

Financing Cr-ISIS: The Efficacy of Mutual Legal Assistance Treaties in the Context of Money Laundering and Terror Finance

ABSTRACT

Technological development throughout the past fifty years has created a world in which information can be communicated across the globe in no time at all. International law enforcement tools like mutual legal assistance (MLA), on the other hand, have not changed with nearly the same pace. Unfortunately, criminal activity rarely stops at international borders, necessitating international cooperation for any sort of effective enforcement. As this Note will discuss, the problems attendant in the current mutual legal assistance scheme, such as extensive delay and incompatibility with electronic data, have led to global tension over extraterritorial action and conflict between regulatory bodies. These developments are most stark in the context of international financial crime, particularly that which is used to finance terrorist organizations. In order to keep pace with these organizations, the process needs to be streamlined and adjusted to handle large amounts of personal and financial data. Such reform to the mutual legal assistance system is an essential component of combatting money laundering and disrupting global terrorist networks.

TABLE OF CONTENTS

I.	INTRODUCTION.....	230
II.	BACKGROUND.....	233
	A. <i>Historical Development of MLA Mechanisms</i>	234
	B. <i>The Development of Modern MLA Programs</i>	235
	C. <i>Operationalizing MLA Treaties</i>	237
	D. <i>Challenges of the Modern MLA Regime</i>	239
	1. Structural Deficiencies.....	240
	2. Operational Deficiencies.....	241
	E. <i>MLA in the Context of International Financial Crime and Terrorism</i>	244
III.	ANALYSIS.....	246
	A. <i>Potential for Extraterritorial Action and Action Outside MLA</i>	247
	1. Correspondent Banking Relationships and the Global Financial System.....	247

	2. Action Based on Domestic Law	249
	3. Asset Forfeiture Actions	252
	B. <i>Conflict Among and Within Enforcement Bodies</i> .	254
IV.	SOLUTION.....	256
	A. <i>Impracticability of Eradication and Replacement</i>	256
	B. <i>Requirements for Successful Reform</i>	258
	C. <i>International Implications of Reform</i>	260
V.	CONCLUSION	262

I. INTRODUCTION

In December 2016, the U.S. Department of Justice (DOJ) filed a complaint seeking the forfeiture of assets linked to the Islamic State (ISIS).¹ Unlike a traditional criminal prosecution, however, the four defendants in this complaint are property, rather than people.² This civil forfeiture action seeks to circumvent the traditional criminal justice system in an effort to disrupt terrorist funding networks without pursuing criminal charges against any specific individual, but instead seeking to seize assets which have themselves been linked to criminal activity.³ The assets, a group of Roman antiquities dating back to as early as 330 BC, were allegedly trafficked by ISIS in an effort to finance its regime through a series of taxes.⁴ One year after the initial complaint was filed, the DOJ filed an amended complaint, adding additional antiquities and, more notably, sought an arrest warrant *in rem* for the very first named property—a gold ring with a dark green gemstone, carved with a depiction of the Roman goddess, Tyche.⁵

However, this case is not as simple as other civil forfeiture actions—none of the items sought are known to be located within the

1. United States' Verified Complaint for Forfeiture *in Rem* at 2, United States v. One Gold Ring with Carved Gemstone, an Asset of ISIL, Discovered on Electronic Media of Abu Sayyaf, President of ISIL Antiquities Department [hereinafter *One Gold Ring*], No. 1:16-CV-02442 (D.D.C. Dec. 15, 2016) [hereinafter 2016 ISIS Complaint].

2. *Id.*

3. Aruna Viswanatha & Georgi Kantchev, *U.S. Files Suit to Seize Antiquities Looted by Islamic State Militants*, WALL ST. J., (Dec. 6, 2017, 1:14 PM), https://www.wsj.com/articles/u-s-tries-to-seize-antiquities-looted-by-islamic-state-and-used-to-fund-terrorism-1512584097#comments_sector [https://perma.cc/RAU6-HNQF] (archived Nov. 4, 2018). This avenue is particularly useful in this instance because the ISIS leader to whom the items were initially linked was killed in a raid in Syria in 2015, during which US law enforcement discovered the information relied upon by the complaint. *Id.*

4. See 2016 ISIS Complaint, *supra* note 1, at 3–4, 9.

5. United States' Amended Verified Complaint for Forfeiture *in Rem* at 10, *One Gold Ring*, No. 1:16-CV-02442 (D.D.C. Dec. 6, 2017) [hereinafter 2017 ISIS Amended Complaint]; see also 2016 ISIS Complaint, *supra* note 1, at 8–9.

territorial bounds of the United States.⁶ Therefore, in order to retrieve the antiquities and achieve the objective of disrupting one of ISIS's sources of funding, the DOJ is left to rely on international frameworks for cooperation between law enforcement entities. In this case, the DOJ aims to send the arrest warrant *in rem* as part of a mutual legal assistance (MLA) request to Turkey—the ring's last known location.⁷ Unfortunately, as this Note will discuss, the MLA process is fraught with inefficiencies, particularly in the context of counterterrorism and international financial crime.

An inevitable result of the increase in globalization and the simplicity of transmitting money and data across hemispheres in seconds has been a corresponding increase in international crime. This type of crime is particularly pervasive in the financial sector and opens up avenues through which to establish funding networks for terrorist and criminal organizations. Unfortunately, because of the transient nature of the evidence of this sort of criminal activity, successful investigation and prosecution of this conduct by domestic law enforcement is incredibly difficult. Domestic law enforcement entities are increasingly reliant on MLA mechanisms to glean information from their foreign counterparts necessary to develop their investigations, particularly those involving international crime.⁸ These legal mechanisms on which the United States and much of the rest of the world rely are well intended but are unequipped to deal with the mass amounts of data incident to these types of global investigations.

In order to effectively combat transnational crime, the international community must devise a cohesive, uniform vehicle through which law enforcement bodies across the globe can exchange information with one another and build investigations that cross borders rather than cease at them. It also necessitates increased utilization and cooperation with international law enforcement and financial regulatory bodies; these bodies may operate both as central information hubs and as potential mediators of international disputes over data sharing and extraterritorial action. The current mechanisms through which law enforcement agencies communicate with their foreign counterparts are outlined, for the most part, in bilateral or multilateral “mutual legal assistance treaties” (MLATs).⁹

6. Viswanatha & Kantchev, *supra* note 3.

7. Government's Motion for Issuance of Warrant of Arrest *in Rem*, *One Gold Ring*, No. 1:16-CV-02442 (D.D.C. Dec. 6, 2017) [hereinafter 2017 ISIS Arrest Warrant].

8. Kimberly Prost, *The Need for a Multilateral Cooperative Framework for Mutual Legal Assistance*, in COUNTER-TERRORISM STRATEGIES IN A FRAGMENTED INTERNATIONAL LEGAL ORDER 93, 98 (Larissa Van Den Herik & Nico Schrijver eds., 2013).

9. U.S. DEP'T OF JUSTICE: CRIMINAL DIV., PERFORMANCE BUDGET: FY 2017 PRESIDENT'S BUDGET 25 (2016) [hereinafter DOJ BUDGET]; see DAVID MCCLEAN,

The United States maintains these agreements with more than sixty countries, while the United Kingdom (UK) has signed fewer than twenty in addition to a broad agreement among the nations of the European Union (EU).¹⁰ Additionally, many areas of the world have developed regional schemes for mutual assistance based on geographic and cultural proximity.¹¹ However, as this Note will discuss, the current mutual legal assistance regime on the whole is not without its problems.

Part II of this Note begins with a discussion of the background of MLA,¹² and of the general global trend toward international cooperation and away from national isolationism.¹³ While many countries do buy into the current MLA system, some nations and regions still steadfastly refuse to share information between law enforcement agencies, or are party to MLA agreements but fail to make use of them.¹⁴ This hesitance may be due to political or geographical isolation, or concerns about implicating a nation's own citizens in international criminal investigations.¹⁵ This Part also discusses the historical use of the MLA regime specifically in the context of investigating transnational crime and organizations that finance terrorism. Finally, it lays out the most common problems that come hand in hand with the system as it currently exists, such as

INTERNATIONAL CO-OPERATION IN CIVIL AND CRIMINAL MATTERS 185 (3d ed. 2012) (discussing the MLAT scheme in place under the UN Model Treaty).

10. *Country Profile: United Kingdom*, MUTUAL LEGAL ASSISTANCE TREATIES, <https://mlat.info/country-profile/united-kingdom> (last visited Nov. 4, 2018) [<https://perma.cc/8ZT7-CQ5T>] (archived Nov. 4, 2018); *Country Profile: United States*, MUTUAL LEGAL ASSISTANCE TREATIES, <https://www.mlat.info/country-profile/united-states> (last visited Nov. 4, 2018) [<https://perma.cc/3SS7-9CUZ>] (archived Nov. 4, 2018).

11. Prost, *supra* note 8, at 98.

12. This Note uses the term “mutual legal assistance” as a general reference to the overarching framework created by bilateral and multilateral agreements between nations, given that this framework is the most commonly used method by which law enforcement agencies exchange information. Additionally, it tends to be used this way in textual references given that the agreements are called “mutual legal assistance treaties.”

13. See Alan Ellis & Robert L. Pisani, *The United States Treaties on Mutual Assistance in Criminal Matters: A Comparative Analysis*, 19 INT'L L. 189, 189 (1985) (discussing increased concerns about transnational crime given the “shrinking of international borders that has occurred since the end of [World War II]”).

14. See Prost, *supra* note 8, at 112 (noting “[t]here is little evidence of any use being made of the Caribbean and SADC agreements,” and the ECOWAS Treaty and ASEAN and SAARC Conventions either lack practical necessity or are too new to evaluate).

15. See, e.g., Int'l Ctr. for Transitional Justice, *Regional Judicial Cooperation in the Fight Against Impunity for International Crimes: Analysis of National Regulatory Systems and Internal Procedures in View of the Protocol on Judicial Cooperation of the ICGLR*, 4–5 (March 15–16, 2016), https://ungreatlakes.unmissions.org/sites/default/files/judicialcooperation_greatlakes_confreport_eng_ictj.pdf [<https://perma.cc/44M7-KEVK>] (archived Nov. 4, 2018) (listing challenges to regional mutual legal assistance agreements in the Great Lakes Region including lack of political willingness, human rights challenges, and policies of exclusion).

lack of efficiency, uniformity, and resources with which to fulfill requests.

In Part III, the Note delves into potential avenues for investigative action and data acquisition outside the MLA process. Many of these avenues have historically been used by law enforcement agencies and pose their own unique set of enforcement and political difficulties. The United States has also developed investigative and enforcement tools which give it greater latitude in effecting domestic judgments against foreign actors, which have impacted and incensed both the international law enforcement community and the global financial community. These tools include the use of domestic laws, like the Stored Communications Act (SCA) and asset forfeiture, in addition to international financial regulations. Part III also discusses conflict among and within enforcement bodies engaged in the MLA system and the public and private implications of the current system, particularly when it comes to the variation in international data privacy protections.

