



**THE FOURTH SESSION OF THE AD HOC COMMITTEE TO ELABORATE A
COMPREHENSIVE INTERNATIONAL CONVENTION ON COUNTERING
THE USE OF INFORMATION AND COMMUNICATIONS TECHNOLOGIES
FOR CRIMINAL PURPOSES**

**STATEMENT BY
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**ON BEHALF OF
THE CARIBBEAN COMMUNITY
(CARICOM)**

**AGENDA ITEM 6: PROVISIONS ON PROCEDURAL MEASURES AND
LAW ENFORCEMENT**

PLENARY (ROOM M)

January 11, 2023

Madame Chair, thank you for giving me the floor.

Jamaica is pleased to deliver this statement on behalf of the 14 Member States of CARICOM. In reviewing the three clusters of articles contained in the chapter on Procedural Measures and Law Enforcement, CARICOM has made the following observations:

Cluster 1 – Articles 40 to 42

Article 40 – Jurisdiction

Article 40 on jurisdiction is an extremely important provision within the context of the Convention. CARICOM notes that the language is taken from various sources.

Article 40 (1)(a to b), Article 40 (2) (a)(b) and (d) and Article 40 (3) are consistent with the UNCAC and other UN instruments, while Articles 40 (2) (c) and (2) (e) will require detailed deliberations.

In CARICOM's assessment, it would be necessary to consider whether there is a need to extend or qualify those provisions in the context of ICTs.

CARICOM is particularly concerned about Article 40 (2)(c) and Article 40 (2) (e), both of which are extremely wide in scope.

In fact, in relation to Article 40(2)(c), similar but much narrower provisions exist in the UNCAC and UNTOC. If you examine Article 42(2)(c) UNCAC and Article 15(2)(c) of the UNTOC, these provisions ground jurisdiction in a State notwithstanding the commission of the offence in another member state. However, this is done on the

limited basis that the extra-territorial offence consists of the participation in any offence contained in the Convention, and where such participation is committed outside the territory with a view to the commission of an offence of converting criminal property or acquiring or possession of criminal property within the state asserting jurisdiction.

Unlike the UNCAC and UNTOC, the CND provision allows a Member State to assert jurisdiction generally in circumstances where the offence is committed outside of the jurisdiction without the limitations that exist in UNCAC and UNTOC. CARICOM would recommend an adjustment to the wording of this provision to bring it in line with these two UN instruments. This is simply too wide.

CARICOM has similar concerns with Article 40 (2)(e) of the CND. This could prove problematic as a Member State could simply lawfully assert jurisdiction because the data belongs to its nationals. This could create grave uncertainty in respect of jurisdiction. Further dialogue is necessary to appreciate the workability of a provision such as this in the context of the new instrument.

Article 41 – Scope of Procedural Measures

With respect to Article 41 on the scope of procedural measures, there is need for discussion on the terminologies to be used and a determination of how expansive the scope of application will be.

In examining Article 41 (1), CARICOM recommends that the powers and procedures which are provided for in this chapter should be

applied to criminal investigations or proceedings and not “specific” criminal investigations or proceedings which could be considered too prescriptive and create a requirement to establish a list of offences.

CARICOM supports Article 41(2) which addresses the scope of procedural measures for the purposes of interception.

The CND is largely consistent with CARICOM's submission. However, Article 41 (1) of the CND speaks to the establishment of the powers and procedures for “the purpose of specific criminal investigations or proceedings”. CARICOM did not make such a qualification in terms of it being applicable to specific offences. A view could be taken that if the term “specific criminal investigations” is used, we run the risk of the instrument being too prescriptive and then the instrument will have to establish a list of such offences.

Three options were presented in article 41(2)(c) in relation to the collection of evidence in electronic form. CARICOM's preference is for “a criminal offence” so that the paragraph would read –

“c) The collection of evidence in electronic form of a criminal offence.”

This would allow Member States (in their own domestic legislation) to determine the breadth of the applicability of these provisions.

CARICOM supports the CND proposal of Article 41(3).

Article 42 – Conditions and Safeguards

CARICOM can support Article 42. However, the expressed reference in the CND to the protection of privacy and personal data is concerning and we are of the view that it should not be included within this article for the following reasons;

1. The protection of privacy is already included within the rights and fundamental freedoms arising from obligations under applicable international human rights law and liberties;
2. The highlighting of this protection may serve to elevate this right and protection above others. There are other rights which are captured within international instruments that are also as important and are not specified and expressly mentioned – all of which must be balanced against the interest of law enforcement in being able to justifiably exercise the powers contained within the chapter on procedural measures with a view to investigate and collect digital/ electronic evidence.

Cluster 2 – Articles 43 to 49

Article 43 – Expedited Preservation of [stored computer data] [accumulated digital information]

CARICOM strongly supports Article 43 as the preservation of data is a critical investigative tool given the transient nature of computer material.

Article 45 – Production Order

CARICOM supports Article 45 which deals with production orders. CARICOM recommends that Article 45 (1)(a) includes legal persons as obtains in Article 43 which deals with the preservation of data.

CARICOM can also support Articles 44, 46, 47 and 48.

Article 49 – Admission of [digital] [electronic] evidence

This provision could prove quite problematic. The admissibility of evidence is the prerogative of the court, guided by the rules of evidence. An international instrument is an inappropriate forum to legislate on an issue that is ultimately determined by a Judge being guided by the domestic law. As such, CARICOM is unable to support this provision.

Cluster 3 – Articles 50 to 55

Articles 50 to 55 are consistent with other UN treaties and can be supported by CARICOM in principle without prejudice to further discussions to ensure their applicability to this instrument.

I thank you, Madame Chair.