

THE INTERNATIONAL COOPERATION CHALLENGE: MAPPING PAKISTAN'S RESPONSE TO TERRORIST FINANCING AND MONEY LAUNDERING

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ABSTRACT

The paper aims to dissect the gaps and challenges in Pakistan's international cooperation framework centred around terrorist financing (TF) and money laundering (ML). Since Mutual Legal Assistance (MLA) is a relatively new concept for the law enforcement agencies in the country, its application poses considerable difficulties. The element of reciprocity is at the heart of MLA; therefore, the formal and informal channels of international cooperation form the basis for curbing transnational crime. Pakistan's existing risk assessments point to an elevated risk of TF/ML as funds are generated both at home and in foreign countries for funding or otherwise supporting terrorist organizations and terrorist operations within the country and abroad. The challenge to trace financial links for moving TF funds in or out of the country include large undocumented/informal economy, extensive use of cash, significant illegal hawala/hundi activity, use of cash couriers, Pakistan's geographical landscape with porous borders and the existence of Afghan refugees in the country.

1. INTRODUCTION

Due to globalization, the nature of criminal activity is increasingly becoming transnational. Criminals involved in activities such as terrorist financing (TF) and money laundering (ML), place, layer and integrate funds in various jurisdictions around the world to shroud illicit gains, conceal their monies and

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avoid attracting the attention of law enforcement agencies. Furthermore, differences in legal systems of different countries can allow for gaps in laws to be exploited. As Baizura Kamal states, criminals can use “clash of bureaucracies, protection of sovereignty ... and the complete incapacity of nations,”¹⁴⁶ to further their activities and expand criminal enterprises. As such, the very notion of sovereignty – and the ability of a State to effectively implement its own laws – could pose a challenge in curbing transnational crime. These are challenges associated with State frontiers and borders, and thus, require coordinated responses, executed both timely and efficiently. The ease with which criminal activity has penetrated borders across the globe requires an urgent need to focus on international cooperation frameworks.

In light of such challenges, there has been a recalibration of responses – including the growing need for international cooperation. Rather than leaving a State to seek its own remedy for a crime committed in its jurisdiction by a criminal in a foreign country, avenues of cooperation between different governmental actors now allow for the tackling of transnational crime through crime detection, prevention, and prosecution. The term ‘international cooperation’ in criminal matters refers to mutual legal assistance (MLA) and extradition – which are instruments used to overcome the challenges associated with transnational crime. It has been adopted to broadly refer to a number of arrangements that can be undertaken by authorities at home and abroad to ensure mutual cooperation and information sharing in terms of criminal matters.

¹⁴⁶ Baizura Kamal, 'International Cooperation: Mutual Legal Assistance And Extradition' <https://www.unafei.or.jp/publications/pdf/GG6/05-4_Malaysia.pdf>

This paper analyses Pakistan's nascent international cooperation frameworks. While extradition is rooted in our legal framework, mutual legal assistance (MLA) remains a relatively new concept for Pakistan since it was only after being grey listed by the Financial Action Taskforce (FATF) in 2018 that Pakistan began to improve its international cooperation frameworks. In this paper, we find significant challenges associated with the application of MLA laws – primarily rooted in its inorganic evolution due to pressure from the Financial Action Task Force (FATF). Although Pakistan had ratified a number of international instruments pertaining to curbing transnational crime, their application was rarely invoked. Additionally, in order to make MLA frameworks and international cooperation more robust broadly, it is necessary to understand its complex interplay with human rights regimes within the domestic and international frameworks, as well as learn from comparable jurisdictions.

2. ELEMENTS OF INTERNATIONAL COOPERATION: MLA AND EXTRADITION

Mutual legal assistance (MLA) refers to the concept of countries mutually agreeing to gather and exchange information in an effort to enforce public or criminal laws.¹⁴⁷ MLA is the formal process by which one State requests another State to exercise its coercive powers or to take steps to obtain evidence that must be admissible in a criminal trial. MLA requests are issued to countries and are received from foreign countries – and designated authorities are required to cooperate and provide the necessary information, often in collaboration with other justice sector actors and law enforcement

¹⁴⁷ 'Informal Expert Working Group on Mutual Legal Assistance Casework Best Practice' (United Nations Office on Drugs and Crime 2001)
<https://www.unodc.org/pdf/lap_mlaeg_report_final.pdf>

agencies. These requests can vary – from detention, to sharing of information, to recording statements before judicial authorities and production orders to financial institutions or companies.¹⁴⁸

MLA has the element of reciprocity at its core; however, governments can offer MLA in cases even if a reciprocal agreement or treaty with other states is not available. Finally, even though MLA operates under stricter rules than through informal channels (through bilateral engagement between LEAs across borders), often both are pursued in tandem to obtain required information from foreign authorities.¹⁴⁹

Extradition, on the other hand, requires a State to effectively surrender an individual to another State for prosecution or punishment for crimes committed in the requesting country's jurisdiction. In contrast with MLA, extradition at its core relies on the element of "dual criminality"¹⁵⁰ – that is, both jurisdictions must have criminalized the offense under question, and are usually brought about after the signing of either multilateral or bilateral treaties. Such treaties also define instances when extradition is to be denied. For instance, certain countries will not extradite individuals for military or political offenses, except in cases of terrorism.¹⁵¹ Due to these considerations, even with treaties in place, extraditions can prove to be "contentious" and

¹⁴⁸ Baizura Kamal, 'International Cooperation: Mutual Legal Assistance And Extradition' <https://www.unafei.or.jp/publications/pdf/GG6/05-4_Malaysia.pdf>

¹⁴⁹ 'Manual On Mutual Legal Assistance and Extradition' (*Unodc.org*) <https://www.unodc.org/documents/organized-crime/Publications/Mutual_Legal_Assistance_Ebook_E.pdf>

¹⁵⁰ *Ibid.*

¹⁵¹ *Ibid.*

wrought with “geopolitical friction,” as states compete to exercise their own legal sanctions against the offender.¹⁵²

3. INTERNATIONAL COOPERATION AND PAKISTAN

Pakistan has a nascent international cooperation framework, based primarily on the Extradition Act 1972,¹⁵³ the Mutual Legal Assistance (Criminal Matters) Act, 2020¹⁵⁴ and rules formed therein. There has not been much use of the clauses promising extradition this is mainly due to an absence of case management system for extradition which makes it unclear as to the process followed from the time an extradition request is received, to the time it is executed or denied. Although recent years have witnessed the terms of extradition gaining more currency due to political instability in the country.