Finally, Part IV begins by detailing the impracticability of solutions that propose to eliminate the current MLA regime, and the reasons to favor reform as an alternative. The Note specifies the potential elements of reform necessary to combat the problems currently faced by law enforcement and international governments. Finally, Part IV concludes with an explanation of the problems inherent in the system that are unable to be solved by reform, and the potential implications of reform for those issues.

II. BACKGROUND

In order to understand the current mutual legal assistance system that governs communication and assistance between national law enforcement bodies, this Note will first lay out a brief background on how the system came to exist. MLA as a general concept developed concurrently with shifting notions toward the acceptability and utility of bodies of international law and international cooperation. As globalization and technological development throughout the twentieth century necessitated more sophisticated channels of communication between foreign governments, international bodies began testing out different methods of implementation of MLA that were consistent with both domestic laws and the overall goals of the program.¹⁶

16. See MCCLEAN, *supra* note 9, at 151 (discussing role of technological development in obtaining and using evidence located abroad in criminal proceedings); U.N. OFFICE ON DRUGS & CRIME, MANUAL ON MUTUAL LEGAL ASSISTANCE AND EXTRADITION 21 (2012), <http://www.unodc.org/documents/organized-crime/Publications/>

A. Historical Development of MLA Mechanisms

At the time of the nation's inception, American institutions flatly refused to provide assistance to foreign jurisdictions in criminal cases and investigations.¹⁷ This refusal was based on the grounds that providing such assistance would create a conflict of laws.¹⁸ Specifically, the United States did not believe in giving domestic effect to foreign criminal prohibitions, particularly when the conduct being investigated by the foreign entity would not result in criminal liability in the United States.¹⁹ Additionally, the common law tradition in the United States and the UK was seen as incompatible with taking evidence abroad, given the potential conflict with the Confrontation Clause and the inability to adequately assess the reliability of the evidence at trial.²⁰ Subsequent legislation in the United States in the mid-1800s regarding judicial assistance to foreign nations held fast to this justification while still managing to increase flexibility, choosing to restrict assistance to certain types of testimony and certain civil suits.²¹

Since the end of World War II, increased globalization has forced foreign and domestic judicial bodies to develop new methods through which to seek and receive assistance from other jurisdictions in gathering evidence and building cases on criminal matters.²² This concept is generally referred to as mutual legal assistance.²³ During this time period, restrictions on the provision of assistance to foreign courts were loosened, and governments generally began to be more amenable to providing international legal assistance in both civil *and*

Mutual_Legal_Assistance_Ebook_E.pdf [https://perma.cc/CL3K-5FNR] (archived Nov. 6, 2018) [hereinafter UNODC Manual] (“Realistically, it is not possible to have a bilateral treaty with every country in the world, but the increasing globalization of crime requires States to have some means of international cooperation with all parts of the globe.”).

17. Ellis & Pisani, *supra* note 13, at 191.

18. *Id.*

19. *Id.* at 191. This notion is particularly interesting given the current US reliance on asset seizure/forfeiture laws to effectively require foreign jurisdictions to give effect to US criminal laws.

20. See MCCLEAN, *supra* note 9, at 151 (discussing a defendant's right “to be confronted with the witnesses against him” found in both the Sixth Amendment and traditional English practice).

21. See Ellis & Pisani, *supra* note 13, at 191–92 (discussing the Act of March 2, 1855 limiting assistance to witness testimony where letters rogatory have been submitted, and the Act of March 3, 1963 limiting judicial assistance to suits for the “recovery of money or property” where the government is a party or has an interest).

22. See Prost, *supra* note 8, at 115 (in a discussion of mutual legal assistance, citing extradition as an example of an area of law in which globalization has necessitated development in the international cooperation framework).

23. Anton Du Plessis, *A Snapshot of International Criminal Justice Cooperation Against Terrorism Since 9/11*, in COUNTER-TERRORISM STRATEGIES IN A FRAGMENTED INTERNATIONAL LEGAL ORDER, *supra* note 8, at 29, 37 (referring to the framework for formal assistance as “mutual legal assistance” and informal assistance as “mutual assistance”).

criminal cases.²⁴ At this time, the United States provided assistance in foreign investigations through the judicial branch and tended to rely on the issuance and receipt of letters rogatory between judicial bodies in order to facilitate the exchange of information.²⁵ However, courts and law enforcement agencies universally recognized that this practice was—and continues to be—costly, time consuming, and inefficient, and began to explore new avenues through which to exchange information.²⁶ Effective MLA therefore naturally required the creation of new vehicles for inter-agency communication and transmission of investigative data.

B. *The Development of Modern MLA Programs*

Mechanisms for MLA in criminal cases have developed concurrently with changing attitudes toward international law and cooperation. Over the years, these mechanisms have taken many forms, including the European Convention on Mutual Assistance in Criminal Matters, the subsequently enacted Commonwealth Scheme, and various other international conventions on criminal assistance.²⁷ Even today, mechanisms used to facilitate the exchange of evidence of criminal activity come from a wide variety of sources. The most common are treaties, executive agreements, and *ad hoc* agreements between nations contingent on continued reciprocity, in addition to auxiliary programs implemented by other international regulatory and enforcement bodies.²⁸

Modern MLA regimes vary across the globe, but most commonly and concretely take effect via treaty.²⁹ These treaties typically

24. See Ellis & Pisani, *supra* note 13, at 193–94 (discussing the elimination of the “civil suit” and government interest requirements, and establishment of a commission to propose means of improving foreign legal assistance).

25. *Letter of Request*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining letter rogatory or letter of request as “a document issued by one court to a foreign court, requesting that the foreign court (1) take evidence from a specific person within the foreign jurisdiction or serve process on an individual or corporation within the foreign jurisdiction and (2) return the testimony or proof of service for use in a pending case”).

26. Ellis & Pisani, *supra* note 13, at 194–95.

27. See McCLEAN, *supra* note 9, at 170–72, 179–81. The European Convention, developed in 1959, was the first multilateral agreement in this area, with a focus on flexibility for varying legal systems. The Commonwealth Scheme, on the other hand, operated as a set of recommendations rather than binding obligations. Other previous schemes laid the groundwork for the current system through the adoption of requirements like the establishment of central information hubs, or justified grounds for refusal.

28. ANDREW K. WOODS, GLOB. NETWORK INITIATIVE, DATA BEYOND BORDERS: MUTUAL LEGAL ASSISTANCE IN THE INTERNET AGE 13–14 (2015), https://csis-prod.s3.amazonaws.com/s3fs-public/legacy_files/files/attachments/150128_data_report.pdf [<https://perma.cc/4PBA-VZPJ>] (archived Nov. 4, 2018).

29. Gail Kent, *The Mutual Legal Assistance Problem Explained*, STANFORD LAW SCH. CTR. FOR INTERNET & SOC’Y (Feb. 23, 2015, 1:06 PM),

resemble something similar to the United Nations Model Treaty on Mutual Assistance in Criminal Matters (Model Treaty).³⁰ The Model Treaty was promulgated in 1990 with the intent of providing a basis for future negotiations between United Nations member states.³¹ As such, it incorporates provisions from previous schemes, but runs rather slim in terms of procedure, since it is intended to provide a baseline on which nations can build.³² The Model Treaty delineates the scope of MLA—for example, its provisions do not extend to extradition or custody proceedings—and provides grounds upon which assistance may be refused.³³

Prior to the development of the Model Treaty, the concept of MLATs first began to filter into international discussions in the 1960s.³⁴ However, the United States refused to buy into the idea until over a decade later, when its own criminal prohibitions were implicated.³⁵ The United States signed its first treaty on Mutual Assistance in Criminal Matters with Switzerland in 1973, after learning that Swiss banking-secrecy provisions were being used to conceal the evasion of American tax and security laws.³⁶ Although the United States capitulated to Switzerland's refusal to contravene its strict financial privacy laws, the negotiations nonetheless led to a complex, extensive treaty that would serve as the impetus for additional similar future engagements.³⁷

Internationally, the use of the MLAT as a law enforcement tool saw the most significant rise in popularity in the 1980s as a result of concerns about the burgeoning international drug trade, terrorist networks, and a general increase in global financial and white-collar crime.³⁸ The success of these treaties continues to be of vital importance to law enforcement efforts aimed at detecting crime and

<http://cyberlaw.stanford.edu/blog/2015/02/mutual-legal-assistance-problem-explained> [<https://perma.cc/W43L-3MZ7>] (archived Oct. 29, 2017).

30. *Id.*; see, e.g., G.A. Res. 45/117, Model Treaty on Mutual Assistance in Criminal Matters (Dec. 14, 1990); Mutual Legal Assistance in Criminal Matters, U.K.-U.S., Jan. 6, 1994, T.I.A.S. 96-1202 [hereinafter US-UK MLAT].

31. MCCLEAN, *supra* note 9, at 185.

32. *Id.* at 185–86.

33. *Id.* at 186.

34. *Id.* at 196–97.

35. *Id.* at 196–97.

36. Ellis & Pisani, *supra* note 13, at 196–97 (saying the treaty went into force in 1977); see Daniel Halvarsson, The Suspect and Mutual Legal Assistance: A Legal Analysis of the Rights of the Individual in the Suppression of Transnational Organized Crime 39–40 (Spring 2015) (unpublished Master's Thesis, Uppsala University), <http://www.diva-portal.org/smash/get/diva2:846157/FULLTEXT01.pdf> [<https://perma.cc/DHR5-L2QT>] (archived Nov. 4, 2018) (noting older MLATs used to contain exceptions for fiscal offenses or violations of bank secrecy rules, but these are no longer grounds for refusal to comply with an MLAT request).

37. See Ellis & Pisani, *supra* note 13, at 197–98.

38. MCCLEAN, *supra* note 9, at 154–55 (suggesting the development of mutual assistance has been in large part due to concerns “about the drugs trade, international terrorism, and commercial crime”).

obtaining evidence of criminal activity that has no physical source or exists solely within the bounds of the internet and financial records.³⁹ Over the next few decades following the ratification of the treaty with Switzerland, the United States entered into several more similar treaties with international allies. That number skyrocketed in 2010 when fifty-six new treaties between the United States and various EU member states went into effect following post-9/11 negotiations, reflecting the global focus on counterterrorism efforts and international crime.⁴⁰

C. Operationalizing MLA Treaties

These bilateral and multilateral treaties signify a commitment to provide assistance to cosignatories in their respective ongoing criminal investigations, so long as such assistance is consistent with international and domestic laws.⁴¹ Each treaty may describe general operational terms, or may specify procedures for particular acts such as the service of documents, gathering locally stored information, taking witness testimony, or restraining or forfeiting assets linked to criminal activity that are located abroad.⁴² Operationalizing these treaties is not so simple, however. Each side is usually required to establish a central authority for receiving and processing both incoming and outgoing requests.⁴³ In the United States, that authority is the Office of International Affairs (OIA), located within the DOJ's Criminal Division.⁴⁴

The process begins with a written request from the central authority of one nation to that of another, both of which review the request to ensure that it complies with treaty requirements and domestic laws, including constitutions and founding documents as well as legislative materials.⁴⁵ The request is then sent from the central authority to the domestic law enforcement agency responsible

39. WOODS, *supra* note 28, at 3–4.

40. Press Release, Dep't of Justice: Office of Pub. Affairs, U.S./EU Agreements on Mutual Legal Assistance and Extradition Enter into Force (Feb. 1, 2010), <http://www.justice.gov/opa/pr/2010/February/10-opa-108.html> [<https://perma.cc/J5CB-HR5S>] (archived Nov. 11, 2017).

