

13 September 2010

Original: English

Fifth session

Vienna, 18-22 October 2010

Item 6 of the provisional agenda*

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**The technical and legal obstacles to the use of videoconferencing****Note by the Secretariat****I. Introduction**

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

2. In that decision, the Conference noted that the working group on international cooperation found that the comprehensive provisions contained in Article 18 of the Organized Crime Convention on mutual legal assistance constituted an integral set of rules applicable in areas in which no other treaty applied; ways and means of requesting assistance, such as by email and oral communication; and the use of working languages.

* CTOC/COP/2010/1.

¹ See <http://www.unodc.org/unodc/en/treaties/ctoc-cop-session4-decisions.html>.

² United Nations, *Treaty Series*, vol. 2225, No. 39574.



3. The Conference also took note of the working group's recommendation 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 for that type of cooperation, which had various benefits, including its cost-effectiveness and potential for the protection of witnesses.
4. Furthermore, the Conference decided that an in-depth discussion on the application of articles 12, 13, 16, and 18 should be held at the fifth session, on the basis of clear, practical examples of the application of those articles with a view to further facilitating the effective application of those articles.
5. In addition, the present note describes the efforts undertaken by the secretariat to support Member States efforts in overcoming the technical and legal impediments to the use of videoconferencing under the Convention and the Protocols thereto.

II. Videoconferencing and the use of video link technology

6. Videoconferencing refers to the use of interactive telecommunications technologies for witness testimony via simultaneous two-way video and audio transmissions. This technology allows for a witness to testify from a room adjoining the courtroom via closed-circuit television or from a distant or undisclosed location through an audio-visual link. In the courtroom setting, a judge, the defendant, the defence counsel and the prosecutor can ask questions of the witness and see and hear the witness' answers and demeanour in real time transmission.³ Videoconferencing equipment can permit the concurrent transmission of computer images, such as documents and PowerPoint presentations so that video can be displayed on one screen and the computer data on another. In other words, a remote witness can be seen on a big screen while the documents being discussed by the witnesses can be visible (to a judge or jury) on screen monitors.
7. Video link technology can be used for multiple purposes, including remote appearances before the court of witnesses, victims, persons in detention, as well as of judges and counsel at pre-trial matters, trials, administrative hearings and appeals; between national courts, and by courts of different jurisdictions. It is also used in the context of witness protection, for example, where the physical security or the emotional well-being in bringing a witness to a particular court or jurisdiction cannot be adequately addressed or in order to avoid direct contact between the victims of witnesses and the accused.⁴
8. At the international level, the use of videoconferencing has been increasing through the work of international criminal tribunals, such as the International Criminal Court, the International Criminal Tribunal for Rwanda, the International Criminal Tribunal for the former Yugoslavia, the Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia.

³ Fredric Lederer, *The legality and practicality of remote witness testimony*, p. 20.

⁴ UNODC, *Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime*, 2008 p. 37.

III. Videoconferencing, as covered by the Organized Crime Convention and other international legal instruments

9. Criminal groups use to their advantage all forms of technology, communications and travel in engaging in criminal conduct. The Organized Crime Convention aims to assist Member States by providing legal and operational standards that can be successfully used in addressing the many facets and forms of transnational organized crime.

10. At the operational level, the Convention provides various tools to better overcome legal obstacles in order to facilitate international cooperation in criminal matters. The Convention's provisions relating to mutual legal assistance are of particular importance because they can be used in investigations, prosecutions and judicial proceedings involving the offences covered by the Convention, offences under the Protocols thereto and serious crimes, where there are reasonable grounds for suspecting that the offence is transnational in nature and involves an organized criminal group. Furthermore, these provisions can be used in situations where no other treaty applies.

11. Many States do not sufficiently use to their benefit the tools found in the Convention, and particularly those pertaining to mutual legal assistance. The use of videoconferencing is one such tool which is provided for in Article 18, para. 18:

Where ever possible and consistent with fundamental principles of domestic law, when an individual is in the territory of a State Party and has to be heard as a witness or expert by the judicial authorities of another State Party, the first State Party may, at the request of the other, permit the hearing to take place by videoconference if it is not possible or desirable for the individual in question to appear in person in the territory of the requesting State Party. States Parties may agree that the hearing shall be conducted by a judicial authority of the requesting State Party and attended by a judicial authority of the requested State Party.

