KYOTO CONGRESS 2020

Fourteenth United Nations Congress on Crime Prevention and Criminal Justice
Kyoto, Japan
7-12 March 2021

Session #262 – Cooperation on cybercrime: Risks and safeguards

Organised by the Council of Europe in cooperation with the Government of Romania

Tuesday, 9 March 2021 (14h00-15h30 Kyoto / 6h00-7h30 Strasbourg)

Speakers:

- Cristina Schulman, Romania
- Camila Bosch Cartagena, Chile
- Jayantha Fernando, Sri Lanka
- Patricia Adusei-Poku, Ghana
- Alexander Seger, Council of Europe

Aim of the meeting:

Promote an effective criminal justice response to cybercrime and challenges of electronic evidence with human rights and rule of law safeguards

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

www.coe.int/cybercrime

1

The challenge

Alexander Seger
Head of Cybercrime Division
Council of Europe

Cybercrime and e-evidence: Failure to protect?

- ► 1% of cybercrime reported to criminal justice?
- ► 1% of cases reported resulting in convictions?
- ► What % of all other crime where evidence is on a computer system?

- Problem of rule of law in cyberspace?
- Do governments meet their obligation to protect individuals against crime?
- Can victims expect justice?
- Primary response by national security bodies; residual response by criminal justice system?

2

The challenge

Less than 1% of cybercrime reported to / recorded by LEA?

WHY?

- Criminal justice too complicated, too many safeguards, not efficient, "useless"?
- Attacks against industry and institutions considered matter of national security?
- Self-defence?
- Reputation?
- Insurance pays?
- Unclear legislation and responsilities of LEA (cyberviolence)?
- …..

From 1% of cybercrime reported to LEA, only 1% adjudicated?

WHY?

- The scale and quantity of cybercrime, devices, users and victims
- Technical challenges (VPN, anonymisers, encryption, VOIP, NATs etc.)
- Cloud computing, territoriality and jurisdiction
- The challenge of mutual legal assistance
- Strict rule of law and data protection safeguards for criminal justice v. "margin of appreciation" for national security response?

- **Primary government response through cybersecurity, national defence and national security institutions?**
- **Residual response through criminal justice?**

3

KYOTO CONGRESS 2021
Fourteenth United Nations Congress on Crime Prevention and Criminal Justice
Kyoto, Japan
7-12 March 2021
Session #262 – Cooperation on cybercrime: Risks and safeguards

The challenge

Rule of law requirements for investigative measures interfering with rights of individuals:

- must be prescribed by law and the law must meet the requirements of precision, clarity, accessibility and foreseeability;
- must pursue a legitimate aim;
- must be necessary, that is, it must respond to a pressing social need in a democratic society and thus be proportionate;
- must allow for effective remedies;
- must be subject to guarantees against abuse.

The key challenge:

How can we provide for an effective criminal justice response to cybercrime and electronic evidence and for cooperation at all levels with human rights and rule of law safeguards?

4

KYOTO CONGRESS 2021 | Fourteenth United Nations Congress on Crime Prevention and Criminal Justice
Kyoto, Japan 7-12 March 2021 | Session #262 – Cooperation on cybercrime: Risks and safeguards

Ingredients of a response

Cristina Schulman
Chair of the
Cybercrime Convention Committee
Ministry of Justice of Romania

A criminal justice framework based on the Budapest Convention on Cybercrime:

Criminalising conduct	+	Procedural tools	+	International cooperation
▪ Illegal access ▪ Illegal interception ▪ Data interference ▪ System interference ▪ Misuse of devices ▪ Fraud and forgery ▪ Child pornography ▪ IPR-offences		▪ Expedited preservation ▪ Production orders ▪ Search and seizure ▪ Interception of computer data Limited by safeguards		▪ Extradition ▪ MLA ▪ Spontaneous information ▪ Expedited preservation ▪ MLA for accessing computer data ▪ MLA for interception ▪ 24/7 points of contact

Harmonisation

Procedural powers and international cooperation for any criminal offence involving evidence on a computer system!

