

Ad Hoc Committee Fifth Session: Analysis of CND Remaining Chapters

Global Partners Digital submission
March 2023

About Global Partners Digital

Global Partners Digital is a social purpose company dedicated to fostering a digital environment underpinned by human rights.

Introduction

We welcome the opportunity to provide comments on the “Consolidated negotiating document on the preamble, the provisions on international cooperation, preventive measures, technical assistance and the mechanism of implementation and the final provisions of a comprehensive international convention on countering the use of information and communications technologies for criminal purposes”.

We appreciate the work undertaken so far in the preparation of this document. However, we believe that there are various elements of the document that should be modified to mitigate risks to human rights and ensure the convention is consistent with the states obligations to respect, protect and promote human rights.

Preamble

We are pleased that the preamble makes several references to human rights and fundamental freedoms. However, we believe that existing language on “the need to ensure proper balance between the interests of law enforcement and respect for human rights as enshrined in the applicable international and regional human rights conventions and treaties” could be improved. While we understand that this is based on the preamble of the Budapest Convention and do not consider it to pose risks to human rights, we still recommend removing “balance” to avoid implying a potential trade-off between human rights and other interests, or framing human rights and security as competing objectives when they are in fact mutually supportive.



We recommend that this provision better reflect the importance of respect for human rights when countering cybercrime. For example: “Committed to the obligation of states to ensure full respect for human rights as enshrined in the Universal Declaration of Human Rights and the International Covenant on Civil and Political rights, as well as other applicable international and regional human rights conventions and treaties, which reaffirm the right of everyone to hold opinions without interference, 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 respect for privacy”.

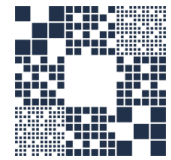
We are concerned with the provision of the preamble which recognises the need for cooperation between various stakeholders and the need to protect legitimate interests in the use and development of information technologies. We would prefer that these two concepts be de-coupled and that there be a standalone sentence that emphasises the importance of multi-stakeholder cooperation. For example, “Recognizing also the importance of the role of civil society, academia and the private sector in preventing and combating cybercrime, including ensuring accountability, protection of human rights and fundamental freedoms, and gender equality”.

Chapter IV: International Cooperation

- Cluster 1 (Articles 56–57)

We are pleased that these articles provide some general conditions on international cooperation, including explicit recognition that the powers and procedures provided for in this chapter shall be subject to the conditions and safeguards provided for in article 42. We also welcome the conditions and limitations set out in article 57 with respect to the protection of personal data.

However, in article 56 paragraph 1 we would recommend that the cooperation is not based on reciprocity, but instead on dual criminality. We also recommend that article 56 paragraph 3 remove “whenever” before dual criminality. These changes would ensure that international cooperation is based on the principle that assistance can only be granted if the conduct in question is a criminal offence under the laws of both the requesting and the requested state parties. Likewise, we recommend that the cooperation is limited to offences set forth in this convention and serious crimes. We do not see a clear role for “preventing” or “disrupting” in paragraph 1 of the text, so we would welcome their deletion since they are not useful to refer to formal action to address actual criminal offences.



Finally, we would still recommend that article 56 on general provisions for international cooperation contain more detailed information on the applicable conditions and safeguards for human rights. These should require that any cooperation by states be subject to conditions and safeguards which protect human rights. These provisions should make explicit reference to state obligations under international human rights law and provide examples of conditions and safeguards, including judicial or other independent supervision, grounds justifying the application of certain powers, and limitations on the scope and the duration of such powers. We find it insufficient to simply sign post to safeguards reflected in article 42 which also is currently subject to revisions and in its current drafting may not be enough to guarantee respect for human rights in this context.

In article 57, we suggest adding a final paragraph that clarifies that any transfer of data should acknowledge the legal requirements to accept such transfer by the states parties. For example, “This article is without prejudice to States Parties’ domestic legal framework that imposes conditions on the transfer of personal data to other States”.

In paragraph 1, we suggest qualifying the type of administrative or civil proceedings and other judicial or administrative procedures to which data can be transmitted by requiring that the data is “strictly and directly related to those proceedings” in order to avoid unintended expansion on the use of personal data. We also recommend clarifying what is meant by an “imminent and serious threat to public safety”, which could be accomplished through a clear definition or modifications to the text.

