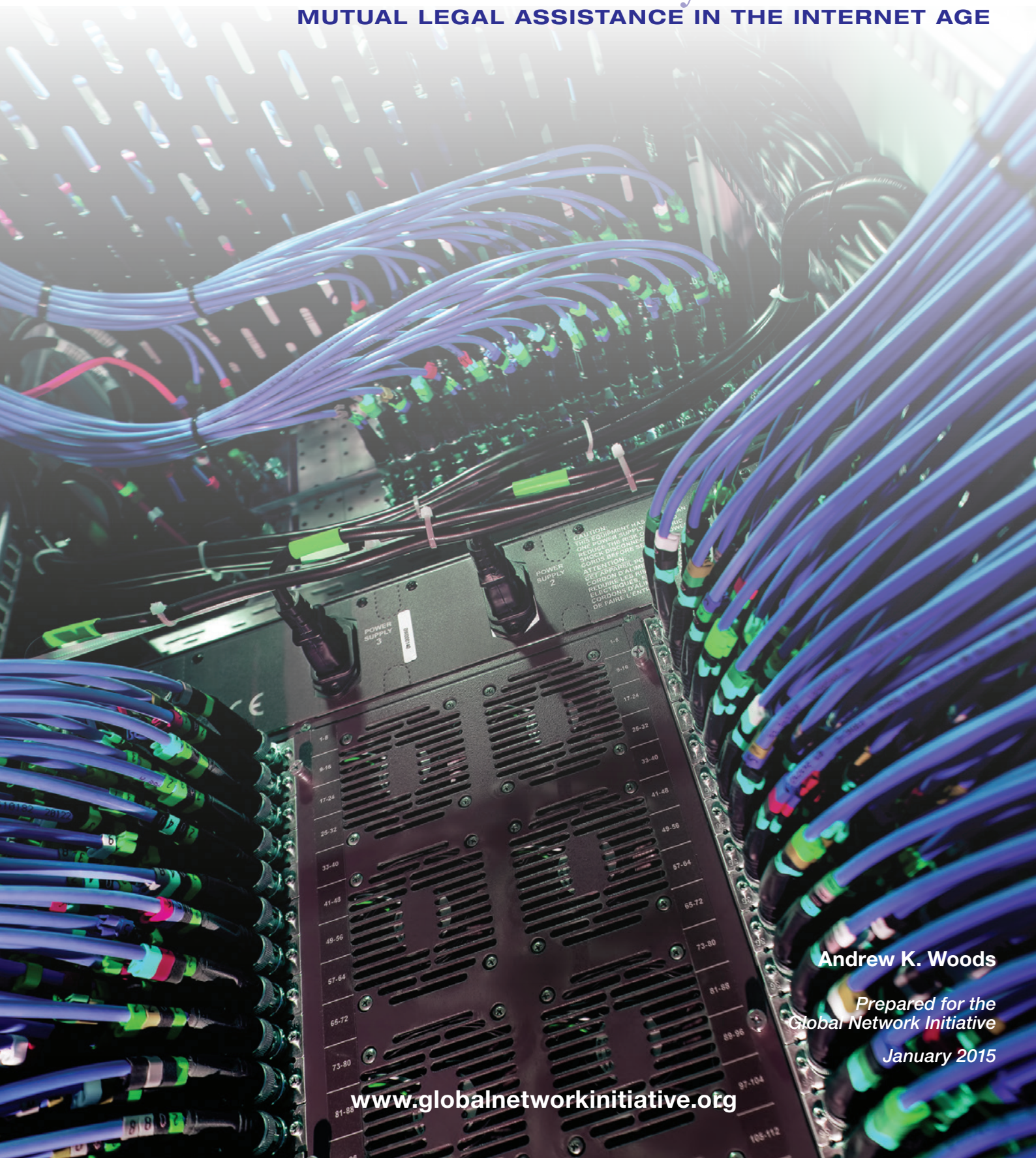


Data Beyond Borders

MUTUAL LEGAL ASSISTANCE IN THE INTERNET AGE



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ABOUT THE REPORT

This report was commissioned by the Global Network Initiative (GNI), with funding from the John D. and Catherine T. MacArthur Foundation, and written by Andrew K. Woods. The report has been informed by a number of confidential, wide-ranging discussions with people who have considerable experience with the mutual legal assistance regime. These interviews included dozens of members of civil society; law enforcement agents, diplomatic officers, and legal officials in a number of countries; the legal and policy teams of major communications companies, many of which are based in the U.S., but also several technology companies based in Europe and Africa. The author is grateful to everyone who contributed time and expertise to create this report. The views expressed in this report are those of its author and do not necessarily reflect those of the Global Network Initiative.

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About the Global Network Initiative

The Global Network Initiative (GNI) is a multi-stakeholder group of companies, civil society organizations (including human rights and press freedom groups), investors and academics dedicated to protecting and advancing freedom of expression and privacy in the Information and Communications Technology (ICT) sector. To learn more, visit www.globalnetworkinitiative.org.

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EXECUTIVE SUMMARY

The global nature of today's Internet services presents a unique challenge to international law enforcement cooperation. On a daily basis, law enforcement agents in one country seek access to data that is beyond their jurisdictional reach; as one industry analyst put it, there has been, "an internationalization of evidence." In order to gain lawful access to data that is subject to another state's jurisdiction, law enforcement agents must request mutual legal assistance (MLA) from the country that can legally compel the data's disclosure. But the MLA regime has not been updated to manage the enormous rise of requests for MLA. This report reviews existing MLA law and policy and proposes a number of reforms.

This report draws from dozens of wide-ranging conversations with a diverse set of stakeholders, including law enforcement agents from around the world, global Internet and telecommunications companies, and civil society groups large and small. Out of these conversations, five key principles have emerged—principles that ought to drive MLA reform for the twenty-first century. First, a country's request for MLA must be justified, and the level of assistance the country enjoys should be proportional to the country's interest in the data. Second, reforms must encourage respect for human rights: protecting user privacy, narrowly tailoring how much data is requested and transmitted, and so on. Third, reforms must increase the transparency of the existing MLA regime. Fourth, reforms must significantly increase the efficiency of the existing regime. Fifth and finally, reforms must be scalable in order to manage the coming wave of government requests for MLA.