41. UNODC Manual, *supra* note 16, at 19.

42. See Ellis & Pisani, *supra* note 13, at 198 (laying out the broad categories of assistance in criminal matters typically provided for by treaty).

43. G.A. Res. 45/117, *supra* note 30, art. 3.

44. DOJ BUDGET, *supra* note 9, at 25.

45. See Mark A. Rush & Jared A. Kephart, *Lifting the Veil on the MLAT Process: A Guide to Understanding and Responding to MLA Requests*, LEGAL INSIGHT (K&L Gates), Jan. 20, 2017, at 4, http://m.klgates.com/files/Publication/669681d7-12d7-451e-8240-a33cf67c959f/Presentation/PublicationAttachment/ec5fc22d-3e3c-4607-bcb3-f4e99e3f59b4/GE_Alert_01202017.pdf [<https://perma.cc/AR52-KZNA>] (archived Nov. 6, 2018) (saying review for validity is governed by treaty requirements, the U.S. Constitution, and statutory requirements for execution).

for carrying it out.⁴⁶ In the United States, an incoming request would be sent to OIA, which would then forward it to the appropriate U.S. Attorney's Office after confirming regulatory compliance.⁴⁷ There, the appropriate division would then transform it into a domestically enforceable court order, and, once fulfilled, the desired information or proof of completion of the request would be sent back to the central authority of the country of origin through OIA.⁴⁸ As anyone familiar with the American judicial system knows, this process necessarily takes a significant amount of time, much to the dismay of law enforcement both domestically and abroad. Outgoing requests from the United States to other nations engage solely the executive branch, unlike incoming ones, which involve both the executive and judicial branches.⁴⁹ They are drafted by U.S. Attorneys during the course of law enforcement investigations and approved by OIA before they are sent abroad.⁵⁰

Interestingly, because of the lack of contact with the judicial branch, and the lack of constitutional protections for foreign citizens, there is no method through which an individual affected by an MLAT request from the United States may restrict its enforcement.⁵¹ Because MLATs are exclusively for the benefit of governments, and because of the general necessity of discretion in conducting criminal investigations so as to avoid notice to the potential defendants, subjects of MLAT requests rarely have notice of the action and certainly have no standing to challenge it.⁵² The only barrier to entry of the evidence into the record at trial is proof of compliance with the Federal Rules of Evidence and of Criminal Procedure, which will be discussed in more detail in a subsequent subpart.⁵³

Another wrinkle in the operation of the MLA system is the prevalence of areas of the world that refuse to engage in bilateral

46. Kent, *supra* note 29.

47. *Id.*

48. *Id.*

49. Rush & Kephart, *supra* note 45, at 2–3.

50. *Id.* at 3.

51. *Id.* at 5 (“[B]ecause MLA requests are investigatory in nature, the target of the investigation does not have a right to receive notice that the request has been filed. . . . Similarly, the target . . . has no independent right to be heard regarding an MLA request.”).

52. *See In re Request from the U.K. Pursuant to the Treaty Between the Gov’t of the U.S. and the Gov’t of the U.K. on Mutual Assistance in Criminal Matters in the Matter of Dolours Price*, 685 F.3d 1, 10–13 (1st Cir. 2012) (ruling MLATs do not give rise to any judicially enforceable private rights of action to impede requests, to suppress or exclude evidence, or to claim that a request was improper).

53. *See* Rush & Kephart, *supra* note 45, at 3 (“[E]videntiary protections remain in place; that is, to be admissible in court, the evidence must still meet all of the relevant requirements of the Federal Rules of Evidence.”).

MLATs.⁵⁴ This group of nations includes many African countries as well as a handful of nations in the Middle East and Asia.⁵⁵ Some of these areas are more willing to engage in regional assistance, but because of a lack of resources, lack of law enforcement infrastructure, or skepticism about the potential costs and benefits of providing assistance to foreign criminal investigations, they have yet to broadly engage in treaties with the rest of the world.⁵⁶ Several of these areas that do not maintain bilateral treaties with the rest of the globe have engaged instead in regional MLA agreements in order to facilitate cross-border investigations and resource sharing with their closest neighbors.⁵⁷ However, there is no central communication hub for each region to facilitate communication *among* regions, so each regional agreement operates as an island, where the members communicate with one another but not with non-member nations.⁵⁸ This complicates cross-regional investigations due to both decentralization and differing cultural and legal traditions in the areas involved.⁵⁹

D. Challenges of the Modern MLA Regime

Current mutual legal assistance as it exists in the United States and throughout the world is sound in theory but problematic in application. The main problems with MLA, and the use of requests via MLAT in particular, arise in two general categories: structure and operation. Treaties are multilateral agreements between nations, and enforcement of such agreements typically depends in large part on voluntary compliance with the terms of the treaty.⁶⁰ The enforcement mechanisms offered by international bodies tend to lack teeth, as do many other provisions of international law.⁶¹ Additionally, the processing and execution of requests requires a significant amount of

54. See, e.g., Int'l Ctr. for Transitional Justice, *supra* note 15 (showcasing the rarity of bilateral mutual legal assistance treaties in the Great Lakes Region, in addition to challenges in enforcing even regional cooperation).

55. See generally *MLAT Index*, MUTUAL LEGAL ASSISTANCE TREATIES, <https://www.mlat.info/mlat-index> (last visited Nov. 6, 2018) [<https://perma.cc/4M5A-667K>] (archived Nov. 6, 2018) (listing the bilateral mutual legal assistance treaties in effect; absent nations include: Cambodia, the Democratic Republic of the Congo, Rwanda, Saudi Arabia, and Libya).

56. See, e.g., Int'l Ctr. for Transitional Justice, *supra* note 15, at 5, 9.

57. See Prost, *supra* note 8, at 98–99 (listing the most common regional mutual legal assistance agreements).

58. See *id.* at 106 (Due to geographic limitations inherent in these agreements, “they do not address cooperation between countries of different regions.”).

59. *Id.*

60. See *id.* at 122 (“[M]utual assistance, even rendered pursuant to treaty, is of an inherently discretionary nature.”).

61. *Id.*

resources while implicating the difficulties that come with trying to cross language barriers and variations in legal systems.

1. Structural Deficiencies

The first structural barrier to effective MLA is the lack of accountability for refusal to comply with requests adequately or at all. Refusals are generally governed by the provisions in the Model Treaty, as well as those found in the United Nations Convention Against Transnational Organized Crime (UNTOC or the Convention).⁶² In Article 18, UNTOC requires signatories to the Convention to provide written reasons for refusal.⁶³ Countries are required to attempt to settle disputes through negotiation, but if that is impossible within a reasonable time, the issues shall be submitted to arbitration.⁶⁴ Parties then have six months to agree on terms of the arbitration, after which either party may refer the dispute to the International Court of Justice.⁶⁵ However, there is no requirement that the nations do so and no punishment for noncommunication or noncompliance.⁶⁶ Additionally, during ratification, nations may declare that they do not consider themselves bound by the arbitration requirements at all, at which point there is no additional remedy for noncompliance.⁶⁷

Common justifications for failure to comply with MLA requests include the ever-amorphous “national or public interest”; issues surrounding punishment such as dual criminality or lack thereof, double jeopardy, and severity of punishment; and privacy considerations for both public and private actors.⁶⁸ States remain wary of providing information to other nations, fearing that such information may result in the prosecution of conduct that is not criminalized in the country to which the request was sent, or of excessive punishment, including capital punishment, all of which raise additional human rights concerns.⁶⁹ In fact, many MLATs require dual criminality of the conduct under investigation in order to

62. See United Nations Convention against Transnational Organized Crime, Nov. 15, 2000, 40 I.L.M. 335 [hereinafter UNTOC]; UNODC Manual, *supra* note 16, at 2 (“The [UNTOC] can be viewed as a model or blueprint for international cooperation in extradition and mutual legal assistance.”). There are 189 parties and 147 signatories to the UNTOC. *United Nations Convention against Transnational Organized Crime*, U.N. TREATY COLLECTION, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtmsg_no=XVIII-12&chapter=18&clang=_en (last visited Nov. 6, 2018) [<https://perma.cc/3E2E-HSBF>] (archived Nov. 6, 2018).

63. UNTOC, *supra* note 62, art. 18, ¶ 23.

64. *Id.* art. 15, ¶¶ 1–2.

65. *Id.* ¶ 2.

66. *Id.* ¶ 2–4.

67. *Id.* ¶ 3.

68. UNODC Manual, *supra* note 16, at 70–73.

69. Kent, *supra* note 29.

require a receiving country to comply with a request.⁷⁰ In the absence of dual criminality, or if the request itself violates a constitutional provision or another domestic law, the request will likely go unfulfilled. Furthermore, although these problems are typically thought to only impact legal relationships between nations of disparate levels of development, recently conflicts between more developed nations have arisen which have the potential to impact international cooperation.⁷¹

2. Operational Deficiencies

The current MLA regime also possesses significant operational issues. The current process is incredibly inefficient, and receiving a response to a request may take months.⁷² This situation is also not limited to the United States. In the UK, the average length of time between the receipt of a request and completion of that request is thirteen months.⁷³ This is a function of both the number of requests received by certain nations who have access to large amounts of information, like the United States and the UK, and of the minimal resources available to fill those requests.⁷⁴

Countries that must respond to many more requests than they send tend to be less willing to funnel resources toward other nations' law enforcement efforts and believe that they should receive more international assistance toward the operation of their programs.⁷⁵ On the other hand, nations who receive few requests are inclined to send more and free-ride off the resources of foreign law enforcement bodies. Inefficiency results not only due to resource disparities, but also due to the massive increase in the number of requests issued globally as electronic data becomes increasingly more important to

70. See UNODC Manual, *supra* note 16, at 48 (saying the concept of dual criminality requires that the offense at issue be "punishable under the domestic law of both the requesting State Party and the requested State Party," based on the underlying conduct and a standard of substantial similarity).

