



Elaboration of a convention on cybercrime / countering the use of information and communications technologies for criminal purposes – 3rd formal session 29 August – 9 September 2022

Switzerland's submission relating to provisions on international cooperation, technical assistance, prevention measures, mechanism of implementation, final provisions and preamble

The present document outlines Switzerland's view and proposals on international cooperation, technical assistance, prevention measures, mechanism of implementation, final provisions and preamble, to be discussed at the AHC third formal session from 29 August – 9 September 2022.

These concrete proposals are often based on or inspired by existing provisions of International Criminal Law treaties and are presented in light of such existing international legal instruments relevant to the elaboration of the future UN cybercrime treaty. The proposals made are to be understood as a starting point in view of the upcoming discussions. We hope that these proposals will contribute to a fruitful and constructive discussion at the AHC's next meetings. The present submission may also provide some guidance regarding the direction and goals that, in our view, the negotiations should be aimed at during the meetings.

1. Provisions on international cooperation

General principles

Title 1 – General principles relating to international cooperation

General principles relating to international cooperation

The Parties shall cooperate with each other, in accordance with the provisions of this chapter, and through the application of relevant international instruments on international cooperation in criminal matters including rights arising pursuant to obligations they have undertaken under the applicable international human rights instruments, arrangements agreed on the basis of uniform or reciprocal legislation, and domestic laws, and which shall incorporate the principle of proportionality, to the widest extent possible for the provisions on criminalization of this Convention.

Provisional measures

¹ At the express request of another State, provisional measures may be taken by the competent authority to preserve the existing situation, to safeguard threatened legal interests or to protect jeopardised evidence unless the proceedings clearly appear to be inadmissible or inappropriate.

² If any delay would jeopardise the proceedings and if there is sufficient information to determine whether all the conditions are met, provisional measures may be ordered as soon as a request is announced. Such measures shall be revoked if the foreign State does not make the request within the deadline set.

Principle of non-discrimination

Nothing in this Convention shall be interpreted as imposing an obligation to extradite or to afford mutual legal assistance, if the requested State Party has substantial grounds for believing that the request for extradition for offences set forth in this Convention or for mutual legal assistance with respect to such offences has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin or political opinion or that compliance with the request would cause prejudice to that person's position for any of these reasons.

Title 2 – Principles relating to extradition

Extradition

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- a. This article applies to extradition between Parties for the criminal offences established in accordance with the provisions on criminalization of this Convention, provided that they are punishable under the laws of both Parties concerned by deprivation of liberty for a maximum period of at least one year, or by a more severe penalty.
- b. Where a different minimum penalty is to be applied under an arrangement agreed on the basis of uniform or reciprocal legislation or an extradition treaty applicable between two or more parties, the minimum penalty provided for under such arrangement or treaty shall apply.

² Extradition shall be subject to the conditions and safeguards provided for by the law of the requested Party or by applicable extradition and human rights treaties, including the grounds on which the requested Party may refuse extradition.

³ If extradition for a criminal offence referred to in paragraph 1 of this article is refused solely on the basis of the nationality of the person sought, or because the requested Party deems that it has jurisdiction over the offence, the requested Party shall submit the case at the request of the requesting Party to its competent authorities for the purpose of prosecution and shall report the final outcome to the requesting Party in due course. Those authorities shall take their decision and conduct their investigations and proceedings in the same manner as for any other offence of a comparable nature under the law of that Party.

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- a. Each Party shall, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, communicate to the Secretary-General of the United Nations the name and address of each authority responsible for making or receiving requests for extradition or provisional arrest.
- b. The Secretary-General of the United Nations shall set up and keep updated a register of authorities so designated by the Parties. Each Party shall ensure that the details held on the register are correct.

Title 3 – General principles relating to mutual legal assistance

General principles relating to mutual legal assistance

¹ The Parties shall afford one another mutual legal assistance to the widest extent possible for the provisions on criminalization of this Convention.

² Each Party shall also adopt such legislative and other measures as may be necessary to carry out the obligations set forth in this Convention.

³ Each Party may, in circumstances requiring it, make requests for mutual legal assistance or communications related thereto by expedited means of communication, including fax or email, to the extent that such means provide appropriate levels of security and authentication (including the use of encryption, where necessary), with formal confirmation to follow, where required by the requested Party. The requested Party shall accept and respond to the request by any such expedited means of communication.

