Derechos Digitales and the Association for Progressive Communications

Contribution to the Ad Hoc Committee to Elaborate a Comprehensive International Convention on Countering the Use of Information and Communications Technologies for Criminal Purposes - Fifth Session

Introduction

Derechos Digitales is a non-profit non-governmental organisation founded in 2005, with ECOSOC consultative status. We are dedicated to the defense and promotion of human rights in the digital environment, especially those related to freedom of expression, privacy and access to knowledge and information.

The ***Association for Progressive Communications (APC)*** is an international networked organisation dedicated to empowering and supporting people working for peace, human rights, development and protection of the environment, through the strategic use of information and communication technologies (ICTs). APC has 62 organisational members and 29 associates active in 74 countries, mostly in the global South. We work to build a world in which all people have easy, equal and affordable access to the creative potential of ICTs to improve their lives and create more democratic and egalitarian societies. APC was granted category one consultative status to the United Nations Economic and Social Council (ECOSOC) in 1995.

Derechos Digitales and *APC* welcome the opportunity to contribute to this Ad Hoc Committee Fifth Session. Both organizations work to protect and promote human rights, online and offline. In this sense, we expressed before in this process our concerns about the abusive use of cybercrime national legislation as a tool to undermine human rights, targeting civil society organizations, human rights defenders, digital security researchers, whistleblowers and journalists.[1] From a global South perspective, we have seen cybercrime legislation used to criminalize legitimate activities, to silence dissent and women that want to speak up, to

[1] Open letter to UN General Assembly: Proposed international convention on cybercrime poses a threat to human rights online. https://www.apc.org/en/pubs/open-letter-un-general-assembly-proposed-international-convention-cybercrime-poses-threat-human.
Derechos Digitales Submission to the 2nd Session of the Ad Hoc Committee. https://www.unodc.org/documents/Cybercrime/AdHocCommittee/Second_session/Derechos_Digitales.pdf .
Joint Submission to the 4th Session of the Ad Hoc Committee. https://www.unodc.org/documents/Cybercrime/AdHocCommittee/4th_Session/Documents/Multi-stakeholders/CNDletter-20.12.2022.pdf

threaten freedom of expression and to validate state surveillance, which indicates that we are not talking just about potential risks, but instead a reality[2].

Acknowledging the importance of protecting human rights in the digital realm, we recall the need to reinforce the necessary safeguards to avoid the possibility of state abuse through broad regulations that legitimize cyber surveillance and censorship in general. Hence, together with other civil society organizations, we have been calling this Ad Hoc Committee to ensure that every normative proposal is consistent with the obligations assumed by member states in international human rights law and to oppose every proposal contrary to it.

Both digital spaces and criminal systems are inserted within societies that account for pre-existing structural inequalities. Neither the digital technologies nor the laws and norms that govern them are neutral: they have the potential to promote the exercise of human rights, but they can also perpetuate and worsen structural inequalities. Bearing this in mind, we believe that a central element of this future convention should be the integration of a gender perspective.[3]

In the most recent UN General Assembly Resolution (A/RES/77/211) on privacy in the digital age, the assembly recognizes the importance of the promotion and respect for the right to privacy as a way to prevent gender-based violence as well as any form of discrimination which can occur in digital and online spaces. In fact, it encourages to mainstream a gender perspective in the conceptualization, development and implementation of digital technologies and related policies[4].

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[2] An example of this is the Nicaraguan legislation on cybercrime (Law No. 1042 from October 2020) that does not comply with requirements of legality and proportionality in accordance with international human rights law. For that reason, recently, the Inter-American Commission on Human Rights has urged the Nicaraguan State to "Derogate and/or adapt the laws approved to ensure their accordance with human right's standards." See more at:
https://www.oas.org/es/cidh/informes/pdfs/2021_Nicaragua-ES.pdf
Civil society organizations also raised concerns regarding, for example, the Cybercrime Prevention Act of 2012 in the Philippines that contain broad and catch all provisions that have been used to silence journalists, bloggers, and internet users or the Prevention of Electronic Crimes Act (PECA) of 2016 in Pakistan that that has been used against women as a silencing tactic when they speak up about experiences of harassment. For example, see more at:
https://www.apc.org/sites/default/files/Philippines_report_2020.pdf and
https://www.hrw.org/news/2022/02/28/pakistan-repeal-amendment-draconian-cyber-law

