

## Joint civil society expert views on International Cooperation Chapter of CND

23 April 2023

H.E. Ms. Faouzia Boumaiza Mebarki

Chairperson

Ad Hoc Committee to Elaborate a Comprehensive International Convention on Countering the Use of Information and Communication Technologies for Criminal Purposes

Your Excellency,

We, the undersigned, are representatives of NGOs and experts that have been engaging with and assisting the deliberations of the Ad Hoc Committee (AHC). Throughout the AHC sessions, including intersessionals, we have actively participated by submitting written and oral inputs, along with independent expert analysis of the issues raised as the Consolidated Negotiating Document (CND) has developed. As a collective, we have significant experience and expertise in the field of human rights law and standards.

As the fifth session concludes, we would like to submit our written recommendations on the chapter of international cooperation for your consideration in the preparation of the upcoming first draft.

- 1. Clearly define the scope of international cooperation in Chapter IV overall and limit which crimes it applies to:**
  - a. Chapter IV's measures to international cooperation and the collection of evidence in electronic form should be specifically limited to specific criminal investigations and proceedings of serious criminal offenses "set forth in the Convention" where dual criminality can be established among state parties.
  - b. If Member States opt to broaden the scope of cooperation beyond the specific crimes set forth in this Convention (that should be narrowly defined), the proposed Convention should, at the very least, be confined to "serious crimes", akin to those defined in Article 2 of the United Nations Convention against Transnational Organized Crime, and should explicitly and clearly include the principle of dual criminality.
- 2. Sharpen Article 56 on dual criminality, focus on criminal justice, and include safeguards**
  - a. **Expressly mandate and clearly define the principle of dual criminality in the scope of the Convention:** Article 56 should be revised to unambiguously incorporate the "dual criminality" principle. Dual criminality must be defined based on the principle that assistance can only be granted if the conduct in question is a criminal offense under the laws of both the requesting and the requested state parties.
  - b. **Clarify terminology for ensuring a criminal justice focus:** We kindly recommend removing the words "preventing" and "disrupting" from Article 56 as

they fall beyond the purview of this chapter. For example, “preventing” may include educational initiatives, which are more appropriately addressed in the chapter for technical assistance or preventive measures.

**3. Supporting the inclusion of conditions and safeguards in Article 56 para 4:**

- a. We concur with the OHCHR's recommendation that conditions and safeguards in the criminal procedural and law enforcement chapter be consistently applied across the entire international cooperation chapter. Thus, we strongly recommend keeping Article 56 paragraph 4 in the next version of the CND.
- b. As several of us have noted in previous comments, it is also critical that Article 56 is amended so that it ensures procedural powers are applied in a manner that truly respects the principles of legality, necessity and proportionality, including by explicitly requiring prior independent (preferably judicial) authorisation before any interference with privacy can occur, and based on strong evidentiary showing and clear limitation of the scope and the duration of such power. The article should require independent oversight bodies with the authority to conduct audits, and spot checks, along with adequate notification and access to effective redress mechanisms. Measures preventing a service provider from disclosing the execution of any power or the existence of an investigation should be an exceptional measure, limited in duration, and subject to a strict criteria with clear and compelling reasons for imposing such restrictions. Powers and procedures provided for in this Convention should not undermine the security and integrity of digital communications and services. These amendments are all the more critical in the context of cross-border cooperation.

**4. Expand grounds for refusal in mutual legal assistance on the basis of human rights:** We propose incorporating a more open-ended list of grounds for refusal in mutual legal assistance requests to reflect a deeper understanding of characteristics that could make certain persons or groups vulnerable to prosecution or punishment. In particular, we recommend that Article 61 allow states to refuse mutual legal assistance when dealing with offenses where fulfilling the request could potentially undermine the protection of human rights or gender equality. We are supportive of the proposed language for 61(19)(i) that reads “If the requested State Party considers that execution of the request is likely to prejudice its sovereignty, security, ordre public or other essential interests ,including the protection of human rights and fundamental freedoms”.

