

International legal frameworks on cybercrime: The Budapest Convention on Cybercrime and the future UN Convention – Risks or synergies?

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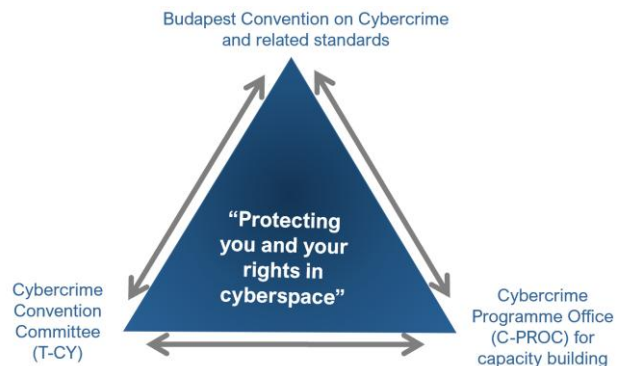
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The framework of the Convention on Cybercrime

- ▶ Budapest Convention on Cybercrime (2001)
 1. Specific offences
 2. Procedural powers
 3. International cooperation
- ▶ 1st Protocol on Xenophobia and Racism via Computer Systems (2003)
- ▶ 2nd Protocol on enhanced cooperation and disclosure of electronic evidence (2022)
- ▶ Guidance Notes

By November 2023: **68 Parties and 23 Observer States**



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The tools of the Convention on Cybercrime

Budapest Convention (2001):

1. Offences against and by means of computer systems (articles 2-12)
 - CIA offences (illegal access, data/system interference etc.), forgery and fraud, “child pornography”, IPR
2. Procedural powers to investigate cybercrime and collect e-evidence in relation to **any** offence (articles 14-21)
 - Expedited preservation, production orders, search and seizure, interception, safeguards
3. International cooperation on cybercrime **and** e-evidence
 - General provisions, expedited preservation, MLA, 24/7 network

Second Protocol on enhanced cooperation and disclosure of e-evidence (2022):

- Scope: criminal investigations and proceedings related to computer systems and data and collection of e-evidence re **any** criminal offence
- Direct cooperation with service providers and registrars in other Parties
- Giving effect to production orders from other Parties
- Expedited cooperation in emergencies
- Video conferencing
- Joint investigation teams and joint investigations
- Data protection and other safeguards

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The reach of the Convention on Cybercrime

Budapest Convention (2001):

By November 2023:

- Parties: 68 (European, Argentina, Australia, Canada, Chile, Costa Rica, Ghana, Japan, Mauritius, Nigeria, Philippines, Senegal, Sri Lanka, Tonga, USA etc.)
- Signatories: 2 (Ireland, South Africa)
- Invited to accede: 21 (Cameroon, Fiji, Kazakhstan, Korea, New Zealand, Uruguay, Vanuatu etc.)
- 130+ States have legislation aligned with BC

Second Protocol on enhanced cooperation and disclosure of e-evidence (2022):

By November 2023:

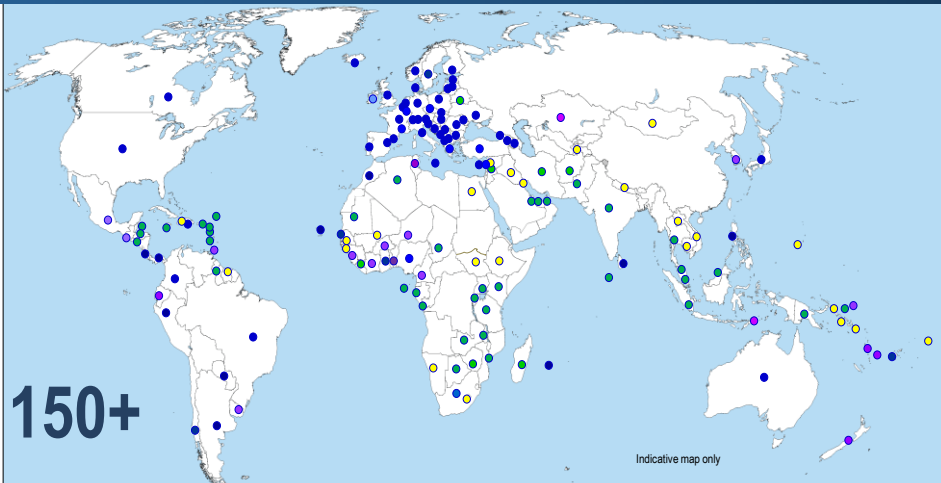
- Signed: 40 States (European, Argentina, Canada, Japan, Sri Lanka, USA etc.)
- Ratified: 2 (Japan, Serbia)