There are a number of specific MLA reforms to be implemented. Three significant and urgent reforms are as follows:

1. **Electronic MLA:** Countries must develop an electronic system for submitting, managing, and responding to MLA requests. This is a huge undertaking, and should begin with the United States, the country that is most often on the receiving end of MLA requests. The system could begin on a voluntary basis with incentives for countries to opt-in.
2. **MLA Education:** Government officials—particularly law enforcement agents—must be trained to craft narrowly tailored and legitimate requests for MLA. Better understanding about what sorts of data can be lawfully accessed through the MLA regime and what data can be accessed outside the regime could have a significant impact on the number of the requests for MLA.
3. **MLA Staffing:** The number of MLA requests is rising quickly. Until the process becomes more streamlined—and even after it has been maximally streamlined—additional staff will be necessary to review, track, and process incoming MLA requests. More MLA staff are also needed to evaluate and process outgoing requests for MLA. As a result, MLA staffing should be an urgent priority for every country in the world.

MLA reform will not be easy. Because countries have diverging incentives depending on whether they tend to *make* requests for MLA or *receive* requests for MLA, and because they do not all agree on the appropriate grounds for providing MLA, reforms may be most promising among like-minded states. Because the MLA regime is essentially bilateral, the central challenge to reform is strong leadership and political will. Fortunately, there are compelling arguments for why all states should take a leadership role in MLA reform. First, when the MLA regime does not function swiftly and fairly, governments resort to other tactics such as demanding data localization, attempting to apply their laws extraterritorially, or worse, such as persecuting technology companies and their users. Second, all states benefit from a more robust system of MLA. Even states that do not typically seek MLA will likely need to do so – and quickly – when their citizens begin using an Internet service that for whatever reason lies beyond the state's jurisdictional reach.

I. INTRODUCTION

The global nature of today's Internet services presents a unique challenge to international law enforcement cooperation. Twenty years ago, a law enforcement official might never have needed to engage her government's diplomatic services in order to investigate a routine domestic crime such as theft or assault. But today, because so much of daily life occurs "online" – very often subject to another country's jurisdiction – law enforcement agents regularly request foreign government assistance to obtain digital evidence, even for routine crimes that do not otherwise cross national borders. For example, suppose an Indian law enforcement agent seeks access to the contents of an Indian citizen's U.S.-based email account, and the Indian police have what a U.S. court would regard as probable cause to believe that the account is linked to a crime committed in India. The law enforcement official's best option to gain lawful access to the data is to ask for mutual legal assistance (MLA) from the United States, which has the legal authority to compel the U.S. email service provider, by warrant, to produce the relevant data. In this particular scenario, India and the United States – that is, the country that wants access to the data and the country with legal authority to compel the production of the data – have a mutual legal assistance treaty (MLAT), which sets out the terms for managing the sharing of evidence across borders. There are hundreds of bilateral and multi-lateral MLATs around the globe, and the MLA regime is the dominant and widely accepted method for managing lawful government-to-government requests for data across jurisdictions.¹

But the MLA regime is in need of reform. The current process is **inefficient**, with the time required to process a request being measured in months and

in some cases years.² In some states, data preservation rules help to ensure that critical evidence is not lost, but significant delays leave many law enforcement agents with the sense that the MLA process is a waste of time, and as we will see, when law enforcement do not use the MLA process, they resort to other tactics to access the same data.

The process is also largely **opaque**. Law enforcement officials are often unable to determine who is handling their request or why it is taking so long. For companies, the process is similarly opaque: requests for information arrive in the form of a government warrant, often without identifying that the warrant is being served in accordance with an MLAT and that the data will be shared with a foreign government. This means the process is opaque for users, too, because it limits the company's ability to give full and complete information about which governments are requesting access to their customer data, one of the key features of corporate transparency reports.

Finally, the MLA regime is also **incomplete**. Not every country-to-country relationship is governed by an MLAT, and these gaps can leave companies and local law enforcement unsure of how to manage government requests for data across jurisdictions.

MLA reform is a subset of a much larger Internet policy challenge – adapting a series of laws and regulations drafted in the twentieth century to cope with the demands of a digital twenty-first century – and it is deeply linked to the largest questions of Internet governance. When the MLA process does not function swiftly and fairly, law enforcement officials sometimes resort to drastic measures. For example, some states have attempted to demand that

1 This phrase, "data across jurisdictions," is borrowed from the Reform Government Surveillance project, which has as one of its five key principles, "Avoiding Conflicts Among Governments." The principle states:

In order to avoid conflicting laws, there should be a robust, principled, and transparent framework to govern lawful requests for data across jurisdictions, such as improved mutual legal assistance treaty — or "MLAT" — processes. Where the laws of one jurisdiction conflict with the laws of another, it is incumbent upon governments to work together to resolve the conflict.

See <https://www.reformgovernmentsurveillance.com>.

2 The U.S. President's Review Group states that the average length of time that it takes for the United States to produce evidence to its foreign partners under the MLA process is 10 months. See Liberty and Security in a Changing World: Report and Recommendations of The President's Review Group on Intelligence and Communications Technologies, Dec. 12, 2013, available at: http://www.whitehouse.gov/sites/default/files/docs/2013-12-12_rg_final_report.pdf.

their domestic laws apply extraterritorially.³ This is problematic for obvious reasons. If every country applied its criminal laws extraterritorially, it would provoke significant international conflict and put businesses in the impossible situation of trying to comply with every legal regime in the world simultaneously. Another strategy states have deployed is to require all communications companies to store some data locally. But data localization would impose enormous technological burdens on communications companies while increasing costs to users, eroding privacy protections, and delaying innovation.⁴ Data localization and the extraterritorial application of criminal laws are two of the biggest threats to an open and free Internet, and both of these threats are aggravated by an inadequate MLA regime. If local governments can swiftly and fairly get lawful access to data across jurisdictions, they will be much less likely to resort to these drastic measures. Perhaps just as importantly, they are less likely to violate human rights to get the data they seek. MLA reform is therefore not just a matter of giving local law enforcement officials swifter lawful access to Internet data; it is about balancing sovereignty interests with the goal of maintaining an open and free Internet.

