
Submission to the 6th session of the Ad Hoc Committee (AHC) on cybercrime: gender considerations on the convention draft text

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This submission provides a commentary on the draft [text](#) of the convention, published in May 2023 in preparation for the sixth session of negotiations to be held in New York in August 2023. This submission focuses on the proposed role of gender mainstreaming in the draft text and broader gender considerations regarding other aspects of the text. It builds on [previous submissions](#) and [briefing papers](#) on the same topic, prepared by Chatham House for earlier sessions and available online.

Although the focus of this submission is on specific recommendations for gender mainstreaming and gender equality in the convention, this submission should be read in conjunction with other submissions by civil society organizations throughout the process on the importance of human rights safeguards and provisions in the convention. Intersectional gender equality is a human right, and so the protection of human rights in general advances gender equality.

The submission provides recommendations regarding six aspects of the convention text:

- the general commitment to gender mainstreaming;
- the criminalization of non-consensual intimate image dissemination (NCIID);
- conditions and safeguards on procedural measures and law enforcement;
- language consistency in the extradition article in international cooperation;
- preventative measures on gender-based violence;
- gender considerations in technical assistance.

Throughout this document, we propose amendments to the draft convention text that we believe will strengthen its commitment to gender mainstreaming and gender equality. These recommendations are designed to act purely as policy guidance for Member States to incorporate into their own positions according to relevant domestic and international law, rather than as legal opinion.

Commitment to gender mainstreaming

The new preamble of the draft text includes a clause “affirming the importance of mainstreaming a gender perspective in all efforts to prevent and combat the offences covered by this Convention” (10). This clause replaces a previous reference to gender mainstreaming in the Convention’s general provisions (Article 5.2) of the consolidated negotiating document (CND), which required States to make efforts to “mainstream a gender perspective and to take into consideration the special circumstances and needs of vulnerable groups, in particular women, children, and the elderly” under the article on human rights.

While it remains highly positive that gender mainstreaming features explicitly, constituting an important step towards gender equality, our recommendation is that it should be reinstated in the main convention text. The preamble is not strictly binding, offering context to and guiding the interpretation of the convention text, so moving gender mainstreaming to the preamble weakens this commitment. Reinstating the Convention’s commitment to mainstreaming a gender perspective under the article on human rights

will unequivocally affirm that gender equality is a human right and ensure that the commitment to gender mainstreaming is legally binding upon Member States, even if the obligation is a best effort one.

Furthermore, the preamble text (like Article 5.2) concerns only “efforts to prevent and combat” cybercrime. In previous analyses, we argued that this is an unduly narrow scope, as gender mainstreaming should pertain to the entire convention. We also argued that the original wording of Article 5.2 risked incorrectly positioning people, particularly women, as inherently vulnerable. The revised language we propose below avoids this risk, and also aligns this article with Article 53.3.f discussed below.

More generally, we would recommend reinstating in Article 5 of the Draft Convention a reference to applicable human rights obligations and listing specific examples of international human rights instruments that apply to most States, such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

Recommendation: rewrite Article 5 and reinstate Article 5.2 from the CND so that Article 5 reads:

Article 5. Respect for human rights

1. States Parties shall ensure that the implementation of their obligations under this Convention is consistent with **applicable** international human rights law **such as the** Universal Declaration of Human Rights and the **International Covenant on Civil and Political Rights**.

2. States Parties shall make efforts to mainstream a gender perspective and to take into consideration the special circumstances and needs of persons in vulnerable situations, particularly women, children, people of diverse gender identities, expressions, and sexual orientations, elderly people, and people with disabilities, in measures undertaken under this convention.

Criminalization: non-consensual dissemination of intimate images

In the provisions on criminalization (Chapter 2), the draft text has retained an article on the non-consensual dissemination of intimate images (NCIID). Gender considerations are highly relevant to this article because women and people of diverse gender identities, expressions and sexual orientations experience particular vulnerabilities to this form of online harm. The specific recommendations here are contingent on sufficient safeguarding of human rights and protections against misuse in the convention overall. In this regard, our position remains that the best way to preserve human rights, including gender equality, is to focus on the “core” offences against the confidentiality, integrity, and availability of computer systems and data, for reasons explained in [earlier](#) papers. However, we appreciate that this has been a point of significant contention throughout the negotiations, and we recognize the arguments for limited criminalization put forward by many Member States and non-State participants. The recommendations here are therefore proposed in the context of the likely inclusion of this article in a future treaty.