⁴ Mutual legal assistance shall be subject to the conditions and safeguards provided for by the law of the requested Party or by applicable mutual legal assistance or human rights treaties, including the grounds on which the requested Party may refuse cooperation.

⁵ The requested Party is permitted to make mutual legal assistance conditional upon the existence of dual criminality. That condition shall be deemed fulfilled, irrespective of whether its laws place the offence within the same category of offence or denominate the offence by the same terminology as the requesting Party, if the conduct underlying the offence for which assistance is sought is a criminal offence under its laws.

Spontaneous information

¹ A Party may, within the limits of its domestic law and without prior request, forward to another Party information obtained within the framework of its own investigations when it considers that the disclosure of such information might assist the receiving Party in initiating or carrying out investigations or proceedings concerning criminal offences established in accordance with this Convention or might lead to a request for cooperation by that Party under this chapter.

² Prior to providing such information, the providing Party may request that it be kept confidential or only used subject to conditions. If the receiving Party cannot comply with such request, it shall notify the providing Party, which shall then determine whether the information should nevertheless be provided. If the receiving Party accepts the information subject to the conditions, it shall be bound by them.

Title 4 – Procedures pertaining to mutual assistance requests in the absence of applicable international agreements

Procedures pertaining to mutual assistance requests in the absence of applicable international agreements

¹ Where there is no mutual assistance treaty or arrangement on the basis of uniform or reciprocal legislation in force between the requesting and requested Parties, the provisions of paragraphs 2 through 9 of this article shall apply. The provisions of this article shall not apply where such treaty, arrangement or legislation exists, unless the Parties concerned agree to apply any or all of the remainder of this article in lieu thereof.

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- a. Each Party shall designate a central authority or authorities responsible for sending and answering requests for mutual assistance, the execution of such requests or their transmission to the authorities competent for their execution.
- b. The central authorities shall communicate directly with each other;
- c. Each Party shall, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, communicate to the Secretary-General of the United Nations the names and addresses of the authorities designated in pursuance of this paragraph;

- d. The Secretary-General of the United Nations shall set up and keep updated a register of central authorities designated by the Parties. Each Party shall ensure that the details held on the register are correct at all times.

³ Mutual assistance requests under this article shall be executed in accordance with the procedures specified by the requesting Party, except where incompatible with the law of the requested Party.

⁴ The requested Party may, in addition to the grounds for refusal established in the provision on General principles relating to mutual legal assistance of this Convention, refuse assistance if:

- a. the request concerns an offence which the requested Party considers a political offence or an offence connected with a political offence, or
- b. it considers that execution of the request is likely to prejudice its sovereignty, security, ordre public or other essential interests.

⁵ The requested Party may postpone action on a request if such action would prejudice criminal investigations or proceedings conducted by its authorities.

⁶ Before refusing or postponing assistance, the requested Party shall, where appropriate after having consulted with the requesting Party, consider whether the request may be granted partially or subject to such conditions as it deems necessary.

⁷ The requested Party shall promptly inform the requesting Party of the outcome of the execution of a request for assistance. Reasons shall be given for any refusal or postponement of the request. The requested Party shall also inform the requesting Party of any reasons that render impossible the execution of the request or are likely to delay it significantly.

⁸ The requesting Party may request that the requested Party keep confidential the fact of any request made under this chapter as well as its subject, except to the extent necessary for its execution. If the requested Party cannot comply with the request for confidentiality, it shall promptly inform the requesting Party, which shall then determine whether the request should nevertheless be executed.

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- a. In the event of urgency, requests for mutual assistance or communications related thereto may be sent directly by judicial authorities of the requesting Party to such authorities of the requested Party. In any such cases, a copy shall be sent at the same time to the central authority of the requested Party through the central authority of the requesting Party.
- b. Any request or communication under this paragraph may be made through the International Criminal Police Organisation (Interpol).
- c. Where a request is made pursuant to sub-paragraph a. of this article and the authority is not competent to deal with the request, it shall refer the request to the competent national authority and inform directly the requesting Party that it has done so.
- d. Requests or communications made under this paragraph that do not involve coercive action may be directly transmitted by the competent authorities of the requesting Party to the competent authorities of the requested Party.
- e. Each Party may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, inform the Secretary-General of the United Nations that, for reasons of efficiency, requests made under this paragraph are to be addressed to its central authority.

Confidentiality and limitation on use

¹ When there is no mutual assistance treaty or arrangement on the basis of uniform or reciprocal legislation in force between the requesting and the requested Parties, the provisions of this article shall

apply. The provisions of this article shall not apply where such treaty, arrangement or legislation exists, unless the Parties concerned agree to apply any or all of the remainder of this article in lieu thereof.