Pakistan’s existing risk assessments point to an elevated risk of TF/ML as funds are generated both at home and in foreign countries for funding or otherwise supporting terrorist organizations and terrorist operations within the country and abroad.¹⁵⁵ The challenge to trace financial links for moving TF funds in or out of the country include large undocumented/informal economy, extensive use of cash, significant illegal hawala/hundi activity, use of cash couriers, Pakistan’s geographical landscape with porous borders and the existence of Afghan refugees in the country.¹⁵⁶ While such TF risks continue to evolve over time, authorities at a national level continue to engage with all agencies including law enforcement to update information wherever

¹⁵² Ibid.

¹⁵³ The Extradition Act 1972

<https://www.oecd.org/site/adboecdanti-corruptioninitiative/39365414.pdf>

¹⁵⁴ Mutual Legal Assistance (Criminal Matters) Act, 2020

http://www.na.gov.pk/uploads/documents/1597653825_608.pdf

¹⁵⁵ National Risk Assessment (NRA) 2019

¹⁵⁶ Ibid.

required and disseminate the understanding for targeting, investigating and prosecuting TF activities in line with the risks.¹⁵⁷

Nevertheless, international cooperation has also been a persistently weak area for Pakistan's law enforcement and investigation agencies, with glaring legal gaps existing in its mutual legal assistance procedures in civil and criminal matters. An MLA specific law did not exist to provide explicit legal cover with recourse being made to antiquated criminal justice procedures which were poorly understood and applied by justice sector actors. Investigation and prosecution quality when dealing with transnational crime has been poor, primarily due to chronic institutional weaknesses and lack of training, resources and powers available to effectively undertake investigations.¹⁵⁸ FATF's grey-listing of Pakistan in 2018 provided the impetus to improve its frameworks for international cooperation. Pakistan has now started to pursue international cooperation and provide timely and qualitative responses to incoming requests from other countries as well. In addition to this, Pakistan also signed bilateral treaties with certain countries, promoting an exchange of information directly.¹⁵⁹

The passing of the Mutual Legal Assistance (Criminal Matters) Act, 2020,¹⁶⁰ and the formulation of the Mutual Legal Assistance Internal Rules 2020 was envisaged as integral in upgrading Pakistan's MLA architecture and bolstering compliance under this category. However, the MLA Act 2020, passed by

¹⁵⁷ 'Counter Financing of Terrorism – NACTA – National Counter Terrorism Authority NACTA Pakistan' (Nacta.gov.pk) <<https://nacta.gov.pk/counter-financing-of-terrorism-2/>>

¹⁵⁸ 'Measuring Pakistan's Technical Compliance with The FATF Recommendations' (Research Society of International Law (RSIL) 2021) <https://rsilpak.org/wp-content/uploads/2021/05/2021_FATF-technical-compliance_RSIL.pdf>

¹⁵⁹ Ibid.

¹⁶⁰ Mutual Legal Assistance (Criminal Matters) Act 2020 <http://www.na.gov.pk/uploads/documents/1597653825_608.pdf>

Parliament has been met with criticism regarding its rushed passage as well as its validity. Indeed, the FATF found the MLA Act 2020 contradictory to its aims of promoting MLA in ML/TF matters, and in a surprising move, downgraded Pakistan's compliance from Partially Compliant to Non-Compliant under Recommendation 37.¹⁶¹ This glaring lack of understanding on part of the authorities, as well as the tension between the requirements of FATF, Pakistan's own needs for international cooperation and the question of interplay between fundamental human rights become essential to explore – and forms the basis of this paper.

4. INTERNATIONAL LEGAL FRAMEWORK

The transnational nature of offences requires countries to have established and well-functioning mechanisms for approaching authorities abroad to exchange information and evidence investigations. Throughout history, states have emphasized the importance of international cooperation and have enacted several instruments that promote such collaboration. UN Conventions and the FATF framework provide a cohesive international framework, applicable on Pakistan¹⁶² as well as the rest of the international community.

4.1. Relevant United Nations Conventions

¹⁶¹ '3rd Follow-Up Report Mutual Evaluation of Pakistan' (Asia/Pacific Group on Money Laundering (APG) 2021) <<https://www.fatf-gafi.org/media/fatf/documents/reports/fur/APG-3rd-Follow-Up-Report-Pakistan-2021.pdf>>

Recommendation 37 requires states to have effective and efficient means of providing legal assistance to other countries with issues to crimes related to money laundering, as well as its predicate offences. Legal assistance should also extend to investigations and prosecutions in cases of terrorist financing.

¹⁶² Pakistan has ratified all the UN Conventions under consideration.

