

Ad Hoc Committee Seventh Session: Analysis of Draft Text of the Convention

Global Partners Digital submission
January 2024

About Global Partners Digital

Global Partners Digital is a civil society organisation working to ensure that human rights underpin the development, use and governance of digital technologies.

Introduction

We welcome the opportunity to provide comments on the revised text of the convention prepared by the Committee Chair and with the support of the Secretariat.

We appreciate the work undertaken so far in the preparation of this document. However, we are concerned that, despite the extensive input provided by GPD and other actors, the revised draft does not address the most significant concerns raised.

Given the nature of the proposed Convention as a multilateral instrument, the text should provide a solid basis that presents the best grounds to ensure the Convention's consistency with human rights, the rule of law, democracy, and gender equality. We recommend that the below modifications be made to mitigate risks to human rights and ensure the convention is compliant with states obligations to respect, protect and promote human rights.

We understand that a number of the provisions covered in this analysis, including the majority of those articles relating to scope (Article 3, Article 17, Article 35 and Article 40(20), with the exception of Article 23) and human rights safeguards (Articles 5 and 24) have been italicised in the revised draft meaning that no compromise proposal has been made at this stage. For this reason, this analysis is based on the revised draft as presented as well as the proposals made by the informal groups and by specific multilateral groupings, as published on the AHC website.

- Article 2. Use of terms

The introduction of the "relevant stakeholders" definition is helpful to clarify and bring consistency across the Convention. It could be enhanced by adding reference to special protection groups and victims of cybercrime that can bring relevant and usually marginalised perspectives to the consideration of the implementation of the



Convention. Given the technical nature of the activities the Convention deals with, it might be useful to add express reference to technical experts or technical community as part of the relevant stakeholders definition, in cases in which they are not associated to any of the other identified groups.

- Article 3. Scope of application

Article 3 should be limited to specific investigations and prosecutions of criminal offences established in accordance with Articles 6–16. That is why we consider that paragraph 2 should be deleted altogether to avoid an expansion of the Convention scope that is incompatible with the effective protection of human rights. If paragraph 2 is retained, the best option would be to limit its application to the collection of evidence where there is reasonable grounds to suspect the commission of a serious crime defined in a consistent manner with the standard established in UNTOC. This is conditioned on the addition of additional safeguards in a new paragraph 3.

Canada, with support from Australia, Chile, the Dominican Republic, the European Union and its Member States, Iceland, Japan, Liechtenstein, New Zealand, Norway, the United Kingdom, the United States, and Switzerland, has submitted for consideration a proposal for a new paragraph 3 to limit the risk that the Convention can be used for prosecution of crimes domestically established that are incompatible with the international human rights law. We recommend incorporating Canada's proposal with the following additions to broaden its protective scope and to reinforce positive human rights obligations of States.

Proposed text amendments:

1. This Convention shall apply, in accordance with its terms, to the prevention, investigation and prosecution of the criminal offences established in accordance with articles 6–16 of this Convention including the freezing, seizure, confiscation and return of the proceeds from such offences.

~~2. This Convention shall also apply to the collecting, obtaining, preserving and sharing of evidence in electronic form, as provided for in the relevant articles of this Convention.~~

3. Nothing in this Convention shall enable the violation of international human rights law, including the impermissible restriction ~~be interpreted as permitting or facilitating repression~~ of expression, conscience, opinion, belief, peaceful assembly or association; ~~suppression of political activity~~; or permitting or facilitating discrimination or persecution based on individual characteristics.

- Article 5. Respect for human rights

Analysis:



We note that there have been no changes to this article from Group 5, but we continue to support the proposal made by New Zealand and stick to “in accordance with their obligations under international human rights law”.

We also recommend including language proposed by Uruguay to add a second paragraph to mainstream the gender impacts of cybercrime.

We would not support the alternative proposal advanced by Mexico, Costa Rica and Peru which makes reference to regional instruments because this can have unintended consequences by permitting deference to regional frameworks or instruments that have lower standards of protection for human rights.

Finally, we continue to suggest adding at the end of paragraph 1 a reference to the principles of legality, necessity, proportionality, transparency, oversight and access to remedies as overarching safeguards that should support the states implementation of the Convention.

