



Access Now statement to UN Ad Hoc Committee to Elaborate a Comprehensive International Convention on Countering the Use of Information and Communication Technologies for Criminal Purposes:

Item 6: Procedural measures and law enforcement

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11 January 2023

We are glad to hear the recognition expressed by many states that the issue of procedural measures can have deep significance on a range of vital interests - including their intrusion on privacy and other protected human rights.

As we have noted before, we believe that ideally, procedural measures under this proposed treaty should apply primarily only for those matters included in the Criminalisation chapter, and which we believe should include only the “core” cyber-dependent crimes.

We welcome the effort made to provide a baseline, cross-cutting conditions and safeguard in the form of Article 42 in the Consolidated Negotiating Draft (CND). This is a good start, the beginnings of a foundation that must be further worked on. Specifically, we believe that Article 42 should avoid using the phrasing “adequate protection of human rights and liberties” - the word “adequate” should be dropped. We strongly support the current requirements at the end of 42(1), requiring the incorporation of principles of proportionality, necessity, and legality, and the protection of privacy and personal data; this language must remain.

The internationally accepted principles of necessity and proportionality provide us guidance on how Article 42 should be further improved. We shall submit to the AHC our previously published universal implementation guide for the Necessary and Proportionate principles, which provides detailed guidelines and a checklist on how legal mechanisms for access to protected information for investigatory purposes and communications surveillance should operate in a manner respecting international human rights law. Correspondingly, Article 42 should require that government applications involving measures under chapter III include the legal authority involved, the necessity of a search or other procedural mechanism being

sought, and how the burden of proof has been satisfied. It should apply to all measures seeking the preservation, access to, search and seizure, or disclosure of protected information, and not be bound by legacy, outmoded legal approaches of different safeguards to metadata or content data.

We welcome recognition of the explicit reference to judicial or other independent supervision in Article 42(2). We recommend that 42(2) also require the conditions and safeguards to include reference to appeals and remedies, penalties for unlawful access, how emergency procedures would operate, as well as requirements around government transparency. Government transparency in the use of procedural measures and law enforcement mechanisms not only protects and furthers human rights; it provides useful information on what is and what is not working, and builds much needed trust and understanding.

We note that several states have called upon an expansion of the time period in Article 43 for which preservation of data can be requested. We admit our concern at the potential for abuse here, with preservation requests being transformed, for all purposes, into a general data retention mandate instead. At minimum, we would stress that any expansion of the time period for preservation of requests should be subject to safeguards and oversight, including demonstrating necessity, proportionality, and legality for such requests of an additional 90 day preservation period before an independent judicial oversight mechanism.

We are concerned at the overbreadth of Article 46(3) with respect to empowering authorities to order persons knowledgeable with ICT systems to provide information to facilitate electronic search and seizure measures. Proposed powers for law enforcement or other measures on cybercrime cooperation should not necessitate the undermining of encrypted communications or the introduction of general vulnerabilities into software systems; such vulnerabilities facilitate greater insecurity and unauthorized access.

We echo the strong concerns expressed by many delegates here around the proposed Articles 47, 48, 49, and believe that these measures should not be included in the treaty at present.

Thank you Chair.