. V.

⁸⁴ Kostovski v. Netherlands, 12 Eur. H.R. Rep. 434, (1989). The defendant's conviction of armed robbery was overturned because two witnesses statements were read to the court and the defendant did not have an opportunity adequately challenge and question the witnesses either at the time of their statements or later during the proceedings.

withheld because they feared retaliation.⁸⁵ The ECHR indicates this view is limited if there is a “special reason” for the witnesses not testifying before the court.⁸⁶ In 1996, the ECHR held that no violation of the convention occurred when the defendant’s lawyer was able to question the witnesses extensively without the defendant present and not knowing the identity of the witnesses.⁸⁷

⁸⁵ *Windisch v. Austria*, 13 Eur. H.R. Rep. 281 (1990). The defendant, convicted of burglary, never had an opportunity to examine witnesses whose statements were reported by police officers in court. His conviction was overturned. See also *Asch v. Austria*, 15 Eur. H.R. Rep. 597 (1991). The defendant did not have an opportunity to question a witness who appeared in court, refused to answer questions but whose previous statements were reported to the court by police officers.

⁸⁶ *Delta v. France*, 16 Eur. H.R. Rep. 574, 574 para. 45 (1990). The defendant, convicted of robbery, was unable to examine the witnesses although the court considered their statements. The conviction was overturned.

⁸⁷ *Doorson v. Netherlands*, 22 Eur. H.R. Rep. 330 (1996).

Conclusion

The procedures for international cooperation in criminal matters are gaining speed and efficiency. More countries approach letters rogatory with a flexible approach. Some countries have taken steps to codify and facilitate judicial assistance (e.g. Switzerland, Germany, Austria, and Italy). Many countries are granting assistance in the absence of treaties pursuant to their own laws and to the principles of comity. Because of territoriality and sovereignty, many countries require that requests be processed through official channels. This is often time consuming and can, in and of itself, be a delaying tactic. A further consideration is the limited availability to defendants under some of these requests. Some MLATs do not avail the defendant of the process and courts sometimes consider these limitations constitutionally invalid. In order to fully garner witness cooperation by compelling their attendance at the Tribunal and forcing them to talk, States should enact mutual assistance laws where individuals within their borders will be required to honor such requests under the threat of punishment, process, and orders from the trial chamber pursuant to Rule 39 (iv).

Options for the Prosecutor's Office to consider include:

- 1) A formal agreement between the Tribunal, the UN, and the territories of the former Yugoslavia to process and expedite evidentiary requests.
- 2) A scheme or model unilateral assistance treaty by which the Tribunal may expedite requests for evidentiary matters.

- 3) A process by which letters rogatory or mutual assistance requests are processed through the Tribunal, international police agencies, NGOs, and the territories of the former Yugoslavia.
- 4) A process by which summons or subpoena duces tecum are processed through the Tribunal, international police organizations, and the territories of the former Yugoslavia.⁸⁸

The incentives for the Tribunal and the Prosecutor's Office to facilitate a process to gather evidence are self-evident; however, the main obstacle remains the territories of the former Yugoslavia. Any agreement would have to make obvious any positive factors, such as international humanitarian aid and acceptance by the world community, for these countries to cooperate but could be a significant step toward cooperation in the international arena.

⁸⁸ See internal Interpol memoranda detailing cooperation the agency is required to use in assisting the Tribunal.