This report evaluates several reforms that aim to improve the process by which law enforcement agents gain lawful access to Internet data across jurisdictions. To be clear, the report's scope is limited to scenarios where law enforcement agents in State A seek access to data that State B has the authority to lawfully compel, such that State A must ask State B for assistance. The report does not take

a position on the question of how to define State A's or State B's jurisdictional authority over Internet data – whether the appropriate test turns on where the data is stored, the legal residence of the company managing the data, the product's terms of service, or something else entirely. Regardless of how one construes a state's jurisdictional authority to compel Internet data, that authority has limits; when it reaches its limit, states must request mutual legal assistance. That cross-jurisdictional process is the focus of this report.⁵

This report does not attempt to catalogue all of the problems with the MLA process; there are a number of very helpful reports that already do this.⁶ Instead, the report proposes and evaluates a number of short- and long-term reforms to the MLA regime. The criterion for inclusion in this report is simple: the cost of each these reforms pales in comparison to the cost of not reforming the existing regime. Every day that legislatures, foreign ministries, and justice departments avoid implementing these reforms, they raise the cost of reform tomorrow.

Who has an interest in these reforms? Internet users, communications companies, and law enforcement authorities all have legitimate interests in a robust and well-functioning mutual legal assistance regime. Government authorities have a legitimate interest in investigating crimes that occur within their borders to ensure the security of their citizens.⁷ Internet users have a legitimate interest in securing their data from censorship and suppression; they enjoy a number of fundamental human rights that are implicated by MLA, including the rights to

3 For example, Brazil's Marco Civil attempts to apply Brazilian law extraterritorially. See Hogan Lovells Client Alert, *Marco Civil da Internet: Brazil's New Internet Law Could Broadly Impact Online Companies' Privacy and Data Handling Practices*, available at: <http://ehoganlovells.com/cv/92a5426dc5d9947a6ef3abd4eb988b549ae2472b>.

4 For a review of why data localization is so problematic, see Anupam Chander & Uyen P. Le, *Breaking the Web: Data Localization vs. the Global Internet*, EMORY L.J. (forthcoming), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2407858.

5 The report focuses on criminal investigations—not civil, administrative, or purely intelligence matters. Of course, some intelligence matters overlap with criminal investigations, and for this reason MLATs are often used by intelligence agencies. For an example of this overlap, see the recent debate in the U.K. about the proper scope of MLATs. See *Report on The Intelligence Relating to The Murder of Fusilier Lee Rigby*, U.K. Intelligence and Security Committee of Parliament (Nov. 25, 2014) Para 453, p149, available at: http://isc.independent.gov.uk/files/20141125_ISC_Woolwich_Report%28website%29.pdf?attredirects=0.

6 For a thorough review of the problems for businesses, see the International Chamber of Commerce's Policy Statement, *Using Mutual Legal Assistance Treaties (MLATs) To Improve Cross-Border Lawful Intercept Procedures*, Document No. 373/512 (Sep. 12, 2012), available at <http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2012/mlat/>. See also Kate Westmoreland, "What is wrong with the international system for sharing online records for criminal matters?" available at: <https://mlat.info/policy-analysis-docs/what-is-wrong-with-the-mlat-system>.

7 This may sound obvious, but in the midst of trenchant debates about the scope of government power to access online data, it needs to be said. Any reform that attempts to revise the existing regime must begin by acknowledging law enforcement's legitimate interest in controlling crime.

privacy, to freedom of expression, and to freedom of association.⁸ Finally, all companies engaged in communications and e-commerce have a legitimate interest in a clear and predictable legal framework for managing government access to customer data—one that adapts to the ways of modern business. Companies should not be put in the position of making case-by-case determinations, often with little guidance from courts or legislatures, about how and when to comply with government requests for data.

Who should implement these reforms? The short answer is “governments.” MLA is fundamentally a state concern. Companies can take certain steps to ensure the smooth functioning of the MLA process, such as advising law enforcement officers about how to initiate the MLA process. But most of the reforms discussed here are aimed at states—either the state requesting MLA or the state responding to that request. Unfortunately, requesting states and receiving states do not always have the same incentives to improve the MLA regime. Take, for example, the suggestion that states develop electronic systems to process MLA requests. The states that would benefit the most from such systems are those that *make* large numbers of MLA requests, not necessarily those that *receive* those requests, yet these systems will have to be built internally by receiving states and not requesting states. There

is, in other words, a misalignment of incentives to improve the MLA regime. Moreover, different states have different concerns about the shortcomings of MLA; for some states the problem is one of speed, while for others the problem is more a matter of process or principle. For these reasons, the report pays more attention to reforms that can be implemented bilaterally or unilaterally, where state incentives are more likely to align, rather than those reforms that require significant collective action by differently motivated states.

The structure of the report is as follows. Part II identifies a series of widely agreed-upon first principles that should guide MLA reforms. Reforms that do not conform to these principles are inadequate. Part III proposes a series of urgent reforms to the existing MLA process. These reforms are particularly low-hanging fruit because they do not require states to strike new legal agreements. Part IV proposes reforms aimed at improving the international legal framework for MLA. This is a considerably longer-term project than the reforms discussed in Part III. Finally, Part V looks beyond the existing MLA regime to evaluate other legal and policy reforms that could help, over the longer term, to manage the process by which law enforcement seek to gain lawful access to data across jurisdictions.

⁸ For a review of how Internet tools implicate a number of key human rights, see Report of the Office of the United Nations High Commissioner for Human Rights, “The Right to Privacy in the Digital Age,” A/HRC/27/37 (June 30, 2014).

II. KEY REQUIREMENTS FOR MLA REFORM

Before evaluating specific reforms to the MLA regime, it is worth outlining several key features that any reform effort must address. These requirements for MLA reform stem from the critical limitations of the existing regime. If a particular proposal fails to meet these basic requirements, it does not close the most significant gaps in the present regime. Two things are notable about these requirements. First, they apply equally to all reforms, regardless of their size or scope. That is, they should be useful for evaluating the legitimacy of any policy relevant to government requests for data across jurisdictions, regardless of the reform's formal elements. Therefore, these principles could guide any of the following reform options: the crafting of a new MLAT; the reform of an existing MLAT; the implementation of a new MLA policy; the development of domestic laws on MLA; the development of company policy for how to respond to government requests for metadata; the creation of a new treaty on lawful government access to data across jurisdictions, and more. Second, and significantly, there is broad agreement among governments, civil society, and corporations as to the general content of these requirements. So while reform efforts may seem daunting, reformers should take courage from the fact that there is surprisingly little disagreement about the goals of those efforts.

