



Third Intercessional Consultation of the AHC on Cybercrime

Presentation for Panel “The Power of Words: A Discussion on Terminology and Other Aspects of the Chapter on General Provisions” by Nick Ashton-Hart

Good morning distinguished delegates, fellow panellists. Firstly let me thank the Chair and her team, including the Vice-Chairs, and the Secretariat for inviting me to participate today on behalf of ICC United Kingdom.

General Provisions:

The Vienna Convention establishes in Article 31(1) that: A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context *and in the light of its object and purpose*.

That’s why we think the general provisions are so important: They define the object and purpose, and frame all the other provisions.

Secondarily, they also help those negotiating the Convention have essential common frames of reference for all the operative text.

For that reason we think the chapter must contain at least the following provisions:

A Statement of Purpose - We submit that the convention has three objectives 1) to prevent and combat cybercrime (using that term, and not broader phrasing related to misuse of ICTs) while protecting users from such acts, 2) to facilitate and improve international cooperation in pursuit of the first objective, and 3) to facilitate and improve technical assistance and capacity building to ensure that all states have what they need, in law, policy and training, to achieve the first and second objective.

Note that we have deliberately left out the protection of national sovereignty. We understand there are different views about this, but from the perspective of industry, while sovereignty must be respected, sovereignty is not the objective of the convention, tackling cybercrime is.

Its scope of application: the Convention should apply primarily to the detection, investigation, and prosecution of serious cybercrimes. This is important: if the objective is all cybercrime then the Convention is an ocean-boiling exercise. If this convention isn't seen as making a significant impact on serious cybercrime, which is growing at an alarming pace, it will certainly not make any difference to minor crimes or misdemeanours. The best way to avoid this is to

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state very clearly that the primary objective is serious crime.

Obligations in respect of human rights: The very definition of justice has human rights at its core: "Justice is the idea that people are to be treated impartially, fairly, properly, and reasonably by the law and by arbiters of the law, that laws are to ensure that no harm befalls another, and that, where harm is alleged, a remedial action is taken - both the accuser and the accused receive a morally right consequence merited by their actions." None of that is possible without human rights at the core of the process, and for that reason the Convention must have a very clear statement that the protection of human rights while addressing cybercrime is a fundamental objective underpinning the Convention and all the acts and processes that it contains - with specific references to the key fundamental pillars of international human rights law.

Terminology:

We see another fundamental need: for the parties to have a common understanding of key fundamentals. While we're sensibly leaving definitions until later in the negotiation process, we submit that certain concepts fundamental to the entire Convention need to be agreed up front. We see three particular areas that are indispensable - and in all three we regrettably see a lack of consensus which is concerning given the significance of this Convention.

First and most important, we need a common understanding of what constitutes a crime for the purposes of the Convention.

It must be a criminal act, with criminal or malicious intent. It is a simple fact that there won't be international law enforcement cooperation for acts which are not investigated and prosecuted by the state. Acts that are unlawful but not criminal and/or which are pursued by private parties in civil court do not meet this standard and must therefore be excluded from the Convention as there is nothing for law enforcement to cooperate on.

What requirements are there for an act to be subject to international cooperation?

Dual criminality must exist: it must be understood in all the relevant jurisdictions to be the same crime or similar enough to be treated as such. The provisions related to practical cooperation should also require this standard and it should be clearly stated that without it, any Party may refuse to cooperate.

Are the international cooperation provisions to apply to criminal acts which are not directly covered by the convention?

If the answer is yes we submit that two things must also be true:

First, there must be a threshold. How can states agree on the cooperation provisions if they

don't know what scope of acts they'll relate to?

Secondly, the threshold should have a floor: the provisions will only be available for crimes with criminal intent that are subject to incarceration by the state for a minimum term of more than a year.

As I've said, the fact that we don't seem to have a consensus on these fundamentals is a significant concern for the private sector.

It seems to us that the fourth session needs to do more than simply discuss the articles of these sections. It needs to also address these fundamental issues as a matter of priority.

Thank you again Chairman, and I look forward to questions from participants.