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International Legal Cooperation in Cybercrime Matters: A Challenge to Latin American Countries

Marcos Salt[1]

1. International Cooperation in Cybercrime Matters: An inescapable challenge.

It is an absolutely evident truth at this point that the development of information technology and telecommunications and their possible use for the commission of crimes have given rise to a significant change in the way to confront both "cybercrime" and "traditional crime" where computers or networks are used, or when digital evidence that is stored in information systems or communication devices is needed for prosecution.[2]

With the use of communication networks crimes may be committed at a distance, subject to no limitation by physical boundaries. This makes it more difficult to enforce both traditional criminal law in the different countries and existing international criminal law. This involves a challenge both to the traditional penal system and to systems of international cooperation in criminal matters. This challenge becomes even greater when considering the importance acquired by private companies, which are essential for the success of investigative efforts and in relation to which new special rules are required so that the relationship between such companies and governmental law enforcement agencies may be adequately regulated.[3] This issue is even more complex in Latin American countries where governmental agencies have a stronger dependence on, and at the same time a weaker bargaining capacity in their relationship with private companies, many of which are foreign multinational companies having only commercial offices or establishments in some of these countries.

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[1] Professor of Criminal Law and Criminal Procedure Law, University of Buenos Aires, Argentina.

[2] These changes, in my opinion, may involve a "change of paradigm" from the point of view of the scientific study of criminal and criminal procedure law, and also of the rules of international cooperation governed by the principles of public international law. In this respect, it should be noted that the concept and scope of procedural rules and the rules of international cooperation designed to confront these events have extended the traditional notion of "computer crime". This may be clearly seen in The Council of Europe Convention on Cybercrime (ETS No. 185), which provides that its procedural rules will be applicable not only to the computer crimes specifically contemplated in the Convention – articles 2 through 11 – but also to other criminal offences committed with the use of a computer system and the collection of evidence of a criminal offence in electronic form (cf. article 14 of the Convention). Similarly, see the rules of international cooperation (article 23 of the Convention).

[3] See Cormac Callanan and Marco Derke "Cooperation between law enforcement and Internet service providers against cybercrime", Council of Europe, 2008 (www.coe.int/cybercrime).

In a brief preliminary summary, my first tentative conclusion is that **these new challenges demand that the traditional system of international cooperation in criminal matters needs to be rethought**. We all know the difficulties and resistance that this kind of changes elicits in traditional law enforcement structures in the different countries, which are often not too amenable to change, in particular if quick adaptation is required.

The influence of so-called "globalization" on criminal law has been the subject of analysis for a long time now, especially on account of the challenges posed by offences typically included in what is designated as "transnational organized crime". However, computer crime is the most typical criminal offence in this new environment and poses new challenges. Globalization is virtually inherent in its nature. It can be said that networked computers have turned this criminal behavior into the most global of crimes or, if I am allowed to use the colloquial term, cybercrime has become the paradigmatic instance of "global crime", taking the place previously held by other crimes such as money laundering, terrorism or drug traffic.

For such reasons, an efficient law enforcement system can only be conceived through an approach where international cooperation is assigned a central role. No country, no matter how powerful it is, can conceivably act alone in the face of these crimes. On the contrary, the only way forward is to strengthen cooperation mechanisms extensively and generously, showing respect for the peculiarities and different needs of the various legal systems and the needs of each country or region. At the same time, it is indispensable **to ensure that these new tools for international cooperation will not become a threat against the effective exercise of human rights, in particular the right to privacy, or a way for some countries to meddle into the affairs of others**.

However, up to this date, no legal and political means have been found to make possible a fully effective cooperation between countries in actual practice, or to adequately regulate the complex relationship between the public and private sectors in this connection.

In this respect, I have no doubt that the Convention on Cybercrime (nevertheless the debate and objections that some of its rules may bring out) is the major tool now at our disposal for the development of legal regulations, and a debate on such Convention, both at a regional level and in the different Latin American countries, is the road we need to travel if we wish to succeed in the face of this challenge.

The purpose of this brief presentation is to offer you a summary description of the current situation in Latin American countries in relation to these issues, and examine whether the rules of International Cooperation proposed by the Convention on Cybercrime may be enforced in these countries. Also, I will draw some conclusions and express some recommendations on future lines of work that will be oriented to achieve a stronger Latin American role in international cooperation in connection with these matters.

