Need for a more efficient and rights-enhancing UN approach to MLA

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1. need for a possibility of direct/horizontal cooperation (vs current inter-state cooperation though ministries, central units etc)

linked up with resolution 22 of Section IV of the XIXth International Congress of Penal Law, held in 2014 in Rio de Janeiro:

“22. Communications may be digitally sent by the authorities directly to the suspects, accused, witnesses, victims and experts who are physically present in another state, subject to the acceptance of the latter of this method of communication. The communications must be accompanied by a translation into a language understood by the addressee and by a statement spelling out the rights and obligations of the addressee with regard to the communication received, in particular in so far as entitlement to assistance by a lawyer, a duty to appear, contempt of court and perjury are perceived.”

2. need to allow for the direct sending/service of documents abroad (vs current inter-state mechanisms), respecting the rights of the persons involved

linked up with resolution 14 of Section IV of the XIXth International Congress of Penal Law, held in 2014 in Rio de Janeiro:

“14. States should in particular be able to provide fast assistance and to execute a provisional order to preserve or freeze information and evidence during a reasonable time and without unduly affecting the rights of parties.”

3. need for enhanced expediency in executing MLA requests and temporary measures (freezing of evidence) in particular

linked up with resolution 23 of Section IV of the XIXth International Congress of Penal Law, held in 2014 in Rio de Janeiro:

“23. The possibilities of making use of digital technology, such as videolinks, in international criminal justice should be expanded in order to lessen the need for coercive measures like extradition, as well as in order to avoid unnecessary temporary transfer of a detained person or the physical appearance of witnesses and experts before authorities abroad.”

and with calling for a generic ‘best of both worlds’ principle in cross-border MLA cases, as reflected in resolutions 12 and 19 of Section IV of the XIXth International Congress of Penal Law, held in 2014 in Rio de Janeiro:

4. need for a fuller forum regit actum principle, i.e. with the “fundamental principles of the legal system” of the requested state as the only limit (the “law” of the requested state being the limit in current UN treaties that have a forum dimension in their MLA provisions)

5. need for an appropriate, generic regulation of video/telephone conference hearings (including, in the context of video conference hearing, the granting of rights of excuse that accrue to the person involved according to either the law of the requesting or the requested state)

linked up with resolution 12 of Section IV of the XIXth International Congress of Penal Law, held in 2014 in Rio de Janeiro:
“12. States pursuing investigations must afford all persons involved the protection that would accrue to them in a similar domestic case, while also affording them the protection that accrues to them under the national legal system of the state where the investigative measures are taken or where the persons concerned are situated when the investigative measures are taken.”

“19. If states act extraterritorially while investigating in cyberspace, they shall comply with the fundamental and human rights standards applicable to their jurisdiction (agent control standard), as well as those applicable to the state where the extraterritorial investigations are taking place and where the persons concerned are situated when the extraterritorial investigations are taking place.”

6. need for a fuller regulation of the possibility to set up and cooperate in joint investigation teams (vs the current, ‘blank’ regulation of the concept in the UN treaties that allow for the concept), including at least:

- the possibility for detached team members to be autonomously entrusted with the taking of investigative measures on and in conformity with the law of the territory of the state where the team is operating
- the possibility for detached team members to request the taking of any investigative measure in their home country that they could request/take in a similar domestic investigation in their home country
- the possibility for all team members to use information/evidence lawfully obtained within the team in their respective home states

7. need to introduce & regulate the possibility of taking real-time investigative measures (telecom interception, bank account monitoring), since these enhance both the efficiency of investigations and the legal protection of the targeted persons

8. need to introduce the possibility to set refusal grounds aside upon explicit request of and in favour of the defence, if properly assisted by a lawyer

9. need to introduce an obligation to grant MLA also for investigations into corporate crime, even if the requested state does not allow for corporate liability for the offences concerned

10. need to introduce a facts-based ne bis in idem refusal ground (vs a qualification-based interpretation thereof)

11. need for a purpose separation between intelligence and law enforcement cross-border investigations

    in line with resolution 17 of Section IV of the XIXth International Congress of Penal Law, held in 2014 in Rio de Janeiro:

    “17. The later use of information gathered by intelligence services in criminal matters is only allowed where the information concerned could have been obtained through regular mechanisms for judicial or law enforcement cooperation in criminal matters.”