Proposed text amendments (as per our previous comments):

1. States Parties shall ensure that the implementation of their obligations under this Convention is **in accordance** ~~consistent~~ with their obligations under international human rights law **[and the principles of legality, necessity, proportionality, transparency, oversight and access to remedies]**.

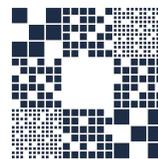
2. State Parties shall mainstream a gender perspective and to empower women and girls, and shall take into consideration the special circumstances and needs of persons and groups in vulnerable situations in measures undertaken to prevent and combat [the use of ICTs for criminal purposes] [cybercrime].

- Article 12. Computer related theft or fraud

The most recent draft adds a letter (c) to the provision criminalising “any deception” that causes a person to act differently than that person would otherwise act. This is dangerously broad and lacking any relevant standards to further identify the criminalised conduct, consequently it risks to cover a wide range of legitimate online activities. For example, this provision could be interpreted in a way that criminalises the action of whistleblowers and journalists that access information or personal data and share it motivated by public interest or newsworthiness. Therefore, we strongly advise deleting this provision.

- Article 13, Article 14 & Article 21.7

The addition of material different from visual depiction enumerated in article 13.2 risks a negative impact on freedom of expression particularly from the perspective of



artistic freedom of representation. We understand that this concern can be partially addressed by the possibility provided to states to limit the provision included in article 13 (3) (b), but we raise that the general provision might result incompatible with freedom of expression restrictions according to article 19 of ICCPR.

We are pleased that articles 13.4 and 21.7 provides protections against the criminalisation of children for the interchange of self-generated material that falls in the article 13 scope, however that protection seems very limited and fragile as it is left as an option for the domestic criminal policy to decide on the exercise of fundamental rights of adolescents in a way that is inconsistent with the Convention on the Rights of the Child and its Protocols, as well as with relevant guidance from the Committee of the Rights of the Child.

We do not recommend that article 14 is included. The current drafting includes as a conduct “communicating” that is overly broad and introduces additional ambiguities in the interpretation of the intentionality requested to configure the offence. Paragraph 4 makes optional limiting this offence to adults as perpetrators, risking again an overcriminalization of conduct by adolescents in a way that is incompatible with their fundamental rights. The provision even gives the option in paragraph 3 to extend the offence in cases where the “person is believed to be a child” setting conditions that allow arbitrary interpretations of it that could create severe damage to the exercise of human rights in countries with restrictive gender or religious perspectives.

- Article 17. Offences relating to other international treaties

We continue to be seriously concerned by the inclusion of article 17 on offences relating to other international treaties. There is a lack of clarity on which applicable international conventions and protocols are captured by this provision and whether they include those currently in force or those to be established in the future as well. It is also unclear whether this is limited to United Nations treaties. Therefore, we believe that this provision could establish an overly broad scope to the Convention, and introduce duplicative or vague provisions which are not subjected to relevant safeguards established by the Convention and pose risks to human rights. Moreover, we are concerned that this provision could create problems with legal clarity and ultimately hinder efforts to combat cybercrime. Article 17 should therefore be removed from the Convention.

If this provision is retained, we would recommend that only United Nations treaties currently in force are captured. We would also recommend removing this provision from the current chapter and placing it elsewhere, for example, within Chapter IX on Final Provisions. This is because the provisions in this chapter already speak to its implementation and effects of the Convention, as well as its relation with protocols. Finally, we recommend that the language in article 17 be softened to not oblige or require action of State Parties, but to encourage them instead: *“State Parties are encouraged to consider the adoption of legislative and other measures necessary to*



ensure that offences established in accordance with existing United Nations treaties also apply when committed through the use of a computer system”.

- Article 21. Prosecution, adjudication and sanctions

So far it has been difficult to carve out space in the criminalisation chapter to include a more general exception to prevent that security researchers activities are unduly prosecuted for the offences defined by the Convention in a rather broader way. One alternative facing the final stage of negotiation would be to include in article 21 a paragraph that can cover this issue. Such a provision would provide a general layer of protection for security research activities but with some level of discretion for states on the determination of what constitutes security research, addressing the concerns shared by some states of the weaponization of this defence by malicious actors. We suggest the following drafting: *“States Parties shall ensure that appropriate measures are in place under domestic law to avoid criminalisation of security research activities conducted with the purpose of enhancing cyber security and reducing the potential for harmful interferences with computer systems, such as penetration testing and discovery and reporting of vulnerabilities”.*

- Article 23. Scope of procedural measures

We are pleased that the draft keeps the reference to “specific” criminal investigations or proceedings. This helps to ensure that the scope to measures established for the purpose of criminal investigations is limited and helps ensure powers are used in connection with individual cases. We still believe this provision could still be strengthened with additional language that acknowledges the need for a reasonable ground to believe that a measure is necessary.

