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International cooperation, with particular emphasis on extradition, mutual legal assistance and international cooperation for the purpose of confiscation, and the establishment and strengthening of central authorities

Expert Group Meeting on the Technical and Legal Obstacles to the Use of Videoconferencing

Report of the Secretariat

Summary of main points

I. Introduction

1. The present report summarizes the main points made during the informal expert group meeting on the Technical and Legal Obstacles to the Use of Video Conferencing.
2. It has been prepared pursuant to decision 4/2 entitled “Implementation of the international cooperation provisions of the United Nations Convention against Transnational Organized Crime”¹ of the Conference of the Parties to the United Nations Convention against Transnational Organized Crime (Organized Crime Convention).²
3. In that decision, the secretariat was requested to seek ways to support the use of videoconferencing, and the giving of evidence by video link, as well as to assist

* CTOC/COP/2010/1.

¹ CTOC/COP/2010/1.

² See www.unodc.org/unodc/en/treaties/ctoc-cop-session4-decisions.html.



States in overcoming technical and legal obstacles, and to report to the Conference, at its fifth session, on the provision of such assistance.

4. The Conference also took note of the working group's recommendations to consider the use of videoconferencing and the giving of evidence by video link, and its encouragement of States parties to provide in their domestic legal systems of that type of cooperation, which had various benefits, including its cost-effectiveness and potential for the protection of witnesses.

5. This report should be read in conjunction with the Note by the Secretariat on the technical and legal obstacles to the use of videoconferencing.³

6. In order to gain a better understanding of the legal and technical obstacles in the use of video conferencing, UNODC held an informal expert group meeting in Vienna from 14-15 October 2010. Experts from the following countries participated: Argentina, Chile, Jordan, Lebanon, Germany, Mexico, Panama, Philippines, Romania, Sweden (presented a written presentation) Spain, the United States of America, and the Russian Federation. There was also participation by officials from the Conference of Ministers of Justice of the Ibero-American Countries (COMJIB), the International Criminal Tribunal for Rwanda and the International Criminal Court. Funding to hold this meeting was provided by the United States of America.

II. The use of videoconferencing and video link technology

7. It is important to keep in mind the differences between videoconferencing and video link technology. Videoconferencing refers to real-time transmission of video (visual) and audio (sound) transmissions between two locations. It allows the virtual presence of the person in the territory over which the state or entity has jurisdiction.⁴ In the context of remote witness testimony, it means that a witness in location A can be questioned **in real time** by a prosecutor, a defence attorney and judge who are located in a court conducting a hearing or trial in location.

8. The preferred and most widely used technology for videoconferencing at present is with the Integrated Services Digital Network (ISDN).⁵ Videoconferencing technology using ISDN has advanced to allow for transmission with no interruption or delay. It is deemed to be reliable and relatively easy to use. Moreover, the transmission can be also encrypted so as to prevent the identification of the locations of the videoconference. In remote areas where ISDN is not available, satellite or GSM based systems can also be used but they are more costly and the transmissions are less reliable.

9. On the other hand, video link technology (a video) can be used for multiple purposes but it does not necessarily refer to real time transmission. An example of

³ CTOC/COP/2010/CRP.2.

⁴ Mutual Legal Assistance in Criminal Matters Act, Canada, Article 22.1(1), R.S., 1985, c. 30 (4th Supp.).

⁵ ISDN is a set of communications standards for simultaneous digital transmission of voice, video, data, and other network services over the traditional circuits of the public switched telephone network. Wikipedia.

such use is when a deposition of a witness is recorded on video so that it may be used at a later date at a hearing or trial.⁶

10. Videoconferencing is a potentially very important and useful tool within the framework of judicial cooperation in criminal matters. In this regard, its use should be seen as a means to facilitate cooperation with other jurisdictions for the taking of testimony.