Currently

- **77 Parties, Signatories and States invited to accede**
- **140+ countries have used it as a guideline for domestic legislation**

5

KYOTO CONGRESS 2021 | Fourteenth United Nations Congress on Crime Prevention and Criminal Justice
Kyoto, Japan 7-12 March 2021 | Session #262 – Cooperation on cybercrime: Risks and safeguards

Ingredients of a response

In preparation:
2nd Additional Protocol to the Convention on Cybercrime on enhanced cooperation and disclosure of electronic evidence

- Legal basis for disclosure of WHOIS information
- Basis for direct cooperation with service providers in other Parties for subscriber information ("direct disclosure")
- Effective means to obtain subscriber information and traffic data ("giving effect")
- Cooperation in emergencies ("expedited disclosure" + "emergency MLA")
- Mutual assistance tools ("video-conferencing", "JITs")
- Data protection safeguards to permit the flow of personal data under the Protocol.

- A more effective criminal justice response to cybercrime and challenges of e-evidence with rule of law safeguards
- Respect for free Internet with limited restrictions in case of criminal misuse ≠ State control of information in cyberspace

6

Ingredients of a response

Risk: Overbroad criminalisation

- restricting freedom of expression
- facilitating State control of information in cyberspace

Risk: Procedural powers without appropriate safeguards

Safeguards in Budapest Convention + 2nd Additional Protocol

- Criminalisation: specific offences
- Embedded within criminal law framework
- Legal basis for specific criminal investigations where specified data is needed (≠ mass surveillance or bulk collection of data)
- Judicial or other independent supervision
- Grounds for refusal, use limitation, reservations
- Etc.

+ data protection safeguards

7

KYOTO CONGRESS 2021
Fourteenth United Nations Congress on Crime Prevention and Criminal Justice
Kyoto, Japan
7-12 March 2021
Session #262 – Cooperation on cybercrime: Risks and safeguards

Experiences: Chile

Camila Bosch Cartagena
Chile

- What is needed in terms of public/private and international cooperation – experience of Chile/Latin America

E-evidence is no longer stored in devices – a lot of the information is stored in THE CLOUD

Apps, social networks, email accounts… means by which crimes are commited or good sources for evidence

Service Providers have stored in there servers electronic data that can be valuable evidence

For countries in Latin America, the mayority of SP are located abroad

While we don't have a legal framework that helps…

8

Experiences: Chile

- What is needed in terms of public/private and international cooperation – experience of Chile/Latin America

Direct cooperation with service providers:

Law enforcement guides – Chile, Argentina, Peru …

Each SP cooperates on there own terms … important to check their online guides

Preservation + suscriber information (art. 18 p 3 of the Budapest Convention)

If the SP doesn't cooperate: 24/7 Network of the Budapest Convention for preservation of electronic evidence

9

KYOTO CONGRESS 2021
Fourteenth United Nations Congress on Crime Prevention and Criminal Justice
Kyoto, Japan
7-12 March 2021
Session #262 – Cooperation on cybercrime: Risks and safeguards

Experiences: Chile

- What is needed in terms of public/private and international cooperation – experience of Chile/Latin America

Thank you!

camilaboschcar@gmail.com

10

Experiences: Sri Lanka

Jayantha Fernando
Director/ Legal Advisor at the ICT Agency of Sri Lanka (ICTA) and Director, Sri Lanka CERT

Road to Budapest Convention

- Sri Lanka Invited to accede to Budapest Cybercrime Convention - 23rd February 2015 (process started in 2008)
- Acceded to the Cybercrime Convention (29th May 2015)
  - Applicable on Sri Lanka – w.e.f - 1st September 2015
- **1st Country in South Asia** & 2nd in Asia after Japan
  - Fastest accession in Council of Europe
- Journey towards accession was a strategy under "***e-Sri Lanka Development Program***" – The 1st Digital Strategy :-
  - Regulatory and Law reform based on "International Standards"
  - Capacity building measures – Law Enforcement & Judicial Training

KYOTO CONGRESS 2020
Fourteenth United Nations Congress on Crime Prevention and Criminal Justice
Kyoto, Japan
7-12 March 2021
Session #262 – Cooperation on cybercrime: Risks and safeguards

Experiences: Sri Lanka

Sri Lankan Legal Framework & How it helped address challenges

- Primary Legislation – Computer Crimes Act No. 24 of 2007
  - Substantive Cybercrime offences
  - Procedural measures to obtain BSI and Traffic Data with Safeguards
  - Mutual Legal Assistance Act – incorporated by Reference
- **Other Legislative and Inter-connected measures**
  - PAYMENT DEVICES FRAUDS ACT, No. 30 OF 2006
  - Intellectual Property Act, No. 36 Of 2003
  - Recommendations of Financial Action Task Force (FATF)
  - Penal Code Amendments (1995) and (2006) –Online Child Pornography
  - **ICCPR Act (2007) – Offences against Hate Speech etc**
  - Mutual Legal Assistance in Criminal Matters Act No. 25 /2002 (Amended Act 24 of 2018)
- **Addressing Challenges through Budapest Convention**
  - Enforcement capacity? International cooperation - Delays?
  - Gathering and presenting Electronic evidence
  - Challenges addressed through Capacity Building programs and Institutional Reform
  - Easter Sunday Incident and aftermath