71. See Rebecca Shaeffer, *A British Court Rules that Sending Defendants to the U.S. Prison System is a Human Rights Violation*, WASH. POST (Feb. 7, 2018), https://www.washingtonpost.com/news/democracy-post/wp/2018/02/07/a-british-court-rules-that-sending-defendants-to-the-u-s-prison-system-is-a-human-rights-violation/?utm_campaign=buffer&utm_content=bufferc506d&utm_medium=social&utm_source=twitter.com&utm_term=.61fec719ff3d [https://perma.cc/KH5T-ZHLS] (archived Nov. 2, 2018) (detailing a conflict between American and British criminal justice systems over whether extradition of an alleged hacker for prosecution in the United States would constitute a human rights violation given the characteristics of the American carceral system).

72. WOODS, *supra* note 28, at 3.

73. Kent, *supra* note 29.

74. WOODS, *supra* note 28, at 3, 10.

75. See UNODC Manual, *supra* note 16, at 85 ("[T]he ordinary costs of executing a request will be borne by the [receiving] State.").

criminal investigations.⁷⁶ In 2015, OIA had a backlog of more than twelve thousand MLA requests pending resolution, and that number is expected to continue to grow.⁷⁷ OIA attorneys currently operate at a capacity of nearly three times the caseload determined to be “manageable” by the DOJ, due to the large increase in number of requests and an overall lack of staff and budgetary resources.⁷⁸ Given the rise in electronic-data requests, the current caseload per attorney is the result of an 81 percent increase from the estimated caseload in 2008.⁷⁹

The amount of data stored on the internet and held by service providers headquartered in the United States—in Silicon Valley, in particular—has contributed significantly to the massive increase in the number of MLA requests sent to the United States.⁸⁰ The United States has become the most natural place to send these requests, given its broad jurisdiction, just as the UK is subject to a significant number of requests for information from global financial institutions. When it comes to execution of these requests by courts and U.S. Attorneys’ Offices, the DOJ has recognized that Assistant U.S. Attorneys often put off executing MLA requests in their districts in favor of addressing cases they deem more pressing, which only further increases the backlog.⁸¹

This issue is further complicated by the fact that there is no uniform “MLAT Request Form” or similar instrument, resulting in the need for OIA to continuously review each request to determine whether or not it complies with both treaty requirements and the receiving country’s legal requirements.⁸² The location of the central point of contact within the government also varies among nations, resulting in a lack of uniformity in transmission that only further delays the execution of requests.⁸³ Potential reforms that have been put forward to address these concerns are aimed at uniformity in both request and response. Many scholars also advocate for the creation of an electronic system through which countries may respond to and track requests, as well as increased financial resources for the international MLA regime and subsequent proportional distribution to ensure the system’s continued functionality and consistency.⁸⁴

76. Kent, *supra* note 29 (“[A]s the number of requests for international communications data goes up . . . [f]ew countries, including the US, have increased the resources provided to Central Authorities.”).

77. DOJ BUDGET, *supra* note 9, at 25–26.

78. *Id.* at 26.

79. *Id.*

80. See DOJ BUDGET, *supra* note 9, at 24; Kent, *supra* note 29.

81. DOJ BUDGET, *supra* note 9, at 25.

82. WOODS, *supra* note 28, at 10.

83. *Id.* at 13.

84. *Id.* at 10–11.

Because of the many issues inherent in this process, prosecutors must naturally be aware of other ways to obtain information critical to their investigations. In a subsequent Part, this Note will discuss the potential for extraterritorial action, but it should be noted that such a refusal to engage in the formal process poses a significant obstacle to the successful operation and reform of MLA.

Law enforcement organizations—particularly in the United States—also face concerns about the admissibility of evidence obtained through the MLA process. In certain nations, only data obtained through MLA is admissible, while others, such as the United States, must comply with domestic rules of evidence and criminal procedure.⁸⁵ The American Federal Rules of Evidence require that prosecutors take significant steps to authenticate evidence before it can be admitted into the record at trial, which may be difficult in practice due to geographic distance, the feasibility of acquiring a witness or the lack thereof, and language barriers.⁸⁶ Additionally, most countries have no special evidentiary laws governing electronic evidence, which poses problems in determining ownership and accuracy of the machine that produced the data for the request, or the potential for human error in compiling that data.⁸⁷ If foreign nations fail to comply with the requirements submitted with the request in order to render the evidence admissible at trial, law enforcement has no avenue through which to resolve the issue absent issuing another MLAT request.

In terms of criminal procedure, it should be noted that recent jurisprudence has suggested that criminal procedure requirements may be more lax in the United States, where the traditional remedy for constitutional violations—the exclusion of the wrongfully acquired evidence—does not apply to searches and seizures conducted by foreign law enforcement.⁸⁸ Further, requests submitted through domestic mechanisms like the Stored Communications Act (SCA) may result in obtaining a copy of data stored overseas, but have been held to not implicate any sort of Fourth Amendment concern given the location of the data and the sufficiency of the SCA request as a warrant.⁸⁹ While the treaty or request may outline procedures the

85. Anna-Maria Osula, *Mutual Legal Assistance & Other Mechanisms for Accessing Extraterritorially Located Data*, 9 MASARYK U. J.L. & TECH. 43, 50–51 (2015).

86. Kenneth N. Rashbaum et al., *Admissibility of Non-U.S. Electronic Evidence*, 18 RICH. J.L. & TECH. 1, 7–10 (2012).

87. U.N. OFFICE ON DRUGS & CRIME, COMPREHENSIVE STUDY ON CYBERCRIME 167 (2013), https://www.unodc.org/documents/organized-crime/UNODC_CCPCJ_EG.4_2013/CYBERCRIME_STUDY_210213.pdf [<https://perma.cc/2JYU-EFDK>] (archived Nov. 7, 2019).

88. *See, e.g.*, *United States v. Getto*, 729 F.3d 221, 231 (2d Cir. 2013); *United States v. Mount*, 757 F.2d 1315, 1318 (D.C. Cir. 1985).

89. *See, e.g.*, *In re Warrant to Search a Certain E-Mail Account Controlled and Maintained by Microsoft Corp.*, 829 F.3d 197, 223 (2d Cir. 2016), *vacated*, No. 17-2

issuing country wishes to be followed, such procedures are often voluntary rather than mandatory, as is compliance with the treaty.

E. MLA in the Context of International Financial Crime and Terrorism

Despite the difficulties attendant to its operation, the acquisition of information through MLA remains a critical law enforcement tool in combating global terrorist networks and other international crime.⁹⁰ Two areas of crime that have proven the most difficult to track and effectively prosecute are (1) the financing and operation of terrorist networks like ISIS, and (2) the money laundering organizations that often accompany them.⁹¹ Both areas of criminal activity rely heavily on fraudulent front companies, often called shell companies or corporations, which cannot be traced to a single individual and whose only tangible element may be a post-office box or a web address.⁹² These companies may regularly engage in legitimate operations but also problematically serve as vehicles through which to discreetly transfer illegally obtained funds without raising the suspicion of law enforcement.⁹³ However, their efforts are not limited to seedy shell corporations, but may also engage legitimate businesses and websites without their knowledge.⁹⁴ Just last year, an FBI investigation revealed that ISIS had been using fake eBay sales to mask payments to foreign operatives, including those made to an individual located in the United States.⁹⁵

Modern terrorist organizations depend in large part on broad, discreet networks of global financing.⁹⁶ Other characteristics of modern terrorism which make it more difficult to track and dismantle include flexible organization structures, decentralization, and a focus

(U.S. Apr. 17, 2017) [hereinafter Microsoft Case] (“Those requirements are consistent with the highest level of protection ordinarily required by the Fourth Amendment for the issuance of search warrants”); *In re Search of Information Associated with [Redacted]@gmail.com That Is Stored at Premises Controlled by Google, Inc.*, 2017 WL 3445634, No. 16-MJ-00757 (BAH), at *10, *16 (D.D.C. 2017) [hereinafter Google Case] (holding that warrants issued pursuant to the SCA are sufficient to meet the privacy protections intended by the Fourth Amendment).

90. DOJ BUDGET, *supra* note 9, at 22 (proposing reform of the current system because “[i]nternational and domestic criminals and terrorists use the internet regularly to carry out their illicit activities.”).

91. *Id.* (saying “[l]aw enforcement authorities around the world struggle to keep pace with criminals’ use of the internet for crime that go beyond cybercrime,” earlier described as terrorists and use of the internet to advance physical crimes.).

92. Shima Baradaran et al., *Funding Terror*, 162 U. PA. L. REV. 477, 482–83 (2014).

93. *Id.* at 482.

94. See, e.g., Feliz Solomon, *ISIS Used eBay to Send Money to a U.S. Operative, Investigators Say*, TIME (Aug. 11, 2017), <http://time.com/4896684/islamic-state-ebay-paypal/> [https://perma.cc/R8R9-H9N6] (archived Nov. 7, 2018).

95. *Id.*

96. Baradaran et al., *supra* note 92, at 482.

on organized crime as the vehicle through which to obtain funds, rather than direct links to state entities.⁹⁷ The methods through which such organizations are funded is generally known as threat or terror finance. Threat finance, defined as “the means and methods used by organizations to finance operations and activities that pose a threat to U.S. national security,” includes donations, funneling of funds through shell corporations, and funds obtained through criminal activity like extortion and fraud.⁹⁸ Through the use of constantly shifting shell corporations and money laundering tactics, or even legitimate donations, these organizations anonymously funnel money through institutions across their network while ensuring that such transactions appear clean.⁹⁹ While assets involved in money laundering are inherently the proceeds of criminal activity, funds involved in terror finance schemes may be funneled through perfectly legitimate sources, like nongovernmental organizations and charities.¹⁰⁰ Because these terrorist organizations are international in nature, any effort to combat their financing through legitimate financial institutions necessitates international cooperation and broad dissemination of information among concurrent criminal investigations.

Currently, that international law enforcement cooperation hinges on the MLA regime, and the operation of various regulatory and enforcement bodies aimed at monitoring the activities of financial institutions. The DOJ has identified reform to the MLA regime present in the United States as critical to global law enforcement efforts to combat terrorism and international crime.¹⁰¹ While the number of MLA requests received by OIA increased by 85 percent since 2000, the number of data requests within that subset has increased by over 1,000 percent.¹⁰²

The United States and the rest of the international community also use regulatory and enforcement mechanisms run by various international and domestic bodies to combat terror finance. The Financial Action Task Force (FATF), composed of thirty-five member jurisdictions, was established in 1989 with the goal of promulgating

97. Larissa Van Den Herik & Nico Schrijver, *The Fragmented International Legal Response to Terrorism*, in COUNTER-TERRORISM STRATEGIES IN A FRAGMENTED INTERNATIONAL LEGAL ORDER, *supra* note 8, at 1, 5–7.

98. *Threat Finance and Financial Intelligence*, AM. SEC. PROJECT, <https://www.americansecurityproject.org/asymmetric-operations/threat-finance-and-financial-intelligence/> (last visited Nov. 7, 2018) [<https://perma.cc/2ALS-HVBD>] (archived Nov. 7, 2017).