- Cluster 2 (Article 58: Extradition)

We welcome that article 58 provides a number of helpful safeguards:

- A requirement that the offence is covered by the convention and criminalised in both states (Article 58(1)(a));
- A requirement that any person extradited must be guaranteed “fair treatment at all stages of the proceedings” (Article 58(14));
- Specifying that nothing in this convention shall be interpreted as imposing an obligation to extradite 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, or if there are substantial grounds for believing that the person would be in danger of being subjected to torture” (Article 58(15)).



We believe this article can be improved through the following means:

- Aligning the the dual criminality requirement with the existing provision of UNTOC, namely, providing that “the offence for which extradition is sought is punishable under the domestic law of both the requesting State Party and the requested State Party by a maximum deprivation of liberty of at least four years or a more serious penalty”, as opposed to the current formulation.
 - Expanding the requirement that any person extradited must be guaranteed “fair treatment at all stages of the proceedings” to include all the conditions and safeguards contained within the convention as well as all the rights and guarantees provided by the domestic law and under international human rights law.
 - Providing a more open-ended list of grounds under which a state may deny a request for extradition if there are substantial grounds for believing the request was made for the purpose of prosecuting or punishing a person. For example, adding “or other status” within article 58(15). This would provide more comprehensive protection and reflect a deeper understanding of characteristics that could make certain persons or groups more vulnerable.
- Cluster 4 (Articles 61-67)

We welcome that article 61 provides a number of helpful safeguards:

- Specifying that measures of mutual legal assistance should only be in relation to offences set out in the convention as well as the collection of evidence in electronic form (Article 61(1));
- Enabling states to decline mutual legal assistance – including under articles 62 to 74 – on the ground of absence of dual criminality, or when it involves matters of a de minimis nature (Article 61(6));
- Specifying that mutual legal assistance may be refused if the requested state party considers that execution of the request is likely to prejudice its sovereignty, security, *ordre public* or other essential interests (Article 61(19)(b)).

In addition, we recommend that article 61 provide states with the ability to refuse to provide mutual legal assistance where the offence is “a political offence or an offence connected with a political offence” or where executing the request would likely prejudice, inter alia, “the protection of human rights or fundamental freedoms”. These types of safeguards are provided elsewhere in the treaty, including under article 69



on mutual legal assistance in the expedited disclosure of preserved traffic data, but this should apply to mutual legal assistance more broadly.

- Cluster 5 (Articles 68–74)

We are pleased that a request for expedited preservation of stored computer data must specify the offence that is the subject of a criminal investigation or proceedings and the necessity of the preservation (article 68(2)). We also welcome 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 (article 68(4)).

We also appreciate that a request for expedited preservation of stored computer data, and expedited disclosure of preserved traffic data, may be refused on grounds that it is a political offence or otherwise would prejudice a states sovereignty, security, *ordre public* or other essential interests (article 68(5) (article 69(2)). We reiterate the need for a grounds of refusal due to human rights concerns for both types of requests.

We are concerned that various investigative powers under this cluster, including accessing stored computer data (article 70), the real-time collection of traffic data (article 73) and the interception of content data (article 74), all contain varying levels of safeguards for and conditions. The interception of content data, for example, is only to be provided if “permitted under treaties applicable to them, as well as their domestic laws”, whereas the real-time collection of traffic data shall be governed “by the conditions and procedures provided for under domestic law”.

While we understand the potentially intrusive nature of the interception of content and the associated risks to human rights, we believe that mutual legal assistance for all of these investigatory powers may pose similar risks. We therefore recommend that providing mutual legal assistance should be restricted to what is considered permissible under both applicable treaties – such as international human rights law treaties – and domestic law. This would provide more comprehensive protections to safeguard against abuse and mitigate risks to the right to privacy. Likewise, we encourage that those provisions acknowledge the obligation of state parties to not generally undermine the security and integrity of digital communications and services posing unjustified risk in the exercise of right to privacy.