Experiences: Sri Lanka

Developing Capacity and Institutional frameworks

- **Effective Capacity Building Measures**
  - Judicial, Prosecution, & Police Capacity buildng through GLACY + Program
  - ToT for Judicial authorities & adoption of e-Evidence Guide (321 Judges trained) – ***International Coop, e-Evidence & Data Privacy***
  - Over 650 Police officer trained through CID Cybercrime Unit (GLACY +)
  - Digital Forensic Labs & Adoption of SOPs for e-evidence
  - Judicial Delegation led by Chief Justice– Training for Nepal Judges (2017)
  - South-South Cooperation - support for Cybercrime Legislation in Fiji
- Sri Lanka CERT – www.cert.gov.lk
  - National CERT established (full member of FIRST and APCERT)
  - Sector specific CSIRTS (eg:- **FinCERT)**
  - Facilitates effective Public private cooperation & Expert assistance for digital forensics
  - Effectiveness enhanced by GLACY+ & Cyber4Dev projects

13

KYOTO CONGRESS 2021 Fourteenth United Nations Congress on Crime Prevention and Criminal Justice
Kyoto, Japan 7-12 March 2021 Session #262 – Cooperation on cybercrime: Risks and safeguards

Experiences: Sri Lanka

2021: Benefits of Cybercrime Convention Committee (T-CY)

Guidance Notes - Common understanding of the Parties on how to apply the Convention and address new phenomena

Guidance Notes on :
- **"botnets", distributed denial of service attacks"**
- **"identity theft and phishing in relation to fraud"**
- **"new forms of malware"**
- **"transborder access to data (Article 32)" / "spam"**
- **Article 18 "Production Order" etc & Cloud Evidence Group - Report**

Additional Protocol to the Convention
- **Bigger Role for Parties in PDG / PDP**
- **Benefits of Participation**
- **Sri Lanka's fast track Drafting of Data Protection Legislation**

The Budapest Convention remains relevant as crimes evolve and benefits Parties from participating in T-CY

14

THE GHANA DATA PROTECTION COMMISSION

Patricia Adusei-Poku
Executive Director of the
Ghana Data Protection Commission

As the standard-bearer of Ghana's Data Protection Act 2012, (Act 843) the Data Protection Commission (DPC) is responsible for regulating how organizations gather and process users data and articulate the business case for proactive data stewardship. The Commission's policy and institutional foundations have enabled it to enhance its service as a regulator and as an anchor for Ghana's growing privacy community.

The Commission's 3T's objectives has been Transparency, Trust and Transformation

15

KYOTO CONGRESS 2020
Fourteenth United Nations Congress on Crime Prevention and Criminal Justice
Kyoto, Japan
7-12 March 2021
Session #262 – Cooperation on cybercrime: Risks and safeguards

Experiences: protection in Africa

"The African Experience" (Background)

In 2014, a Pan African legislative Treaty – the African Union (AU) Convention on Cybersecurity and Personal Data Protection (Malabo Convention) as the first legislative text that unifies the interest of the Continent

16

KYOTO CONGRESS 2021 | Fourteenth United Nations Congress on Crime Prevention and Criminal Justice
Kyoto, Japan 7-12 March 2021 | Session #262 – Cooperation on cybercrime: Risks and safeguards

Experiences: Data protection in Africa

Regional Safeguarding Requirements

PROMOTE ACCOUNTABILITY MECHANISMS

There should be the increase of independent National DP Authorities with the Legal and Institutional framework for DP Accountability

E.g. Nigeria DP bill is currently under review, Uganda DP Act came into force on May 2019 and Kenya DP in Nov 2019

PROMOTE REGIONAL PRIVACY FRAMEWORK

Including guidance and model laws to support data protection standards in the African Region, Regional knowledge as well as facilitate data transfer for businesses in the Region

TRUSTED CROSS – BOARDER DATA FLOW

Promote the regions data Protection & regulations to meet internationally recognized data protection principles