99. Baradaran et al., *supra* note 92, at 488.

100. See Tim Daniel, *International Cooperation in Counteracting Terrorist Financing*, in COUNTER-TERRORISM STRATEGIES IN A FRAGMENTED INTERNATIONAL LEGAL ORDER, *supra* note 8, at 240, 245.

101. DOJ BUDGET, *supra* note 9, at 22.

102. *Id.* at 23.

measures through which to combat money laundering, terror finance, and other related international financial crime.¹⁰³ FATF standards require financial institutions to monitor transactions for suspicious activity and report such activity to the relevant government authorities, who then make recommendations to law enforcement on whether to begin an investigation.¹⁰⁴

The United States also relies heavily on the Office of Foreign Asset Control (OFAC) and the Financial Crimes Enforcement Network (FinCEN), both of which are domestic institutions situated within the Department of the Treasury and are used to enforce international sanctions and monitor financial activity in efforts to stop money laundering and threat finance through domestic action as well as cooperation with their foreign counterparts.¹⁰⁵ Although these institutions seem neutral on their face, they also come with their own set of enforcement problems, especially given the amount of discretion that rests with financial institutions on what activity to report. Particularly when it comes to the filing of suspicious activity reports, financial institutions are given broad latitude in how to determine what makes a transaction “suspicious.”¹⁰⁶ Unfortunately, this discretion has historically resulted in banks electing to file reports based on political characteristics, using proxies like race, age, ethnicity, and religion in order to sort through transactions, which only further perpetuates existing stereotypes surrounding international crime and makes it more difficult to catch criminals who do not fit those characteristics.¹⁰⁷

III. ANALYSIS

The MLA regime currently in place has had significant impacts, both positive and negative, on domestic and international efforts to fight terrorist financing networks and global money laundering. Law enforcement agencies are either forced to work within the system or find sufficient alternatives, which has led to the development of new

103. *FATF Members*, FIN. ACTION TASK FORCE, <http://www.fatf-gafi.org/countries/#FATF> (last visited Nov. 7, 2018) [<https://perma.cc/J6NX-3RT2>] (archived Nov. 2, 2018).

104. Richard Gordon, *Terrorism Financing Indicators for Financial Institutions in the United States*, 44 CASE W. RES. J. INT'L L. 765, 769 (2011).

105. *Office of Foreign Assets Control - Sanctions Programs and Information*, U.S. DEPT OF THE TREASURY, <https://www.treasury.gov/resource-center/sanctions/Pages/default.aspx> (last visited Nov. 7, 2018) [<https://perma.cc/RG87-RF43>] (archived Nov. 2, 2018); *What We Do*, FIN. CRIMES ENFORCEMENT NETWORK, <https://www.fincen.gov/what-we-do> (last visited Nov. 7, 2018) [<https://perma.cc/Z3U3-KGSM>] (archived Nov. 2, 2018).

106. See Laura K. Donohue, *Constitutional and Legal Challenges to the Anti-Terrorism Finance Regime*, 43 WAKE FOREST L. REV. 643, 695 (2008).

107. *Id.*

law enforcement tools both domestically and abroad that raise potential extraterritoriality concerns—particularly when it comes to the recent trend in the United States to go after international assets via domestic forfeiture laws. Further, because of the number of actors necessarily involved in the MLA process, conflict has arisen within and among entities responsible for carrying out the requests and those pursuing international criminal investigations.

A. *Potential for Extraterritorial Action and Action Outside MLA*

Given the inefficiencies inherent in the MLA process and the difficulties of translating or otherwise authenticating evidence received, law enforcement agencies have sought to acquire information through more informal channels of communication.¹⁰⁸ While this may take the form of police-to-police channels or judicial and prosecutorial cooperation,¹⁰⁹ it also may take place through extraterritorial action.¹¹⁰ While extraterritorial action may certainly be faster than the formal process, it also risks disrupting international norms by disrupting nations' domestic laws and effectively replacing them with foreign ones. This Part will discuss the most common and controversial routes taken by law enforcement, particularly within the United States, that may be viewed by other nations as extraterritorial action.

1. Correspondent Banking Relationships and the Global Financial System

As discussed previously, threat finance networks rely heavily on the global financial system in order to disguise the sources and destinations of their funds and to ensure cohesive operation of criminal networks worldwide.¹¹¹ Due to this relationship, criminal investigations related to threat finance often rely on determinations by financial institutions that certain transactions appear suspicious.¹¹² Financial institutions play a critical role in identifying potential sources of criminal activity, providing data about those sources, and eventually, in enforcing judgments levied against them.

108. See Prost, *supra* note 8, at 94–95.

109. *Id.*

110. See, e.g., Corey J. Smith, *Obtaining Foreign Evidence Outside of the Mutual Legal Assistance Treaty Process*, 55 U.S. ATT'YS' BULL. 27, 27 (2007) (suggesting the United States may “move to compel the United States person with signatory authority over the evidence in question to consent to its production”).

111. See Daniel, *supra* note 100, at 245 (saying terrorists receive financing from sources like donations, diversion of funds, legitimate businesses, fraud schemes, and organized crime).

112. See Donohue, *supra* note 106, at 673.

A brief explanation of their operations is key to understanding the course of transnational criminal investigations.

The global financial system has grown to rely extensively on correspondent banking relationships, in which a bank maintains an account with a foreign financial institution in order to facilitate the provision of services on behalf of their clients within that jurisdiction without expending the resources to open up their own branch in every potential place their clients may wish to do business.¹¹³ Financial institutions are expected to comply with rigorous customer due diligence and monitoring requirements in connection with the maintenance of these relationships and these requirements are tailored to the level of risk posed by each foreign institution and its clients.¹¹⁴ The cost of this compliance has resulted in a downward trend in the number of correspondent banking relationships maintained with American financial institutions.¹¹⁵ According to some authors, it also has resulted in the further exclusion of many people from both developed and developing countries from accessing the global financial system—a broad concept which includes everything from credit, insurance, and savings accounts to other financial services.¹¹⁶ In addition to excluding individuals, the strict application of international regulations has also led to the exclusion of small businesses, thus limiting competition and economic development at the local level and more broadly.¹¹⁷

Furthermore, engagement in a correspondent bank relationship with a US institution brings that foreign institution and its accounts under the jurisdiction of OFAC and the United States as a whole, which is a significant concern for foreign banks and clients, considering the strictness of American financial regulations.¹¹⁸

113. Press Release, U.S. Department of the Treasury and Federal Banking Agencies Joint Fact Sheet on Foreign Correspondent Banking (Aug. 30, 2016), <https://www.treasury.gov/press-center/press-releases/Documents/Foreign%20Correspondent%20Banking%20Fact%20Sheet.pdf> [https://perma.cc/M3GV-H3L6] (archived Nov. 2, 2018) [hereinafter DOT Press Release]; *Correspondent Bank*, INVESTOPEDIA <https://www.investopedia.com/terms/c/correspondent-bank.asp> (last visited Nov. 8, 2018) [https://perma.cc/QQ3Z-JUWH] (archived Nov. 2, 2018).

114. DOT Press Release, *supra* note 113.

115. *Recent Trends in Correspondent Banking Relationships: Further Considerations*, INT'L MONETARY FUND (Apr. 21, 2017), <http://www.imf.org/en/Publications/Policy-Papers/Issues/2017/04/21/recent-trends-in-correspondent-banking-relationships-further-considerations> [https://perma.cc/U8XA-45Y2] (archived Nov. 2, 2018) [hereinafter IMF Recent Trends].

116. Walter P. Loughlin, *Anti-Money Laundering, Anti-Terrorist Financing, and the Global Banking System Three Anomalies*, F. PUB. POL'Y: J. OXFORD ROUND TABLE, at 1, 9 (Spring 2012).

117. *Id.* at 1.

118. See IMF Recent Trends, *supra* note 115, at 23 (explaining recent high-profile enforcement in the United States may have significantly affected banks' risk tolerance and subsequent willingness to engage in correspondent banking relationships).

Because of this jurisdiction, American courts then have another avenue through which to issue subpoenas for financial records, which tend to result in a quicker, more reliable response than a lengthy MLAT request.¹¹⁹ This necessarily opens the door for what could be seen as extraterritorial action on the part of the United States to avoid engaging in requests pursuant to treaty obligations, and may not be viewed favorably by nations whose legal systems are being subverted in this way.

2. Action Based on Domestic Law

Efforts to combat threat finance may also be channeled purely through domestic law. In 2007, the Executive Office for U.S. Attorneys issued a notice through a bulletin on extraterritorial issues that laid out avenues through which to seek information *outside* of the MLA process.¹²⁰ These avenues included letters rogatory, Bank of Nova Scotia¹²¹ or PATRIOT Act subpoenas, and issuing compelled consent orders to parties subject to the jurisdiction of the United States.¹²² These avenues may be preferable to use of the MLA regime in certain fast-moving cases involving the internet or financial institutions, particularly when coupled with evidentiary concerns. However, they also necessarily entail subversion of international treaty obligations and risk encouraging the manufacture of jurisdiction over global corporations and technology providers.

Additionally, recent judicial precedent in the United States has addressed the jurisdictional question in a unique way in the situation of technology network providers.¹²³ Instead of using time-consuming

119. Smith, *supra* note 110, at 30 (Under the PATRIOT Act, a prosecutor may, with the approval of the Attorney General, issue a subpoena to “any foreign bank that maintains a correspondent account in the United States.”).

120. *Id.* at 27. During my summer legal internship at the U.S. Attorney’s Office for the District of Columbia, prosecutors tended to choose other investigative tools over mutual legal assistance requests due to the length of time it usually took for MLAT requests to be fulfilled.

121. This term refers to “Bank of Nova Scotia” subpoenas—a type of subpoena used to obtain bank or business records located abroad through serving a subpoena on the enterprise’s American branch or office, named for the case in which they were upheld as permissible by the Court of Appeals for the Eleventh Circuit. *See In Re Grand Jury Proceedings Bank of Nova Scotia*, 740 F.2d 817 (11th Cir.); *see also*, U.S. Dep’t of Justice Criminal Resource Manual, CRM 201-279, <https://www.justice.gov/jm/criminal-resource-manual-279-subpoenas> (last visited Nov. 8, 2018) [<https://perma.cc/G3Y7-99YU>] (archived Nov. 2, 2018) (laying out the Department of Justice’s guide for subpoenas).