[3] We understand gender as the set of ideas, representations, practices and social prescriptions elaborated based on the anatomical difference between the sexes. Gender is a powerful principle of social differentiation and a producer of discrimination and inequalities. The ideas and practices of gender hierarchise human beings socially, economically and legally.
https://www.apc.org/sites/default/files/gender-cybersecurity-policy-litreview.pdf

[4] General Assembly. A/RES/211. Resolution adopted by the General Assembly adopted on 15 December 2022, parra. 11. Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N22/762/14/PDF/N2276214.pdf?OpenElement

Despite the reference to mainstreaming gender perspectives, for instance in articles 87(2), "n", and article 90(2), "g", we consider that the Consolidated negotiating document (A/AC.291/19) to be discussed in the fifth session of the Ad Hoc Committee, requires greater safeguards regarding human rights and the integration of a gender perspective across the articles.

It is of paramount importance to ensure that the articles related to international cooperation, exchange and processing of data, as well as investigation techniques, do not include broad measures or vague terms. These articles must be strictly in accordance with human rights standards, especially regarding principles of legality, necessity and proportionality. For example, it is also necessary to consider the great risk of massive cyber-surveillance and its potential effects to human rights that could be allowed with broad criminal frameworks that enable data exchange between state entities without effective human rights guarantees and oversight. These two concerns are better detailed below.

The need to strengthen gender considerations in the Convention

Gender mainstreaming is a strategy for making women's as well as men's concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of policies and programmes in all political, economic and societal spheres so that inequality is not perpetuated. The ultimate goal of gender mainstreaming is to achieve gender equality.[5]

It is essential that international instruments mainstream gender to ensure that norms contribute to the fulfillment of human rights and gender equality. In the area of cybercrime, and considering the most studied theories in criminology, unfortunately the gender perspective is almost invisible[6]. Therefore, there is a need to include gender perspectives to cybercrime discussions and regulations to avoid exacerbating inequalities that affect historically excluded groups such as women and LGBTQIA+ people.

Gender equality is enshrined in the **Charter of the United Nations** and confirmed in many other international[7] and regional instruments[8] that establish the obligations of States to

[5] General Assembly. A/52/3. Report of the Economic and Social Council for 1997. Available at: https://www.un.org/womenwatch/daw/csw/GMS.PDF

[6] Lazarus, S. (2019). Just married: The synergy between feminist criminology and the Tripartite Cybercrime Framework. *International Social Science Journal*, issj. 12201. Available at: https://doi.org/10.1111/issj.12201

[7] For example, the Convention on the Elimination of All Forms of Discrimination Against Women https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-elimination-all-forms-discrimination-against-women

[8] Such as the Inter-American Convention On The Prevention, Punishment And Eradication Of Violence Against Women "Convention Of Belem Do Para". http://www.oas.org/juridico/english/treaties/a-61.html

combat all forms of discrimination against women, and to protect their human rights, as well as commitments to advance towards gender equality.

Since the landmark Human Rights Council resolution (A/HRC/RES/38/5) on preventing and responding to violence against women and girls in digital contexts[9] and the UN Special Rapporteur on Violence Against Women thematic report on violence facilitated by ICTs against women and girls[10] from 2018 there is an increasing recognition of the intersections between technology and women's rights and the urgent need for states' action on this.

The **Convention on the Elimination of All Forms of Discrimination against Women** has been progressively analyzed by the Committee on the Elimination of Discrimination against Women, which has referred to the issue of ICT-facilitated violence against women in several general recommendations and concluding observations. In its **General Recommendation No. 35** on gender-based violence against women,[11] the Committee clearly stated that the Convention is fully applicable to technological environments, such as the internet and digital spaces, where contemporary forms of violence against women and girls are often committed in their redefined form.