The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988, also known as the Vienna Convention lays down elaborate measures against drug trafficking, money laundering and diversion of precursor chemicals.¹⁶³ The Convention stresses upon the importance of an exchange of information in Resolution 1 to enhance investigation and communication between states. Article 7 of the Convention pertains to mechanisms for Mutual Legal Assistance (MLA), and the instances where it may be sought. The article also expands upon content for MLA requests as well as situations in which MLA requests may be refused.¹⁶⁴

The United Nations Convention against Transnational Organized Crime 2000, also known as the Palermo Convention aims to fight against transnational organized crime and focuses on the means of international cooperation to tackle the globalized nature of these crimes. Article 7(4) emphasizes that parties shall develop and promote “global, regional, sub-regional and bilateral cooperation among judicial, law enforcement and financial regulatory authorities in order to combat money-laundering.” Article 18 states the importance of MLA in assisting with investigations, prosecutions, and judicial proceedings. Article 19 deals with joint investigations in consideration of bilateral and multilateral agreements and arrangements between states. Moreover, article 27 stresses upon the cooperation by law enforcement authorities of state parties.¹⁶⁵

The United Nations Convention against Corruption, 2003 aims to address the scourge of corruption at the global level, the Convention lays down

¹⁶³ The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988

¹⁶⁴ Ibid

¹⁶⁵ The United Nations Convention against Transnational Organized Crime 2000

provisions to prevent and control corruption by introducing a framework for stronger cooperation between States to prevent and detect corruption. Article 43 to 50 of the Convention specifically relate to international cooperation. Article 44 expands upon extradition, Article 45 provides for transfer of sentenced persons, while Article 46 lays down the framework for MLA. Article 47 expands upon transfer of criminal proceedings, Article 48 on cooperation between law enforcement authorities and Article 49 the importance of joint investigations. Article 50 addresses special investigative techniques.¹⁶⁶

The International Convention for the Suppression of the Financing of Terrorism, 1999 aims to criminalize acts of financing terrorism by promoting cooperation between law enforcement authorities. Article 12(2) states that, “States Parties may not refuse a request for mutual legal assistance on the grounds of bank secrecy.”¹⁶⁷ In the context of foreign terrorist fighters, the Terrorism Prevention Branch of the United Nations Office on Drugs and Crime's (UNODC) has stressed the importance of international cooperation to counter the risks stemming from the threat of foreign terrorist fighters.¹⁶⁸

Pakistan has ratified all of the abovementioned UN Conventions.

4.2 FATF Framework

The Financial Action Task Force (FATF) is a global watchdog that develops policies for curbing money laundering and financing of terrorism (ML/TF).¹⁶⁹

¹⁶⁶ The United Nations Convention against Corruption 2003

¹⁶⁷ The International Convention for the Suppression of the Financing of Terrorism 1999

¹⁶⁸ Reinforcing International Cooperation In The MENA Region To Address Returning And Relocating Foreign Terrorist Fighters' (*Unodc.org*)
<<https://www.unodc.org/middleeastandnorthafrica/en/web-stories/reinforcing-international-cooperation-in-the-mena-region-to-address-returning-and-relocating-foreign-terrorist-fighters.html>>

¹⁶⁹ FATF Mandate

It sets standards and guidelines for all countries to adopt, and monitors and evaluates countries on their performance. The aim is to promote countries to adopt FATF Recommendations and in doing so, preserve the integrity of the global financial system.¹⁷⁰

The FATF and its regional bodies regularly monitor countries' AML/CFT frameworks. The FATF conducts peer reviews of each member on an ongoing basis to assess levels of implementation and provides analysis of each country's system for preventing criminal abuse of the financial system. These evaluations, called Mutual Evaluation Reports (MERs), review how well a country's AML/CFT frameworks fulfil the FATF requirements (Technical Compliance), and broadly, how well these frameworks are working to protect against ML/TF risks (Effective Compliance). 1 (from 11) Immediate Outcome and 5 (from 40) Technical Recommendations revolve around the subject of international cooperation.¹⁷¹

Within the Technical Recommendations, the FATF requires the signing and ratification of core UN conventions (summarized above) under Recommendation 36 (International Instruments). Recommendation 37 mandates Mutual Legal Assistance,¹⁷² requiring states to have effective and efficient means of providing legal assistance to other countries with issues to crimes related to money laundering, as well as its predicate offences. Recommendation 38 requires states to have the legal framework and institutional capacity to identify, freeze, seize and confiscate property that has

¹⁷⁰ Financial Action Task Force (FATF), "Mandate"
<<http://www.fatf-gafi.org/media/fatf/content/images/FATF-Ministerial-Declaration-Mandate.pdf>>

¹⁷¹ FATF Effectiveness Assessment
<<https://www.fatf-gafi.org/publications/mutualevaluations/documents/effectiveness.html>>

¹⁷² FATF Recommendations

been obtained from proceeds of money laundering, its predicate offences or terrorist financing. Recommendation 39 deals with the extradition of individuals who have been accused of money laundering and terrorist financing. It calls on states to execute such requests in a timely manner, and also prohibits them from providing safe havens to individuals accused of financing terrorism. Recommendation 40 calls on states to adopt a proactive approach to cooperation with other countries in the matters of money laundering and terrorist financing. It requires all such cooperation to have legislative backing instead of being done on an ad-hoc basis. It also calls for streamlining of processes to ensure that all MLA requests are executed in a timely manner. In addition to this, the need for international cooperation and liaison is further emphasized and integrated within all remaining criterion, within both technical and effective streams.¹⁷³

The application of FATF requirements in Pakistan is of critical importance. In 2018, the FATF placed Pakistan on the ‘grey-list’ – citing ‘structural deficiencies’ that resulted in failure to effectively target TF/ML.¹⁷⁴ In 2019, the Asia Pacific Group’s Mutual Evaluation Report (MER)¹⁷⁵ provided a detailed assessment of the nature of these deficiencies, which included glaring gaps in Pakistan’s international cooperation frameworks and a virtually non-existent MLA mechanism. Consequently, a 27-point Action Plan was

