



# UN CYBERCRIME TREATY

SUMMARY OF THE GI-TOC'S KEY POSITIONS

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## FROM VISION TO ACTION: A DECADE OF ANALYSIS, DISRUPTION AND RESILIENCE

The Global Initiative Against Transnational Organized Crime was founded in 2013. Its vision was to mobilize a global strategic approach to tackling organized crime by strengthening political commitment to address the challenge, building the analytical evidence base on organized crime, disrupting criminal economies and developing networks of resilience in affected communities. Ten years on, the threat of organized crime is greater than ever before and it is critical that we continue to take action by building a coordinated global response to meet the challenge.

# INTRODUCTION

**F**rom 21 August to 1 September 2023, delegates debated a zero draft of the United Nations Treaty on Countering the Use of Information and Communications Technologies for Criminal Purposes, or more succinctly referred to as the ‘cybercrime treaty’, at a UN session in New York. The purpose of the meeting was to agree on as many provisions as possible. However, this progress was not possible as differences between countries continue to prevent any major steps towards consensus.

Throughout this process, the Global Initiative Against Transnational Organized Crime (henceforth ‘GI-TOC’) has submitted several statements and guidance notes outlining its positions on the key points of the treaty.<sup>1</sup> In the spirit of continued engagement, and with a view to contributing ahead of the next draft of the treaty, which is due to be presented in November, the GI-TOC outlines here some key recommendations for member states to consider on the issues of the scope of the treaty (including how the treaty should deal with acts beyond those included in Articles 6 to 16), its human rights safeguards and grounds for refusing international cooperation.<sup>2</sup> This contribution focuses solely on these specific cross-cutting topics, which the chair of the committee highlighted as priorities for moving the negotiations forward ahead of informal negotiations that were held in Vienna in October.

The GI-TOC reaffirms its commitment to engage constructively in this process and humbly requests that states continue to take into account civil society’s positions on these key areas, which can have serious implications for civil society actors and therefore for our collective efforts to prevent and counter all forms of organized crime. A strong push for consensus on an ambiguous and broad treaty could result in the adoption of a UN convention that legitimizes or encourages the targeting and sharing of evidence against individuals, thus providing a legal basis for the UN to run counter to its own human rights obligations and priorities, and setting states on a difficult path to ratification in their own systems.

Importantly, the treaty runs a real risk of damaging efforts to prevent and counter organized crime, including cybercrime. In September 2023, the GI-TOC published the 2023 Global Organized Crime Index, which analyzes levels of criminality and resilience across all 193 UN member states.<sup>3</sup> The Index found that 83% of the world’s population live in countries with high levels of criminality (up from 79% in 2021). Crucially for these negotiations, it found that open space for civil society and a free media are key indicators of a country’s level of resilience to organized crime. Despite this, the space for civil society to build resilience to crime has been shrinking since 2021, and these negotiations could result in a treaty that further diminishes this space.

‘Civil society and the media can serve as watchdogs to hold state institutions to account, and many are closely engaged in communities heavily affected by organized crime. Yet tighter restrictions and censorship reduce the ability of non-state actors to serve as alternative sources of resilience to those provided by government. The substantive participation of all stakeholders – intergovernmental, state and non-state – in the conversation around the evolving threats of organized crime is critical in stepping up efforts to suppress and prevent organized crime, and reduce its impact on societies.’

– Global Organized Crime Index 2023





# RECOMMENDATIONS

**T**he GI-TOC's positions are all based on the evidence that we have gathered over the last decade that the rule of law, democratic freedoms, human rights and a strong and open society are needed alongside law enforcement responses in order to effectively prevent and counter all types of organized crime. For this reason, we continue to reiterate that any treaty that either deliberately or inadvertently allows states to increase their surveillance powers, and therefore target civil society actors (including journalists, activists, researchers and NGOs), will hamper efforts to improve international cooperation against cybercrime. Against this background, we make the following observations:

## Scope of the convention

The GI-TOC has consistently argued for a narrow scope of crimes for this treaty (in Articles 3, 23 and 53). The zero draft does not include crimes for which consensus could not be reached during the rounds of debate, an approach supported by the GI-TOC. We continue to believe that the criminalization chapter should focus solely on cyber-dependent crimes. As member states move towards consensus on including crimes related to online child sexual exploitation, the GI-TOC believes that the scope should be clearly defined and targeted to include articles relating to online child sexual exploitation and other forms of sexual exploitation online. Language should be in line with international standards of human rights, gender and children's rights, including the best interests of the child. An expanded scope of crimes, whether in a list of offences or in an open-ended format under the cooperation provisions, as has been proposed by the co-chairs of Group 4, is problematic for four main reasons:

- An expanded scope allowing for cooperation on other (and indeed any) criminal offences or serious crimes negates the purpose of a narrow criminalization chapter that defines specific criminal acts. By expanding beyond a negotiated, narrowly defined list of agreed crimes, implementation is likely to be bogged down by governments debating how to apply the treaty, rather than enhancing cooperation among states and across regions on the core list of crimes.
- By creating open-ended boundaries for cooperation or exchange of electronic evidence (e-evidence) in relation to any crime (or 'serious crime'), the treaty could enable increased online surveillance of nationals living abroad on the basis of a 'crime' investigation, and also facilitate the domestic surveillance and repression of marginalized, targeted or politically active groups and individuals, who could be made suspects in any offence deemed to fall within the scope of the treaty.
- If the treaty were to be used to exercise such control, it would not be seen as a misuse of this legal instrument, but as its central purpose. It therefore risks creating new international norms for questionable state control and surveillance of information and communications technologies and computer systems, as well as grounds for cross-border sharing of evidence and data on individuals, who could be criminalized for engaging in activities not defined in the treaty or widely recognized as crimes.
- The capacity-building and technical assistance programmes implemented under the auspices of the treaty could require a UN agency (in this case, the UN Office on Drugs and Crime – UNODC) to implement state training programmes that could undermine the UN's human rights obligations, and empower and train states in practices that go against international human rights law.

It is worth noting that the threshold for 'serious crimes' used in the negotiations is inspired by the UN Convention against Transnational Organized Crime (UNTOC), which has a four-year threshold for 'serious



crimes', but does not automatically apply in the context of cybercrime. Cooperation under the UNTOC has built-in safeguards and limitations, as it only applies to crimes committed across borders by a structured criminal group. Thus, a state could not seek cooperation or evidence under the UNTOC against an individual acting alone who commits an offence that is criminalized in only a minority of states parties. It is therefore inappropriate to use the UNTOC 'serious crime' threshold of four years' imprisonment in isolation. To do so would open the treaty to cooperation or evidence-sharing on an endless list of crimes, including activities that are protected under international law but unduly criminalized in some states.

**Key recommendation:** Maintain a narrow scope for the criminalization chapter (i.e. a narrow list of crimes) and a narrow scope for the collection and sharing of e-evidence. Do not use the UNTOC's 'serious crime' threshold in isolation.

## Human rights safeguards

Human rights protections, or safeguards, as they have been referred to throughout this process, are essential to the success of this instrument. Safeguards are key to striking a balance between the potential powers that governments could exercise in implementing the treaty, and encoding protections for individuals affected by the treaty's provisions. There remains ample room for strengthening and streamlining the human rights safeguards in the draft. Our recommendations are set out below:

- Streamline the scope of application to crimes defined in the convention (include references to Articles 6 to 16). Such limitations would provide protections against the vast application of operational provisions to the crimes set forth in the convention.
- Article 24 could be strengthened by adding references to necessity, legality and protection of privacy and personal data, in addition to proportionality. Judicial oversight is also key to preventing abuses of power, as is the right to challenge government demands for data. The GI-TOC is of the view that judicial oversight should be further emphasized in Article 24(2).
- In addition, references to transparency and accountability in measures should be included in Article 24(2), alongside the existing proposed measures. Taken together, these references reinforce the legal guarantees for procedural measures by providing certainty and increasing the level of legitimacy and checks and balances in the decision-making process.
- The GI-TOC believes that Article 24 should apply to the whole treaty and not only to Chapter IV. It is therefore recommended that this provision be moved to Chapter I (General Provisions).
- There is a need for human rights safeguards in the technical assistance chapter. This chapter is a key method of implementing the treaty, and given the nature of the training and technology that can be shared, it is necessary to strengthen this chapter's safeguards. One recommendation is to use agreed consensus language on human rights and gender mainstreaming from other UN documents and approved by member states, such as relevant Commission on Crime Prevention and Criminal Justice resolutions.
- References to domestic law can be used by governments to override otherwise binding safeguards that can be included in the treaty. If references to domestic law are retained, it is recommended that references to obligations under international law be included in those parts of the text that refer to domestic law.

**Key recommendation:** Strengthen Article 24 and extend its application across the treaty, not only to Chapter IV, and ensure that safeguards on capacity-building and technical assistance are included.



## Grounds for refusal of international cooperation

Grounds for refusal are extremely important for building in safeguards and protections, and for developing trust between member states to ensure a meaningful system of cooperation modelled on the UNTOC.<sup>4</sup> However, grounds for refusal are not sufficient on their own. Even if states gain confidence that they will not be forced to cooperate in a legal process that goes against their principles or obligations, they will be powerless if two other states agree to cooperate under the treaty. In the worst case scenario, two states that both criminalize acts that are protected under international law (such as those under the right to non-discrimination, e.g. diverse sexual and gender identities; or blasphemy and criticism of the government online) could share evidence with each other or, depending on the provisions agreed, initiate extradition proceedings against journalists or others deemed to have committed a 'crime'. They would of course be able to cooperate with each other with or without this treaty, if they have bilateral processes and relationships in place. The key difference is that they would be able to do so with the blessing of a UN convention, and even with the technical assistance of the UN.