For the integration of the gender perspective to be effective, it must necessarily be intersectional, which implies considering how the multiple elements of our identities such as social class, race, ethnicity, sexual orientation, gender expression among others, jointly interact with gender to produce patrons of exclusion. From an intersectional perspective, social problems have become more complex since the analysis considers multiple power systems that were seen separately until then.[12] Recently, as a result of the discussions brought forward in the UN **Commission on the Status of Woman (CSW67)**, in the document of agreed conclusions, the Commission recognizes that the multiple and interrelated forms of discrimination and marginalization are obstacles to the achievement of gender equality and the empowerment of all women and girls in the context of innovation and technological change.[13]

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[9] HRC38. A/HRC/RES/38/5. Accelerating efforts to eliminate violence against women and girls: preventing and responding to violence against women and girls in digital contexts. https://undocs.org/A/HRC/RES/38/5

[10] Ibidem.

[11] UN - Committee on the Elimination of Discrimination against Women. General Recommendation No. 35 on gender-based violence against women, updating General Recommendation No. 19. UN Doc. CEDAW/C/GC/35. 26 July 2017.

[12] APC. A framework for developing gender-responsive cybersecurity policy: Literature review. p. 5 https://www.apc.org/sites/default/files/gender-cybersecurity-policy-litreview.pdf

[13] CSW67 Agreed Conclusions. Innovation and technological change, and education in the digital age for achieving gender equality and the empowerment of all women and girls (advance unedited version, 10 march 2023). Available at: https://www.unwomen.org/sites/default/files/2023-03/CSW67_Agreed%20Conclusions_Advance%20Unedited%20Version_20%20March%202023.pdf

Current best practices in gender mainstreaming are "dual" or "multiple": the gender perspective is incorporated into all aspects of policy and program development and pursued as a distinct and independent objective. A good example of gender mainstreaming is the **2030 Sustainable Development Goals**, which, in addition to having a specific goal on gender equality and the empowerment of women and girls (SDG 5), the General Assembly Resolution A/RES/70/1 establishes the systematic incorporation of the gender perspective throughout the entire SDG agenda.

Following the analysis conducted by Chatham House, cybercrime practices, policies and laws that do not take gender into account - as is the current norm in most national jurisdictions - are therefore gender-blind.[14] They ignore important differences in the capabilities, needs and priorities of women in all their diversity and non-binary people when they operate within the criminal justice system and/or experience vulnerability to cybercrime. Failure to incorporate a gender intersectional perspective may bring with it the risk of festering inequalities leading to new forms of exclusion.

It is important that a gender analysis is applied on the articles discussed during this fifth session. Additionally, it is crucial to include provisions that explicitly state that the application and interpretation of the treaty must comply with human rights standards and promote gender equality.

We strongly recommend to include in the **Preamble** and in **Article 5** the need to mainstream gender across the convention as a whole and through the articles in the efforts to prevent and combat cybercrime. Including such a perspective will allow the Convention to address the specific needs and priorities of women and people of diverse sexualities and gender expressions and the differentiated impacts of cybercrime on the basis of gender in conjunction with other intersectionalities. This will lead to a more effective implementation of the convention, as well as provide special protection guarantees to groups in vulnerable situations.

International cooperation and data transfer

Taking into account that the articles to be discussed in this fifth session of the Ad Hoc Committee are directly related to **Art. 42** on conditions and safeguards, it is important to mention that, while specific references to safeguards related to judicial intervention/supervision and access to justice should be included —such as the need for prior judicial authorization, explicitly guaranteeing the right to an effective remedy that provides mechanisms to challenge measures that affect privacy, as well as mechanisms of transparency

[14] Millar, Katharine. What Does it Mean to Gender Mainstream the Proposed CybercrimeConvention? Contribution to the AHC. Available at: https://www.chathamhouse.org/sites/default/files/2022-12/2022-12-21-Gender-mainstreaming-and-the-proposed-cybercrime-convention.pdf

and accountability of States—; it is essential that within the references to the rights to be protected, specific mention is made to gender issues —including sexuality, gender identity and gender expression— as private personal data requiring special protection. This, while generating specific and strengthened privacy protections for forms of communication such as medical, legal, religious or public interest communications, would also ensure that the article adequately safeguards individuals of all genders in situations of vulnerability. [15]

This is especially important when considering **Chapter 5, Cluster 1**, specifically **Articles 56 and 57** (general principles and protection of personal data) as broad powers to exchange information and data are granted to states without sufficient limitations aimed at protecting the integrity and lives of people and communities in vulnerable situations. These types of broad powers could be problematic, for example, for people with diverse gender identities, expressions and sexual orientations, both in general and in jurisdictions where access to abortion and/or expression of LGBTQI+ identities are not currently legally permitted, generating great risks of criminalization and surveillance.