- Cluster 6 (Articles 75–78)

We are concerned with the language provided for in article 75(1)(d) which provides that state parties shall exchange information information “on specific means and methods used by those committing the offences covered by this Convention,



including, where applicable, the use of false identities, altered or false documents or other means of concealing their activities and the use of illicit encrypted platforms and [cybercrime tactics, techniques and procedures]”.

While this language does not necessarily pose direct risks to human rights, we would recommend removing the reference to “illicit encrypted platforms”. This language is not only superfluous, as it is followed by text on tactics and techniques, but it also risks framing encryption in an overly securitised manner. This could ultimately contribute to a more hostile perspective by states to encryption, which is an essential tool for individuals to communicate privately. We recommend removing this language, or alternatively providing more general language such as “to exchange information with other States Parties on specific means and methods used by persons committing crimes established under this convention, including, where applicable, means of concealing their activities”.

Article 76 on “Public-private partnerships to enhance the investigation” would benefit from adding a reference to commitment to ensure full respect for human rights in the guidelines for service providers in assisting law enforcement agencies in the investigation that are proposed in paragraph 2, consistent with the states human rights obligations and the UN Guiding Principles in Business and Human Rights.

We also recommend that Article 76(2) replace “State Parties shall develop guidelines for” with “State Parties may encourage” to remove this as an obligation for states.

Article 77 on “Joint investigations” should ensure respect for the rule of law, and avoid its misuse for “forum shopping” or other procedures that can undermine fundamental rights protections or criminal procedural safeguards in the state where the investigation is carried out or where individuals targeted by the investigation are. Investigative measures should always be in compliance with the domestic legal framework of the state where the investigation is carried out, or where individuals are targeted. We propose to substitute the last sentence of the provision for the following: “Joint investigation teams shall carry out their operations in accordance with the domestic law of the Party in which they operate and fully respect international human rights law”.

Article 78 on “special investigative techniques” would allow states to take measures “such as electronic or other forms of surveillance, as well as for conduct of undercover operations by its competent authorities”. All the article says in terms of limitations, conditions or safeguards is that this must be “permitted by the fundamental principles of its domestic legal system” and “subject to the conditions prescribed by its legislation. The article goes on to encourage states to conclude bilateral and multilateral agreements to cooperate when undertaking these “special



investigative techniques". In the absence of any specific limitations, conditions or safeguards, this article could incentivise or create the potential for interferences with the right to privacy which are not permitted by international human rights law, and should be removed. However, if it is retained, we suggest the following minimum requirements:

- Including a definition of what is a "controlled delivery";
- Deleting the open reference to "special investigative techniques" and replace it with a specific, enumerated list of those electronic surveillance powers that are intended to be authorised by the Convention;
- Narrowing the definitions to what is legitimate, necessary, and proportionate to avoid overbroad interpretations;
- Adding "subject to international human rights law" or similar language alongside the domestic law requirement to ensure compliance with international human rights law; and,
- Establishing safeguards to promote transparency and accountability in the exercise of each technique.

Chapter V: Technical Assistance, Including Information Exchange

We are pleased that article 87(2) makes specific references to mainstreaming a gender perspective into policymaking, legislation and programming, as well the effective protection of human rights, including the protection of privacy and personal data and respect for due process while preventing and combating offences covered by the convention.

We are, however, concerned about the inclusion of article 87(2)(g) on "modern law enforcement equipment and techniques and the use thereof, including electronic surveillance, controlled deliveries and undercover operations". In the absence of any limitations, conditions or safeguards, this sub-article could incentivise or create the potential for interferences with the right to privacy which are not permitted by international human rights law, and should be removed. This is particularly worrying as article 87 lacks specific safeguards with respect to international human rights law and only provides that "such programmes shall deal, in particular and to the extent permitted by domestic law". We therefore recommend the removal of article 87(2)(g) or changing it to "modern law enforcement equipment and techniques and the use thereof in accordance with relevant international human rights law obligations".

Finally, 87(2)(n) on mainstreaming a gender perspective into policymaking, legislation and programming could be strengthened by adding an explicit commitment with a sensitive training for legal and judicial personnel interacting with victims and accused



of cybercrime, including training on trauma-informed and culturally-relevant practices for legal and judicial personnel interacting with them.