¹⁷³ FATF Methodology

<<https://www.fatf-gafi.org/media/fatf/documents/methodology/FATF%20Methodology%2022%20Feb%202013.pdf>>

¹⁷⁴ Shahbaz Rana, “Pakistan Formally Placed on FATF Grey-list,” *The Express Tribune*, June 29, 2018,

<<https://tribune.com.pk/story/1746079/1-pakistan-formally-placed-fatf-grey-list>>

¹⁷⁵ The Asia/Pacific Group on Money Laundering, “Pakistan Mutual Evaluation Report October 2019”

<<https://www.fatf-gafi.org/media/fatf/documents/reports/mer-fsrb/APG-Mutual-Evaluation-Report-Pakistan-October%202019.pdf>> (hereafter cited as MER 2019)

developed by FATF for Pakistan to align its AML/CFT frameworks with international standards.¹⁷⁶ Since 2018, Pakistani authorities have resorted to multi-focal action to improve the country's performance, including extensive legislative and administrative reforms. In 2020, this effort culminated into the passage and amendments of around 15 laws, which also includes the passage of the Mutual Legal Assistance (Criminal Matters) Act, 2020 – seemingly setting the foundation of a robust international cooperation framework in Pakistan. However, the Act was devised and passed owing largely to the external pressure to acquiesce to the FATF's requirements, instead of growing organically from within the criminal justice sector. Because of this, the MLA Act, 2020 was wrought with difficulties, and further failed to satisfy the criteria set by the FATF particularly under Recommendation 37, as will be assessed in the upcoming sections.

5. DOMESTIC LEGAL FRAMEWORK

As mentioned earlier, Pakistan's international cooperation frameworks are nascent, particularly the MLA framework that has come about due to the external pressure of adhering to the FATF's criterion. Under this, the Extradition Act of 1972 provides the basis of surrendering an individual to another state for prosecution. Apart from this, the passage of the Mutual Legal Assistance (Criminal Matters) Act, 2020 allowed for the creation of a legal architecture for processing and addressing incoming and outgoing MLA requests. Under the ambit of this Act, several rules and directives were passed, including those by the executive (Ministry of Interior and NACTA) as well as the province of Khyber Pakhtunkhwa.

¹⁷⁶ "FATF Plenary Meetings - Chairman's Summaries," Financial Action Task Force (FATF). <<http://www.fatf-gafi.org/about/outcomesofmeetings/>>

5.1. Extradition Act, 1972¹⁷⁷

The Extradition Act of 1972 is an important law under international cooperation, pertaining to extradition of fugitive offenders. The Act is applicable to persons returned from a treaty State or a foreign State not being a treaty State. Chapter I of the Act lays down protocols for preliminary determination for the purposes of invoking provisions of the Act; it determines scope, duties, and limitations of the Act. When identifying the purpose of the Act, the provisions state that any special intent or state of mind or special circumstances of aggravation which may be necessary to constitute that offence under the law shall be disregarded. Chapter II elaborates upon the surrender of fugitive offenders; this also pertains to an offence in respect to which the fugitive's surrender is sought was committed before or after the commencement of this Act and whether or not a court in Pakistan has jurisdiction to try that offence. Section 5(2)(a) highlights circumstances where the fugitive offender is not to be surrendered. Section 6 states that a requisition for the surrender of a fugitive offender shall be made to the Federal Government via specified means that include; a) a diplomatic representative in Pakistan of the State asking for the surrender; or b) by the Government of the State asking for the surrender through the diplomatic representative of Pakistan in that State; or c) in such other manner as may have been settled by arrangement between the Federal Government and the Government of the State asking for the surrender. Chapter III deals with the surrender to Pakistan of persons accused of extradition offences, this chapter highlights the manner in which a requisition for the surrender to Pakistan of a person who, being accused or convicted of an extradition offence, is or is

¹⁷⁷ The Extradition Act 1972

<<https://www.oecd.org/site/adboecdanti-corruptioninitiative/39365414.pdf>>

suspected to be in a treaty State may be made by the Federal Government. Chapter IV pertains to miscellaneous matters that may arise during the application of provisions of this Act.¹⁷⁸

According to an ADB/OECD report on Anti-Corruption,¹⁷⁹ the Extradition Act, 1972 is not extensive in nature and scope, and does not espouse all the requirements compared to more recent extradition legislation in other jurisdictions. While dual criminality remains a mandatory requirement for incoming extradition, it is conduct-based in Pakistan. This means that the facts of the case must constitute an offence in both States, no matter how those offences are qualified as per Article 43(1) of UN Convention on Corruption.¹⁸⁰ Furthermore, there were operational gaps with regards to management of MLAs, arising from MLA management not clearly being defined in the Extradition Act, 1972.¹⁸¹ In order to counter these challenges, the extradition regime was reliant heavily on the Code of Criminal Procedure (CrPC) and other laws in place of MLA legislation, as explained below.

5.2. Mutual Legal Assistance (Criminal Matters) Act, 2020¹⁸²

Prior to the passage of the MLA Act, the Code of Criminal Procedure (CrPC) and elements of the National Accountability Ordinance 1999 would provide a basis for coordinating and issuing MLA requests – however this was

¹⁷⁸ The Extradition Act 1972

<<https://www.oecd.org/site/adboecdanti-corruptioninitiative/39365414.pdf>>

¹⁷⁹ Ibid.

