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PHILIPPINES

PH Interventions during the 2nd Session of the AHC-Cybercrime
30 May-10 June 2022, Vienna, Austria
PROCEDURAL MEASURES AND LAW ENFORCEMENT

Madam Chair, the Philippine Delegation submits the following points in relation to the guiding questions you have prepared on the matter of Procedural Measures and Law Enforcement, particularly on the:

1st Set of Questions

1. It is this Delegation's submission that the concept of jurisdiction would be more appropriate to be addressed under the chapter on Procedural Measures and Law Enforcement. We advance this view since this concept is better discussed together with the available tools and measures that would assist the member states in the exercise of its jurisdiction over the offenses established in the UN treaty under consideration.

2. We have no objection in the inclusion of the fact that a State party being the object/target of a crime as one of the bases in establishing jurisdiction in the UN treaty under consideration.

3. We submit that extradition-related matters, although it touches upon jurisdiction, are best covered under the chapter on International Cooperation.

4. As consistently articulated by this Delegation, the scope of the chapter on procedural measures and law enforcement should apply to all offenses requiring the collection of electronic evidence, regardless of whether they are covered by the UN treaty under consideration or not.

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By allowing the procedural measures/articles relating to electronic evidence to be applicable to other offenses covered by other international instruments, member states will not be compelled to propose the inclusion of cyber-enabled crimes in the UN treaty under consideration, which may result in it being overbroad.

5. In the exercise of procedural modalities by a member state, certain elements shall be included as conditions and safeguards that balance the requirements of law enforcement with the protection of human rights and liberties. Further, additional measures are needed to lawfully obtain evidence in order to enable an effective criminal justice response and to uphold substantive rights and freedoms, including the right to data privacy and personal data protection.

To this end, the UN treaty under consideration must ensure that the application of the powers and procedures therein are subject to conditions and safeguards provided for in member states' domestic laws and their obligations under international treaties on human rights, to ensure adequate protection of these rights and liberties, including right to data privacy and personal data protection.

6. We find no harm in having as reference in the UN treaty under consideration specific international and regional human rights treaties, such as the (1966 United Nations International Covenant on Civil and Political Rights, 1950 Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms, 1969 American Convention on Human Rights, 1981 African Charter on Human Rights and Peoples' Rights) and other applicable international human rights instruments.

We are also amenable to the idea of referencing universal legal principles including, but not limited to proportionality, transparency, and legitimate purpose, especially on the concept of data privacy/protection.

2nd Set of Questions

1. This Delegation submits that the following powers and procedures are necessary for purposes of detecting, disrupting, investigating, prosecuting, and adjudicating the offenses established in the UN treaty under consideration:

a. Preservation of Data;
b. Production Order;
c. Search and Seizure of Data;
d. Real-time Collection of Data; and
e. Interception of Data.

Nevertheless, the last two powers and procedures may require further reflection on safeguards given their intrusiveness.

2. As the UN treaty under consideration will apply to member states of many different legal systems and cultures, we are of the opinion that it is not possible to specify in detail the applicable conditions and safeguards for each power or procedure. Accordingly, it is incumbent upon the national authorities and their domestic laws and procedures to require specific conditions or safeguards, which may be provided constitutionally, legislatively, judicially or otherwise.

This shall be towards the end view of ensuring that these conditions and safeguards provide for the adequate protection of human rights and liberties.

Further, this Delegation recognizes that there are some common standards or minimum safeguards arising pursuant to obligations of State Party, such as the International Covenant on Civil and Political Rights, and the European Convention for the Protection of Human Rights, among others.

3. We agree that certain procedural measures should apply to certain types of data. For instance, preservation may only apply to stored data that has already been collected and

retained by data-holders, such as service providers. They do not apply to the real-time collection and retention of future traffic data or to real-time access to the content of communications.

4. In our jurisdiction we follow a six-(6) month period of preservation of data, subject to requests for extension. In practice, however, and when dealing with service providers situated outside our jurisdiction, the preservation of data is initially limited to ninety (90) days or three (3) months, subject to subsequent requests for extension.

The foregoing notwithstanding, it is a good practice being observed by major service providers, upon request of the requesting party, to preserve the data subject of an investigation for as long as the latter is still in the course of obtaining legal processes (e.g., application for warrant and mutual legal assistance) for its disclosure.

5. We find no harm in discussing these terminologies at this stage of the negotiations since the determination between these terms will greatly affect the crafting of the scope and actual language of the substantial provisions of the UN treaty under consideration.

This delegation submits that the terminologies be discussed during the Intersessional Consultation and the Fourth Session considering that presently, delegations are also soliciting inputs to find convergence on the terms to be used.

6. We submit that the definition of subscriber information is better kept under the General Provisions. This is because it is possible for subscriber information to be referred to in the UN treaty under consideration for multiple times outside the provision of production order.

7. This Delegation submits that suspicion of ICT-related crimes or the commission of criminal offenses may be considered as one of the grounds for search and seizure or for interception of content data, if and only if the grounds of suspicion are reasonable.

It is reasonable when in the absence of actual belief on the part of the law enforcers, the suspicion that the person to be subject of the procedural measures provided for by the UN treaty under consideration, is probably guilty of committing the offense is based on actual facts, that is, supported by circumstances sufficiently strong in themselves to create the probable cause of guilt of the said person. A reasonable suspicion, therefore, must be founded on probable cause, coupled with good faith on the part of the law enforcers implementing the procedural measures.

At any rate, the exact definition of "suspicion" should be left to national authorities' interpretation.

8. We have no opposition in allowing member states to register their declarations and reservations but the same must only be with respect to certain provisions on and not the totality of procedural measures.

Further, such reservation to certain provisions shall not defeat the raison d'etre of the Convention.

3rd Set of Questions

1. This Delegation is of the opinion that the level of detail on freezing, seizure and confiscation, as well as the disposal of confiscated proceeds of crime or property in the UN treaty under consideration is best patterned after the formulations provided for under the UN Convention Against Transnational Organized Crime and UN Convention Against Corruption, as these conventions provided comprehensive guidelines for member states on how to implement said actions.

2 & 3. We welcome the inclusion of provisions pertaining to protection of witness and the assistance to and protection of victims in the UN treaty under consideration. In doing so, due consideration must be given to the framework provided for by the UN Convention Against Transnational Organized Crime, which remain relevant and effective to date.

4th Set of Questions

1. The Philippine Delegation submits that the actual standards for the collection and admissibility of digital evidence shall be left to the discretion of the national authorities, taking into consideration the differences in legal systems and cultures.

2. This Delegation also supports the adoption of a provision concerning Special Investigative Techniques that is guided by the formulation under Article 20 of the UN Convention Against Transnational Organized Crime. We believe that investigations involving cybercrimes and other crimes entailing the collection of electronic evidence necessitate the employment of specialized techniques on the part of the law enforcers. Establishing the parameters within which said techniques may be exercised in the UN treaty under consideration would be advantageous for member states in countering these types of offenses.

3. We find no harm in the establishment of criminal record provision in the UN treaty under consideration for as long as in its implementation, authorities strictly adhere to data privacy principles of transparency, proportionality and legitimate purpose, as provided for under their domestic laws and international obligations.

4. We support the proposal of having a provision on measures to enhance cooperation with law enforcement authorities in the UN treaty under consideration. Cooperation of law enforcement authorities in cases that are transborder in nature, such as cybercrimes, enhances the effectiveness of law enforcement actions as it ensures rapid exchange of information, facilitation of inquiries, and easy coordination.

Thank you, Madam Chair.

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