Chapter VI: Preventive Measures

- Article 90: General provision on prevention

We are pleased that article 90(2) specifies that states shall endeavour, in accordance with fundamental principles of their domestic law, and with applicable international human rights law, to reduce existing or future opportunities for cybercrime, through appropriate legislative, administrative or other measures.

We are concerned that article 90 does not distinguish that such preventive measures are distinct from criminal procedural measures that could interfere with the rights and freedoms of individuals or legal persons. These risks are implied throughout the article, including in article 90(2)(a) where it provides that “Strengthening cooperation between law enforcement agencies and other relevant entities ... especially those in the private sector ... relating to matters involving the commission of offences covered by this Convention, while ensuring that the burden of such entities is proportionate and that private sector entities fully respect laws protecting the rights of their users”. But this is not done in an explicit manner. We therefore recommend more clearly distinguishing that such measures are distinct and lifting this to the beginning of article 90(2) as follows: “These measures should be clearly defined and distinct from criminal procedural measures that could interfere with the rights and freedom of individuals or legal persons. Prevention measures should focus on”.

Chapter VII: Mechanism of Implementation

- Article 94 (Options 1 & 2: Conference of the States Parties to the Convention)

We are pleased that article 94 provides various options for the effective implementation of the convention, namely options 1 and 2, as both seek to establish a Conference of the States Parties to the Convention. These options are based on existing language used in UNTOC and UNCAC should be largely retained as they guarantee that all state parties would be able to participate. We are also unconvinced of the viability and long-term effectiveness of a review mechanism or body which sits within an existing UN mechanism. Still, we recommend that the text be updated to strengthen commitments to human rights and safeguard multi-stakeholder participation. For example, article 94(4)(e) could be revised to “Reviewing periodically the implementation of this Convention by its States Parties and the impact on the enjoyment of human rights”; and article 94(6) to “The



Conference of the State Parties will also consider inputs received from relevant non-government organizations”.

Chapter VIII: Final Provisions

- Article 96: Implementation of the Convention

We believe that article 96 should make additional reference to international human rights law and standards. This would reinforce the importance of considering states international human rights law obligations in the implementation of the convention, as opposed to simply in accordance with its domestic law. For example, article 96(1) could be modified to “Each State Party shall take the necessary measures, including legislative and administrative measures, in accordance with its obligations under international human rights law and the fundamental principles of its domestic law, to ensure the implementation of its obligations under this Convention”. Moreover, article 96(2) could be modified to “Each State Party may adopt more strict or severe measures than those provided for by this Convention for preventing and combating the offences established in accordance with this Convention if consistent with their obligations under international human rights law”. We believe this change would help to mitigate risks of disproportionate measure and sanctions.

- Article 98: Relation with protocols

We are concerned that article 98(2) specifies that any additional protocols “shall be negotiated and adopted following the same procedural and organizational rules for the negotiation and adoption of this Convention”, but it does not clearly specify a role of multi stakeholders. We appreciate that the AHC has shown openness to multi stakeholder engagement through its agreed upon “Modalities of the participation of multi-stakeholders” (A/AC/291/CRP.5/Rev.1). We therefore recommend that article 99(2) make reference to these modalities to ensure that future negotiations are equally, if not more, open, inclusive and transparent for multi stakeholder engagement. For example, providing that “Such protocols shall be negotiated and adopted following the same procedural and organizational rules followed for the negotiation and adoption of this Convention, including the modalities of the participation of multi-stakeholders”.

- Article 100: Reservations

We understand that Article 100 on reservations does not currently provide draft text and that the need for this provision and its content will be assessed once discussion on the substantive provisions have reached a more advanced stage. However, there



are several provisions and proposals within the previous chapters, and even within this very document, that make explicit reference to the potential for reservations, including the preceding provision (article 99) pertaining to settlement of disputes.

We recommend that states are restricted from making reservations due to concerns that this will enable them to avoid international legal obligations that are consequential for human rights. If states are permitted to make reservations, this article should restrict reservations to a limited number of provisions which are clearly set out within the substantive text and repeated here. No other reservations should be allowed and there should be specific language to this effect.