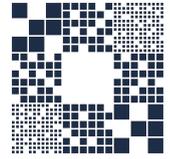
On the other hand, we are concerned with the replacement of “articles 6 to 16” reference with “in this Convention” in paragraph 2(a) as it significantly broadens the scope of procedural measures to apply to criminal offences established in Chapter II or on the basis of article 17, which is currently unclear and undermines the specific requirement provided for in 1(a).

We continue to support the deletion of paragraph 2(b) as proposed by the European Union and others because it dramatically widens the scope of procedural measures.

As we suggested previously, paragraph 2(c) should be deleted or at least amended to ensure that it pertains solely to e-evidence relating to article 6 to 16.

Proposed text amendments (as per our previous comments):

1. Each State Party shall adopt such legislation and other measures as may be necessary to establish its powers and procedures provided for in this Chapter for the purposes of [specific] criminal investigations or proceedings



where there are reasonable grounds to believe that a criminal offence is committed or being committed.

2. Except as provided otherwise in this Convention, each State Party shall apply the powers and procedures referred to in paragraph 1 of this article to:
 - (a) The criminal offences established in articles 6 to 16 accordance with this Convention.
 - (b) ~~Other criminal offences committed by means of [a computer system] [an information and communications technology device]; and~~
 - (c) The collection of evidence in electronic form of ~~any criminal offence~~ solely pertaining to the criminal offences mentioned in clauses (a) and (b).

3. (a) Each State Party may reserve the right to apply the measures referred to in article 29 only to offences or categories of offences specified in the reservation, provided that the range of such offences or categories of offences is not more restricted than the range of offences to which it applies the measures referred to in article 30. Each State Party shall consider restricting such a reservation to enable the broadest application of the measure referred to in article 29;

(b) Where a State Party, owing to limitations in its legislation in force at the time of the adoption of the present Convention, is not able to apply the measures referred to in articles 29 and 30 to communications being transmitted within a A/AC.291/22 12/38 V.23-10098 [computer system] [information and communications technology device] of a service provider, which:

- (i) Is being operated for the benefit of a closed group of users; and
- (ii) Does not employ public communications networks and is not connected with another [computer system] [information and communications technology device], whether public or private; that State Party may reserve the right not to apply these measures to such communications. Each State Party shall consider restricting such a reservation to enable the broadest application of the measures referred to in articles 29 and 30.

- Article 24. Conditions and safeguards

The most recent draft does not introduce changes to enhance specificity and human rights safeguards as we have previously suggested. The procedural and international cooperation measures should be accompanied by more robust safeguards that are applicable to all the powers and procedures in the Convention.

We continue to note that article 24(1) only makes reference to the principle of proportionality. We would support the inclusion of legality, necessity and proportionality as established core principles of international human rights law.

We are concerned with the deletion of reference to “the right to effective remedy” in paragraph 2. We are also concerned that in paragraph 3 reference to “this



Convention” has been reverted to “this chapter” limiting the scope of application of the safeguards in this provision.

We continue to recommend that article 24 provides additional detail on conditions and safeguards, such as: specifying that requests for authorization must be made by an individual of a specified rank within a competent authority; ex post independent monitoring; evidentiary showing, providing a clear guarantee that investigative powers may not be used in ways that compromise the security of digital communications and services; and including additional transparency requirements that can support greater accountability from states.