11. In many jurisdictions, videoconferencing and video link are widely accepted and used measures, in national and international contexts. They are deemed to be useful tools in criminal procedure when their use can help to make the prosecution of a case possible, especially in cross border cases or to prevent the loss of evidence. Its use can also spare victims the burden of repeated examinations and it can assist in the protection of witnesses. Video link and videoconferencing can also be used for vulnerable witnesses (e.g. children witnesses) whose welfare would be at risk by being required to testify in the same room as the accused.

12. At the international level, International Tribunal such as the International Criminal Court as well as the International Criminal Tribunal for Rwanda have seen an increase in their use.

13. Videoconferencing and video link can be used in civil, commercial and criminal proceedings.

14. In criminal matters, videoconferencing can be used in order to cooperate for mutual legal assistance in the taking of testimony of remote witnesses including of protected witnesses who have been relocated to another jurisdiction.

15. At the domestic level, videoconferencing and video link can be used by national courts to hold hearings with detainees or persons in custody. As mentioned earlier, it can be used as a tool for the protection of vulnerable witnesses or as a means of preserving evidence. It can also be used in other ways to improve the efficiency of the courts.

16. At the investigation stage, law enforcement agencies can use videoconferencing for the preparation of cross border operations and can use both videoconferencing or video link to conduct interviews during investigations.

17. Both videoconferencing and video link can be used for operational and administrative purposes, such as for training, and to hold inter and intra-agency meetings (between courts/prosecutor offices).

III. Legal basis for international cooperation through videoconferencing

18. Videoconferencing can be requested through bi-lateral treaties or through regional and international agreements and conventions, such as:

(a) The mutual legal assistance provisions of Article 18 (18) of the Organized Crime Convention and Article 46 (18) of the United Nation's Convention against Corruption (Corruption Convention);

⁶ See also the Note by the Secretariat, CTOC/COP/2010/CRP.2.

(b) The witness protection provisions of Art 24 2 (b) of the Organized Crime Convention and the similar provisions in Article 32 2 (b) of the Corruption Convention;

(c) The Treaty on the European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union;⁷

(d) The European Union Convention on Mutual Assistance in Criminal Matters;⁸

(e) The Protocol to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union;⁹

(f) The Agreement on Mutual Legal Assistance between the United States of America and the European Union, Article 6;¹⁰

(g) The draft Ibero-American Convention for the Use of videoconferencing in International Cooperation among Systems of Justice and its Protocol;¹¹

(h) Pursuant to a general catch-all provision of MLATS (“any other type of assistance not inconsistent with law of the Requested State”) (US MLATS).

19. Some countries can cooperate on a non-treaty basis for the use of videoconferencing on the basis of national legislation.

IV. Legal and practical considerations in the use of videoconferencing

20. The main obstacle to cooperation between states in this area is the lack of national legislation authorising or regulating the use of videoconferencing and video link.

21. Good practices for mutual legal assistance in general should be followed. The Requested State applies the rules of its own country taking into consideration the necessary procedural requirements of the Requesting State. For example, if interpretation is required for a witness, it is the Requesting State that determines its needs in this regard. The Requested State’s role is primarily that of a facilitator.

⁷ The Council Act of 29 May 2000, OJ C197 of 12.07.2005.

⁸ European Treaty Series-No 30.

⁹ C 326 of 21.11.2001.

¹⁰ Entered into force, 1 February 2010.

¹¹ This Convention, expected to come into effect in December 2010, regulates the use of videoconferencing for civil, commercial and criminal matters. Regarding criminal matters, it provides, among other matters, that the use of videoconferencing is possible in any stage of the investigation or judicial procedures; the exam of the diligence (the questioning) is to be conducted by the competent authority of the Requesting State according to their law; during the videoconferencing a competent authority of the Requested State must be present; the requested authority is responsible to identify the witness (to give the oath when required); and for the use of videoconference for the statement of the defendant with the exception of those States that makes reservation on this issue when they ratify the Convention. All costs relating the use of the videoconference are to be borne by the Requesting State.

22. The examination of the witness may be directly conducted by the authorities of the Requesting State.

23. The rights of the accused, as well as those of other participants, must be respected under the applicable national law.

