



Comments on the provisional draft text on "emergency mutual assistance" and "languages of requests" of the Cybercrime Convention Committee (T-CY)

The Electronic Frontier Foundation (EFF), European Digital Rights (EDRI), Association for Civil Rights (ADC), British Columbia Civil Liberties Association (BCCLA), Canadian Internet Policy & Public Interest Clinic (CIPPIC), Derechos Digitales, Hiperderecho, IPANDETEC, IP Justice, Open Net Korea, R3D and TEDIC, welcome this additional consultation opportunity of the Council of Europe for the elaboration of an additional Second Protocol to the Convention on Cybercrime (also known as the Budapest Convention).

We respectfully submit our comments in blue over the original provisional draft text issued in support of this consultation, followed by our comments explaining the reasoning of our suggested edits on the provisions falling within our scope of work, i.e. the protection of human rights in the digital environment.

I. Emergency mutual assistance

1. For the purposes of this Article, an emergency means a situation in which there is a significant and imminent risk to the life or safety of any natural person.
2. Each Party may seek mutual assistance on a rapidly expedited basis where **the requesting Party can articulate reasonable grounds to believe it is of the view** that an emergency exist, and the results are necessary to prevent that emergency. A request under this Article shall include, in addition to the other contents required, a description of the facts that demonstrate that there is an emergency and how the assistance sought relates to it.
3. A requested Party shall **accept** receive such request in electronic form, **and be considered as a sworn statement**. However, it may require appropriate levels of security and authentication before accepting the request.

4. The requested Party may seek, on a rapidly expedited basis, supplemental information in order to evaluate the request. The requesting Party shall provide such supplemental information on the most rapidly expedited basis possible.

5. Once satisfied that an emergency exists and the other requirements for mutual assistance are satisfied, the requested Party shall respond to the request on the most rapidly expedited basis possible.

6. Each Party shall ensure that a person from its authority responsible for responding to mutual assistance requests under Article 25 or 27 of the Convention is available on a twenty-four hour, seven-day-a-week basis for purposes of responding to a request under this Article.

7. ~~The authorities responsible for mutual assistance of the~~ Requesting and requested Parties responsible for mutual assistance may agree to provide ~~that~~ the results of ~~the execution of~~ a request under this Article, or an advance copy thereof, ~~may be provided~~ to the requesting Party through an alternate channel other than that used for the request. **The requesting and requested Parties shall establish in advance the alternate channel other than that used for the request.**

8.a. In the event of an emergency, requests may be sent directly by judicial authorities of the requesting Party to such authorities of the requested Party, or through Interpol or the 24/7 point of contact established under Article 35 of the Convention. In any such cases, a copy shall be sent at the same time to the central authority of the requested Party through the central authority of the requesting Party. Where a request is sent directly to a judicial authority of the requested Party and the authority is not competent to deal with the request, it shall refer the request to the competent national authority and inform directly the requesting Party that it has done so.

b. Where an emergency request under this paragraph is made through Interpol or the 24/7 point of contact, Interpol or the 24/7 point of contact shall act as an intermediary, transmitting the results of the request to the requesting Party. Interpol or the 24/7 point of contact shall delete the results of the request as soon after the transmission has been executed. Interpol or the 24/7 point of contact shall not use the results of the requests.

c. Each Party may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, inform the Secretary General of the Council of Europe that, for reasons of efficiency, requests made under this paragraph are to be addressed only to its central authority.

9. Every six months, requested Parties must audit the results of the requests that they have received under this section to ensure that requesting Parties do not abuse these provisions. Statistical and qualitative reporting on the volume of emergency requests should be published by both requesting and requested Parties on an annual basis.

10. The Parties may suspend the temporary application of the mutual emergency system, in case of systemic misuse or abuse of the emergency powers by the Requesting Party.

Commentary:

We support the creation of emergency MLA procedures as we consider that working towards more efficient MLAT is the right policy option since it is a long-established, tried and tested mechanism. Current proposals at EU level aim at speeding up the procedures at the expense of legal safeguards. Reforming MLATs should be our priority.

Emergency MLA procedures provide a mechanism for countries to access the results of the request in foreign countries necessary to prevent a situation in which there is a significant and imminent risk to the life or safety of any natural person, but also provide an opportunity to create strong legal safeguards for this process. We welcome the Committee's proposal of a definition of an emergency situation so it cannot be used as a work-around to the standard MLA process. The definition of emergency should include both the words significant and imminent in order to limit the use of emergency powers to relevant situations and when the

emergency is close in time. Safety means a threat that would result in serious bodily harm or injury of a natural person.

Emergency MLA should not be used to prevent risks of destruction, flight or loss of evidence nor should it be used to prevent financial or property crimes since there is no risk to human life. Although imminent threats to the life and physical well being of a person may also implicate threats to property, it is important that emergency powers focus on the protection and preservation of human life. Expanding the definition of emergency to include property risks would open up emergency procedures to too many requests that are unrelated to significant and imminent risks to the life or safety of any natural person.

The text in article 2 must include a factual basis, a reasonable grounds to belief, when each Party may seek mutual assistance on a rapidly expedited basis. Requesting Party should only access the results of the request that they would otherwise be able to obtain through a normal MLA process if the emergency was not present.