That is why human rights safeguards need to be applied as broadly and universally as possible within the treaty, including through the inclusion of a chapeau article on safeguards in Chapter V, and general safeguards to apply across the whole treaty as proposed by Canada during the 6th Ad Hoc Committee session. It is recommended that member states work together to fill gaps in order to better align future interpretations of the treaty and to streamline the multiple ways of describing when and under what conditions a request for cooperation may be refused. It is recommended that the treaty should set out mandatory conditions for refusal, including language consistent with non-discrimination obligations under international human rights law and scenarios where there is a high likelihood of human rights violations occurring. The GI-TOC agrees with the position of the UN Human Rights Office that grounds for refusal should expressly include 'the risk that assistance will represent a real and foreseeable risk of irreparable harm, and the risk that the request concerns an offence considered a political offence, or an offence connected with a political offence'.<sup>5</sup> A comparative source that could be drawn from is the UNODC's Model Law on Extradition, which builds on various extradition instruments and human rights jurisprudence on extradition.<sup>6</sup>

In addition, the GI-TOC recommends the streamlining of two specific points on international cooperation:

- While dual criminality is expressly recognized under the general principles of mutual legal assistance treaties in Article 40, any further reference to it in the subsequent provisions (with the exception of Article 42) is missing, which creates uncertainty. The GI-TOC believes that dual criminality should be a mandatory condition of cooperation for all measures in the international cooperation chapter, including the collection and processing of data for evidence in investigations.
- A direct link or reference to Article 36 (Protection of personal data) should be included in all provisions of Chapter IV. The absence of a direct reference to Article 36 could leave open to interpretation how and when data protection reservations can be applied.

**Key recommendation:** Strengthen the grounds for refusal, in parallel with a broader strengthening of human rights safeguards throughout the treaty.



# CONCLUSION

The outcome of this UN cybercrime treaty negotiation remains a highly risky prospect for human rights, freedom of expression, data protection and privacy, and upholding the rule of law, as well as for multilateralism itself. The implications are wide-ranging and could even have a negative effect on holistic and effective whole-of-society responses to cybercrime, as civil society's ability to report on and support efforts to combat crime could be undermined by increased powers of surveillance, censorship and repression. Even without explicitly authorizing nefarious uses, any ambiguity – whether deliberate or inadvertent – risks legitimizing, under the banner and with the support of the UN, the unwarranted sharing of data criminalization, harassment, arrest, extradition and prosecution of people engaging in a wide range of online activities protected under international law; in extreme cases, this could even mean the application of the death penalty.

When compared to the negotiation of the UNTOC, which took 11 sessions and agreed to more than 100 interpretive notes to clarify and guide its implementation, it is remarkable that this Ad Hoc Committee aims to finish its work at its 7th session with apparently no plans for interpretive notes on a range of topics that are much more sensitive and complex. Delegates therefore have a massive responsibility to ensure that they take all of the risks into account as they enter the final phase of negotiations.

## Notes

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<sup>1</sup> See <https://globalinitiative.net/initiatives/un-cyberwatch>.

<sup>2</sup> For more in-depth analysis of the positions outlined in this document, see: Summer Walker, Closing Pandora's box: UN cybercrime treaty negotiations, GI-TOC, August 2023, <https://globalinitiative.net/analysis/un-cybercrime-treaty-negotiations-august-2023>; Ian Tennant, The cost of consensus: Sixth session of the UN Ad Hoc Committee on cybercrime, GI-TOC, September 2023, <https://globalinitiative.net/analysis/united-nations-cybercrime-treaty-negotiations>; Ana Paula Oliveira and Summer Walker, UN 'cybercrime treaty': Legal and human rights safeguards, GI-TOC, May 2023, <https://globalinitiative.net/analysis/un-cybercrime-treaty-meeting-report>.

<sup>3</sup> See <https://ocindex.net/report/2023/0-3-contents.html> for the report and <https://ocindex.net> for the interactive map.

<sup>4</sup> However, even if this is based on the UNTOC, there is a lack of evidence regarding the UNTOC's impact on enhancing international cooperation. See Yvon Dandurand and Jessica Jahn, The future of international cooperation against transnational organized crime: The undoing of UNTOC?, GI-TOC, October 2021, <https://globalinitiative.net/analysis/international-cooperation-organized-crime>.

<sup>5</sup> UN Human Rights Office, Ad Hoc Committee to Elaborate a Comprehensive International Convention on Countering the Use of Information and Communications Technologies for Criminal Purposes, Sixth Session, 21 August–1 September 2023, [https://www.unodc.org/documents/Cybercrime/AdHocCommittee/6th\\_Session/Submissions/Multi-stakeholders/OHCHR1.pdf](https://www.unodc.org/documents/Cybercrime/AdHocCommittee/6th_Session/Submissions/Multi-stakeholders/OHCHR1.pdf).

<sup>6</sup> See [https://www.unodc.org/pdf/model\\_law\\_extradition.pdf](https://www.unodc.org/pdf/model_law_extradition.pdf).