(5 ratifications needed for entry into force)

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The reach of the Convention on Cybercrime



150+

| | | | | |
|--------------------|------|--|-------|--|
| Parties: | 68 | | | |
| Signed: | 2 | Other States with substantive laws broadly in line with Budapest Convention: | 40+ | |
| Invited to accede: | 21 | Further States drawing on Budapest Convention for legislation: | 30+ | |
| | = 91 | | = 70+ | |

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The United Nations treaty process (AHC): background

UN Ad Hoc Committee to elaborate a comprehensive international convention on countering the use of information and communication technologies for criminal purposes:

Established by [UNGA Resolution 74/247](#)

(Initiated by the Russian Federation)

The elaboration of “a comprehensive international convention on countering the use of information and communications technologies for criminal purposes” shall be “taking into full consideration existing international instruments...”.

► Budapest Convention on Cybercrime

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The United Nations treaty process: history

- ▶ 1990: UN Crime Congress (Cuba): no agreement to develop a treaty; capacity building instead
 - ▶ 2005: UN Crime Congress (Bangkok): no agreement to develop a treaty; capacity building instead
 - ▶ 2010: UN Crime Congress (Salvador, Brazil): no agreement to develop a treaty. Intergovernmental Expert Group (UNIEG) to study the matter instead
 - ▶ 2011 – 2021 UNIEG: no agreement to develop a treaty but broad agreement on capacity building
 - ▶ 2019: UN General Assembly Resolution 74/247 proposed by Russia: Established AHC by contested vote (79 yes / 60 no / 54 abst)
 - ▶ 2021: Modalities agreed: consensus or 2/3 majority required
 - ▶ First session of AHC: 28 February 2022 (4 days after start of Russian war of aggression)
- Concerns:**

 - Greater international polarization, divisions
 - Greater digital divide
 - Control of information/society instead of crime
 - Broad scope of criminalization with risks to freedom of expression and other rights
 - Procedural powers without safeguards with risks to privacy and other rights
 - Re-design architecture of Internet governance: sovereign internets under control of states vs. free, open and global Internet with multi-stakeholder governance

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UN treaty process: motivation of Russia?

Russia and cybercrime

- ▶ Major source of cybercrime, disinformation and other cyberoperations for 20+ years
- ▶ Limited intentions to cooperate
- ▶ Operating like a criminal organization: State and non-state actors under the same “roof”
- ▶ FSB/GRU/SVR [and other State institutions]:
 - Commit cybercrime, carry out cyber operations
 - Recruit/employ criminals
 - Outsource activities to cybercriminal organisations
 - Tolerate/give protection to cybercriminal organisations acting in the interest of the regime

Why would Russia promote an international treaty?