Requests under the emergency MLA provisions should be considered a sworn statement for the purposes of certifying that the factual basis for the request is true. Parties may wish to consider who they will authorize to make these sworn statements and provide these authorization lists to all Receiving Parties.

The process for Parties to request supplemental information does not indicate that Receiving Parties must ultimately comply with emergency MLA requests that they believe to be inadequate. When Parties are not able to satisfy privacy safeguards the request must be made through the normal MLA provisions.

To further ensure emergency procedures are not being abused, the Requesting Parties should always be in writing, and Parties should implement a process that compels them to provide a digital or paper trail of the request in order to facilitate this audit process. Statistical and qualitative reporting on the volume of emergency requests should be published by both requesting and requested Parties on an annual basis. While this should be the case for all manner of MLA procedures, it is particularly vital for emergency mechanisms given their potential for over-reach.

We also think accountability mechanisms are necessary to prevent the misuse of emergency procedures. These accountability mechanisms could include penalties for blatant or systemic misuse of emergency procedures by a Party to the Convention as we suggested in numeral 10.

II. Languages

Article[]-Languages of requests

Requests to a Party shall be made in a language acceptable to the requested Party or accompanied by a translation into such a language.

In order to ensure a person's ability to enjoy his or her right to an effective remedy, the requests and all the associated documents necessary to challenge the measure should also be translated by the requesting Party into the language of the affected person whose data is being sought in a reasonable timely manner.

Commentary:

Article 15 of the Budapest Convention states that Parties should ensure that the establishment, implementation and application of the powers and procedures are subject to conditions and safeguards provided for under its domestic law, including rights from the European Convention on Human Rights, and thus, the right to an effective remedy.

If a requested Party accepts requests in a language, but the affected person does not understand that language, it becomes harder to access his or her rights to effective remedy, i.e. to file complaints. For example, if a requested Party accepts English as a language for receiving requests but the person does not

understand it, it is necessary to also have a translation in an official language of the country where the person resides.

III. Audio/video hearings

We reserve that point to other stakeholders with expertise on these issues, as this item would fall outside our scope of work.

Signatories

EFF is an international civil society non-governmental organization with more than 39,000 members in 99 countries throughout the world. EFF is dedicated to the protection of individuals' online civil rights, privacy, and freedom of expression. EFF engages in strategic litigation in the United States, and works in a range of international and national policy venues to promote and protect human rights, foster innovation, and empower consumers.

European Digital Rights (EDRi) is an association of civil and human rights organisations from across Europe. We defend rights and freedoms in the digital environment.

Association for Civil Rights (ADC) is a civil society organization created in 1995 and based in Buenos Aires (Argentina). ADC aims to strengthen a legal and institutional culture that guarantees fundamental rights of individuals. ADC promotes civil and social rights in Argentina and other Latin American countries.

BC Civil Liberties Association (BCCLA) is an autonomous, non-partisan charitable society established in 1962 and is the oldest and most active civil liberties group in Canada. They are funded by the Law Foundation of B.C. and by citizens who believe in what they do. The BCCLA's mandate is to preserve, defend, maintain and extend civil liberties and human rights in Canada. BCCLA achieves their mandate through Advocacy in Action, Public Policy, Community Education, and Justice programs.

Samuelson-Glushko Canadian Internet Policy & Public Interest Clinic (CIPPIC) at the Centre for Law, Technology and Society, University of Ottawa. CIPPIC is Canada's first and only public interest technology law clinic. CIPPIC is unique in Canada, bringing together a team of expert legal professionals and students to advocate for the public interest in policy debates arising from the intersection of law and technology. CIPPIC advocates for the public interest on cutting edge issues including copyright law, data governance, algorithmic decision-making, internet governance, net neutrality, state surveillance, privacy and free speech. CIPPIC's work resides at the heart of Canada's innovation policy agenda: CIPPIC ensures respect for Canadians' rights as the law responds to our use of ever-changing technologies.

Derechos Digitales - América Latina is an independent non-governmental organization, founded in 2005, with main offices in Santiago de Chile, dedicated to the defense and promotion of fundamental rights in the digital environment in Latin America.

Hiperderecho is a Peruvian civil organization dedicated to facilitate public understanding and promote respect for rights and freedoms in the digital environment.

IPANDETEC is a non-profit organization that promotes the use and regulation of ICT and the defense of Human Rights in the digital age, through analysis, advocacy, research, and legislative monitoring of Internet public policies in Central America.

IP Justice is an international civil liberties organization founded in 2002, that promotes balanced intellectual property laws and freedom of expression in a digital world.

Open Net Korea, is a donor-funded not-for-profit organization founded in 2013 in South Korea. Open Net Korea provide a forum for discussion and collaboration to explore effective policies and solutions in the

following areas: Freedom of Expression, Freedom from Surveillance, Reforming Innovation-blocking Regulations, Net Governance and Neutrality, Open Data Policy, Reforming Intellectual Property Regime.

R3D is a non-profit organization in Mexico that defends human rights in the digital environment. It uses research, advocacy and litigation to defend digital rights.

TEDIC is a not-for profit organization from Paraguay that works on civic, open technology for social change and defends digital rights.