² The requested Party may make the supply of information or material in response to a request dependent on the condition that it is:

- a. kept confidential where the request for mutual legal assistance could not be complied with in the absence of such condition, or
- b. not used for investigations or proceedings other than those stated in the request.

³ If the requesting Party cannot comply with a condition referred to in paragraph 2, it shall promptly inform the other Party, which shall then determine whether the information should nevertheless be provided. When the requesting Party accepts the condition, it shall be bound by it.

⁴ Any Party that supplies information or material subject to a condition referred to in paragraph 2 may require the other Party to explain, in relation to that condition, the use made of such information or material.

Section 2 – Specific provision

Title 1 – Mutual legal assistance regarding provisional measures

Expedited preservation of stored computer data

¹ A Party may request another Party to order or otherwise obtain the expeditious preservation of data stored by means of a computer system, located within the territory of that other Party and in respect of which the requesting Party intends to submit a request for mutual legal assistance for the search or similar access, seizure or similar securing, or disclosure of the data.

² A request for preservation made under paragraph 1 shall specify:

- a. the authority seeking the preservation;
- b. the offence that is the subject of a criminal investigation or proceedings and a brief summary of the related facts;
- c. the stored computer data to be preserved and its relationship to the offence;
- d. any available information identifying the custodian of the stored computer data or the location of the computer system;
- e. the necessity of the preservation; and
- f. that the Party intends to submit a request for mutual assistance for the search or similar access, seizure or similar securing, or disclosure of the stored computer data.

³ Upon receiving the request from another Party, the requested Party shall take all appropriate measures to preserve expeditiously the specified data in accordance with its domestic law. For the purposes of responding to a request, dual criminality may be required as a condition to providing such preservation.

2. Provision on technical assistance, including exchange of experience

Training and technical assistance

¹ Each State Party shall, as appropriate, initiate, develop or improve specific training programs for its law enforcement personnel, and other personnel charged with the prevention and detection of the offences covered by this Convention.

² States Parties shall, as appropriate, assist one another in planning and implementing research and training programs and to that end shall also, as appropriate, use regional and international conferences and seminars to promote cooperation and to stimulate discussion on problems of mutual concern.

Moreover, as appropriate and upon request, State parties can assist and support each other in the implementation of this Convention.

3. Provisions on Prevention

Prevention

¹ States Parties shall endeavour to develop and evaluate national projects and to establish, where appropriate, and promote best practices and policies aimed at the prevention of cybercrime.

² States Parties shall endeavour to promote public awareness regarding the existence, causes and gravity of and the threat posed by cybercrime and ways to prevent it. Information may be disseminated where appropriate through trainings, the mass media and relevant internet websites and shall include measures to promote public participation in preventing such crime.

³ States Parties shall, as appropriate, collaborate with each other and relevant international and regional organizations in promoting and developing measures to prevent cybercrime.

Collection, exchange and analysis of information on the nature of cybercrime

States Parties shall consider developing and sharing analytical expertise concerning cybercrime activities with each other and through international and regional organizations.

Participation of society

Each State Party shall take appropriate measures, within its means and in accordance with fundamental principles of its domestic law, to promote the active participation of individuals and groups outside the public sector, such as civil society and non-governmental organizations, in the prevention of cybercrime and to raise public awareness regarding the existence, causes and gravity of and the threat posed by cybercrime.

4. Mechanism of implementation

Conference of the Parties to the Convention

¹ A Conference of the Parties to the Convention is hereby established to improve the capacity of States Parties to combat cybercrime and to promote and review the implementation of this Convention.

² The Secretary-General of the United Nations shall convene the Conference of the Parties not later than one year following the entry into force of this Convention. The Conference of the Parties shall adopt rules of procedure and rules governing the activities set forth in paragraphs 3 and 4 of this article (including rules concerning payment of expenses incurred in carrying out those activities).

³ The Conference of the Parties shall agree upon mechanisms for achieving the objectives mentioned in paragraph 1 of this article, including:

- a. Facilitating activities by States Parties on training, technical assistance and prevention, including by encouraging the mobilization of voluntary contributions;
- b. Facilitating the exchange of information among States Parties on patterns and trends in cybercrime and on successful practices for combating it;
- c. Cooperating with relevant international and regional organizations and non-governmental organizations;
- d. Reviewing periodically the implementation of this Convention;
- e. Making recommendations to improve this Convention and its implementation.

