



# Main features of the Budapest Convention and the question of compatibility

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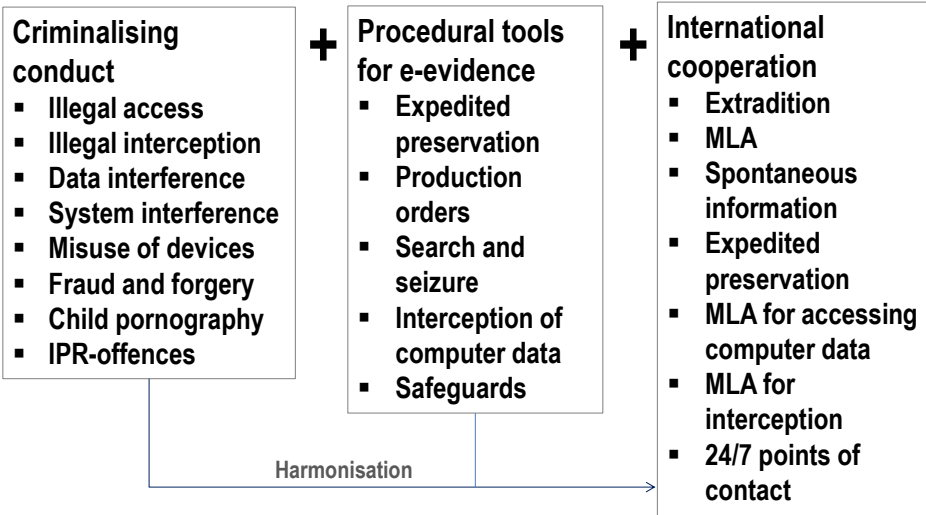


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# Scope of the Budapest Convention



E-evidence in relation to any crime!

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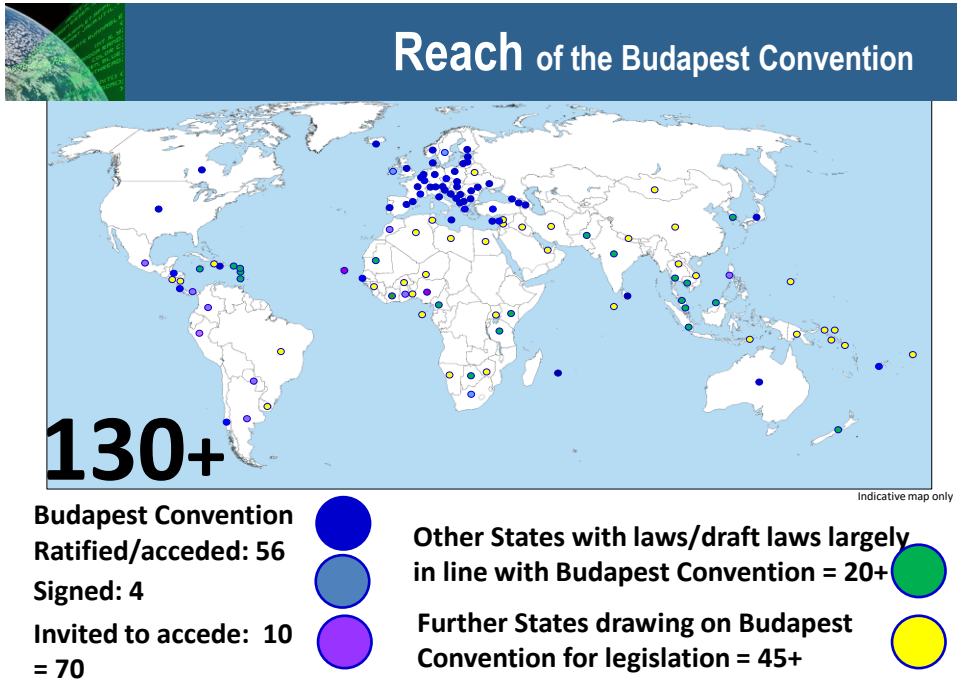
# Domestic legislation in line with the Convention

- ▶ Use as a checklist
- ▶ Compare provisions
- ▶ Use wording

- See [Legal Profile for Malaysia at Octopus Community](#)

Provision of Convention	Provision in national law
Art 4 System interference	?
Art 6 Misuse of devices	?
Art 9 Child pornography	?
Art 16 Expedited preservation	?
Art 18 Production order	?

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## Convention complemented by ...

- ▶ **Protocol on Xenophobia and Racisms via Computer Systems**
- ▶ **Guidance Notes on**
  - Notion of computer systems
  - Botnets
  - Malware
  - Spam
  - Terrorism
  - Transborder access to data (Article 32)
  - Production Orders for Subscriber Information (Article 18)
  - Etc.
- ▶ **[Protocol on enhanced international cooperation under negotiation]**

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## Convention backed up by ...