Proposed text amendments (same than our previous comments):

1. Each State Party shall ensure that the establishment, implementation and application of the powers and procedures provided for in this ~~chapter~~ **Convention** are subject to conditions and safeguards provided for under its domestic law, which shall provide for the protection of human rights, consistent with its obligations under international human rights law, and which shall incorporate the [**principles of legality, necessity and**] proportionality.
2. Such conditions and safeguards shall, [~~as appropriate in view of~~ **regardless**] the nature of the procedure or power concerned ~~and in accordance with their national legislations~~, inter alia, include judicial or [**other similar**] independent review [**and supervision, the right to an effective remedy**], grounds justifying application, [**evidentiary showing**], and limitation of the scope and the duration of such power or procedure. [**Requests for authorization should be made by an individual of a specified rank within a competent authority. User notification and other transparency measures related to the exercise of these powers could only exceptionally be limited. Procedures provided for in this Convention shall not undermine the security and integrity of digital communications and services. Periodic disclosure of statistical data on the use of these powers and procedures should be made available by the states parties.**]
3. To the extent that it is consistent with the public interest, in particular the proper administration of justice, each State Party shall consider the impact of the powers and procedures in this ~~article~~ **Convention** upon the rights, responsibilities and legitimate interests of third parties.

- Article 35. General principles of international cooperation

We continue to recommend that article 35(1) only provides that international cooperation applies in relation to “specific” investigations, prosecutions and judicial proceedings concerning offences established in accordance with “articles 6 to 16 of” this Convention. It is a concerning expansion of the scope of international cooperation the deletion of the article 6 to 16 reference.



In paragraph 2, we suggest amending the wording to avoid implying that dual criminality is a voluntary requirement, but rather reinforce the application of international cooperation solely in the case of offences that are universally recognized as criminal which provide an adequate level of protection for human rights and ensure greater predictability for states in their legal obligations.

We also support the proposal from New Zealand and other states, to include as grounds for refusal risks related with discriminatory prosecution and punishment. This mirrors the proposal included in article 40.21 (c) ter, but expands the protection to all forms of international cooperation.

Proposed text amendments:

1. States Parties shall cooperate with each other in accordance with the provisions of this Convention, as well as other applicable international instruments on international cooperation in criminal matters, and domestic laws, for the purpose of **specific** investigations, prosecutions and judicial proceedings concerning offences established in accordance with **articles 6 to 16 of** this Convention, or for the collection, obtaining, preservation and sharing of evidence in electronic form of offences established in accordance with articles 6 to 16 of this Convention, as well as of serious crime, including those offences covered by article 17 of this Convention when applicable.

2. In matters of international cooperation, ~~whenever dual criminality is considered a requirement,~~ it shall be deemed fulfilled irrespective of whether the laws of the requested State Party place the offence within the same category of offence or denominate the offence by the same terminology as the requesting State Party, if the conduct underlying the offence for which assistance is sought is a criminal offence under the laws of both States Parties

[NZ proposal]. Nothing in this Convention shall be interpreted as imposing an obligation to cooperate 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 sex, 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.

- Article 36. Protection of personal data

We continue to support the Group 10 proposal transmitted to the Chair on October 12 that retains the reference to states parties' ability to deny transfer of personal data if it cannot be provided in compliance with their applicable laws.



We continue to wish to strengthen the article by referencing directly that personal data transferring conditions should fulfil international human rights standards, not only international law or their respective domestic legal frameworks. It will be useful to further reference explicitly widely recognised data protection principles such as lawful and fair processing, transparency, purpose limitation, data minimisation, accuracy, storage limitation, integrity and confidentiality, and accountability. We hope the pending negotiations give room to include these amendments.

Proposed text amendments:

[Informal Group 10 proposal] 1. A State Party transferring personal data pursuant to this Convention shall do so in accordance with its domestic law and any obligations the transferring party may have under applicable international **human rights** law. States Parties shall not be required to transfer personal data in accordance with this Convention if it cannot be provided in compliance with their applicable laws concerning the protection of personal data.

Where the transfer of personal data would not be compliant with paragraph 1, States Parties may seek to impose appropriate conditions to achieve compliance with their applicable laws, in order to respond positively to a request for personal data.

State Parties are encouraged to establish bilateral or multilateral arrangements to facilitate the transfer of personal data.

2. For personal data transferred in accordance with this Convention, State Parties shall ensure that the personal data received are subject to effective and appropriate safeguards in the Parties' respective legal frameworks. **In this regard, State Parties should consider requiring that the data are processed for compatible purposes, limited to what is relevant for the purposes of the processing, and kept only as long as needed in view of such purposes, that processing is subject to appropriate measures to keep it accurate, confidential and secure, that general information about data processing is provided by way of public notice, and that effective oversight and redress is available, including to obtain, subject to reasonable limitations, to the extent needed to protect other rights or important public interests, access and rectification.**

[Informal Group 10 proposal] 3. Subject to Article paragraph 2, State Parties may transfer personal data obtained in accordance with this Convention to another third country or international organisation only with the prior authorisation of the original transferring State Party, who may require that the authorization be provided in written form.