⁴ For the purpose of paragraphs 3 (d) and (e) of this article, the Conference of the Parties shall acquire the necessary knowledge of the measures taken by States Parties in implementing this Convention and

the difficulties encountered by them in doing so through information provided by them and through such supplemental review mechanisms as may be established by the Conference of the Parties.

⁵ Each State Party shall provide the Conference of the Parties with information on its programmes, plans and practices, as well as legislative and administrative measures to implement this Convention, as required by the Conference of the Parties.

Secretariat

The Secretary-General of the United Nations shall provide the necessary secretariat services to the Conference of the Parties to the Convention.

5. Final Provisions

Settlement of disputes

¹ States Parties shall endeavour to settle disputes concerning the interpretation or application of this Convention through negotiation.

² Any dispute between two or more States Parties concerning the interpretation or application of this Convention that cannot be settled through negotiation within a reasonable time shall, at the request of one of those States Parties, be submitted to arbitration or to the International Court of Justice by request in accordance with the Statute of the Court.

³ Each State Party may, at the time of signature, ratification, acceptance or approval of or accession to this Convention, declare that it does not consider itself bound by paragraph 2 of this article. The other States Parties shall not be bound by paragraph 2 of this article with respect to any State Party that has made such a reservation.

⁴ Any State Party that has made a reservation in accordance with paragraph 3 of this article may at any time withdraw that reservation by notification to the Secretary-General of the United Nations.

Signature, ratification, acceptance, approval and accession

¹ This Convention shall be open to all States for signature from [DATE in CITY, COUNTRY] and thereafter at United Nations Headquarters in New York until [DATE].

² This Convention is subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations.

Entry into force

¹ This Convention shall enter into force on the ninetieth day after the date of deposit of the fortieth instrument of ratification, acceptance, approval or accession.

² For each State ratifying, accepting, approving or acceding to this Convention after the deposit of the 38 fortieth instrument of such action, this Convention shall enter into force on the thirtieth day after the date of deposit by such State or organization of the relevant instrument.

Denunciation

¹ A State Party may denounce this Convention by written notification to the Secretary-General of the United Nations. Such denunciation shall become effective one year after the date of receipt of the notification by the Secretary-General.

² Denunciation of this Convention in accordance with paragraph 1 of this article shall entail the denunciation of any protocols thereto.

Depositary and languages

¹ The Secretary-General of the United Nations is designated depositary of this Convention.

² The original of this Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS WHEREOF, the undersigned plenipotentiaries, being duly authorized thereto by their respective Governments, have signed this Convention.

6. Preamble

Convinced of the need to pursue, as a matter of priority, a common criminal policy aimed at the protection of society against cybercrime, inter alia, by adopting appropriate legislation and fostering international cooperation;

Conscious of the profound changes brought about by the digitalisation, convergence and continuing globalisation of computer networks;

Concerned by the risk that computer networks and electronic information may also be used for committing criminal offences and that evidence relating to such offences may be stored and transferred by these networks;

Recognising the need for cooperation between States and private industry in combating cybercrime and the need to protect legitimate interests in the use and development of information technologies;

Believing that an effective fight against cybercrime requires increased, rapid and well-functioning international cooperation in criminal matters;

Convinced that the present Convention is necessary to deter action directed against the confidentiality, integrity and availability of computer systems, networks and computer data as well as the misuse of such systems, networks and data by providing for the criminalization of such conduct, as described in this Convention, and the adoption of powers sufficient for effectively combating such criminal offences, by facilitating their detection, investigation and prosecution at both the domestic and international levels and by providing arrangements for fast and reliable international cooperation;

Mindful of the need to ensure a proper balance between the interests of law enforcement and respect for fundamental human rights as enshrined in international and regional human rights conventions and treaties, which reaffirm the right of everyone to hold opinions without interference, as well as the right to freedom of expression, including the freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, and the rights concerning the respect for privacy;

Mindful also of the right to the protection of personal data to help individuals to exercise control over information relating to themselves which is unlawfully collected and used by others;

Considering the 1989 United Nations Convention on the Rights of the Child and the 1999 International Labour Organization Worst Forms of Child Labour Convention;

Taking into account the existing international and regional conventions on cooperation in the penal field, as well as similar treaties which exist between United Nations member States, and stressing that the present Convention is intended to supplement those conventions.