¹⁸⁰ 'International Cooperation' (United Nations Office on Drugs and Crime)

<https://www.unodc.org/documents/NGO/UNODC_UNCAC_Chapter_IV_International_Cooperation_18Feb2015.pdf>

¹⁸¹ 'Mutual Legal Assistance, Extradition And Recovery Of Proceeds Of Corruption In Asia And The Pacific' (Asian Development Bank, Organisation for Economic Co-operation and Development 2007) <<https://www.oecd.org/site/adboecdanti-corruptioninitiative/37900503.pdf>> 1

¹⁸² Mutual Legal Assistance (Criminal Matters) Act 2020

<http://www.na.gov.pk/uploads/documents/1597653825_608.pdf>

wrought with bureaucratic and partisanship-based challenges. Previously, the CrPC would allow for the issuance of commissions to examine witnesses abroad, as the Extradition Act contained no provisions dealing with outgoing MLA requests. In corruption cases that fall within the jurisdiction of the National Accountability Bureau (NAB), the National Accountability Ordinance 1999 permitted the NAB Chairman to request MLA from a foreign state.¹⁸³ Incoming MLA requests were executed by applying the NAO and the CrPC as necessary, even though the ambit of the CrPC applies only local investigations. The NAO also empowers the NAB Chairman to provide MLA to foreign jurisdictions in corruption matters.¹⁸⁴ All these factors point to the largely haphazard and uncoordinated methodology of addressing MLA requests in the absence of dedicated MLA legislation and a central authority. The MLA (Criminal Matters) Act of 2020 sought to remedy these failings.

On 11th August 2020, the Mutual Legal Assistance (Criminal Matters) Act 2020¹⁸⁵ was approved by the Parliament. The Act extends international cooperation by providing legal assistance to requesting states by undertaking necessary actions for effective law enforcement. Section 2 of the Act lays down definitions to establish clarity. Section 3 of the Act addresses the issue of providing assistance to other countries on the basis of the principle of reciprocity. However, there are provisions to address MLA requests in the absence of reciprocal agreements as well, as required by the State. Section 4 addresses the shortcoming regarding rapid execution of MLA requests by

¹⁸³ 'Mutual Legal Assistance, Extradition And Recovery Of Proceeds Of Corruption In Asia And The Pacific' (Asian Development Bank, Organisation for Economic Co-operation and Development 2007) <<https://www.oecd.org/site/adboecdanti-corruptioninitiative/37900503.pdf>> 1

¹⁸⁴ Ibid.

¹⁸⁵ Mutual Legal Assistance (Criminal Matters) Act 2020 <http://www.na.gov.pk/uploads/documents/1597653825_608.pdf>

making it mandatory for the Central Authority to dispose of MLA requests in a timely manner. It expands upon the functions and duties of the Central Authority. Section 5 describes the manner for transmission of information by the Central Authority, it states that the Central Authority shall not initiate the transmission of any information relating to criminal matters to the appropriate authority in a country concerned with such criminal matters, without a prior request by that country. Section 6 elaborates upon the importance of form, manner and conditions of the request. Section 7 deals with MLA requests by Pakistan; it elaborates upon the subject matter of requests as well. Furthermore, Section 8 of the Act requires requesting states place a timeframe on their requests.

Sections 8 and 18 address the weaknesses in confidentiality surrounding MLA requests. The former requires requesting states to provide details regarding confidentiality. The latter makes it mandatory for all officials authorized by law to ensure maximum confidentiality regarding a request for MLA, its details and its subjects. It also criminalizes failure to maintain confidentiality. Section 9 provides detailed instructions for law enforcing agencies on how to proceed with investigations. Furthermore, Sections 19 and 20 bring electronic data into the scope of investigations. Section 21 deals with costs arising from execution of a request for MLA in Pakistan, it states that execution of a request for MLA in Pakistan shall be conducted without charge to the requesting country except for; a) costs incurred by the attendance of experts in the territory of Pakistan; or b) costs incurred by the transfer of a person in custody; or c) any costs of substantial or extraordinary nature.¹⁸⁶

¹⁸⁶ Research Society of International Law, *Measuring Pakistan's Technical Compliance with the FATF Recommendations*

The MLA Act, 2020 was further amended in 2021 after drawing criticism from the Asia Pacific Group and the FATF for being “unduly restrictive” mainly because Section 13(2) of the Act requires Court to issue a freezing order of confiscation order only after notifying the subject of the matter.¹⁸⁷ The new amendments address the identified shortcomings pertaining to coverage of predicate offenses; however, there are concerns raised against potential human rights violations involving fundamental rights guaranteed by the constitution that could result by granting sweeping powers to authorities under the Act.

5.3. Ministry of Interior Internal Guidelines: International Cooperation

UNSC resolution 1373 aims for states to “find ways of intensifying and accelerating the exchange of operational information” and “exchange information in accordance with international and domestic laws”.¹⁸⁸ In order to facilitate this, the MLA Act, 2020 permits the formulation of rules and regulations as to further furnish and implement the provisions of the Act.

Hence, the Ministry of Interior (MOI) passed the Mutual Legal Assistance Internal Guidelines.¹⁸⁹ These Guidelines have been designed to assist foreign countries to understand the steps which are to be followed when requesting international cooperation from Pakistan and the information which is

¹⁸⁷ '3rd Follow-Up Report Mutual Evaluation of Pakistan' (Asia/Pacific Group on Money Laundering (APG) 2021) <<https://www.fatf-gafi.org/media/fatf/documents/reports/fur/APG-3rd-Follow-Up-Report-Pakistan-2021.pdf>>

¹⁸⁸ MLA Internal Guideline, Ministry of Interior 2020 - The Gazette of Pakistan <<https://interior.gov.pk/index.php/downloads/category/1-forms?download=212:mla-guidelines>>

¹⁸⁹ MLA Internal Guideline, Ministry of Interior 2020 - The Gazette of Pakistan <<https://interior.gov.pk/index.php/downloads/category/1-forms?download=212:mla-guidelines>>

required to be sent for meaningful reply. These guidelines also intend to raise awareness amongst the officials in all relevant ministries, departments, agencies, or organizations, etc. of Pakistan with respect to seeking international cooperation from other countries and providing in-time quality response on incoming requests from other countries. The process of executing incoming and outgoing MLA requests is detailed, including methods and details of assistance requested as well as the conditions for refusal of MLA request. The functions and powers of the Central Authority are also detailed, with the International Cooperation Wing of the MOI being set up to scrutinize and follow-up with all MLA requests. LEAs and other authorities will also be involved in international cooperation requests, and time-frames for such requests are also provided for. Prioritization of requests for international cooperation is also provided for, with requests for cooperation in TF/ML cases being top-priority for the MOI.