ENHANCED COLLABORATION

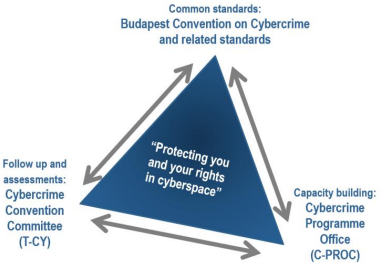
Collaboration with International Stakeholders such as the UN, Tech companies, civil societies

17

KYOTO CONGRESS 2021 | Fourteenth United Nations Congress on Crime Prevention and Criminal Justice
Kyoto, Japan 7-12 March 2021 | Session #262 – Cooperation on cybercrime: Risks and safeguards

Take-aways

- Continue reforms of domestic legislation in terms of specific criminalisation and procedural powers subject to conditions and safeguards ▶ Budapest Convention on Cybercrime as a model/guideline
- Enhanced cooperation and disclosure of electronic evidence to ensure a more effective criminal justice response to cybercrime to ensure the rule of law in cyberspace ▶ Budapest Convention + future 2nd Protocol Budapest Convention as a framework
- Access to evidence in a cross-border/cloud context raises complex questions related to territoriality, jurisdiction and the protection of fundamental rights ▶ Specific safeguards of Budapest Convention + 2nd Protocol (also Council of Europe data protection Convention 108+)
- Capacity building remains a most effective means to enable a more effective criminal justice response to the challenges of cybercrime and e-evidence ▶ Experience of C-PROC



Additional international treaties on cybercrime need to:

- Be based on broad consensus to avoid further polarization/divisions
- Meet the needs of criminal justice practitioners
- Meet human rights and rule of law requirements
- Be compatible with existing instruments

www.coe.int/cybercrime

18

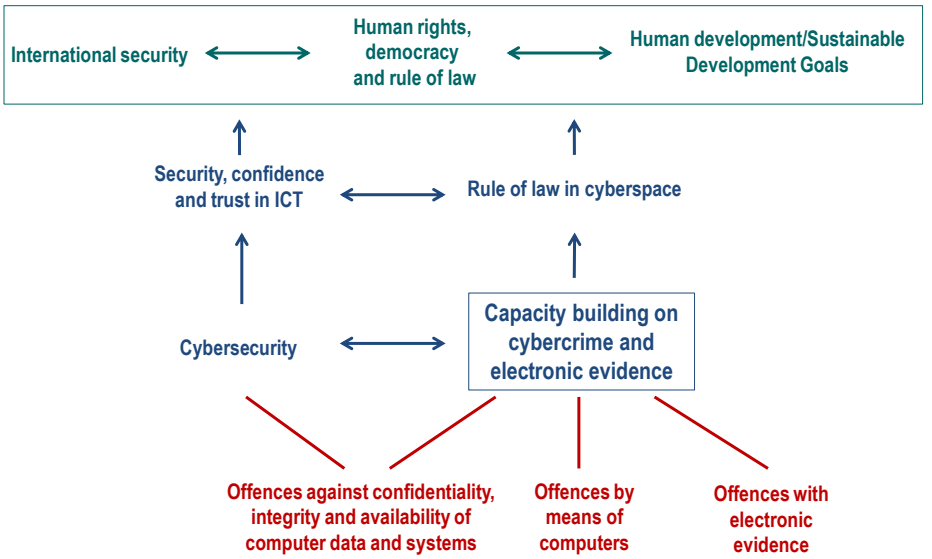
Take-aways

Thank you!

- Cristina Schulman, Romania
- Camila Bosch Cartagena, Chile
- Jayantha Fernando, Sri Lanka
- Patricia Adusei-Poku, Ghana
- Alexander Seger, Council of Europe

Capacity building

About capacity building on cybercrime: the rationale



Capacity building

About capacity building on cybercrime: the rationale

A → *Process of change* → B

Examples from COE perspective:

- No legislation → Legislation in line with Budapest Convention
- Limited international cooperation → Budapest Convention as framework for international cooperation