- Origin in “Doctrine of Information Security” (2000/2016)
 - Spin off: “Fundamentals of the State Policy ... on international information security” (2013): Create a system of international information security.
 - ▶ Promote UN treaty on combating information crime
- UN treaty: part of effort to re-design architecture of Internet governance
- International treaty to legitimize domestic control (“successful” domestic information control already)
- Prosecute and confiscate assets of service providers
- Further polarize the world ▶ Enlarge the bloc of its like-minded countries

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The United Nations treaty process: AHC roadmap

| | | |
|---------------------------------|----------------------------------|---|
| 1st Meeting ✓ | New York, 28 Feb – 11 March 2022 | Objectives, scope and structure of the convention and the mode of work of the AHC |
| 2nd Meeting ✓ | Vienna, 30 May – 10 June 2022 | First reading of the provisions on criminalization, the general provisions and the provisions on procedural measures and law enforcement |
| 3rd Meeting ✓ | New York, 29 Aug – 9 Sep 2022 | First reading of the provisions on international cooperation, technical assistance, preventive measures and the mechanism of implementation, the final provisions and the preamble |
| 4th Meeting ✓ | Vienna, 9 – 20 Jan 2023 | Second reading of the preamble, the general provisions and the provisions on criminalization and procedural measures and law enforcement |
| 5th Meeting ✓ | Vienna, 11 – 21 Apr 2023 | Second reading of the provisions on international cooperation, preventive measures, technical assistance and the mechanism of implementation, and the final provisions |
| 6th Meeting ✓ | New York, 21 Aug – 1 Sep 2023 | Third reading of the draft text of the convention |
| Concluding session | New York, 29 Jan – 9 Feb 2024 | Finalization and approval of the draft text of the convention; discussion and approval of a draft resolution to which the text of the draft convention will be annexed, for consideration and adoption by the General Assembly at its seventy-eighth session, in 2024 |

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The United Nations AHC: current state

6th Meeting New York, 21 August – 1 September 2023 ► Zero-draft text of the Convention as basis for negotiations

- Chapter I: General provisions
- Chapter II: Criminalisation
- Chapter III: Jurisdiction
- Chapter IV: Procedural measures and law enforcement
- Chapter V: International cooperation
- Chapters VI - IX: Preventive measures, Technical assistance, Mechanism of implementation, Final provisions

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The United Nations AHC: state after 6th session

Chapter I General provisions

Overall state of the process:

- Intention of 6th session: Prepare draft text for finalisation and adoption in concluding session (29 January - 9 February 2024)
- Actual result: Draft text consisting mostly of redlines
- Disagreements on fundamental issues

Article 1. Statement of purpose

The purposes of this Convention are to:

- (a) Promote and strengthen measures to prevent and ~~combat~~ retain combat: Venezuela ~~alt: detect, suppress, investigate, and prosecute~~ (Russian Federation, Viet Nam, Venezuela, Syria, Dem. People's Rep. of Korea, Belarus, Nicaragua, Cuba, Belarus, Mali) ~~(keep original: CARICOM, Mexico, Ecuador, South Africa, Pakistan, Iran, Yemen, European Union and its member States, United States, Costa Rica, Lebanon, Panama, Malaysia, Tanzania, El Salvador, Paraguay, Eritrea, New Zealand, Peru, United Kingdom, Canada, Liechtenstein, Morocco, Norway, Rep. of Korea, Australia, Colombia, Switzerland, Guatemala, Chile, Senegal, Georgia, Argentina, Uruguay, Nigeria, Israel, Kenya, Thailand, Japan, Vanuatu, Tonga, Ghana, Indonesia, Qatar, Cabo Verde, Algeria, Brazil, Malawi, Namibia)]~~ [cybercrime] [the use of information and communications technologies for criminal purposes] more efficiently and effectively;
- (b) Promote, facilitate and strengthen international cooperation in preventing and combating [cybercrime] [the use of information and communications technologies for criminal purposes]; and [agreed ad referendum]
- (c) Promote, facilitate and support [capacity-building and (Pakistan, Iran, Yemen, Viet Nam, Egypt, Malaysia, Paraguay, China, Eritrea, Peru, United Kingdom, Canada, Morocco, Norway, Australia, Colombia, Guatemala, Chile, Uruguay, Nigeria, Kenya, Thailand, Saudi Arabia, Vanuatu, Tonga, Ghana, Indonesia, Russian Federation, New Zealand, Chad, Iraq, Qatar, Cabo Verde, Algeria, Brazil, El Salvador, Oman, Malawi, Venezuela, Costa Rica, Ecuador, Namibia, Central African Republic,