Section 1 of the guidelines define the scope and applicability of MLA and its importance, the section further highlights the role and process of central authority which is of utmost significance when it comes to making a request on behalf of Pakistan and receiving requests from foreign states. Section 2 expands upon the execution of outgoing MLA requests from Pakistan; the section breaks down types of outgoing mutual legal assistance requests and the format of incoming requests as well. Section 3 elaborates upon executing incoming MLA requests by explaining the types of incoming mutual legal assistance requests and the format of outgoing requests. Section 4 deals with details and methods of assistance required. It explains the route to be adopted by the central authority in cases where it receives a request for evidence gathering or search warrants. It also explains the steps to be taken when the

central authority is refused by the person named in an evidence-gathering order.

Moreover, the mechanism for assistance from persons serving imprisonment is also addressed to minimize any ambiguity. The section also explains the role of central authority in cases of freezing and seizure orders. In addition, the section also has provisions for assistance requests pertaining to detention of a person in Pakistan as well as assistance for foreign confiscation orders and assistance with respect to requests asking for recovery of fines. The section also expands upon the central authority's role when extending assistance with requests pertaining to electronic data. Section 5 discusses the grounds upon which the central authority may refuse requests for international cooperation. Section 6 details the framework for seeking an informal request made by a counterpart agency, generally via telephone, facsimile or email. Section 7 emphasizes non-disclosure of confidential requests for assistance. Section 8 briefly discusses the expenses related to MLA requests.

5.4. Standard Operating Procedures (SOPs) for International Cooperation by the Government of Khyber Pakhtunkhwa Rules¹⁹⁰

In October 2020, the Government of Khyber Pakhtunkhwa issued Standard Operating Procedures (SOPs) for international cooperation and related matters in the province. These SOPs aim to highlight the steps which are to be followed in cases of outgoing MLA requests as well as incoming MLA requests. The guidelines were issued to raise awareness among officials in all relevant ministries, departments, agencies and organizations with regards to

¹⁹⁰ Khyber Pakhtunkhwa Guidelines on Mutual Legal Assistance (MLA) 2020

mechanisms for seeking and extending international cooperation. The guidelines begin by highlighting instances when a formal mutual legal assistance request is made, they also state that law enforcement agencies and concerned departments should initiate formal international cooperation requests based on information obtained via informal means as such requests have more chances to receive an immediate reply.

The guidelines also identify the central authority as well as the international cooperation cell for clarity. The potential international aspects of terror financing and money laundering investigations must be considered in all domestic proceedings. In addition, the key focus surrounding cross border terrorism financing links should be on key risk areas that include kidnapping, extortion, narcotics, proceeds from businesses, the use of illegal money and value transfer services (MVTs), cash couriers aimed for hawala/hundi, raising money in the name of charity to move outside the country and receiving funds from organizations out of Pakistan.¹⁹¹

5.5. NACTA directives on International Cooperation in Terrorist Financing Matters¹⁹²

The National Counter Terrorism Authority (NACTA) in March 2020 issued directives intended to strengthen international cooperation in matters pertaining to terrorist financing. The guidelines are premised on Pakistan's National Risk Assessment (NRA) 2019¹⁹³ that emphasize the globalized nature of terror financing threats. Law enforcement agencies in addition to

¹⁹¹ Ibid

¹⁹² 'Counter Financing Of Terrorism – NACTA – National Counter Terrorism Authority NACTA Pakistan' (Nacta.gov.pk) <<https://nacta.gov.pk/counter-financing-of-terrorism-2/>>

¹⁹³ NRA 2019

other authorities must analyse international linkages for any terror financing threats and effectively curb them by seeking means of international cooperation, while also responding to incoming requests from foreign countries in a timely manner. The directives called upon authorities to adopt due procedures that are aligned with domestic law as well as international standards to enhance international cooperation.¹⁹⁴

6. GAPS AND CHALLENGES IN THE MLA REGIME

Despite the passage of the MLA Act, 2020, there were glaring issues identified that undermined the purpose of the legislation. In its statement of objectives, it was noted that there was a glaring “lack of uniformity in law and weak coordination mechanisms” which prevented application of the law, and in turn gave rise to further transnational crime. The aim of the Act therefore was to “bridge existing gaps” and move towards effective law enforcement.

However, the MLA Act 2020 contained provisions that would prove to be critical faults. The FATF, in its Follow-Up Report 2021, in a novel yet disturbing move, downgraded Pakistan’s rating of Partially Compliant from before the passage of the MLA Act, 2020 to Non-Compliant – citing that the legislation created new deficiencies within the international cooperation framework.¹⁹⁵

Under Section 5 of the MLA Act, 2020, the subject of the MLA request is to be notified of the said request. The FATF found this condition “unreasonable

¹⁹⁴ 'Counter Financing Of Terrorism – NACTA – National Counter Terrorism Authority NACTA Pakistan' (Nacta.gov.pk) <<https://nacta.gov.pk/counter-financing-of-terrorism-2/>>

¹⁹⁵ '3rd Follow-Up Report Mutual Evaluation Of Pakistan' (Asia/Pacific Group on Money Laundering (APG) 2021) <<https://www.fatf-gafi.org/media/fatf/documents/reports/fur/APG-3rd-Follow-Up-Report-Pakistan-2021.pdf>>

or unduly restrictive,”¹⁹⁶ stating that it could prove costly in terms of effectiveness of domestic and foreign investigations and could also result in requests simply not being made by, or to, foreign jurisdictions for fear of compromising the investigation.