122. Smith, *supra* note 110, at 27–30.

123. Nina Totenberg, *Court Seems Unconvinced Of Microsoft’s Argument To Shield Email Data Stored Overseas*, NPR (Feb. 27, 2018) <https://www.npr.org/2018/02/27/584650612/new-front-in-data-privacy-at-the-supreme-court-can-u-s-seize-emails-stored-abroad> [<https://perma.cc/9K9T-CDQ2>] (archived Nov. 2, 2018) (discussing recent precedent in the lower court cases regarding Microsoft and

MLAT requests in order to access data stored on international servers owned by companies like Google and Microsoft, recently prosecutors have sought to access the data domestically through SCA requests.¹²⁴ Companies have previously subverted the jurisdictional requirement of the SCA by storing data in bits in multiple locations at once or in a constantly shifting cloud, thus being unable to identify the exact location of any piece of data at any given time.¹²⁵ This method of storing data intentionally subverted any possibility of obtaining it via either domestic *or* international action.¹²⁶

However, the United States Court of Appeals for the Second Circuit held that the use of the SCA warrant violated the presumption against extraterritorial action and thus was impermissible, and that the government should seek the evidence through an MLAT request to the country where the server is located—in this case, Ireland.¹²⁷ Contrarily, because Google in particular stores its data in “shards” and thus the contents of one email or one account can be held all over the world simultaneously, the District Court for the District of Columbia approved of the SCA method, and refused to permit Google to avoid the legal process through the use of creative data storage methods.¹²⁸ The former case was heard before the Supreme Court, but the Court was never able to issue a ruling on the merits of the action.

In March 2018, Congress passed, and the president signed, a massive budget bill containing a provision entitled the Clarifying Lawful Overseas Use of Data, or CLOUD, Act.¹²⁹ This Act permits the use of SCA warrants to reach overseas data—in particular, requiring “email service providers to disclose emails within their ‘possession, custody, or control,’ even when those emails are located outside the United States.”¹³⁰ As a result, the federal government was able to obtain and serve an updated warrant, mooted the issue before the Supreme Court and invalidating the Second Circuit’s ruling finding the warrant impermissible.¹³¹

Google, as well as the implications of *United States v. Carpenter* for cellular data, which is also pending decision by the Supreme Court).

124. See generally *In re Warrant to Search a Certain E-Mail Account Controlled and Maintained by Microsoft Corp.*, 829 F.3d 197, 223 (2d Cir. 2016), *vacated*, No. 17-2 (U.S. Apr. 17, 2017); *In re Search of Information Associated with [Redacted]@gmail.com That Is Stored at Premises Controlled by Google, Inc.*, 2017 WL 3445634, No. 16-MJ-00757 (BAH), at *10, *16 (D.D.C. 2017).

125. See Totenberg, *supra* note 123.

126. See *id.*

127. See generally *Microsoft Case*, 829 F.3d 197.

128. See generally *Google Case*, 2017 WL 3445634.

129. Amy Howe, *Judges officially declare Microsoft email case moot*, SCOTUSBLOG (April 17, 2018, 11:12 AM), <http://www.scotusblog.com/2018/04/justices-officially-declare-microsoft-email-case-moot/> [https://perma.cc/6GGW-DL99] (archived Nov. 4, 2018). See generally CLOUD Act, 18 U.S.C. § 2523 (2018).

130. Howe, *supra* note 129 (citing CLOUD Act, *supra* note 129).

131. *Id.*

The CLOUD Act also notably contains a provision permitting the execution of so-called executive agreements to streamline data production through bilateral agreements with foreign states, provided the state has sufficient data protections in place.¹³² The adequacy of data protections is determined by a statutory balancing test of factors such as compliance with the Convention on Cybercrime, a treaty aimed at international cooperation established in 2001 to which the United States is a party.¹³³ However, given the time that has passed since the establishment of the Convention on Cybercrime's protocols, and the refusal of the United States to adopt the Additional Protocol to the Convention on Cybercrime,¹³⁴ these agreements may not be as attractive to foreign nations as the US government may hope.

Congressional authorization of the use of the SCA warrant as a permissible way to obtain data from global cloud-based technology providers raises the potential for significant backlash by foreign governments and businesses.¹³⁵ Given the wide disparity in data privacy protections for individuals in the United States and the EU, in particular, foreign governments likely do not feel that they can rely on the United States to adequately protect that data.¹³⁶ The law also permits foreign law enforcement entities to collect and intercept wire communications from US companies without obtaining a US warrant, further supporting the notion that the US government cares very little about data privacy—even for its own citizens.¹³⁷ The CLOUD Act therefore implicates the same international conflict over data privacy concerns.¹³⁸

132. 18 U.S.C. § 2523.

133. *Id.*; See generally Convention on Cybercrime, Nov. 11, 2001, E.T.S. No. 185.

134. Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems, *opened for signature* Jan. 28, 2003, E.T.S. No. 189 (entered into force Jan. 3, 2006) (providing for the criminalization of racist or xenophobic acts committed through computer systems).

135. See Selena Larson & Lydia DePillis, *Microsoft argues data privacy case is one for Congress to decide*, CNN (Feb. 28, 2018, 3:18 PM), <https://money.cnn.com/2018/02/27/technology/microsoft-data-privacy-arguments-supreme-court/index.html> [<https://perma.cc/5DUC-JJEK>] (archived Nov. 4, 2018) (expecting a backlash from the EU due to cultural and legal privacy norms and higher expectation of respect for individual privacy rights).

136. See Press Release, Court of Justice of the Eur. Union, The Court of Justice Declares that the Commission's U.S. Safe Harbour Decision is Invalid, Case C-362/14, Maximilian Schrems v. Data Protection Commissioner (Oct. 6, 2015) (invalidating the Safe Harbor provision, thus holding that U.S. data protections are not adequate to justify transfer of personal data to the U.S. from the EU).

137. CLOUD Act, 18 U.S.C. § 2523(b) (2018); David Ruiz, *Responsibility Deflected, the CLOUD Act Passes*, ELEC. FRONTIER FOUNDATION (Mar. 22, 2018), <https://www.eff.org/deeplinks/2018/03/responsibility-deflected-cloud-act-passes> [<https://perma.cc/72TN-UFDE>] (archived Nov. 5, 2018).

138. Ellen Nakashima, *Supreme Court to hear Microsoft case: A question of law and borders*, WASH. POST (Feb. 25, 2018), <https://www.washingtonpost.com/world/>

On the other hand, international reticence to enter into these executive agreements with the United States could be the final push to force Congress to take efforts to reform the domestic MLA process. Importantly, the act itself applies specifically and narrowly to “provider[s] of electronic communication service[s] or remote computing service[s].”¹³⁹ Absent reform of the MLA process, counterterrorism investigations will likely be stuck with the current system for global financial data, regardless of their newfound ability to circumvent the system for email and telephone data. Therefore, Congress will either be forced to reform the current system or enact additional domestic legislation that may further incense international opponents of extraterritorial action.

3. Asset Forfeiture Actions

Domestic law may also be used to effectuate judgements internationally through the use of forfeiture law. The use of domestic criminal prohibitions in conjunction with forfeiture actions is beneficial in the realm of terror finance and counterterrorism because such actions help prevent terrorist acts, reinforce state legitimacy by providing due process and constitutional protections, and prevent individuals from being able to cast themselves as “heroes” for the cause, as they might in response to military action.¹⁴⁰ Highly controversial, asset forfeiture laws are used to dispossess criminals of the benefits and instrumentalities of their illegal activities, and, similarly to threat finance efforts, to disrupt criminal networks.¹⁴¹ MLATs commonly contain provisions for international assistance in forfeiture proceedings, allowing foreign central authorities to freeze or seize international assets held by individuals subject to domestic criminal judgments.¹⁴²

According to Congress, the deposit of funds into a foreign bank that maintains a correspondent banking relationship with an American bank qualifies as a deposit of funds into that entity’s correspondent bank *account*, thus rendering those funds subject to seizure and forfeiture in subsequent criminal proceedings.¹⁴³ When funds are seized from a correspondent bank account, the foreign financial institution is responsible for subsequently closing the

national-security/supreme-court-case-centers-on-law-enforcement-access-to-data-held-overseas/2018/02/25/756f7ce8-1a2f-11e8-b2d9-08e748f892c0_story.html?utm_term=.8b9e8c3dedbe [https://perma.cc/N57K-3LM9] (archived Dec. 5, 2018).

139. 18 U.S.C. § 2713 (2018).

140. Du Plessis, *supra* note 23, at 35–36.

141. *Asset Forfeiture*, FBI, <https://www.fbi.gov/investigate/white-collar-crime/asset-forfeiture> (last visited Nov. 9, 2018) [https://perma.cc/ZMA3-HKDJ] (archived Nov. 4, 2018).

142. *See, e.g.*, US-UK MLAT, *supra* note 30, art. 16 (discussing assistance in forfeiture proceedings).

143. Loughlin, *supra* note 116, at 4.

domestically held account of the individual connected with criminal activity and reclaiming the funds for itself. Naturally, this system discourages foreign banks from establishing relationships with American institutions due to the potential damage to their reputation in the countries in which they must close accounts and the possible difficulties with what is essentially domestic enforcement of a foreign nation's criminal penalties.¹⁴⁴

Recently, the United States has also begun to explore the potential of using forfeiture actions and money judgments as methods through which to seize funds connected with terrorist activity. In July 2017, craft store Hobby Lobby agreed to a \$3 million dollar fine and the forfeiture of more than a million dollars' worth of Iraqi antiquities; these antiquities were likely looted by less-than-reputable sources, and were then smuggled into the United States using false customs declarations of which the corporation was aware.¹⁴⁵ In addition, as described at the outset of this Note, the United States is exploring the possibility of civil forfeiture as an avenue through which to effect counterterrorism objectives.¹⁴⁶ Civil forfeiture has been suggested by some scholars as an underutilized method through which to combat threat finance as a necessary corollary action to the acquisition of financial data, particularly where individual prosecution is difficult or impossible.¹⁴⁷

These types of actions directly impose monetary punishments, potentially on foreign actors, without necessarily engaging the MLA process. However, the MLA process only discusses the exchange of information and stops short of addressing any sort of cooperation regarding final judgments beyond cooperation according to the prosecuting nation's domestic laws.¹⁴⁸ Thus, when the United States enforces a money judgment against a financial institution in place of an individual or against an individual themselves, that money is disposed of according to domestic forfeiture laws. These laws in the United States allow funds seized pursuant to federal law to be used for domestic "law enforcement purposes" and contain no provision on sharing those funds with other nations with a stake in the

144. *See id.* at 8–9.

145. Richard Gonzales, *Hobby Lobby To Forfeit Smuggled Iraqi Antiquities*, NPR (July 5, 2017), <https://www.npr.org/sections/thetwo-way/2017/07/05/535698988/hobby-lobby-to-forfeit-smuggled-iraqi-antiquities> [<https://perma.cc/348C-46JS>] (archived Nov. 4, 2018).

146. *See generally* United States' Verified Complaint for Forfeiture *in Rem* at 2, *United States v. One Gold Ring with Carved Gemstone, an Asset of ISIL, Discovered on Electronic Media of Abu Sayyaf, President of ISIL Antiquities Department* [hereinafter *One Gold Ring*], No. 1:16-CV-02442 (D.D.C. Dec. 15, 2016) (seeking the forfeiture of assets linked to the Islamic State (ISIS)); United States' Amended Verified Complaint for Forfeiture *in Rem* at 10, *One Gold Ring*, No. 1:16-CV-02442 (D.D.C. Dec. 6, 2017) (seeking assets through an arrest *in rem*).