**5. Include safeguards on personal data:** The importance of effective data protection legislation and gender responsive policies to protect abuses of human rights has been recognised, inter alia, in UN General Assembly resolution on the right to privacy in the digital age adopted by consensus (A/RES/77/211, OP 7). With that in mind, we recommend that Article 57 require that any cross border transfer of personal data be based on the principles of legality, necessity, and proportionality. We also recommend that Article 57 include a requirement that the receiving State Party adopt effective data protection legislation that meets the minimum human rights standards, as set out in the report of the UN High Commissioner for Human Rights on the right to privacy in the digital age (A/HRC/39/29, paras 27-33.) Further, many States have data protection laws that impose limits on the transfer of personal data to other States (“third country

transfers”). Hence, we recommend that Article 57 clarify that this Convention is without prejudice to such provisions and does not restrict the application of existing regional and domestic data protection legislation that regulate the cross border transfer of personal data.

6. **Delete Article 64 to preserve Convention safeguards:** Article 64 should be removed entirely, as the proposed provision enables a State Party to voluntarily forward information to another State Party within the limits of its domestic law and without prior request. This may lead to bypassing the safeguards established by the Convention, potentially undermining the protection of human rights and compromising the consistency of the Convention's objectives. Should the provision be retained, it should at minimum include a central authority as the immediate recipient of any spontaneously shared information.
7. **Stress the need for central authority over cross-border investigations and cooperation.** We would like to reiterate that cross-border investigations typically require close vetting by a central body in each participating country. This central body must ideally be trained to assess the compliance of a cross border data request with the countries' domestic law and international human rights obligations, and subject to effective, independent oversight. This process is sometimes slow, and requires more dedicated resources from states in a world where digital evidence leads to more frequent cross-border investigations and remains critical. Yet a few provisions of the Convention's chapter on international cooperation (e.g. Articles 64, 66, 68, 69, 70, 71, 73-78 and others) bypass this important vetting and do not replace it with any other comparable safeguard or mechanism.
8. **Remove Articles 73 and 74:** In light of the need for comprehensive and robust safeguards related to the powers these articles encompass, and considering their absence in the proposed Convention, we recommend their deletion.
9. **Eliminate Article 78 to protect human rights:** We recommend removing Article 78 entirely due to its replication of capabilities present elsewhere in the international cooperation chapter and its inclusion of vague terms like "special investigative techniques" and "electronic and other forms of surveillance". These terms could undermine human rights in terms of foreseeability and public scrutiny, creating legal uncertainty and potentially leading to intrusive privacy interferences not permitted by international human rights law. Article 78 also refers to specific techniques already defined in other parts of the Convention, without referencing the attached safeguards and limitations. In many states, unrestricted investigative techniques have led to human rights abuses targeting vulnerable communities.
10. **Remove Articles 65, 70, 71, 72, 76:** In light of the perspectives shared by various Member States, we suggest removing Articles 65, 70, 71, 72, and 76. We do not believe these are appropriate in their current form and we believe they would cause significant harm.
11. **Clarify electronic data preservation request and expedited disclosure powers in Articles 68 and 69:** We recommend clarifying the circumstances under which a request to preserve electronic data can be made and add an additional paragraph to allow for exceptional circumstances when requests for preservation of electronic data can be kept

confidential and not disclosed to the user. We advocate for similar clarifications on the proposed provisions regarding expedited disclosure proposed in Article 69, and caution against measures to compel the mandatory production of metadata or short timelines for compliance with requests - which may undermine effective review and oversight.

**12. Strengthen safeguards in Article 75:** We propose that a direct reference to Article 42 on “Condition and Safeguards” be made within Article 75, and to explicitly refer to the need for “cooperation to be conducted in accordance with international human rights law and this Convention,” as proposed by OHCHR in its submission for the fifth session. With respect to Article 75(1)(d), we express our concern that the term “illicit encrypted platforms” may not only be unnecessary but also has the potential to frame encryption in an overly negative manner. Encryption is an essential tool for ensuring private communication free from intrusion by unauthorized persons and is instrumental to exercise the internationally protected rights of freedom of expression, freedom of assembly, privacy and more.

We hope that these inputs towards the international cooperation chapter after the discussions of this fifth session can help in the preparations of the final draft. We stand ready to further assist and shall continue to engage in the work of the AHC.

These inputs were prepared based on discussions and expertise from the following:

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