The FATF Follow Up Report 2021 also noted a key disparity in the MLA Act in terms of confidentiality. Section 18 of the MLA Act, 2020 requires confidentiality, however this is in conflict with Section 5, which requires the subject of the request to be notified. The FATF termed this fallacy as “contrary to protecting the integrity of the investigation or inquiry,” and thus severely compromised the effectiveness of the legislation.

Additionally, there were concerns raised against coordinating authorities. While the central authority is defined in the MLA Act, 2020, section 2 notes that in practice the National Executive Committee (comprising representatives from the MOI; Law and Justice; MOFA and the Home Secretariats of all four provinces) essentially exercises the relevant powers. Pakistan responded to this concern by the Asia/Pacific Group on Money Laundering (APG) by clarifying that in practice, the National Executive Committee acts as the Central Authority. The FATF termed this mechanism as “unclear,” noting that decisions taken through these means were riddled with bureaucratic delays and could impact prioritization. It was concluded that while the MLA Act 2020 was a welcome development in establishing MLA processes and timeframes, it created new deficiencies which had been afforded significant weightage given Pakistan’s existing risks. Thus, Pakistan was downgraded on this front.

¹⁹⁶ Ibid.

Pakistan responded to this by passing the Mutual Legal Assistance (Amendment) Act, 2021¹⁹⁷ with the aim of streamlining MLA processes and requests as well as ensuring full compliance with the FATF's requirements. Under Section 2 of this new amendment, the role of the central authority was redefined to being held by the "Secretary of the Ministry of Interior," and section 4 further added to the role in question by ensuring that all MLA requests will be processed and decided by the central authority expeditiously. The FATF's concerns regarding Section 5, were also adopted in the amendment in that now, no notifications of MLA requests will be made to the subject of the request.¹⁹⁸ These developments are likely to gain favour with the FATF and the APG and may result in improved ratings on Pakistan's Technical Compliance score. However, it is also necessary to explore any human rights considerations that may be of importance in a bid to fully abide by the FATF's requirements.

7. INTERPLAY BETWEEN HUMAN RIGHTS AND MLA REGIMES

The development of MLA mechanisms is fundamental for curbing transnational organized crime; the globalized nature of crime has compelled states to adopt a wide variety of methods for international cooperation.¹⁹⁹ However, there has been some tension pertaining to human rights violations of suspects in cases invoking requests for mutual legal cooperation.

¹⁹⁷ Mutual Legal Assistance (Criminal Matters) Act 2021

<http://www.senate.gov.pk/uploads/documents/1628509087_207.pdf>

¹⁹⁸ Ibid.

¹⁹⁹ Mushtaq Ghumman, 'Extending Cooperation to Other States: Cabinet Approves Several MLA Requests' (*Brecorder*, 2021)

<<https://www.brecorder.com/news/40108894/extending-cooperation-to-other-states-cabinet-approves-several-mla-requests>>

The Constitution of the Islamic Republic of Pakistan²⁰⁰ guarantees fundamental rights relevant to this discussion. These include the right to a fair trial and due process (Article 10A), the right to protection against retrospective punishment (Article 12), prohibition of torture and other forms of cruel, inhuman and degrading treatment (Article 14), protection against slavery (Article 11) and the right to life (Article 9).²⁰¹

While MLA laws are not as invasive in terms of restricting personal rights and freedoms as extradition is, the process of requesting and acquiring information still has important human rights implications. Particularly, the link between human rights and MLA arises when states either conduct mutual assistance in a manner that is detrimental to human rights of the suspect or when the state receiving assistance uses it in a manner that threatens the human rights enshrined in international instruments.²⁰² Problems also arise when the suspect does not have a platform to plead their innocence before the state they are residing in, the state which has been requested is likely to carry out assistance regardless of whether the suspect agrees or not. This can escalate to informal intimidation campaigns by authorities to pursue the suspect. Moreover, the state being requested may indulge in practices constituting unfairness in attempts to fulfil requests.²⁰³

To counter this threat of infringing human rights, several scholars have attempted to analyse the seriousness of these violations in order to ascertain

²⁰⁰ The Constitution of the Islamic Republic of Pakistan 1973
<http://www.na.gov.pk/uploads/documents/1333523681_951.pdf>

²⁰¹ Ibid.

²⁰² 'Dalhousie Journal of Legal Studies | Journals | Schulich School Of Law, Dalhousie University' (Digitalcommons.schulichlaw.dal.ca)
<<https://digitalcommons.schulichlaw.dal.ca/djls/>>

²⁰³ Efrat A, and Newman A, 'Defending Core Values: Human Rights and The Extradition Of Fugitives' (SAGE Journals, 2020)
<<https://journals.sagepub.com/doi/10.1177/0022343319898231>>

whether these violations trump the need for MLA. It has been argued that MLA requests are carried out in a manner that is comparatively less intrusive for the suspect as compared to extradition.²⁰⁴ Moreover, the MLA Act 2020 allows the central authority to reject requests by foreign states on the basis that the request violates international conventions of human rights. Such provisions serve as a safeguard for gross violations of human rights during the MLA process. In the *Soering* case, the European Court of Human Rights authored a landmark judgment.²⁰⁵ Soering was a German citizen who was arrested in the United Kingdom after an extradition request from the United States was made, Soering had allegedly committed a murder in Virginia. The punishment for murder in Virginia is the death penalty, this gave rise to questions of human rights violation. The European Court of Human Rights stated that extradition leading to a death penalty or even death penalty in Virginia would lead to violation of article 3 of the European Convention on Human Rights (“ECHR”).²⁰⁶ The court emphasized that the United Kingdom owed Soering protection of his rights since he was residing in its jurisdiction at the moment. The same principle also applies to MLA, states have a duty to protect the human rights of those in their jurisdiction.