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The United Nations AHC: state after 6th session

Scope ► What should this treaty address in terms of:

- **Criminalisation**
 - Majority: Limited list of offences against and by means of computers (similar to Budapest Convention)
 - Russia+: Extended / open-ended list of offences: Any offence involving information and communication technologies

[Article 15 quater. Incitement to subversive or armed activities]

Each State party shall adopt such legislative and other measures as are necessary to establish as an offence a call issued by means of information and communications technologies for subversive or armed activities directed towards the violent overthrow of the regime of another State. (Russian Federation, Mali, Belarus, Nicaragua, Burkina Faso, Eritrea, Venezuela, Sudan, Cuba, Burundi, DPRK, Egypt, Iran, Sierra Leone. Delete: Canada, United States, New Zealand, Dominican Republic, Guatemala, Norway, Georgia, Australia, EU & its mS, Israel, United Kingdom, Lebanon, Liechtenstein)]

[Article 15 quinques. Extremism-related offences]

1. Each State party shall adopt such legislative and other measures as are necessary to establish as an offence or other unlawful act distribution by means of ICT of materials that call for unlawful acts motivated by political, ideological, social, racial, ethnic, or religious hatred or enmity, advocacy and justification of such actions or the provision of access to them.

2. Each State party shall adopt such legislative and other measures as are necessary to establish as an offence or other unlawful act under its domestic law humiliation by means of ICT of a person or group of people on account of their race, ethnicity, language, origin, attitude towards religion. (Russian Federation, Mali, Belarus, Nicaragua, Burkina Faso, Eritrea, Venezuela, Sudan, Cuba, Nigeria, Burundi, DPRK, Egypt, Sierra Leone. Delete: Canada, United States, New Zealand, Dominican Republic, Guatemala, Norway, Georgia, Australia, EU & its mS, Israel, United Kingdom, Lebanon, Liechtenstein)]

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The United Nations AHC: state after 6th session

Scope ► What should this treaty address in terms of:

■ Procedural powers

- Measures similar to those of the Budapest Convention: ok.
- Scope like Budapest Convention: Apply to evidence on computer systems of any crime?
- Or applicable only to list of offences specified in the Convention?
- Or only serious crime?
- Exclude interception powers?
- With or without safeguards?

Article 23. Scope of procedural measures

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish the powers and procedures provided for in this chapter for the purpose of [prevention (Russian Federation, Eritrea)] [specific (United States, Georgia, Norway, Liechtenstein, Canada, Israel, Ghana, Switzerland, United Kingdom, EU and its member States). (Delete: Iran,)] criminal investigations or proceedings.

2. Except as provided otherwise in this Convention, each State Party shall apply the powers and procedures referred to in paragraph 1 of this article to:

(a) The criminal offences established in accordance with [articles 6 to 16 (delete: China, Russian Federation, . Retain: Morocco)] of this Convention [and serious crimes as defined by this Convention (Egypt)]: [Retain original: EU and its member States, Lebanon, United States, Georgia, Norway, Liechtenstein, Canada, Kenya, Morocco, Rep. of Korea, Switzerland, Tanzania] [merge sub-paras (a) and (b): Yemen]

(b) Other [criminal delete: Russian Federation, Nicaragua, Cuba. Against: United States, Cote d'Ivoire, Senegal, United Kingdom] offences committed by means of [a computer system] [an information and communications technology device] [as established in accordance with article 17 of this Convention (Iran)]: and [delete subparagraph: EU and its member States, Lebanon, Georgia, Singapore, Norway, Liechtenstein, Canada, Malaysia, Switzerland, Albania]