In terms of data transfer, it is important to remember that States are subject to a series of international obligations related to privacy and data protection, including the protection of personal data, the right to informational self-determination and the inviolability of communications. In this respect, we recommend member states to take the example from the Esperanza Protocol[16] on recommendations for criminal prosecutions, international standards require a clear regulatory framework and a strong supervisory framework to monitor the collection, storage, sharing and access to information[17]. Such legislation should include independent oversight mechanisms and the right to effective remedies. This should therefore be a prerequisite for data sharing to take place.

States should also review their existing laws, policies and practices related to data protection to ensure that they comply with human rights standards. Therefore, data exchange should also be subject to a necessity and proportionality test on a case-by-case basis, which should be specified in the article in question.

In turn, provisions should be added specifying that data exchange and transfer, as well as extradition, are carried out within the framework of the rule of law, human rights and subject

[15] See also: OHCHR. Contribution to the 5th Session of the Ad Hoc Committee. https://www.unodc.org/documents/Cybercrime/AdHocCommittee/5th_session/Documents/OHCHR_submission_5th_session_Ad_Hoc_Committee_Cybercrime.pdf

[16] The Esperanza Protocol (PLE) addresses threats faced by human rights defenders, journalists, and others providing useful guidance for government officials, prosecutors, judges, human rights defenders (HRDs), journalists and others on prosecution and judicial processes based on international human rights standards. It was developed by CEJIL with the active participation of more than 50 human rights experts. Available at: https://esperanzaprotocol.net/about-the-esperanza-protocol/

[17] Esperanza Protocol. Available at: https://esperanzaprotocol.net

to an intersectional gender analysis to identify the risks to individual security (in particular for women, non-binary and LGBTQI+ persons) that such a procedure entails.

Additionally, States should have in place processes for regular evaluation, monitoring and auditing of the safeguards adopted concerning the protection of data they collect and store as part of cybersecurity investigations. Data collection never takes place in a gender-neutral environment: the leaking of personal information or large databases pose gendered and sexualized risks, as women and, in particular, lesbian, gay, bisexual, intersex and transgender (LGBTQI+) individuals may suffer stigmatization, marginalization and violence following the exposure of private information related to their sexual and reproductive history, sexuality and/or gender identity.[18]

The recommendations stated are in line with UN resolutions regarding privacy matters. For example, the recent resolution referred above emphasizes that States must respect international human rights obligations regarding the right to privacy when they collect personal data, when they share or otherwise provide access to data collection through, inter alia, information -and intelligence- sharing agreements and when they require disclosure of personal data from third parties, including business enterprises[19].

Regarding the principles and procedures relating to **mutual legal assistance**, it is important to include provisions specifying that States have the possibility to refuse the request for mutual legal assistance if there are serious doubts that the request may be based on discrimination based on gender or sexual orientation, as well as in case the offense is a political offense or an offense related to a political offense or when the execution of the request may prejudice, inter alia, the protection of human rights or fundamental freedoms and gender equality.

Multiple investigatory powers: risks of legitimizing surveillance

[18] For example, in July 2016, the municipality of São Paulo experienced a data breach exposing the personal data of an estimated 650,000 patients from the Brazilian public health system. This massive data breach included names, addresses and medical information such as abortion cases and pregnancy stages. Another massive data breach occurred in Chile that same year where a public hospital suffered a cybersecurity failure and made available to their workers and even to the general public more than three million health records including the names, ID numbers and addresses of women and girls who asked for the morning-after pill in a public hospital and people living with HIV. See more in Gender perspectives on privacy: Submission to the United Nations Special Rapporteur on the right to privacy. Association for Progressive Communications (APC). October 2018: https://www.apc.org/sites/default/files/APC_submission_Gender_Perspectives_on_Privacy_Oct_2018.pdf

[19] General Assembly. A/RES/211. Resolution adopted by the General Assembly adopted on 15 December 2022, pag. 5. Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N22/762/14/PDF/N2276214.pdf?OpenElement.