The scope of the article on NCIID (Article 15) has been amended from the CND. It no longer contains a requirement for “intent to cause serious emotional distress”. In previous submissions, we recommended the removal of this requirement because it raises the bar for criminalization and leads to subjective national interpretations of what constitutes emotional distress. However, the article now includes a clause (15.3) saying States “may require the intent to cause harm before criminal liability attaches”. This clause may also make it more difficult for States to prosecute and convict those who commit these crimes, because it increases the difficulty of proving intent, encourages a culture of impunity, and discourages victims from coming forward.

The new draft also omits a clause in the CND that specifies the scope of the NCIID as it applies to a child, which states that “a child cannot consent to the posting of an intimate image of which he or she is the

subject”. Reading the NCIID article in conjunction with the CSEA articles (Articles 13 and 14 in the draft text, articles 18-21 in the CND) shows that the definitions and terms used in these articles might conflict or overlap for similar offences covered under NCIID. CSEA is specifically defined in Article 13.2 in different terms to the definition of “intimate image” in Article 15.2. Care should be taken to ensure that CSEA is criminalized under Articles 13 and 14, rather than Article 15, and the additional clause removing the possibility of consent by a child helps ensure this.

In addition, there are several elements of this article that require further scrutiny during both the negotiation of the convention text and its later implementation. First, like other articles in the chapter on criminalization, it is crucial that the drafting ensures legitimate activities are not unduly criminalized: for example, other multistakeholder organizations and Member States have argued that the condition of “intentionally and without right” in other articles is not sufficient to exclude good-faith cybersecurity researchers from potential criminalization. While such exemptions for security research are not relevant to this article, we are mindful that there may be situations where intimate images are shared for a legitimate purpose, and so recommend following the consensus decision on the best way to exclude such purposes throughout the criminalization chapter, ensuring consistency in language.

Second, this article addresses only one kind of gendered cyber harm relating to the dissemination of intimate images, and we stress the importance of considering NCIID as part of a broader range of gendered harms that can result from similar offences. In some cases, such as “upskirting” (taking a picture or video under another person’s clothing without their permission), the harm starts with the production of the image itself. In other cases, such as sending unsolicited pictures of genitalia, the dissemination is not associated with a privacy violation or lack of consent in the production of the image, but the harm occurs in the receipt of the image. In several jurisdictions, these offences are either addressed through specific criminal laws or under broader laws related to voyeurism, privacy invasion, or sexual offenses. Recognizing broader gendered consequences further underscores the importance of integrating gender considerations throughout the development of the convention and its implementation. This understanding also holds particular significance at the national level, where efforts should be directed toward harmonization with existing laws that address such impacts, ensuring a comprehensive legal framework.

Third, and related to the recommendation on intent to cause harm discussed above, we note that the cybercrimes with gendered implications are not only intended to cause harm: for example, they might be committed also or instead for the purposes of sexual gratification. Member states may wish to consider other ways to capture relevant forms of intent associated with NCIID that avoid both unduly raising the threshold for prosecution while specifying the crime in an appropriately narrow manner.

Finally, we note that the language of Article 15 is suitably technology-neutral, concerning a “visual recording or representation of a natural person made by any means”. While we support the efforts to make this article technology-neutral, we note that current developments in AI raise significant challenges to legal definitions of “representation”, including when images are generated by an algorithm from large datasets. These technological changes have gendered implications, including through the production of “deepfake” intimate images, and so deserve further consideration in the implementation of the convention, especially in relation to articles 55.4 and 57.5.b on the impacts of technological change.