A. Justified and Proportional Access

Governments have a legitimate interest in regulating criminal activity that touches their soil. This is a bedrock principle of MLA reform. But law enforcement officials must also make the case for why they ought to have access to the data they seek. International norms of due process require that the mere assertion of wrongdoing is not enough to justify a search or seizure of personal data. Law enforcement authorities must explain why they have a legitimate and reasonable interest in the relevant data, and reforms should be designed to ensure that all government requests for data are justified in terms that make sense to the responding country.

In other words, there must be some jurisdictional nexus between the country and the data sought, which could include, among other things: the location of the crime, the citizenship of the victim, the citizenship of the suspect, the severity of the crime, the relevance of the data to the criminal investigation, and so on. Moreover, a country's access to data ought to be proportionate to this jurisdictional nexus. That is, countries should have greater access to more data when that data is highly relevant to serious crimes committed by their own citizens, against their own citizens, and on their own soil, and less access when the data is less relevant to an investigation into less serious crimes with fewer of these jurisdictional hooks in place. Put most simply, a government's access to data across jurisdictions must be proven to be essential to solving a legitimate criminal matter. Even where the governmental interest in the data is overwhelming, though, this access should not be automatic – the requesting state must prove that it has a legitimate interest in the data, and its request must be narrowly tailored and proportionate to the crime being investigated.

B. Human Rights Protections

MLA reforms should be designed to ensure the protection of human rights. This begins with narrowly-tailored requests for data. Narrow tailoring of requests for communications information is essential to protecting individuals' fundamental rights to freedom of expression and privacy while permitting lawful criminal investigations. The broader the request, the greater scrutiny the request should receive. Receiving countries, and ultimately companies, should strive to produce no more than what is necessary to comply with legitimate law enforcement needs. Countries should limit their use of the data to the purposes stated in the request and destroy any non-responsive data. Finally, data should not be handed over to governments if there is a reasonable and foreseeable chance the government will use that data to commit human rights abuses. Any assessment of a request should also include an

examination of whether the relevant provisions of the requesting country's underlying criminal law are consistent with international human rights requirements. Companies should follow the Global Network Initiative's Principles and Implementation Guidelines for responsible human rights practice when vetting government requests for data, and governments should treat human rights concerns, including a request's potential impact on the data subject's right to free expression, as a legitimate basis for denying a request for MLA.

C. Transparency

Companies and states must be transparent about the receipt and processing of government requests for access to user data. Governments should inform the public about its handling of incoming MLA requests, including the volume of those requests, the sorts of data sought, and the countries making the requests. Companies should also be permitted to disclose information about these requests. Laws should be enacted as necessary to require governmental reporting and to permit company reporting about MLA. Total transparency about individual MLA requests may not be possible—states often have good reasons for keeping the initial details of a criminal investigation quiet, including fears about tipping off the suspect—but reforms should aim for maximal transparency. Most importantly, interested parties ought to have a better sense of how the MLA regime functions. Transparency is necessary for enabling redress where abuses of MLA mechanisms occur. Users and companies ought to be able to know who is requesting their data and for what purposes. Governments requesting legal assistance should be able to track and monitor the progress of their request—something that is only possible if there are key performance indicators in place, and a system for monitoring and auditing the regime's performance.

D. Efficiency

The process for requesting and providing mutual legal assistance must be made more efficient. Government A should not have to wait longer than 30 days for a complete response from Government B about their request for data, except (a) where additional time is needed to evaluate the potential human rights implications of the MLA request or (b) for particularly complex requests. Efficiency is critical so that law enforcement sees MLA as the best way to access data across jurisdictions, rather than demanding data localization or attempting to apply local law extraterritorially. Responding countries have a responsibility to outline clear legal standards for requesting countries, and to minimize delays in processing MLA requests. Furthermore, these efficiency gains—faster handling of requests, fewer resources spent—must be achieved without compromising individual privacy and the legal process necessary to adequately review requests for legal assistance.

E. Scalability

Any efficiency gains must also be scalable, because the number of government requests for data across jurisdictions—like the amount of digital data itself—is growing enormously. This is only possible if reforms embrace electronic handling of MLA requests, and reduce the number of hops an MLA request makes. The number of steps an MLA request takes can be reduced to avoid redundancies and paper shuffling without a reduction in due process.



III. IMPROVING THE MLA PROCESS

MLA agreements are critical to facilitating international cooperation, but in many countries the problem is less a lack of MLA agreement than an inadequacy of MLA process. In a significant portion of cases, an MLAT is already present but is inadequate in operation. In these cases, policy reform is necessary. Below are a series of urgent reforms that would improve the MLA process in the near term. Many of these reforms can be implemented unilaterally, avoiding some of the significant political and coordination hurdles that make treaty reform so daunting.

A. Electronic MLA

1. Improved MLA Technology

The existing MLA process is slow partly because so little of the process is standardized so as to allow digital certification, transmission, intake, and processing. For example, a request from a law enforcement agent in one country might be transmitted to that country's embassy in another country—by diplomatic pouch or secure communication—where it can be transmitted to a local diplomat who can turn it into a domestic legal instrument to compel the data. This process requires many hops: from local law enforcement in State A to central government of State A to foreign office of State A to foreign office of State B to central government of State B to local law enforcement of State B. Movement of initial requests and responses should be electronic (very often it is not) and requests should not need to be evaluated in piecemeal fashion (as they sometimes are).