8. LESSONS TO BE LEARNED: SRI LANKA’S MLA LAW

Pakistan can further draw lessons from comparable jurisdictions from its neighbourhood in terms of further improving its MLA frameworks. The Mutual Assistance in Criminal Matters Act (MACMA), 2018 of Sri Lanka²⁰⁷ proves as an excellent case study. The Mutual Assistance in Criminal Matters

²⁰⁴ Daniel Halvarsson, '*The Suspect and Mutual Legal Assistance*' (Uppsala Universitet 2015).

²⁰⁵ ECtHR, *Soering v United Kingdom*, Series A, No. 161.

²⁰⁶ *Ibid.*, para. 91

²⁰⁷ MACMA Sri Lanka

<<https://rm.coe.int/t-cy20-item5-mla-amendment-act-sri-lanka/16808f1f72>>

(Amendment) Act, No. 24 of 2018 provides a clear legal basis for Sri Lanka to take expeditious action in response to requests by foreign countries to identify, freeze, seize, or confiscate the widest range of property. The amendments allow Sri Lanka to provide MLA on the basis of reciprocity, provide clear responsibilities and accountabilities for processing incoming and outgoing requests and require confidentiality for officers working on MLA requests. Sri Lanka has also established a case management system with standard procedures, accountability and clear timelines for handling MLA cases.²⁰⁸

While intended for the same purposes, Sri Lanka's MACMA 2018 differs greatly from the Mutual Legal Assistance (Criminal Matters) Act (MLA) 2020. MACMA has an increased scope since its provisions also extend to intergovernmental organizations that are engaged in combatting corruption, money laundering or financing of terrorism, whereas MLA applies to countries only. In addition, MLA explicitly states that the provisions of this Act are not applicable to offences of political nature, unless it is directly linked to a criminal offence. The MACMA law has no such limitations.

While both laws delegate the central authority to administer the application of provisions pertaining to international cooperation, MACMA elaborates in greater detail the duties and functions of the authority to avoid any ambiguity in the functions of the central authority. In comparison to MACMA, MLA lays down the basic structure of duties the central authority has been entrusted with. A similar lack of detailed protocol is also noticed in relation to data surrounding electronic crimes. While MLA acknowledges data derived from information systems, it goes into very little detail regarding the nature

²⁰⁸ APG Follow Up Report Sri Lanka-2019

of this data. MACMA has provisions pertaining to the tracing of crimes committed via the internet, information communications technology, cloud computing, block-chain technology and other computer networks including the trading in of any digital currencies.

To allow for greater understanding of the format and content of outgoing requests, MACMA has an enclosed Mutual Assistance Request Form. Although MLA addresses the format of incoming and outgoing assistance requests, it is difficult to understand the true nature of request formats unless one supplements their understanding with the help of guidelines and other administrative instruments.

9. THE WAY FORWARD

Pakistan faces a significant threat in the field of transnational organized crimes, illicit drug trafficking and resultant money laundering are the most prevalent transnational crimes in Pakistan. Since Pakistan's grey-listing by FATF in June 2018, Pakistan has committed to enhancing its Anti-Money Laundering regime that inevitably involves efficient international cooperation given the highly globalized nature of money laundering and terror financing. A holistic view of international cooperation and its implications on curbing organized crime makes MLA a necessity that states must pursue.

The recent developments in Pakistan's MLA framework are welcome, and if embraced by local law enforcement agencies fully, can be significantly useful in improving Pakistan's investigative capacities. There is a dire need for a cultural shift within domestic agencies towards embracing international cooperation and to deepen linkages with counterpart agencies abroad. Doing so would not only allow Pakistan to achieve the remaining points on the

additional FATF Action Plan but would also considerably improve the quality of investigations within the justice sector, resulting in better prosecutions and higher conviction rates.

Looking towards comparable jurisdictions like Sri Lanka and its MACMA amendments can further enrich Pakistan's own MLA frameworks, providing not merely a qualitative boon to the legislation, but also arming it with the necessary tools to tackle modern-day challenges, such as crypto-currencies and block-chain technologies. Within this vein, integrating fundamental human rights and ensuring safeguards and protection of basic liberties within the legislative and administrative regime governing international cooperation becomes imperative as well. Nevertheless, Pakistan's commitment to improving its ML/TF regimes, including boosting international cooperation – despite being imposed by external factors – presents a unique opportunity for the country to cohesively remedy the wider, long-standing malaise of its criminal justice sector.

10. CONCLUSION

It was found that the impetus to develop and indeed, to fine-tune Pakistan's MLA regimes arose primarily from the pressure of adopting the FATF's recommendations to exit the grey list. Instead of arising organically as a manifestation of improved investigative capacity and reliance on international cooperation, the evolution of Pakistan's MLA framework was brought about in a haphazard manner, ignoring domestic realities, nor understanding the true nature behind adopting such frameworks. As a result, the MLA law, seemingly designed to promote and boost existing cooperation frameworks in Pakistan, were instead detrimental to its own cause, becoming redundant as duly noted by the FATF-APG in its Follow-Up Reports. Similar to much

of the FATF legislation passed without due deliberation, the amendments to the MLA Act, 2020 were also passed to merely acquiesce the global watchdog.