A description of three actual cases may help us think on this problem and its practical implications:

a. A judge investigated a report of e-mail threats and coercion against a public official in a Latin American country. In such connection, the judge asked that the e-mail service provider (the e-mail account was provided by a U.S company) disclosed the details of the IP address from which the threats had been sent and put this e-mail account under surveillance. The commercial office of the company informed the judge that **it had not such information available in the country and could not satisfy his request because the server was located in the United States, and suggested that the court should address a petition to that country by the usual diplomatic means**.

b. A judge investigated a kidnapping in a Latin American country. Ransom was requested and contact with the victim's family was made through an e-mail account of the same company as in case "a" above. The police asked the company's help, and in this case its central office agreed to cooperate by creating a "mirror account" and giving notice at the time the kidnapper made connection. Thanks to the assistance provided by the company, which was totally informal and not in line with any of the devices established under agreements of cooperation in criminal matters in force, the police was able to arrest the kidnapper.

As it may be easily noted, in case b. the decision that made an efficient investigation possible did not rely on a measure adopted by a public agency but on an action taken by a private company.

c. In an action pending in Argentina where a defendant was accused of distribution of pornographic images involving minors under 18, part of the evidence was obtained from the accused person's e-mail, which had been intercepted by German police authorities. A higher court ruled that the accused person's indictment should be overturned and the proceedings stayed until evidence was produced that the German police had acted under a court order when intercepting the accused individual's e-mail.[4]

These cases show the practical issues faced daily by law enforcement agencies, which arise from the absence of clear rules establishing devices for international cooperation, and also from deficiencies in domestic law. In one case, lack of cooperation by a private company and a slow international cooperation system prevented the adequate prosecution of a crime. In another, cooperation was efficient but had to be obtained through "informal" channels police cooperation which would be of uncertain value in a criminal process. In the last case referred to above, an entire investigation failed to achieve a satisfactory result due to the absence of adequate mechanism for judicial cooperation between two countries whose legal systems are, however, very similar as regards both Criminal substantive Law and the rules governing criminal process.

[4] Case 21,871. Judgment rendered by the Argentine Criminal Court of Appeals on November 23, 2004. The Court of Appeals assimilated e-mail to letters sent by post and declared it inviolable in the absence of a court order.

2. Proposal of the Council of Europe Convention on Cybercrime (ETS 185)[5] and its Possible Implementation in Latin American Countries

- General Principles

One of the principal aims of the Convention (ETS 185) is to establish a special system of international cooperation.[6]

Most of the general principles of international cooperation and the provisions on extradition and mutual legal assistance contained in the Convention (articles 23, 24, 25, 26), in spite of some specific discrepancies, have been similarly regulated and accepted both by domestic law in Latin American countries and by international conventions or regional agreements of cooperation in criminal matters subscribed by the countries in the region and currently in force. Such is the case, for example, of the Inter-American Convention on Mutual Assistance in Criminal Matters of 1992 and the optional protocol related to the Inter-American Convention on Mutual Assistance in Criminal Matters,[7] the Inter-American Convention on Extradition,[8] the Protocol of Mutual Legal Assistance in Criminal Matters of Mercosur or, in relation to special crimes, the United Nations Convention Against Transnational Organized Crime or the Inter American Convention Against Corruption.[9]

Also, the Convention contains clear statements regarding the validity recognized to other bilateral or multilateral cooperation agreements, including the domestic law of each country, as a framework for cooperation.[10] Furthermore, the Convention contemplates general cooperation principles to be followed in the alternative by countries parties to the Convention in the event no international conventions or treaties exist on the matter. **Such principles are compatible with the principles accepted under similar conventions in force in Latin America**.[11]

In this respect, it may be concluded that there is a vast international system of cooperation and mutual assistance in criminal matters in force in Latin America, the essential principles of which are derived from sources similar to the Convention. On the other hand, this system of cooperation is subject to constant review by competent authorities[12] for the purpose of gaining greater efficiency in the

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[5] Designated hereafter as "the Convention".

[6] See Chapter III and the text of the Explanatory Report. For reasons of space I will not go into too extensive an analysis of the articles of the Convention (a subject otherwise well known by this audience). Instead, I will refer only to some specific questions that have an effect on the analysis of conditions in Latin American countries.

[7] In force since 04/07/02. In fact, some of these regional American conventions generally have characteristics which are similar to those of the European Convention on Mutual Assistance in Criminal Matters of 1959 and the European Union Mutual Assistance in Criminal Matters (2000). The latter convention, however, contemplates more modern criteria for cooperation and exchange of information, such as the possibility of direct contact between judicial authorities from different countries.