### Cybercrime Convention Committee (T-CY)

- 56 members (Parties to Convention), 14 observer States, 10 observer organisations (including EUROPOL and INTERPOL)
- Plenaries and working groups
- Assessing implementation of the Convention by the Parties
- Guidance Notes to use existing provision to address new challenges
- Preparation of new instruments ► [Protocol to the Budapest Convention](#)

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## About the future Protocol ...

### A. Provisions for more efficient MLA

- Expedited MLA for subscriber information
- International production orders
- Direct cooperation between judicial authorities
- Joint investigations
- Emergency procedures for access to data
- Role of 24/7 contact points

### B. Provisions for direct cooperation with providers in other jurisdictions

### C. Framework and safeguards for existing practices of transborder access to data

### D. Data protection

- June 2017: Decision to negotiate
- Sep 2017: start of negotiations
- Dec 2019: Scheduled end of negotiations

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## Convention backed up by ...

### Capacity building

Dedicated Cybercrime Programme Office of the Council of Europe (C-PROC) in Romania for worldwide capacity building

- ▶ Support to implementation of Budapest Convention and follow up to T-CY decisions

200+ activities in 2017 under several projects (priority to countries joining Convention):

- Cybercrime@Octopus – Global scope
- Cybercrime@EAP – Eastern Partnership region
- iPROCEEDS - Cooperation on Cybercrime: targeting crime proceeds on the Internet in South-eastern Europe
- GLACY+ EU/COE - Joint Project on Global Action on Cybercrime
- CyberSouth - Strengthen legislation and institutional capacities on cybercrime and electronic evidence (Algeria, Jordan, Lebanon, Morocco, Tunisia)

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## How to accede to the Budapest Convention

### Treaty open for accession by any State (article 37)

#### Phase 1:

- If a country has legislation in place or advanced draft: Letter from Government to CoE expressing interest in accession
- Consultations (CoE/Parties) in view of decision to invite
- Invitation to accede

#### Phase 2:

- Domestic procedure (e.g. decision by national Parliament)
- Deposit the instrument of accession at the Council of Europe

- ▶ Acceded: Australia, Chile, Costa Rica, Dominican Republic, Mauritius, Panama, Senegal, Tonga
- ▶ Invited: Argentina, Cabo Verde, Colombia, Ghana, Mexico, Morocco, Nigeria, Philippines, Paraguay, Peru

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## Benefits of joining Budapest Convention

- ✓ Trusted and efficient cooperation with other Parties
- ✓ Participation in the Cybercrime Convention Committee (T-CY)
- ✓ Participation in future standard setting (Guidance Notes, Protocols and other additions to Budapest Convention)
- ✓ Enhanced trust by private sector
- ✓ Technical assistance and capacity building

“Cost”: Commitment to cooperate

**Disadvantages?**

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High level round table on the Budapest Convention on Cybercrime  
Universiti Kebangsaan Malaysia  
Kuala Lumpur, Malaysia 6-7 February 2018

## Compatibility of domestic legislation with the Budapest Convention

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## Substantive criminal law: offences against computers

Article	Budapest Convention	Malaysian Law
Art. 1	Definitions	Section 2 of Computer Crimes Act 1997 (CCA): Interpretation
Art. 2	Illegal access	Section 3 of CCA 1997- Unauthorized access to computer material Section 4 of CCA 1997 - Unauthorized access with intent to commit or facilitate commission of further offence
Art. 3	Illegal interception	Section 234 of CMA 1998 – Interception and disclosure of communications prohibited
Art. 4	Data interference	Section 5 of Computer Crimes Act 1997- Unauthorised modification of the contents of any computer-
Art. 5	System interference	Section 5 of the CCA – Unauthorised modification of the contents of any computer Section 2 of CCA 1997 – Interpretation Section 235 of CMA - Damage to network facilities
Art. 6	Misuse of devices	Section 236 CMA – Fraud and related activity in connection with access devices etc Section 6 of the CCA 1997 – Wrongful communications

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## Substantive criminal law: offences against computers

### Article 5 of the Convention: system interference

Establish as criminal offences under domestic law, when committed intentionally, the **serious hindering without right of the functioning of a computer system** by inputting, transmitting, damaging, deleting, deteriorating, altering or suppressing computer data.

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 <b>Substantive criminal law: offences by means of computers</b>		
Article	Budapest Convention	Malaysian Law
Art. 7	Computer-related forgery	Section 463 – Forgery – Penal Code Section 4 of CCA 1997 – Unauthorised access with intent to commit or facilitate commission of further offence
Art. 8	Computer-related fraud	Section 415 of Penal Code (covers both conventional and cyber fraud)- Cheating. Section 3 of CCA 1997 – Unauthorized access to computer material Section 4 of CCA 1997 – Unauthorized access with intent to commit or facilitate commission of further offence Section 233 of CMA 1998 – Improper use of network facilities or network service et
Art. 9	Child pornography	New Offences Against Children Act 2017
Art. 10	IPR offences	Section 7, 8 and 41 of Copyright Act 1987 (reprint- 2001) (Act 332)
Art. 11	Attempt, aiding, abetting	Section 4(1/b,3) and Section 7(1) of CCA – Abetments and attempts punishable as offences Section 34 and 511 of the Penal Code
Art. 12	Corporate liability	Section 244 of the CMA (Offences by body corporate)