(⇒) The collection [obtaining, preservation and sharing (India, Iran, Iraq)] of evidence [including (Russian Federation, Nicaragua)] in electronic form of ([any delete: Iran] [criminal delete: Russian Federation, Iran. Against: United States, Liechtenstein, Switzerland] offence [of paragraphs (a) and (b) (Iran)] any offence established in accordance with articles 6 to 16 of this Convention (Singapore,

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The United Nations AHC: state after 6th session

Chapter V International cooperation

Article 35. General principles of international cooperation*

Scope ► What should this treaty address in terms of:

■ International cooperation

- Measures similar to Budapest Convention: ok
- Cooperation on offences listed in the Convention: ok
- Cooperation on any offence where evidence is on a computer system?
- Or cooperation limited to serious offences?

1. States Parties shall cooperate with each other in accordance with the provisions of this Convention, as well as other applicable international [legal (China)] instruments on international cooperation in criminal matters, and domestic laws, for the purpose of [prevention (Egypt, Russian Federation, Cuba, Belarus, Eritrea)] investigations, prosecutions and judicial proceedings concerning offences established in accordance with [articles 6 to 16 of (delete: CARICOM, Pakistan, China, India, Nigeria, Yemen, Russian Federation, Venezuela, Syria. Retain: Morocco)] this Convention [delete rest of para: Norway], or for the collection, [obtaining, preservation and sharing (delete: Japan)] of evidence in electronic form [of offences established in accordance with articles 6 to 16 of this Convention (delete: CARICOM, Pakistan, Nigeria, Yemen, Russian Federation, Venezuela, Cuba, Syria)], [as well as of serious crime as defined in article 2 (h) (EU and its member States, United States, Against: Malaysia), [(including and: Egypt) those offences covered by article 17 of this Convention when applicable delete: Costa Rica, EU and its member States, Lebanon, Pakistan, Georgia, China, Singapore, Norway, Liechtenstein, Canada, India, Morocco, Rep. of Korea, Switzerland, Albania] and where applicable removable or making inaccessible the criminal content (Iran, Russian Federation, Nicaragua, Cuba. Against: Liechtenstein, Malaysia)] [which may include those offences covered by article 17 of this Convention when applicable (United Kingdom)] [of a criminal offence (CARICOM, Against: Canada, United Kingdom)] [of any offence: (Morocco)]. [Member States view the possibility of assisting each other through legal assistance on criminal and civil matters linked with unlawful actions in the area of use of information and communications technologies as necessary and in line with the requirements of their national legislation (Russian Federation, Syria) (against: EU and its member States, Lebanon, United States, Japan, Liechtenstein, Canada)] [Retain original:

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The United Nations AHC: state after 6th session

Terminology

- Convention on
 - Majority: “Cybercrime”
 - Russia+: “Use of information and communication technology for criminal purposes”
- Definitions
 - Majority: “Computer system”, “computer data”, “traffic data” etc. as in Article 1 Budapest Convention
 - Russia+: “Information and communication technology device”, “digital information” etc.

Article 2. Use of terms

For the purposes of this Convention:

(a) ~~“Alt1. [Computer system]–[Information and communications technology device]”~~ [shall mean any device or a group of interconnected or related devices, one or more of which, pursuant to a program, performs automatic processing of data (EU and mS, Canada, Albania, Georgia, Colombia, Chile, Singapore, Rep. of Korea, Japan, Dominican Republic, Peru, Liechtenstein, Ecuador, Switzerland, New Zealand, Paraguay, Norway, Mozambique, UK, US, Tanzania)];

[Alt2. “Information and communications technology system” shall mean a complex of data and information as well as all means of gathering, storing, transmitting, retrieving, altering and any other way of processing data or information including but not limited to microelectronics, printed circuit boards, computer systems, software, signal processors, mobile telephony, satellite communications and networks.