In the digital age, the right to privacy has become a gateway to the protection of other rights[20] and therefore requires strong protection as "a necessary precondition for the protection of fundamental values, including liberty, dignity, equality...", and "an essential element for democratic societies..."[21]. The right to privacy can be restricted only in "a carefully circumscribed manner"[22]. Interference with the right to privacy is permissible under international human rights law as long as it is not arbitrary or unlawful. Thus, their use must be justified on the basis of effectiveness in the pursuit of a legitimate aim and strict compliance with the principles of legality, necessity and proportionality.

With respect to state enforcement of surveillance measures, the **UN Human Rights Committee's General Comment 16** on **Article 17 of the ICCPR** requires that "relevant legislation should specify in detail the precise circumstances in which such interference may be permitted" and "should be made only by the authority designated by law, and on a case-by-case basis." Moreover, the arbitrary collection of personal information by the government constitutes a highly intrusive act that "violates the rights to privacy and freedom of expression and may contradict the principles of a democratic society"[23] .

The recent UN's General Assembly's resolution[24] on privacy in the digital age stressed that unlawful or arbitrary surveillance and/or interception of communications, as well as the unlawful or arbitrary collection of personal data violate the right to privacy, can interfere with the right to freedom of expression and to hold opinions without interference, the right to freedom of peaceful assembly and association and the right to freedom of religion or belief and may contradict the tenets of a democratic society. In fact, the resolution specifically states that this includes when undertaken extraterritorially or on a mass scale. In this sense, it's important to note that one of the recommendations set forth in that resolution is to develop or maintain, in this regard, preventive measures and remedies for violations and abuses of the right to privacy in the digital age that may affect all individuals, including where there are particular effects for women[25].

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[20] UN. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye, A/HRC/29/32, May 20, 2015. Available at: https://www.undocs.org/es/A/HRC/29/32

[21] UN. Report of the Special Rapporteur on the right to privacy, A/HRC/40/63, October 16, 2019. Available at: https://undocs.org/es/A/HRC/40/63

[22] id.

[23] UN - General Comment 16. Human Rights Committee. Art. 17 right to privacy. 32nd session U.N. DOC. HRI/GEN/1/ REV

[24] General Assembly. A/RES/211. Resolution adopted by the General Assembly adopted on 15 December 2022. Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N22/762/14/PDF/N2276214.pdf?OpenElement

[25] General Assembly. A/RES/211. Resolution adopted by the General Assembly adopted on 15 December 2022, par. 7 J . Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N22/762/14/PDF/N2276214.pdf?OpenElement

A new treaty should not serve as a validation of intrusion and surveillance practices harmful to human rights. We call on this Ad Hoc Committee to integrate respect for human rights into any proposal relating to cybercrime investigation and international cooperation, requiring compliance with principles of legality, necessity and proportionality, and judicial review, prior to any intrusive measures.

In provisions relating to access to stored computer data (**article 70**), real-time collection of traffic data (**article 73**) and interception of content data (**article 74**), it is important to clarify that the provision of mutual legal assistance must be limited to what is established by international human rights law, international treaties and domestic legislation in order to provide greater protections for the right to privacy.

From a gender perspective, it is also important to consider that there is a significant risk of overuse or misuse of law enforcement powers under this chapter of the consolidated negotiating document to collect data on a wide range of vulnerable or high-risk individuals or communities. Women and other marginalised groups are impacted by this in more severe ways due to their position in society - exposing sensitive information relating to personal health, sexuality and gender identities and expressions. These provisions could be used, for example, to monitor location data and/or the use of fertility tracking apps by people who may become pregnant to determine proximity to sexual and reproductive health services.

Article 78 is specially concerning given it includes broad and open-ended capabilities through undefined terms both in terms of predictability (a key aspect of the principle of legality) and in terms of public scrutiny and accountability. In line with the **Office of the United Nations High Commissioner for Human Rights** submission, the notion "special investigative techniques" opens the gate for the use of any surveillance technique, including those that may be prohibited under international human rights law, such as government hacking[26]. As such, a priori this provision fails to comply with the requirements of legality, necessity and proportionality under international human rights law. Therefore, *we recommend that the article be deleted completely*.

