

India needs to sign a Cybercrime Convention



Karnika Seth, cyberlaw expert & Advocate , Supreme Court of India

Today most cybercrimes such as 419 Nigerian attacks or fake employment or lottery scams are transborder. In the age of social media and cloud computing, investigation of cybercrimes require data and evidence often located in another jurisdiction. There are widespread phishing attacks, global attacks on infrastructure, transnational organized crimes and cyberwars. Therefore, international cooperation in cybercrime matters is not an advantage but a necessity today.

The Information Technology Act,2000 also applies to any offence or contravention committed outside India by any person irrespective of his nationality if the act or conduct constituting the offence or contravention involves as computer, computer system or network located in India. However, incase there is an offence committed by any Foreign national under IT Act,2000 such as identity theft (section 66C of IT Act,2000 and/or hacking under Section 66), legal assistance and cooperation will be required from concerned Authorities in the foreign country where the foreign national resides for any investigation / prosecution/ extradition. This is difficult to obtain in the absence of a *Cybercrime Convention* that India is signatory to (as India has not signed any) and/or an Mutual Legal Assistance Treaty(MLAT) for cooperation on *cybercrime* matters (as India has not signed any). Although India has signed MLAT with few countries for legal assistance *on criminal matters*, a crime/cybercrime may not be covered by it in those arrangements which require dual criminality to be satisfied and one of countries doesnot consider a cybercrime to be a crime as per its laws. Moreover,the scope of assistance agreed in a MLAT India has signed with other countries on criminal matters is not adequate to effectively handle cybercrime matters, particularly because digital medium is dynamic. A cyber crime can play havoc in cyberspace if it is a botattack . As the speed of committing crime and impact thereof is greater in cybercrime cases and because electronic evidence can be easily tampered or is volatile, it is imperative to trace the offender in the shortest possible time and preserve original evidence. Moreover, tracing of offender in cybercrime cases may be more difficult

due to availability of several techniques to camouflage one's identity using steganography, onion routing or other hide IP practices. In the MLATs signed by India for criminal matters , in general,there are no timelimits for execution of requests and therefore such MLATs may not provide efficient procedure or cooperation framework in cybercrime matters.Effective investigation and prosecution of cybercrime matters requires quick action as evidence is volatile and failure to collect electronic evidence in a timely manner can stifle effective investigation

India is currently a signatory to UN Convention against Transnational Organized Crime. This Convention applies to criminal matters in general and may not be effectively used in cyber crime cases. In 2013, a *comprehensive study was conducted by UN* on the emerging problem of cybercrime with a view to examining options to strengthen existing and to propose new national and international legal or other responses to cybercrime. It was found that there is a large diversity of national cybercrime laws on international cooperation and there is need for harmonization of national legal frameworks-definition and scope of cybercrimes, investigative powers, and admissibility of electronic evidence. It was felt that the Convention and national legal frameworks need to be adapted by making suitable amendments to deal with rising cybercrimes. In my view, it would be more efficacious to sign the Cybercrime Convention and also make efforts to frame MLATs that expressly deal with international cooperation on cybercrime matters or atleast update the existing MLATs with effective provisions to deal with cybercrime matters. This will bring harmonization in both substantive and procedural laws governing cooperation from other countries on legal assistance in cybercrime matters.

- Unlike a MLAT , Mutual Legal Assistance Treaty, a Convention has the advantage that it brings uniformity in legal cooperation with more than one country.
- A Cybercrime Convention could also address procedure for extradition. In MLATs generally extradition is not dealt with and a separate extradition treaty is signed by India with other countries.
- A Convention such as European Convention on Cybercrime doesnot supersede the MLAT provisions and contracting states are free to use the MLAT provisions for international cooperation .Thus many countries that sign Convention also have existing bilateral arrangements with other countries and they can freely rely on those provisions.

It is imperative that India signs a Cybercrime Convention such as the European Cybercrime Convention that establishes and harmonizes legal cooperation between member nations in investigation and prosecution of cybercrimes.

It will assist in harmonizing –

- types of criminal activity to be covered e.g cheating by personation, forgery, misrepresentation, etc.
- types of judicial proceedings that stands covered
- procedure for requesting assistance –format, content requirements and authorities from and to which the request may be sent,
- cooperation In relation to seizure/production/confiscation/preservation of Documents /electronic records/evidence
- process for Interception of electronic communications-preservation requirements
- cooperation in recordal of evidence
- extradition procedure
- timelines for responding to requests for cooperation
- standard for confidentiality and data protection .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.

Even United States of America has signed the European Convention on Cybercrime and ratified it .India must consider signing the European Cybercrime Convention that will provide basis for effective mutual legal cooperation in cybercrime matters with other countries and/or atleast, existing MLATs be updated or supplemental MLAT specifically for international cooperation on cybercrime matters be signed by India with other countries.