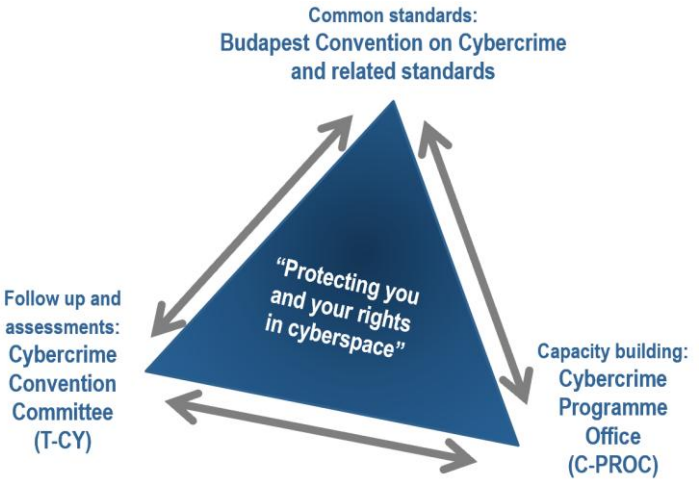
Capacity building activities

Capacity building works best where governments have determined clear objectives to be achieved through a process of change

KYOTO CONGRESS 2020
Fourteenth United Nations Congress on Crime Prevention and Criminal Justice
Kyoto, Japan
7-12 March 2021
Session #262 – Cooperation on cybercrime: Risks and safeguards

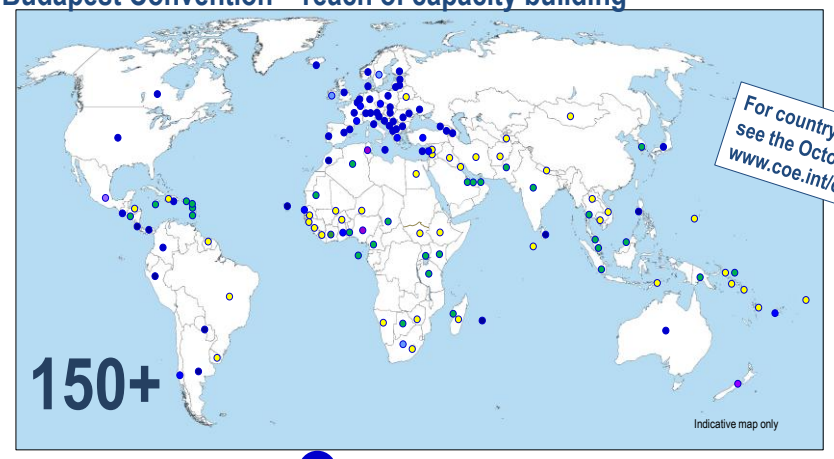
Capacity building

About capacity building on cybercrime: the COE approach



Capacity building

Reach of the Budapest Convention – reach of capacity building



For country-specific information see the Octopus Community at www.coe.int/cybercrime

Parties:	65
Signed:	3
Invited to accede:	9
=	77

Other States with laws largely in line with Budapest Convention = 20+

Further States drawing on Budapest Convention for legislation = 50+

23

KYOTO CONGRESS 2020
Fourteenth United Nations Congress on Crime Prevention and Criminal Justice
Kyoto, Japan
7-12 March 2021
Session #262 – Cooperation on cybercrime: Risks and safeguards

Capacity building

Cybercrime Programme Office of the Council of Europe (C-PROC) in Romania

Octopus Project	Jan 2021 – Dec 2024	EUR 5 million	Voluntary contributions
GLACY+ project on Global Action on Cybercrime Extended	Mar 2016 – Feb 2024	EUR 19 million	EU/CoE JP
iPROCEEDS II project targeting proceeds from crime on the Internet in South-eastern Europe and Turkey	Jan 2020 – Jun 2023	EUR 5 million	EU/CoE JP
EndOCSEA@EUROPE project against Online Child Sexual Exploitation and Abuse	July 2018 – June 2021	EUR 0.95 million	End Violence against Children Fund
CyberSouth on capacity-building in the Southern Neighbourhood	July 2017 – Dec 2021	EUR 5 million	EU/CoE JP
CyberEast Project on Action on Cybercrime for Cyber Resilience in the Eastern Partnership region	June 2019 – June 2022	EUR 4.22 million	EU/CoE JP

24

Impact of capacity building

- Works, responds to needs and makes an impact
  - Legislation with safeguards
  - Investigations and criminal proceedings
  - Public/private, interagency and international cooperation
  - Sustainable training
- Facilitates multi-stakeholder cooperation, partnerships and synergies
- Has human development benefits and feeds into Sustainable Development Goals
- Helps reduce the digital divide
- Is based on broad international agreement and may help overcome political divisions