



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

**STATEMENT BY  
MRS. ANDREA MARTIN-SWABY  
DEPUTY DIRECTOR OF PUBLIC PROSECUTIONS AND HEAD OF  
JAMAICA'S CYBERCRIMES AND DIGITAL FORENSICS UNIT**

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

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

**PLENARY (ROOM M-3)**

**JUNE 9, 2022**

Madame Chair

CARICOM will now answer the second, third and fourth group of questions posed by you on agenda item 6: provisions on procedural methods and law enforcement.

## **Group 2**

### **1. Which powers and procedures should the Convention foresee for the purposes of detecting, disrupting, investigating, prosecuting and adjudicating the concerned offences?**

CARICOM believes that the following are relevant for the future convention: the expedited preservation of computer data, the production of computer data through court orders, search and seizure warrants which authorize investigators to search and seize computer material which is reasonably required for a criminal investigation; and the interception of content data for specified serious offences to be determined by the domestic law of the member state.

With regard to questions 2 and 3 Madame Chair,

### **2. Are there any specific conditions and safeguards that should apply to certain procedural measures?**

### **3. Should certain procedural measures apply to certain types of data?**

CARICOM would like to refer you, Madame Chair, to our written submissions, noting that these issues were addressed in our previous intervention on the first group of questions.

**4. What time limits should apply to the preservation of data pending a request by competent authorities for its disclosure?**

CARICOM recommends that the time period for the initial preservation of data should be 90 days with the possibility of extending the period through court orders. This period of 90 days is deemed to be a suitable timeframe to afford law enforcement adequate time to pursue orders for the production of data as well as procuring search and seizure warrants.

**5. Do Member States wish to discuss nomenclature differences between electronic information vs. computer data; accumulated v. stored (data or information) at this stage of the negotiations?**

CARICOM believes that the differences between electronic information vs. computer data can be discussed when the definitions are being formulated for inclusion within the General Provisions. CARICOM maintains its position and would like to reiterate that this should be done before the substantive text is negotiated.

**6. Member States may wish to consider whether the definition of subscriber information, under a provision on “production order”**

**would be (1) required; and (2) better kept within this provision, or under the convention's general provisions on the use of terms.**

CARICOM believes that the term subscriber information can be defined under the provision treating with Production Orders. In this definition, it should be clearly stated what the subscriber information entails and the fact that it does not include content and traffic data, as has been done in other international instruments.

On this matter, CARICOM will also listen to the views of other member states in this regard.

**7. Should the suspicion of ICT-related crimes or the commission of criminal offences be stated as grounds for search and seizure, or for interception of content data?**

CARICOM believes that the precondition for obtaining legal authority to undertake a search should be the existence of reasonable grounds to believe, as prescribed by domestic law regarding the search and seizure of tangible documents. This should also be the threshold in relation to the interception of data due to the privacy rights of individuals.

CARICOM maintains that the all-important safeguard regarding these procedural measures is that the State should be allowed to incorporate these measures in accordance with the domestic context of each Member State and to impose the threshold which is consistent with their constitutional, legislative and judicial framework.

Accordingly, there may be no need to include within the provision the requirement for suspicion of ICT related crimes or the commission of criminal offences.

It should be noted however, that while CARICOM, recommended its included, our region will take into account the views of the other Member States on this issue.

### **Group 3**

#### **1. Which level of detail should be in the provisions on freezing, seizure and confiscation, as well as the disposal of confiscated proceeds of crime or property?**

CARICOM proposes that the provisions on procedural measures should be wide enough to allow competent authorities to, in a timely manner, access relevant information and initiate procedures to freeze, seize and confiscate property that is or is suspected of being the proceeds of crime. These provisions should be set out in sufficient detail to ensure that competent authorities are empowered to conduct specified criminal investigations without obstruction. Ideally, the provisions should detail what are the powers of the competent authorities, what items/data are subject to the powers of 'search, seizure and confiscation' and what are the circumstances and the burden of proof that must exist before the competent authorities can exercise their powers.

In this regard, CARICOM proposes the standard of 'reasonable belief that a criminal offence was committed or is being committed' should be adopted. Our proposal is that the provisions should speak to the search, seizure and confiscation of information stored or processed electronically on any ICT system and device. The provision must also give the competent authorities the power to secure any relevant data or equipment. These provisions should also include the protection of the rights of *bona fide* third parties. Article 31(9) of UNCAC may serve as a useful guide to the Committee.

