

MLATS and International Cooperation for Law Enforcement Purposes

Setting the Scene – Why is this Relevant

MLATS and other forms of cross border cooperation are important tools for law enforcement, governments, and in many ways private sector because they act as formal mechanisms for access to data and information that is located in a different jurisdiction.

This is particularly important today as people and data under investigation or relevant to a country's investigations can reside beyond the borders of the country. For example information that is stored on the cloud, untethered communications, and data stored by multinational service providers (social media) can all host and transmit data in multiple jurisdictions.

Mechanisms of international cooperation are relevant and important to the discussions today and in looking at surveillance from a human rights perspective because they have the ability to bypass domestic protections like the judiciary, traditional forms of authorization and safeguards to access, and external review processes. Furthermore, MLATs can allow access to data that would otherwise not be accessible in a domestic investigation.

Furthermore, they allow for access to and sharing of data with any country that is a party to the agreement.

This can result in foreign governments accessing any type and amount of information without the knowledge of the individual and places individual privacy at risk.

Thus it is important that MLATS and other forms of international cooperation for purposes of fighting crime incorporate a minimum set of safeguards.

Case studies:

1. The question of judicial oversight is currently being questioned in the US by researchers for the Belfast project. In November 2012 researchers for the Belfast Project filed a petition for a writ of certiorari in the Supreme Court of the United States. In the petition the researchers presented the question "what legal standard governs judicial review of subpoenas issues by foreign governments pursuant to Mutual Legal Assistant Treaties. They argued that that the decision by the First Circuit "bestows upon the PSNI greater powers in relation to the serving of subpoenas in the United States than could be exercised by, for instance, the FBI."¹
2. An interesting article came out in the news about google's transparency report said that a Google representative had argued that one of the reasons for the large number of US information requests was that: "government requests for user data from the US include

1. <http://www.bcheights.com/belfast-project-researchers-appeal-to-supreme-court-1.2956636#.UMeffncUiYk>

those issued by US authorities on behalf of other governments due to mutual legal assistance treaties (MLAT) and other diplomatic mechanisms."² In the absence of a Mutual Legal Assistance Treaty (MLAT) with the United States, all that Pakistan can do is use diplomatic channels to request the US government to make the social website accept Pakistan's demand, according to an information technology ministry official.³

3. As an example of the impact that MLATs are having on private sector business, in November 2012, as a result of amendments to the Mutual Legal Assistance (Tax Matters) Act, 2003 – companies and limited partnerships registered in the British Virgin Islands are now required to maintain "records and underlying documentation" and to keep such records and underlying documentation for a minimum of five years. The records and underlying documentation can be kept at any location(s) but if they are not kept at the office of the company's registered agent the company must provide a written record to its registered agent of the physical address of the place or places at which the records and underlying documentation are kept.

Responses to these amendments that have come out in the news include that the amendments are vague and 'records and underlying documentation' could include virtually anything.⁴

4. On the 4th of December 2012, in response to take down requests from the Pakistani Government, Google Inc asked the government of Pakistan to sign the Mutual Legal Assistance Treaty (MLAT) agreement before they consider any requests for removal of video clips.

This was interesting as it shows the use of MLAT by a private company to refuse requests for removal. By doing so, Google seems to be making the statement that they will only comply with formal requests.

5. In December 2012 India considered using MLATs to to secure the presence of the websites based abroad and had referred to the MLAT between the US, but instead issued service of summonses forms to bring Facebook, Orkut, YouTube, Yahoo, Blogspot, Google and Microsoft to court for allegedly committing offences, including those of selling obscene materials to youths and hatching criminal conspiracy.⁵

This case brings to light the types of crimes and information that MLATs are being used for.

2. <http://arstechnica.com/tech-policy/2012/11/us-gets-more-google-user-data-than-all-other-countries-combined/>

3. <http://tribune.com.pk/story/472022/anti-islam-video-govt-unlikely-to-lift-youtube-ban/>

4. <http://www.lexology.com/library/detail.aspx?g=297c3dd5-23ea-4797-961c-88a9c00aada2>

5. http://zeenews.india.com/news/delhi/centre-not-co-operating-in-complaint-against-websites-court_814836.html

6. In another case, The Spanish Civil Guard's Heritage Protection Group obtained a court order, and under the Mutual Legal Assistance Treaty (MLAT) between Spain and US and requested assistance in recovering a stolen tapestry from the 16th century.⁶
7. As of 2012 India is likely to sign Mutual Legal Assistance Treaty in criminal matters with Israel and Nepal among other countries to facilitate easy access in investigation of crime and service of Letters Rogatory. "India is planning to sign a mutual legal assistance treaty (MLAT) on criminal cases with Israel, Oman, Azerbaijan and Nepal, Currently, India has entered into 32 MLAT treaties with other countries.