A better process would be electronic each step of the way. On an initial basis, two countries could run a pilot project to examine how digital, form-based MLA processing might work. Imagine, for example, that the United Kingdom created an online portal for MLA requests. This portal could

specify that if the request is filed accurately, fully, and certified, electronic MLA requests would have priority over incomplete and/or paper requests in order to incentivize requesting states to make use of the electronic form.⁹ To be clear, electronic MLA processing is not a panacea: it does not replace the time-consuming work of having a lawyer review the adequacy of the MLA request. But a centralized and electronic request portal would certainly alleviate some of the strain on the current regime and reduce the time and effort necessary to ensure that the request contains all necessary evidentiary showings.

In addition to making MLA requests electronic, the provisioning of digital evidence in accordance with an MLAT should be entirely electronic. That is, companies should be able to securely provide electronic evidence to the country that has compelled them to produce it, and that evidence should be passed back to the requesting country electronically, rather than on paper or on disk. This would require countries to establish secure means of transmitting such data—using diplomatic channels already in place—but also would require investments in training and resources to ensure that the data is provided in a way that satisfies the legal requirements of both states.

2. Tracking System

States should also create internal tracking systems for managing MLA requests. This would give requesting law enforcement a sense of how far along their request is in the process. It need not be online: instead, the system could simply route secure messages back to the requesting law enforcement officer that their request has been processed and forwarded on, or denied. Of course, the system would need to be secure. If such a system worked, it could significantly relieve the sense that many law enforcement agents have that their requests simply enter a black box.

⁹ Emergencies or particularly grave crimes could still trump other less-immediate MLA requests, electronic or not.

B. Requesting Country Process

1. Educating Law Enforcement

Perhaps the lowest-hanging fruit, from the standpoint of policy changes to the existing MLA regime, is better training for requesting law enforcement officials. A significant portion of requests for access to data across jurisdictions are incomplete, overbroad, and ill-informed about the relevant legal requirements. Moreover, many law enforcement agents do not know whom to contact within their own central government, let alone the foreign government that can compel the evidence, to initiate an MLA request. Better education and training promises to reduce some of the friction in the current system, freeing up resources to shepherd legitimate and complete requests through more efficiently. This training should include not only attention to the receiving country's legal requirements, but also international human rights requirements. Law enforcement in the requesting country should be trained to review their requests and screen out any requests that might cause the receiving country to raise concerns on human rights grounds. If the receiving country must ask the responding country for more information in order to establish that there is a legitimate government interest in the data, the process will be needlessly delayed. The development of electronic MLA portals presents an opportunity for receiving states to provide on-the-spot training to requesting countries. If the electronic MLA system is implemented well, it will require governments to provide adequate information so the receiving country can assess essential criteria including the legality and proportionality and human rights impact of the request.

Who should do this training? It should be the shared responsibility of central law enforcement authorities, international organizations, and companies. Although MLA is primarily a government concern, companies should be involved because they are often the first point of contact when law enforcement in a particular country requests access to the data they store. Rather than merely refer the law enforcement

agent to the MLA process, the company has the first chance to explain how the process works and to frame expectations. Internet and communications companies – who have a great deal to gain from the MLA regime's smooth functioning in the short term – should expand their training programs, and implement new programs where they do not already exist. This training must be thorough and widely implemented to have an impact.

Law enforcement authorities – especially those with the resources to do this training and an interest in swift global cooperation – should conduct trainings not only in their home country but also in conjunction with key law enforcement partners abroad. Finally, international organizations – primarily Interpol and the UN Office of Drugs and Crime (UNODC) – should develop a training protocol for MLA requests. The UNODC currently has an MLA tool that law enforcement can download, but it is not publicly available: law enforcement must request access before they can see the tool.¹⁰ This is unnecessary. Many law enforcement agents do not know about the tool – it is not widely publicized – and some will be hesitant (or not authorized) to request access to download an executable file to their computer. Furthermore, because the tool is limited to registered law enforcement, companies cannot review the tool to see if the advice they give to local law enforcement is in line with the suggestions of the UNODC. UNODC should make this tool openly available online, and the office should coordinate their training programs with those of Internet and communications companies and domestic justice departments.

2. Legal Justification

All requests for MLA must explain why the requesting government has a legitimate interest in the data sought. Merely asserting that the government seeks information in connection to a crime is not enough. The government must explain: (i) the crime it is investigating, and (ii) its reasons for believing that the requested data is necessary to

10 See *Mutual Legal Assistance Request Writer Tool*, available at: <https://www.unodc.org/mla/en/index.html>.

the investigation. This requires demonstrating facts related to the investigation – enough facts to enable the recipient of the request to assess whether the data the country seeks is necessary to its investigation, and to determine that the underlying criminal provisions are not themselves abusive under international human rights law. Many governments have the equivalent of a “reasonable suspicion” standard – if not something higher, like probable cause – that limits searches and seizures to those connected to a legitimate criminal investigation. Law enforcement agents should be aware of, and couch their request for MLA in terms of, the legal standards of the country that has the authority to compel the data they seek. To this end, requesting governments should explain their legal requirements for MLA in explicit terms to their MLAT partners. An international body like the UNODC or Interpol ought to publish a handbook for law enforcement officials outlining the legal standards for searches and seizures in different countries.

3. Uniform Request Format

One of the causes for delay in the handling of MLA requests is poorly or oddly formatted requests. Of all the MLA reforms, one of the simplest to implement would be to develop and encourage widespread use of a standardized MLA request form. This could include standard fields for things like “data sought,” “crime being investigated,” “facts that give reason for suspicion,” and so on in order to meet the legal requirements of the receiving country. Ideally, this form would be incorporated into the electronic request system described above. Standardized MLA request forms also offer a chance to educate law enforcement about the requirements for MLA in a particular country.

C. Responding Country Process

1. Adequate Staffing

It is critical that responding countries have adequate staffing to manage incoming request for legal assistance. For instance, the Office of International Affairs at the Department of Justice in the United States, which is responsible for handling incoming MLA requests, has not had the resources to increase its capacity to handle MLA requests over the last five years, despite an exponential increase in the number of requests.¹¹ The White House has asked Congress for more resources to address MLA—a critical first step in MLA reform—but it remains to be seen whether those resources are forthcoming.¹² This problem is by no means limited to the United States: every country should evaluate its existing and future capacity to respond to requests for MLA.