[8] Entry into force: 03/28/92.

[9] See, as an example, Article V on jurisdiction; Article XIII on extradition; Article XIV on assistance and cooperation; Article XVIII on Central Authorities.

[10] Cf. Article 23 and Explanatory Report.

[11] Cf. Article 27 and Explanatory Report.

[12] See, as an example, the work of REMJA (Meeting of Ministers of Justice or of Ministers or Attorney Generals of the Americas). One example of good practice is The Hemispheric Information Exchange

achievement of its goals. **Consequently, it may be said that in relation to the articles establishing the general principles of international cooperation, extradition and mutual assistance, no serious difficulties should arise in Latin America for the acceptance of the proposals contained in the Convention.**

Some Latin American countries might raise an objection in connection with the absence of the so-called "democratic clause".

- **Specific Provisions**

Contrarily, I believe difficulties may indeed arise with respect to the specific provisions included in section 2. In particular, objections of a constitutional nature regarding the limits to be imposed on the penal enforcement system in relation to the right to privacy, possible conflicts with personal data protection laws currently in force and with respect to the local authorities' ability to enforce such regulations in compliance with constitutional and legal requirements in the different countries (differentiated roles to be assigned to police, prosecutors and court authorities).[13]

In effect, the Convention, Chapter III, section 2,[14] introduced innovative rules on cooperation which are especially devoted to the peculiar nature of computer related offences and evidence obtained in electronic form. Such rules are not contemplated, at least not expressly or not with such clarity, in any of the conventions on cooperation in criminal matters currently in force in Latin American countries, nor in their respective domestic laws on cooperation in criminal matters (Expedited preservation of stored computer data – Article 29; Expedited disclosure of preserved traffic data – Article 30; Mutual assistance regarding accessing of stored computer data – Article 31; Mutual assistance in the real-time collection of traffic data – Article 33; mutual assistance regarding the interception of content data – Article 34. All these cooperation measures actually reflect, in the area of international cooperation, the special procedural provisions also established by the Convention in Chapter II.[15] For this reason, I believe that both subjects should be considered in conjunction when actual Latin America's possibilities to access the Convention are examined. In other words, the possible acceptance of these rules of international cooperation in criminal matters may depend on their prior acceptance as constitutionally valid rules by domestic procedural law and by regulations under telecommunication laws in the different countries. In this respect, the debate on the acceptance of these specific rules of cooperation is an extension of the debate to be undertaken in Latin American countries regarding procedural measures of a similar nature contemplated in Section 2 (Procedural Law).

Network for Mutual Assistance in Criminal Matters and Extradition (the "Network"). It has been in development since year 2000, when the Third Meeting (REMJA-III) decided to increase and improve the exchange of information among OAS Member States in the area of mutual assistance in criminal matters. By the end of 2006, 23 countries were part of the Network, which comprised three components: a public page, a private page and a secure electronic communication system.

[13] On the other hand, the debate of and certain opposition to specific rules is not typical of Latin American countries only, but have also occurred in academic and legislative bodies of many Convention signatory countries which have not ratified such Convention yet, as is the case of Germany and Canada.

[14] See Section 2 Specific Provisions, and Explanatory Report.

[15] Articles 16, 17, 18, 19, 20 and 21. See Explanatory Report.

For this reason, it should be particularly noted that in the academic and political debate in Latin America the acceptance of the procedural articles contained in the Convention is a more controversial issue than the provisions of substantive criminal law.[16]

Latin American procedural codes are relatively modern as a result of a significant reform movement that took place in this region upon the arrival of democracy and which allowed old codes, of an inquisitorial nature, to be set aside and replaced by new codes that responded to a more accusatorial approach, respectful of the rules of criminal law in countries operating under the rule of Law.[17]

These Codes, however, do not contain specific rules contemplating cybercrime issues and the peculiar nature of digital evidence. Rather, the rules on obtaining physical evidence, search and seizure and the interception of traditional communication means are applied in practice by analogy,[18] which causes difficulties in court practice. The same deficiency is observed in laws governing telecommunications.[19]

For the reasons stated above, I believe that future works and projects on cybercrime in Latin America could be devoted to creating the necessary changes in domestic procedural rules in the countries of this region and in regulations on communications as a first step towards introducing a debate on their extended application to international cooperation.

In relation to Article 35 (24/7 contact points network), I do not believe that any regulatory difficulties or constitutional objections to its creation and operation will arise.