The fact that data relevant to an investigation is now often held in different or multiple jurisdictions and the fast nature of crime today raises a number of questions including:

1. What powers do governments have to require a company in its jurisdiction to access and produce data of another jurisdiction based on principles of physical presence of the organization (not the data or where the party is headquartered)
2. To what extent should countries be able apply domestic legal safeguards like data protection to data.
3. Does fast access mean a bypassing of safeguards
4. To what extent should foreign governments be able to ask access to data directly through service providers?

What are some of the mechanisms used for international cooperation?

Thus far governments have used a number of mechanisms for facilitating cooperation between law enforcement across borders including:

1. MLATS
2. Voluntary disclosure based on pressure and incentives
3. Agency to agency initiatives like "24/7 network" for law enforcement cooperation founded by the US Federal Bureau of Investigation
4. EU initiative to set up a cybercrime network to increase coordination between LEA's and others in certain key areas including organized online fraud etc.
5. Extradition treaties: handles transfer of persons
6. Letters of rogatory
7. Interpol
8. Services of Summonses

Of these, MLAT is commonly referred to as the most frequently used mechanism for international cooperation for crime fighting purposes.

6. <http://abclocal.go.com/ktrk/story?section=news/local&id=8913033>

What are the basic elements of MLATS?

In brief MLATs

1. Allow authorities in each country to request and receive information located in the other's jurisdiction.
2. Can be bilateral and multilateral
3. Define the jurisdictional scope of the treaty including which territories, which types of criminal activity, and which types of judicial proceedings. MLATS specify which types of requested assistance must be provided and which can be refused.
4. Define the processes for requesting assistance including the proper way in which to file a request for assistance, authorities from and to which the request may be sent, and what information must be included in the request.
5. Define the scope of assistance that can be requested for example:
 - a. Documents
 - b. Testimony
 - c. Interception of electronic communications (this may include communications content and communications data and may include specific cooperation with private CSPs/ direct interception by authorities of one country conducting investigations on behalf of another country. This is found in the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union 2000 (Source ICC doc)
 - d. Cooperative investigations
 - e. Transfer of persons to give evidence in judicial proceedings etc.
6. Provide provisions for confidentiality and data protection. MLATS include provisions on confidentiality of the information transferred, and some MLATS protect individual rights regarding processing of transferred personal data. For example, the European Convention on Mutual Assistance in Criminal Matters Art. 26 addresses data protection standards that must be applied when transferring information through an MLAT. (Source ICC doc)
7. Some MLATs also address the allocation of costs of assistance between the requesting and requested countries

Despite these factors, there are a number of vague elements about MLATS that often make them inefficient mechanisms for law enforcement to use and pose as risks to individual privacy

What are the challenges to MLATS?

1. **Unclear time tables:** Despite treaties providing for time frames to be identified there are no clear time tables and no expedited processes. Thus, MLATS are often thought to be ineffective because they cannot provide information quickly enough.
2. **Not comprehensive geographic scope:** Not all countries have MLATS meaning that other treaties or informal methods must be used when cooperation is needed.
3. **Unclear role of service providers and private companies:** Many MLATS do not clearly provide what is the role of communication service providers. Thus, it is unclear if

governments can ask information directly through service providers and if service providers can deny information.

4. **Lack of domestic safeguards and efficient legal process:** The lack of efficient systems for carrying out requests and the lack of safeguards and procedure for regular investigations can hinder the effectiveness of MLATs.
5. **Incorporation of evolving technology:** Many MLATS have not been updated to adequately address changing technology and communications mentioned above including:
 - a. Evolution of networks and services like untethered communications (location independent and machine independent). This makes it difficult for LEA to locate and identify individuals, devices and data across globally distributed communications and networks
 - b. Electronic Devices that are used while roaming
 - c. Global internet content providers whose facilities are primarily located in one or a few countries
 - d. Data stored on the cloud via a multinational enterprise
 - e. Global online service providers (social media)

Some of started to address these scenarios. For example, the multilateral EU Convention on Mutual Legal Assistance in Criminal Matters specifies: when LEA from one member state can require access to facilities to located in another member state to access information about a resident from its own member state, a LEA is able to intercept communications from another member state in its own state. but for many, if it is unclear how the information can be accessed through the MLAT, informal routes are more likely to be used. (Source ICC doc).

