

Procedural Report to the Ad Hoc Committee to Elaborate a Comprehensive International Convention on Countering the Use of Information and Communications Technologies for Criminal Purposes

Group D Informal Negotiations – Provisions on Procedural Measures and Enforcement

20th January 2023

Overview

The Co-Facilitators of Group D informal negotiations were mandated by the Chair of the Ad Hoc Committee, Ambassador Faouzia Boumaiza, to assist Member States in successfully carrying out the Programme of Work in a timely manner and explore options that will allow the Committee to achieve consensus on specific issues.

These informal negotiations focused on Articles 40 (Cluster 1), 47, 48 and 49 (Cluster 2) of the provisions on Procedural Measures and Law Enforcement under Chapter 3 of the Consolidated Negotiating Document (CND).

A total of four (4) sessions were convened, all of which were open to the participation of Member States and non-member observer States both in person and online through Microsoft Teams, in English only.

In addition, the Co-Facilitators sought to engage delegations bilaterally to obtain a greater understanding of the positions expressed in the room and to explore possibilities for compromise in order to reach consensus.

The Co-Facilitators also hosted a virtual multi-stakeholder engagement on the Articles in question to obtain their views as to what elements should be taken into consideration by Member States in drafting the Convention.

Summary of Discussions on the Articles

Article 40 – Jurisdiction

- At the outset, the proposal was made for Article 40 to be relocated to Chapter 2 on Criminalization, or as a stand-alone chapter, on the premise that this Article concerns the jurisdiction of a court to take a case. This proposal received the support of forty-eight (48) Member States during the informal negotiations. There were no objections to this proposal.
- The Co-Facilitators observed a clear divergence of views on Article 40(2) as a whole. These views were expressed in relation to the following:

1. Whether the elements contained in this paragraph were already adequately covered in Article 40(6);
 2. Whether the establishment of jurisdiction by a State Party over an offence committed against its national or a legal person, as well as an offence committed by a national or legal person who has habitual residence in its territory, as seen in sub-paragraphs 2 (a) and (b) is sufficient to address the concerns in Article 40(2)(e);
 3. Whether Article 40(2)(c) should be modified to bring it in line with language in UNTOC; and
 4. Whether Article 40(2)(e) should be deleted.
- A proposal was made to relocate Article 40(3) and 40(4) to the Article on Extradition, on the basis that both provisions treat with establishment of jurisdiction by a State Party over an offence when the alleged offender is present in its territory and it does not extradite the person. Twenty-nine (29) Member States requested that the original placement be retained, whereas no member state supported this proposal.

Article 47 – Real-time Collection of Traffic Data & Article 48 – Interception of Data

- During the deliberations on Articles 47, it was noted that Member States had considered this provision in conjunction with Article 48. Thirty-one (31) delegations called for the deletion of both Articles, while thirty-six (36) proposed the retention of Article 47 and thirty-eight (38) proposed the retention of Article 48.
- The Co-Facilitators noted that, on either side, the positions were conditioned against Article 42 on *Conditions and Safeguards*. In this regard, a proposal was made for the Co-Facilitators to discuss this Article in the informal negotiations. However, bearing in mind the mandate given to Co-Facilitators by the Chair of the Ad Hoc Committee, the proposal was brought to the attention of the Chair who subsequently announced her decision not to expand the agenda of the informal negotiations to include Article 42.

Article 49 – Admission of Electronic/ Digital Evidence

- Based on the views on Article 49 expressed during the first round of this session of the Ad Hoc Committee, and in an effort to maximise the time allotted for informal negotiations, the Co-Facilitators requested that delegations clearly indicate their desire to delete or retain the Article in the CND.
- Of the participating Member States, forty-nine (49) proposed deletion and five (5) proposed retention of Article 49.

- In addition, two (2) proposals were made for the inclusion of sub-paragraphs.

Multi-stakeholder Engagement

Article 40 – Jurisdiction

- On Article 40 on jurisdiction, **Electronic Frontier Foundation** stated that these provisions were too broad, could lead to extra-territorial application and contradicts Article 4 on Sovereignty. With this in mind, **ICC-UK** proposed a new paragraph stating that, *"Nothing in this Convention shall be construed to permit one State Party to exercise jurisdiction over a service provider or custodian of [electronic data] solely because individuals within the jurisdiction of that State Party use the applications or services offered by that provider or custodian."*
- Furthermore, **Electronic Frontier Foundation** expressed scepticism about the placement of this provision under Chapter 3 rather than Chapter 4 on International Cooperation.

Article 47 – Real-time Collection of Traffic Data & Article 48 – Interception of Data

- With the exception of **Rashtriya Raksha University**, all stakeholders who actively engaged in the discussion were of the opinion that Articles 47 and 48 on *Real-time Collection of Traffic Data* and *Interception of Data*, respectively, should not be included in the Convention as they would be highly intrusive. **The ICC-UK** indicated that these articles should not be included and should only be discussed when there is more clarity on Article 42 on *Conditions and Safeguards*.
- **Electronic Frontier Foundation** expressed the view that these Articles violate human rights and that this cannot be corrected by safeguards. Rather, the measure itself is problematic. The representative underscored that, in the event of retention of these Articles, Article 42(2) should state that such data must be "associated with specified information within the territory of the State" in order to justify indiscriminate data retention. It should also include safeguards such as "respect for international human rights law and the right to a fair trial and protection of privacy". It was also pointed out that data retention is illegal according to High Court Jurisdiction. Therefore, the Convention should not prescribe when it is legal. Apart from the matter of human rights, it was said that this poses a risk for implementation, as such intrusive provisions could be thrown out by the highest constitutional courts, even if they are ultimately retained in the Convention, limiting the overall implementation of these powers.
- **OHCHR** expressed scepticism about the inclusion of these Articles in the Convention. The representative acknowledged that while the measures can be powerful tools for law enforcement, they also lead to a profound breach of privacy and should not be

made mandatory in every country due to the far-reaching impact on human rights. The view was asserted that, if these powers were to be retained, it would be extremely important to limit them to serious crimes that fall within the scope of the Convention, and these measures would require clearly defined additional safeguards, independent private authorisation, limitation of scope, notification of data subjects, among others.

Article 49 – Admission of Electronic/ Digital Evidence

- Regarding Article 49, this provision was said to be too permissive and does not provide guarantees in relation to human rights safeguards and could include methods of data extraction that are very intrusive. Therefore, the whole article would need to be reworded or deleted altogether.

The Way Forward

The Co-Facilitators observed that Member States are taking a holistic approach to their analysis of Articles 40, 47, 48 and 49, bearing in mind interlinkages with other provisions in part one of the consolidated negotiating document (CND) as well as Chapters to be deliberated during the 5th Session of the Ad Hoc Committee.

In light of this, the decision was taken for the Co-Facilitators to conduct intersessional bilateral meetings with delegations and convene additional informal negotiations of the Committee at the 5th Session in Vienna in April 2023.