- Article 40. General principles and procedures relating to mutual legal assistance



We recommend that the scope of mutual legal assistance continue to be limited to the offences established in accordance with articles 6 to 16 of this Convention. If the consensus is for including in the scope more broadly serious crimes, we support the EU proposal to insert a definition for them that should be consistent with UNTOC. In the current draft the previous paragraph 1 has been stricken providing opportunity for a broader interpretation of when the mutual legal assistance could be requested on the ground of the treaty, including the open ended reference to other international treaties in article 17.

We continue to advocate for a provision that more widely could allow to refuse providing assistance where executing the request would likely prejudice, “the protection of human rights or fundamental freedoms”, but we consider that the article could be significantly strengthened by the inclusion in paragraph 21 of the proposals (c) bis and (c) ter supported for a group of likeminded states.

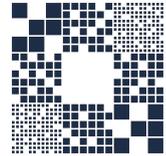
Proposed text amendments:

1. States Parties may afford one another the appropriate measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences established in accordance with articles 6 to 16 of this Convention, and for the purposes of the collection of evidence in electronic form of offences established in accordance with articles 6 to 16 of this Convention.

2. Mutual legal assistance ~~shall~~ **may** be afforded to the ~~fullest~~ **widest** extent possible under relevant laws, treaties, agreements and arrangements of the requested State Party with respect to investigations, prosecutions and judicial proceedings in relation to the offences for which a legal person may be held liable in accordance with article 18 of this Convention in the requesting State Party.

3. Mutual legal assistance to be afforded in accordance with this article may be requested for any of the following purposes:

- (a) Taking evidence or statements from persons;
- (b) Effecting service of judicial documents;
- (c) Executing searches and seizures, and freezing;
- (d) Searching or similarly accessing, seizing or similarly securing, and disclosing data stored by means of [a computer system] [an information and communications technology device] pursuant to article 44;
- (e) Collecting real-time traffic data pursuant to article 45;
- ~~(f) Intercepting content data pursuant to article 46;~~
- (g) Examining objects and sites;
- (h) Providing **relevant** information, evidentiary items and expert evaluations;



- (i) Providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records;
- (j) Identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes;
- (k) Facilitating the voluntary appearance of persons in the requesting State Party;
- (l) Recovering proceeds of crime;
- (m) Any other type of assistance that is not contrary to the domestic law of the requested State Party.

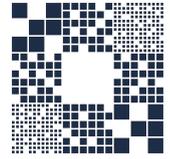
4. Without prejudice to domestic law, the competent authorities of a State Party may, without prior request, transmit information relating to criminal matters to a competent authority in another State Party where they believe that such information could assist the authority in undertaking or successfully concluding inquiries and criminal proceedings or could result in a request formulated by the latter State Party pursuant to this Convention.

5. The transmission of information pursuant to paragraph 4 of this article shall be without prejudice to inquiries and criminal proceedings in the State of the competent authorities providing the information. The competent authorities receiving the information shall comply with a request that said information remain confidential, even temporarily, or with restrictions on its use. However, this shall not prevent the receiving State Party from disclosing in its proceedings information that is exculpatory to an accused person. In such a case, the receiving State Party shall notify the transmitting State Party prior to the disclosure and, if so requested, consult with the transmitting State Party. If, in an exceptional case, advance notice is not possible, the receiving State Party shall inform the transmitting State Party of the disclosure without delay.

6. The provisions of this article shall not affect obligations under any other treaty, bilateral or multilateral, that governs or will govern, in whole or in part, mutual legal assistance.

7. Paragraphs 8 to 30 of this article shall apply to requests made pursuant to this article if the States Parties in question are not bound by a treaty on mutual legal assistance. If those States Parties are bound by such a treaty, the corresponding provisions of that treaty shall apply unless the States Parties agree to apply paragraphs 8 to 30 of this article in lieu thereof. States Parties are strongly encouraged to apply the provisions of those paragraphs if they facilitate cooperation.