24. A witness who is examined via videoconference may be called on to identify documentary or physical evidence during his or her testimony. Documents can be viewed and discussed in a videoconference by use of a document camera. A document camera can display the document on a screen in both locations so that the witness in the Requested State and the parties at the Requesting State location may view the document and the witness simultaneously.

25. When possible, documents should be sent well in advance and marked through the regular mutual legal assistance channels by Requesting State to the Requested State to be shown to the witness that will be testifying in the Requested State. Marking of the documents sent through mutual legal assistance requests will ensure that the authority of the Requested State is more easily able to identify the document(s) needed for the witness(s) under examination. Other forms of physical evidence such as a firearm may be difficult to authenticate by videoconference and therefore its use is not recommended where physical evidence would need to be shown for identification purposes.

(a) Law applicable to the testimony

26. Under the law of some states, it appears that a witness testifying by videoconference would be able to assert whatever privileges apply in both the Requesting and the Requested State, such as a marital privilege, a lawyer-client or doctor-patient privilege.

27. If a witness provides false testimony, this may constitute an offence in both jurisdictions. In theory, either or both of the jurisdictions could prosecute. If the witness is a national of the Requested State and it does not extradite its nationals, then the prosecution would be left to the Requested State under the extradite or prosecute principle.

(b) Information to be provided to the witness

28. It is good practice to inform the witness about the procedures related to the videoconference or video link (depending upon the type of witness), including where possible, showing in advance the room where it will be conducted.

(c) Preparation for the videoconference

29. It is recommended that technicians of both locations test the transmission and equipment a few days prior to the scheduled videoconference.

30. The Requesting State should propose a date and time for the videoconference taking into consideration any time difference between the two locations.

31. A DVD copy of the entire videoconference should be maintained for the records.

32. In preparing its request for mutual legal assistance via videoconference, the Requesting State should clearly specify any technical or other needs and provide the reasons for this request.

(d) Costs

33. It appears that in the legislation of some countries specifically provides that costs associated with taking of testimony by videoconference are to be borne by the Requesting State. Where mutual legal assistance provisions are used, the practice of States is that, unless otherwise agreed, the Requesting State bears all costs associated with the videoconference. In practice, some countries do not seek reimbursement of the associated costs.

34. Costs of the equipment appear to be decreasing and thus are more affordable for an increasing number of States.

35. Costs will depend upon existing infrastructure and needs. For this reason, a technical assessment of needs should be made when determining costs.

36. Over the medium and long term, the use of videoconferencing may lead to the reduction of other costs, such as travel expenses, the costs of protecting witnesses or of transporting persons in custody or detention. Videoconference and video link equipment, once installed, can also be used for other purposes, such as training and communication.

37. States must also consider the overall costs of use and maintenance of the equipment which will include the costs of a technician with sufficient expertise.

(e) Some concerns were expressed relating to the use of videoconference and video link technology to take the testimony of witnesses in criminal trials. These concerns are:

38. A witness may not fear arrest in the Requested State for false testimony.

39. The inability to have a face-to-face interrogation.

40. The possibility of intercepting the transmission of the testimony.

41. With respect to the use of videoconferencing, the possibility of a breach of confidentiality concerning the witness's identity or location.

42. With respect to use of video link, the possibility of tampering with the testimony of the witness.

43. Possible inconsistencies with domestic law.

V. Conclusions

44. For States able to use videoconferencing, experience shows that its use grows as it proves its value in being a reliable, efficient and cost saving tool, not just for the taking of testimony of remote witnesses, but for a wide range of uses.

45. It would be of benefit to States that are not able to use videoconferencing because they need legislation authorizing its use, to collect and make available to them, the legislation from other States.

46. The working group was not able to examine all issues relating to videoconferencing and some issues require further research. It was agreed that it could be useful if UNODC were to further develop the points raised during the expert group meeting in order to draft a practical guide. Such a guide, including legislation from other countries, could be of benefit to those States seeking to draft legislation in this area and/or seeking to use this technology.
