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A survey of mutual legal assistance involving digital evidence[☆]

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ABSTRACT

International cooperation is becoming more important in digital investigations, yet methods of exchanging and requesting digital evidence across borders continues to use traditional protocols. This work provides a comprehensive study about Mutual Legal Assistance in relation to digital evidence. First, we survey available information related to making a Mutual Legal Assistance Request, followed by analyses of practitioner questionnaire results related to making and receiving Mutual Legal Assistance Requests involving digital evidence. The given survey is a first effort to provide data behind the challenges identified by practitioners when attempting to request Mutual Legal Assistance related to digital evidence. From this data, some justification for commonly cited challenges are found, as well as the circumstances in which these challenges arise.

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Introduction

International cooperation in digital investigations is growing more important as relevant data is increasingly stored in multiple jurisdictions (Broadhurst, 2006; Martini and Choo, 2013). Many prior works have discussed the growing challenges of requesting potential evidence from foreign countries (Broadhurst, 2006; Cerezo et al., 2007; Martini and Choo, 2013; Westmoreland and Kent, 2015). Likewise, the authors have been involved in informal discussions with cybercrime investigators, prosecutors and foreign affairs officers from many countries that express growing concern and frustration at the current

international cooperation request process. Specifically concerning formal international requests (Mutual Legal Assistance), the Commission on Crime Prevention and Criminal Justice (Roma-Lyon Group, 2013) identified challenges with formal international requests as:

- Few states reported monitoring outgoing request to ensure proportionality
- Some states prioritize incoming requests and others don't – this causes problems when one state believes the crime 'high priority' and another state believes it is 'low priority'
- Differing income levels between countries can result in a low priority for a case even if the amount is substantial in the requesting country
- Multiple follow-up inquiries also take resources away from work on more urgent cases
- Several members commented that the effort for the request may be much more than the potential punishment (in the case of extradition)
- There are several states where requests for assistance in minor cases burden the Central Authority and

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prosecutors to the extent that they cannot focus on more serious cases

In the author's experience, when speaking directly with cybercrime investigators, many mention a lack of international cooperation, especially timely cooperation, with some claiming that international cooperation 'never works'. From our observations, while many investigators have some complaints, the success of international cooperation appears to differ with each requesting country, and to whom the request is being made. While other works have looked at the problem of international cybercrime, and many discuss the challenges of international cooperation (Malby et al., 2013; Westmoreland and Kent, 2015), to our knowledge, none have attempted to quantify formal international cooperation related to digital investigations, and attempt to identify the causes of often-mentioned challenges.

This, however, does not mean that no work is being done to solve the problem. Kent (2014) identifies a number of challenges to requesting digital evidence, especially from foreign private companies. She also provides practical and comprehensive short, medium and long term plans to improve the situation. James et al. (2014) look at the capacity of national and foreign organizations to deal with incoming requests for digital evidence, and propose a national development strategy that also considers expanding capacity and capabilities in strategically important countries. In an attempt to address the challenge of communication during international requests, INTERPOL is currently working on communication channels to allow the timely sending, tracking and verification of requests (2nd Working Group Meeting, 2013). Likewise, the United Nations Office on Drugs and Crime (UNODC) continues development on a 'Mutual Legal Assistance Request Writer Tool' (Mutual Legal Assistance Request Writer Tool, 2016) that helps to ensure that formal international requests are complete and accurate. Of course, legislation is also needed, and a number of governments and private organizations are working towards legislation to improve international cooperation (de la Chapelle, 2016; AccessNow, 2016).

Contribution

This work contributes to the field of digital investigation by giving a quantitative and qualitative views of challenges related to international cooperation during investigations. Specifically, this work provides raw data that allows us to assess what – and when – international cooperation related to the exchange of digital evidence is working.

International cooperation

International cooperation can take many forms, however, when requesting evidence from other countries that will be used in a court of law, requests normally need to be in the form of formal Mutual Legal Assistance (MLA) requests form one Central Authority (CA) to another. This study will focus on formal MLA requests as defined by the United Kingdom [?], where "Mutual legal assistance ... is a method of cooperation between states for obtaining

assistance in the investigation or prosecution of criminal offences. MLA is generally used for obtaining material that cannot be obtained on a police cooperation basis, particularly enquiries that require coercive means."

It should be noted that many organizations recommend making informal contact with the requested country before submitting a formal MLA request (normally police to police). Informal contact before making a formal MLA request has many benefits. First, the requested country can assist in determining whether a request can be carried out locally, the best way to make a request, specific information required in the formal requests, and languages and formats that must be used. This information is not always easily accessible online, and information that is online may be out of date or not specific enough. A second benefit when dealing with digital evidence is that data preservation requests do not normally require a formal MLA request. Data preservation can be initiated through informal channels while preparing the formal request. Less formal contact can normally be initiated in regards to intelligences requests, and can be facilitated by organizations such as INTERPOL, G8 High-tech Crime network, Asia CTINS network, and many others. If possible, these routes should be explored before sending a formal MLA request.

Survey of mutual legal assistance contacts: is contact information available?

Documents specifying the requirements for mutual legal assistance requests are easily found¹ on public channels – in English – for over 100 countries (Fig. 1). Of the discovered documents, most countries had varying amounts of information available. At least contact information for a central authority was included, even with no further instructions. For G8/G20 countries, information also included general instructions for making an MLA request. The majority of documents did not contain dates or version numbers. Because of this, it is difficult assess whether the information collected is correct and up-to-date.

The Council of Europe (CoE) maintains a website where associated countries should post their mutual legal assistance process information.² This information specifically concerns the transfer of sentenced persons, but in many cases provides general insight into the MLA process of the country.

The Organization of American States (OAS) also maintains contact information and basic MLA requirements for its members.³ The information contained normally describes both the legal system and the mutual legal assistance process for each member country. While not exactly comprehensive in most cases, it does provide a good starting point for making contact with the country.

¹ Easily found in this case means less than an hour searching with a public search engine using English keywords.

² Council of Europe. National procedures on judicial cooperation in the criminal field – Transfer of sentenced persons. http://www.coe.int/t/dghl/standardsetting/pc-oc/Country_information3_en.asp.

³ Organization of American States. Mutual Assistance in Criminal Matters and Extradition. <http://www.oas.org/JURIDICO/mla/en/atg/index.html>.

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