Summary of Recommendations

Preamble

We recommend:

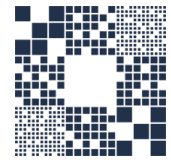
- Better reflection of the importance of respect for human rights when countering cybercrime. For example, we recommend adding: “Committed to the obligation of states to ensure full respect for human rights as enshrined in the Universal Declaration of Human Rights and the International Covenant on Civil and Political rights, as well as other applicable international and regional human rights conventions and treaties, which reaffirm the right of everyone to hold opinions without interference, 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 respect for privacy”.
- That there be a standalone sentence that emphasises the importance of multi-stakeholder cooperation. For example: “Recognizing also the importance of the role of civil society, academia and the private sector in preventing and combating cybercrime, including ensuring accountability, protection of human rights and fundamental freedoms, and gender equality”.

Chapter IV: International Cooperation

Cluster 1 (Articles 56–57)

We recommend:

- In article 56 paragraph 1, that the cooperation is not based on reciprocity, but instead on dual criminality. In paragraph 3, we recommend removing “whenever” before dual criminality.
- In article 56 paragraph 1, deleting “preventing” or “disrupting” since they are not useful to refer to formal action to address actual criminal offences.
- In article 56, including more detailed information on the applicable conditions and safeguards for human rights, by:
 - Requiring that any cooperation by states be subject to conditions and safeguards which protect human rights.
 - Making explicit reference to state obligations under international human rights law and providing examples of conditions and safeguards, including judicial or other independent supervision, grounds justifying the application of certain powers, and limitations on the scope and the duration of such powers.
- In article 57, adding a final paragraph that clarifies that any transfer of data should acknowledge the legal requirements to accept such transfer by the



states parties. For example, “This article is without prejudice to States Parties’ domestic legal framework that imposes conditions on the transfer of personal data to other States”.

- In article 57 paragraph 1, qualifying the type of administrative or civil proceedings and other judicial or administrative procedures to which data can be transmitted, by requiring that the data is “strictly and directly related to those proceedings” in order to avoid unintended expansion on the use of personal data; and clarifying what is meant by an “imminent and serious threat to public safety”, which could be accomplished through a clear definition or modifications to the text.

Cluster 2 (Article 58: Extradition)

We recommend:

- Aligning the dual criminality requirement with the existing provision of UNTOC, namely, providing that “the offence for which extradition is sought is punishable under the domestic law of both the requesting State Party and the requested State Party by a maximum deprivation of liberty of at least four years or a more serious penalty”, as opposed to the current formulation.
- Expanding the requirement that any person extradited must be guaranteed “fair treatment at all stages of the proceedings” to include all the conditions and safeguards contained within the convention as well as all the rights and guarantees provided by the domestic law and under international human rights law.
- Providing a more open-ended list of grounds under which a state may deny a request for extradition if there are substantial grounds for believing the request was made for the purpose of prosecuting or punishing a person. For example, adding “or other status” within article 58(15). This would provide more comprehensive protection and reflect a deeper understanding of characteristics that could make certain persons or groups more vulnerable.

Cluster 4 (Articles 61-67)

We recommend:

- In article 61, providing states with the ability to refuse to provide mutual legal assistance where the offence is “a political offence or an offence connected with a political offence” or where executing the request would likely prejudice, inter alia, “the protection of human rights or fundamental freedoms”.

Cluster 5 (Articles 68-74)

We recommend:

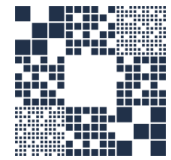


- In relation to the various investigative powers under this cluster, including accessing stored computer data (article 70), the real-time collection of traffic data (article 73) and the interception of content data (article 74):
 - Providing mutual legal assistance should be restricted to what is considered permissible under both applicable treaties – such as international human rights law treaties – and domestic law. This would provide more comprehensive protections to safeguard against abuse and mitigate risks to the right to privacy.
 - Acknowledging the obligation of state parties to not generally undermine the security and integrity of digital communications and services posing unjustified risk in the exercise of right to privacy.