12. The use of video links technology is also provided for in connection to the protection of witnesses under Article 24, para. 2 (b):

Providing evidentiary rules to permit witness testimony to be given in a manner that ensures the safety of the witness, such as permitting testimony to be given through the use of communications technology such as video links or other adequate means.

13. Provisions on the use of videoconferencing for mutual legal assistance are also contained in other international legal instruments, including Article 10 of the European Union Convention on Mutual Assistance in Criminal Matters, and in bilateral and multilateral treaties. An Ibero-American agreement on the use of videoconferencing is expected to be signed by the member countries at the Seventeenth Conference of Ministers of Justice of the Ibero-American Countries to be held on 21 to 22 October 2010 in Mexico.

IV. Technical, legal and other obstacles to the use of videoconferencing

14. The use of videoconferencing appears to pose a number of challenges for States. Firstly, there is the need to become familiar with the technology and its use in a court setting. In this regard, it is important to note that technology is rapidly advancing and high-definition images are sufficiently clear to allow a judge to easily observe all aspects of the demeanour of a witness.

15. The second challenge for States relates to the cost of the equipment. The technology is becoming more affordable and experience seems to show that overall it proves to be cost-effective if used properly. Mobile equipment is also readily available and has the advantage that its use does not need to be limited to one location but can be used by multiple courts or government offices. Where equipment is not available, the costs of renting video link equipment need to be weighed against the costs of travel, accommodation and possibly the provision of security for witnesses and others involved in the court proceedings. Nevertheless, the costs associated with the purchase of equipment will continue to remain an issue for some developing countries.

16. Legal issues continue to pose the greater challenge to the use of videoconferencing between States. Some of the legal issues are rooted in the fundamental principles of most legal systems, particularly regarding the right of defendants to confront and cross-examine witnesses. This is a developing area of legal jurisprudence. Where videoconferencing is permitted, as a general rule, exceptional circumstances must be shown in order to justify its use instead of having a witness testify in person before the court. These issues remain an obstacle to the greater use of videoconference technology that has not yet been overcome in many national jurisdictions.

17. A further set of practical and legal issues may arise specifically in those cases where the videoconferencing is used as a means of mutual legal assistance between two different jurisdictions. These may relate to matters such as whether judges must be present on both sides of the videoconference, whose law should apply to the taking of the testimony, the actual conduct of the examination, etc. It is worth noting that even where States do not allow the use of videoconferencing at the domestic level, some may allow for evidence to be taken through videoconference technology in cases of mutual legal assistance, providing that the testimony or evidence will be admissible in the requesting State.

V. Support by the secretariat

18. The issue of videoconferencing has been raised in workshops relating to the work of the secretariat in the areas of mutual legal assistance, as well as in the context of witness protection. It has been noted that this is an area where Member States need support in order to address both the legal and technical obstacles they face in using video link technologies.

19. In 2010, extrabudgetary resources were made available to the secretariat to hold an expert group meeting on exploring the technical and legal issues in the use

of videoconferencing. It was planned that this meeting would be held in Vienna from 21 to 22 July and that the secretariat would then submit to the fifth session of the Conference a conference room paper, containing the outcome of the meeting, including deliberations, as well as recommendations, if any. The secretariat sent letters of invitation to a number of States asking for their participation, but due to the low rate of confirmation of participation received, the decision was made to postpone the meeting to 14 and 15 October 2010.

20. It is expected that issues to be discussed at the expert group meeting will include: international legal instruments, apart from the United Nations Convention against Transnational Organized Crime and the United Nations Convention against Corruption, that deal with international cooperation and provide for the use of videoconferencing; their use and the rate of success; legal obstacles encountered; existing regional agreements and their provisions, the use and admissibility of and criteria for videoconferencing; ways countries cooperate through the use of videoconferencing without specific national legislation; and technical obstacles and innovative practices used.

21. Other issues that are expected to be raised during the meeting may include, inter alia, whether a judge needs to be present at both locations; who should give the oath and how does the requesting party ensure that the possibility of being prosecuted for perjury is not an empty threat; how questioning and cross-examination are to be conducted, particularly where interpretation is needed; whether the privileges to be applied are those of the State where the proceeding is being held or the State where the witness is located; issues related to the observation of the witness' demeanour; and issues relating to the responsibility for covering the costs.

22. The expert group meeting will produce a set of recommendations that will be circulated at the fifth session of the Conference of the Parties to the Organized Crime Convention. A guide on the use of videoconferencing will also be prepared by the secretariat.