None of the Latin American countries is party to the Convention yet, and accordingly no work experience has been made in that area. However, Brazil, Chile, Dominican Republic, Mexico and Peru are members of the G 8 Network.

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[16] In fact, there is stronger consensus on this issue in comparative law, and many countries have already enacted amendments to their penal codes which contemplate computer crime. These amendments cover many of the requirements set out in the Convention, while progress is slower in procedural law.

[17] The reform of procedural systems was a far-reaching continental movement of strong political influence. It began with the creation of a model Code (the model criminal Procedural Code for Latin America). Such reform made it possible to reform, in different stages, virtually all the procedural Codes in the region along greatly similar guidelines, which gave rise to a strong similarity that is quite useful at the time of considering future homogeneous reforms. See the Criminal Procedural Codes of Guatemala, Costa Rica, El Salvador, and the more modern ones of Nicaragua, Honduras, Dominican Republic and Chile.

[18] Cf., for instance, the Codes of Argentina, Chile, Brazil, Paraguay and Costa Rica. (See Cybercrime – Country profiles, prepared during the OAS-COE Workshop on Cybercrime Legislation, Bogota, September 2008). An example of more advanced legislation is that of the Dominican Republic, Law No. 53-07, of April 23, 2007, for the prevention of High-Tech Crime.

[19] It should be noted here, as an example of the difficulties involved in this subject, that the Argentine Supreme Court recently declared that Argentine Law 25,873 was unconstitutional. This law made it mandatory for companies to cooperate with courts and preserve certain traffic data. See case Halabi, decision entered on February 24, 2009.

Interpol's work experience[20] is also a significant precedent in the region, not only because of the contact network and the information exchange experience but also on account of the creation of the Regional Working Parties, one of them being the Latin America Working Party on Information Technology Crime.[21]

I believe that for an adequate implementation of these new agencies in Latin America it will be essential that special attention be paid to the need of assuring ongoing education and training, taking into account the lack of resources that is usual in the countries of this region. Planning for mechanisms of international cooperation would be useful in this respect.

Also, considering the duties assigned to contact points under Article 35 and the characteristics of Latin American procedural Codes, I think it is important that from an institutional point of view such contact points report to the Attorney General's Office or that they include prosecutors as members and have a direct connection with court authorities.

- **Mechanisms for the Approval of Convention Rules of International Cooperation in Latin American countries.**

The system for the approval of treaties of cooperation in criminal matters differs from one Latin American country to another, although it has similar basic features. In Argentina, for instance, the National Constitution gives the Legislative Power authority to approve or reject treaties made with other countries and with international organizations.[22] The Legislative also has powers to approve integration treaties that delegate jurisdiction.[23]

It should be noted that under the Argentine Constitution international treaties have a higher rank than domestic laws, which facilitates their direct enforcement after an international convention is ratified.[24] The same happens in other Latin American countries, particularly in countries where the Constitution has been recently modified. Thus, the rules of cooperation contemplated in Chapter III could be directly applied in these countries, and they

[20] See the contact points network (Internet National Central References Point – NCRP).
[21] Created in 2005 (LAWPITC). Permanent members of LAWPITC currently include representatives of the specialized High-tech Crime Investigation Units from Argentina, Brazil, Chile, Colombia, Costa Rica, Cuba, Mexico, Panama, Peru, Spain, Uruguay and Venezuela.
[22] In Chile, for instance, as prescribed by the Constitution (section 32, paragraph 17, and section 50), the President negotiates, subscribes and ratifies international treaties. Congress may only accept or reject a treaty before it has been ratified. The procedure for approval is assimilated to the procedure for the enactment of laws.
[23] See Argentine Constitution, section 75 paragraphs 22 and 24. The Argentine Constitution establishes a different procedure for approval depending on whether treaties are made with Latin American or other countries. In the event of a treaty with a Latin American country, a majority of all members of each House of Congress is required. In the event of treaties with non Latin American countries, the Argentine Congress will declare the advisability of approval of the treaty by a majority of all members of each House present at the meeting, and the treaty may only be approved with the favorable vote of a majority of all members of each House one hundred and twenty days after such declaration.
[24] Similarly, the Costa Rican Constitution (Section 7) provides that "International treaties approved by the Legislative Assembly have a higher rank than domestic laws". In relation to Paraguay, see sections 137, 141 and 145 of the Paraguayan Constitution. In Uruguay, **the relationship between domestic laws and treaties has not been expressly established.**

could event involve the repeal of prior laws that are in conflict with them. However, even in these countries the Constitution has a higher rank than international agreements, and consequently any provisions in conflict with constitutional rules would not be enforceable. Also, it should be noted that any rules requiring the enactment of a specific law under the Constitution, as is the case of the categorization of an offence in Criminal Substantive law, would not be enforceable either. In such cases, at the time of subscribing the international agreement, the government assumes an international commitment to enact a law, but the provisions of such agreement are not enforceable until Congress enacts a specific law in compliance with the international commitment assumed by the government.