Recommendation: remove 15.3 on the intent to cause harm as part of the criminalization of NCIID and reinsert CND Article 25(2) clause 4 on inability of a child to consent to intimate image dissemination. Article 15 would thus read:

Article 15. Non-consensual dissemination of intimate images

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally and without right, the offering,

selling, distributing, transmitting, publishing or otherwise making available of an intimate image of a person by means of [a computer system] [an information and communications technology device], without the consent of the person depicted in the image. **A child cannot consent to the posting of an intimate image of which they are the subject.**

2. For the purpose of paragraph 1, “intimate image” shall mean a visual recording or representation of a natural person made by any means, including a photograph, film or video recording, in which the person is nude, is exposing their genital organs, anal region or breasts, or is engaged in sexual activity, and in respect of which, at the time of the recording, there were circumstances that gave rise to a reasonable expectation of privacy.

~~3. A State Party may require the intent to cause harm before criminal liability attaches.~~

Procedural measures and law enforcement: conditions and safeguards

In the chapter on procedural measures and law enforcement (Chapter 4), the article on conditions and safeguards (Article 24 in the draft text) is crucial for gender mainstreaming.

Article 24 removes the requirement for States to incorporate principles of “necessity and legality and the protection of privacy and personal data”, leaving only the “principle of proportionality”. We consider it to be vital that this article explicitly mentions privacy protections. Furthermore, as we have previously argued, it is best practice to also mention gender-related facts - including sexuality, gender identity and expression - as private personal data that requires protection. Specific and strengthened privacy protections for protected forms of communication, including medical, legal, religious or public interest, would also ensure the article adequately safeguards people of all genders and ensures the rights and wellbeing of women and people of diverse gender identities. Additionally, the language recommended below could be incorporated into Article 36 on the protection of personal data in the context of international cooperation, to underline the importance of gender-related data protection to international cooperation as well as domestic procedural measures and law enforcement.

Recommendation: Article 24 could be strengthened by re-inserting specific language on gender-related privacy protections. This language could also be incorporated into Article 36. Article 24.1 would thus read:

Article 24. Conditions and safeguards

1. Each State Party shall ensure that the establishment, implementation and application of the powers and procedures provided for in this chapter are subject to conditions and safeguards provided for under its domestic law, which shall be consistent with its obligations under international human rights law **and commitment to gender mainstreaming**, and which shall incorporate the principles of proportionality, **necessity, legality, and the protection of privacy and personal data, to include data relating to gender and sexuality and privileged communications.**

International cooperation: language consistency

The draft text has made positive changes to language relating to gender to ensure consistency throughout the convention. Consistency in language is important for the implementation of the convention and can also aid consensus. Throughout the convention, ‘gender’ can be inferred as a protected characteristic (e.g. Article 34.5), referring to an individual’s expression of their identity. However, the extradition exemptions in Article 37.15 under Chapter 5 currently include sex rather than gender in addition to the other protected characteristics of race, language, religion, nationality, ethnic origin and political opinions.

Recommendation: to ensure consistency throughout the text and to align with other uses in the convention, “sex” should be replaced with “gender” in Article 37.15. Article 37.15 would thus read:

15. Nothing in this Convention shall be interpreted as imposing an obligation to extradite if the requested State Party has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person’s **gender**, race, language, religion, nationality, ethnic origin or political opinions, or that compliance with the request would cause prejudice to that person’s position for any one of these reasons.

Preventative measures: online gender-based violence

The draft text includes a preventive measure to develop “strategies and policies to prevent and eradicate gender-based violence” online (Article 53.3.f). This measure is welcome and highly relevant, as countering gender-based violence requires extensive investment beyond criminalization and law enforcement action. However, this article omits the clause “in particular, violence against women and girls” that was in the equivalent article in the CND (Article 90.2.g). It also continues to omit reference to other UN processes and international legal instruments to address online gender-based violence, including its specific manifestations against women and girls, such as the Committee on Elimination of Discrimination against Women (CEDAW) General Recommendation no.35.