Cluster 6 (Articles 75–78)

We recommend:

- In article 75, paragraph 1(d), removing “on specific means and methods used by those committing the offences covered by this Convention, including, where applicable, the use of false identities, altered or false documents or other means of concealing their activities and the use of illicit encrypted platforms and [cybercrime tactics, techniques and procedures]” or alternatively providing more general language such as “to exchange information with other States Parties on specific means and methods used by persons committing crimes established under this convention, including, where applicable, means of concealing their activities”.
- In article 76, adding a reference to commitment to ensure full respect for human rights in the guidelines for service providers in assisting law enforcement agencies in the investigation that are proposed in paragraph 2, consistent with the states human rights obligations and the UN Guiding Principles in Business and Human Rights.
- In article 76 paragraph 2, replacing “State Parties shall develop guidelines for” with “State Parties may encourage” to remove this as an obligation for states.
- In article 77, replacing the last sentence of the provision with the following: “Joint investigation teams shall carry out their operations in accordance with the domestic law of the Party in which they operate and fully respect international human rights law”.
- In article 78, removing the article due to the inherent interferences with the right to privacy it represents. If it is retained, we suggest the following minimum requirements:
 - Including a definition of what is a “controlled delivery”;
 - Deleting the open reference to “special investigative techniques” and replacing it with a specific, enumerated list of those electronic



surveillance powers that are intended to be authorised by the Convention;

- Narrowing the definitions to what is legitimate, necessary, and proportionate to avoid overbroad interpretations;
- Adding "subject to international human rights law" or similar language alongside the domestic law requirement to ensure compliance with international human rights law; and,
- Establishing safeguards to promote transparency and accountability in the exercise of each technique.

Chapter V: Technical Assistance, Including Information Exchange

We recommend:

- Removing article 87, paragraph 2(g) or changing it to "modern law enforcement equipment and techniques and the use thereof in accordance with relevant international human rights law obligations".
- Strengthening article 87, paragraph 2(n) by adding an explicit commitment with a sensitive training for legal and judicial personnel interacting with victims and accused of cybercrime, including training on trauma-informed and culturally-relevant practices for legal and judicial personnel interacting with them.

Chapter VI: Preventive Measures

We recommend:

- More clearly distinguishing that preventive measures are distinct and lifting this to the beginning of article 90(2) as follows: "These measures should be clearly defined and distinct from criminal procedural measures that could interfere with the rights and freedom of individuals or legal persons. Prevention measures should focus on...".

Chapter VII: Mechanism of Implementation

Article 94 (Options 1 & 2: Conference of the States Parties to the Convention)

- We recommend that the text be updated to strengthen commitments to human rights and safeguard multi-stakeholder participation. For example, article 94(4)(e) could be revised to "Reviewing periodically the implementation of this Convention by its States Parties and the impact on the enjoyment of human rights"; and article 94(6) to "The Conference of the State Parties will also consider inputs received from relevant non-government organizations".



Chapter VIII: Final Provisions

Article 96: Implementation of the Convention

We recommend:

- Modifying article 96, paragraph 1 to:(1) “Each State Party shall take the necessary measures, including legislative and administrative measures, in accordance with its obligations under international human rights law and the fundamental principles of its domestic law, to ensure the implementation of its obligations under this Convention”.
- Modifying article 96, paragraph 2(2) to: “Each State Party may adopt more strict or severe measures than those provided for by this Convention for preventing and combating the offences established in accordance with this Convention if consistent with their obligations under international human rights law”.

Article 98: Relation with protocols

We recommend:

- In article 98, paragraph 2, making reference to the “Modalities of the participation of multi-stakeholders” (A/AC/291/CRP.5/Rev.1) to ensure that future negotiations are equally, if not more open, inclusive and transparent for multi stakeholder engagement. For example, providing that “Such protocols shall be negotiated and adopted following the same procedural and organizational rules followed for the negotiation and adoption of this Convention, including the modalities of the participation of multi-stakeholders”.

Article 100: Reservations

We recommend:

- States are restricted from making reservations due to concerns that this will enable them to avoid international legal obligations that are consequential for human rights. If states are permitted to make reservations, this article should restrict reservations to a limited number of provisions which are clearly set out within the substantive text and repeated here. No other reservations should be allowed and there should be specific language to this effect.