Even in an ideal MLA regime, where timelines are short and administrative processing happens entirely by secure electronic means, central governments will need to dedicate significant resources to reviewing incoming requests for MLA. This work is time consuming. Both lawyers and other staff are needed to review the completeness of the request and the adequacy of the response. And language specialists are often necessary in order to ensure that requests are made in the language of the receiving authority.

2. Clear and Public Legal Requirements

Countries must publish their legal requirements for complying with a request for MLA. These requirements must be clearly explained, and they should be translated into other languages, including at a minimum the official UN languages of Arabic, Chinese, English, French, Russian and Spanish.

¹¹ See President Review Group, *supra* note 2, Recommendation No. 34.

¹² See U.S. Department of Justice, Fiscal Year 2015 Budget Request, available at: <http://www.justice.gov/jmd/2015factsheets/mut-legal-assist.pdf>.

They should work with international partners and companies under their jurisdiction to ensure that these legal rules are passed along to law enforcement around the world. Ideally, law enforcement officials will conduct trainings based on these materials, which translate the responding state's legal requirements into terms that make sense in the requesting state.

3. Time Limits

Most MLATs include a provision mandating that assistance be “promptly” executed.¹³ In practice, the process is slow and the actors involved are largely unaccountable for their speed. Governments—seeking better cooperation from partner governments—should voluntarily announce time limits for handling MLA requests. Specifically, most MLA request should take no longer than 30 days to complete—from request to final response—and no single “hop” in the multi-step process should take longer than 5 days to forward the request onward. This time limit might need to be waived in exceptional circumstances for particularly complex or serious criminal investigations, but the default should be shorter processing times. Of course, the clock on this 30-day time limit should not begin until the responding state receives a request for MLA that satisfies its requirements under domestic law and human rights law. Requesting law enforcement should know about these time limits, and be incentivized to submit requests that can be handled expeditiously.

4. National Transparency Efforts

A number of major Internet and communications companies now produce annual transparency reports that detail how, and how often, the company handles government requests for access to user data. These reports offer users critical insight into the way that their data is managed. But these reports could be even more useful if they distinguished

between local government requests for user data in accordance with an MLA and requests that originate within the local jurisdiction. Under the current regime, MLA requests arrive at the doorstep of the company in the form of a local warrant for data, often without indicating which country initiated the request. As a result, for example, many American companies regularly count foreign MLA requests as U.S. Government requests for data—which technically they are, but only on behalf of another country—making it difficult to fully and accurately report the true origins of some government requests for client data. In order to get a more accurate picture of which countries are requesting access to user data, responding governments should explain to the company that is being asked to produce the data that the warrant is being produced on behalf of another country (the requesting country) and should identify that country by name. This would allow corporate transparency reports to accurately reflect which countries are demanding and receiving user data. Importantly, this would also better enable companies to conduct internal auditing to ensure that they are fulfilling their commitment to human rights.

Countries should also embrace the notion of transparency reports. Not only would clear and regular reporting give individuals a better sense of which governments are accessing data, but it would also help policymakers to understand where to direct attention to make the MLA regime run more effectively. It is currently difficult to assess in any systematic way which MLA relationships are functioning poorly as compared to others because most countries do not record and publicly release data about the numbers, types, and locations of the MLA requests they receive. To the contrary, many countries prohibit companies from disclosing the most basic aggregate data about that country's requests for access to data.¹⁴

¹³ See, e.g., Treaty between the Government of Australia and the Government of the United States of America on Mutual Assistance in Criminal Matters, and Exchange of Notes, Art. 5 (“The Central Authority of the Requested State shall promptly execute the request or, when appropriate, shall transmit it to the authority having jurisdiction to do so.”).

¹⁴ As Vodafone's recent transparency report notes, it is a crime for the company to reveal the most basic information about government requests for access to stored content in almost a third of all countries where Vodafone does business. See: http://www.vodafone.com/content/sustainabilityreport/2014/index/operating_responsibly/privacy_and_security/law_enforcement.html.

D. Consistent and Transparent Corporate Policy

Mutual legal assistance is fundamentally a state concern, and states must fix the current regime with better MLA agreements and better MLA policy. A well-functioning process would provide greater legal clarity and transparency and assure a greater degree of due process. But where states have not established clear and consistent guidelines for mutual legal assistance, companies can take a number of important steps to alleviate the situation. First, they can clarify to local law enforcement their disclosure requirements—that is, what data they are willing to disclose to local law enforcement in accordance with local law absent a clear MLA framework. Communications companies often operate in countries where they are not legally compelled to provide data, nor are they prohibited under their home jurisdiction from providing some basic forms of metadata, such as subscriber information. Currently, each company makes its own *case-by-case* determination of what they disclose based on their own analysis of the law and other instruments, such as the Universal Declaration of Human Rights and the GNI Principles. Because these determinations are not made public, and because they vary according to company and the laws of the state with legal authority over the company, local law enforcement agents often perceive communications companies to be making up the rules as they go. This fuels law enforcement frustration, and increases the likelihood

that the local government will either demand data localization or attempt to apply their laws extraterritorially. Companies should provide clear guidelines to local law enforcement about what sorts of data require a request for MLA and what sorts of data requests can be processed by the company directly in accordance with local law and international human rights standards.

This should not be read to imply that government access to data ought to be determined on a voluntary basis by companies. To the contrary, companies should *only* respond to government requests for data that are legitimate and lawful. Where two governments have an MLAT, that should be the primary mechanism for handling government requests for data across jurisdictions. But where MLA is not legally required, companies must have transparent and consistent policies to guide their disclosure of customer data in accordance with local law enforcement requests. Clarity about what these policies are can reduce significant strain on the MLA system. Government officials in receiving countries say that they process a significant number of requests for MLA that could have been handled directly by the company under the company's own disclosure policy and in accordance with the law. To the extent that a company is legally permitted to turn data or metadata over to another country, it should follow the GNI Principles in order to ensure the protection of human rights.

