

**6th Session of the Intergovernmental Expert Group (IEG) on Cybercrime
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Agenda Item 2: International Cooperation

U.S. Intervention on International Cooperation

Effective international cooperation requires appropriate legal bases for cooperation at both the international and national levels. National laws serve as a basis for creating procedures that enable international cooperation. National legislative frameworks must also provide for appropriate domestic jurisdiction for authorities to criminalize, investigate, and prosecute cybercrime offenses.

Multilateral treaties for cooperation

Beyond domestic laws, effective international cooperation on cybercrime relies on both formal, treaty-based cooperation, such as mutual legal assistance, or “MLA”, and other means, such as traditional police-to-police cooperation. To that end, countries should join a multilateral instrument because multilateral instruments are effective tools for increasing international cooperation among the parties to the instrument. And, as countries engage in debates on a new instrument on cybercrime, it is important that they take care to ensure that any new instrument does not conflict with existing instruments, which already enable international cooperation for many states at the present time.

It is also because multilateral fora are so important to effective international cooperation on cybercrime that we would recommend that the UN Commission on Crime Prevention and Criminal Justice, or “CCPCJ”, consider extending the workplan of the IEG beyond 2021 in order to retain a forum for experts and practitioners to exchange information on cybercrime.

UNTOC

The Draft Study, based on data collected prior to 2013, asserted that globally, over 60 percent of countries are not parties to any multilateral cybercrime instrument, with the result that they have no international legal obligation to include specialized cybercrime investigative powers in national legislation, or to respond to requests for cooperation from foreign partners.

However, many countries that reported not being party to any multilateral cybercrime instrument are likely parties to the UN Convention against Transnational Organized Crime, or “UNTOC”, which enjoys broad acceptance and nearly universal ratification, even if those countries have not yet implemented the treaty in their national laws and procedures. The UNTOC is a very useful instrument for international cooperation on cybercrime, as the UN General Assembly recently observed in resolution 74/177. In fact, the United States has sent and received numerous requests for assistance that rely on the UNTOC as a legal basis for cooperation in electronic evidence and cybercrime cases. The United States believes it is possible for States Parties to the UNTOC to make these requests for assistance more regularly to obtain electronic evidence.

To further highlight the applicability of the UNTOC to cybercrime investigations, it should be noted that the majority of significant cybercrime originates in some form of organized crime, such as underground “markets,” with criminal participants in more than one country. Cybercrime cases involving an organized criminal group often substantially outnumber the instances in which isolated hackers are the main criminal actors.

Based on requests that the United States has received to date, an increasing number of countries recognize the applicability of the UNTOC to cybercrime or criminal matters involving electronic evidence. To this end, it seems clear that States interested in combating cybercrime should consider ways to join or apply existing instruments like the UNTOC, and ensure that national authorities are aware of their ability to engage in international cooperation and to investigate and prosecute cybercrime using the UNTOC.

Budapest Convention

Similarly, the Budapest Convention is another existing multilateral instrument that facilitates international cooperation on cybercrime matters. The Budapest Convention is currently in place and functioning among 33 percent of UN Member States across six continents, with another third of UN Member States using it as a model for their national approaches. In our view, Budapest will remain the most relevant and forward-leaning multilateral agreement on cybercrime for the foreseeable future, and it remains available to countries seeking an immediate path to legislative reforms on cybercrime, stronger law enforcement capacity, and increased international cooperation, all without prejudice to future discussions on a UN instrument. In addition, parties to the Budapest Convention are currently drafting and negotiating a Second Additional Protocol to address the challenges of

obtaining electronic evidence across borders, including more efficient means for international cooperation.

Delays in MLA

It is commonplace to hear that the MLA system itself results in delays to criminal investigations. To be sure, formalities in the MLA process, which are intended to assure legality and respect national sovereignty, mean that the process will generally not be as quick as operational police-to-police cooperation. However, countries can take numerous steps to reduce the length of time required for execution of MLA requests.

As an initial matter, preparing a request that meets the requirements of the requested country is essential to ensuring speedy MLA execution. A key source of significant delay in the MLA process comes from time the requested party spends obtaining additional information from the requesting country. Capacity-building and training on country-specific requirements for MLA requests can reduce response times, resulting in execution of a request without extended additional communications to obtain additional information. In addition, as the Draft Study notes, delays in the execution of MLA requests may be related to a country's reliance on more formal channels of communications, such as diplomatic letters which must be transmitted through a country's foreign affairs ministry, as opposed to e-mail communications between "central authorities" designated by a relevant bilateral or multilateral instrument. Indeed, trained and experienced domestic central authorities, which serve as the national bodies responsible for receiving, executing and sending requests, are essential and increase efficiencies for mutual legal assistance.

DOJ Office of International Affairs

In the United States, attorneys and support staff of the Department of Justice's Office of International Affairs ("OIA"), the U.S. central authority, process thousands of requests for international assistance and are able to file legal process directly in U.S. court to obtain electronic data. To strengthen cooperation with international partners, OIA attorneys meet regularly with foreign counterparts in case consultations intended to facilitate outstanding requests and improve response times. OIA attorneys also regularly participate in trainings around the world on U.S. legal standards for electronic evidence and the key related components for foreign MLA requests seeking such evidence from the United States.

Role of UNODC

Likewise, the UN Office on Drugs and Crime (“UNODC”), with support from the United States and other partner countries, has engaged in key capacity-building activities designed to improve cooperation through MLA. In particular, the UNODC developed the “Mutual Legal Assistance Request Writer Tool” to improve the ability of criminal justice practitioners in Member States to draft expeditious MLA requests. According to UNODC, the MLA tool incorporates specific templates for different types of international cooperation in criminal matters, such that practitioners can input specific information into the tool, which in turn assists in creating an MLA request. The MLA tool also includes a “digital evidence module,” which covers expedited preservation of stored computer data and real-time collection of traffic data, and also includes features on asset recovery.

Similarly, as part of UNODC’s role to provide technical assistance to Member States, UNODC developed the “Practical Guide for Requesting Electronic Evidence Across Borders,” available on request to police agencies and other government practitioners in Member States. The Guide, which is continuously updated, is another resource for countries to use to improve law enforcement capabilities in understanding electronic evidence and procedures to obtain such evidence from foreign partners.

Police-to-police cooperation

Direct police-to-police cooperation and the use of 24/7 networks also play a critical role in assisting countries with investigations involving cybercrime and electronic evidence. As the Draft Study noted, two-thirds of countries reported that international operational cooperation facilitates investigations involving cybercrime and digital evidence. Such police-to-police cooperation often means that a country can obtain evidence on a faster time frame than MLA; however, because the evidence may not be admissible at trial, authorities may require a follow-up MLA request.

24/7 Networks

24/7 networks, with responsible contact points in each participating country, similarly play a vital role in facilitating cooperation, particularly with regard to emergency situations. 24/7 networks also facilitate preservation requests for data that will often become the subject of an MLA request, and such preservation

requests are routinely handled in days, if not hours. The risk of delays in cybercrime investigations—where evidence may be deleted quickly— makes membership in a 24/7 network essential.