The same will happen with rules that contemplate the creation of agencies, such as Article 35, which will be understood as programmatic provisions that are binding on governments but the implementation of which may be differed.[25]

In countries where no higher rank has been specifically assigned to treaties over domestic laws, greater difficulties may arise for their practical implementation after their approval, as this will require the enactment of domestic regulations regarding all the issues involved so as to adapt them to the laws then in force.

Notwithstanding the above, a possibility not to be dismissed is that difficulties of interpretation may arise and court rulings declaring some provisions unconstitutional may be rendered, including after the Convention has been approved by the Legislative of the different countries through the procedures established by each national Constitution.

For this reason, I believe that it may be useful to work towards the modification of internal law in compliance with the provisions of the Convention (procedural codes, telecommunication laws and domestic legislation on international cooperation), in order to reduce difficulties of interpretation and the risk of court rulings declaring Convention rules unconstitutional. Also, it is clear that the authorities in charge of law enforcement are more used to work with domestic legislation than with international treaties.[26]

Another possible option that should not be dismissed as a strategy to speed up the process of alignment of Latin American countries with the Convention is to work on existing agreements of cooperation in criminal matters at a regional level, for instance through additional protocols including the special rules of cooperation contemplated in the Convention.

3. Some Conclusions and Recommendations.

[25] Regarding the difficulties involved in implementing International Cooperation, including in countries that have ratified the Convention, see Pedro Verdéelo, "The effectiveness of international cooperation against cybercrime: Examples of good practice", Project on Cybercrime Council of Europe (www.coe.int/cybercrime).

[26] Similarly, the Italian Ratification Law of the Convention, No. 2012 of 2008. A similar experience was that of Romania and France, where amendments were introduced to cooperation and criminal procedural laws.

1. Cybercrime creates new challenges to the penal system in the different countries, and these challenges are then translated into a need to find new, previously unheard of, forms of international cooperation in criminal matters. The European Convention is the main international instrument setting out regulations on this matter, and Latin American countries must also take part in their consideration.

2. The effectiveness of these international cooperation devices depends on the prior existence of adequate domestic law regulations. In my opinion, Latin American countries in general are still going through a process of change that must be completed before they are able to face the challenges of international cooperation. This process of change should be accelerated through a stronger joint work in regional bodies.

3. The general principles of cooperation in criminal matters now contained in regional and international agreements currently in force in most Latin American countries are generally compatible with the general principles proposed by the Convention. The discussion on specific provisions will undoubtedly be more difficult, as they are not expressly contemplated either in regional agreements or in the domestic law of most countries. The enforcement of international cooperation mechanisms may be approved by Latin American countries pursuant to the procedures for the approval of international treaties established under the Constitution of each of those countries referred to above. In some countries, the rules of international cooperation included in the Convention shall become operative upon its ratification. In others, its inclusion in the domestic legal framework will also be necessary.

4. The process of discussion and acceptance of these rules of cooperation will not be an easy task. Instead, a long process is to be expected if this task is undertaken on a country by country basis. Work at a regional level could reap greater benefits. For instance, through OAS mechanisms or at meetings of different sub-regional blocks.

5. Also, in my opinion, it is necessary to define mechanisms that will make it possible to prevent these powerful cooperation tools placed at the service of a more globalized and international penal system from becoming a threat to the exercise of fundamental individual rights or facilitating ways for undue intervention by some countries in the affairs of others. No doubt, this goal requires the creation of counterbalancing devices so as to permit an egalitarian use of these tools and a more generous attitude of the international community towards bridging the digital gap among different countries.

   This objective, which is of primordial importance so that the adoption of the Convention by Latin American countries will be made easier, requires in particular an improvement in the mechanisms of cooperation by the private sector and highly developed countries. A fact that should not be disregarded is that in many countries of this region private companies have more tools at their disposal than the government does, and this condition of subordination is inadmissible. In an egalitarian system of international cooperation, the solution

to a lack of resources or technological tools may not come from reliance on other countries, and much less on private companies.