147. *See* Daniel, *supra* note 100, at 277–79.

148. *See, e.g.*, US-UK MLAT, *supra* note 30, art. 16.

investigation.¹⁴⁹ Although there are domestic provisions for “equitable sharing,” by which law enforcement agencies engaged in joint investigations share in forfeited assets, US enforcement of these provisions tends to be focused on either state law or on receiving funds from other nations rather than sharing its own.¹⁵⁰ Furthermore, the effectiveness of forfeiture actions as a vehicle through which to combat terrorism and terror finance has been questioned.¹⁵¹

B. *Conflict Among and Within Enforcement Bodies*

MLA networks that operate through treaties and international or domestic enforcement bodies naturally present situations of potential conflict. This conflict may materialize either through variation in legal systems among nations or through the exclusion or inclusion of certain member states. Networks like the Organization for Economic Cooperation and Development (OECD) and the FATF have been criticized for their lack of transparency and accountability for the policy decisions they make, particularly since these decisions occur outside the democratic process but have domestic effect.¹⁵² Further criticisms have centered on exclusion of the countries targeted by enforcement policies from the decision-making process, usurpation of policy-making power from democratic governments, and differential (sometimes favorable) treatment of their own member states.¹⁵³ For example, within the United States, as of June 2016 not a single domestic charity had been blacklisted as a potential vehicle for terror finance since 2009, even though charities are a commonly known target of terrorist organizations.¹⁵⁴ Potential inadequacies in

149. See 28 U.S.C. § 524(c) (2015) (limiting use of assets in the Asset Forfeiture Fund to specified “law enforcement purposes,” including paying expenses incurred by investigations, storage fees for forfeited assets, overtime pay, and training costs for officers); Ellis & Pisani, *supra* note 13, at 212 (detailing MLAT provisions requiring assets to be turned over to the requesting state, but nothing further).

150. See U.S. DEP’T OF STATE: BUREAU FOR INT’L NARCOTICS & LAW ENFT AFFAIRS, INTERNATIONAL NARCOTICS CONTROL STRATEGY REPORT: VOLUME II: MONEY LAUNDERING AND FINANCIAL CRIMES 21–23 (2014), <https://www.state.gov/documents/organization/222880.pdf> [<https://perma.cc/RZ8Z-ZN8L>] (archived Dec. 5, 2018).

151. See RAPHAEL PERL, CONG. RESEARCH SERV., RL33160, COMBATING TERRORISM: THE CHALLENGE OF MEASURING EFFECTIVENESS 2–3 (2007) (noting that even the seizure of terrorist funds may not indicate progress toward eradicating terrorism, since this may not affect the terrorists’ ability to raise additional financing for expansion).

152. Bruce Zagaris, *International Enforcement Law Trends for 2010 and Beyond: Can the Cops Keep Up With the Criminals?*, 34 SUFFOLK TRANSNAT’L L. REV. 1, 23 (2011).

153. *Id.* at 23–24.

154. *Stopping the Money Flow: The War on Terror Finance: Joint Hearing Before the Subcomm. on Terrorism, Nonproliferation, and Trade of the Comm. on Foreign*

the systems of member states might not result in economic sanctions via blacklisting, while similar systems in nonmember states might result in significant punishment.¹⁵⁵

The FATF has stated that of the 194 countries with anti-terror financing laws, only thirty-three of those nations have ever reported a conviction under those laws, and thus others may not be enforcing them as rigorously as their counterparts.¹⁵⁶ Furthermore, punishment for noncompliance with these and other regulations aimed at combatting international financial crime tends to be significantly more rigorous on noncompliant entities located in nations excluded from the decision-making process.¹⁵⁷ The Egmont Group is known to slow down international transactions for certain institutions such that it is nearly impossible for those institutions to clear funds through other countries.¹⁵⁸

The anti-terror financing and anti-money laundering frameworks in place and monitored by the FATF are also interesting in that they impose very heavy costs on financial institutions, both through reporting requirements and through penalties assessed for noncompliance.¹⁵⁹ These regulations have resulted in banks facing civil liability for failure to prevent the flow of funds used in international crime through their institutions.¹⁶⁰ This disciplinary framework assigns liability primarily based on the assumption that, because of know-your-customer monitoring policies, financial institutions “should have known” that criminal activity was taking place involving their clients and accounts.¹⁶¹

Even within the Treasury Department, the US government has experienced inefficiency and conflict among enforcement institutions. The United States has no comprehensive policy across agencies to combat terror finance, resulting in variation in policy and priority across enforcement bodies.¹⁶² Without the creation of a consistent

Affairs and the Subcomm. on Emerging Threats and Capabilities of the Comm. on Armed Services H. of Rep., 114th Cong. 2 (2016) [hereinafter *Stopping the Money Flow*].

155. Zagaris, *supra* note 152, at 23–24.

156. *Stopping the Money Flow*, *supra* note 154.

157. Zagaris, *supra* note 152, at 23.

158. See Michael Levi & Peter Reuter, *Money Laundering*, 34 CRIME & JUST. 289, 291 (2006) (“Since 1999, there has been a formal process for imposing economic sanctions on countries that do not play their part, by slowing down their international transactions and making it almost impossible for their banks to clear funds through other countries.”).

159. See Loughlin, *supra* note 116, at 6 (describing the mission as imposing heavy costs on banks alleged to have customers aiding terrorist groups).

160. See *id.* (“[T]he procedures banks have implemented to combat terrorist financing are now being turned against them as a basis for claims that the banks have legal liability for the very terrorist violence they have sought to prevent and detect.”).

161. See *id.* at 11 (litigation holding banks liable argues “that the banks ‘should have known’ of alleged terrorist use of bank facilities . . .”).

162. *Stopping the Money Flow*, *supra* note 154, at 1–2.

domestic policy, the benefits of a cohesive international policy will not be fully realized.

IV. SOLUTION

In order to eliminate or at least address the problems and inefficiencies posed by the current MLA regime, nations have two general options: (1) eliminate the current MLA program entirely, and start from scratch in favor of a different mechanism or set of mechanisms to exchange information, or (2) reform the current system in such a fashion that ameliorates the issues it currently faces.

A. Impracticability of Eradication and Replacement

The elimination of the current MLA program is both unlikely and an inadequate solution to the problems with the current system. It would also likely result in additional problems and inefficiencies in the transition to the replacement for the MLA system. Domestically, The elimination of the current scheme would require withdrawal from more than sixty international treaties by the president, and typically only a six-month window in which to phase out the current system and implement another method for information exchange.¹⁶³ In addition to being politically unlikely, this option is also logistically impractical, because it would require either piecemeal or wholesale withdrawal from these treaties—and, should the United States withdraw, there is no guarantee that other countries would move to do the same, thus decreasing the possibility that whatever new measures were put in place would overcome any of the efficiency concerns posed by the current system. Political allies may view the decision as a slight to their own system and may not cooperate with whatever other mechanism the United States tries to enforce.

Without another concrete mechanism in mind that would allow for cooperation among foreign law enforcement agencies, the elimination of the current system through withdrawal and only a brief grace period would either leave thousands of requests in the

163. See, e.g., US-UK MLAT, *supra* note 30, art. 22 (“Either party may terminate this Treaty by means of a written notice to the other Party. Termination shall take effect six months following the date of notification.”); Curtis Bradley et al., *Authority to Suspend, Terminate, or Withdraw from Treaties*, THE ALI ADVISER (Apr. 5, 2017), <http://www.thealiadviser.org/us-foreign-relations-law/authority-suspend-terminate-withdraw-treaties/> [https://perma.cc/WUQ8-SFXW] (archived Nov. 10, 2018) (noting that the majority of actions to withdraw from or terminate treaties have been conducted by the President, and undisputed by Congress). Additionally, withdrawal could be an even more complicated solution in other nations depending on their domestic requirements for treaty engagement and termination.

lurch, never to be fulfilled, or would require their execution in an unreasonably short period of time. The DOJ clearly lacks the resources to surmount the request backlog as it is, so the latter option seems rather untenable.¹⁶⁴ Alternatively, thousands of judicially enforceable court orders related to MLA requests would suddenly have no purpose and no clear resolution, absent action taken by the individual courts to send the information abroad.

In terms of selecting an alternative method through which to achieve international cooperation in criminal investigations, none of the alternatives seem to solve the problems posed by the MLATs and, additionally, raise problems of their own. It is likely that the American judicial system would at least temporarily return to the use of letters rogatory, which, as stated previously, are historically more inefficient and time consuming than the current system.¹⁶⁵ The potential use of executive agreements for cooperation in place of reforms approved by the legislative branch in order to modernize MLA would require a large amount of political capital—particularly if such an action is done contrary to the will of Congress—although it should be noted that the current administration seems willing to take this route regardless.¹⁶⁶ *Ad hoc* agreements crafted for particularly large investigations or areas in which investigations are common would be redundant, time consuming, and a drain on resources. Further, they would likely be internally inconsistent and any sort of judicial remedy for a violation would be distinguishable from other cases under other agreements, leaving those whose privacy has been infringed upon without realistic redress.¹⁶⁷

Reliance on extraterritorial action taken through the manufacture of jurisdiction over financial institutions or through correspondent banking relationships damages international financial cooperation and disincentivizes financial institutions from doing business within the United States lest they be subject to its jurisdiction.¹⁶⁸ Further, these extraterritorial and regulatory methods like anti-money laundering laws have been shown to have limited efficacy and are plagued by human bias in selecting the individuals and transactions deemed “suspicious,” often resulting in action that reinforces racial and ethnic stereotypes.¹⁶⁹

164. See DOJ BUDGET, *supra* note 9, at 25–26 (describing the significant backlog faced by OIA in handling MLAT requests).

165. Ellis & Pisani, *supra* note 13, at 194–95.

166. See WOODS, *supra* note 28, at 14 (discussing the opportunities for states to forge executive agreements).

167. Donohue, *supra* note 106, at 643.

168. Loughlin, *supra* note 116, at 11.

169. See Baradaran et al., *supra* note 92, at 527 (showing many firms are still willing to aid in formation of shell companies); Donohue, *supra* note 106, at 695 (saying industry engagement in ethnic and religious profiling regarding terror finance has

B. Requirements for Successful Reform

In order to effectively combat the problems associated with the current MLA regime and still manage to have a net-positive effect on international crime and terror finance, there need to be significant reforms to the system as it currently stands, and those reforms need to be both broad and internationally consistent. The most significant obstacle in the way of treaty reforms on the US side is the constitutional requirement that such reforms would require that the legislature ratify any such changes, along with the need for approval by the executive branch.¹⁷⁰ However, this avenue is both more politically feasible and potentially more effective than any of the existing alternatives.