Recommendation: re-insert the clause on women and girls and other groups as targets of gender-based violence online and include references to existing processes and instruments. Article 53.3.f would then read:

Developing strategies and policies to prevent and eradicate gender-based violence that occurs through or is amplified by the use of information and communications technologies, taking into consideration the special circumstances and needs of persons in vulnerable situations, **particularly women, children, people of diverse gender identities, expressions, and sexual orientations, elderly people, and people with disabilities, building on other UN processes, especially the Committee on Elimination of Discrimination against Women (CEDAW) General Recommendation no.35;**

Technical assistance: mainstreaming a gender perspective

Gender mainstreaming is an essential aspect of technical assistance and capacity-building for countering cybercrime, as the gender digital divide contributes to and exacerbates gender inequality more broadly. As we argue [elsewhere](#), countering gender inequalities in cybercrime capacity-building and technical measures improves both a Member State’s ability to counter cybercrime and gender equality. However, the draft text omits an article including “methods for mainstreaming a gender perspective into policymaking, legislation and programming” into technical assistance and capacity-building, as well as the immediately preceding article on human rights protections.

Recommendation: re-insert clauses on human rights and gender mainstreaming into Article 54.3, to read:

(i) The effective protection of human rights, including the protection of privacy and personal data and respect for due process while preventing and combating offences covered by this Convention;

(j) Methods for mainstreaming a gender perspective into policymaking, legislation and programming;

Conclusion and summary of recommendations

A full list of recommendations is as follows: Some Member States have consistently highlighted the gendered dimensions of cybercrime in previous AHC sessions, with many more underlining the importance of gender equality and diverse participation in the negotiations themselves. Such emphasis on gender is laudable and highly welcome, and we hope that Member States continue this positive momentum into the sixth session. We therefore summarize the recommendations contained in this document below.

Recommendation 1: Rewrite Article 5 and reinsert and amend Article 5.2 from the consolidated negotiating document to read:

Article 5. Respect for human rights

1. States Parties shall ensure that the implementation of their obligations under this Convention is consistent with **applicable** international human rights law **such as the** Universal Declaration of Human Rights and the **International Covenant on Civil and Political Rights**.

2. States Parties shall make efforts to mainstream a gender perspective and to take into consideration the special circumstances and needs of persons in vulnerable situations, particularly women, children, people of diverse gender identities, expressions, and sexual orientations, elderly people, and people with disabilities, in measures undertaken under this convention.

Recommendation 2: Amend Article 15 to read:

Article 15. Non-consensual dissemination of intimate images

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally and without right, the offering, selling, distributing, transmitting, publishing or otherwise making available of an intimate image of a person by means of [a computer system] [an information and communications technology device], without the consent of the person depicted in the image. **A child cannot consent to the posting of an intimate image of which they are the subject.**

2. For the purpose of paragraph 1, “intimate image” shall mean a visual recording or representation of a natural person made by any means, including a photograph, film or video recording, in which the person is nude, is exposing their genital organs, anal region or breasts, or is engaged in sexual activity, and in respect of which, at the time of the recording, there were circumstances that gave rise to a reasonable expectation of privacy.

~~3. A State Party may require the intent to cause harm before criminal liability attaches.~~

Recommendation 3: Amend Article 24.1 to read as follows. Also incorporate this language into Article 36.

Article 24. Conditions and safeguards

1. Each State Party shall ensure that the establishment, implementation and application of the powers and procedures provided for in this chapter are subject to conditions and safeguards provided for under its domestic law, which shall be consistent with its obligations under international human rights law **and commitment to gender mainstreaming**, and which shall incorporate the principles of proportionality, necessity, legality, and the protection of privacy and personal data, to include data relating to gender and sexuality and privileged communications.

Recommendation 4: Amend Article 37.15 to read: ... “on account of that person’s **gender**, race, language, religion, nationality, ethnic origin or political opinions...”

Recommendation 5: Amend Article 53.3.f to read:

Developing strategies and policies to prevent and eradicate gender-based violence that occurs through or is amplified by the use of information and communications technologies, taking into consideration the special circumstances and needs of persons in vulnerable situations, **particularly women, children, people of diverse gender identities, expressions, and sexual orientations, elderly people, and people with disabilities, building on other UN processes, especially the Committee on Elimination of Discrimination against Women (CEDAW) General Recommendation no.35;**

Recommendation 6: re-insert clauses from the consolidated negotiating document on human rights and gender into Article 54.3, to read:

(i) The effective protection of human rights, including the protection of privacy and personal data and respect for due process while preventing and combating offences covered by this Convention;

(j) Methods for mainstreaming a gender perspective into policymaking, legislation and programming;