What safeguards is the principle asking for?

When international cooperation between law enforcement takes place it is important that individual rights are not negated. In an effort towards ensuring that privacy and basic human rights are protected during international cooperation the principle asks for the following:

1. **Highest available standard should apply:** Mutual legal assistance treaties (MLATs) should ensure that, where the laws of more than one state could apply to communications and communications metadata, the higher/highest of the available standards should be applied to the data.

Currently, this is not the case. MLATS provide guidance as the when the requesting or the requested countries law should apply (in most cases it is in accordance with the laws of the requested state unless the treaty providers otherwise), but this distinction is not based on which jurisdiction has the highest standard.

2. **Transparency:** Mutual legal assistance processes and how they are used should also be clearly documented and open to the public.

Currently, the most amount of transparency around MLATs provided by governments seems to be the published policy. Governments have not been transparent about how

the process of MLATs works, and have not provided aggregate information as to the cost, type, or number of MLAT requests filed and complied with per year.

3. **Distinguish between intelligence and evidence:** The processes should distinguish between when law enforcement can collaborate for purposes of intelligence as opposed to sharing actual evidence.

Currently, some MLATS allow for sharing of both intelligence and actual evidence. Requesting countries need to specify the information sought and explain how the requested information will be relevant to an investigation. For example, in the Indian context requests must include a description of the subject matter and nature of the investigation, prosecution, or proceeding including the specific criminal offense, a description of the evidence, information, or other assistance sought, a statement of the purpose for which the evidence, information, etc. is sought.

4. **No blanket surveillance:** Governments cannot use international cooperation as a means to surveil people who it would otherwise be unlawful for them to surveil under their own laws, including their own citizens.

Currently, as seen above MLATS do require that requesting governments show that data is needed for an investigation and require that requests specify the data sought, but they do not specifically prohibit the surveillance of its own citizens via international cooperation. Furthermore, MLATS specify that requested countries must comply with request even if the request is not in compliance with its domestic laws, but some MLATs do not specify that requesting Governments cannot make requests for information that would normally be illegal under their laws.

5. **Verification process:** States must verify that the data collected or supplied, and the mode of analysis, in relation to its own citizens under the MLAT is in fact limited to what is permitted.

Currently, many MLATS do not have built in third party and neutral review processes. It is only the receiving authority reviewing and carrying out the information.

6. **When there is not a MLAT:** In the absence of an MLAT, service providers should not respond to requests of the government of a particular country requesting information of users if the requests do not include the same safeguards as providers would require from domestic authorities, and the safeguards do not match these principles.

This speaks to informal and other methods of accessing information and requires that governments set up basic practices and safeguards for any international request, be it through a treaty or not.

Other possible safeguards and best practices:

1. Proportionality of obligations on providers with limited relevance for LI purposes (those having limited business in a given country) (paid with public funds)
2. Transparent cooperation outside of formal MLAT processes
3. Transparency of role of service provider and MLATS should not seek to place new burdens on CSPs ‘
4. Accountability
5. Reporting mechanisms
6. Notification of access to the individual

Materials used for preparing presentation on MLATS:

1. This document was prepared by the International Chamber of Commerce and looks at using MLATs to improve cross border lawful intercept procedures: <http://bit.ly/ULzF44>
2. This document was prepared by the International Chamber of Commerce and looks at cross border law enforcement access to company data: <http://bit.ly/R11uy7>
3. This document was prepared by the G20 Anti-Corruption Working Group and is a guide to the different MLAT procedures of G20 countries: <http://bit.ly/TbeQkA>
4. This document was prepared by the Organization of American States and looks specifically at MLATs and extradition: <http://bit.ly/YsbRln>
5. Examples of MLATS:

US and Bermuda MLAT: <http://bit.ly/12tcbXi>

US and Swiss MLAT: <http://bit.ly/12DzL2P>

India MLATS: This page has links to all the MLATS India has signed as well as links to Interpol notices in India, extradition agreements, and letters of rogatory: <http://bit.ly/ULzsy0>