In the same manner, **Article 87, "g",** on training and technical assistance poses the same risks related to surveillance as it includes a recommendation to States to implement training programmes with "*modern police equipment and techniques and their use, **including electronic surveillance**, controlled deliveries and undercover operations*" without setting specific limitations on the application of those activities. This wide range of powers to use diverse techniques and equipment could generate the legitimization of interference with the

[26] OHCHR. Contribution to the 5th Session of the Ad Hoc Committee. Available at: https://www.unodc.org/documents/Cybercrime/AdHocCommittee/5th_session/Documents/OHCHR_submission_5th_session_Ad_Hoc_Committee_Cybercrime.pdf

right to privacy which is not permitted under international human rights law. Therefore we recommend the deletion of that item.

In this regard, it is crucial to emphasize that the development and deployment of surveillance technologies may hinder gender equality. Any potential convention should detail the robust procedural and human rights safeguards governing criminal investigations conducted under such an instrument. and must ensure that any interference with the right to privacy complies with the principles of legality, necessity and proportionality, including by requiring independent judicial authorization of surveillance measures. We also draw your attention to the recommendations of the **United Nations High Commissioner for Human Rights** on the need to control the production and sale of surveillance systems that do not respect human rights, as well as to call for a moratorium on those that do not meet the basic criteria[27].

It is important to recall that following the revelations of the use of Pegasus malware through the investigation by Forbidden Stories and Amnesty International[28], which showed that the malware was being used to monitor journalists and human rights defenders, a group of **UN experts** called on all states to impose a global moratorium on the sale and use of surveillance technologies until robust regulations are in place to ensure their use under international human rights standards[29].

Given these global trends on the increase of different surveillance techniques, it is especially important to ensure that the convention does not enable surveillance practices that already have harmful consequences on fundamental rights and have a differentiated impact on women and vulnerable groups. As we have stated on numerous occasions[30], the fight against cybercrime must not come at the expense of fundamental rights, gender equality and dignity of the people whose lives will be affected by this proposed convention. States must ensure that any proposed convention on cybercrime is consistent with their human rights obligations, and must oppose any proposed convention that is inconsistent with those obligations.

Civil society participation in technical assistance

The participation of organized civil society is of utmost importance for the discussion of this Convention in general, and specifically, in relation to technical assistance. First of all, it is

[27] UN News. Urgent action needed over artificial intelligence risks to human rights. Available at: https://news.un.org/en/story/2021/09/1099972
[28] Available at: https://www.amnesty.org/en/latest/research/2021/07/forensic-methodology-report-how-to-catch-nso-groups-pegasus/
[29] Available at: https://www.ohchr.org/en/press-releases/2021/08/spyware-scandal-un-experts-call-moratorium-sale-life-threatening?LangID=E&NewsID=27379
[30] Available at: https://www.derechosdigitales.org/wp-content/uploads/Joint-NGO-letter-to-UN-AHC-on-Cybercrime-20211221_Copyedited-FINAL-ES.pdf

important to keep in mind that the participation of civil society is relevant to enhance and enrich the debates, as well as to provide key and updated information on many technical issues related to the digital environment. We strongly call for a meaningful participation that guarantees the inclusion of different expertises as well as representation for women and other marginalised groups.

In this regard, it is important to mention that although we welcome the inclusion of **article 88** and its content, we believe that the participation of society should not be limited to a specific article, but rather incorporated in a cross-cutting manner in all tasks related to technical assistance, taking into account the multiplicity of expertise needed to address these issues, as well as the states' obligation under the principle of transparency and access to information. We believe that this Convention must continue to build open spaces and different processes to ensure meaningful participation, and the facilitation of that participation through transparency, information and resources.

We also recommend going beyond articles **13 and 63, paragraph 6**, of the **United Nations Convention against Corruption** (UNCAC), so that civil society organizations can mainly provide information in order to better understand local challenges and realities, identify relevant issues, promote awareness-raising processes among authorities, anticipate problems, as well as work together with other stakeholders in capacity building efforts.

In addition, while we understand the importance of **training and technical assistance**, mainly in relation to developing states, civil society actors specialized in human rights in general and digital rights in particular should be included in the processes.