In order to be successful, reform efforts must address the following concerns: efficiency, uniformity, transparency, and the mediation of conflict between nations over criminal investigations.¹⁷¹ While these reforms should occur broadly at an international level, nations could also benefit from domestic legislative and judicial reform so as to streamline the MLA process.

The current system could greatly be improved in terms of efficiency through the implementation of an electronic system through which law enforcement agencies may both send and receive MLAT data and track pending requests.¹⁷² Although, historically, requests implicating electronic surveillance and covert operations have been rare, they have the potential to become increasingly valuable tools to track electronic and financial crime.¹⁷³ These requests in particular, while encouraged, are not regulated by international enforcement systems or treaties and would greatly benefit from the establishment of an electronic system both to encourage efficiency of data transmission and government accountability.¹⁷⁴

The establishment of a uniform electronic system across all nations engaged in MLA would also address some of the resource disparities present in the current system.¹⁷⁵ Nations with fewer resources, or those who receive more requests, would have to put less effort into tracking requests and transmitting information, while

focused on individuals connected with the Middle East, either through passports, personal identification, religion, or Arab-sounding names).

170. WOODS, *supra* note 28, at 14.

171. *See id.* at 5–6.

172. *Id.* at 2.

173. *See* Halvarsson, *supra* note 36, at 32 (“[S]pecial investigative techniques [such as electronic surveillance and covert operations] are acknowledged as important tools in the suppression of transnational crime.”).

174. *Id.* at 30–31.

175. *See* WOODS, *supra* note 28, at 8 (suggesting such a system would “alleviate some of the strain on the current regime and reduce the time and effort necessary to ensure that the request [complies with requirements].”).

streamlining compliance for all nations involved. It could also potentially help centralize information related to ongoing investigations in more than two countries and minimize the effort necessary to comply with multiple overlapping requests. Limiting the number of steps necessary to comply with an MLA request would further efficiency goals and reduce the burden on central authorities.¹⁷⁶ An electronic system would also allow for a uniform system of ensuring that MLA data is transmitted securely and safely.¹⁷⁷

The establishment of an electronic system also has implications for increasing uniformity among treaty requests and responses. In order to streamline the current system, uniformity is necessary both in execution and in form. There would be a global benefit from the creation of uniform requirements for MLA, or at the very least a form for each treaty that has been predetermined as compliant with treaty requirements.¹⁷⁸ This way, central authorities will spend less time reviewing requests for compliance and will have more resources to devote to ensuring execution. Uniformity in execution, particularly among the various local law enforcement agencies in the United States, will also result in ensuring that the domestic actions taken are both legal in the receiving nation and proportional to the scope of the request.¹⁷⁹ Such a tracking mechanism would also enable nations or international organizations to compile data on requests globally and be better able to address structural and operational concerns as they arise in the future.

The goal of uniformity would also be furthered by the establishment of an “international clearinghouse,” so to speak, to mediate conflict between governments over requests and to centralize reform efforts.¹⁸⁰ MLA would be significantly furthered by the creation of an international organization that maintained contact with (or perhaps was housed within) other domestic and international regulatory bodies like the FATF and OFAC in order to ensure that MLA reform efforts are both proportional and transparent, particularly when they implicate global financial institutions.¹⁸¹ A third-party entity could also mediate conflicts between nations over compliance and provide mechanisms through which to ensure that data sent between nations is handled appropriately and that data privacy concerns are addressed. Global financial institutions in particular have a significant stake in the reform of the MLA process because they must comply with domestic and international

176. *Id.* at 7.

177. *Id.* at 8.

178. *Id.* at 10.

179. *Id.* at 6.

180. *Id.* at 16.

181. *Id.* at 6.

requirements surrounding the disclosure of customer data, which may include the provision of notice to the customer, and which may implicate the privacy of their other customers not subject to MLA requests.¹⁸² Finally, a third-party intermediary would be in the best position to establish methods of redress for abuse of the MLA system, both by nations burdened by requests, and by individuals seeking to challenge the requests as overbroad or unduly infringing upon their privacy interests without legitimate law enforcement interests at stake.¹⁸³

The reforms to MLA could also easily be crafted to address the numerous human rights concerns cited by nations hesitant to comply with treaty requirements. Treaty provisions could be reformed to require requests for data to be narrowly tailored to protect customer and subject privacy, as well as to prevent unauthorized use and disclosure of data.¹⁸⁴ Requests should also be required to be justified by relevance to a legitimate government interest or ongoing investigation, and to be proportional to the scope of the investigation, and compliance should not be required if such information could be used to perpetuate human rights abuses.¹⁸⁵ These provisions would help increase transparency and accountability if a third-party organization has an effective oversight mechanism.

C. *International Implications of Reform*

While the above reforms would certainly improve the system as it stands, the assumptions on which the concept of MLA rests are not necessarily always secure. MLA conceptually assumes that nations will be able to overcome international constraints on conducting extraterritorial law enforcement investigations through reciprocity and mutual interests.¹⁸⁶ However, if nations' interests and values or their relative resource expenditures do not sufficiently align, then MLA risks creating more problems than it solves, including the loss of domestic political consensus and the undesirable use of the information exchanged between the parties.¹⁸⁷

182. *See id.* at 12 (“[C]ompanies must have transparent and consistent policies to guide their disclosure of customer data in accordance with local law enforcement requests.” Additionally, where disclosing data, companies should seek to protect their customers’ basic right to privacy.)

183. *Id.* at 16.

184. *See id.* at 6 (“Even where the governmental interest in the data is overwhelming, though, this access should not be automatic – the requesting state must prove that it has a legitimate interest in the data, and its request must be narrowly tailored and proportionate to the crime being investigated.”)

185. *Id.* at 6–7.

186. Luz Estella Nagle, *U.S. Mutual Assistance to Colombia: Vague Promises and Diminishing Returns*, 23 *FORDHAM INT’L L.J.* 1235, 1239 (2000).

187. *Id.* at 1247.

For example, agreements with nations controlled by corrupt regimes pose further problems because, although the dual criminality requirement may be met, the United States has no assurance that the information it provides will not be used to perpetrate human rights abuses, including interrogation through torture, wrongful convictions, and excessive punishment.¹⁸⁸ This issue has been particularly starkly displayed in the relationship between the United States and Colombia. Such agreements thus lose political popularity, but the United States continues to comply in order to glean information on domestic crime—in particular, narcotrafficking and narcoterrorism.¹⁸⁹ Conversely, the United States is likely using information obtained from Colombia to track and punish individuals engaged in the drug trade who, given the level of corruption of the Colombian government, may have ties to high-ranking government or law enforcement officials.¹⁹⁰ This set of circumstances would naturally lead to Colombian law enforcement displaying more reticence to hand over valuable information to foreign governments.

On the other hand, disparities in moral values and theories of criminal justice could also cut against the United States' interest in effective prosecution. Recently, the UK's High Court held that the extradition of an accused hacker to the United States and subsequent incarceration in the American carceral system would violate the defendant's human rights.¹⁹¹ Invoking the "forum bar," an extradition reform put into place after several defendants were sent to the United States to be tried for conduct that occurred entirely in the UK, the High Court decided that the defendant's human rights would not be respected in an American jail, given the lack of mental health treatment and the excessive use of solitary confinement.¹⁹² In detailing this decision, a senior legal and policy staffer for Fair Trials suggested that the deficiencies in the American criminal justice system undermine international cooperation between the United States and even its closest allies, which can easily be extended to refusals to comply with American law enforcement through MLA.¹⁹³

Furthermore, because the extensive burden of the costs of investigation into money laundering and terror finance is primarily placed on global financial institutions, the recent increase in the number of requests and more stringent FATF regulations tend to disincentivize engagement with the global financial system as a

188. *Id.* at 1246–47.

189. *See id.* at 1247–52.

190. *See id.* at 1291–92.

191. Shaeffer, *supra* note 71.

192. *Id.*

193. *Id.*; *Who are Fair Trials?*, FAIR TRIALS, <https://www.fairtrials.org/about-us/our-people/our-staff/> (last visited Nov. 10, 2018) [<https://perma.cc/V9JX-ZDR3>] (archived Nov. 5, 2018).

whole.¹⁹⁴ Financial institutions with fewer resources subject to the burden of anti-money laundering and anti-terror finance requirements are less inclined to engage with financial institutions abroad, thus limiting their local customers' access to the financial system on the whole—including access to credit, loans, and checking or savings accounts.¹⁹⁵ Disengagement with the financial system results in transactions—including those related to criminal activity—being funneled through illegitimate sources, which are naturally much more difficult to track by law enforcement.¹⁹⁶ A potential solution to this problem is to have the FATF implement regulations requiring the implementation of risk-based account monitoring, rather than the stringent due diligence requirements which fail to account for cultural differences, in order to reduce compliance costs with MLA requests.¹⁹⁷ This shift in requirements would encourage global engagement with the financial system, thus resulting in fewer transactions taking place within the cash economy and instead flowing through regulated, monitored financial institutions.¹⁹⁸

V. CONCLUSION

MLA operationalized via treaty is one of the most important innovations for cross-border investigations in the recent history of international law enforcement. However, due to the massive technological changes in the way information is stored and processed, in addition to the rise of the internet and cloud computing, the process has become less and less valuable as a tool for international criminal investigations. Due to insufficient resources to comply with MLAT requests, as well as the substantial increase in the number of requests for data, many of these requests are going unfulfilled for months. Given the transient nature of electronically stored information, criminal investigations suffer as a result of this delay.

As the international community seeks new methods through which to fight international financial crime and disrupt terror finance networks, it will have two choices: reform the process, or devise an entirely new one. The current system, although flawed, is certainly preferable to extraterritorial avenues, which come with a much more concerning host of international consequences. Additionally, many of

194. Loughlin, *supra* note 116, at 11.

195. *Id.* at 9.

196. *See id.* at 11 (“[P]ersons excluded from the financial system often resort to what is available in the informal, unregulated, undocumented, and largely cash economy.”).

197. *See id.* at 10 (discussing an FATF report encouraging members to implement risk-based account monitoring requirements in an effort to efficiently use limited resources.).

198. *Id.* at 11.

those consequences could easily be revised through the creation of an electronic system that includes standardization, increased transparency, and the ability to challenge illegitimate requests. This would further promote engagement in the MLA system, given the avenue for redress for privacy and human rights violations, while streamlining the process for the countries already part of the system. The proposed reforms are the best avenue through which to achieve more effective law enforcement investigations in areas that involve significant amounts of data, namely financial crime and terror finance.

*Michaelene K. Wright**

* J.D. Candidate, 2019, Vanderbilt Law School; B.A., 2015, West Virginia University. Thank you to Professor Yesha Yadav for your guidance and feedback. I would like to express my gratitude to the editorial staff and executive board of the *Vanderbilt Journal of Transnational Law* for their keen eyes for detail and to my friends and family for their endless love and support.