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 <b>Substantive criminal law: offences by means of computers</b>		
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## Article 9 Convention - Child pornography

- 1 Establish as criminal offences when committed intentionally and without right, the following conduct:
  - a producing child pornography for the purpose of its distribution through a computer system;
  - b offering or making available child pornography through a computer system
  - c distributing or transmitting child pornography through a computer system;
  - d procuring child pornography through a computer system for oneself or for another person;
  - e possessing child pornography in a computer system or on a computer-data storage medium.

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## Procedural law: Investigative powers

Article	Budapest Convention	
Art. 15	Conditions and safeguards	Federal Constitution of Malaysia Part II – Fundamental Liberties (supreme law of the country) Examples of safeguards insubstantive law Section 252 of CMA 1998
Art. 16	Expedited preservation	Section 263 of the CMA – General duty of the licensees (limited to telecommunications sector service providers)  Section 51 (1) of CPC
Art. 17	Expedited preservation and partial disclosure of traffic data	See above

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## Procedural law: Investigative powers

Article	Budapest Convention	
Art. 18	Production order	Section 10 of the CCA:- Powers of search, seizure and arrest Chapter 3 of the CMA :- Powers of entry, investigation into offences and prosecution (Section 245 to Section 262) Section 51 of the Criminal Procedure Code (summons to produce document or other things) Section 90A of the Evidence Act 1950 Admissibility of documents produced by computers and of statements, contained therein. Provisioning of subscribers information in General Consumer Code

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## Procedural law: Investigative powers

Article	Budapest Convention	
Art. 19	Search and seizure	Section 10 of the CCA 1997 – Powers of search, seizure and arrest Part X Chapter 3 of CMA 1998 – Powers of Entry, Investigation into Offences and Prosecution
Art. 20	Real-time collection traffic data	Section 268 of CMA 1998 – Minister may make rules on record keeping
Art. 21	Interception of content data	Section 252 of CMA 1998 – Power to intercept communications (includes both traffic and content data)
Art. 22	Jurisdiction	Section 9 of the CCA – Territorial scope of offences under this Act Section 4 of the CMA – Territorial and extra-territorial application

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## Procedural law

### Article 16 of the Convention – Expedited preservation of stored computer data

1. Each Party shall adopt such legislative and other measures as may be necessary to enable its competent authorities to order or similarly **obtain the expeditious preservation of specified computer data, including traffic data**, that has been stored by means of a computer system, in particular where there are grounds to believe that the computer data is particularly vulnerable to loss or modification. ....

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## Procedural law

### Article 18 - Production order

- 1 ...measures to empower competent authorities to order:
  - a a person in its territory to submit specified computer data in that person's possession or control, which is stored in a computer system or a computer-data storage medium; and
  - b a service provider offering its services in the territory of the Party to submit subscriber information relating to such services in that service provider's possession or control.
- 3 For the purpose of this article, the term "subscriber information" means any information contained in the form of computer data or any other form that is held by a service provider, relating to subscribers of its services other than traffic or content data and by which can be established:
  - a the type of communication service used, the technical provisions taken thereto and the period of service;
  - b the subscriber's identity, postal or geographic address, telephone and other access number, billing and payment information, available on the basis of the service agreement or arrangement;
  - c any other information on the site of the installation of communication equipment, available on the basis of the service agreement or arrangement.

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## International cooperation

### Chapter III of the Convention - International cooperation

#### Section 1 – General principles

- Art 23 General principles on international cooperation
- Art 24 Principles related to extradition
- Art 25 Principles related to mutual legal assistance
- Art 26 Spontaneous information
- Art 27 MLA in the absence of applicable international instruments
- Art 28 Confidentiality and limitation on use

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## International cooperation

### Chapter III of the Convention - International cooperation

#### Section 2 – Specific provisions

- Art 29 - Expedited preservation of stored computer data
- Art 30 - Expedited disclosure of preserved computer data
- Art 31 - Mutual assistance regarding accessing stored computer data
- Art 32 - Trans-border access to stored computer data (public/with consent)
- Art 33 - Mutual assistance in real-time collection of traffic data
- Art 34 - Mutual assistance regarding interception of content data
- Art 35 - 24/7 network

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## International cooperation

### Provisions in Malaysian Law

- Section 6 of the Extradition Act 1992
- Section 9(3) of the CCA 1997
- Specific Extradition Treaties with Thailand, Indonesia, Hong Kong, Australia and USA
- Mutual Assistance in Criminal Matters Act 2002 [to be amended].

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## Compatibility of Malaysian legislation and Budapest Convention on Cybercrime

### Conclusion

- ▶ With few exceptions, the minimum requirements seem to be met by Malaysian legislation

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