# THE BUDAPEST CONVENTION ON CYBERCRIME AND ELECTRONIC EVIDENCE: ITS ELEMENTS AND BENEFITS

Betty SHAVE
Council of Europe Expert

# In a nutshell

- The convention improves domestic criminalisation and criminal procedure as well as international cooperation
- It covers electronic evidence in physical-world crimes as well as classic cybercrime
- It makes it easier to obtain data from foreign providers, especially the big ones
- It was always intended to be open to any country. Its 66 Parties, including Australia, Japan, the Philippines, Sri Lanka and Tonga, are spread around the world. New Zealand has been invited to accede

# In a nutshell , cont'd.

- It's a current, working treaty used every day. Its text is technology-neutral
- The Council of Europe offers a vast cybercapacity building program (free of charge) driven by countries' requests
- Participation in COE activities, even before a country becomes a Party, provides a network of helpful colleagues
- The process to become a Party is straightforward

# Scope of the Budapest Convention

## Criminalising conduct

- Illegal access
- Illegal interception of data
- Data interference
- System interference
- Misuse of access devices, passwords, etc
- Electronic fraud and forgery
- Child pornography
- Copyright and related offences

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## Procedural tools

- Expedited preservation (freezing of data so it does not disappear)
- Production orders
- Search and seizure
- Collection of traffic data
- Interception of computer data

Limited by safeguards

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## International cooperation

- Extradition
- Mutual legal assistance (MLA)
- Spontaneous information to other countries
- Expedited preservation
- MLA to obtain stored data and traffic data
- MLA for content interception
- 24/7 points of contact

# Keeping the Convention up to date

- Protocol on Xenophobia and Racism via Computer Systems (33 Parties + 12 Signatories)

- Guidance Notes on
  - Botnets
  - Malware
  - Critical infrastructure attacks
  - Spam
  - Terrorism
  - Transborder access to data (Article 32)
  - Production orders for subscriber information (Article 18)
  - Election interference
  - And others

- Protocol on enhanced international cooperation: forthcoming

*The Budapest Convention remains up-to-date and relevant.*

# Joining the Budapest Convention

## Treaty open for accession (article 37)

**Phase 1:**

- A country with legislation in place or advanced stage
- 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 of the instrument of accession

# Useful links

- The Budapest Convention and its Explanatory Report (in numerous languages) Full list (coe.int)

- Other materials, usually in English and French:
- Guidance notes Guidance Notes (coe.int)

- Protocol on Xenophobia and Racism via Computer Systems Full list (coe.int)

- Protocol on enhanced international cooperation https://rm.coe.int/0900001680a2aa1c

- Information about the Council of Europe's capacity-building programs Worldwide Capacity Building (coe.int)

- Home page of the COE's cybercrime activities Action against Cybercrime (coe.int)

# The Budapest Convention on Cybercrime
# BENEFITS of membership in the Convention

**Substantive law** – provides for a minimum standard of criminalisation of specific illegal acts, thus offering a common understanding and harmonised legislation between the Parties;

**Procedural powers** – provides for a minimum set of specific procedural measures for obtaining electronic evidence, therefore offering a common operational standard strategy between the Parties in investigating specific crimes committed with the use of a computer system or traditional crimes that involve electronic evidence

Moreover, the Convention provides a **legal basis for international cooperation** on cybercrime and electronic evidence. Chapter III of the treaty comprises general and specific provisions for cooperation among Parties "to the widest extent possible" not only with respect to cybercrime (offences against and by means of computers) but also with respect to any crime involving electronic evidence

Membership in the Budapest Convention means membership in **networks of practitioners** – the 24/7 network of contact points among them – and thus the ability to engage in trusted cooperation.

Parties to the Convention are able to improve their **cooperation with the private sector**. Indications are that private sector entities are more likely to cooperate with criminal justice authorities of Parties to the Convention given that Parties need to have a domestic legal framework on cybercrime and electronic evidence in place, including the human rights safeguards of Article 15.

# BENEFITS of membership in the Convention

Parties are **members of the Cybercrime Convention Committee,** the T-CY. They share information and experience, assess implementation of the Convention, or prepare templates for mutual assistance requests and other tools to facilitate the application of the treaty to counter cybercrime more effectively

Through the T-CY, Parties contribute to the further evolution of the Budapest Convention, for example, in the form of Guidance Notes or negotiation of additional protocols. Thus, even if a State did not participate in the negotiation of the original treaty, a new Party is able to participate in the **negotiation of future instruments such as the** forthcoming 2nd Additional Protocol on enhanced international cooperation and access to electronic evidence

States requesting accession or having acceded may become **priority countries or hubs for capacity building** programmes. Such technical assistance is to facilitate full implementation of the Convention and to enhance the ability to cooperate internationally. Donors are consistently providing resources to support countries in this undertaking, in particular through the Cybercrime Programme Office of the Council of Europe (C-PROC).

# Article 14 – Scope of procedural provisions

Each Party shall adopt such legislative and other measures as may be necessary to **establish the [criminal procedure] powers and procedures … for the purpose of specific criminal investigations or proceedings.**

**KEY ELEMENTS**

- The procedural powers can be used for specific criminal investigations or proceedings;
- The powers cover offences established under Articles 2 through 11 of the Convention;
- They also cover other criminal offences committed by means of a computer system and
- the collection of evidence in electronic form of any criminal offence;
- Application of Arts.20 and 21 may be limited in special cases

# Article 15 – Conditions and safeguards

Implementation and application of the criminal procedure powers and mechanisms

## KEY ELEMENTS

- The powers are subject to conditions and safeguards in domestic law and must adequately protect human rights and liberties, including rights arising from human rights treaties and the principle of proportionality;
- As appropriate, the safeguards on those powers must include supervision by a judge or other independent supervision, grounds justifying their use, limitation of their scope and duration, etc;
- Consistent with the public interest, especially the sound administration of justice, countries should consider the impact of the powers and procedures upon the rights, responsibilities and legitimate interests of third parties.