8. States Parties may decline to render assistance pursuant to this article on the ground of absence of dual criminality. However, the requested State Party may, when it deems appropriate, provide assistance, to the extent it decides at its discretion, irrespective of whether the conduct would constitute an offence under the domestic law of the requested State Party. Assistance may be refused when requests involve matters of a de minimis nature or matters for which the cooperation or assistance sought is available under other provisions of this Convention.



9. A person who is being detained or is serving a sentence in the territory of one State Party and whose presence in another State Party is requested for purposes of identification, testimony or otherwise providing assistance in obtaining evidence for investigations, prosecutions or judicial proceedings in relation to offences established under this Convention may be transferred if the following conditions are met:

(a) The person freely gives informed consent;

(b) The competent authorities of both States Parties agree, subject to such conditions as those States Parties may deem appropriate.

10. For the purposes of paragraph 9 of this article:

(a) The State Party to which the person is transferred shall have the authority and obligation to keep the person transferred in custody, unless otherwise requested or authorized by the State Party from which the person was transferred;

(b) The State Party to which the person is transferred shall, without delay, implement its obligation to return the person to the custody of the State Party from which the person was transferred as agreed beforehand, or as otherwise agreed, by the competent authorities of both States Parties;

(c) The State Party to which the person is transferred shall not require the State Party from which the person was transferred to initiate extradition proceedings for the return of the person;

(d) The person transferred shall receive credit for service of the sentence being served in the State from which the person was transferred for time spent in the custody of the State Party to which the person was transferred.

11. Unless the State Party from which a person is to be transferred in accordance with paragraphs 9 and 10 of this article so agrees, that person, regardless of the person's nationality, shall not be prosecuted, detained, punished or subjected to any other restriction of liberty in the territory of the State to which that person is transferred in respect of acts, omissions or convictions prior to the person's departure from the territory of the State from which the person was transferred.

12. (a) Each State Party shall designate a central authority or authorities that shall have the responsibility and power to send and receive requests for mutual legal assistance and either to execute them or to transmit them to the competent authorities for execution. Where a State Party has a special region or territory with a separate system of mutual legal assistance, it may designate a distinct central authority that shall have the same function for that region or territory;

(b) Central authorities shall ensure the speedy and proper execution or transmission of the requests received. Where the central authority transmits the request to a competent authority for execution, it shall encourage the speedy and proper execution of the request by the competent authority;

(c) The secretariat shall be notified of the central authority designated for this purpose at the time each State Party deposits its



instrument of ratification, acceptance or approval of or accession to this Convention, and shall set up and keep updated a register of central authorities designated by the States Parties. Each State Party shall ensure that the details held in the register are correct at all times;

(d) Requests for mutual legal assistance and any communication related thereto shall be transmitted to the central authorities designated by the States Parties. This requirement shall be without prejudice to the right of a State Party to require that such requests and communications be addressed to it through diplomatic channels and, in urgent circumstances, where the States Parties agree, through the International Criminal Police Organization, if possible.

13. Requests shall be made in writing or, where possible, by any means capable of producing a written record, in a language acceptable to the requested State Party, under conditions allowing that State Party to establish authenticity. The secretariat shall be notified of the language or languages acceptable to each State Party at the time it deposits its instrument of ratification, acceptance or approval of or accession to this Convention. In urgent circumstances and where agreed by the States Parties, requests may be made orally, but shall be confirmed in writing forthwith.

14. Where not prohibited by their respective laws, central authorities of States Parties are encouraged to transmit and receive requests for mutual legal assistance, and communications related thereto, as well as evidence, in electronic form under conditions allowing the requested State Party to establish authenticity and ensuring the security of communications.

15. A request for mutual legal assistance shall contain:

- (a) The identity of the authority making the request;
- (b) The subject matter and nature of the investigation, prosecution or judicial proceeding to which the request relates and the name and functions of the authority conducting the investigation, prosecution or judicial proceeding;
- (c) A summary of the relevant facts, except in relation to requests for the purpose of service of judicial documents;
- (d) A description of the assistance sought and details of any particular procedure that the requesting State Party wishes to be followed;
- (e) Where possible and appropriate, the identity, location and nationality of any person, item or accounts concerned; and
- (f) The ~~time period~~ and purpose for which the evidence, information or other assistance is sought.