Concerning the disposal of confiscated proceeds of crime or property, CARICOM believes that guidance may be sought from both the UNTOC and UNCAC which contain articles addressing the disposal of confiscated assets (*see articles 14 and 57 respectively*). These articles provide that the proceeds of crime confiscated must be disposed of by States in accordance with their domestic law and administrative procedures. They also provide for international cooperation among states with respect to the disposal of assets. However, the instrument we are now negotiating may also set out that states should have mechanisms for managing property frozen, seized or confiscated.

**2. Should the convention contain a provision on the protection of witnesses? If yes, which factors of protection are important to include in such a provision, and what level of detail, in terms of definitions and description of related procedures, should be expected? Would the committee like to follow the formulation of UNTOC (article 24)?**

CARICOM is of the view that the Convention should contain provisions that provide for protection of witnesses. The participation of these persons will be crucial to the successful investigation and prosecution of the offences established in accordance with this instrument. However, these persons for fear of retaliation do not want to participate in the criminal justice system. As a result, perpetrators often go free. Because of this, CARICOM agrees that the formulation of *Article 24 of the UNTOC* should be used as a base. This article provides for the physical protection of witnesses, the modification of evidentiary rules to accommodate witnesses and the relocation of witnesses. However, we may wish to also be guided by *Article 32 of the UNCAC* which not only deals with the protection of witnesses and victims, but also experts who are called upon to provide evidence concerning offences established by that Convention.

**3. Should the convention contain a provision on the assistance to and protection of victims? If yes, which factors of protection are important to include in such a provision, and what level of detail, in terms of definitions and description of related procedures, should be expected? What role should victims and reporting persons have? Would the committee like to follow the formulation of UNTOC (article 25)?**

Yes, as already mentioned CARICOM supports the inclusion of provisions dealing with the protection of victims. It is recommended

that one article which addresses the protection of witnesses, victims and experts (see *article 32 of UNCAC*) be included. CARICOM also supports the inclusion of provisions that require States to assist the victims of offences established pursuant to this instrument. CARICOM proposes that this article deals with compensation and retribution. Additionally, victims should have the opportunity to make representations on the kind of harm that they have suffered because of the crime. In this regard, we suggest that the formulation in *article 25 of UNTOC* should be used as a starting point. These provisions should be specific to victims. Finally, it may be helpful to define for the purposes of this Instrument, who is a victim.

#### **Group 4**

- 1. Should the convention set standards for the collection and admissibility of digital evidence in general? What would be the advantages and disadvantages of this approach?**

CARICOM is of the belief that the instrument should not provide for the collection and or admissibility of evidence because each jurisdiction's domestic legislation will govern these aspects. Specifically, concerning the collection of evidence, the resources of jurisdictions will vary thereby causing an undue burden on Member States to comply.

- 2. Should the convention contain a provision on special investigative techniques? If yes, which ones should be referenced, and what level of detail, in terms of definitions and**

**description of related procedures, should be expected?  
Would the committee like to follow the formulation of UNTOC  
(article 20)?**

CARICOM is of the view that this instrument should provide for the use of special investigative techniques, such as surveillance and interception of communication, which are both detailed in the UNCAC and UNTOC. However, each country should be left to decide what techniques should be employed on a case by case basis. The formula already existing in the other Conventions can be followed for inclusion within this new Convention as it will allow for Member States to include similar specifications in their domestic laws.

**3. Should the convention contain a provision on the establishment of criminal record by following the formulation of UNTOC (article 22)?**

CARICOM remains open to dialogue on this issue. However, we note that Art. 22 of UNTOC allows Member States the discretion of adopting such legislative measures.

**4. Should the convention contain a provision on measures to enhance cooperation with law enforcement authorities by following the formulation of UNTOC (article 26)?**

Yes, CARICOM, firmly agrees on the inclusion of a provision on measures to enhance cooperation with law enforcement

authorities. We notice that both UNTOC and UNCAC speak to same. It will promote and enhance cooperation to resolve investigative matters in a more opportune manner.

Thank you, Madame Chair.