IV. IMPROVING MUTUAL LEGAL ASSISTANCE TREATIES

The most pressing problems with the mutual legal assistance regime are matters of policy, not international law. States can always elect to provide MLA without a treaty, through letters rogatory and other forms of diplomatic assistance. But MLATs are the best way to outline a streamlined process for providing MLA while ensuring legal due process for users. Where two countries are not bound by a mutual legal assistance treaty, they ought to adopt one. These new agreements should reflect the principles outlined above, and there should be an MLAT for every state-to-state relationship, or at least every major region in the world.¹⁵ Meanwhile, existing MLATs need not be amended to reflect the above principles, but supplemental agreements could be created to incorporate these principles.

A. New Treaty Provisions

The UN Model Treaty on Mutual Assistance in Criminal Matters is a good starting place for incorporating modern MLA principles into international law. The treaty provides for the traditional elements present in an MLAT agreement: parties, scope, grounds for refusal, requested content, execution, limitation of use, confidentiality, and so on. But the UN model treaty should be updated to reflect the global spread of electronic communications and the impact this has had on law enforcement in the twenty-first century. In particular, existing MLATs should be revised to accommodate a broader, more clearly defined scope; greater transparency; increased efficiency; and more human rights protections.

1. Clearly Defined Scope

Most existing MLATs were designed to cover traditional telecommunications data. In order to dispel any doubt about their scope and applicability to modern cloud-based Internet services, MLATs

should include language that clearly indicates their coverage of current and future communications services – not just voice and text messages, but also machine-to-machine communications, location data, cloud services, and more. This should include language to incorporate existing international communications standards, leaving room for those standards to evolve without the need to update the treaty.

2. Greater Transparency

MLATs should require every signatory to identify a central point of contact for managing MLA requests, and should identify the government offices responsible for managing MLA. This should include a provision for reporting regularly about the nature, number, and location of requests received and granted. Governments should agree to issue transparency reports that outline the aggregate details of what data is being requested, by whom, and for what purposes.

3. Increased Efficiency

MLATs should identify a clear timetable for responding to requests for data or, at a minimum, benchmarks for processing MLA requests. For example, countries could outline that 50% of MLA requests must be handled within two weeks, and 95% of MLA requests must be handled within 30 days. There will be exceptional cases for which more time is needed, but the bulk of MLA requests should be processed in under a month. Each signatory should agree to appoint a central point of contact, someone who is responsible to the requesting state for updates and for meeting the compliance deadline. This would ideally also include a provision for a secure system for tracking the progress of MLA requests.

¹⁵ The United States has over 60 MLATs, but there are still significant gaps. For example, there is no MLAT between the United States and Vietnam. The United States might have valid human rights concerns about the criminal laws of Vietnam, but these should not prevent them from signing an MLAT with Vietnam. The agreement could specify, as many of them do, grounds for refusal to provide assistance, and could articulate human rights concerns.

4. Human Rights Protections

MLATs should include explicit provisions for human rights protections. Even where two states agree to share information about an investigation into activity that is clearly criminal in both countries, their MLAT should include an affirmative obligation not to share data that might lead to human rights abuses. In particular, these agreements should allow states to deny a request for MLA if they suspect that providing the data will lead to a violation of human rights under the International Covenant for Civil and Political Rights. That treaty, which has 74 signatories and 168 parties, guarantees a fundamental right to privacy (Article 17) and a right to free expression (Article 19), among other things.

B. Executive Agreements

There are serious barriers to reforming bilateral treaties, often including the need for domestic ratification by a legislature. But states can forge executive agreements or letters of exchange – often without legislative approval – in order to outline these and other principles – either as riders to a pre-existing MLAT or as a placeholder to guide law enforcement while a full treaty is negotiated. While executive agreements may not require legislative approval, they are considered binding under international law so they offer a compelling way for states to commit to modernize their MLA principles (or create new ones) without having to negotiate and ratify a new treaty.

V. ALTERNATIVES TO MLA

Some reforms are beyond the scope of fixing the existing MLA regime and call for creating an altogether new arrangement to handle lawful government requests for access to data across jurisdictions. These reforms are briefly discussed here in no particular order. The aim of this brief discussion is not to fully evaluate these reforms – a task that is beyond the scope of this report – but rather to show that there is no simple alternative to reforming the existing MLA regime. While each of these reforms may hold significant promise, each also poses a number of considerable problems, further underlining the need for immediate reform of the existing MLA regime as a matter of both law and policy.

A. Revising Domestic Laws

One of the more intractable problems faced by the existing MLA regime is the lack of common elements in different nations’ laws. Of course, it is unrealistic to expect that national laws will become perfectly harmonized, but domestic laws could be revised to ease some of the tensions in the MLA regime. For example, a lack of data preservation rules risks evidence being sought through the MLA process being deleted or unavailable when the order is served on a provider locally. Furthermore, even though national criminal laws differ widely from country to country, national legislatures can take steps to *clarify* how those laws interact with the nation’s treaty obligations under an MLAT. For example, some U.S. lawmakers have proposed revising the Electronic Communications Privacy Act (ECPA).¹⁶ If Congress revises ECPA, it should do so mindful of the fact that ECPA affects the MLA process.

For example, ECPA prohibits companies from revealing any content data without a warrant, whether the requesting body is U.S. law enforcement

or non-U.S. law enforcement, while permitting companies to voluntarily hand over metadata to non-U.S. law enforcement without a warrant. Reformers have argued that ECPA could be further revised to permit American companies to lawfully respond directly to valid requests from non-U.S. governments to disclose content data about non-U.S. users outside of the United States which are consistent with due legal process and the strictest interpretation of international human rights standards.¹⁷ (The European Union could enact similar reforms to the EU Data Protection Directive for “third countries” located outside of the EU.) This is a hugely controversial proposal and fraught with difficulties, not least the challenge of determining citizenship of users in a way that would allow a requesting authority and a company to assign constitutional and other legal protections. It would surely give companies leeway to comply with valid local law enforcement requests for data and provide a more timely process that relies on similar principles to MLA. But this proposal would put companies in the position of determining when to comply with law enforcement requests for access to user data, rather than having the two governments concerned agree about whether incoming requests satisfy the receiving country’s legal requirements. By comparison, reforming the existing MLA process—even radically so—would provide both the company and the user with greater legal certainty.