“Information and communications technology device” shall mean a piece of hardware and software used or designed for processing, storage and transfer of electronic information. (Russian Fed., Iran, Pakistan)]

[Alt3. “Information and communications technology system” shall mean a collection of hardware, software and the peripherals that includes of input, output, processing, storage and interconnection between individual components, which work together to perform an overall task or set of tasks supervised by an operating system, firmware or applications software. (Iran,

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The United Nations AHC: state after 6th session

Safeguards

- Include:
 - General human rights provision
 - Specific conditions and safeguards for procedural powers (similar to Article 15 Budapest Convention)
- ▶ Majority: Yes, necessary to enable cooperation
- ▶ Russia+: “Not a human rights treaty”

Article 5. Respect for human rights

States Parties shall ensure that the implementation of their obligations under this Convention is [consistent ~~alt: in accordance (New Zealand) alt: in line (Morocco)~~ with their obligations under [applicable: Syria] (international human rights law (alt: instruments (Oman, Syria. Against: EU and its member States)) to which they are a party (Viet Nam, Malaysia, Saudi Arabia, Bahrain, Nigeria, Qatar, EU and its member States, Iraq)] applicable human rights treaties (China, Against: Mexico, Philippines, United States, Canada, EU and its member States)).

[Alt: 1. States Parties shall implement their obligations and perform the provisions contained in this Convention in accordance with their obligations under international human rights law (both of a universal and regional character: Mexico, Costa Rica, Peru), and in full respect for the rule of law.

2. States Parties shall mainstream a gender perspective and to empower women and girls, and shall take into consideration the special circumstances and needs of persons and groups in vulnerable situations in measures undertaken to prevent and combat the use of ICTs for criminal purposes [cybercrime]. (Uruguay, United Kingdom, Mexico, Argentina, Dominican Rep., Colombia, Palestine, Guatemala, Panama, Chile, Paraguay, Lebanon, Costa Rica, Brazil, EU and its member States, El Salvador, Peru, South Africa– para 2., Switzerland, Australia, Georgia, Norway, Liechtenstein, Ecuador, United States, Canada, New Zealand) (Against: Malaysia, Russian Federation, Syria, Nigeria, Senegal, Mali)]

[retain original: Côte d’Ivoire, India, Senegal, Iraq, Holy See, Sudan, Vanuatu, China, Kenya, South Africa, Malaysia, Singapore, Yemen, Saudi Arabia, Uganda, Philippines, Indonesia, Egypt, Belarus, Bahrain, Israel, Algeria, Rep. of Korea, Nigeria, Venezuela, Burkina Faso, Tanzania, Morocco, Chad, Qatar, Turkey, Namibia, Pakistan, CARICOM, Tonga] [delete article: Iran] [merge with article 24 (as amended) as paragraph 1: Viet Nam, Russian Federation, Venezuela, Burkina Faso, Against: Vanuatu, Brazil, EU and its member States, Switzerland, Georgia, Uganda, United States, Canada, New Zealand, Senegal, Namibia, Lao PDR, Holy See]

[Alt: States Parties shall carry out their obligations under this Convention in accordance with their obligations under applicable international human rights law.

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The United Nations AHC: what next?

The plan

- AHC Chair
 - To engage in bilateral consultations
 - To prepare a new version of the draft text by mid-November
- Concluding session (29 January – 9 February 2024) to finalise and adopt treaty

Scenarios

1. Treaty agreed by consensus or 2/3 majority in February 2024
2. Agreement by Feb 2024 on fundamental issues (scope etc.) but additional sessions needed to finalise text
3. Process blocked, suspended or abandoned
4. One or more States submit their own proposal of a treaty directly to the UNGA

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Future UN treaty and Budapest Convention: synergies?

IF a UN treaty along the lines of the Zero Draft:

- ▶ Main concepts and provisions consistent with Budapest Convention (“32% copied” from BC)
- ▶ Advanced tools of the Second Protocol not available in UN treaty
- ▶ UN treaty may facilitate accession to the Budapest Convention

IF the UN treaty process does not succeed:

- ▶ Budapest Convention remains available as an international framework
- ▶ More States will join the Budapest Convention

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Q & A

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