Open-ended Intergovernmental Expert Group to Conduct a Comprehensive Study of the Problem of Cybercrime

2. Legislation and frameworks

(Contribution by Portugal)
legislation and frameworks

• In view of fighting cybercrime,
  • each country needs to adopt **domestic legislation**
  • in line with **international standards**

• **Common standards** to avoid **safe heavens**

• **Budapest Convention** is *the* recognized model
Budapest Convention

Article 3 - Illegal interception
Article 4 - Data interference
Article 5 - System interference
Article 6 - Misuse of devices
Article 7 - Computer-related forgery
Article 8 - Computer-related fraud
Article 9 - Child pornography
Budapest Convention

Besides: guidance notes

- Notion of computer systems
- Botnets
- DDOS attacks
- Critical information infrastructure attacks
- Malware
- Spam
- Identity theft / phishing in relation to fraud
- Terrorism
- Transborder access to data (Article 32)
- Production orders for subscriber information (Article 18)
Some exemples

(Personal experiences)
(from the Portuguese speaking countries
and also from the Ibero-American region – mostly Spanish speaking countries)
Angola

- Pending, in the *Assembleia Nacional*
- Draft new Penal Code
- all the types of crimes of the Budapest Convention
Argentina


• almost of the types of crimes of the Budapest Convention
Brazil

- Pending, in the *Senado*
- all the types of crimes of the Budapest Convention
Cabo Verde

• Lei nº 8/IX/2017
  • Law on Cybercrime
• All the provisions of the Budapest Convention
Chile

• Pending, in the Senado
• Boletín Nº 10145-07 (new Cybercrime Law)
  (http://www.senado.cl/appsenado/templates/tramitacion/index.php)
• To introduce, in the national law, all the types of crimes of the Budapest Convention
Colombia

• Penal Code
• Ley 1273 - 2009
• Types of crimes of the Budapest Convention
Costa Rica

- Penal Code
- all the types of crimes of the Budapest Convention
El Salvador

- Decreto 260, de 2016
- Special Law on Cybercrime
- All the types of crimes of the Budapest Convention
Guatemala

- Pending, in the parliament
- Draft new Cybercrime Law
- Purpose of transposing, into the national law, all the provisions of the Budapest Convention
Mozambique

- Pending
- An amendment to the Penal Code
- Including the substantive provisions of the Budapest Convention
Panama

- Pending, in the parliament draft new Cybercrime Law
- Purpose of transposing, into the national law, all the substantive and procedural provisions of the Budapest Convention
Paraguay

- Paraguayan Penal Code
  - (amended with respect to cybercrime by Ley nº 4439, of 2011)
- Includes all the types of crimes of the Budapest Convention
Peru

- Ley 80086
- Law on Cybercrime
- All the substantive and procedural provisions of the Budapest Convention
São Tomé and Príncipe

- *Lei nº 15/2017 - Law on Cybercrime*
- All the provisions of the Budapest Convention
Uruguay

- Pending of approval
  - draft new Cybercrime Law
- Inspired in the substantive provisions of the Budapest Convention
legislation and frameworks

Need

• **international** binding **instrument**

• an **effective and functioning** international treaty
  • to facilitate cooperation
Budapest Convention

• is **functioning – is effective**
• it is in force – provides concrete **cooperation**
• the membership is increasing
• has also impact on domestic legislation
• is backed up by the T-CY and by capacity building activities
  • Thus, it is not just *one more* international instrument:
    • T-CY **assesses the quality of implementation** and share good practices
    • publishes **guidance notes** to help to interpret the convention and to show how it can be used to address new phenomena
      • **and thus remains up to date**
    • works on the **new Protocol** on enhanced international cooperation to address the problem of evidence in the cloud
Need of a new treaty?

No: Budapest Convention!
30 parties
Intergovernmental Expert Group - 2013

Need of a new treaty?  No: Budapest Convention! 39 parties
Intergovernmental Expert Group - 2017

Need of a new treaty? No: Budapest Convention! 50 parties
Need of a new treaty?

No:
Budapest Convention!
71 parties and candidates
legislation and frameworks

new difficulties to law enforcement

obtaining evidence from the cloud
difficult questions/challenges for criminal justice

- **where** is the evidence?
- cloud computing: **territoriality and jurisdiction**
- **loss of location** and transborder access: *welcome to the jungle!*
- unclear where data is stored and/or which legal regime applies
- unclear which provider for which services controls which data
- provider present or offering a service in the territory of a Party
- subscriber versus traffic versus content data
- **limited effectiveness of MLA**
BUDAPEST CONVENTION
• Guidance Note on Article 18
• Domestic rules on production orders (Article 18)

PRACTICAL MEASURES
• Cooperation with providers

PROTOCOL TO BUDAPEST CONVENTION
[negotiations: September 2017 / December 2019]
A. Provisions for more efficient MLA
B. Provisions for direct cooperation with providers in other jurisdictions
• Direct requests by LEA to a service provider abroad and disclosure by providers in specific situations and with conditions and safeguards
• Direct preservation requests to providers abroad
• Emergency procedures
C. Framework and safeguards for existing practices of transborder access to data