B. A New Treaty on Government Access to Data

Another alternative to bilateral MLA reform is for countries to forge entirely new international agreements to coordinate and streamline the process through which governments request access to data across jurisdictions.¹⁸ Over the long term, such an arrangement promises a number of advantages over

16 See The Law Enforcement Access to Data Stored Abroad Act (2014), available at: http://www.hatch.senate.gov/public/_cache/files/1f3692d5-f41f-4c73-acf2-063c61da366f/LEADS%20Act,%20September%2018,%202014.pdf.

17 See Professor Orin Kerr’s recommendation that congress reform ECPA to make disclosure to foreign governments about foreign customers voluntary but not mandatory. See Orin S. Kerr, *The Next Generation Communications Privacy Act*, 162 U. Pa. L. Rev. 373, 418 (2014).

18 Microsoft has articulated the boldest vision for such an agreement. See, e.g., Brad Smith, *Time for an International Convention on Government Access to Data*, Jan. 20, 2014, available at: <http://blogs.microsoft.com/on-the-issues/2014/01/20/time-for-an-international-convention-on-government-access-to-data/>.

the current, largely bilateral MLA arrangements.¹⁹ First, a plurilateral or multilateral treaty regime offers a fresh start to these issues, unencumbered by the stigma that MLATs carry in many law enforcement agencies. Second, a new treaty offers the chance to have a public, multistakeholder dialogue about how to craft a sensible regime that allows governments to prosecute crimes, while also enhancing individual privacy, human rights, transparency, and the rule of law. A treaty could set forth universal rules for government access to data—rules that would apply the same way everywhere—or at least the same in all the states that sign the treaty, rather than the hodgepodge arrangement currently in place. This is especially important because of the nature of today’s Internet services: the majority of government requests for users data are processed by a few countries that struggle to meet the demand. A multilateral treaty could authorize a more efficient process for managing this demand. Ultimately, many of the problems that the existing regime faces could theoretically be solved by a more tightly coordinated process that would improve uniformity, efficiency, consistency, and more. The appeal of a new international agreement is obvious.

However, there are costs associated with negotiating a new agreement. For one, it will take time. A significant portion of states may never see eye-to-eye on key MLA issues, so some states will likely be left out of any new arrangement. Moreover, there is a risk that pushing for a plurilateral or multilateral treaty in the context of MLA will allow states to argue that it makes little sense to invest in the existing regime if a new one is around the corner. This might allow them to avoid making improvements to the existing MLA process, including some of the most impactful and easy-to-implement reforms described above. Moreover, there is a risk that attempting to reach agreement among several states—depending on which states are involved—could actually lead to *lower* protections for human rights than provided under the current regime. Of course, many of these concerns can be mitigated by initially limiting the arrangement to a small number of likeminded countries with strong human rights records. A small club of likeminded states could

agree to a treaty that addresses a significant portion of the growing volume of data requests among such states. This would still leave the hard work of MLA reform for all of those states not covered by the new agreement.

C. An Independent Clearinghouse

Perhaps the most radical alternative to the existing MLA regime would be to create a clearinghouse to manage government requests for access to data across jurisdictions. In this scenario, a company might rely on the trusted third party to manage their voluntary disclosure regime. Rather than make case-by-case determinations of when to hand over data to a requesting government, a company could refer the government to the clearinghouse. This centralized body could be established to manage requests for information in a more uniform, more transparent, and more expedited manner than the MLAT process. Because of existing legal rules—such as the ECPA requirement that companies subject to ECPA not handover content without a warrant—the scope of the clearinghouse would likely be limited to requests for basic subscriber information and other limited metadata.

The appeal of a third-party intermediary for MLA requests is that it would solve the coordination problem of MLA reform. No single state has the incentive or ability to create a uniform system for automating and securely transmitting MLA requests between states (especially given the sensitive nature of these criminal inquiries). But a trusted third party might play such a role. This third party would have to operate under decision-making rules that are designed to: (i) prevent the disclosure of user information that could be used to violate human rights; and (ii) permit disclosure only when the requesting government has satisfied its own internal standards for making the metadata demand. If a country’s domestic law requires a court order to compel disclosure of metadata, it could not get around that requirement by making the request to the clearinghouse without satisfying its own legal processes first.

¹⁹ There are of course multilateral MLATs, like the EU agreement, but these create no centralized authority so they operate country-to-country.

But this idea is also hugely problematic. It would leave decision-making authority with a private body rather than with states, making it very difficult to get off the ground as a practical matter. States are unlikely to agree to any third party to handle their highly sensitive criminal inquiries, let alone the very same third party that other states use. Such a third party might become a target for surveillance or cyber attacks. Leaving this decision-making authority with a nongovernmental or intergovernmental body also raises serious concerns about due process, transparency, and more. By comparison, bilateral MLA reform holds enormous appeal.

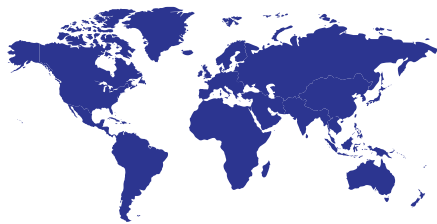


CONCLUSIONS

The MLA process is a reasonable and feasible system for addressing the ever-growing demands of law enforcement agents seeking access to data across jurisdictions. But MLA needs to be updated for the modern era. In particular, states must work together to create a secure electronic system for managing MLA requests; they must increase their staffing for MLA issues; and they must conduct thorough training at all levels of law enforcement to ensure that MLA requests are generated and processed as efficiently and securely as possible and in a way that respects international human rights. Over the longer term, a number of more significant reforms may be necessary, but these are three reforms that *states can implement in the next year* and that could have a significant positive impact on the functioning of the MLA regime.

This matters because when the MLA regime does not function well, some states resort to other means to get access to the data they seek. These tactics can include: threatening their citizens, mistreating companies, demanding data localization, and attempting to apply their laws extraterritorially. MLA reform is therefore not just a matter of enhanced law enforcement cooperation. Rather, it is a matter of crafting international policy that protects Internet users' fundamental human rights, allows companies to provide global services, and ensures that states can adequately protect their citizens from crime. Ultimately, the responsibility for crafting this policy lies with the only actors capable of doing so: the national governments that request and receive mutual legal assistance.

Global Network Initiative



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