

EFF Oral Intervention on Criminal Procedural Measures
Informals Article 47 & 48 & 49
Fourth Session - January 17th, 2023

Our comments will focus on Art. 47, 48, and 49.

We prefer to exclude Art. 47 and Art. 48 from the proposed Convention. Strong safeguards are needed, but if States decide to go ahead with such Articles, the scope **should also be clarified** to ensure **it does not include state hacking powers**. While the existing language, in our interpretation, does not authorize such powers, law enforcement's use of malware to track real-time traffic data or communication content has been misinterpreted in certain countries. Thus, it should be excluded from the proposed Treaty.

State hacking powers remain controversial and can cause collateral harm to the integrity and security of networks, data, and devices. There is no consensus as to when these powers can be appropriately invoked, and there is a risk that some State Parties will inappropriately implement Articles 47 and 48 to include this type of intrusive surveillance. Both these Articles should, therefore, expressly note that they do not authorize such powers.

There is also a potential concern with Article 47(3), which enables gag orders on service providers. It does not require judicial oversight, nor has a time period after which a gag would expire. Also, no provision allows ISPs to publish accurate transparency reports, even if those reports just say the fact of receipt of the legal process, without identifying the target.

We also recommend excluding Article 49. It is important to recognize that technical forensic techniques are still evolving and must address all digital ecosystem challenges. This lack of consistent safeguards poses a threat to human rights. Chain of custody is, in particular, a challenge, as it has become commonplace for law enforcement agencies to interact with the digital devices of suspects. There is also growing documentation of the creation of digital evidence through control of these devices in some jurisdictions by, for example, using control over these devices to visit websites and download content deemed illegal. Members of the vulnerable (e.g., LGBTQ+) are especially at risk of these techniques.

We recommend deleting Article 49. But if States decide to keep that article, it should include an objective, qualitative component so that the provision does not defer to national standards. Specifically, we recommend the following change:

[Digital] [Electronic] evidence derived or extracted from devices, equipment, electronic media, information systems, computer programs, or any information and communications technologies shall have the probative value of material forensic evidence in criminal procedure when such evidence meets the technical conditions under the laws of the States Parties concerned and where such technical conditions are adequate to ensure the integrity of digital evidence in its acquisition and preservation.