(f ter) If appropriate, the specific time period which relates to the criminal activity under investigation.

16. The requested State Party may request additional information when it appears necessary for the execution of the request in accordance with its domestic law or when it can facilitate such execution.

17. A request shall be executed in accordance with the domestic law of the requested State Party and, to the extent not contrary to the domestic law of



the requested State Party and where possible, in accordance with the procedures specified in the request.

18. Wherever possible and consistent with fundamental principles of domestic law, when an individual is in the territory of a State Party and has to be heard as a witness or expert by the judicial authorities of another State Party, the first State Party may, at the request of the other, permit the hearing to take place by videoconference if it is not possible or desirable for the individual in question to appear in person in the territory of the requesting State Party. States Parties may agree that the hearing shall be conducted by a judicial authority of the requesting State Party and attended by a judicial authority of the requested State Party. If the requested State Party does not have access to the technical means necessary for holding a videoconference, such means may be provided by the requesting State Party, upon mutual agreement.

19. The requesting State Party shall not transmit or use information or evidence furnished by the requested State Party for investigations, prosecutions or judicial proceedings other than those stated in the request without the prior consent of the requested State Party. Nothing in this paragraph shall prevent the requesting State Party from disclosing in its proceedings information or evidence that is exculpatory to an accused person. In the latter case, the requesting State Party shall notify the requested State Party prior to the disclosure and, if so requested, consult with the requested State Party. If, in an exceptional case, advance notice is not possible, the requesting State Party shall inform the requested State Party of the disclosure without delay.

20. The requesting State Party may require that the requested State Party keep confidential the fact and substance of the request, except to the extent necessary to execute the request. If the requested State Party cannot comply with the requirement of confidentiality, it shall promptly inform the requesting State Party.

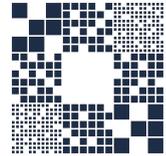
21. Mutual legal assistance may be refused:

(a) If the request is not made in conformity with the provisions of this article;

(b) If the requested State Party considers that execution of the request is likely to prejudice its sovereignty, security, ordre public or other essential interests;

(c) If the authorities of the requested State Party would be prohibited by its domestic law from carrying out the action requested with regard to any similar offence, had it been subject to investigation, prosecution or judicial proceedings under their own jurisdiction;

(c bis) When, as determined by the requested State, the offence for which the person is sought to be a political offence, or an offence related thereto, or an ordinary offence prosecuted for political reasons, [or where executing the request would likely prejudice the exercise of human rights or fundamental freedoms];



(c) Nothing in this Convention shall be interpreted as imposing an obligation to cooperate 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 sex, 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.

(d) If it would be contrary to the legal system of the requested State Party relating to mutual legal assistance for the request to be granted.

22. States Parties may not refuse a request for mutual legal assistance on the sole ground that the offence is also considered to involve fiscal matters.

23. States Parties shall not decline to render mutual legal assistance pursuant to this article on the ground of bank secrecy.

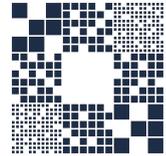
24. Reasons shall be given for any refusal of mutual legal assistance.

25. The requested State Party shall execute the request for mutual legal assistance as soon as possible and shall take as full account as possible of any deadlines suggested by the requesting State Party and for which reasons are given, preferably in the request. The requested State Party shall respond to reasonable requests by the requesting State Party on the status, and progress in its handling, of the request. The requesting State Party shall promptly inform the requested State Party when the assistance sought is no longer required.

26. Mutual legal assistance may be postponed by the requested State Party on the ground that it interferes with an ongoing investigation, prosecution or judicial proceeding.

27. Before refusing a request pursuant to paragraph 21 of this article or postponing its execution pursuant to paragraph 26 of this article, the requested State Party shall consult with the requesting State Party to consider whether assistance may be granted subject to such terms and conditions as it deems necessary. If the requesting State Party accepts assistance subject to those conditions, it shall comply with the conditions.

28. Without prejudice to the application of paragraph 11 of this article, a witness, expert or other person who, at the request of the requesting State Party, consents to give evidence in a proceeding or to assist in an investigation, prosecution or judicial proceeding in the territory of the requesting State Party shall not be prosecuted, detained, punished or subjected to any other restriction of the person's liberty in that territory in respect of acts, omissions or convictions prior to the person's departure from the territory of the requested State Party. Such safe conduct shall cease when the witness, expert or other person having had, for a period of fifteen consecutive days or for any period agreed upon by the States Parties from the date on which the person has been officially informed that the presence of the person is no longer required by the judicial authorities, an opportunity of leaving, has nevertheless remained voluntarily in the territory of the requesting State Party or, having left it, has returned of the person's own free will.



29. The ordinary costs of executing a request shall be borne by the requested State Party, unless otherwise agreed by the States Parties concerned. If expenses of a substantial or extraordinary nature are or will be required to fulfil the request, the States Parties shall consult to determine the terms and conditions under which the request will be executed, as well as the manner in which the costs shall be borne.

30. The requested State Party:

(a) Shall provide to the requesting State Party copies of government records, documents or information in its possession that under its domestic law are available to the general public;

(b) May, at its discretion, provide to the requesting State Party, in whole, in part or subject to such conditions as it deems appropriate, copies of any government records, documents or information in its possession that under its domestic law are not available to the general public.

31. States Parties shall consider, as may be necessary, the possibility of concluding bilateral or multilateral agreements or arrangements that would serve the purposes of, give practical effect to or enhance the provisions of this article.

- Article 41. 24/7 Network

In the current draft, law enforcement cooperation established in this article has the same broad and ambiguous scope defined for international cooperation in article 35. We would continue to recommend strengthening the article by adding reference to the application of the safeguards and conditions established in articles 24 and 36 to the functioning of this law enforcement cooperation.

We continue to suggest the strengthening of this provision by adding language for ensuring the security, reliability, and integrity of the network. All communications shall occur over secure and authenticated channels to safeguard the integrity and confidentiality of the information and avoid access by malicious actors. Law enforcement cooperation should take place in any case within the framework of existing mutual legal assistance treaties, and according to the safeguards established on them, this provision should not provide ground for information sharing outside them.

- Articles 42- 45

The current draft of this group of articles in which the phrase “where the data are in the possession or control of a service provider located or established in that other State Party” has been introduced creates the risk of massive extraterritorial surveillance without safeguards. This phrase provides the opportunity to states to compel a service provider with a representative office in either country involved in the cooperation to secretly surveil individuals located in third states. Given the lack of specific safeguards for the application of these provisions, these measures could



be executed in total secrecy, without notification to the targeted individual or any mechanism of oversight available.

We welcome that articles 42 and 43 provide an opportunity to refuse a request on the basis of the grounds contained in article 40, paragraph 20. However, the provision needs to be strengthened by establishing the requirement that the request specify the offence that is the subject of a criminal investigation or proceedings and the necessity of the preservation or disclosure. We are pleased that a state may require dual criminality as a condition for responding to a request for mutual assistance for the preservation of stored computer data according to article 42, paragraph 4.

- Article 47. Law enforcement cooperation

Law enforcement cooperation is established to cover all the offences in the Convention without subjecting it to safeguards established in article 24 and 36. We recommend specifying that law enforcement cooperation should be triggered by a specific justified request linked to a committed offence established in accordance with articles 6 to 16 of the Convention. This has the purpose to ensure information exchange is strictly related to the offences covered by the Convention and cannot be used with the purpose of a general interchange of information that will be incompatible with the respect of human rights.

- Article 54. Technical assistance and capacity-building

We continue to believe that article 54 could be improved by making reference to both the domestic legal system and international human rights law. We recommend that article 54(3) be modified to *“Activities referred to in paragraphs 1 and 2 of this article may include, to the extent permitted by domestic law and in accordance with international human rights law”*. We further recommend that technical assistance and capacity-building measures should be subject to human rights impact assessments before they are undertaken, which should provide relevant information on potential risks to human rights and mitigation efforts.

We also continue to believe that article 54(3)(h) could be revised to better reflect a commitment to methods and training in the protection of victims and witnesses who cooperate with judicial authorities, as well as those accused of cybercrime. For example, we recommend the following: *“Methods used in the protection of victims and witnesses who cooperate with legal and judicial authorities, as well as those accused themselves of cybercrime, which should include training on trauma-informed and culturally-relevant practices.”*